

THE SELLER'S RIGHT TO CURE AND FUNDAMENTAL BREACH UNDER CISG

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أثر حق البائع في اصلاح الاخلال الجوهرى على حق المشتري في فسخ
العقد وفقا لاتفاقية فيينا للبيع الدولية
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ABSTRACT

This paper search the occurrence of seller's fundamental breach under the Convention on Contracts for the International Sale of Goods (CISG) in cases where the cure of such breach is still possible without causing unreasonable delay or inconvenience to the buyer. This issue implies a kind of conflict between the buyer's right to avoid the contract and the seller's right to enforce it despite his failure to perform. This article distinguishes between the seller right to cure prior to the time of performance and after the time of performance. It explores the scholarly and judiciary views in this area; and defends the view that, the seller has an unconditional right to cure fundamental breach as long as the time allowed for performance has not lapsed. However, if the projected performance time has passed, the buyer has immediate right to avoid the contract as set out in article 49 (1) a CISG regardless of the seller's ability and willingness to cure. ^{٣٠٠}

المخلص

الهدف من هذا البحث هو عرض وتحليل اتجاهات الفقه والقضاء بصدد التعارض المتراعي بين حق المشتري في فسخ العقد وفق المادة ٤٩ من الاتفاقية وحق البائع في محاولة إصلاح الإخلال الجوهري والابقاء على العقد وفق المادة ٤٨ من الاتفاقية. اذ لا خلاف في ان للبائع حق غير مشروط لإصلاح الإخلال الجوهري طالما ان اجل التنفيذ المتفق عليه في العقد لم يحل ميعاده. ولكن معالجة الاتفاقية لهذه الحالة مشوبة بالغموض وعدم الوضوح في الحالات التي يكون فيها هذا الاصلاح ممكنا، بعد فوات ميعاد التنفيذ، دون التسبب بمضايقة او تأخير غير معقول بالنسبة للمشتري. حيث اختلف الفقه بين أولوية حق البائع في الحفاظ على العقد والاستمرار في تنفيذه وبين حماية حق المشتري بالفسخ. ولتحليل هذا الخلاف والموازنة بين هذه الاراء تم تقسيم هذا البحث الى ثلاث مطالب: خصصنا المطلب الاول لبيان حق البائع في اصلاح اي اخلال بالعقد قبل فوات ميعاد التنفيذ. ويناقد المطلب الثاني الاراء المختلفة بصدد التزام بين حق المشتري في فسخ العقد وحق البائع اصلاح الاخلال الجوهري بعد فوات ميعاد التنفيذ. وخصصنا المطلب الثالث لبيان اتجاهات القضاء بصدد هذه المسألة. ويخلص البحث الى ان محاولة البائع او قدرته على اصلاح الاخلال الجوهري لا يؤثر على حق المشتري في فسخ العقد لان المادة ٤٨ من الاتفاقية قد جعلت حق البائع في اصلاح الاخلال الجوهري مقيد بعدم استخدام المشتري لحقه في فسخ العقد.

INTRODUCTION

Perhaps the most troubling question for courts applying the CISG has been whether the breach could be fundamental in situations where, after the projected time of performance has passed, the cure of such breach is still possible without unreasonable delay or inconvenience for the buyer. This troublesome question stems from the contradictory interpretation of the principle of favor contractus and the provisions relating to the remedy of contract avoidance, in particular, Articles 25, 48 and 49 CISG. Favor contractus means adopting a solution to maintain the valid existence of a contract, whenever possible, against the unilateral premature termination by one of the parties. This principle is important in the international sale contracts because the goods sold are transferred across international borders and mostly over long distances, and this risks their damage in transport, creates additional costs of insurance, carriage, and export and import complexities. To some extent, this fact has shaped the concept that the breach is not fundamental as long as a cure is possible. In other words, only if the seller's attempt to remedy the breach was unsuccessful, can the buyer avoid the contract for fundamental breach. The UNIDROIT Principles make it unequivocal that curable breach is not fundamental and the right to cure is not precluded by notice of termination. The CISG, on the other hand, provides no clear answer whether a chance to cure would prevent the breach from being fundamental. It is worth examining if the CISG differs from the UNIDROIT Principles on this issue of curing breach by the seller. The CISG distinguishes between the seller right to cure prior to the time of performance and after the time of performance; therefore, this paper will be divided into three sections to discuss the cure prior to the time of performance, cure after the time of performance, and third section to discuss the CISG's case law on this issue.

