THE SELLER'S RIGHT TO AVOID THE CONTRACT IN INTERNATIONAL SALES

Jonathan Yovel[*]

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[*] Faculty of Law, University of Haifa, Israel. The author gratefully acknowledges invaluable comments by Prof. Albert H. Kritzer an Dr. John Felemegas. Research work for this article was carried out under the auspices of the Max Planck Institute for Comparative Private and Private International Law in Hamburg, and the author thanks the Institute's director, Professor Reinhard Zimmermann, as well as fellows, researchers and other staff, for their hospitality, assistance, and opportunities to present my ideas to a wonderful group of students and international scholars. Prof. Richard Speidel's unmistakable and lingering influence, conveyed in class, in writings and in conversation, is distinctly expressed throughout this article.
All online sites referred to were verified for June 1, 2006.

I. PREFACE

In the context of transnational transactions, the question of severing contractual relations due to a breach of contract (designated as "avoidance" or "termination" by different legal instruments) is of special interest. The complexities, costs, and particular risks associated with international transactions call for inventive balances between an aggrieved party's interest in protecting reliance interests—inter alia, through termination of the contractual relations—and the interest that the party in breach may still have in maintaining them, even under conditions of breach. This article analyzes an aggrieved seller's right (or more precisely, power) to terminate the contract for breach in the context of two sophisticated transnational regimes that are quickly growing in prominence and influence. These are the UN Convention on Contracts for the International Sale of Goods, 1980 (hereinafter CISG)[1] and the newly drafted Principles of European Contract Law, 2003 (hereinafter PECL).[2]

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[1] USCA, Title 15, Appendix (Supp. 1987). Since entering into force in 1988, the CISG has been adopted by some 64 countries, representing roughly 2/3 of world international trade. Subject to certain exceptions of subject-matter (CISG Art. 2) and subject to the power of the parties to derogate from it (CISG Art. 6), the CISG covers all international sales transaction when applicable; in the US, it would substitute for UCC Art. 2 as well as for non-code law in matters governed by its provisions. For general literature on the CISG *see* JOHN HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES (Kluwer, 1999). A vast, updated and masterly organized source of CISG-related materials is available on the Pace University website at http://cisgw3.law.pace.edu/cisg.html.

[2] Concluded (in English) in 2003, the PECL is not a statute or convention nor—yet—a model law, but a scholarly document produced by an authoritative panel of European jurists under the auspices of the EU (a.k.a. the "Lando Commission" alluding to its chair). Its purpose is to unify contract law in the several European states and provide interpretative directions. It has been compared to a restatement of law in its nature and "applies" to all contractual transactions, domestic and transnational. *See* OLE LANDO AND HUGH BEALE (EDS.), PRINCIPLES OF EUROPEAN CONTRACT LAW: PARTS I AND II (Kluwer Law International (2000) (hereinafter "Lando and Beale").

Evaluated both together and separately, a comparison of these two systems yields a new analysis of the question of contract avoidance in transnational transactions. Here is an opportunity for drafters to formulate remedial regimes that respond to diverging provisions in legal systems informed by different ideological approaches to the question of contractual relations: from the tactical, risk-allocating approach that regards contractual relations as something akin to an investment, to be continued or aborted upon rational calculations of alternative transactions, to the most relational approaches, emphasizing long-time cooperation, wishing to strengthen relations and allow parties to move through an escalation of remedies and other measures until reaching the radical severance of contractual relations through avoidance of the contract. Indeed, in important respects the very nature of the contractual interaction is best studied through the topic of remedies for breach, and through the availability of the power to unilaterally severe the contractual relation in particular.

II. AVOIDANCE OF INTERNATIONAL COMMERCIAL CONTRACTS: GENERAL

Avoidance of the contract ("termination," in the language of the PECL) by an aggrieved seller is the most extreme measure offered by both the CISG and PECL in response to breach by the buyer ("non-performance," in the language of the PECL).[3] Avoidance severs the contractual relations and nullifies obligations pertaining to any future performance, except for contractual performances designated to take effect upon avoidance, such as dispute resolution clauses or liquidated damages.[4] (Any restitution

[3] Ole Lando, *Salient Features of the Principles of European Contract Law: A Comparison with the UCC*, 13 PACE INTERNATIONAL LAW REVIEW (Fall 2001) 339, at 361, available online at http://cisgw3.law.pace.edu/cisg/biblio/lando.html.

[4] *See* CISG Art. 81(1), PECL Art. 9:305(2). Nor does avoidance preclude recourse to any other remedy consistent with it, such as damages (*See* CISG Art. 81(1), PECL Art. 8:102) The UNCITRAL Secretariat Commentary (referring to the 1978 Draft) notes that "Such a provision was important because in many legal systems avoidance of the contract eliminates all rights and obligations which arose out of the existence of the contract. In such a view once a contract has been avoided, there can be no claim for damages for its breach and contract clauses relating to the settlement of disputes, including provisions for arbitration and clauses specifying 'penalties' or 'liquidated

following avoidance is not, properly speaking, a contractual performance, but a statutory or common-law requirement designed to reinstate as much as possible the respective parties' pre-contractual positions, as opposed to post-avoidance measures designed to protect the expectation interest, such as damages).[5] Both the CISG and the PECL offer aggrieved parties less extreme measures to deal with breach or with anticipatory breach,[6] and contain various cure measures that – when applied or applicable – allow for delayed or remedial performance and thus either delay recourse to avoidance or render it unnecessary or unavailable.[7] In this, both the CISG and PECL manifest a "relational" bias, namely attempting to salvage fractured contractual relations by providing an escalation of remedial measures, whose eventual failure ultimately leads to breaking up

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damages' for breach, terminate with the rest of the contract" (Official Records pp. 41-42, available online at http://cisgw3.law.pace.edu/cisg/text/secomm/secomm-45.html).

[5] *See* CISG 81-84, PECL. Arts. 9:307 (concerning money) and 9:308 (concerning property). Money refunded accrues interest, CISG Art. 84, PECL Art. 9:508, at a rate determined by non-CISG law otherwise applicable to the contract (*See* Switzerland 20 February 1997 Bezirksgericht [District Court] Saane, case presentation including English translation available at http://cisgw3.law.pace.edu/cases/970220s1.html). In variations, mutual restitution *See*ms to be a universal feature of contract avoidance. The effect of CISG Art. 81 on avoidance was even described as "chang[ing] the contractual relationship into a restitutional relationship." *See* Germany 11 October 1995 Landgericht [District Court] Düsseldorf, case presentation including English translation available at http://cisgw3.law.pace.edu/cases/951011g1.html. *See* also Harry M. Flechtner, *Remedies Under the New International Sales Convention: The Perspective from Article 2 of the U.C.C.*, 8 J.L. & COM. 53 (1988), at 80, available online at http://cisgw3.law.pace.edu/cisg/biblio/flecht.html; Francesco G. Mazzotta, *Commentary on CISG Article 81 and its PECL Counterparts*, available online at http://cisgw3.law.pace.edu/cisg/text/peclcomp81.html#er; Günter H. Treitel, *Remedies for Breach of Contract, in* INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW (Tübingen, Mouton, The Hague, Paris: J.C.B. Mohr, 1976). Courts acknowledge the CISG restitution as a matter of course; *See* Switzerland 5 February 1997 Handelsgericht [Commercial Court] Zürich, case presentation available at http://cisgw3.law.pace.edu/cases/970205s1.html; Switzerland 20 February 1997 Bezirksgericht (Zivilgericht) [District Court] Saane, case presentation including English translation available at http://cisgw3.law.pace.edu/cases/970220s1.html.

[6] Such as suspension of performance and requirement of assurances (*See* CISG Art. 71, PECL Art. 8:105), requirement of performance (*See* CISG Arts. 46, 62 (but *See* Art. 28), PECL Arts. 9:101, 9:102).

[7] *See* CISG Arts. 37, 47, 48, 49(2)(b), 63, 64(2)(b), etc., PECL Arts. 8:104, 8:106, etc.

of the contractual framework through avoidance.[8] Therefore both the CISG and PECL generally reserve avoidance of the contract to instances of so-called "fundamental" breach,[9] although both allow for some non-fundamental breaches to be "upgraded" to the status of "avoidable" breaches through the use of curative ("*Nachfrist*") periods set by the aggrieved seller.[10]

The general analytical structure of the clauses analyzed in this commentary is as follows: Power of avoidance is granted to seller only in cases of fundamental breach (CISG 64(1)(a), PECL 9:301(1)); but in certain cases is expanded to non-fundamental breaches that follow a *Nachfrist* notice ("constructive fundamentalism") (CISG 64(1)(b), PECL 8:106(3)). Under PECL, all notices of termination must be given in reasonable time (PECL Art. 9:303(2). The CISG reserves this restriction to instances in which the buyer has already paid the price (CISG Art. 64(2)).This complex approach to the power of avoidance is intended to respond to respective risk allocations borne by the parties. This commentary analyzes those risks, their treatment by the respective CISG and PECL articles, and points out the major interpretative questions that any application of these provisions must deal with. It begins by examining the general framework and analyzing

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[8] *See* IAN MACNEIL, THE NEW SOCIAL CONTRACT: AN INQUIRY INTO MODERN CONTRACTUAL RELATIONS (1980); Robert W. Gordon, *Macaulay, Macneil and the Discovery of Solidarity and Power in Contract Law*, 1985 WIS. L. REV. 565.

