

Reproduced with permission of Camilla B. Andersen & Ulrich G Schroeter eds., *Sharing International Commercial Law across National Boundaries: Festschrift for Albert H. Kritzer on the Occasion of his Eightieth Birthday*, Wildy, Simmons & Hill Publishing (2008) 247-266

## *Favor Contractus* Reading the CISG in Favor of the Contract

Bertram Keller [\*]

*Favor contractus* is often said to be an underlying principle of the CISG<sup>1</sup> according to Article 7(2) of the Convention. *Favor contractus* means to maintain a contract. But why should a contract be maintained? After a short inquiry into its theoretical foundations [I.], the article tries to demonstrate where and how the principle is at play in the CISG. The inductive inquiry embraces regulations dealing with contract formation [II.], performance [III.] and remedies for non-performance [IV.]. At all events, disputes will be interpreted 'in favor of the contract'. As a general principle of the Convention, *favor contractus* demands cooperation, a favorable interpretation and sometimes even an adaptation of the contract [V.].

### I. *FAVOR CONTRACTUS* MEANS TO MAINTAIN A CONTRACTUAL BOND.

'*Favor contractus*' could be rendered 'in favor of the contract'. But what

\* University of Munich. The author studied law and philosophy in Heidelberg, Cambridge, Paris and Vienna, has lectured on international trade law and legal theory in Rome and Frankfurt and is in the last throes of a Ph.D. thesis on the foundations of contract law. As a former participant and continuing arbitrator in the Vis Moot he came to know Al Kritzer in Vienna. At the time he was fully overwhelmed to learn that the brain behind the most comprehensive electronic source on the CISG was not a young computer nerd, but a distinguished elder professor. Wherever '<http://cisgw3>' appears in the notes to this text, it will be in his particular honour.

<sup>1</sup> The following abbreviations for international sets of contract law rules will be used: 'CISG' for the 'United Nations Convention on Contracts for the International Sale of Goods' (1980); 'UP' for the 'UNIDROIT Principles of International Commercial Contracts' (Revised 2004); 'PECL' for the 'Principles of European Contract Law' (Revised 2002) and 'VC' for the 'Vienna Convention on the Law of Treaties' (1969).

does that mean? Could one ever read contract law against the contract? That depends on the underlying conception of 'contract'. According to Oliver Wendell Holmes a contractual obligation is no duty to perform a contract as such but only to perform or pay damages at the promisor's opinion.<sup>2</sup> As an economic strategy, it is sometimes more efficient to breach or terminate a contract.<sup>3</sup> To break off is, of course, not to favor a contract. Is *favor contractus* just a synonym for the demand that contracts be observed (*pacta sunt servanda*)?

The maxim *pacta sunt servanda* is attributed to Cicero,<sup>4</sup> but does not reflect the legal status of mere agreements in classical Roman law.<sup>5</sup> The idea began its real career under Canon law and Natural Law<sup>6</sup> and eventually became the fundamental basis of contract law in general<sup>7</sup> and international law in particular.<sup>8</sup> In this respect Article 26 of the 1969 Vienna Convention on the Law of Treaty states that: 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith'. Correspondingly Article 1.3 of the UNIDROIT Principles of International Commercial Contracts reads: 'A contract validly entered into is binding upon the parties'. The CISG gives the principle a more pragmatic face in Article 46: 'The buyer may require performance by the seller'. To keep the contract is to perform it as previously agreed upon. *Pacta sunt servanda* calls for the sanctity of contractual commitments. Sanctity, however, focuses on compliance with, not maintenance of the contract. Contract law may attempt to guarantee this

<sup>2</sup> Holmes, OW (1881) *The Common Law* (Reprint 1991) Dover Publications, Chapter VIII.

<sup>3</sup> Cf. the lead opinion by Judge Posner in: U.S. Court of Appeal, 9 August 1985 (*Lake River v. Carborundum*) 769 *Federal Reporter 2d* at 1284.

<sup>4</sup> *De officiis* III, 92: '*Pacta et promissa semperne servanda sint*' (Contracts and promises are always to be kept).