1- CURE PRIOR TO THE TIME OF PERFORMANCE

The seller's right to cure non-conforming goods or documents prior to the time of performance is relatively non-controversial. This has been seen as possible areas for the application of the general principle of preservation of the contract. If the seller has delivered the goods prior to the date set for delivery by the contract, Articles 34 and 37 CISG expressly grant him an unfettered right to cure. The seller, up to the contractual time of delivery, is entitled to cure any lack of conformity in

the documents, deliver any missing part or make up any deficiency in the quantity of the goods delivered, deliver goods in replacement of any non-conforming goods, or remedy any lack of conformity in the goods. The possibility for the seller to cure averts the avoidance of the contract by the buyer. If the breach of non-conformity was effectively cured before the delivery date, the buyer cannot then be said to suffer a detriment that substantially deprives him of what he was entitled to expect under the contract. In addition, the buyer's refusal to allow cure prior to the time of performance is by definition a breach of good faith obligations because the buyer must enable the seller to perform his obligations. In this situation of curing defective performance before the due date of delivery, a fundamental breach can only occur in the form of anticipatory breach within the meaning of Article 72(1) CISG .

1. CURE WHEN PROJECTED PERFORMANCE TIME HAS PASSED

The CISG does not permit a definite conclusion in respect to the seller's right to cure if the projected time of performance has passed. Article 48 (1) CISG provides that the seller may, even after the date of delivery, remedy at his expense any failure to perform his obligations provided that the remedy takes place within a reasonable time and without causing unreasonable inconvenience to the buyer. However, the opening phrase of Article 48 (1) makes seller's right to cure subject to the buyer's right of avoidance in Article 49 CISG. If the requirements of Article 49 CISG are met, the buyer's right to avoid the contract takes precedence over the right to cure. The controversy here is whether the possibility of cure has to be taken into account when it comes to determine whether the seller's breach was fundamental in the sense of Articles 25 and 49 CISG. There are two views can be identified:

1) Curable Breach Is Not Fundamental

The first view sees "an intimate relationship between cure provisions and fundamental breach". Most commentators agree that a breach is not fundamental as long as repair is possible within a reasonable time and without causing the aggrieved buyer unreasonable inconvenience or uncertainty of reimbursement by the seller. The opening clause of Article 48(1) CISG states that it is "subject to Article 49". However, this does not necessarily mean that the curability of the defect must not be regarded when it comes to examining the concept of fundamental breach.

Furthermore, the purpose of Article 48(1) would be frustrated if the buyer were allowed to avoid the contract before giving the seller an opportunity to cure the defect. Thus, a breach that can be cured in accordance with the requirements of Article 48(1) CISG will usually not be regarded as fundamental unless the seller refuses or fails to cure. However, exceptions may be admitted where the buyer has a particular and legitimate interest in being allowed to avoid the contract immediately.

2) .The Occurrence of Fundamental Breach Is Independent from the Seller's Right to Cure

Some authors, on the other hand, argue, that “there is no requirement in the Convention requiring an injured party to give a breaching party an opportunity to cure before exercising the right of avoidance”. The seller's right to cure operates independently of the distinction between fundamental and non-fundamental breaches. An offer to cure should not be considered in determining fundamental breach. The imprecise elements, such as cure within reasonable time, unreasonable inconvenience or unreasonable uncertainty would weaken the concept of fundamental breach because these hinge the non-fundamentality of the breach on receiving a rightful offer to cure which, in its turn, would burden the buyer with the risk of evaluating the offer as either a rightful one or one based on mere expectancy. In addition, defining fundamental breach in the light of a feasible repair would render meaningless the buyer's right to require substitute goods under Article 46(2) CISG. In practice, the buyer's right to require substitute goods would be limited to those situations where repair is impossible because the buyer would be barred from requiring substitute performance whenever the seller offers a cure. Such a result was certainly not in the minds of the drafters as they had originally dedicated all of Article 46 CISG to the right to require substitute goods.