[9] For what constitutes a fundamental breach (non-performance) *see* CISG Art. 25, PECL Art. 8:103, respectively; according to Lando, the latter was modeled on the former, *see* Lando, *supra* note 3 p. 362. For a discussion of fundamental breach in CISG law and related UNIDROIT Principles as well as the related topic of non-conformity of goods, *see* Robert Koch, *Commentary on Whether the UNIDROIT Principles of International Commercial Contracts May Be Used to Interpret or Supplement Articles 47 and 49 of the CISG*, available online at http://cisgw3.law.pace.edu/cisg/biblio/koch2.html and references noted there.

[10] *See*, e.g., cases discussed in note 47 *infra*. In the case of the CISG, while fundamental breaches make avoidance available immediately, non-fundamental non-delivery allows for avoidance if the aggrieved party has fixed a curative period for performance – a so-called "Nachfrist period" – and the breach has continued throughout that period. This is available in cases of non-payment or failure to take the goods, even without establishing that the failure constitutes a fundamental breach, under CISG Art. 64(1)(b). Under the PECL, "delay in performance" followed by further failure to perform throughout a Nachfrist period may allow for termination (PECL Art. 8:106(3)). This matter is discussed in detail below.

the main concepts, then proceeds to more detailed aspects of avoidance of the contract by the seller under the two documents.

III. Breach and Fundamental Breach

While the buyer's primary obligation in most transactions is to tender the contractual price,[11] contracts that govern both domestic and international transactions frequently allocate to the buyer substantial other performances – such as taking delivery – whose breach may allow the aggrieved seller to declare the contract avoided ("terminate," in the context of the PECL). Some failures to perform may create considerable costs for the seller or place her at risk in relation to third party contractors such as carrier etc. (consider, e.g., the numerous performances allocated to the buyer under all the standard contract-types stretching from Ex-Works to FOB). The seller's power to declare the contract avoided therefore mirrors the respective risks associated with the buyer's similar power when the seller breaches the contract, regulated by CISG Art. 49. The PECL, ranging as it does over contracts in general rather than merely sales contracts,[12] does not reflect the CISG's distinction between avoidance by the buyer and the seller; both are covered by PECL Art. 9:301 (Right to Terminate the Contract), Art. 9:303 (Notice of Termination) and Art. 8:106 (Termination after Additional Period for Performance). [13]

As stated above, the main feature of avoidance of the contract shared by both CISG and PECL is that it is generally restricted to cases of fundamental breach. Furthermore, the seller's power to avoid is further restricted in cases where the buyer has already paid the price. Payment typically puts the buyer in the least favorable position should the contract be avoided; in some senses it is parallel to the seller having delivered the goods, although the special character of payment is peculiar among all objects of exchange. On the one hand, it is the least costly object for restitution in terms of transaction costs

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[11] *See* CISG Art. 53, and any of the several INCOTERMS 2000.

[12] At risk of sounding pedantic one might caution, that at least for the time being it would not be quite correct to talk of the PECL as "applying" to any legal relations; having no legally binding force of any kind they do not legally "apply" to the cases that fall under them.

(although restitution of funds may be subject to third party rights, preferences in bankruptcy, and other impediments to the collection of debt). On the other hand, it is almost costless to keep, necessitating the kind of legal action for the collection of debt that modern payment systems seek to avoid.[14] Indeed, it is impossible to analyze the kinds of risks parties are exposed to in such situations without a proper understanding of payment systems and their role as risk-allocating mechanisms in contractual relations in general, and in international commerce in particular. Even the interpretation of what it means to have "paid the price" may depend on the finality of the financial tender that typically complements sales transaction, and different types of payment systems are governed by varying rules concerning that.[15]

"Paying" the contractual price – typically, the buyer's chief obligation – may sound straightforward enough, but that, of course, is far from true whenever a payment system or other complexities of a financial transaction are involved. Many payment modes involve necessary preparatory steps such as procuring or at least applying for credit, a letter of credit or bank guarantees, obtaining adequate foreign currency,[16] complying with required formalities where applicable, etc.,[17] without which eventual payment would become infeasible, delayed, or at any count contrary to the contractual stipulation. Such

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[13] For avoidance\termination of an installment contract *See* also CISG 73, PECL 9:302.

[14] There are two such types of risks: enforcement risks, whereby the seller's right to restitution is subject to defenses or other impediments, and credit risks whereby the buyer becomes insolvent. As restitution in the form of payment becomes debt, it is exposed to bankruptcy and similar defenses even when other legal rights are effective. *See* ROBERT L. JORDAN, WILLIAM D. WARREN, AND STEVEN D. WALT, NEGOTIABLE INSTRUMENTS, PAYMENTS AND CREDITS (5th ed. 2000) at pp. 3-4.

[15] Consider, e.g., the finality of payment via credit cards to that of funds transfers in the United States, as well as negotiable instruments – checks in particular. In barter or other transactions where "payment" is in kind, the same risks are associated with both sides.

[16] For default rules applying to currency *See* PECL Art. 7:108.

[17] However, note that under PECL 7:107(1) the debtor is entitled to pay "in any form used in the ordinary course of business." A clear contractual stipulation to the contrary (e.g., such that requires a buyer to open a letter of credit) would of course trump this default rule. The interesting question, however, is that of an implied obligation to pay by L/C absent a contractual stipulation, yet where such is the prevalent custom, as in CIF contracts. CISG Art. 9 may then make such an imposition binding on the buyer.

performances are normally considered inherent to the buyer's "obligation to pay the price."[18] Some tribunals may consider such failures under the doctrine of anticipatory breach of the buyer's obligation to pay the price while others may consider them actual breaches.[19] Defaulting in this respect may even constitute a fundamental breach if fulfilling the respective conditions of CISG Art. 25 and PECL Art. 8:103. Yet even when not considered fundamental, failure to properly arrange for payment may allow the seller to avoid the contract if the failure is not remedied throughout an additional curative period ("*Nachfrist*") set by the seller for this purpose.[20] This important mechanism, allowing for bypassing the fundamental breach requirement in some cases, is discussed in detail in section 5, below.

In making avoidance of the contract available only in cases of fundamental breach, both CISG and PECL seem to deviate from commercial practices that allow parties to reject goods—and more importantly, documents—that fail to strictly conform with the contractual specifications, even if that discrepancy is of little practical significance.[21]

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[18] CISG Art. 54.

[19] *See* CISG Art. 72, PECL Art. 9:304. For failure to open a letter of credit as being, presumably, both a (fundamental) breach and an anticipatory breach under CISG, *See* Australia 17 November 2000 Supreme Court of Queensland (Downs Investments v. Perwaja Steel), case presentation available at http://cisgw3.law.pace.edu/cases/001117a2.html, also available at UNILEX (all cases recorded by UNILEX are available online at http://www.unilex.info), affirmed on appeal [2001] QCA 433. For discussion in the context of avoidance of the contract *See* section 6, below.

[20] *See* CISG Art. 64(1)(b), PECL Art. 8:106(3).

[21] Such discrepancies indeed generated several criticisms regarding the CISG's application to documentary transactions in general. *See* Alastair Mullis, *Avoidance for Breach under the Vienna Convention: A Critical Analysis of some of the Early Cases*, in ANDREAS AND JARBORG (EDS.), ANGLO-SWEDISH STUDIES IN LAW (Upsala: Iustus Forlag 1998), p. 326 et seq., available online at http://cisgw3.law.pace.edu/cisg/biblio/mullis1.html; *also* Peter Schlechtriem, "Interpretation, gap-filling and further development of the UN Sales Convention" available online at http://cisgw3.law.pace.edu/cisg/biblio/schlechtriem6.html. Prof. Schlechtriem's critique is also germane to the commercial realities of the commodification of contracts, where practitioners regard themselves as dealing not in goods but in "contracts," moving away from the language of the assignment of in-personam (contractual) obligations to the in-rem, "propertized" language of goods or of commodities. The general question of the adjusted application of commercial law

Such practices are prevalent in documentary transactions[22] such as CIF,[23] and in particular such that involve documentary credit such as an L/C or "unclean" documents such as bills of lading.[24] Under the fundamental breach rule it would seem that such rejection would not amount in itself to avoidance but instead to a demand for cure (*see* CISG Arts. 30, 34, 47) that, if unmet, may then constitute a breach allowing avoidance, as discussed below.[25] However, two considerations mitigate the apparent difference between the fundamental breach and strict compliance approaches to avoidance of contract. The first is contractual, namely the parties' general freedom to stipulate what breaches would count as fundamental; in documentary transactions, strict documentary compliance may simply be agreed upon. The second has to do with the function of custom, usage, and commercial practices. Under CISG Art. 9(2), parties are generally bound by prevalent usages; this general principle would certainly apply to the construction of fundamental breach under CISG Arts. 25 and 64. Perhaps even more significantly, PECL 1:105 makes

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originally designed for transactions in goods (such as the CISG) to transactions in contracts is of course broader than can be dealt with here. Possibly, however, relational approaches to functional conformity of goods – the CISG's approach in the context of avoidance and its limitation to fundamental breach for lack of conformity (CISG Art. 35) – can be extended at least to some documentary transactions, the exception continuing to be financial (payment and credit) as well as investment instruments. This cautious approach is partially expressed by CISG Art 2(d).