<sup>5</sup> Ulpian, D. 2.14.7.4 '*nuda pactio obligationem non parit*' (mere agreements do not oblige); cf Zimmermann, R (1990) *The Law of Obligations. Roman Foundations of the Civilian Tradition* (Paperback 1996) Clarendon at 537 et seq.

<sup>6</sup> For an historical overview cf Wehberg, H (1959) '*Pacta sunt servanda*' (53) *American Journal of International Law* at 775.

<sup>7</sup> Zweigert, K and Kötz, H (1998) *An Introduction to Comparative Law* (3rd edition) Oxford University Press § 24.

<sup>8</sup> Kelsen, H (1960) *Pure Theory of Law* University of California Press, Chapter IX, no. 49; Kelsen, H (1966) *Principles of International Law* (Reprint 2003) Lawbook Exchange, Chapter 1.

strict sanctity by means of extensive rights to terminate the contract for reasons of non-compliance with any of its terms.

In contrast *favor contractus* demands to honor contractual bonds in general. 'Whenever possible, a solution should be adopted in favour of the valid existence of the contract against its premature termination on the initiative of one of the parties'.<sup>9</sup> But why to maintain a contract? The following reasons may be adduced:

*Autonomy.* Parties negotiate a consensual position that allocates risks and goals. A contractual bond materializes the will of the parties. 'The principle of "favor contractus" correlates with the general significance of the contractual consensus of the parties as the driving force behind the creation and evolution of transnational commercial law'.<sup>10</sup> Although, autonomy includes the freedom of 'changing your mind'.<sup>11</sup>

*Security.* Contracts establish mutual reliance. Contractual bonds stabilize the relation between parties. The stability of contractual commitments provides general security for international trade. In this way *favor contractus* coincides with the principle *pacta sunt servanda* as security of sanctity. Still, as previously noted, a strict construal of the contract's terms might also call for its termination.

*Utility.* Liquidation mostly means economic loss. International transactions involving long distances increase potential loss. Time and money invested provide a strong economic reason to uphold the contract.<sup>12</sup> However, as the economic analysis of law has demonstrated, there may be situations where a breach of contract is economically more efficient.<sup>13</sup>

<sup>9</sup> Bonell, MJ (1987) in Bianca, CM and Bonell, MJ (eds) *Commentary on the International Sales Law* Guiffre, Art 7 no 2.3.2.2, available at: <http://cisgw3.law.pace.edu/cisg/biblio/bonell-bb7.html>.

<sup>10</sup> Berger, KP (1999) *The Creeping Codification of the Lex Mercatoria* Kluwer at 162.

<sup>11</sup> Farnsworth, EA (1998) *Changing your mind. The Law of Regretted Decisions* Yale University Press at 174.

<sup>12</sup> Magnus, U (1995) 'Allgemeine Grundsätze im UN-Kaufrecht' (59) *Rabel Journal of Comparative and International Private Law* 469 at 483, english translation 'General principles of UN-Sales Law' available at: <http://cisgw3.law.pace.edu/cisg/text/magnus.html>.

<sup>13</sup> Posner, RA (1998) *Economic Analysis of Law* (5th ed) Aspen Publishers § 4.8; Schwartz, A and Scott, RE (2003) 'Contract Theory and the Limits of Contract Law'

*Justice.* Parties agree on a particular exchange of benefits. The reciprocal structure establishes a presumption of fairness rather than sanctity.<sup>14</sup> To uphold the contract is to honor the 'equilibrium' between the parties.<sup>15</sup> Yet, following that reasoning, unfair or unequal contracts should vanish.

