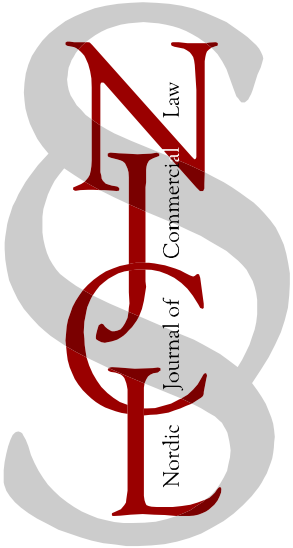

THE SELLER'S RIGHT TO CURE A FAILURE TO PERFORM: AN ANALYTIC COMPARISON OF THE RESPECTIVE PROVISIONS OF THE CISG AND THE PECL

by Jonathan Yovel[*]

Nordic Journal of Commercial Law

issue 2005 #1

[*] Faculty of Law, University of Haifa, Israel. The author is extremely grateful for invaluable comments on a prior draft by Prof. Albert H. Kritzer and Dr. John Felemegas, as well as gratefully acknowledges the hospitality of Professor Reinhard Zimmermann, director of the Max Planck Institute for Comparative Private and Private International Law in Hamburg, under whose auspices this commentary was written, as well as that of its fellows and other staff.

1. General

A contractual party's right to cure a non-performance under the condition that such cure does not create any – or at least any excessive – hardship for the aggrieved party, has emerged from Common Law traditions to become almost a staple of modern contract law, and of modern sales law in particular.[1] This study reviews and analyses the respective provisions governing the seller's right to cure under two important legal regimes, that of the UN Convention on Contracts for the International Sale of Goods, 1980 (hereinafter CISG)[2] and the newly drafted Principles of European Contract Law, 2003 (hereinafter PECL).[3]

Different justifications to the principle of cure may be cited, whether in terms of risk allocation, good faith obligations, or the relational approach to contract as a framework of relations between parties that shifts the analytic emphasis from overt rules (whether set contractually or by statute) to the actual framework of relations and interests involved. Be the theoretical overview what it may, the principle of cure is perhaps the most important deviation from strict doctrines of liability for breach, and as such it maintains an important relation to the doctrine of contract avoidance ("termination" in the context of the PECL), as discussed below.

Curing a non-performance may be relevant in various contexts: payment, defective or missing documents, non-conforming or non-delivered goods, etc. In the PECL – which apply to any and all contractual transactions, not only sales or international sales – Art. 8:104 recognizes a non-performing party's general right to cure, limited by parameters that will be discussed presently. In

---

[1] For a survey of national systems *see* Ole Lando & Hugh Beale eds., *Principles of European Contract Law: Parts I and II, Kluwer Law International* (2000) 368-370; *also* Treitel, *Remedies*, §276. Such is the general case in Common Law, expressed already in *Borrowman, Phillips & Co. v. Free & Hollis*, (1878) 4 Q.B.D. 500. *See* Jacob S. Ziegel, "The Remedial Provisions in the Vienna Sales Convention: Some Common Law Perspectives" in Galston & Smit (ed.), *International Sales: The United Nations Convention on Contracts for the International Sale of Goods*, (Matthew Bender, 1984) pp. 9-1 to 9-43, available online at <http://cisgw3.law.pace.edu/cisg/biblio/ziegel6.html>. The English Sales of Goods Act does not include a seller's general right to cure, while the UCC §2-508 famously does. For elaboration on the position of English law *see* and *Goode*, Commercial Law 298-301; Rex J. Ahdar, "Seller Cure in the Sale of Goods", *1990 Lloyd's Mar. Com. L. Q.* 364. Other commentators are more skeptical concerning the availability of post-breach cure under English law; *see* Anette Gàrtner, "Britain and the CISG: The Case for Ratification - A Comparative Analysis with Special Reference to German Law" *in Review of the Convention on Contracts for the International Sale of Goods (CISG)*, Kluwer Law International (2000-2001) 59-81, available online at <http://cisgw3.law.pace.edu/cisg/biblio/gartner.html>; *see also* Sale and Supply of Goods, Law Com. 85, *Scot. Law Com.* 58 (1983) para 2.38 according to which "There is great uncertainty, at least in English law, as to the existence and extent of the seller's right to repair or replace defective goods".

[2] 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 exemptions (*See* Art. 2) and subject to the power of the parties to derogate from it (Art. 6), the CISG covers all international sales transaction; 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 and usefully organized source of CISG-related materials is available on the Pace University website at <http://cisgw3.law.pace.edu/cisg.html>.

[3] 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").

the CISG – divided as it is into seller's and buyer's rights and obligations – the right to cure non-performance depends upon the nature of the non-performance and the time of cure, and is divided into different typical situations, covered by several articles. Some grant parties the right to cure defective performance prior to the time of the projected performance as contracted: in those cases, cure limits aggrieved parties' power to declare contracts avoided in situations of anticipatory breach. Thus, Art. 34 relates to curing defective or non-conforming documents, and Art. 37 deals with breach in respect to goods. Other articles refer to the aggrieved party's power to require curative performance, such as Art. 46(2) and (3). These are relatively non-controversial issues, and one may argue that refusal to allow cure prior to the time set for performance is *ad definitio* a breach of good faith obligations. Indeed, the true meaning of cure pertains to a defaulting party's right to cure a defective performance or non-performance *after* the time of the projected performance has passed. Thus this commentary deals with the seller's right to cure under CISG Art. 48 and PECL Art 8:104, which extend the right to cure once the fact of breach has been established.

Although both the PECL and CISG recognize a right to cure under certain conditions, they differ both in general approach as well as in the specific rights granted. This may not be surprising, as the PECL applies to any and all contractual transactions, not only sales or international sales; however, the seller's right to cure is closely related to the buyer's right to avoid the contract, an issue on which the CISG and PECL share similar approaches.[4] Indeed, the relation between cure and avoidance must be a central topic for analysis once the nature of the right to cure has been clarified.

2. The Jurisprudential Nature of the Right to Cure

One must distinguish between a breaching party's *general* (or *unqualified*) right to cure and a *qualified* right. A general right means that within certain timeframe constraints and other objective constraints, the breaching party may exercise the right unilaterally, independent of anything the aggrieved party may do in respect to the breach. A qualified right means that the breaching party's right to cure a non-performance depends upon the aggrieved party's failure to use some power or exercise some right that renders cure unavailable.[5]

---

[4] *See* Jonathan Yovel, "Comparison between provisions of the CISG (Buyer's right to avoid the contract: Article 49) and the counterpart provisions of the PECL (Articles 9:301, 9:303 and 8:106)", available online at <http://cisgw3.law.pace.edu/cisg/biblio/yovel49.html>.

