INTERPRETATION, GAP-FILLING AND FURTHER DEVELOPMENT OF THE U.N. SALES CONVENTION†

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translation by Martin Koehler**

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I. Preliminary Remarks

The uniform UN Sales Law, the Convention on Contracts for the International Sale of Goods (CISG),[1] was compiled and adopted in its final form at the United Nations Conference in Vienna in 1980, but preliminary work and forerunners had long been in existence reaching back to the 1930s and to the first drafts drawn up by Ernst Rabel for UNIDROIT, the Institute for the Unification of Private Law in Rome. Thus, it is no surprise that the Convention, like national codifications, is beginning to show symptoms of aging. This is partly due to technical and economic developments, which could not have been foreseen at the time the Convention was drafted – such as electronic commerce – and partly due to misjudgment of the practicality of certain provisions and their consequences. In particular, the acceptability of certain provisions of the CISG in countries with different basic structures of commercial law may have been overestimated, so that perhaps the resistance in England to adoption of the Convention, and the advice often given in practice to exclude the CISG's application could have been partly induced by such misjudgments as to the acceptability of certain solutions and provisions of the Convention.[2] It is, however, certainly more difficult to implement corrections to or amendments of an international Convention than it is for a national legislator to reform national law since, at the international level, the cooperation of all parties to a Convention – i.e., all of the Contracting States and their legislative organs – is necessary. In the case of the CISG, such a process can only be seen as hopeless when one considers the length and difficulty of its labor pains. One should therefore be on the lookout for Convention-internal provisions that allow for adaptation and fur-

[1] United Nations Convention on Contracts for the International Sale of Goods, April 11, 1980, 1489 U.N.T.S. 3, *reprinted in* United Nations Conference on Contracts for the International Sale of Goods, 19 I.L.M. 668 (1980) [hereinafter CISG]. The text of the CISG is available in several languages at http://cisg.law.pace.edu and at http://unidroit.org.

[2] *See* Tom McNamara, *U.N. Sale of Goods Convention: Finally Coming of Age?*, Colo. Law, Feb. 2003, at 11-22.

ther development of the CISG and the construction of bridges to other legal systems – such as the way in which, in German and in Swiss law, certain general clauses have kept the enacted Codes of these countries and their basically rigid texts flexible and thus have long forestalled the need for intervention of the legislature. Further, the legal-technical tools of broader interpretation of the text and of analogy have made it possible to offset weaknesses and gaps in the respective Codes.

In the CISG it is, in particular, the two paragraphs of Article 7 that provide the mechanism for resolving interpretive issues and allowing further development of the Convention. The distinction between the scope of paragraph (1) and the scope of paragraph (2) is important in each case, but can also be unclear. For instance, when dealing with electronic communication of legally relevant statements, profound theoretical considerations can turn on whether, according to the principles of Article 7(1), one attempts to base further development of the Convention on an interpretation of the individual provisions on declarations and their communication – offer, acceptance, revocation, avoidance, reduction, notice of defects, etc. – or, alternatively, whether one seeks to form a gap-filling uniform rule in terms of Article 7(2). But that is perhaps of little interest in practice and, in my opinion, should therefore not be overrated; also, the comprehension and application of the CISG elsewhere, particularly in Anglo-Saxon legal circles, are less controlled by theory and methodology than is the case with Civilians. In any event, it rather always depends on each individual case. I therefore do not wish to provide abstract advice; I will instead consider individual issues.

II. Interpretation of the Convention in Accordance with Article 7(1) and Documentary Sales Contracts

A. *Delivery by Means of Documents*

In critical analyses of the CISG in Anglo-Saxon literature, it is often deplored that the Convention does not take into account the peculiarities of commodity trade and thereby, in par-

ticular, those of documentary sales of commodities,[3] which, in the light of the significance of these forms of transactions – "the volume of paper trading greatly exceeds the volume of dealings in the underlying goods"[4] – is regarded as a major deficit of the CISG. In this connection, there is also criticism that the regulations of the Convention are too lenient in cases of breach, which "might not suit the harsher environment of international commodity sales."[5] They are, in particular, said to be unsuitable for losses in markets with strongly fluctuating prices, which are completely different from losses caused by defects in goods such as shoes or specially designed machines.[6] Finally, the Convention's regime on passing of risk is said to have an "upsetting effect" on the rules on risk contained in FOB and CIF contracts in the commodities trade.[7]

The thrust of these critical opinions regarding the suitability of the CISG must come as a surprise as, for Ernst Rabel, trade in commodities and the applicable forms and contract-types such as CIF or FOB were always present in his preparation of the foundations for the legal unification of the transnational sale of goods in his magnum opus "Das Recht des Warenkaufs [The Law of the Sale of Goods]."[8] In using the term "goods," Rabel relied on the English Sale of Goods Act and the

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[3] *See* Alastair Mullis, *Avoidance for Breach under the Vienna Convention; A Critical Analysis of some of the Early Cases*, *in* ANGLO SWEDISH STUDIES IN LAW 326-55 (Andreas & Jarborg eds., Lustus Forlag 1998).

[4] *Id.* at 328 (quoting Michael Bridge, *International Private Community Sales*, 19 CANADIAN BUS. L.J. 485, 485 (1991)).

[5] MICHAEL BRIDGE, THE INTERNATIONAL SALE OF GOODS: LAW AND PRACTICE, margin note 2.41 (1999).

[6] *See* Mullis, *supra* note 3, at 328.

[7] *See* BRIDGE, *supra* note 5.

[8] ERNST RABEL, DAS RECHT DES WARENDAUFS, vol. 1 (de Gruyter 1936), reprinted 1957, vol. 2 (de Gruyter 1988); *see* vol. 1, at 38 *et seq.* (taking into account the already mentioned special characteristics of the trade in commodities by means of documents that are said to stand in the way of the unification of law – primarily by dealing with the argument that the worldwide trade in commodities is supposed to have created its own commercial law stipulated in model forms, what was even then expressed mainly by Groβmann-Doerth in his renowned DAS RECHT DES ÜBERSEEKAUFS (Mannheim 1930). It must be generally remembered here that Rabel extensively evaluated the consequences of such forms and practices to international trade in commodities and, in addition, the problems of non-conforming tender of goods or documents compiled and evaluated by Groβmann-Doerth in his monograph DIE RECHTSFOLGEN VERTRAGSWIDRIGER ANDIENUNG (1934). The discussion with the Anglo-Saxon critics of the CISG seems therefore at times to be a continuation of the dialog between Rabel and Groβmann-Doerth.