All four classic legal reasons could be said to argue just as much in favor of the contract as against. Thus *favor contractus* is not easily traced back to one definite underlying rationale. 'In favor of' always implies a conflict. The conflict arises between those arguments that speak for the contract and those that speak against it. In terms of argumentation theory *favor contractus* would be more a 'priority relation' than a 'principle'.<sup>16</sup> *Favor contractus* expresses a priority for the contract. Nonetheless this idea is a sound 'general principle underlying the Convention' according to Article 7(2) CISG.<sup>17</sup> 'Principle' means under the CISG a generic term for normative standards suitable to fill gaps and guide interpretation. The application of principles is necessary to achieve the mandate of Article 7(1) to 'promote uniformity in its application'.<sup>18</sup> Yet not every thinkable standard is an 'underlying principle' of the CISG. A principle is only 'underlying the Convention', if the normative idea can be traced back from its provisions. Applying a general principle presupposes an inductive inquiry. The following three sections lay out how *favor contractus* underlies all kinds of regulations under the Convention concerning formation [II.], performance [III.] and remedies for non-performance [IV.]. If disputes about the meaning of some provisions should arise, the text already implements a reading 'in favor of the contract'.

---

(113) *Yale Law Journal* 541.

<sup>14</sup> Sharma, KM (1999) 'From Sanctity to Fairness' (18) *New York Law School Journal of International & Comparative Law* 95.

<sup>15</sup> Nassar, N (1995) *Sanctity of Contracts Revisited* Martinus Nijhoff Publishers at 235 arguing for a general 'equilibrium theory' in transnational law.

<sup>16</sup> Alexy, R (2000) 'On the Structure of Legal Principles' (13) *Ratio Juris* 294 at 297.

<sup>17</sup> Magnus 'Allgemeine Grundsätze im UN-Kaufrecht' supra fn 12 at 483.

<sup>18</sup> Honnold, JO (1999) *Uniform Law for International Sales under the 1980 United Nations Convention* (3rd ed) Kluwer § 102, available at: <http://cisgw3.law.pace.edu/cisg/biblio/honnold.html>.

## II. FAVORABLE FORMATION PROMOTES THE EMERGENCE OF CONTRACTS.

How could a contract be favored, when it is not even there, that is, if it is yet to exist? Notwithstanding this paradox the principle of *favor contractus* already appears in the field of contract formation. Favorable formation facilitates the emergence of a contractual bond.

### 1. Form

Under the CISG the contract is 'not subject to any requirement as to form' (Article 11).<sup>19</sup> As some legal cultures have strict formal requirements freedom of form is by no means a given. By its informal approach the CISG facilitates the formation of contracts. Party autonomy overrides conflicting security interests. As Article 29(1) CISG underlines, the mere agreement of the parties suffices to conclude a contract. With this general idea of 'informality'<sup>20</sup> the CISG favors the emergence of contracts. The parties could of course agree in the contract on formal requirements, thus restricting their own autonomy. Article 29(2) CISG underlines the binding nature of such self-restrictions. Yet, according to the second sentence the reliance of one party on assenting conduct by the other party may outweigh a 'no oral modification'-provision. To allow any assenting statement as 'conduct'<sup>21</sup> focuses on the concrete reliance interest. The demand for 'further activities'<sup>22</sup> is based on the more abstract idea of stability. If any statement amounts to 'conduct' that would practically invalidate the first sentence of Article 29(2) CISG. Thus 'conduct' should be read parallel to Article 18(3) CISG as indicating 'assent by performing an act'. Vice versa the preclusion of Article 29(2) CISG should also apply by analogy if a party relied on a contract formed according to Article 18(3)

<sup>19</sup> Cf Article 1.2 UP and Article 2:101(2) PECL.

<sup>20</sup> Mexican *Compromex* Arbitration, 29 April 1996 (*Conservas La Costeña v. Lanin*), available at: <http://cisgw3.law.pace.edu/cases/960429m1.html>.

<sup>21</sup> Honnold *Uniform Law for International Sales* supra fn 18 at § 204.

<sup>22</sup> Enderlein, F and Maskow, D (1992) *International Sales Law* Oceana Publications, Art 29 no 4 (available at: <http://cisgw3.law.pace.edu/cisg/biblio/enderlein.html>).

CISG and ignored the writing requirement.<sup>23</sup> If the parties have performed, both relying on an existing contract, not only the principle *favor contractus* calls for a contract.