[5] Commentators frequently use "right" and "power" interchangeably. Hohfeld's analytic language would be useful here (Hohfeld supplied a Saussurian-style analytic syntax whereby legal concepts are defined through their relation to other concepts): to claim that A holds a *right* – properly defined – correlates with B's *duty*; A's *liberty* correlates with B's *lack of right* to object, and A's *power* correlates with B being *subject* to that power in the sense that using the power would change the normative array of rights, duties, liberties, powers, subjections, immunities etc. between the parties. Thus the "right to declare the contract avoided" is, properly speaking, a legal *power* (it changes the parties' legal relations), as is the buyer's *power* to set a *Nachfrist* period; but as the seller's "right to cure" does not in itself change the relational framework yet does require the buyer to accept the curative tender it is, properly speaking, a *right*. Had it required no compliance from the buyer – had it been performed, say, by the seller and a third party – cure would be, properly speaking, a *liberty*. *See* Welsley Hohfeld, *Fundamental Legal Conceptions as Applied in Juridical Reasoning* (New Haven: Yale University Press, 1964 [1919]). For an application of the Hohfeldian matrix to the analysis of contractual relations *see* Jonathan Yovel, "What is Contract Law 'About'? Speech Act Theory and a Critique of 'Skeletal Promises'", 94 *Northwestern U. Law Rev.* (2000) 937-962.

The primary right that aggrieved parties may hold and whose exercise would frustrate any subsequent attempt to cure is the right to declare the contract avoided.[6] Once the contract is legally avoided there can be no cure.[7] Thus a contractual regime may subject the power to avoid the contract to the right to cure.[8] In such cases, the breaching party is immune – at least temporarily, until the curative period is over and cure fails – from the aggrieved party's power to declare the contract avoided. In all other cases, any post-avoidance communication or indeed curative performance by the breaching party would fail *qua* cure, amounting to an offer of a new or modified contract which may or may not excuse past breaches.[9]

The following discussion analyzes the relations between cure and avoidance of the contract in the PECL and CISG on these theoretical lines. Both the CISG and PECL allow for post-breach cure and both restrict the right to circumstances discussed in detail below; however, while the CISG allows for cure subject to avoidance of the contract, the PECL makes no such overt, general qualification. As argued below, contextual considerations both rationalize this discrepancy and mitigate it.

---

6 *See* PECL Art. 9:305.

7 *See* Ziegel, *supra* note _Ref99341181\h * MERGEFORMAT 2 at 9-21.

8 *See*, e.g., UNIDROIT Principles Art. 7.1.4(2); BGB [German Civil Code] §323(1); *see also infra* note _Ref101280380\h * MERGEFORMAT 36 and keyed text.

9 Cure may, of course, be reached at in this way as well. Such may be the case even when declarations of avoidance were deemed ineffective (e.g., because the alleged breach was not fundamental). In such cases, following a new agreement the question of the scope of seller's obligation, although in essence being curative in nature and in relation to the prior contractual relations between the parties, is a matter of general contractual interpretation. Courts would take into consideration the curative context, but allow that parties have since undertaken a new allocation of performances and risks. Such was the case, e.g., in France 26 April 1995 *Cour d'appel* [Appellate Court] Grenoble (*Marques Roque Joachim v. Manin Rivière*), available online at <http://cisgw3.law.pace.edu/cases/950426f2.html>.

3. Cure for What?

When analyzing cure mechanisms, two initial questions emerge: What failures of performance may be cured? Under what restrictions? While the latter question is dealt with in detail below, the former requires special initial attention. Under CISG Art. 48(1) the seller is allowed to cure "*any* failure" to perform his obligations. As scholars comment,[10] this is a general provision, which covers fundamental and non-fundamental breaches alike. Likewise, PECL Art. 8:104 covers all "tenders of performance" that do not "conform to the contract," whether the non-conformance be fundamental or not, as long as the delay in performance itself does not constitute a fundamental non-performance. The breaching party's right to cure, then, initially operates independently of the distinction between fundamental and non-fundamental breaches, on which its inverse right – the aggrieved party's right to avoid the contract – hinges.

However, unlike the CISG, PECL Art. 8:104 restricts the right to cure to those cases in which the very delay in performance does not constitute a fundamental non-performance. In cases where "time is of the essence" as the Comment to PECL 8:104 puts it,[11] the only way to achieve cure is through the aggrieved party setting a *Nachfrist* period; otherwise, the non-performing party has no right to cure. Indeed, this point requires some clarification: PECL Art. 8:104 sets apart a category of curative tenders that, while indeed remedying the initial non-performance at the time of the projected contractual performance – whether fundamental or not (e.g., a non-conformity of goods) – would, if allowed, constitute a fundamental non-performance at the time of cure. In transactions in which the time of performance is of the essence, the delay inherently associated with any curative performance may be such as to constitute a fundamental non-performance, even if the initial failure of performance was not fundamental and indeed cured. In such cases, the non-performing party has no right to cure and, accordingly, the aggrieved party has no obligation to accept cure. In granting the right to cure, Art. 8:104 is indifferent to the question of the fundamentality of the initial non-performance, but would not allow the curative tender itself to amount to a fundamental non-performance. Otherwise, the right to cure under Art. 8:104 exists in all (and only in all) cases where the delay itself – while *ad definitio* amounting to a non-performance in relation to the contract – does not constitute a fundamental non-performance.

In both the CISG and PECL, the crucial question of the relation between the seller's right to cure and the buyer's right to avoid the contract arises; ultimately, that question will determine in what cases the right to cure may actually take effect as a right rather than a newly-arrived agreement between the parties. This topic must be analyzed in detail, as follows.

4. The Relation Between Cure and Avoidance (Termination) of the Contract

Both the CISG and PECL must regulate the relations between the seller's right to cure "any" failure to perform, and the buyer's power to declare the contract avoided in certain cases (namely, fundamental and tantamount breaches). That is because cure and avoidance cannot both occur in the context of the same contract – it is an absurdity to have a contract both avoided and cured.

---

[10] *See* Chengwei Liu, "Cure by Non-Conforming Party: Perspectives from the CISG, UNIDROIT Principles and PECL, available online at <http://cisgw3.law.pace.edu/cisg/biblio/chengwei1.html>.

[11] Ole Lando & Hugh Beale eds., *Principles of European Contract Law: Parts I and II, Kluwer Law International* (2000) 368-372.

Cure and avoidance compete for positions of relative preeminence in the same normative space, while each is operated by a different party.[12] Granted, a successful curative performance by the seller – one that adheres to the relevant rules, etc. – cures her breach, *ex post*; this, however, does not entail that the seller's *ex-ante right* to cure preempts the aggrieved buyer's power to avoid the contract. Accordingly, one can identify three theoretical models for relations between the right to cure and the power to avoid the contract:

The preemptive model, according to which the right to cure preempts the power to declare the contract avoided, with the logical corollary that no avoidance can become effective unless proper opportunity for cure has been allowed;[13]

The unconditional model, according to which avoidance of the contract is allowed irrespective of the availability of cure, and once the contract has been avoided no cure – even when otherwise available – could take place;

The independent or "race" model according to which whichever is invoked earlier in time, whether the right to cure or a declaration of avoidance, becomes effective, rendering the other unavailable; but no a-priori normative hierarchy is established.