then-in-effect (U.S.) Uniform Sales Act;[9] the extension of the scope of application of the Uniform Sales Law to – e.g. – specially produced machinery was, on the other hand, more of a completion.[10] Also, the experts of the Anglo-Saxon legal community from H.C. Gutteridge to Soia Mentschikoff, Barry Nicholas, John Honnold and Allan Farnsworth, who had participated to a large extent in the unification of Sales Law up until and during the Vienna Conference in 1980, could hardly have ignored these forms of the international sale of goods and the peculiarities of their own legal systems in this area; indeed, the report of the UNCITRAL Secretariat, drawn up in preparation of the Vienna Conference, expressly states that documentary sales of goods shall be covered by the Convention, "though in some legal systems such sales may be characterized as sales of commercial paper."[11]

Regarding any criticism of the existence of discrepancy or even conflict between the CISG and INCOTERMS, such criticism probably fails to take fully into account Article 6 and the established primacy of the agreement between the parties, which is set forth therein. Of course, clauses such as FOB or CIF have priority over the provisions of the CISG – in particular, with respect to the passing of risk.[12] The particular risk of loss from extreme price fluctuations on the international commodity markets is comparable[13] and, even if the matter is not

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[9] *See* RABEL, *supra* note 8, at 55.

[10] *Id.* at 44.

[11] COMMENTARY ON THE DRAFT CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, U.N. SECT., 13, para. 8 of commentary on Article 2 (Exclusions from Convention), U.N. Doc. A/CONF. 97/5 (1979).

[12] *See* RABEL, *supra* note 8, at 46 *et seq.* (no one intends to curtail party autonomy; for further details on priority trade terms, at 56 *et seq.*); *see also* McNamara, *supra* note 2, at 18 (finding an interpretation clause lacking in the CISG). For an example of the unproblematic handling of a CIF clause in a CISG contract see St. Paul Guardian Ins. Co. v. Neuromed Med. Sys. & Support, 2002 U.S. Dist. LEXIS 5096 (S.D.N.Y. 2002); *see also* Oberlandesgericht [OLG] [Provincial Court of Appeal] Hamburg 1 U 167/95, 28 Feb. 1997 (F.R.G.), *at* http://cisgw3.law.pace.edu/cases2/970228g1.html (concerning a commodity sale); Forum des Internationalen Rechts 168-71 (1977) [The International Legal Forum 2] 166-70 (1997) (CIF clause as an indication that time was of the essence).

[13] *See* GROßMANN-DOERTH, DAS RECHT DES ÜBERSEEKAUF, *supra* note 8, at 259 *et seq.*; GROßMANN-DOERTH, DEI RECHTSFOLGEN VERTRAGSWIDRIGER ANDIENUNG, *supra* note 8, at 104 *et seq.* and 185 *et seq.* (the central point of the problem of choosing between avoidance and a second tender is the market fluctuations in the commodities trade).

regarded as expressly settled by the provisions of the Convention, it might be regulated by relevant clauses in the contract, or adequately defined by interpretation of the contract pursuant to Article 8(2), (3). For example, it is to be understood that delivery by the handing over of the documents by a certain deadline fixed by or determinable from the contract would be "of the essence" for the buyer.

In my opinion, the only doubts that merit consideration are, that for international purchasers of commodities very often it is not the goods as such, i.e., the actual raw materials, etc., that are most relevant to the deal, but the documents embodying the contract and/or resulting from the contract, the latter often being provided by the first seller (such as the producer)[14] so that – according to the report of the UNCITRAL Secretariat quoted above – in some legal systems this transaction is not regarded as a sale of goods, but as a sale of documents. One must, in this respect, differentiate – at least in the Swiss and German legal systems – between various legal forms.

1) *First Case*

First, the goods can be sold as such and a surrogate for their delivery in the form of a document, which embodies the rights to delivery of the goods, can be agreed upon.

2) *Second Case*

Second, such a document can itself be the object of a contract of sale. In other words, instead of 100,000 barrels of crude oil of the kind West Texas Intermediate, documents – whether in paper or electronic form – which entitle the rightful holder to demand delivery of that amount of oil of a specified category, could be traded as such, in particular, therefore, such documents as "Warenpapiere" in the sense of § 925 ZGB.[15] And those documents are often traded onwards in "string transactions," i.e., sold and transferred several times until the end pur-

[14] *See* BRIDGE, *supra* note 5, margin note 5.05 (for the possible constellations in this respect in a CISG contract).

[15] ZGB (*Schweizerisches Zivilgesetzbuch* [Swiss Civil Code]). *See* Heinrich Honsell & Alfred Koller *in* BASLER KOMMENTAR ZUM SCHEWIZERISCHEN PRIVATRECHT, art. 184, margin note 56 (Heinrich Honsell & Wolfgang Wiegand eds., Basel, Helbing & Lichtenhahn, 2d ed. 1996), [hereinafter BASLER-KOMMENTAR].

chaser finally takes delivery of the physical goods. The obligations of the seller and his liability for the performance of the contract are, in such contracts, no longer primarily linked to the physical condition of the goods – in so far as the contract of sale does not contain additional specific terms in this respect[16] – and their delivery, but also to the timely transfer of the documents and their conformity with the stipulations of the seller's obligations in the contract of sale. If the documents identify the goods to be delivered in accordance with their designation and description in the contract of sale, then the seller has complied, as he has provided the buyer with rights of access to goods "of the quantity, quality and description required by the contract"[17] – Article 35(1) – and has therefore performed in accordance with the terms of the contract. Discrepancies between the physical condition of the goods and their description in the relevant documents can lead to liability of the issuer of the documents obliged to hand over the goods in accordance with the terms of the documents – e.g., the warehouse, the carrier, etc. – but not the seller, in so far as the contract does not contain any additional undertakings relating to the quality of the physical goods,[18] or in exceptional cases of fraud or other fraudulent conduct.

The documents which enable such an "onward trading" can be variously regulated in the national legal systems, and can grant the rightful holder rights of varying "strength." So-called "Traditionspapiere" – in German and Swiss domestic law – "represent" possession[19] and their transfer in the form allowed under the relevant laws on property and negotiable instruments effects a transfer of possession and possibly ownership to their acquirer: their transfer is the "delivery" which the seller has undertaken, and this can, of course, take place repeatedly before the final customer himself demands handing over, i.e.,

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[16] *See* BRIDGE, *supra* note 5, the sample contracts printed in appendices 1 and 2 for contracts of sale FOSFA Contract No. 53 (Vegetable and Marine Oil—FOB) and GAFTA contract No. 100 (Feeding stuffs in Bulk—CIF).

[17] CISG, *supra* note 1, art. 35(1).

[18] *See* BRIDGE, *supra* note 5.