## 2. Offer and Acceptance

The CISG formation rules also promote contractual bonding. Article 16(2) CISG allows for irrevocable offers.<sup>24</sup> In favor of the contract reliance overrules the freedom to change one's mind. The offeree may indicate its assent by 'performing an act' (Article 18(3) CISG), which could consist of 'any form of conduct' (Article 2:204(1) PECL). A late acceptance is under the prerequisites of Article 21 CISG 'nevertheless effective'.<sup>25</sup> Even a reply which modifies the offer amounts to an acceptance under Article 19(2) CISG if it does 'not materially alter the terms'.<sup>26</sup> In all these provisions reliance outweighs the other party's autonomy of will. Or the autonomy is limited to a reaction 'with undue delay' as under Article 19(2) CISG or Article 21(2) CISG. Thus the CISG reads offer and acceptance in favor of conclusion. This underlying idea of *favor contractus* in contract formation could contribute an argument to the endless battle over the 'battle of forms'. The 'last shot rule'<sup>27</sup> always implies the risk of dissent and nullification of the contract. A favorable interpretation maintains the contract and any standard terms which are 'common in substance' as provided in Article 2.1.22 UP and Article 2:209 PECL.

## 3. Open terms

An offer under the CISG has to be 'sufficiently definite'. According to Article 14(1) CISG the parties have to indicate the goods and at least to make

<sup>23</sup> Contra Enderlein & Maskow *International Sales Law* supra fn 22 at Art 11 no 1.1: 'In such event there will be no contract since the written form is required, even though the parties have performed'.

<sup>24</sup> Cf Article 2.14(2) UP and Article 2:202(3) PECL.

<sup>25</sup> Cf Article 2.1.9 UP and Article 2:207 PECL.

<sup>26</sup> Cf Article 2.1.11(2) UP and Article 2:208(2) PECL.

<sup>27</sup> Cf the critical discussion in Honnold *Uniform Law for International Sales* supra fn 18 at § 170.3.

'provision for determining the quantity and price'. Yet, the price determination in Article 55 CISG presupposes that no price was fixed and no provision made. Article 14(1) CISG aims to secure a stable core of agreement between the parties. This interest in legal security conflicts with the party autonomy promoted in Article 55 CISG, i.e., the general consent of the parties to have a contract. Tolerating open terms, Article 55 CISG underlines the idea of *favor contractus*.<sup>28</sup> Under a consistent reading of the two Articles an offer is sufficiently definite if it 'can be determined' either by the parties or under the CISG.<sup>29</sup> A contextual interpretation of the contract under Article 8(3) CISG might often suffice to determine its content.<sup>30</sup> Parties could be held for instance to their practices or precontractual negotiations.<sup>31</sup> Otherwise the price could be fixed according to Article 55 CISG. As the parties showed their intention to be bound without determining the price, the contract does not have to fail.

#### 4. Validity

The 'mere agreement' of the parties may modify or terminate the contract. Thus Article 29 CISG hinders additional formal requirements of validity. In general the CISG 'is not concerned with the validity of the contract' (Article 4 CISG). The theoretical range of *favor contractus* concerning questions of validity may be seen in Chapter 3 UP and Chapter 4 PECL. Initial impossibility does not prevent the emergence of a contract.<sup>32</sup> Only some relevant mistakes may lead to an avoidance.<sup>33</sup> Avoidance is excluded, if the party in

<sup>28</sup> Correspondingly the UNIDROIT Principles state in Article 2.1.14 that terms deliberately left open do 'not prevent a contract from coming into existence'.

<sup>29</sup> According to Article 2:103 PECL 'there is sufficient agreement if the terms: (a) have been sufficiently defined by the parties so that the contract can be enforced, or (b) can be determined under these Principles'.

<sup>30</sup> Austrian Supreme Court, 10 November 1994, available at: <http://cisgw3.law.pace.edu/cases/9411103a3.html>.

<sup>31</sup> Bonell, MJ (1990) 'Formation of Contracts and Precontractual Liability Under the Vienna Convention on International Sale of Goods' in *Formation of Contracts and Precontractual Liability* ICC Publishing Pub. No. 440/9, available (in German) at: <http://www.tldb.net>.