In the remainder of this section, the three models are invoked in the contexts of the Convention and the European Principles while remarking on the differences between their approaches as well as that of the UNIDROIT Principles. As we shall see, both PECL and CISG take the unconditional model (2) as their general framework while weaving in elements of the independent model (3) as well.

4.1 Cure for Non-Fundamental Breaches Under CISG

The relation between cure and avoidance of the contract in the CISG has been subject to considerable controversy within the drafting committee,[14] and remains in academic controversy today.

Obviously, whether the right to cure is contingent upon the contract not having been avoided is a major relational characteristic of the contractual framework. However, both PECL and to an even greater degree the CISG apply a stringent approach to the buyer's right to avoid the contract following breach by the seller.[15] To wit, declaring the contract avoided is generally reserved – with one significant exception – to *fundamental* breaches. This means that the right to cure is unqualified in the sense defined above in both PECL and CISG for any non-fundamental breach.

Does the latter statement indeed hold? It might be argued that under both PECL and CISG avoidance of the contract may precede and thus frustrate seller's attempt to cure even in the cases

---

12 While avoidance and enforcement of the contract also negate each other in the same normative space – they maintain opposite obligations for the parties – it is only the aggrieved party that chooses between them.

13 *See infra* note _Ref101280380\h * MERGEFORMAT 36 and keyed text.

14 *Official Records of the United Nations Conference on Contracts for the International Sale of Goods, Vienna 10 March - 11 April 1980, A/CONF. 97/19*, at 40 *et seq.*, available online at <http://cisgw3.law.pace.edu/cisg/text/link48.html>.

15 *See* Yovel, *supra* note _Ref99709231\h * MERGEFORMAT 5.

of some non-fundamental breaches. The issue here is, of course, that dealt with by CISG Art. 49(1)(b), whose proper interpretation engaged several scholarly disputes, and by its counterpart PECL 8:106(3). Those provisions allow for avoidance of the contract even for non-fundamental breaches, as long as three conditions are satisfied:

That the breach in question is one of non-delivery (according to CISG) or delay in performance (according to PECL);

That the non-performing party was allowed a reasonable time extension to perform – so-called *Nachfrist* period; and

That he has failed to do so. The non-fundamental breach is then "upgraded" and avoidance of the contract becomes available.

On the face of it, this seems to belie the cure doctrine of CISG Art. 48. In fact, however, the two doctrines sit very well together due to the curative nature of the *Nachfrist* mechanism. In fact, whether the buyer allows a curative period on a *Nachfrist* mechanism such as CISG Art. 47 or PECL Art. 8:106, or whether the seller invokes cure based on the provisions discussed here, are two sides of the same coin and probably of little practical importance. Because the requirements of reasonableness direct both doctrines,[16] the curative period in both cases is of the same nature.

4.2 Cure for Non-Fundamental Breaches Under PECL

The first clause of PECL Art. 8:104 simply states the right to cure a non-conforming tender at any time prior to the designated time for performance; it is therefore the counterpart of CISG Art. 37 rather than Art. 49 and relatively non-controversial. The second clause of Art. 8:104 grants a non-performing party the right to cure *after* the designated time to perform has passed (of course, following the sphere of application of the PECL, in any contractual context and not limited to sellers). However, unlike the CISG, this right under PECL is limited to cases where the delay would not amount to a fundamental non-performance. The nature of this limitation is discussed below in the section devoted to cure; it does not affect the clear rule that, in all cases of non-fundamental non-performance, the non-performing party maintains a general right to cure.

What is being cured under Art. 8:104? The language here is somewhat peculiar: it is a "tender of performance" that "does not conform" to the contract. The term "tender performance" appears

---

[16] For reasonableness being a general principle of the CISG (and in this somewhat mitigating the absence thereof of a general obligation to act in good faith) *see* Albert H. Kritzer, "Overview Comments on Reasonableness", available online at <http://cisgw3.law.pace.edu/cisg/text/reason.html>: "Reasonableness is specifically mentioned in thirty-seven provisions of the CISG and clearly alluded to elsewhere in the Uniform Sales Law. Reasonableness is a general principle of the CISG." *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 Autֹnoma de Mexico (1989) 1440-1441. For the definition of reasonableness recited in the Principles of European Contract Law 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* <http://cisgw3.law.pace.edu/cisg/text/reason.html#over>.

elsewhere in the Principles though infrequently;[17] in most cases, to "tender performance" seems to mean "to perform", whether the performance conforms to the contract or not. To emphasize this, the examples given in the PECL Comment on cure include both cases of sales and of services.[18] Art. 8:104 also indicates that cure occurs in cases where the other party refused "acceptance" of the performance, although parties under PECL generally have no right to reject non-conforming tender and the so-called "perfect tender" of the UCC § 2-601 is unknown to it.[19] The defining words are, therefore, "tender conforming to the contract," similar to that used in Art. 9:401 (Right to Reduce Price). What does "non-conformity" of tender to the contract (as opposed of non-conformity of goods) mean?

Specifically, is the language of "non-conforming tender" different in any material sense from the simpler "non-performance" more prevalent in the PECL?

Is the right to cure under Art. 8:104 reserved to cases where some performance was tendered, as opposed to total failure to perform?

There is nothing in the short PECL Comment on cure to indicate such a construction. While legal regimes sometimes distinguish between complete failure to perform and partial failure,[20] and while one can admit to the logic of allowing for cure in cases of debtors who at least tried and managed to complete a portion of their obligations, such a distinction is generally reserved to specific areas of law and is justified by specific contexts. It does not seem correct to make it a core precept of the general principle of cure.

Thus, for the time being and until tribunals and cases offer casuistic constructions of Art. 8:104 the conclusion should be that there is no essential difference between "tender non-conforming to the contract" and "any failure to perform," the more overt language of the CISG Art. 48(1).

4.3 Cure for Fundamental Breaches Under CISG

The CISG's treatment of the relation between cure and avoidance of the contract changes drastically in respect to fundamental breaches . Under CISG Art. 48(1) the seller is allowed to cure "*any* failure" to perform his obligations. On the other hand, under Art. 49(1) the buyer may avoid the contract where the seller's failure amounts to a fundamental breach, whether the seller offers to cure or not.

The relation between the two competing rights is set up in Art. 49(1) where the operative language makes the seller's right to cure "subject to Art. 49." Art. 49 regulates avoidance of the contract following either fundamental breach or "constructed fundamentality" following failure to perform

---

[17] *See* especially PECL Arts. 6:108 (quality of performance), 7:103 (Early Performance), 9:201 (Right to Withhold Performance) and 9:303 (Notice of Termination).

[18] *See supra* note _Ref99709183\h * MERGEFORMAT 12.

[19] *See* 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>.