[22] According to the Secretariat Commentary, Art. 2(d) CISG does not exclude documentary sales of goods from the scope of application of the Convention. The Commentary warns however that in some legal systems such sales may be characterized as sales of commercial paper, excluded by Art. 2(d). *See* Secretariat Commentary on Art. 2, available online at http://cisgw3.law.pace.edu/cisg/text/secomm/secomm-02.html . As prevalent kinds of commercial paper tend to be "negotiated" rather than sold, paper falling under UCC Article 3 ("Negotiable Instruments") – ostensibly given to strict or "formalist" construction based on flaws discernible "on the face of the instrument" – would not fall under the scope of application of the CISG to begin with.

[23] *See* Secretariat Commentary, para 7.

[24] *See*, e.g., INCOTERMS 2000, CIF, provisions A8, B8.

[25] According to Prof. Schlechtriem's view, the right to declare the contract avoided for non-delivery of goods following a Nachfrist period should be construed as extending to non-delivery of documents of title as well, PETER SCHLECHTRIEM, UNIFORM SALES LAW: THE UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (Vienna: Manz 1986), 77 also available online at http://cisgw3.law.pace.edu/cisg/biblio/schlechtriem.html.

a similar provision for contracts in general, beyond *lex mercatoria*. Strict compliance with documentary requirements may fall under both categories: contractual stipulation as well as prevalent usage.[26]

IV. SELF-HELP

Contract avoidance is sometimes referred to as a "self-help" remedy although, properly speaking, it is not a remedy in the strict contractual sense: rather than remedial, its effects are to excuse parties from further performances, and to restore pre-performance conditions by either requiring reciprocal restitution of all exchanges or making such restitution or its substitute available to parties.[27] The basic feature of avoidance in the CISG is its autonomous, unilateral character: it requires no court action and is executed entirely through appropriate declarations. [28] A declaration of avoidance of the contract is made by notice to the party in breach (CISG Art. 26); the declaration is performative in that that once lawfully made, the contract is avoided. The PECL shares the CISG's approach to contract avoidance as a unilateral act requiring merely a notice to the party in breach.[29] In this, it is "markedly different" from several continental systems,[30] where the

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[26] E.g. under various INCOTERMS 2000 (for instance, B8 in all but Ex-Works).

[27] With significant exceptions, under the CISG a buyer's inability to make restitution forfeits his right to avoid the contract (CISG Art. 82), which has no exact PECL counterpart (*See* PECL Art. 9:309 which states a right to monetary recovery of value that cannot be restituted, but does not restrict the power to terminate as such).

[28] For provisions governing declarations of notice of avoidance by notice, *See* CISG 26, PECL 9:303; *See also* UNIDROIT Art. 7.3.2.

[29] There are two exceptions to the rule that notice of termination is required. Under PECL Art. 8:106(3), a notice setting a Nachfrist period during which the defaulting party may yet perform may provide that at the end of the period the contract will terminate automatically upon failure to cure; and according to PECL Art. 9:304(4), the contract terminates automatically upon total and permanent impediment.

[30] For a comparison between CISG's approach to avoidance of the contract by notice as opposed to domestic law requiring otherwise, *See* Belgium 1 March 1995 Rechtbank [District Court] van koophandel Hasselt (J.P.S. v. Kabri Mode), available at http://cisgw3.law.pace.edu/cases/950301b1.html.

general principle is that avoidance requires court proceedings.[31] Note that this is consistent with the rule, shared by CISG and PECL, under which the aggrieved party need not serve the non-performing party with notice to put the latter into breach (such as a *mise en demeure* or *Mahnung*).[32] Parties must, of course, be cognizant of the fact that in subsequent litigation, tribunals may disagree with a claim that a given breach justified avoidance of the contract (or that pertinent declarations were properly executed). The risk then is that an unlawful declaration of avoidance is construed itself as a breach or anticipatory breach of the contract, rendering the presumably aggrieved party liable to remedies (including avoidance of the contract) generated by such breach. Such risk is associated with all self-help measures and is typically born by aggrieved parties employing them. In avoidance of the contract under the CISG or PECL, this risk is especially pronounced by the insistence that only fundamental breaches allow the

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[31] This is the prevalent Common Law rule, which holds also in "hybrid" legal systems such as Israel, *see* Contract Law (Remedies for Breach of Contract) 1970, Art. 8. It conforms to several continental rules such as the Danish Sale of Goods Act Arts. 27, 32, and 52; Finnish and Swedish Sale of Goods Acts Arts. 29, 39, 59; Portuguese Civil Code Art. 436(1); and the Dutch BW 6:267, but differs from other legal systems that require a resolution by judicial pronouncement, whereby the court must decide whether the non-performance was sufficiently significant to justify termination of the contract, such as French, Belgian and Luxembourg Civil Code Art. 1184(2) (although clauses allowing automatic termination – clauses résolutoire de plein droit – are also available), Italian Civil Code Art. 1453 and Spanish Civil Code Art. 1124 (though in Spain a notice of termination may be effective if it is accepted by the defaulting party). *See also* LANDO AND BEALE at pp. 410, 415 n1.

[32] *See* commentary to PECL Art. 8:101. Strangely enough, litigants in countries where the rule for avoidance of domestic contracts is different still approach courts for declarations of avoidance even when they themselves claim that the CISG governs the case. *See*, e.g., France 4 June 2004 Cour d'appel [Appellate Court] Paris (SARL NE... v. SAS AMI... et SA Les Comptoirs M…), case presentation including English translation available at http://cisgw3.law.pace.edu/cases/040604f1.html, where plaintiffs sued for a declaration of avoidance and for damages. Presumably, a court may refuse to hear the first part of the suit (in a common-law country it probably would) referring the plaintiff instead to CISG Art. 64(1)(a) (in that case it was a matter of avoidance by buyer, but the principle is the same). The risk for making an unlawful declaration of avoidance then sits with the aggrieved party; continuing to refer the matters to courts (who are accustomed to such procedures in domestic issues) may be a clever way to avoid that risk, tantamount to a declaratory verdict concerning the fundamentality of the breach which could, conceivably, be sought in a common law system.

aggrieved party to declare the contract avoided. A prudent seller unsure of the fundamentality of the buyer's breach may then attempt to "upgrade" the severity of the breach through the usage of a *Nachfrist* mechanism, available under both the CISG and PECL. While suspending her power to avoid the contract for the length of the curative period (unless an anticipatory breach becomes apparent during that period), the two-tier mechanism significantly reduces her exposure to counterclaims regarding the unlawfulness of declaring the contract avoided. This useful mechanism is examined in detail below.

V. NO FAULT, NO GRACE, NO REGARD TO TITLE

Both the PECL and CISG share a no-fault approach to breach of contract that allows for avoidance. In this, the general common law rather than general civil law approach is followed (*see*, however, PECL Art. 8:103(c)).

Neither CISG nor the PECL sets a default "grace period" for performance, during which the aggrieved party is enjoined from avoiding the contract.[33] However, both treat the matter of a cure or remedial period set or allowed by the aggrieved party as a special case during which the power to avoid the contract is suspended, as discussed below. Similarly, curative performance intended and indicated by the party in breach may limit the aggrieved seller's power to avoid the contract for a certain duration. Under PECL 9:303(3)(b) when the aggrieved party knows of the intention of the non-performing party to tender curative performance and fails to notify it that it will not accept cure, it forfeits the power to terminate the contract if the non-performing party in fact performs. Likewise, according to CISG Art. 48(2) an aggrieved buyer who failed to object to the breaching seller's indication that it intends to cure, is estopped from avoiding the contract for an indicated period.[34]

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[33] By contrast, compare the French and Belgian délai de grâce (Code Civil Art.1184; similarly, Spanish Code Civil Art. 1124 (3)).

[34] *See* Jonathan Yovel, *Seller's Right to Remedy Failure to Perform: Comparison Between Respective Provisions of the CISG and the PECL,* available online at http://cisgw3.law.pace.edu/cisg/biblio/yovel48.html.