<sup>32</sup> Article 3.3 UP; Article 4:102 PECL.

<sup>33</sup> Article 3.5 UP; Article 4:103 PECL.

error 'expressly or impliedly confirms the contract'<sup>34</sup> or the other party is 'willing to perform'<sup>35</sup>. The effect of the avoidance is limited to those terms affected by the grounds of invalidity, unless it is 'unreasonable to uphold the remaining contract'.<sup>36</sup> The latter provision on partial avoidance exposes a general pattern in favor of validity. The contract is considered to be valid as long as there are no strong reasons to the contrary. Despite the fact that the CISG does not apply to validity, these examples complete the picture of favorable formation of contracts in international trade in general.

### III. FAVORABLE IMPLEMENTATION DEMANDS COOPERATION.

A contract already came into existence. No breach occurred yet. The parties are on their way to perform the contract. What role could *favor contractus* play at this stage of implementation?

#### 1. Determination

Implementation presupposes the exact determination of the performances owed. If the contract does not fix the price or uses vague terms, Article 55 CISG assumes the 'price generally charged' at the time of contract conclusion. The determination of a price allows for performance of the payment. Thus Article 55 CISG enables the implementation of the contract. Beyond that the UP and the PECL fix a 'reasonable price' if the determination by one party or a third person fails or is manifestly unreasonable.<sup>37</sup> By acknowledging the underlying idea of *favor contractus*, one could decide similar cases under the CISG in an analogous manner. As already the 'price generally charged' is a conception of reasonableness, that method is fully consistent with Article 55 CISG. The determination of the goods is their specification. Except as otherwise agreed, the seller specifies the goods and arranges for delivery. The question of conformity arises only after the seller already determined and delivered the goods. Thus the act of determination is unilateral.

<sup>34</sup> Article 3.12 UP; Article 4:114 PECL.

<sup>35</sup> Article 3.13 UP; Article 4:105(1) PECL.

<sup>36</sup> Article 3.16 UP; Article 4:116 PECL.

<sup>37</sup> Cf Article 5.1.7 UP, Article 6:105 and Article 6:106(2) PECL; cf also Sec. 2-305 UCC.

However the seller may have to provide the buyer with information, eg under Article 32(3) CISG, to allow for effective insurance. If the buyer has to specify some features of the goods and fails to do so, the seller may 'make the specifications himself' (Article 65(1) CISG). Efficient performance outweighs the original allocation of the parties so to favor the implementation of the contract.

## 2. Mode of Performance

Late performance is considered non-performance and will be handled there. If the seller does not deliver all of the goods, according to Article 51(1) CISG only the missing part constitutes a non-performance. The buyer may only avoid the entire contract if the delivery in parts amounts to a fundamental breach (Article 51(2) CISG). Thus, the CISG allows for partial performance unless it does substantially deprive the other party of what it is entitled to expect under the contract. Unless there was not a specific risk allocation or a concrete reliance of the buyer, it is simply fair and economically more efficient to uphold the contract. The same rationale underlies the delivery by installments in Article 73 CISG. The failure to perform one installment only allows for remedies concerning 'that' installment. To avoid the rest of the contract for the future demands additional 'good grounds'. In contrast to these clear signs of *favor contractus*, Article 52(1) CISG gives the buyer a choice to accept or refuse earlier performance. The UP use instead the general formula that a party may reject a mode of performance unless he 'has no legitimate interest in so doing'.<sup>38</sup> Earlier performance provokes the same normative conflict as partial performance does. Thus it is more consistent to demand a specific reason for the refusal. Reading Article 52(1) CISG correspondingly in favor of the contract, the buyer may not reject without any reason, but has to lay down a specific interest in punctual performance. An arbitrary choice of the buyer ignores the economic reality of the contract and the party's duty to act in good faith.<sup>39</sup> The same should be true for perform-

<sup>38</sup> Article 6.1.3 and 6.1.5 UP. According to 7:103 PECL a party may decline a tender 'except where acceptance of the tender would not unreasonably prejudice its interests'.