[20] Such is the case with the construction of "non-delivery" in CISG Art. 49(1)(b) that authorities agree is different from "partial delivery"; *see* Yovel, *supra* note 3. In other contexts, some legal systems allow defenses against enforcement of negotiable instruments in cases of completer failure of consideration tendered but not in cases of partial failure, etc.

throughout a *Nachfrist* period. As the second case in fact allows for cure – initiated by the aggrieved buyer – the remainder of this section will discuss cure in cases of fundamental breaches. What does "subject to Art. 49" mean?

Does it mean that under CISG the seller's right to cure is qualified, in that in case of fundamental breach it can be cut off through the buyer's exercise of his power to declare the contract avoided?

Or does it even indicate that cure is not designated for cases of fundamental breaches at all?

If either of these is the proper construction of the relation between Arts. 48 and 49, then the right to cure in cases of fundamental breach under CISG seems limited indeed; it would then also stand in contrast to the PECL's much more liberal approach to cure. In the following, I shall argue that the proper construction of the relation between cure and avoidance of the contract under PECL in fact allows for cure even in cases of fundamental breach, although in those cases they are indeed subject to being cut off by the buyer's exercise of the right to avoid the contract; hence a qualified right to cure in the terms specified above.

It is worthwhile to note that under UNIDROIT Principles the breaching party's right to cure is unequivocally stronger than the aggrieved party's power to terminate the contract. UNIDROIT Principles Art. 7.1.4(2) states that "The right to cure is not precluded by notice of termination"; the Comment adds that "If the aggrieved party has rightfully terminated the contract ... the effects of termination ... are also suspended by an effective notice of cure. If the non-performance is cured, the notice of termination is inoperative." This is not the place for a comprehensive critique of this approach; to this commentator, it seems unattractive in the extreme in the sense that rightful terminations of contracts may posthumously be rendered inoperative, thus introducing serious uncertainty into the calculations of the aggrieved part who has terminated the contract rightfully and wishes to move on; it also plays havoc with the conceptual integrity of termination of contract.[21] Nor does the PECL contain a similar provision, as discussed below.

According to Professor Honnold, the seller's right to cure under Art. 48, being more specific than the general right to avoid the contract, prevails over the buyer's right to avoid the contract.[22] With

---

[21] For a similar criticism *see* Christopher Kee, "Commentary on the Manner in which the UNIDROIT Principles May Be Used to Interpret or Supplement Article 48 of the CISG", July 2004, available online at <http://cisgw3.law.pace.edu/cisg/principles/uni48.html>.

[22] *See* John Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention, Kluwer Law International*, 3d ed. (1999); pp. 320-21, available online at <http://cisgw3.law.pace.edu/cisg/biblio/ho48.html>. With respect, I dispute this jurisprudential point on the following grounds. Cure is certainly more specific than breach in general, in the sense that the set of all the cases of cure is a sub-set of all the cases of breach (it is complemented by the set of non-cured breaches). Had avoidance been available for any breach, the set of all available avoidances would then be identical with the set of all breaches and Honnold's argument would hold. However, under both CISG and PECL avoidance of the contract is generally limited to cases of fundamental breach (and even then not to all such cases, as reasonable time limitations render avoidance unavailable in some cases). There are cases where cure is available but avoidance is not, namely the set of non-fundamental breaches. Hence both the set of all instances of cure and the set of all rightful avoidances are both independent subsets of the general set of breaches – they maintain a certain zone of convergence, namely, the set of fundamental breaches that where the contract has not been avoided – yet none is more or less specific than the other. Indeed, to claim that the set of instances of cure is in some sense a subset of the set of available avoidances is simply assuming that which is to be determined.

respect, such a construction might hold absent the operative words "subject to Art. 49." As the clause stands,[23] following a long and tortured legislative history in the drafting committee,[24] it clearly regulates the relationship between cure and avoidance by creating a hierarchy between them: cure is available only inasmuch as the power to avoid the contract under Art. 49 has not been rightfully exercised.[25] As Professor Ziegel puts it, "no right to cure survived avoidance of the contract by the buyer."[26] Thus, under terms of CISG Art. 48(1), the buyer's right to avoid under Art. 49 is an independent right unaffected by the seller's intentions to cure. This conclusion is strengthened by Art. 48(2) that deals with suspension of the buyer's power to declare the contract avoided during a curative period requested by the seller: the aggrieved buyer's communicative act (including failure to communicate) is necessary for such a suspension. Had the seller's right to cure been preemptive in relation to the buyer's power to avoid the contract, no such communicative act on behalf of the buyer would be necessary: the buyer would then have been automatically enjoined from exercising the power to avoid the contract during the period specified in the seller's notice (which would not then be a "request" at all) (for discussion see below). Case law generally supports this conclusion,[27] although cases exist in which courts remark, at least in

---

[23] I use the term "clause" here according to the American usage of normative rather than textual structure, viz., to designate a complete and separate norm, even if within the formal structure of the text holding it, it does not occupy a separate position.

[24] *See UNCITRAL Digest of case law on the United Nations Convention on the International Sale of Goods* (8 June 2004), A/CN.9/SER.C/DIGEST/CISG/48; Digest 2. Available at: <http://www.uncitral.org/english/clout/digest_cisg_e.htm>. *See also* John O. Honnold, Uniform Law for International Sales Under the 1980 United Nations Convention (Kluwer 1980) 296 (hereafter cited as "Honnold"); Michael Will, "Article 48" *in Bianca-Bonell Commentary on the International Sales Law*, Giuffrט: Milan (1987) 347-358 available online at <http://cisgw3.law.pace.edu/cisg/biblio/will-bb48.html>; and Mirghasem Jafarzadeh, "Buyer's Right to Withhold Performance and Termination of Contract: A Comparative Study Under English Law, Vienna Convention on Contracts for the International Sale of Goods 1980, Iranian and *Shi'ah* Law" (2001) available online at <http://cisgw3.law.pace.edu/cisg/biblio/jafarzadeh1.html>.

[25] Some courts appear to have in fact established a different hierarchy. In one German case, the court held that the right to avoid the contract under Art. 49(b)(2) was not available to a buyer who did not allow the seller the proper opportunity to cure; hence, the declaration of avoidance in that case was deemed unlawful. However, in that case the court also ruled that no fundamental breach was committed as the goods that were delivered – fabrics for the manufacture of goods – passed the relevant tests of conformity. As this was not a case of non-delivery, Art. 49(b) could not apply and, if avoidance of the contract was unavailable, that must have been the cause, not the relations between avoidance of the contract and cure. Furthermore, this case should be read in the context of CISG Arts. 47 and 48(2), as the seller has communicated to the buyer his intention to cure; the unavailability of avoidance during the ensuing period follows Art. 48(2), not necessarily an inverse relation between Arts. 48 and 49 to the one argued for above. Additionally, the court held that by sending samples of fabric instead on the curing goods themselves seller has performed lawfully, as there was no certainty that buyer would accept the substitute goods. To this commentator, it seems that the court deemed that the seller has performed reasonably and in good faith in attempting to cure the alleged breach. In itself, however, that cannot change the normative hierarchy between avoidance of the contract (which under CISG as under PECL is not a matter of fault but one of objective performance) and cure under CISG. Indeed, the fact that the power to avoid is normally suspended following Art. 48(2) is a logical corollary of that hierarchy; it would be redundant otherwise. Germany, 24 September 1998 *Landgericht* [District Court] Regensburg; case presentation including English translation available online at <http://cisgw3.law.pace.edu/cases/980924g1.html>.