Additionally, the fundamental breach requirement itself may operate as setting a grace period in relation to avoidance, in the sense that the buyer's failure to pay – or to carry out any other of her allocated or derivative[35] performances – may become fundamental only some time after the breach itself has come to pass. E.g., a very short delay – in respect to the contractual stipulation – in opening a letter of credit will normally not constitute a fundamental breach, but a longer delay may.[36]

As the CISG deals exclusively with obligatory questions,[37] the aggrieved seller's power to declare the contract avoided is wholly independent from questions of title to the goods. The power to avoid is likewise indifferent to the question who is in possession of the goods, if the buyer has either taken delivery or accepted them, or who is in possession of documents of title.[38] If questions of title need to be resolved, domestic law would apply and determine entitlements.[39] The PECL, wider in scope and application than the CISG, is nevertheless limited to contractual (and related obligation) context too.[40] As noted above, discharging rights granted by the CISG and

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[35] *See* CISG Art. 54 according to which "The buyer's obligation to pay the price includes taking such steps … to enable payment to be made."

[36] *See* HONNOLD at 354; *also* JOSEPH LOOKOFSKY AND HERBERT BERNSTEIN, UNDERSTANDING THE CISG IN EUROPE (Deventer, 1997) 114.

[37] *See* CISG Art. 4(b).

[38] Except, of course, for determining the existence of breach or fundamental breach, in which case failure to effect a change of title may be the breach that makes avoidance of the title available. *See*, e.g., discussion below, *infra* note 48.

[39] *See* the Australian case Roder v. Rosedown, Federal District Court Adelaide, 28 April 1995, available online at http://cisgw3.law.pace.edu/cases/950428a2.html (the contract of sales contained a retention of title clause whereby title to the goods did not pass to the purchaser until the purchase price had been paid in full, which was not the case). *See* Robert Koch, *Commentary on Whether the UNIDROIT Principles of International Commercial Contracts may be Used to Interpret or Supplement Article 25 CISG*, PACE REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (1998) 246, available online at http://www.cisg.law.pace.edu/cisg/biblio/koch1.html.

[40] Whether obligations stemming from PECL Arts. 2:301-3 should be properly classified as contractual or other in nature (tort, quasi-contract, collateral (or "implied" contract) is a question that cannot be dealt with here; all these legal constructs are, however, obligatory in nature.

PECL – such as the right to restitution following avoidance of the contract – may be found subject to third party interests and property rights, regulated by domestic law.[41] Both the CISG and the PECL do not contain a so-called "perfect tender" rule that allows for rejecting[42] non-conforming goods after tender was performed (such as the UCC §2-601).[43] Buyer must accept non-conforming goods, returning them to the seller only upon avoidance.[44] Such taking of the goods does not constitute "acceptance" in the Common

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[41] *See infra* note 70.

[42] CISG Art. 86(2) indeed uses the language of buyer's "right to reject" non-conforming goods. As there is no such general right in the CISG, this clause should be read in the context of prospective avoidance of the contract, i.e. the case covered by Art. 42(2), in which case the buyer, prior to the avoidance of the contract, must – on the seller's behalf and at his expense – preserve the goods during the interim period; or in the context of either premature delivery or delivery in excess (CISG Art. 52(1) and (2), respectively).

[43] Prof. Schlechtriem considers this a major deviation from common law doctrines, to the extent that the buyer's duty take over defective goods "must be repugnant to the Anglo-Saxon legal convictions" (Peter Schlechtriem, "Interpretation, gap-filling and further development of the UN Sales Convention" available online at http://cisgw3.law.pace.edu/cisg/biblio/schlechtriem6.html). However, White and Summers suggest that, at least in the context of sales transactions governed by the Uniform Commercial Code, various courts' rulings have so eroded the perfect tender rule that "the law would be little changed if §2-601 gave the right to reject only upon 'substantial' non-conformity [instead of the UCC language that grants a right to reject for failure of the goods "in any respect to conform to the contract" - JY]." James J. White & Robert S. Summers, *Uniform Commercial Code* (4th ed., 1995) p. 441.

[44] Prof. Schlechtriem suggests a construction according to which buyer, although not permitted to reject non-conforming goods outright, may nevertheless postpone taking them over for a reasonable duration necessary for determining whether under the circumstances avoidance is available or forthcoming (*see* Schlechtriem, *supra* note 43). While any such conduct will still be subject to Art. 86 obligations – namely the buyer's duty to care for the goods taken – such physical taking would not carry any legal effect in the sense of "taking over" the goods according to Art. 69; thus the risk would remain with the seller and would not pass to the buyer who acts, in essence, as the seller's agent in respect to preserving the goods. Note that this construction sits well with Art. 86 that carefully distinguishes between the act of "taking over" (Art. 69) which carries the effect of passage of risk, and "receiving" (Art. 86(1)) or "taking possession" (Art. 86(2)) which do not.

Law sense of the contract having been discharged and the power to avoid the contract lost.[45]

VI. AVOIDANCE BY SELLER IN CASES OF NON-FUNDAMENTAL BREACH: SELLER'S *NACHFRIST* MECHANISM IN CISG AND PECL

The general principle according to which both the CISG and the PECL reserve avoidance of the contract to cases of fundamental breach can be, in some cases, bypassed. In cases of some non-fundamental breaches, both the CISG and PECL allow the aggrieved seller to avoid the contract if she first sets an additional period of time of reasonable length for the buyer to perform, and the buyer has failed to perform throughout that curative period. So-called a "*Nachfrist*" period after similar provisions in German, Swiss, and other legal systems,[46] aggrieved sellers may "upgrade" certain non-fundamental breaches to the status of avoidance-justifying breach.[47] Moreover, the CISG seems more generous in

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[45] *See* Schlechtriem, *supra* note 43.

[46] *See* LANDO AND BEALE, op. cit., at 377. BGB § 326 practically makes Nachfrist periods compulsory in most cases, whereas CISG and PECL merely make it available to the non-breaching party. For the Swiss *Nachfristmodell see* Art. 107, 108 Obligationenrecht (Swiss Law of Obligations). Professor Treitel makes the point that other legal systems contain similar mechanisms, *See* Günter H. Treitel, *Remedies for Breach of Contract*, in INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW (Tübingen, Mouton, The Hague, Paris: J.C.B. Mohr, 1976) Ch. 16, §§ 149-151. Such is Art. 7(b) of the Israeli Contract Law (Remedies for Breach of Contract), 1970, which combines the optional version of Nachfrist with the exception that avoidance under Nachfrist for non-fundamental breaches may be objected to on grounds of injustice, with courts retaining appropriate discretion.

[47] In one French case, the seller sent the buyer a notice of avoidance following buyer's refusal to take delivery on a certain early date (amended from the original contractual stipulation). The court judged the breach non-fundamental and determined that the only way for the seller to avoid the contract was to first fix a Nachfrist period, which was not done: France 4 February 1999 Cour d'appel [Appellate Court] Grenoble (Ego Fruits v. La Verja Begastri), case presentation including English translation available online at http://cisgw3.law.pace.edu/cases/990204f1.html. In ICC Court of Arbitration case 7585/1992, the tribunal deemed the buyer's failure to open a letter of credit according to the contract a breach, but not a fundamental breach; nevertheless, the seller's declaration of avoidance was effective as it took place several months after the breach, and that time was constructed to operate as a valid Nachfrist period. Published (in

allowing aggrieved sellers to avoid the contract following a *Nachfrist* period than it is towards aggrieved buyers (the PECL, of course, makes no such distinction to begin with).[48] This and the following sections will examine the conditions under which avoidance of the contract becomes available to aggrieved sellers following a *Nachfrist* period.

Curative periods set by the aggrieved seller fall under CISG Art. 63 and PECL Art. 8:106, respectively. They share the same basic structure: under both, the aggrieved seller is empowered to fix an additional period for the buyer to come through on her obligations. During that period the aggrieved seller may resort to remedies (such as damages), but not avoid the contract, unless the party in breach declares that no curative performance will be forthcoming. The main constraint applying to *Nachfrist* periods is that, to allow for eventual avoidance of the contract, the period must be of contextually reasonable length to allow the party in breach to cure its non-performance. This condition met, and the party in breach failing to perform throughout the *Nachfrist* period, the aggrieved party is empowered to avoid the contract (the *Nachfrist* mechanism of PECL Art. 8:106(3) also allows automatic expiry of the contract once the additional period has

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English) in the ICC International Court of Arbitration Bulletin Vol. 6/N.2 - November 1995, 60-64; available online at http://cisgw3.law.pace.edu/cases/927585i1.html.