<sup>39</sup> For an attempt to clarify the meaning of good faith under Article 7(1) CISG cf Magnus, U (2006) 'Comparative editorial remarks on the provisions regarding good

ance by third persons. If the contract does not call for personal performance the buyer could not refuse performance by a third person.<sup>40</sup> A different set of interests underlies Article 52(2) CISG. As the excessive quantity is an imposed acquisition for which he has to pay, that does already justify his refusal.

### 3. Conformity

The provisions on conformity guard the central entrance door to remedies for breach of contract. Non-conformity alters performance to 'non-performance'.<sup>41</sup> However, the buyer loses his right to avoid the contract if he does not examine the goods (Article 38 CISG) and make notice as to the lack of conformity within a reasonable time (Article 39 CISG). Correspondingly, the buyer has to notify the seller of any right or claim by a third party (Article 43 CISG). The duties of examination and notification should enable the seller to remedy his non-performance and thereby maintain the contract. Thus, the notice has to specify as precisely as possible the lack of conformity to permit the seller to react adequately.<sup>42</sup> The prospect of remedy for non-performance increases if the seller is informed without delay. The buyer has a period 'as short [...] as practicable' (Article 38 CISG) to examine and 'a reasonable time' (Article 39 CISG) to notify.<sup>43</sup> But what does that mean in practice? The examination of complicated machines and a detailed notice of insufficient conformity could not be expected within few weeks.<sup>44</sup> However,

---

faith in CISG Article 7(1) and the UNIDROIT Principles Article 1.7' in Felemegas, J (ed) *An International Approach to the Interpretation of the United Nations Convention on Contracts for the International Sale of Goods (1980) as Uniform Sales Law* Cambridge University Press, also available at: <http://cisgw3.law.pace.edu/cisg/principles/uni7.html#um>.

<sup>40</sup> Cf Article 7:106 PECL which demands that the third person either acts with the assent of the obligor or has a legitimate self interest in the performance.

<sup>41</sup> Cf the explicite definition of 'non-performance' in Article 7.1.1UP.

<sup>42</sup> Swiss Supreme Court, 13 November 2003 (*Used laundry machine case*), available at: <http://cisgw3.law.pace.edu/cases/031113s1.html>.

<sup>43</sup> For a clear distinction of the two periods of time cf CISG Advisory Council (2004) 'Opinion no. 2: Article 38 and 39', available at: <http://cisgw3.law.pace.edu/cisg/cisg-ac-op2.html>, at no. 5.9.

<sup>44</sup> U.S. District Court [Western District of Michigan, Southern Division], 17 December 2001 (*Shuttle Packaging Systems v. Jacob Tsonakis*), available at: <http://>

to facilitate cure and provide a stable time frame for contractual implementation a general guideline should be one month.<sup>45</sup> After two years without notice Article 39(2) CISG cuts off the buyer's rights regardless of his examinations. Certainty of the implemented performance prevails over fairness of exchange. This brings us back to the fundamental question: When are goods in conformity? The goods have to be of the 'quantity, quality and description required by the contract' (Article 35(1) CISG). The autonomous agreement by the parties sets the standards. However, in interpreting the agreed upon terms the purpose of the contract has to be taken into account. Discrepancies which are usual in the particular sector of trade do not constitute a lack of conformity.<sup>46</sup> Even more important for the faith of the contract is the burden of proof. The buyer has to prove the non-conformity of the goods taken over.<sup>47</sup> Without sufficient evidence the contract prevails.

#### IV. FAVORABLE NON-PERFORMANCE HINDERS AVOIDANCE.

The principle of *favor contractus* is most evident in the event of non-performance. How a contractual relation could be maintained after a breach depends on the possibilities for avoidance of the contract. Liquidation is still, of course, a result which should reproduce the reciprocal interests of the parties after the breach. But liquidation is not a vivid contractual relation anymore. The CISG stresses the idea of *pacta sunt servanda* in Article 46(1) CISG with the general right of the buyer to require performance. Even if national courts are not bound to enter a judgement for specific performance (Article 28 CISG), the normative emphasis remains.

---

[cisgw3.law.pace.edu/cases/011217u1.html](http://cisgw3.law.pace.edu/cases/011217u1.html).