[26] Ziegel, *supra* note _Ref99341181\h * MERGEFORMAT 2, at 9-21. Such is also Professor Schlechtriem's opinion, *see* Peter Schlechtriem, *Uniform Sales Law - The UN-Convention on Contracts for the International Sale of Goods* (Manz, Vienna: 1986) pp. 76-77, available online at <http://cisgw3.law.pace.edu/cisg/biblio/schlechtriem.html>. Professor Schlechtriem adds that this construction was objected to at the committee by the German delegation that wished to strengthen the right to cure so that it does not become subject to cut off by avoidance of the contract, but that this approach was not ultimately accepted. For case law where the court had – among other determinations – accepted the buyer's effective declaration of avoidance of the contract as putting an end to the availability of cure by the breaching seller *see* Italy 24 November 1989 Court of First Instance Parma (*Foliopack v. Daniplast*), presentation including English translation available online at <http://cisgw3.law.pace.edu/cases/891124i3.html>.

[27] This conclusion is supported by case law. *See*

Italy 24 November 1989 Court of First Instance Parma (*Foliopack v. Daniplast*), CLOUT case No. 90, case presentation including English translation available at <http://cisgw3.law.pace.edu/cases/891124i3.html>;

Germany 17 September 1991 *Oberlandesgericht* [Appellate Court] Frankfurt, CLOUT case No. 2, case presentation including English translation available at <http://cisgw3.law.pace.edu/cisg/cases/910917g1.html> ;

obiter dicta, and contra the analysis presented here,[28] that buyer's right to avoid the contract is in some manner contingent upon giving the seller a proper opportunity to cure the defect.[29]

4.4 Cure and Termination Under PECL

As noted above, unlike the CISG, PECL Art. 8:104 restricts the right to cure to those cases in which the very delay in performance does not constitute a fundamental non-performance. This is not a matter of competition between the non-performing party's right to cure and the aggrieved party's power to terminate the contract (under PECL Art. 9:301), that would obviously kick in in such cases. Whether the aggrieved party intends to terminate or not, in cases where "time is of the essence" as the PECL Comment on Art. 8:104 puts it,[30] the only way to achieve cure is through the aggrieved party setting a *Nachfrist* period, i.e., suspending its power to terminate the contract for the duration of the curative period.

While the CISG, in the opening words of Art. 48(1), sets the relations between cure and avoidance of the contract, the PECL does not overtly make the right to cure subject to the buyer's power to terminate the contract. In the terms discussed above, the right to cure in Art. 8:104, although limited to the classes of cases discussed above, is general rather than qualified.

This would seem to indicate a stronger right to cure in the PECL than in the CISG that would extend to the relation between cure and termination. However, as noted above, Art. 8:104 limits the right to cure to cases where the *delay* in performance would not amount to a fundamental non-performance. Under PECL 9:301, only fundamental non-performances allow the buyer to terminate the contract.[31] It thus follows that the seller has no right to cure in any case where due to the delay the buyer holds the power to terminate the contract, even if the buyer eventually does not exercise that power.

Under PECL Art. 8:104, the question of whether the seller's right to cure is or is not subject to the buyer's power to terminate the contract simply cannot occur in cases where the power to terminate stems from the very delay associated with the curative tender.

Germany 1 February 1995 *Oberlandesgericht* [Appellate Court] Oldenburg , CLOUT case No. 165, case presentation including English translation available at <http://cisgw3.law.pace.edu/cisg/cases/950201g1.html> ;

Germany 25 June 1997 *Bundesgerichtshof* [Supreme Court], CLOUT case No. 235, case presentation including English translation available at <http://cisgw3.law.pace.edu/cisg/cases/970625g2.html>;

ICC Arbitration Case No. 7531 of 1994, CLOUT case No. 304, case presentation available at <http://cisgw3.law.pace.edu/cisg/cases/947531i1.html>.

See also Official Records of the United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March–11 April 1980 (*United Nations publication, Sales No. E.81.IV.3*), p. 41.

[28] As well as contra the proper construction of CISG Art. 49 that requires no grace period for performance as a condition for declaring the contract avoided.

[29] *See supra* note _Ref99613505\h * MERGEFORMAT 26; other courts casually argue that "[seller] offered to repair the defect: [buyer] should have accepted this proposal, instead of seeking avoidance of her contract with the [seller]", even in cases of alleged fundamental breach; Switzerland 27 April 1992 District Court Locarno Campagna, case presentation including English translation available at <http://cisgw3.law.pace.edu/cases/920427s1.html>. Such dicta, in consideration of the above argument, seem to reflect preferred rather than the applicable law.

[30] *See supra* note _Ref99709183\h * MERGEFORMAT 12.

[31] Termination for non-fundamental delays in performance is also available, following a *Nachfrist* period set by the buyer (*see* PECL Art. 8:106(3)); however, in such cases it is pointless to ask cure is available as the essence of the *Nachfrist* mechanism is the granting of a curative period, although set by the buyer rather than by the seller.

What about cases of fundamental non-performance that may be cured without the delay amounting to fundamental non-performance? Such cases potentially involve two competing norms: ostensibly, they allow for the non-performing party's right to cure under Art. 8:104, as well as for the aggrieved party's power to terminate the contract under Art. 9:301. What is the relation between these two norms?

Had there been no overt solution to this question we would have to move towards jurisprudential considerations such as offered by Honnold, e.g., examining whether there is some established solution to a clash of the two norms (such as the application of the more specific over the more general one), or employ some general framework of risk allocation. In the context of the PECL, however, interior analysis shows that the power to terminate the contract is generally independent and effectively not contingent upon the right to cure, as follows.

The general way in which termination of contract in the PECL is executed is through appropriate notices (see Art. 9:301). It is typical of the PECL that it regulates substantive rights through a regulation of the corresponding notices.[32] Art. 9:303(3)(a), allows the aggrieved party to give a notice of termination either before or after a late tender – such as cure – has been made; the only restriction is that for a post-cure notice of termination to be effective it must be given in reasonable time. This is therefore not merely a procedural rule regarding the proper way to exchange notices but a regulation of the relations between termination and cure in the PECL. Under PECL Art. 9:305(1) that governs the effects of termination of contract, "Termination of the contract releases both parties from their obligation to effect and to receive future performance." Cure is obviously a future performance (the language of Art. 8:104 is "tender of performance" but the semantic difference is meaningless), and so termination of the contract under PECL releases the aggrieved party from any obligation to receive cure, exactly as its effect is to relinquish her right to enforce the contract through specific performance.