[48] Under CISG Art. 49, an aggrieved buyer may declare the contract avoided following a Nachfrist period only in cases of non-delivery of goods, while Art. 64 permits avoidance following Nachfrist over either the buyer's failure to pay or to take delivery of the goods. Regarding Art. 49, scholarly exegesis has broadened the avoidance-sanctioning defect to non-delivery of documents of title as well; Prof. Schlechtriem's argument is that in typical contexts, goods without appropriate documents are not the contracted goods at all: they have been delivered physically perhaps, but not legally. By analogy, the failure to take delivery of goods under Art. 64(1)(b) should also extend to failure to accept documents of title. *See* PETER SCHLECHTRIEM, UNIFORM SALES LAW: THE UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (Vienna: Manz 1986), available online at http://cisgw3.law.pace.edu/cisg/biblio/schlechtriem.html, 77; Jonathan Yovel, *Buyer's Right to Avoid the Contract: Comparative analysis of Respective Provisions of the CISG and PECL*, 2005 NORDIC JOUR OF COMMERCIAL LAW 1, available online at http://www.njcl.***. Prof. Koch and others support this construction, *See* Robert Koch, *Commentary on Whether the UNIDROIT Principles of International Commercial*

expired to no avail). However, post-*Nachfrist* avoidance under CISG and PECL is available only for certain types of breach. Those are explored next.

VII. What Breaches Allow for Avoidance of the Contract Following Nachfrist?

While the *Nachfrist* mechanism shared by the CISG and PECL relaxes the principle that only fundamental breaches allow for avoidance of the contract, it does so in a limited way. For not all breaches (non-performances) allow for post-*Nachfrist* avoidance of the contract. The CISG allows the aggrieved seller to avoid the contract post-*Nachfrist* in two categories of the buyer's non-fundamental failures to perform: 1) if the buyer has failed to pay the price; 2) if the buyer has failed to take delivery of the goods (CISG Art. 64(1)(b)).[49] These failures may occur in conjunction or independently.

A. Non-Payment and Nachfrist under CISG

As noted above, "payment" in the CISG may entail several performances, such as complying with legal formalities and taking preparatory steps to ensure that the eventual payment will come through. Examples are obtaining or at least applying for credit, for a letter of credit or for bank guarantees,[50] procuring adequate foreign currency, complying

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Contracts May Be Used to Interpret or Supplement Articles 47 and 49 of the CISG, available online at http://cisgw3.law.pace.edu/cisg/biblio/koch2.html.

[49] Note, that the corresponding provision regarding the buyer's power to avoid the contract post-Nachfrist is limited to cases of non-delivery only (CISG Art. 49(1)(b)). Prof. Honnold refers to Art. 64 as maintaining a "problem of consistency:" presumably, seller's non-delivery is parallel to buyer's non-payment, and buyer's failure to take delivery of the goods has no direct counterpart in Art. 49. Prof. Honnold worries that this may allow sellers to avoid contracts prematurely on the basis of short Nachfrist periods in order, e.g., to benefit from a sharp increase in market value of the goods. Yet as he notes, CISG Art. 63(1) requires that the additional curative period be of "reasonable length", and although this requirement is not mirrored in PECL Art. 8:106(1), only a reasonably long period would allow for avoidance under PECL Art. 8:106(3). *See* Honnold, at 387-8.

[50] *See* ICC Court of Arbitration case 7197/1992, where the tribunal ruled that the Bulgarian buyer's failure to open a letter of credit according to the contract was a fundamental breach of its obligation to pay, and that legal impediments to the payment of debt in foreign currency did not constitute force majeure. Published (in French) Journal du Droit International, 1993, 1028-1037; and UNILEX, also available at

with required formalities where applicable, etc.[51] Such performances require "to enable payment to be made" are normally considered inherent to the buyer's "obligation to pay the price"[52] and thus failing on them throughout a *Nachfrist* period would normally allow the aggrieved seller to avoid the contract. However, a seller who has actually received the price – even in a manner inconsistent with the contract – should be considered as having forfeited the power to avoid the contract on those grounds, although still entitled to damages if applicable.[53]

B. Not Taking Delivery and Nachfrist under CISG

CISG Art. 64(1)(b) allows the seller to avoid the contract post-*Nachfrist* also in case the buyer has failed to take delivery of the goods. In some circumstances, a simple delay in the buyer's performance in taking the goods may do no more than accrue storage and associated costs (insurance, etc.) that are imposed on the seller and refundable from the buyer on CISG Art. 85. However, in other situations the seller may be seriously burdened

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http://cisgw3.law.pace.edu/cases/927197i1.html. In an Australian case, the court also deemed the buyer's failure to open a letter of credit as agreed a fundamental breach, especially as buyer was expected during this time to continue performance (charter a ship for the sale of scrap metal, etc.), Downs Investments Pty Ltd v Perjawa Steel SDN BHD, *supra* note 19. For the matter of letter of credit, *See also* HONNOLD at 387, 510; as well as United States 21 July 1997 Federal District Court [New York] (Helen Kaminski v. Marketing Australian Products) CLOUT abstract no. 413, case also available online at http://cisgw3.law.pace.edu/cases/980406u1.html.

[51] The Secretariat Commentary to Article 64, para 7, stipulates that "The buyer's obligation to pay the price includes taking such steps and complying with such formalities which may be required by the contract … to enable payment to be made, such as registering the contract with a government office or with a bank, procuring the necessary foreign exchange, as well as applying for a letter of credit or a bank guarantee to facilitate the payment of the price." Available online at http://cisgw3.law.pace.edu/cisg/text/secomm/secomm-64.html.

[52] *See* CISG Art. 54.

[53] *See* UK Sales of Goods act §10, according to which contractual stipulations as to time of payment are not "of the essence" absent contrary intent and thus would not normally provide grounds for avoidance of the contract.

with the responsibility of caring for perishable goods[54] or goods stranded in faraway places, ports or places of transit.[55] Even if not a fundamental breach, untimely taking delivery may create hardships that for the seller would warrant post-*Nachfrist* avoidance of the contract, especially if the price had not yet been paid (commentators note that even in such situations it would be an extraordinary case in which a seller would avoid the contract having been paid).[56]

C. Delay in Performance and Nachfrist under PECL

The approach of the PECL to post-*Nachfrist* termination by the seller is different than the approach of the CISG. It does not limit the availability of post-*Nachfrist* termination to cases of the buyers' failure to pay or take delivery, but instead focuses on the matter of *delay* in performance – any performance. In case of delay in performance, PECL Art. 9:301(2) refers to and authorizes termination of the contract *also* according to PECL 8:106(3), [57] that governs all post-*Nachfrist* terminations. Thus, in the context of termination of the contract by the buyer, also governed by Art. 8:106(3), non-

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[54] In a Vietnamese case, the buyer failed to take delivery of a quantity of monosodium glutamate; the court justified the seller's immediate avoidance of the contract on grounds of fundamental breach due to the goods being "a very delicate substance" that could have deteriorated in prolonged storage; an immediate avoidance of the contract was therefore in reasonable time. The court *See*ms not to assign ample weight to the fact that the buyer has opened (and prolonged) a letter of credit and has already paid 50% of the price, on top of expressing intention – as well as eventually attempting to perform – to take the goods at a few day's delay. Vietnam 5 April 1996 Appellate Court (Ng Nam Bee Pte Ltd. v. Tay Ninh Trade Co.), case presentation including English translation available at http://cisgw3.law.pace.edu/cases/960405v1.html.

[55] *See*, e.g., the circumstances of the case: United States 14 April 1992 Federal District Court [New York] (Filanto v. Chilewich), available at http://cisgw3.law.pace.edu/cases/920414u1.html, in which quantities of footwear were delivered DAF ("Delivered at Frontier") in several installments by the Italian manufacturer to be received by agents of the UK/USA buyer at the Yugoslav boarder.

[56] *See* HONNOLD, p. 389.

[57] Somewhat redundantly perhaps: it seems that PECL Art. 8:106(3) would be effective also absent the reference by Art. 9:301(2). The term "also" in PECL Art. 9:301(2) retains the availability of termination according to PECL Art. 9:301(1) in cases of fundamental non-performances. It has the same effect as the words "which is not fundamental" in PECL Art. 8:106(3).

fundamental non-conformity cannot be grounds for termination of the contract even when a *Nachfrist* period has been set according to PECL Art. 8:106(1) and passed to no avail, because the crux of the matter is not one of delay.[58] The reflection of this in the case of the seller would be non-conformity of payment – either in method, currency, etc., which although it may be subject to a *Nachfrist* period under PECL Art. 8:106(1), would not allow for termination on the contract under PECL Art. 8:106(3) as the matter is not one of delay in performance.