It is worth to distinguish between the qualified and unqualified right to cure. The unqualified right refers to a general right to cure, subject to a certain timeframe and other objective limitations which the breaching party may exercise independent of any thing the buyer may do in respect to that breach. A qualified right means that the breaching party's right to cure depends upon the buyer's failure to use some power or exercise some right that renders cure unavailable. The seller's right to cure is an unqualified right for any non-fundamental breach; while it is qualified

under Article 49(1) CISG. The opening of Article 48(1) states that it is “subject to Article 49” and this creates a hierarchy in the terms cure and avoidance. The buyer may avoid the contract where the seller’s breach amounts to fundamental breach regardless of whether the seller offers to cure or not. This conclusion is supported by Article 48(2) which suspends the buyer’s right to declare the contract avoided during any curative period requested by the seller. The buyer’s refusal to accept cure, according to Article 48(2), has no legal effect other than to maintain his power to avoid the contract effective. Thus, the seller’s right to cure is qualified upon the buyer’s acceptance, whether by assenting or failing to refuse the seller’s curative offer.

Defining fundamental breach as incurable breach or one that the seller refuses to cure makes international sales unnecessarily uncertain. Buyers become uncertain whether they are entitled to avoid the contract with the breaching seller and they pursue an alternative means of obtaining the goods they want. The sellers, on the other hand, must also be certain of their rights in contracts across national borders where their ability to dispose of the goods is more limited. The seller’s rights can be protected effectively according to Article 48(2) and 48(3) CISG. However, the uncertainty of whether the curable breach amounts to a fundamental breach would worsen the buyer’s position because they would be uncertain whether the seller would cure or not, or know whether the cure would be successful.

3) CISG’S CASE LAW

In case law, there are some reported cases where some courts have stated, mostly in the obiter dictum, that the buyer’s right to avoid the contract is contingent upon giving the seller a proper opportunity to cure. Such statements do not necessarily mean that curable breach is not fundamental. These statements may be a result of particular circumstances in these cases or they may refer to the seller’s unqualified right to cure because the breach was not fundamental from the outset. In addition, such statements could be interpreted to mean that if the seller refuses or fails to cure, the buyer may restore his right to avoid the contract if he had already lost it.

A good example where the court held that there was no fundamental breach if there was a serious offer to cure the defect is the judgment of the Koblenz Court of Appeals on 31 January 1997. The Court stated that

in order to “determine the occurrence of a fundamental breach regard is to be had not only to the gravity of the breach, but also to the willingness of the seller to cure the defect”. This must be read restrictively in the light of the post breach negotiations between the parties in that specific case. In this case, a sale of acrylic blankets had gone wrong. The seller had broken an exclusive distribution agreement, the delivered goods were defective and five acrylic blanket rolls were missing. The buyer refused to pay the purchase price because of these allegations but he had never declared the contract avoided. Attempts to settle the dispute in the presence of the Spanish manufacturer of the goods, who had offered to make a substitute delivery against payment of the purchase price, were unsuccessful and were rejected by the buyer. The Koblenz Court of Appeals found that the buyer’s notice of non-conformity was not specific enough. The buyer had communicated that five rolls of acrylic blankets were missing but did not specify how he wished the seller to cure this defect in the spirit of Article 39 CISG. Therefore, the buyer could not declare the contract avoided as per Article 51(1) CISG as he had lost the right to rely on a lack of conformity. In particular, a declaration of the buyer could not be interpreted as a declaration of avoidance as the subsequent conduct of the buyer was incompatible with such an interpretation according to Article 8(3) CISG. In the case at hand, the Court excluded the presence of a fundamental non-conformity, including lack of both quantity and quality, because the buyer, who had lost his right to avoid the contract, had unjustifiably rejected the seller’s offer to remedy the non-conformity by delivering substitute goods. This was not a result of applying Article 48(1) CISG since the Court expressly acknowledged the prevalence of the buyer’s right to avoid the contract over the seller’s right to cure. In the quoted statement above, there was no doubt that the Court referred to the revival of the buyer’s right to avoid the contract upon a seller’s failure to cure the defect. Therefore, this decision cannot rightfully serve as an example of the reliance of the fundamentality of the breach upon the seller’s intention to cure. In the case law, it is by no means certain that the courts give precedence to the buyer’s right to avoid the contract over the seller’s right to cure where the breach of the seller is fundamental. The buyer is entitled to avoid the contract for fundamental breach immediately without being obliged to accept the seller’s offer to cure .