<sup>45</sup> Schwenger, I in Schlechtriem, P and Schwenger, I (2005) (eds) *Commentary on the UN Convention on the International Sale of Goods* (2nd ed) Oxford University Press at Art 39 para 17; cf also German Supreme Court, 3 November 1999, available at <http://cisgw3.law.pace.edu/cases/991103g1.html>.

<sup>46</sup> Schwenger in Schlechtriem & Schwenger *Commentary* supra fn 45 at Art 39 para 8.

<sup>47</sup> Swiss Supreme Court, 13 November 2003, supra fn 42.

### 1. Fundamental Breach

The idea of 'fundamental breach' lies at the heart of the CISG's conception of non-performance. Buyer and seller may only avoid the contract straightaway if the breach is fundamental (Articles 49 and 64 CISG).<sup>48</sup> The buyer may require substitute goods only if the lack of conformity constitutes a fundamental breach (Article 46(2) CISG). A contract performed in part may only be avoided if the failure amounts to a fundamental breach of the entire contract (Article 51(2) CISG). Even if there was a fundamental failure to perform an installment, the buyer may only avoid the contract if he has 'good grounds' to suspect a fundamental breach in respect to future installments (Article 73(2) CISG). The general rule is: Efficient performance supersedes scrupulous performance. Only if the failure to perform destroys the core of the reciprocal exchange does it disrupt the contractual relation. Unless that point has been reached, the CISG stabilizes the contractual relationship between the parties. What, then, makes a breach fundamental? According to Article 25 CISG, a breach is fundamental if it deprives the other party 'of what he is entitled to expect under the contract'. The failure has to be as intense as the purpose of the contract could not be fulfilled anymore.<sup>49</sup> If the other party offers to cure its failure and such a remedy is reasonable, only immense time pressure may frustrate the contractual purpose. Thus a reasonable offer to cure hinders a fundamental breach.<sup>50</sup> The breach is likewise not fundamental if the buyer could make some use of the defective goods.<sup>51</sup> Whenever damages or adjustment of the price offer a reasonable compensation for the disappointed expectations the contract remains. Even if the purpose was frustrated, this detrimental result had to be foreseeable. Contractual expectations are limited by a fair allocation of risks. Again the outcome favors the contractual bond.

<sup>48</sup> Article 7.3.1 UP and Article 9:301 PECL use the term 'fundamental non-performance'.

<sup>49</sup> Koch, R (1999) 'The Concept of Fundamental Breach of Contract under the United Nations Convention on Contracts for the International Sale of Goods (CISG)' *Review of the Convention on Contracts for the International Sale of Goods (CISG) 1998* Kluwer 348, available at: <http://cisgw3.law.pace.edu/biblio/koch.html>.

<sup>50</sup> Honnold *Uniform Law for International Sales* supra fn 18 at § 184.

<sup>51</sup> German Supreme Court, 3 April 1996 (*Cobalt sulphate case*), available at: <http://cisgw3.law.pace.edu/cases/960403g1.html>.

## 2. Additional Period

The buyer may fix an additional period of time for performance.<sup>52</sup> If he does so, Article 47(2) CISG excludes any remedy for breach of contract other than damages for the delay. Following the idea of *venire contra factum proprium* the buyer is estopped from refusing performance that he has invited.<sup>53</sup> 'The other party can be expected to rely on that invitation'.<sup>54</sup> However the CISG goes one step further. The buyer has to fix an additional period 'of reasonable length'. If the period is too short, his commitment under Article 47(2) CISG nevertheless endures for the reasonable length.<sup>55</sup> As an opportunity to repair may require less time than solving a delivery problem, the 'reasonable length' depends on the remaining possibilities for performance. The underlying idea of the provision is to protect the seller while he makes efforts to deliver conforming goods.<sup>56</sup> Consequently, the additional period has really to allow for performance.<sup>57</sup> As the buyer may, according to Article 46 CISG, freely choose in between these remedies, he may opt for the faster alternative. Whereas the self-commitment first favors the contract, the additional period provides an alternative reason for avoidance under Article 49(1)(b) CISG. As late performance does not automatically constitute a fundamental breach of contract, the buyer may resolve this uncertainty by fixing an additional period of time. Certainty prevails here over the contract. However, this privilege of certainty demands that the buyer stress the final character of the period fixed. The finality only effects the seller. Avoidance does not befall the contract *ipso facto*, but has to be declared expressively. The buyer may of course postpone that declaration and set as many further 'additional periods'

<sup>52</sup> The following arguments equally apply to the additional period under Article 63 CISG.