[19] It is not necessary or possible to go into the various legal dogmatic explanations of this "representation effect" here. *See* ALFRED KOLLER art. 925 ZGB, margin note 17; for the abundance of German theories see WOLFGANG ZÖLLNER, WERTPAPIERRECHT (Beck 14th ed. 1987); ROLAND DUBISCHAR, HGB Vol. 7 (Transportrecht) (Beck 1997) § 450 HGB, margin note 2.

the physical possession of the goods. Documents other than those papers also allow onward trading without the intermediaries acquiring direct possession of the goods, such as so-called delivery notes, i.e., orders to a warehouse in which the seller of first instance has stored the goods and which has to hand them over to the end buyer, who presents the note, on payment of the storage costs, the purchase price, etc. Here too, the point is, notwithstanding all legal-technical details of the law of these instruments to which the national laws governing these papers applies, that ultimately "delivery" by means of the transfer of vested rights to delivery contained in documents, perhaps even resulting in the transfer of ownership in the physical goods, is achieved, even when a layman is not aware that the document, be it a bill of lading, a warehouse receipt, a delivery note, etc., in the first instance vests only the rights to delivery of the goods and only in the end the commercial result of the transaction – or of a string of transactions – will be the access to the physical goods provided by these documents.

In the interpretation of the CISG in accordance with the guidelines recited in Article 7(1) (more hereto following), these trading forms, although they are effected by the transfer of "rights" embodied in documents and therefore presuppose corresponding obligations of the seller, are governed by the provisions of the Convention – see, in particular, Articles 30 and 34 – even though the 1964 Hague Sales Convention (ULIS) was clearer in this respect, in particular with regard to the legal consequences of breach of the relevant seller's obligations, cf. Articles 18, 50, 51 ULIS.[20] In particular, such trade forms and objects of sale are not excluded from the scope of the CISG on the grounds of its Article 2(d).[21] The critical reservations regarding the CISG that it primarily regulates "consignments of shoes . . . or sales of tractors" and, therefore, must be regarded

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[20] *See* JOHN HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION (1999), margin note 219 [hereinafter UNIFORM LAW] (explaining the reasons for this scarcity in the CISG, "[t]he first sentence of the present article was included to provide a simpler and less cluttered text" instead of "many references to delivery by documents").

[21] *But see*, Franco Ferrari *in* KOMMENTAR ZUM EINHEITLICHEN UN-KAUFRECHT—CISG (Peter Schlechtriem & Ingeborg Schwenzer eds., Beck 4th ed. 2004), sect 2 margin note 34 [hereinafter SCHLECHTRIEM-KOMMENTAR]; *see also* PETER SCHLECHTRIEM, EINHEITLICHES UN-KAUFRECHT 15 (Mohr Siebeck 1980) (with reference to the report of the UNCITRAL Secretariat at 40, sub. 8).

as not suitable for the customary document trading on the international commodity markets[22] are, in my opinion, caused by a lack of familiarity with the Convention and the possibilities which it allows for party autonomy in contracts. The same applies to the numerous calls to consequently exclude the application of the Convention from the realm of commodity sales on the ground that the CISG is not suited to them. It must be freely admitted that German-language literature seldom devotes to documentary sales the detailed analysis this subject requires[23] and limits itself in particular to the function of certain papers as a transfer surrogate,[24] neglecting, however, the repercussions of a documentary sale agreement on the obligations of the seller.[25]

3) *Third Case*

The third conceivable case is questionable: Not only documents such as bills of ladings, warehouse receipts, delivery notes, etc., and thereby rights of the holder of the documents to the handing over of the goods, are traded, but sales contracts as such, to be legally precise: the rights of buyers under their sales contracts to have the goods delivered and ownership transferred are the object of these sales.

Under the scrutiny of the jurist, such a contract arguably involves the sale of rights, which are actually excluded from the

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[22] Mullis, *supra* note 3, at 328.

[23] An excellent treatment is, however, offered by the commentary of WOLFGANG WITZ ET AL., INTERNATIONAL EINHEITLICHES KAUFRECHT PRAKTIKER-KOMMENTAR UND VERTRAGSGESTALTUNG ZUM CISG (Verlag Recht und Wirtschaft 2000) (although some commentaries do not even contain any reference to document trading in the index) [hereinafter KAUFRECHT].

[24] *See, e.g.*, BURGHARD PILTZ, INTERNATIONALES KAUFRECHT: DAS UN-KAUFRECHT (WIENER ÜBEREINKOMMEN VON 1980) IN PRAXISORIENTIERTER DARSTELLUNG § 3, margin note 76 *et seq.* (Beck 1993).

[25] These questions are, however, addressed in the treatment of the problem whether the buyer must object by notice of lack of conformity. *See* Ulrich Magnus *in* STAUDINGER KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH MIT EINFÜHRUNGSGESETZ UND NEBENGESETZEN: WIENER UN KAUFRECHT, art. 34, margin note 18 (CISG) (Martinek ed., de Gruyter 1999) [hereinafter STAUDINGER-KOMMENTAR]; Widmer *in* SCHLECHTREIM-KOMMENTAR, *supra* note 21, art. 34, margin note 5 (in my opinion, a reference here to an analogous application of Articles 38 and 39 does not suffice; instead the object of the – breached – seller's obligation should have been more exactly specified).

scope of the CISG.[26] But are they really? In this respect, the Convention must be interpreted and, in particular with respect to this constellation, i.e., the purchase of contracts, the principles of interpretation contained in Article 7(1) are significant.

B. *Sales of Contracts as Sales of Goods: Article 7(1)*

Article 7(1) stipulates three directives to interpretation. It does so in a standard formula which has since been applied in many other Conventions on the Unification of Law.[27]

1) *Principle of Interpretation: "International Character" –Ban on Recourse to Domestic Concepts; Example: "Good Faith and Fair Dealing" in German Law*

Proper interpretation of the Convention should take into account "its international character." This is what is meant by the so-called autonomous interpretation, i.e., an understanding and interpretation of the Convention that must detach itself from national preconceptions of the terms applied.[28] Autonomous interpretation of the Convention is often proposed, but is at the same time often neglected, as it is only natural that the reader, interpreter or applier of the Convention brings his ingrained preconceptions of his own laws to his interpretation. The requisite "international understanding" in itself raises doubts whether the finely drawn difference between the sale of "goods" as such and an obligation of supply arising from this contract of sale, perhaps to transfer documented rights to surrender possession, on the one hand, and the purchase of the rights to delivery, i.e., a purchase of contracts, on the other

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[26] *See* Ferrari *in* SCHLECHTREIM-KOMMENTAR, *supra* note 21, art. 1, margin note 36 (providing commentary on the exclusion of Contracts of Sale regarding rights and the provision thereof).

[27] *See* Convention on Agency in the International Sale of Goods, Feb. 8, 1983, art. 6 § 1; UNIDROIT Convention on International Factoring, May 28, 1998, art. 6 § 1; Convention on International Financial Leasing, May 20, 1988, art. 6 § 1; UN Convention on the Assignment of Receivables in International Trade, Dec. 12, 2001, art. 7 § 1; UNIDROIT Principles of International Commercial Contracts, 2004, Art. 1.6, *available at* http://cisgw3.law.pace.edu/cisg/principles.html.