CONCLUSION

The understanding of the relationship between the occurrence of fundamental breach and the seller right to cure is important to evaluate the buyer's right to avoid the contract according to Article 49 CISG. The right to cure non-conformity under Articles 34 and 37 CISG is a means to limit the injured buyer's right to avoid the contract. If the seller's attempt to remedy the defects was unsuccessful, the buyer may avoid the contract only if the breach was fundamental.

The curability of fundamental breach would not preclude the buyer's right to avoid the contract. Articles 48 (2) and 49 CISG give priority to the buyer right to avoidance rather than seller's attempt to cure. When a seller does not deliver the goods in a timely manner or presents fundamentally non-conforming goods after the projected date for delivery, Article 48 permits the seller to cure the defective performance, subject to article 49 CISG, if it does not result in unreasonable delay, unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer. Because article 48 (2) entitles the buyer to reject seller's offer to cure, the buyer's right to avoidance precedes over seller's right to cure fundamental breach in all cases when the projected time of performance has passed. The occurrence of fundamental breach is independent from the seller's right to cure.

1. The term *favor contractus* used by Bonell; M. J. Bonell, 'Article 7' in C. M. Bianca and M. J. Bonell (eds), *Commentary on the International Sales Law: The 1980 Vienna Sales Convention* (Giuffrè, Milan 1987) 65, para 2.3.2.2, 81; this principle treated among CISG's scholarly writings under different headings such as Keeping The Deal Together or the principle of preservation of the contract, it also being referred to from the avoidance corner as Avoidance as a Remedy of Last Resort or an *ultima ratio* remedy. For using of these different terms see respectively: Robert A. Hillman. 'Applying the United Nations Convention on Contracts for the International Sale of Goods: The Elusive Goal of Uniformity' (1995) *Cornell Review of the Convention on Contracts for the International Sale of Goods* 21, 30; Phanesh Koneru. 'The International Interpretation of the UN Convention on Contracts for the International Sale of Goods: An Approach Based on General Principles' (1997) 6 *Minnesota Journal of Global Trade* 105, 121; Ulrich Magnus. 'The Remedy of Avoidance of Contract under CISG: General Remarks and Special Cases' (2005-06) 25 *Journal of Law and Commerce* 423, 424.

2. Bonell (n 279) para 2.3.2.2, 81.

3. Article 7.1.4 UNIDROIT; Lachmi Singh. 'United Nations Convention on Contracts for the International Sale of Goods (1980) [CISG]: An Examination of The Buyer's Right to Avoid the Contract and its Effect on Different Sectors of the (Product) Market' (February 2006) <<http://www.cisg.law.pace.edu/cisg/biblio/singh.html>> accessed 7/25/2014.
4. Following Article 34 sentence 2 CISG, the seller has a right to cure up to that date of delivery any lack of conformity in the documents provided that the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. Article 37 CISG provides a similar right to cure in case of defective goods. See: André Janssen and Sörren Claas Kiene, 'The CISG and Its General Principles' in André Janssen and Sörren Claas Kiene (eds), CISG Methodology (Sellier.european law publishers GmbH, Munich 2009) 261, 274; Alastair Mullis, 'Obligations of the Seller' in Peter Huber and Alastair Mullis (eds), The CISG: a New Textbook for Students and Practitioners (Sellier.european law publishers 2007) 146.
1. .الطالب The seller seems to have no right to cure the legal defects where a third party claims ownership of the goods (Article 41 CISG) or claims an infringement of patent rights or trademarks (Article 42 CISG) although the seller could potentially cure the defect by settling the dispute with the third party. John O. Honnold, Uniform Law for International Sales under the 1980 United Nations Convention (3rd edn, Kluwer Law International, The Hague 1999) section 245.1; André Janssen and Sörren Claas Kiene (n 282) 274.
5. Article 34 CISG.
6. Article 37 CISG.
7. Peter Schlechtriem, 'Ch. 6: The Seller's Obligations Under the United Nations Convention on Contracts for the International Sale of Goods' in Galston and Smit (eds), International Sales: The United Nations Convention on Contracts for the International Sale of Goods (Matthew Bender 1984) 6-1, 6-28.
8. Joseph Lookofsky, 'The 1980 United Nations Convention on Contracts for the International Sale of Goods' in J.Herbots and R. Blanpain (eds), International Encyclopaedia of Laws - Contracts, Suppl 29 (December 2000) 1-192, comment on art. 26 CISG, 102.
9. Jonathan Yovel. 'The Seller's Right to Cure a Failure to Perform: An Analytic Comparison of the Respective Provisions of the CISG and The PECL' (2005) 1 Nordic Journal of Commercial Law,1
10. The buyer's right to avoid the contract based on fundamental breach is confirmed in Articles 49(1) (a) CISG.
11. Peter Huber, 'Remedies of the Buyer' in Peter Huber and Alastair Mullis (eds), The CISG: a New Textbook for Students and Practitioners (Sellier.european law publishers 2007) 217, 221, 225.
12. Shinichiro Michida, 'Cancellation of Contract, (1979) 27 American Journal of Comparative Law, 279' <<http://www.cisg.law.pace.edu/cisg/biblio/michida.html>>