Making post-*Nachfrist* avoidance of the contract available to delays in performance, as PECL Art. 8:106(3) does, may prove tricky to those comfortable with the CISG's tighter approach. For whether the buyer's non-performances – e.g., to pay and/or take delivery – are definite or merely delays in performance would typically be unknown at the time of non-performance. The seller would then have an option, to treat them as definite failures (either as fundamental non-performances or not), or as non-fundamental delays of performance, for which she might fix a *Nachfrist* period according to PECL Art. 8:106(1) and terminate the contract upon the buyer's continued failure to perform on PECL Art. 8:106(3). The PECL's allowance for post-*Nachfrist* termination may thus encompass non-performances by the buyer that would not allow for post-*Nachfrist* avoidance under CISG. A buyer who is slack in her contracted obligations to set up a service system, or a promotion campaign, or to conform with some formality in which the seller has an interest, may risk being held as delaying performance and subject to post-*Nachfrist* termination. In the absence of a material criterion that distinguishes between the several kinds of performances (to pay, to take delivery, to promote, to care for reputation or rights, etc.), tribunals must come up with clear yet contextual criteria to distinguish between any non-performance and a delay in performance, lest the former be masked as the latter and the Nachfrist mechanism abused in the sense of wrongly applying to breaches where delay in performance is not the essential factor. Tribunals may take into consideration the following points.

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[58] Compare with the clause regarding to buyer's setting a *Nachfrist* period in cases of non-delivery under CISG Art. 49(1)(b).

1) Any interpretation of the "delay of performance" language of PECL 8:106(3) must be conducted within the general framework of PECL Art. 9:301, namely the fundamental breach principle. Thus, exceptions to the principle under PECL Art. 8:106(3) should be narrowly and contextually construed.

2) All such exceptions must pass the good faith test – no trivial delays in performance or masking definite non-fundamental non-performances as "delays" should be allowed to result in contract termination. The *Nachfrist* mechanism allows for "upgrade" of some non-fundamental delays, but certainly not any and all of them.

3) In the context of international sales, tribunals may look to CISG Art. 64(1)(b) as an interpretative guideline in construing what non-performances sould be allowed to result in avoidance of the contract.

Certainly, such rulings may still allow for more extensive sets of cases where contracts would be terminated under PECL than under CISG; these may cover, for instance, buyer's failure to supply certain documents other than documents of title. No *Nachfrist* period would allow for avoiding the contract under CISG 49(1)(b) for such a failure, but the case can turn differently under PECL 8:106(3). In conclusion, while the aforementioned constraints must not allow for the erosion of the fundamental breach principle of the PECL, it is also a mistake to obscure the differences between the two post-*Nachfrist* avoidance rules. The drafting of the PECL was done with full cognizance of the approach taken by the CISG and the differences, even if not great, are material nonetheless.

VIII. *NACHFRIST* AND REASONABLE TIME

The *Nachfrist* mechanism cannot be used to bypass the reasonable time requirement governing all notices of termination set in PECL Art. 9:303(2). PECL Art. 8:106(3) requires that the additional curative period be of "reasonable length." If it is "too short," the aggrieved party may terminate only after an overall reasonable time has passed, even if the additional period has already expired. For purposes of termination, this imposes a

de-facto "reasonable length" on the *Nachfrist* period, although such is not generally required (see PECL Art. 8:106(1)).[59]

It is not always clear, however, as of when should the period in question be counted. In some cases, courts looked not to the *Nachfrist* period indicated by the seller, but instead to the entire period available for the buyer's cure – from breach to termination – although the actual *Nachfrist* period involved was much shorter.[60]

PECL Art. 8:106(3) includes a useful mechanism, in that the *Nachfrist* notice may include a conditional termination notice, which will apply automatically if the non-performing party fails to remedy during the additional period.[61] In this case, a contract may be terminated without a designated notice: the *Nachfrist* notice then doubles as a conditional notice of termination.[62] This means that the seller must make the *Nachfrist* nature of the notice obvious to the defaulting buyer, less the latter consider it merely a "grace" period bereft of legal effect in terms of ensuing avoidance of the contract.[63] In

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[59] The CISG contains such a time limitation only in cases where delivery was made (CISG Art. 49(2)(b)(ii)), a limitation that applies also to the cure period under Art. 48 (CISG Art. 49(2)(b)(iii)).

[60] *See* Italy 11 December 1998 Corte di Appello [Appellate Court] Milan (Bielloni Castello v. EGO), case presentation including English translation available at http://cisgw3.law.pace.edu/cases/981211i3.html, seller set two consecutive Nachfrist periods of fifteen days each, but the overall period made de-facto available for buyer's performance after breach totaled two and a half months, which the court judged to be a reasonable time. *See* also ICC Court of Arbitration case 7585/1992, *infra* note 65.

[61] Whether the Nachfrist notice in fact makes this provision or not would become an interpretative question. *See*, in a similar context, such an approach to Nachfrist notice by the Austrian Supreme Court where the seller – mistakenly considering German domestic law to be applicable – gave a notice according to BGB § 326; the court judged this to satisfy the conditions of a Nachfrist notice under CISG Art. 63 and therefore under Art. 64(1)(b) as well. Austria 28 April 2000 Oberster Gerichtshof [Supreme Court], case presentation including English translation available at http://cisgw3.law.pace.edu/cases/000428a3.html.

[62] *See* LANDO AND BEALE, op. cit., at 415.

[63] Thus in ICC Court of Arbitration case 7197/1992, *supra* note 50, the tribunal held (in obiter) that although the buyer had failed to perform its obligation within the additional period of time fixed by the seller, the seller would have been entitled to avoid the contract under Art. 64(1)(b) CISG only if it had declared its intention to do so and had given notice to the buyer pursuant to Art. 26 CISG. As things stood, the extra period set

case the additional period is not deemed to be of reasonable length, such automatic termination will take effect after a reasonable time only, in accordance with the principle examined above. However, there is one case in which there is no sense in insisting on a reasonably long curative hiatus prior to the termination of the contract taking effect. That is the case of anticipatory breach during *Nachfrist*, when clearly no curative performance is forthcoming. This case is examined next.

IX. ANTICIPATORY BREACH DURING *NACHFRIST* PERIOD

Both the CISG and PECL operate on the general principle that anticipatory breach may provide grounds for remedies – including avoidance of the contract in case of anticipatory fundamental breach – even before the time of performance has arrived.[64] This principle is carried into the respective provisions governing avoidance of the contract following a *Nachfrist* period.

CISG Art. 64(b) stipulates that avoidance of the contract during a *Nachfrist* period becomes available upon the buyer's "declaration" that she will not perform within the set curative period. That is a more limited criterion than that of CISG Art. 72, which allows for avoidance of the contract if "it is clear" that a fundamental breach is to take place. Under Art. 64(b), that information must originate from the defaulting buyer. However, there is no requirement that the said declaration be a specific one directed at the seller to the effect that buyer will continue defaulting on this specific transaction. A general declaration of insolvency, for instance, should fulfill the "declaration" requirement of CISG Art. 64(1)(b), unless accompanied by a specific communication to the contrary (even an insolvent buyer may go ahead with a transaction that will eventually generate

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by the seller did not qualify as a Nachfrist period for the purpose of avoidance of the contract because the seller did not communicate it as such. This *See*ms a certain deviation from CISG Art. 64(1)(b) as the provision applies to "additional period of time fixed by the seller in accordance with paragraph (1) of article 63," which does not require any mention of the seller's intention to avoid the contract upon the buyer's continued default.

[64] *See* CISG Art. 72, PECL Art. 9:304.

value for distribution in eventual bankruptcy).[65] In the communicative framework of *Nachfrist*, unlike the general rule governing anticipatory breach, general third-party information is not basis enough to declare the contract avoided prior to the expiry of the duration of the curative period.

PECL Art. 8:106(2) maintains a similar device, whereby the aggrieved party who has set a *Nachfrist* period is allowed to terminate the contract during that period if she "receives notice from the other party" to the effect that no performance is forthcoming. This requirement is likewise narrower than the general one governing anticipatory breach under the PECL, according to which it must be "clear" that default would persist (PECL Art. 9:304). The reasons for diverging from the general rule in the context of a curative *Nachfrist* period are the same as discussed above in the context of the CISG.

X. Time Restrictions on the Seller's Power to Avoid the Contract

A. General

Under CISG Art. 64(1), the seller's power to avoid the contract is unrestricted, time-wise.[66] An aggrieved seller is thus allowed to either set a curative period under CISG Art.

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[65] Thus, to the tribunal's approval in ICC Court of Arbitration case 7585/1992, the aggrieved seller postponed a notice of avoidance for a little over three months – operating as a Nachfrist period – although "it was absolutely clear that Defendant [defaulting buyer] did not have financial resources" to pay the contractual price (but did not communicate this to the aggrieved seller). *See supra* note 47. However, in the Australian case Roder v. Rosedown, *supra* note 39, buyer going "into administration" was judged grounds enough for the seller to avoid the contract under CISG Art. 64(1) as no possible performance could be expected. The seller in a Swiss case was cautious too, providing consecutive Nachfrist periods to no avail after the buyer, who has paid a portion of the price, has gone into bankruptcy (and eventual liquidation); presumably, seller was very anxious to go through with the deal as the goods involved were especially produced and required costly disassembly for an alternative transaction. Switzerland 3 December 2002 Handelsgericht [Commercial Court] St. Gallen, case presentation including English translation available online at http://cisgw3.law.pace.edu/cases/021203s1.html.