[28] For an example of an interpretation that fails to detach itself from national preconceptions of terms applied see Raw Materials, Inc. v. Manfred Forerich GmbH & Co. KG, 2004 U.S. Dist. Lexis 12510, 2004 WL 1535839 (N.D. Ill. July 6, 2004) (using domestic case law under UCC 2-615 to interpret Article 79 of the CISG), *available at* http://cisg.law.pace.edu/cases/040706ul.html.

hand – a distinction that might be extremely difficult to explain to a non-jurist who trades (and perhaps speculates) on the commodities market. There is every reason for equal treatment, i.e., for treating sales of contracts as sales of goods under the Convention.

2) *Principle of Interpretation: "To Promote Uniformity" – Stare Decisis?*

The second directive contained in Article 7(1), i.e., "to promote uniformity in [the] application [of the Convention]"[29] would be better met, if one were to apply the Convention to all documentary sales independently of whether the contract documents to be transferred embody sales contracts or vest rights to supply goods or to their handing over. Besides, this interpretation guideline is an important anchor for international case law as a source of law, even if a fully developed doctrine of stare decisis is neither expected nor desired. But the requisite consideration of decisions of courts in other Contracting States (particularly where there is an established line of rulings) by courts which are later faced with the same issue, and the development of a technique of "distinguishing," could have its Convention internal basis in this interpretation directive.

3) *Principle of Interpretation: "Observance of Good Faith in International Trade"*

The third directive laid down in Article 7(1), "to observe good faith in international trade,"[30] no matter how unsure the meaning of "good faith in international trade" may be,[31] argues against interpreting the Convention in such a way that even though the sale agreement for the transfer surrogates – in the form of vested rights of surrender against carriers or warehouse owners – falls within the Convention's scope, the purchase of a

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[29] CISG, *supra* note 1, art. 7(1).

[30] *Id.*

[31] *See* Peter Schlechtriem *in* COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS, art. 7, rn. 17 *et seq.* (Clarendon Press 2d ed. to be published in 2005) (questioning whether this formula corresponds with the German legal principle of "*Treu und Glauben*," and whether it is only a matter of a principle for the interpretation of the Convention, or a directive for the interpretation of the contractual relationship between the parties).

contract of sale and the established rights of delivery therein, does not.

Certainly, the critics' misgivings regarding the application of the CISG to the commodities trade are not based only on the herein-mentioned juristic borderlines drawn between the purchase of goods and the purchase of contractual rights, but also – although without any real concrete substantiations – on the assertion that the regulation by the Convention of the rights and obligations of the parties does not answer the necessities and practices of the often speculative trading on the commodity markets. That assertion is disputed and can be refuted by a precise analysis, yet the above-mentioned reference must suffice; that the supposed peculiarities of the trade in commodities can, and are, met by corresponding contract forms must suffice for present purposes. In as far as international usages already exist in the trade in certain commodities, or where the parties have established suitable practices between themselves, the respective issue-based rules derived from usages or practices of the parties, in accordance with Articles 9(1) and (2), have priority over the provisions of the CISG.

III. Gap-Filling in Accordance with Article 7(2) CISG

A. *Delimitations*

Gap-filling in accordance with Article 7(2) – this provision, too, has become a standard formula in Conventions for the Unification of Law – allows the elimination of deficits in the provisions for Convention internal issues – matters governed by this Convention – through the development of uniform law rules based on the general principles underlying the Convention; only when this filling of gaps fails due to the lack of general principles – or when the case is concerned with matters which are either not the subject of sales law or have been deliberately left unregulated by the authors of the Convention, such as prescription or interest rates – should recourse be had via the PIL (Private International Law = Conflict of Law) rules of the forum to non-uniform domestic law.

As has been mentioned, the borderline between gap-filling by expansive interpretation in accordance with Article 7(1) or by the developing of uniform rules under Article 7(2) can be

blurred. In my opinion, a wider interpretation should be attempted first, before new – uniform law – provisions are developed. There too, the demarcation line between an analogy with which jurists from German and Swiss legal systems are familiar, and the gap-filling procedure in terms of Article 7(2) is sometimes described as difficult, and often as theoretical;[32] an attempt is made to create order with the concepts "a principle, which is only contained in one rule of the CISG: then analogy – a principle which underlies several rules: then gap-filling,"[33] yet in that respect we are concerned with a theoretical-methodological problem, which is not to be pursued in this paper.

B. *Gaps and Principles*

The first step in the gap-filling procedure is the identification of an internal Convention gap, which cannot be closed by the liberal interpretation of a related provision. An abstract listing of such gaps cannot be laid out here. The second step is to find a general principle on which the Convention is based, i.e., an underlying basic value of the Convention allowing the development of a new rule, which is in accordance with that value. Long lists of such principles are recited in the commentaries,[34] yet the usefulness of these lists is limited; in each case it is the actual issue and the gap arising in respect thereof that are important. In that context, very often, in the listing of principles and their application, the distinction between legitimate internal gaps to be filled in the Convention and other shortcomings to be negotiated in individual contracts is not always clearly distinguishable. In particular, the assertion that "good faith" is one of the basic principles on which the Convention is based, often leads, due to German convictions and practices, but not in accordance with the intentions of the CISG's drafters, in

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[32] *See* Peter Schlechtriem *in* INTERNATIONALES UN-KAUFRECHT: EIN STUDIEN- UND ERLÄUTERUNGSBUCH ZUM UBEREINKOMMEN DER VEREINTEN NATIONEN ÜBER VERTRÄGE ÜBER DEN INTERNATIONALEN WARENKAUF (CISG), margin note 47 (Mohr Siebeck 2d ed. 2003) [hereinafter INTERNATIONALES UN-KAUFRECHT].

[33] Ferrari *in* SCHLECHTREIM-KOMMENTAR, *supra* note 21, art. 7, margin note 47; *see also* Rolf Herber in previous editions of this commentary.