PECL Art. 9:303(3)(b) mitigates the harshness – for the non-performing party – created by the strict hierarchy in favor of termination over cure in Art. 9:303(3)(a). It determines that in cases in which the aggrieved party "knows or has reason to know" of forthcoming cure in reasonable time, it must notify the curing party of its refusal to accept cure in order to maintain its power to terminate the contract. Failure to notify the curing party accordingly will render termination of the contract unavailable and the road to cure open; however, a notice of refusal to accept cure would keep the power to terminate the contract alive. Even then – unless the refusal to accept cure includes or is constructed to include a notice of termination of the contract – the right to cure under Art. 8:104 would still hold. Only a termination of the contract would relieve the aggrieved

[32] This is of course not particular to the PECL: as the German Bundesgerichtshof [Federal Court] spells it, "provisions of the law... like para. 323 BGB [provision of the Civil Code of Germany that deals with termination], are only applicable if the notice of termination...was validly declared." Case VIII ZR 140/75, Date 3 November 1976, English translation available online at <http://www.ucl.ac.uk/laws/global_law/german-cases/print_bundes.shtml?03nov1976>

party from her obligation to accept cure. The conclusion then must be, that the right to curative performance depends on the contract not having been previously terminated.

Art. 9:303(3)(b) is a relational protection of the non-performing party's reliance interests in the context of curative performance, but it obviously recognizes the aggrieved party's power to terminate the contract, which can be rendered ineffective only under the specified circumstances indicated. Note, that the onus-creating language in PECL Art. 9:303(3)(b) relating to the aggrieved party "knows or has reason to know" is wider than under the corresponding CISG Art. 48(2) and (3), according to which the information relating to the forthcoming cure must be communicated by the breaching party itself. The PECL recognizes that there are instances in which the aggrieved party should assume that cure is forthcoming, even absent direct communication from the breaching party to that effect.

Of course, the aggrieved party's notification to the non-performing, cure-aspiring party under 9:303(3)(b) may be that it refuses cure and hereby terminates the contract; like under the CISG, the PECL does not offer non-performing parties a preemptive right to cure in cases of fundamental and tantamount non-performances (there are no other relevant cases in fact), unless the aggrieved party assents to accept cure or unreasonably fails to notify the curing party that it would not accept it.

The analytic conclusion then must be that the power to terminate the contract under PECL – which exists only in cases of fundamental and tantamount breaches – is independent of any allowance for cure, except where the aggrieved party's power becomes suspended under Art. 9:303(3)(b). This differs from the approach of several national legal systems. As Professor Zimmermann explains it, in German sales law the right to "supplementary performance" is the aggrieved buyer's "primary right."[33] Although not spelled out as such,[34] termination of the contract under German law generally becomes available to the aggrieved party following the breaching party's failure to cure.[35] That is not the approach of either the CISG or the PECL.

Under PECL, Termination of the contract releases the aggrieved party from the obligation to accept cure and thus nullifies the non-performing party's right to cure, which otherwise exists in relation to both fundamental and non-fundamental non-performances alike (with the exception of the fundamentality of the delay itself, as discussed above). The aggrieved party is allowed to terminate the contract even after a curative tender, as long as it does so in reasonable time. Of

---

[33] Reinhard Zimmermann, "Liability for Non-Conformity: The New system of Remedies in German Sales Law and its Historical Context," 10th John Maurice Kelly Memorial Lecture, Dublin 2004, at pp. 38-9.

[34] *See* BGB §§ 437 *et seq*.

[35] BGB § 323(1). That is the general case; there are specific clauses such as § 635 (for contractor's option to cure). BGB § 323(2) lists several categories of exemptions and scattered clauses add to those (e.g. § 440 and the obvious § 325(5)).

course, a successful cure may frustrate the availability of post-cure termination if the cure – as successful cure should – renders the non-performance at the time of cure non-fundamental.

4.5 No Preemptive Cure as Unqualified Right under CISG and PECL

Both the CISG and PECL allow for some measure of preemptive cure, i.e., cure that renders avoidance of the contract unavailable, whether temporarily or irrevocably. This does not mean, however, that preemptive cure is given the normative status of *right* that unilaterally tramps rights and powers held by the aggrieved party. Under the CISG Art. 48(2), if the aggrieved buyer allows the seller to cure during the time indicated in his request (whether by assenting or failing to reply), she is barred from avoiding the contract during that period. Note, however, that the decision whether to suspend the power to avoid the contract or not remains with the aggrieved buyer: she may always answer in the negative to a seller's request. As the seller's right to cure operates whether the buyer consents to accept cure or not, the buyer's refusal to accept cure in itself has no legal effect other than keeping her power to avoid the contract effective. However – as concluded above – nor is the buyer's power to avoid the contract effected merely by the seller's intention or efforts to cure. That power becomes available only in cases of fundamental and tantamount breaches, and we conclude that those are the cases in which Art. 48(2) really matters.

The question of preemptive cure becomes relevant in cases of fundamental breach, because otherwise the seller has no right to avoid the contract. Yet the only way in which cure can be preemptive in those cases is when the buyer agrees in advance to withhold exercising her power to avoid the contract for an indicated duration; and under both PECL and CISG the buyer's silence operates as such an assent to cure.

4.6 Conclusion

Under the risk-allocating terms of CISG Art. 48(1) (no unreasonable delay, no inconvenience to buyer, and assumption of costs by seller), the seller holds an unqualified right to cure in all cases of non-fundamental breach.[36] However, the seller's right to cure in cases of fundamental breach is qualified in that it may be cut off and become unavailable if the seller rightfully avoids the contract under Art. 49(1), unless the buyer has assented to accept cure or failed to object to it, which would result in suspension of her power to avoid the contract under Art. 48(2).[37]

---

[36] Cure obviously becomes available also in cases of non-fundamental non-delivery if the buyer has set a *Nachfrist* period. Failure to cure throughout that period makes avoidance of the contract available to the buyer under CISG Art. 49(1)(b).

[37] Honnold's proposal to internalize the offer to cure into the construction of the fundamentality of the breach would have been a brilliant resolution to the relation between cure and avoidance; unfortunately it was not accepted. *See* Ziegel, *supra* note _Ref99341181\h * MERGEFORMAT 2, at 9-21. *See also* Michida, "Cancellation of Contract", 27 *Am.J. Comp. L.* 286-288 (1979), available online at <http://cisgw3.law.pace.edu/cisg/biblio/michida.html> Occasionally courts would determine that willingness to cure may reduce the severance of the breach from fundamental to not-fundamental; *see* Germany 31 January 1997 *Oberlandesgericht* [Appellate Court] Koblenz, CLOUT case No. 282, case presentation available online at <http://cisgw3.law.pace.edu/cisg/cases/970131g1.html>. This is an attractive relational notion, consistent with the PECL's general obligations of good faith and fair dealing; however, I doubt whether it may hold under the CISG's approach to avoidance of contract, *see* Yovel, *supra* note _Ref99709231\h * MERGEFORMAT 5.