accessed 7/27/2014; Shinichiro Michida. 'Cancellation of Contract' (1979) 27 American Journal of Comparative Law 279 Honnold, Uniform sale Law, (n 283) 214-312, 320.

13. Honnold, Uniform Law for International Sales, (n 283) 296; M. Will, 'Article 25' in C. M. Bianca and M. J. Bonell (eds), Commentary on the International Sales Law : The 1980 Vienna Sales Convention (Giuffrè, Milan 1987) 205, 349; Peter Huber, 'Remedies of the Buyer', in Peter Huber and Alastair Mullis (eds), (n 290) 222 and 228; Markus Muller-Chen, 'Article 48' in Ingeborg H. Schwenzer (ed), Commentary on the UN Convention on the International Sale of Goods (CISG) (3rd edn, Oxford University Press 2010) 732, para 15; Alastair Mullis, 'Avoidance for Breach under the Vienna Convention; A Critical Analysis of Some of the Early Cases' in M. Andreas and N. Jarborg (eds), Anglo-Swedish Studies in Law, Lustus Forlag (1998) 326, 343.

14. Peter Huber, in Peter Huber and Alastair Mullis (eds) (n 290) 222.

15. Honnold, Uniform Law for International Sales under the 1980 United Nations Convention, (n 283) 320ff.

16. Peter Huber, in Peter Huber and Alastair Mullis (eds) (n 290) 223.

17. Fritz Enderlein and Dietrich Maskow, International Sales Law: United Nations Convention on Contracts for the International Sale of Goods Convention on the Limitation Period in the International Sale of Goods (Oceana Publications 1992) 454, 187; Andrew Babiak. 'Defining "Fundamental Breach" Under the United Nations Convention on Contracts for the International Sale of Goods' (Spring 1992) 6 Temple International and Comparative Law Journal 113, 143, footnote 92; Leonardo Graffi. 'Case Law on the Concept of "Fundamental Breach" in the Vienna Sales Convention' (2003) 3 International Business Law Journal 338, 344.

18. Jacob S. Ziegel, 'Ch. 9: The Remedial Provisions in the Vienna Sales Convention: Some Common Law Perspectives' in Galston and Smit (eds), International Sales: The United Nations Convention on Contracts for the International Sale of Goods (Matthew Bender 1984) 9-1, 9-23.

19. The buyer can request substitute delivery only if the lack of conformity constitutes a fundamental breach.

20. M. Will, 'Article 48' in C. M. Bianca and M. J. Bonell (eds), Commentary on the International Sales Law : The 1980 Vienna Sales Convention (Giuffrè, Milan 1987) 347, 357.

21. Yovel, 'The Seller's Right to Cure' (n 288) 10.

22. Eric C. Schneider. 'The Seller's Right to Cure under the Uniform Commercial Code and the United Nation Convention of International sale of Goods' (1989-1990) 7(1) Arizona journal of International and Comparative Law 69, 72.