[34] *See* Ferrari *in* SCHLECHTREIM-KOMMENTAR, *supra* note 21, art. 7, margin notes 48-56.

actual cases to erroneously basing contractual amendments, which are seen to be desirable, on the principle of good faith.[35]

C. *Example One: Additional Seller Obligations (Ancillary Obligations)*

In an actual case – the facts of which are presented slightly modified here – a German company had delivered medical equipment to a Swiss company over a period of several years. This equipment had been resold by the Swiss purchaser to hospitals and doctors' practices. A corresponding framework contract – supply and distribution agreement – had expired, which the parties had apparently not even noticed, but the supply continued thereafter on the basis of oral orders. The legal basis for the individual deliveries was the CISG. The issue in question was whether the German seller was also responsible for, and had to hold in store, the accessories – "belonging parts" ("Zugehör" in the terminology of the ZGB [the Swiss Civil Code]), e.g., the tool-kit of car, and of spare parts possibly needed in the future. The CISG is silent on the question of such additional obligations – in the terminology of the Swiss and German legal systems, "ancillary obligations" ("Nebenpflichten"). In particular, it does not contain any presumption corresponding with § 311c of the BGB [the German Civil Code] that the seller of goods is also obliged to supply any accessories – or belonging parts in the sense of Article 644 of the ZGB.[36] The gap in the CISG is to be filled by a rule which is to be developed from a principle which is to be drawn from various provisions of the CISG – in particular, by reference to Articles 30 and 34 dealing with documents concerning the goods that are necessary for their usability, and also by reference to Article 35(2)(d), dealing with packaging obligations, and Article 35(a) and (b) in respect of the features of the goods sold. The relevant principle provides that the seller is not only obliged to deliver the "bare" goods, but also everything which is a prerequisite for their

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[35] *See, e.g.*, ANNETTE KOCK, NEBENPFLICHTEN IM UN-KAUFRECHT. DARGESTELLT AM BEISPIEL DER PFLICHTEN DES VERKÄUFERS [Ancillary duties under CISG: Examples of Sellers Obligations] 30 *et seq.*, 175 *et seq.* (Regensburg: Roderer 1995); *but see* EIKE NIKOLAI NAJORK, TREU UND GLAUBEN IM CISG 52 *et seq.*, 61 (Kölner Diss 2000).

[36] *See* Wiegand *in* BASLER-KOMMENTAR, *supra* note 15, art. 644, margin note 25 (discussing the effectiveness of the obligations business).

agreed use by the buyer, i.e., concerning the "conformity" of the goods with the contract. Accessories or "belonging parts" belong thereto per definition.

However, in my opinion, "spare parts" and their supply is a different matter altogether: a general, normative rule applicable to all international sales contracts which holds that a seller must provide spare parts – and for how long? – cannot be inferred from the provisions of the CISG. In German law, this is occasionally accepted and a general reference is made to §§ 242, 157 of the BGB [German Civil Code], which could be a temptation to employ the asserted basic principle of good faith as a suitable gap-filling under the CISG too. In my opinion, this would go far beyond the mark of finding a solution in individual cases. The basis for finding a solution in an individual case can only be a – possibly supplementary – interpretation of the actual contract, which was easily possible in my example by applying Article 9(1), as the supply of spare parts on request was an established practice in terms of the old framework agreement continued by the parties even after its expiration.

D. *Example Two: Breach of Service Obligations Covered by the CISG under Article 3(2)*

The normative "gap-filling" by uniform rules on additional obligations – in contrast to contractual supplementary extensions of the obligations of the parties by interpretation of their communications under Article 8 – is, however, only the first step. The next gap appears when we consider the legal consequences of a breach of such additional obligations. This gap is particularly wide in the case of additional service obligations, which in the case of mixed contracts could fall within the scope of the CISG if, in accordance with Article 3(2), these service obligations do not constitute the preponderant part of the seller's obligations. Here is another example which is based on a case decided by the German Federal Supreme Court [BGH]:[37] A German manufacturer sold a second-hand machine to a Spanish client and had undertaken to have this machine "run-in" by its

[37] *See* Bundesgerichtshof [BGH] [Federal Supreme Court] Düsseldorf VIII ZR 60/01, 31 Oct. 2001 (F.R.G), *at* http://cisg.law.pace.edu/cisg/wais/db/cases2/011031g1.html (dealing primarily with the incorporation by reference of standard terms into sales contracts under articles 8 and 14 of the CISG).

own mechanic. The German mechanic did not show up or was unsuccessful in getting the electronic control system of the engine to function properly. What legal remedies were available to the Spanish client?

1) *Non-performance*

Should the promised service not be performed, the legal remedies of the buyer must be developed, in closing the gap, on the basis of the legal remedies available in the case of non-delivery of goods:

a) Right to require performance – subject to Article 28

One might, firstly, consider a right to demand specific performance, but its judicial enforcement would be uncertain, not only because of the limited possibilities of execution – which can also vary from country to country – but also on account of Article 28. In any event, an enforcement of that right is apt to be too time consuming.

b) Damages

A claim for damages under Article 74 – which was also raised in the Federal Supreme Court case mentioned – i.e., as a claim for damages without avoiding the contract, ought not to provide any difficulties. Whether the seller could and would be excused, if, e.g., the mechanic had died suddenly or was denied entry into Spain on account of false information about terrorist activities, is a factual issue not to be explored here.

c) Avoidance of the contract? Article 49(1)(a) or (b) – additional period of time – in connection with Article 51

The possibility of avoidance (cancellation) of the contract is difficult. Firstly, the basic principle of Article 51(1) and Article 73(1) is to be heeded, whereby in the case of divisible performances, avoidance is to be limited to the respective performances affected, should a fundamental breach exist. This must most certainly apply in the case of mixed contracts. Should the non-performance or the non-timely performance of the services to be rendered in itself constitute a fundamental breach – such as when the installation was to be completed by a "fixed" date – the services part of the contract can be avoided: the buyer is

then free to purchase the services elsewhere and to claim the (additional) expenses as damages in terms of Article 75. In applying the rules on setting of an additional period of time for performance,[38] in our case too, a gap-filling rule can be developed, based on the principle valid for non-performance, non-payment and non-acceptance, whereby, after the futile lapse of a new deadline, the services part of the contract can be avoided.

It is more difficult to avoid the entire contract. The buyer may have lost interest in the machine because of the delay in installation, but perhaps also for other reasons, although the machine as such is in perfect order. Here the gap-filling rule to be developed must consider the principle underlying Article 51(2) and Article 73(3), so that the provision of services must be so intertwined with the delivery of the goods, that non-compliance with the services obligations presents a fundamental breach of the entire contract – in our case, e.g., if the machine could not be used at all without the mechanic's services.

d) Price reduction

In my opinion, price reduction in terms of Article 50 should also be possible. The failure to provide proper service is a reduced performance on the part of the seller and equal to non-conforming delivery in terms of Article 35(1).

e) Retention of the price

Important, but unregulated, is the right of the purchaser to refuse performance himself, in part or as a whole, in particular, payment of the purchase price. It ought to be developed as a general right of retention; a separate viewpoint will be taken on this below.