[66] Prof. Honnold admits this "may seem anomalous" but justifies the rule on grounds of the position of the aggrieved seller not wishing to jump the gun and avoid the contract too early, on the grounds that avoidance on fundamental breach is not yet available, nor too late and risk unreasonable delay. *See* Honnold, at 389.

63(1), or simply wait and refrain from avoiding the contract in hope that the buyer comes through, knowing that her power to avoid the contract at a later time will not expire by this delay alone.[67] The tables are turned, however, once the price – the total price[68] – has been paid. CISG Art. 64(2) then restricts the seller's power to avoid the contract in terms of the time in which a declaration of avoidance may be considered effective. These restrictions are examined in detail below.[69] Before examining them, however, one should note the meaning of the payment of the price as the "crossing of the Rubicon" in the CISG.

Professor Honnold notes, that as avoidance of the contract normally involves mutual restitution, sellers will generally be reluctant to avoid contracts after the price has been paid.[70] However, one can conceive of serious risks to the seller generated by the buyer's

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[67] However, *See* Prof. Kritzer's important argument that even when not spelled out, "reasonableness is a general principle of the CISG." Performing reasonably does not always mean that performance must be "made in reasonable time," as in contexts of provisions that make specific distinctions between cases in which powers (such as power to avoid the contract) must be exercised in reasonable time or not. Otherwise, the overt distinctions between cases in which avoidance must be declared in reasonable time and those in which it is not would be meaningless. Kritzer's point is well taken in that even these provisions must be interpreted against the general principle of reasonable performance. Albert H. Kritzer, *Overview Comments on Reasonableness*, available online at http://cisgw3.law.pace.edu/cisg/text/reason.html. *See* also comments by Jelena Vilus, available online at http://cisgw3.law.pace.edu/cisg/text/reason.html#vilus; rpr. in HOMENAJE A JORGE BARRERA GRAF, vol. 2, Mexico: Universidad Nacional Autonoma de Mexico (1989) 1440-1441. For the definition of reasonableness expressed in the PECL and references to reasonableness in Continental and Common Law domestic rules, doctrine and jurisprudence, go to http://cisgw3.law.pace.edu/cisg/text/reason.html#def. For further discussion regarding the correlation between the PECL's definition of reasonableness and the meaning of this term to CISG legislators when they used the concept in drafting the Convention's provisions, *See* Kritzer, id.

[68] *See* Secretariat Commentary on CISG Article 64, paras 8, 12, available online at http://cisgw3.law.pace.edu/cisg/text/secomm/secomm-64.html.

[69] It is typical to the architecture of the CISG and PECL that while the former regulates substantive rights of termination mostly in discrete clauses (such as Art. 64), the latter regulates several substantive rights through its general treatment of notices pf termination, common to both sides. *See* PECL Art. 9:303.

[70] HONNOLD § 356 (p. 388). Of course, the practical availability of retrieving either funds or goods from a defaulting party rests on more than contract or sales law, especially as

other breaches, such as failure to take possession of the goods (which may create problems with carriers, port authorities, etc.) or arranging for formal conformities; the seller may find herself not only in breach of contract with other parties but also in possible legal trouble (e.g., for holding imported goods without import license, veterinary or other clearances, or required certificates, etc. that were supposed to be generated by the buyer). As Honnold notes, the seller may also be invested in long-term interests that require the buyer's performance, such as setting up a distributorship or a promotion program.[71] Nevertheless, a buyer who has paid the price yet defaulted otherwise is in a precarious position herself. This is the mirror-image of the situation of the seller who has delivered the goods, and the CISG treats both situations similarly in restricting the aggrieved party's power to avoid the contract to a reasonable time.

The PECL differs in its general approach. Firstly, there is no "crossing of the Rubicon" – the PECL does not distinguish between cases in which the price had been paid and those in which it was not. Secondly, PECL Art. 9:303(2) requires that in *all* cases notice of termination be given in reasonable time after awareness of the non-performance became effective.[72] This approach looks rather to the interest of the non-

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rights against third party creditors and bankruptcy preferences are regulated by domestic law; the CISG itself does not govern property rights, *See* CISG Art. 4(b). *See* Jacob S. Ziegel, *Report to the Uniform Law Conference of Canada on Convention on Contracts for the International Sale of Goods* (July 1981), at 130, available at http://cisgw3.law.pace.edu/cisg/text/ziegel81.html. Commercial debts will typically be inferior in preference to those held by secured creditors, and the restitution according to Art. 81(2) would become that weakest of types of debt in bankruptcy – an unsecured commercial debt (unless under contractual or statutory lien).

[71] Id.

[72] Lando and Beale note that this rule corresponds to those in several legal systems, notably Civil Law regimes, but these in fact feature a certain variation that may very well decide cases differently: from "without delay" to "shortly" to "reasonable time": *See* Danish Sale of Goods Act §§ 27, 32 ("promptly" or "within a short time"); Finnish and Swedish Sale of Goods Acts, §§ 29, 32, 39, 59 ("reasonable time"); Dutch BW Art. 6:89 ("promptly"); French, Belgian and Luxembourg Code Civil Art. 1648 for garantie des vices cachés ("dans un bref délai") and, in Belgium, in some other cases on the basis of good faith, *see* Cass. 18 May 1987, Arr. Cass. 546 and Cass. 8 Apr. 1988, Arr. Cass., no. 482; UK Sale of Goods Act 1979, §§ 34 and 35 (and *see* Treitel, *op. cit.* at 711); Portuguese Civil Code Art. 436(2). *See* LANDO AND BEALE, *at p.* 415. Austrian

performing party in duly knowing whether its breach will carry termination or not. However, in one important case the PECL actually grants the aggrieved seller a wider power to terminate the contract than the CISG: that of a buyer's late performance. The next section examines the CISG and PECL provisions governing these types of cases.

B. Late performance by the Buyer After the Price was Paid

Under CISG, when the price was paid yet the buyer is still in breach in that her performance (the payment or another[73]) is *late*, the aggrieved seller's declaration of avoidance must be given before she becomes aware that the performance has been tendered (CISG Art. 64(2)(a)). This restriction protects the reliance interest of the aggrieved buyer during her cure efforts, and is an incentive both to the aggrieved seller not to postpone a declaration of avoidance unnecessarily and to the curing buyer to notify the seller of the curative performance as soon as possible, in order to cut off the latter's power to avoid the contract.[74]

By contrast, under PECL Art. 9:303(3)(a) the aggrieved party retains the power to terminate the contract until a reasonable time *after* it has or ought to have become aware of the late tender. In fact, PECL Art. 9:303(3)(a) goes out if its way to emphasize that the

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and German law maintain a shorter time limit, "unverzüglich"("without undue delay.") *See* BGB § 121 (controlling all acts of rescission, including HGB § 377), ABGB §§ 932, 933. German courts acknowledged a discrepancy between the two criteria, even when the facts satisfied both; *see* Germany 17 September 1991 Oberlandesgericht [Appellate Court] Frankfurt, case presentation including English translation available at http://cisgw3.law.pace.edu/cases/910917g1.html (in this case a one-day delay in sending an avoidance telex after the breach was discovered at a trade fair was judged both reasonable and unverzüglich). In another case, an Italian buyer of a used car was allowed to avoid the contract three months after she discovered the car was previously stolen and title cannot be transferred; the court accepted the time as pertinent to the various inspections required: Germany 22 August 2002 Landgericht [District Court] Freiburg, case presentation including English translation available at http://cisgw3.law.pace.edu/cases/020822g1.html.

[73] The Secretariat Commentary envisions that "in most cases" the late performance would indeed be the payment of the price, but the performance in question may of course be a different one. *See* Secretariat Commentary, *supra* note 68 at para. 9.

[74] For a discussion between the power to avoid the contract and the right to cure *See* above, text related to note 34.

aggrieved party need not terminate before the late tender has been made. The exception to this rule is that the aggrieved party loses its power to terminate the contract if it fails to notify the party in breach that it will refuse to accept a curative performance, as long as it has reason to know that the party in breach intends such cure (PECL Art. 9:303(3)(b), which completes the general cure provision of Art. 8:104).[75] While no legal system studied has a mechanism identical to that of PECL Art. 9:303(3)(b),[76] the CISG maintains a similar provision regarding limitation of an aggrieved buyer's power to avoid the contract (CISG Art. 48(2)), with the difference that the intention to cure must be communicated by the seller-in-breach to the buyer. CISG has no direct counterpart to Art. 48 regarding cure by buyer.[77] Note, that the PECL does not make a special provision for cases in which the price was paid, and Art. 9:303(2) applies whether it was or was not.

C. Buyer's Breach other than Late Performance

The seller's power to avoid the contract when the price had been paid for breaches other than late performance is limited by the CISG Art. 64(2)(b) to a "reasonable time" after one of the following occurrences has come to pass: either the aggrieved seller knew or ought to have known of the breach (CISG Art. 64(2)(b)(i)), or a *Nachfrist* period (set according to Art. 63(1), as discussed above) has passed to no avail (CISG Art.