23. See for instance Germany 14 October 2002 Appellate Court Köln (Designer clothes case) [Available at: <http://cisgw3.law.pace.edu/cases/021014g1.html>]; Germany 31 January 1997 Appellate Court Koblenz (Acrylic blankets case) [Available at: <http://cisgw3.law.pace.edu/cases/970131g1.html>]; Switzerland 5

November 2002 Commercial Court of the Canton of Aargau (Inflatable triumphal arch case) [Available at: <http://cisgw3.law.pace.edu/cases/021105s1.html>]; Switzerland 5 November 2002 Commercial Court of the Canton of Aargau (Inflatable triumphal arch case) [Available at: <http://cisgw3.law.pace.edu/cases/021105s1.html>].

24. The breach did not justify avoidance of the contract since the non-conformity did not deprive the buyer of what he was entitled to expect under the contract: France 26 April 1995 Appellate Court Grenoble (Marques Roque Joachim v. Manin Rivière) [Available at: <http://cisgw3.law.pace.edu/cases/950426f2.html>]; Germany 2 March 1994 Appellate Court München (Coke case) [Available at: <http://cisgw3.law.pace.edu/cases/940302g1.html>]; for contra view regarding these decisions see Robert Koch, 'The Concept of Fundamental Breach of Contract under the United Nations Convention on Contracts for the International Sale of Goods (CISG)' (1999) Review of the Convention on Contracts for the International Sale of Goods (CISG) 1998, Kluwer Law International 177, 255.

25. The unsuccessful attempt to cure may amount as a fundamental breach entitles the buyer to avoid the contract Germany 1 February 1995 Appellate Court Oldenburg (Furniture case) [Available at: <http://cisgw3.law.pace.edu/cases/950201g1.html>]; Germany 14 August 1991 District Court Baden-Baden (Wall tiles case) [Available at: <http://cisgw3.law.pace.edu/cases/910814g1.html>]; see also Koch, 'The Concept of Fundamental breach', (n 303) 156.

26. Germany 31 January 1997 Appellate Court Koblenz (Acrylic blankets case) [Available at: <http://cisgw3.law.pace.edu/cases/970131g1.html>]; This case recurrently cited as an example of precedence of the seller's right to cure over the buyer's right to avoid the contract. See: Koch, 'The Concept of Fundamental breach', (n 303) 253-254; Alastair Mullis, 'Avoidance for Breach under the Vienna Convention: A Critical Analysis of Some of the Early Cases' (n 292) 343; Graffi, 'Case Law on the Concept of "Fundamental Breach" in the Vienna Sales Convention', (n 296) 345; Peter Huber, 'CISG: The Structure of Remedies', (January 2007) 71 *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, 13-34, 23.

27. The buyer had failed to prove the conclusion of a distributorship agreement; therefore, the question whether breach of such agreement constitute a fundamental breach remained undecided. However, the court stated that the breach of a secondary obligation under the contract, like that deriving from an exclusive distributorship agreement, if proved, may amount to a fundamental breach giving a right to avoid the contract (Art. 49(1) (a) CISG.)

28. But see different analysis of this case by Koch, 'The Concept of Fundamental breach', (n 303) 253-254; Alastair Mullis, 'Avoidance for Breach under the Vienna Convention: A Critical Analysis of Some of the Early Cases', (n 292) 343; Graffi, 'Case Law on the Concept of "Fundamental Breach" in the Vienna Sales Convention', (n 296) 345; Peter Huber, 'CISG: The Structure of Remedies',

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29. Italy 24 November 1989 Court of First Instance Parma (Foliopack v. Daniplast) [Available at: <http://cisgw3.law.pace.edu/cases/891124i3.html>]; Germany 17 September 1991 Appellate Court Frankfurt (Shoes case) [Available at: <http://cisgw3.law.pace.edu/cases/910917g1.html>]; Germany 1 February 1995 Appellate Court Oldenburg (Furniture case) [Available at: <http://cisgw3.law.pace.edu/cases/950201g1.html>]; Germany 25 June 1997 Supreme Court (Stainless steel wire case) [Available at: <http://cisgw3.law.pace.edu/cases/970625g2.html>]; ICC Arbitration Case No. 7531 of 1994 (Scaffold fittings case) [Available at: <http://cisgw3.law.pace.edu/cases/947531i1.html>]; Yovel, 'The Seller's Right to Cure' (n 288) 10-11; Graffi, 'Case Law on the Concept of "Fundamental Breach" in the Vienna Sales Convention' (n 296) 345.

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