2) *Malperformance of services*

The legal consequences and remedies are also unregulated in the case where the services due are not performed in conformity with the terms of the contract, i.e., "malperformed." In the development of gap-filling rules on the basis of the relevant provisions of the CISG on conformity of the goods to the terms of the contract, there are three questions, which, in my opinion,

[38] *See* CISG, *supra* note 1, art. 49(1)(b), 64(1)(b).

must be answered: a) Duty to give notice; b) Cure – limits in terms of Article 46; and c) Avoidance of contract.

a) Duty to give notice?

Principally, legal remedies in respect of non-conformity require timely notice, Article 39(1), and the remedies lapse two years after handing over of the goods, if no notice thereof has been given by the buyer to the seller, Article 39(2). In my opinion, this applies in respect of claims for defective services, too; the examination required under Article 38 also determines the commencement of this reasonable period of time for notice. The buyer, therefore, has "to examine the [services] or cause [the services] to be examined, within as short a period as is practicable in the circumstances."[39]

b) Cure – limits in terms of Article 46?

The rules to be developed regarding the rights of the buyer to a cure, i.e., a subsequent performance provide difficulties, since Article 46(2) and (3) provides for two forms of cure in case of defects – delivery of substitute goods or repair – which contain very different preconditions. However, in respect of services, it is very difficult to draw the line between a complete new service, as "substitute performance" in accordance with Article 46(2), and "repair," the choice of these remedies being allowed to the party obliged to perform the services. However, this cannot mean that he can decide on "substitute performance" – which equals delivery of substitute goods – and then argue with the non-achievement of the requirement of Article 46 (2), i.e., the threshold of "fundamental breach." To fill the gap, I would therefore propose that, in respect of a demand for cure, the service-obligated seller can only invoke unreasonableness as regulated in Article 46(3).

c) Avoidance of the contract?

The threshold for avoidance of a contract because of non-conformity is known to be high, and German rulings on the CISG, in particular, have required extremely high standards for

[39] CISG, *supra* note 1, art. 38(1).

a fundamental breach on account of defects.[40] According to the prevailing opinion, this threshold can also not be lowered by employing the technique of setting an additional period of time, i.e., by setting in vain a deadline for redressing the defects. This must also apply to malperformed services. The, at first glance surprising, difference from the case of complete non-performance of services, for which the application of the extended-deadline-rule was advocated, ought to be almost always minimal in practice – unless the purchaser wants to "back out" of the entire contract, and, therefore, intends as a first step to avoid the services part. If only the service part of the contract is at stake, the damages which can be claimed in terms of Articles 74 or 75 are always the cost of the external services required to cure the defective or non-rendered services. The fact that, in most cases, the buyer remains limited to these damages, is in accordance with the fundamental solution in cases in which the condition of the goods does not conform to the terms of the contract.

E. *Example Three: Right of Retention, e.g., Buyer's Right to Refuse Payment*

1) *Gap-filling*

If the buyer has received goods or documents which do not comply with the terms of the contract, the question arises whether, besides the regular legal remedies, the buyer can, at least temporarily and until he has determined his next course of action, refuse payment and perhaps even suspend his obligation to take delivery; a bank providing a letter of credit would even subject itself to a claim for damages by its client were it to make payment on presentation of a non-conforming, perhaps an "unclean" document indicating that the goods have been damaged, etc. Rights of retention are also – as mentioned above – to be considered when supplementary work or services, which, according to Article 3(2) are governed by the CISG, are not rendered, or not in conformity with the terms of the contract.

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[40] *See* Schlechtriem, *in* SCHLECHTREIM-KOMMENTAR, *supra* note 21, art. 25, margin note 21a.

2) *Proposals*

The literature predominantly affirms that if a gap exists it can be filled in conformity with a general principle of the CISG, as a basis for which, in particular, Articles 58 and 71 of the CISG are invoked.[41] The corresponding proposals are, however, often somewhat vague[42] and not concrete enough to be applied in practice; the difficulty of the details is shown by an impressive attempt, published a year ago, to review this question.[43] That shall not be repeated here, yet various individual problems relating to the development of a general right of retention as under § 273 BGB [German Civil Code] should be dealt with, as should the question whether its development can at least to a certain extent answer a further point of criticism raised by our Anglo-Saxon colleagues regarding the usefulness of the CISG.

The embodiment of a relevant principle in the CISG is easy to determine: Not only the principle of payment against delivery as concurrent conditions (do ut des or tit-for-tat) in Article 58 and the "defense of uncertainty" established in Article 71 are based on the principle that one can retain one's own performance when the other party is tardy – in the broadest sense – but also Article 81(2), sentence two (concurrent restitution after avoidance of the contract), and the special rights of retention regulated in Articles 85, sentence two, and 86(2), sentence two, allow a recognition of this principle. It is questionable, however, whether its framework is precise enough to enable the derivation of a general rule therefrom. Therefore, it is neces-

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41 *See* Magnus, *in* STAUDINGER-KOMMENTAR, *supra* note 25, art. 4, para. 4a; Schlechtriem, *in* INTERNATIONALES UN-KAUFRECHT, *supra* note 32, margin note 42d, 205, 250; Amtsgericht [AG] [Petty District Court] Hamburg- Altona 317 C 472/00, 14 Dec. 2000 (F.R.G.), *available at* http://cisgw3.law.pace.edu/cisg/wais/db/cases2/001214g1.html.

42 *See* Ferrari, *in* SCHLECHTREIM-KOMMENTAR, *supra* note 21, art. 4, margin note 45a ("as these provisions [i.e., Articles 58(1) and 71(1)] appear to embody a general principle, it must be presumed that all national provisions in this regard [i.e., to retention rights] are superceded, Article 7 para. (2)").

43 *See* Wolfgang Witz, *Zurückbehaltungsrechte im internationalen Kauf - Eine praxisorientierte Analyse zur Durchsetzung des Kaufpreisanspruchs im CISG* [The right to withhold the price in international sales: A practical analysis of enforcement of the purchase price under the CISG] *in* FESTSCHRIFT FUR PETER SCHLECHTRIEM ZUM 70 291-307 (Ingeborg Schwenzer & Gunter Hager eds., Siebeck 2003) [hereinafter SCHWENZER-HAGER].

sary to examine, firstly, the prerequisites of retention in detail, then the manner of invoking this defense and finally its consequences.

a) Prerequisites

In so far as any opinions regarding the prerequisites for a general principle of retention are to be found, it is presupposed that only rights arising under the Convention are being dealt with, more exactly, rights which arise from obligations created by a contract governed by the CISG.[44] In addition to the obligations regulated by the CISG, obligations which the parties have autonomously established on the basis of Article 6 must also be included; thus, the already mentioned obligations to keep in stock and to deliver spare parts, and also other additional obligations arising, e.g., from non-competition agreements – in so far as they are admissible – such as distribution commitments, etc., are covered and allow, in case of their non-performance, withholding of the obligor's performance.[45]

Tort claims, and in my opinion, also claims arising from other contracts are ruled out as a basis for retention. A uniform rule can carry no weight for claims arising either from contracts which are governed by domestic law, or from tort, and the enforcement of such claims through retention of one's own performance due under the CISG.

b) Defense or objection

It is technically unclear whether a defense or an objection is being dealt with, i.e., whether the defense must be raised or is ex officio considered. Despite the arrangement of reciprocal obligations in Article 58(1) as concurrent conditions, in my opinion, the defense that the other party is tardy must be raised by the debtor. Therefore, in our (Germanic) terminology this is a defense ("Einrede").[46] This must all the more be the case for a general right of retention – independent of the procedural and

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[44] *See* Magnus *in* STAUDINGER-KOMMENTAR, *supra* note 25, art. 4, Rn. 47a.