Under PECL Art. 1:804, the right to cure is not qualified for either fundamental or non-fundamental non-performances, although it is limited in cases where time is of the essence, as discussed above. However, under Art. 9:303(3)(a) the aggrieved party's power to terminate the contract is unaffected by later cure as long as the notice of termination is given in reasonable time after cure was performed. This provides a strong incentive to non-performing parties to communicate their intention to cure so as to bring about the suspension of the aggrieved party's power to terminate the contract under Art. 9:303(3)(b), as otherwise their cure will not operate preemptively.

5. Expenses of Cure and Associated Risks

Cure may accrue costs and internalize risks that are not allocated between the parties in the contract. If any exist, the CISG Art. 48(1) allocates them to the seller.[38] As far as the buyer is concerned, the curative performance is to be as close as possible to the projected contractual performance. Obviously, any associated costs which would effectively serve to remove or reduce the seller's susceptibility to a lawsuit for breach of contract must be borne by the seller. The PECL is silent on this point, but as this rule seems germane to the logic of cure it must hold under it, as well. Also, as cure is a substitute performance, PECL Art. 7:112, according to which each party must bear "the costs of performance of its obligations", will apply here, by analogy if not directly.[39]

6. "Without Unreasonable Delay"

There must be a limit to the period during which the aggrieved buyer must accept cure. CISG Art. 48(1) limits cure only to cases where it can be achieved without unreasonable delay.[40] This language, similar to the "*unverzüglich*" of the BGB [German Civil Code][41] or the "*interpellation suffisante*" prevalent in the French Code Civil,[42] indicates a relatively shorter period than the

---

[38] Germany 9 June 1995 *Oberlandesgericht* [Appellate Court] Hamm, CLOUT case No. 125, case presentation available including English translation available online at <http://cisgw3.law.pace.edu/cases/950609g1.html> (costs for replacing defective windows).

[39] By analogy because in curing, the seller is not performing an obligation but excersicing a right. The purported gap in Art. 8:104 – the allocation of costs and risks associated with cure – calls for completion by analogy from within the PECL before we proceed to external sources of construction.

[40] ICC Arbitration Case No. 7754 of January 1995, *ICC International Court of Arbitration Bulletin* 2000, 46, case presentation available at <http://cisgw3.law.pace.edu/cases/957754i1.html> (the conditions are satisfied when, e.g., defective motors can easily be adjusted in due time and at minimal costs).

[41] *See* BGB § 121. German courts acknowledged a possible discrepancy between "reasonable time" and "without unreasonable delay," even when the facts happened to satisfy 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. Had the seller attempted to cure, however, it might have been determined that the condition of "without reasonable delay" could not be met: Germany 22 August 2002 *Landgericht* [District Court] Freiburg, case presentation including English translation available at <http://cisgw3.law.pace.edu/cases/020822g1.html>.

[42] *E.g.* Arts. 1139, 1146.

"reasonable time" under which a declaration of avoidance must be given according to CISG Art. 49.[43] It is therefore a further application of the general principle of reasonableness that, as Professor Kritzer has argued, is a general principle of the CISG.[44]

In cases where the seller has indicated to the buyer the length of the intended cure period – as must be the case when the breach is fundamental (under CISG Art. 49(2)) and is prudent also when it is non-fundamental – that indication, subject to the requirement of reasonableness, will determine the period for cure. In no case other than when he has explicitly accepted is the buyer obligated to accept cure later than that.[45]

The PECL's generally stringent approach to delay bears an interesting relation to the parallel requirement in CISG Art 49(1). PECL Art. 8:104 in fact uses language that appeared in early drafts of the CISG and was later scrapped for the "*unverzüglich*" principle.[46] In the context of the PECL, the general obligation to act in good faith and fair dealing (Art. 1:201) governs the substantial right to cure. It should be added, that in similar contexts the PECL treats delayed performance more severely than the CISG. For instance, while avoidance of contract for non-fundamental breaches is available under CISG in cases of non-delivery only (following a *Nachfrist* period, see CISG Art. 49(1)(b)), PECL allows avoidance following *Nachfrist* in the wider category of cases of non-fundamental delays in performance (see PECL Art. 8:106(3)).

May there be cure in a time that is longer than "reasonable"? Honnold[47] emphasizes, that the seller's request according to Art. 48(2) should not necessarily be restricted to the conditions of cure of Art. 48(1); seller may therefore request to perform cure under different conditions, to which the buyer may agree or not, but will be held to if she fails to respond to the said request.

What if the seller's request under Art. 48(2) and (3) does not indicate a time frame for cure? According to some sources, such an indication is a *sine qua non* of the request and without it, it can have no effect.[48] To this commentator, this seems too harsh; if the seller does not indicate a time for cure, the default time indicated in Art. 48(1) – namely, "without reasonable delay" – would kick in and govern the undertaking to cure. Art 48(2) allows the seller to attempt to divert from the minimal time requirement, but does not oblige him to do so.

---

43 *See* ICC Arbitration Case No. 9083 of August 1999, case presentation including English translation available online at <http://cisgw3.law.pace.edu/cases/999083i1.html>.

44 *See supra* note _Ref99709794\h * MERGEFORMAT 17.

45 *See Official Records of the United Nations Conference on Contracts for the International Sale of Goods, Vienna 10 March - 11 April 1980, A/CONF. 97/19*, at 40 *et seq.*, available online at <http://cisgw3.law.pace.edu/cisg/text/link48.html>.

46 Namely, seller may cure "if he can do so without such delay as will amount to a fundamental breach of contract". Art. 44 (later became Art. 48) of the 1978 Draft. *See Official Records*, *supra* note _Ref99449495\h * MERGEFORMAT 46.

47 *See Honnold*, 298.

48 *See Official Records of the United Nations Conference on Contracts for the International Sale of Goods, Vienna, 10 March–11 April 1980* (United Nations publication, Sales No. E.81.IV.3), 41, para. 14.

7. Retaining the Right to Damages

The performance of cure does not obliterate the fact that a contract was breached. Thus, although the performance of appropriate cure virtually substitutes for that of the original contractual obligation (hence making both avoidance of the contract and any order for specific performance inappropriate), it does not preclude an additional order for damages.[49] Under CISG Art. 48(1) these are damages "as provided for in this Convention" i.e., including those damages covered by Art. 74.[50] (A dictum by an Austrian court suggests that while CISG generally provides for reliance as well as expectation damages for breach of contract, cure generally revokes the availability of the latter.[51] However, one must note that while in cases of successful cure expectation damages will not be awarded on the merits (that, after all, is what cure is aimed to achieve), it does not follow that this is the proper construction of the damages clause in Art. 48. Even cure that is identical to the projected contractual performance in all save the time of performance may fail to compensate for loss of some of the projected (and foreseeable, etc.) added value to the buyer expected from the contract. There is no reason to indemnify the seller from liability in such cases. From this perspective, what cure affords breaching sellers (and to what it subjects aggrieved buyers) is, in fact, the possibility of mitigating any damages to which the seller would otherwise be liable through substitute performance. There is no guarantee that the substitute performance will cover the entire loss to the buyer generated by the breach.