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[75] *See* Jonathan Yovel, *Seller's Right to Remedy Failure to Perform: Comparison Between Respective Provisions of the CISG and the PECL,*, available online at http://cisgw3.law.pace.edu/cisg/biblio/yovel48.html.

[76] *See* Lando and Beale, p. 415. The authors surmise that such forbearance may be implied by the duty of good faith or, in Common Law systems, promissory estoppel. Indeed, to this commentator's mind, neither source of obligation may create such a forbearance as under the circumstances indicated in PECL Art. 9:303 which include communicative passivity on the part of the debtor. Certainly no promissory estoppel may come into effect where not a modicum of promise was given, as Lando and Beale note (for a communicative alternative, *See* CISG Art. 48(2)-(4)). The duty to perform in good faith would probably cut the other way: it would require the party in breach – who intends to cure and wishes the aggrieved party to forebear from termination – to at least take pains to communicate this intention. Requiring the aggrieved party to forebear on mere hearsay without substantive basis for knowing that cure is forthcoming *See*ms itself an act in bad faith.

[77] *See* Yovel, *supra* note 75.

64(2)(b)(ii)).[78] The former obviously correlates with PECL Art. 9:303(2) (general duty to terminate in reasonable time). The correlation is less perfect in the case of the latter, which is in fact a limitation on the power of avoidance following a *Nachfrist* period – as set out in Art 64(1)(b) – to the effect that once the price had been paid and *Nachfrist* on the persisting breach *other* than late performance had passed to no avail, the seller's power to avoid the contract must be executed in reasonable time or else expire. This provision seems not to have a direct counterpart in the PECL. PECL Art. 8:106(3) limits termination following failed *Nachfrist* periods to cases of "delay in performance" only, which correlates to what CISG 64(2)(b) in fact excludes ("in respect to any breach other than late performance, etc."). The non-correlation, however, is merely a slight technical problem, as PECL Art. 9:303(2) would govern cases falling under CISG Art. 64(2)(b)(ii), as well.

D. Reasonable Time

Although used frequently, the expression "reasonable time" is not defined in the CISG nor in the PECL. Courts and commentators offer contextual criteria,[79] noting that what may constitute "reasonable" in any given case may be effected by the nature of the goods,[80] the transaction, the payment arrangements, third party claims, and whether legal advice or expert opinions were actually necessary in order to determine concrete rights (e.g., in cases of non-conformity merely sorting the matter out may be, for practical

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[78] In this aspect CISG Art. 64 resembles CISG Art. 49, except that the latter adds a similar provision limiting the power of avoidance when cure has been effected according to CISG Art. 48(2), namely on the defaulting seller's initiative rather than the buyer's. As the CISG does not contain a buyer-equivalent to the seller's right to cure after the time for performance has passed (Art. 48), Art. 64(2)(b) contains only two sub-clauses to the three of Art. 49(2)(b).

[79] Lando and Beale remark that "What is a reasonable time will depend upon the circumstances. For instance the aggrieved party must be allowed long enough for it to know whether or not the performance will still be useable by it. If delay in making a decision is likely to prejudice the defaulting party, for instance because it may lose the chance to prevent a total waste of its efforts by entering another contract, the reasonable time will be shorter than if this is not the case." Op. cit. *at p.* 413.

[80] *See* Cong ty Ng Nam Bee v. Cong ty Thuong mai Tay Ninh, *supra* note 54, discussing perishable goods.

reasons, longer than under no tender at all).[81] Courts have ruled on the reasonable length of time taking all such circumstances into account; and, in the absence of clear indicators, the question of when does the period begin to run is invariably left to judicial discretion.[82]

PECL Art. 1:302 supplies some guidelines to "reasonableness" in general, but those are somewhat circular – "reasonable" is what reasonable persons, acting in good faith, would "consider reasonable." More helpful is the notion that reasonableness is contextual, and takes into consideration "the nature and purposes of the contract, the circumstances of the case", etc. Another approach would be to consider reasonableness in definition and execution of contractual obligations as an articulation of the principle of good faith.[83] In the context of CISG Art. 64, this seems to mean that as far as delaying the declaration of avoidance, the seller has a duty to avoid in good faith only in cases where

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[81] *See*, e.g., Germany 31 January 1997 Oberlandesgericht [Appellate Court] Koblenz, case presentation available at http://cisgw3.law.pace.edu/cases/970131g1.html; *see also* Plate, *The Buyer's Remedy of Avoidance under the CISG: Acceptable from a Common Law Perspective?*, 6 VINDOBONA JOURNAL OF INTERNATIONAL COMMERCIAL LAW AND ARBITRATION (2002) 57, at 67, available online at http://cisgw3.law.pace.edu/cisg/biblio/plate.html.

[82] As "reasonable time" operates in cases of the seller's breach (under CISG Art. 49) as well as the buyer's breach, decisions pertaining to the former are useful in constructing the latter. Thus *See* France 14 June 2001 Cour d'appel [Appellate Court] Paris, Aluminium and Light Industries Company v. Saint Bernard Miroiterie Vitrerie, case presentation including English translation available at http://cisgw3.law.pace.edu/cases/010614f1.html, where the court applied CISG Art. 49(2) to a transaction of faulty fancy glass panels, determining that the eight months that lapsed from the determination of the breach to the notice of avoidance was an unreasonably long period. The court took into account the various expert inspections of the panels sought in this case, and began counting the period from the last one. In different circumstances, the German Supreme Court ruled that the five months that had elapsed between the buyer's being informed of the seller's breach (a delivery stop) made for too long a period and could not be considered as a reasonable time under article 49(1)(b): *See* Germany 15 February 1995 Bundesgerichtshof [Supreme Court], case presentation including English translation available at http://cisgw3.law.pace.edu/cases/950215g1.html.

[83] PETER SCHLECHTRIEM, UNIFORM SALES LAW (tr. From German: Einliches UN Kaufrecht, Manzsche, Vienna, 1986) 39. *See also* idem (ed.), Commentary on the UN Convention on the International Sale of Goods (CISG), Oxford 1998; Klein, J, *Good Faith in International Trade* 15 LIVERPOOL L.R. 114-141 (1993), available online at http://cisgw3.law.pace.edu/cisg/biblio/Klein.html.

the goods have been delivered.[84] Under the comprehensive commitment to good faith expressed in PECL Art. 1:201, however, this duty applies to all terminations. A different construction—one that would apply a general obligation of good faith to CISG obligations—would undermine the distinction between CISG Art. 64(1) and (2): under a general obligation of good faith, any declaration of avoidance by the seller would have to be made in reasonable time so as not to create undue hardship for the buyer. The limitation of the power of avoidance to a "reasonable time" under CISG Art. 64(2) would then become, in fact, tautological.[85]

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[84] A scholarly controversy exists regarding whether or not good faith is a general principle of the CISG, as it clearly is of the PECL (Art. 1:106). Professor Magnus, drawing on comparisons between CISG Art. 7 and the UNIDROIT Principles (Art. 1.6.) claims that it is (*see* Ulrich Magnus, *Remarks on good faith*, available online at http://cisgw3.law.pace.edu/cisg/principles/uni7.html. Dr Felemegas reads Art. 7 differently, as applying to the interpretation of the CISG only and not to performances in general, *see* John Felemegas, *Remarks on Good Faith and Fair Dealing*, available online at http://cisgw3.law.pace.edu/cisg/text/peclcomp7.html.This is certainly not the proper place to attempt to resolve this important issue, or even to determine whether it is, properly stated, merely an interpretative question – albeit a preeminent one – as Magnus and Felemegas approach it, or whether its determination transcends mere interpretative approaches. One may doubt, however, whether courts in legal systems that regard good faith obligations (in either the negotiation or performance stage) as immutable tenets of private law – metaphorically speaking, a part of the "constitution" of private law – might not impose derivative obligations also when dealing with contractual obligations governed by the CISG. Such may be inferred from dicta of Israel Supreme Court, where good faith is a general principle of Private Law, (*See*, e.g., Klemer v. Guy (1993), 50(1) PD 184) following the Contracts (General Part) Law, 1973, §§ 12, 39, 61(b) and expressed in the anticipated Civil Code, §§ 2, 163 of the 2004 draft, available online at http://www.justice.gov.il/MOJHeb/Codex/.

[85] Regarding CISG Art. 7, *See* Felemegas, op. cit.; regarding CISG Art. 8, *See* Maja Stanivukovic, *Remarks on the Manner in which the PECL may be Used to Interpret or Supplement CISG Article 8*, available online at http://cisgw3.law.pace.edu/cisg/text/peclcomp8.html#er. Regarding CISG Art. 9, *See* Anja Carlsen, *Remarks on the Manner in which the PECL may be Used to Interpret or Supplement CISG Article 9*, available at http://cisgw3.law.pace.edu/cisg/text/peclcomp9.html#er.