[45] *See* Witz *in* SCHWENZER-HAGER, *supra* note 43, § 295: Implementation of secondary claims.

[46] For the Swiss legal terminology, see INGEBORG SCHWENZER, SCHWEIZERISCHES OBLIGATIONENRECHT, ALLGEMEINER TEIL, margin note 4.34 (Bern 3d ed. 2003); regarding CISG, art. 58(1), see Witz *in* SCHWENZER-HAGER, *supra* note 43, at 302.

enforcement provisions on the raising of defenses and the corresponding divergence in the national laws; it is hardly conceivable that an Anglo-Saxon judge could ex officio consider a right of the defendant to withhold performance. In fact, the practical enforcement of the right of retention is often closely intertwined with procedural rules of the lex fori, as is shown by § 274 BGB [German Civil Code], and therefore, is not accessible to unification by gap-filling.[47]

c) Consequences

It has been often pointed out that a gap-filling right to withhold performance thus "implanted" into the CISG can have no real consequences, i.e., giving priority over other creditors or similar privileges like a security interest.[48] This must be respected. However, it should be considered whether the seller, who retains (part of) the goods, because the buyer is in default with some ancillary obligation, may be entitled to a self-help sale in accordance with Article 88.[49]

3) *The buyer's right of retention when there is a tender of non-conforming goods or documents as a functional equivalent to the so-called "perfect tender" rule?*

An important point of criticism of the CISG on the part of our Anglo-Saxon colleagues is the absence of a "perfect tender" rule, i.e., the right of the buyer to reject defective goods, in the words of § 2-601(a) UCC: "if the goods or the tender of delivery fail in any respect to conform to the contract, the buyer may reject the whole."[50] Although the words (if the buyer "exercises the right under the contract or this Convention") "to reject [the goods]" have slipped into Article 86(2) of the CISG (at the same time he must see to their preservation and may have to take possession), a true general right of rejection of defective goods is

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[47] For difficulties arising therefrom, see Witz *in* SCHWENZER-HAGER, *supra* note 43, at 296 *et seq.*; Regarding Swiss law, see *id.* at 300.

[48] *See, e.g.*, Ferrari *in* SCHLECHTREIM-KOMMENTAR, *supra* note 21; Schlechtriem *in* INTERNATIONALES UN-KAUFRECHT, *supra* note 32, margin note 42d.

[49] In this respect, I have modified my opinion in INTERNATIONALES UN-KAUFRECHT, *supra* note 32, margin note 42d.

[50] U.C.C. § 2-601(a) (1998).

out of the question.[51] The buyer must, according to predominant opinion, at first take over the goods, and whether he may return them depends on the – as mentioned – extremely high threshold for a fundamental breach by delivery of non-conforming goods. However, a decisive difference between the meaning of "acceptance" according to – e.g., English Law – and the taking of delivery of the goods according to the CISG must be highlighted: Whereas, according to English Law, the buyer may no longer reject the contract by reason of acceptance, i.e., he can no longer treat the contract as "discharged" after acceptance,[52] under the CISG taking delivery does not mean that the right of avoiding the contract has been lost. The right, based on the perfect tender rule, to reject goods which do not comply with the terms of a contract, thus preserves the buyer's right to cancel the contract, which would be lost through acceptance. In respect of a contract governed by the CISG, however, this right remains available to the buyer even after taking delivery of the goods; it does not amount to "acceptance as performance."

Nevertheless, that the buyer must take over defective goods, must be repugnant to the Anglo-Saxon legal convictions.[53] The same appears to apply to the document trading discussed above. According to the CISG, the buyer would also have to "accept" documents that do not conform to the contract, such as "unclean" documents.[54] This would contradict every business practice. Can the right of retention sketched out here avoid or lessen such unacceptable consequences for the buyer? For rights of retention on the part of a buyer who has been ten-

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[51] *See* Hornung *in* SCHLECHTREIM-KOMMENTAR, *supra* note 21, art. 86, margin note 5 (rejection refers to the cases of Article 52(1) and (2) [refusal of a premature or a partial delivery], to the case of the defense of uncertainty in Article 71 and to the cases of fundamental breach allowing avoidance, and a demand for substitute goods under Article 46(2)).

[52] *See* Mullis, *supra* note 3, at 332 (using the phrase "to treat the contract as discharged" synonymously with termination of the contract by the buyer); McNamara, *supra* note 2, at 17; GROßMANN-DOERTH, DIE RECHTSFOLGEN VERTRAGSWIDRIGE ANDIENUNG, *supra* note 8, at 130 *et seq.* (regarding "acceptance as conforming performance," in this context in the German legal system).

[53] *See* GROßMANN-DOERTH, DIE RECHTSFOLGEN VERTRAGSWIDRIGE ANDIENUNG, *supra* note 8, at 109, 120 (reporting respective terms in commercial contracts).

[54] *See* Mullis, *supra* note 3, at 346 (referring to The Hansa Nord, 1976 Q.B. 44 (Eng. C.A.), in which the deciding judge Roskill L.J. defined and implemented the seller's obligations regarding the documents as "sacrosanct:" "Any breach justifies rejection.") *See also* BRIDGE, *supra* note 5, margin note 3.24.

dered non-conforming goods or documents, it must, in my opinion, be differentiated: a) Withholding of the purchase price; b) Refusal to take delivery of non-conforming goods; and c) Refusal to take up non-conforming documents.

a) Withholding of the purchase price

A right of retention allows, in the first instance, to withhold payment of the purchase price until a decision regarding the legal remedy which the purchaser can and wishes to apply because of the non-conformity of the goods or documents.[55] Of course, the retention of the purchase price must correspond with the disadvantage caused by the non-conformity, i.e., be limited to a part of the purchase price, in so far as the threshold of fundamental breach, allowing complete avoidance of the contract, has not been reached.[56] In the case of non-conforming documents, e.g., unclean documents, which can hardly be of any use at all for the buyer, this would certainly be the norm (see the following), in particular when, expressly or implicitly, "time is of the essence" for correct tender. The exercise of the right of retention does not avoid the contract, but leaves it suspended, and it allows, in particular, the seller – within the framework of Article 48 – a second tender. If the withholding was unfounded, however, the seller may treat it as a repudiation of the contract by the buyer.

b) Refusal to take delivery of non-conforming goods

The exercise of a right of retention – as a right to suspend the performance of one's own obligation – can be opposed to the claim of the seller, who is physically tendering the goods, to take delivery. In that case too, the contract remains at first unaffected and the seller can vindicate it through a second tender within the framework of Article 48. Generally, however, since in the natural course of events this refusal to take delivery, in so far as a divisible delivery is not involved, can only be exer-

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[55] *See* WITZ ET AL., *supra* note 23 (For withholding of the purchase price by non-compliance of the goods see Articles 58-59 margin note 12 with a reference to Article 58(3) stating that the buyer can "certainly ensure the compliance of the goods"). *See also* Witz, *supra* note 43, at 305 *et seq.* (regarding retention rights after acceptance).