PECL Art. 8:104 says nothing about damages; however, it does not preclude further damages in cases of cure and the same logic should apply here. Thus the general PECL clauses that make damages available to aggrieved buyers would operate here. Cure would not preclude damages, although it would contribute towards there mitigation, and a perfect performance of cure would mitigate those damages completely.

---

[49] In one French case, reliance damages were awarded the aggrieved buyer for expenses incurred in the process of cooperating with the performance of cure by the seller (applying extra transportation, etc.) In that case, however, the damages were assessed as 10% of the full sale price. To this commentator, this seems a dubious approach: determining damages must be an empirical, verifiable matter. Damages added to cure – the "whether" covering expectation or reliance interests – should be determined according to evidence pertaining to actual losses suffered (including loss of expected gain), as opposed to a lump sum or a neat proportion of the total sale price. *See* France 26 April 1995 *Cour d'appel* [Appellate Court] Grenoble (*Marques Roque Joachim v. Manin Riviere*), case presentation including English translation available online at <http://cisgw3.law.pace.edu/cases/950426f2.html>.

[50] It may be argued that the damages clause in CISG Art. 48 is redundant because such cases as would fall under it would fall under the more general Art. 45(2) according to which "The buyer is not deprived of any right he may have to claim damages by exercising his right to other remedies." That would be a jurisprudential mistake, as under CISG (and PECL) cure is not a right of the aggrieved buyer but of the breaching seller. So although both clauses are consistent they do not cover the same cases. *Contra* Oberlandesgericht Hamm, *supra* note _Ref99620076\h * MERGEFORMAT 39.

[51] *See* Austria 14 January 2002 *Oberster Gerichtshof* [Supreme Court], case presentation including English translation available online at <http://cisgw3.law.pace.edu/cases/020114a3.html>. The court also curiously refers to cure as a "right" of the aggrieved buyer although under CISG (and PECL) the seller does not generally have an obligation to cure; she has a right to cure, as analyzed above. Had there been a buyer's right to impose cure and a seller's obligation to make one, and the seller would default on that, that would have to become an issue separate from her breach of the contractual obligation itself. Obviously, nowhere in the CISG is a party obligated to perform more than the contract stipulates. Of course, under certain conditions the buyer has a right to specific performance that needs be enforced in court (*see* CISG Arts. 28, 46) but that is a different matter entirely, not to be mixed with that of cure. Switzerland 5 November 2002 *Handelsgericht* [Commercial Court] des Kantons Aargau, case presentation including English translation available at <http://cisgw3.law.pace.edu/cases/021105s1.html>.

8. System of Notices

While avoidance is *declared*, cure is *performed*. However, declaring the *intention* to cure (or otherwise making it known to the aggrieved party, cf. PECL Art. 9:303(3)(b)) may carry with it a legal effect in the sense of shifting a certain communicative onus to the aggrieved party who wishes to retain the power to avoid the contract. This is true for both PECL (as discussed cursorily above) and the CISG, as follows.

While PECL Art. 8:104 does not indicate any special mode for notices of cure exchanged by the parties – and is thus subject to the regular rules governing communication, set in Art. 1:303, and indirectly those governing notices of termination in Art 9:303 – the CISG designates an entire communicative system to govern the establishment of cure, Art. 48(2), (3) and (4). This system governs, however, more than merely the ways in which notices in the context of cure are to be exchanged between the parties, as it regulates some of the *substantive* rights of the parties contingent on their communicative behavior.

Under both CISG and PECL (and unlike under the UNIDROIT Principles), cure may be exercised without notice to the aggrieved buyer.[52] CISG Art. 48(2), however, discusses the case in which the seller "requests" the buyer's approval of the seller's intended cure.[53] (Literally, the relevant language is "accept[ing] performance", by the buyer, a slightly awkward wording within the context of the CISG which does not operate under the perfect tender rule and thus buyers have no right to reject performance other than by avoiding the contract).[54]

There are two separate operations involved here. In case of non-fundamental breach, the seller is not so much "requesting" anything as much as giving notice of cure - it is not a request because the buyer has no right to refuse. The operation of the request is much more significant under conditions of fundamental breach. As under such conditions the buyer retains the right to avoid the contract, the seller in fact offers to cure the breach under condition that the buyer forebear from exercising her right to declare the contract avoided. The buyer may, of course, refuse the offer to cure and exercise her power to avoid the contract (or not avoid it, as the case might be, and resort instead to other remedies, such as damages). But if she agrees to "accept" cure, or simply fails to respond to the request within a reasonable time, she will become estopped from exercising her right to avoid the contract or reducing the price for the duration indicated in the request. Note that this is an exception to the general rule of the CISG Art. 18(1) according to which "Silence or inactivity does not in itself amount to acceptance."

---

52 *Contra* Liu, *supra* note _Ref99345016\h * MERGEFORMAT 11 at 5.

53 In terms of speech acts, the matter of request is not determined literally but as a matter of contextually constructing a communicative performance: under Art. 48(3) a "notice" by the seller that she intends to cure within a specified time is assumed to amount to such a request. This is an "indirect" speech act; *see* Jerrold Fodor, *Semantics* (New York: Crowell, 1977), at p. 57 *et seq*.

54 *See* Jonathan Yovel, "Comparison between provisions of the CISG (Buyer's right to avoid the contract: Article 49) and the counterpart provisions of the PECL (Articles 9:301, 9:303 and 8:106)", available online at <http://cisgw3.law.pace.edu/cisg/biblio/yovel49.html>.

The harshness of this rule is mitigated by Art. 48(4) according to which a request according to Art. 48(2) becomes effective upon *receipt* by the buyer (itself an exception to the general rule in Art. 27 where it suffices to dispatch the notice).[55] Of course, whether a breach is fundamental or not may be controversial; the buyer herself may be unsure of the availability of avoidance, the seller unsure whether she holds a right to cure. Art. 48(2) provides a strong incentive to the cautious seller to communicate with the buyer and sort this out. There is no prejudice to the seller for if the breach is non-fundamental than she retains to right to cure whatever the buyer's response may be. Yet it would prevent the situation of a seller engaging in costly cure while buyer intends to declare the contract avoided. The "race" between cure and avoidance is thus best resolved through application of CISG Art. 49(2).

[55] Seller must then allow "reasonable time" for the buyer to answer. *See* Finland 12 November 1997 Turku Court of Appeal, case presentation including English translation available at <http://cisgw3.law.pace.edu/cases/971112f5.html>. See *also* when a communication "reaches" an addressee, CISG Art. 24.