[56] *See* Schlechtriem *in* INTERNATIONALE UN-KAUFRECHT, *supra* note 32, margin note 206.

cised in respect of the entire delivery, such a "full" rejection would contradict the fundamental idea behind Articles 49(1)(a), 46(2) in connection with Article 25, namely that in the case of non-conformity of the goods, the buyer should in general have to accept delivery of the goods and is restricted to claim damages or price reduction only. Yet, compatible with this fundamental idea should be the right of the to refuse to take delivery for a certain period of time, i.e., the time which he reasonably needs to assess the situation and to decide whether he can avoid the contract, demand substitute delivery, or whether he must resort to another legal remedy. Should he choose repair, this refusal to take delivery should at least be possible until the repair has been made or until the expiration of a deadline set for such a cure. The obligations of preservation contained in Article 86(1), (2) remain unaffected by the right to temporarily refuse acceptance. The buyer must, if necessary, take the goods and store them. He has to receive and perhaps take possession, but he need not take delivery in the sense of "acceptance." Article 69(1) is then applicable for the passing of risk, i.e., only in the case of a justified exercise of the right of retention does the risk not pass to the buyer,[57] insofar as the exceptions of Articles 66 or 70 are not applicable anyway.

c) Refusal to take up non-conforming documents

In the case of documents which do not conform to the contract, the refusal of their acceptance exercised as a right of retention must, at any rate in the case of "unclean" documents indicating perhaps damage to the goods, be always allowed, as such documents are, as a rule, of no use whatsoever for the buyer and their tender alone often constitutes a fundamental breach of the contract.[58] As long as the buyer has not avoided or cannot avoid the contract, the seller still has the possibility of a second tender of missing or non-conforming documents. The right to reject non-conforming documents is advocated in the literature, as a final refusal, however, only in the case where the buyer simultaneously declares avoidance of the contract (be-

[57] *See* Hornung *in* SCHLECHTREIM-KOMMENTAR, *supra* note 21, art. 86, margin note 6.

[58] *See* Mullis, *supra* note 3, at 345 *et seq.*

cause of a fundamental breach).[59] However, a declaration of avoidance, if effective, should bring the contract to a final end and thereby also cut off the seller's right to a second tender. INCOTERMS oblige the buyer to take up, e.g., transport documents, only when they fully conform to the contract,[60] and one would have to consider whether an international usage in terms of Article 9(2), i.e., implicitly agreed, has not in this respect already come into existence.[61] At all events, the particularities of document trading must be taken into account in the interpretation of Article 25 and the threshold for the avoidance of the contract as a result of non-conformity of the documents tendered – and thereby also for the right to reject them – should be lower than in the case of defects in the goods themselves.[62]

Should the buyer have to furnish a letter of credit, then an agreed perfect tender rule applies practically to the documents to be tendered, in any case. The agreement in the contract of sale that the buyer is to furnish a letter of credit, must be read as an implied reference to and, thereby, an incorporation of the terms[63] to be agreed between the buyer and the issuing bank in favor of the seller/beneficiary, so that the provision established therein, that payment is only to be made against fully conforming documents – "strict compliance" – contains a party-autonomous agreed right of rejection.[64] In regard to these forms of

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[59] *See* WITZ ET AL., *supra* note 23, art. 60, margin note 13. *See also* Witz, *supra* note 43, at 304 (purchase price claim is to be dismissed; no complaint is allowed).

[60] *See* interpretation of provision B 8, such as for a CIF contract.

[61] *See St. Paul Guardian Ins.*, *supra* note 12 (ICC CIF clause as international trading custom).

[62] Should the goods be tendered in a physically damaged state and should certain, additionally required documents be non-conforming (*see, e.g.*, Bundesgerichtshof [BGH] [Federal Supreme Court] Hamburg VIII ZR 61/95, 3 Apr. 1996 (F.R.G.), *at* http://cisg.law.pace.edu/cisg/wais/db/cases2/960403g1.html.), then for every partial performance see Article 51(1), and for avoidance of the entire contract, paragraph (2), to be applied analogously (gap-filling). *See also Mullis*, *supra* note 3, at n.97.

[63] *See* WITZ ET AL., *supra* note 23, art. 60, margin note 13 (conditions for acceptance of the documents according to fig. 22 *et seq.* ERA are applicable in accordance with Articles 8, 9 of the CISG, also between the contracting parties to the contract of sale).

[64] *See* JENS NIELSEN, MÜNCHENER KOMMENTAR ZUM HANDELSGESETZBUCH, vol. 5, at 977 *et seq.*, margin note H 104 *et seq.* (Beck 2001); for an introduction see INTERNATIONAL CHAMBER OF COMMERCE GUIDE TO EXPORT-IMPORT BASICS, at 182 *et seq.*, 196 *et seq.* (2003). Here too, the refusal to take up the documents is, in the

international documentary sales transaction, what the critics find lacking in the CISG is in fact created by agreement of the parties: the taking up of documents and payment of a letter of credit can be refused always when the documents do not conform 100% with the contract.

IV. Final Remarks

The ideas which have been tentatively introduced here may not offer a completely satisfying substitute for a perfect tender rule in circumstances in which such a rule is regarded as appropriate, but perhaps provide a bridge to the Anglo-Saxon sense of justice which – understandably – balks against obliging buyers to accept defective goods or to take up non-conforming documents. It would be a solution which "would fall somewhere between fundamental breach and perfect tender."[65]

You will have gained the impression, that the CISG is still a construction site. This impression is correct. It is necessary to investigate whether we have the appropriate tools and building plans for further construction and development. I believe that I have been able here, by means of some examples, to provide an affirmative answer to that question.

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first instance, merely an exercise of the right of retention and, as long as avoidance is not declared, can be overcome by the tender of contract conforming documents.

[65] *See* Briole, *supra* note 5.