<sup>53</sup> This idea is underlying Article 80 CISG and forms part of the good faith principle in Article 7(1) CISG.

<sup>54</sup> Honnold *Uniform Law for International Sales* supra fn 18 at § 291.

<sup>55</sup> German Court of Appeal Naumburg, 27 April 1999 (*Automobile Case*), available at <http://cisgw3.law.pace.edu/cases/990427g1.html>.

<sup>56</sup> Secretariat's Commentary on Article 43 of the 1978 Draft in (1981) *United Nations Conference on Contracts for the International Sale of Goods (Vienna, 10 March-11 April 1980)*, *Official Records United Nations*, I at 39 et seq, available at: <http://cisgw3.law.pace.edu/cisg/text/secomm/secomm-47.html>.

<sup>57</sup> Audit, B (1990) *La vente internationale de marchandise* LGDJ at no 130.

as he wants to save the contract.<sup>58</sup> For any other defects except late performance, the additional period does not lead to a right to avoid the contract under Article 49(2) CISG.<sup>59</sup> Without this restriction the buyer might circumvent the general conception of fundamental breach.

### 3. Cure

The seller may cure any non-performance, including non-conforming documents (Article 34 CISG) before (Article 37 CISG) and after (Article 48 CISG) the time of delivery. By means of the cure provisions the CISG offers a powerful tool with which to maintain the contract. Article 50 CISG expressly excludes a reduction of price if the seller remedies a failure to perform. However, the decisive question is: does avoidance take priority over cure?<sup>60</sup> This question is misleading. As discussed above, a reasonable offer to cure prevents a breach from becoming fundamental. The prospect to implement the contract postpones avoidance. If, on the other hand, the buyer fixes an additional period of time, he, in fact, invites the seller to cure. The pending cure hinders an avoidance of the contract. Yet the additional period may run out or the success of the cure turn unclear. The seller remains in an uncertain position as to whether the buyer deems the cure a suitable and timely remedy. If the buyer does not react to a corresponding request, the seller may rely on his own indications (Article 48(2) CISG). That reliance does not, of course, anticipate an acceptance of the cure. But the buyer has to accept the cure, unless he suffers 'unreasonable inconvenience'. Otherwise, he loses his remedies for non-performance.<sup>61</sup> The buyer may refuse an attempt by the seller to save the contract only if he has a 'legitimate interest in refusing

<sup>58</sup> Will, M in Bianca/Bonell *Commentary* supra fn 9 at 344, available at: <http://cisgw3.law.pace.edu/cisg/biblio/will-bb47.html>.

<sup>59</sup> Schlechtriem, P (1986) *Uniform Sales Law* Manz at 75, available at: <http://cisgw3.law.pace.edu/cisg/biblio/slechtriem-47.html>.

<sup>60</sup> The question is under dispute since the Vienna Conference, cf Schneider, EC (1989) 'The Seller's Right to Cure under the Uniform Commercial Code and the United Nations Convention on Contracts for the International Sale of Goods' (7) *Arizona Journal of International and Comparative Law* 82, available at: <http://cisgw3.law.pace.edu/cisg/biblio/schneider.html>.

<sup>61</sup> Heuzé, V (2000) *La vente internationale de marchandises* LGDJ at 264; Bianca, CM in Bianca/Bonell *Commentary* supra fn 9, Art 37 no 3.2.

cure' as formulated in Article 7.1.4(c) UP. In favor of the implementation of the contract the buyer even has to tolerate slight imperfections of the goods.<sup>62</sup> The right to cure in Articles 34, 37 and 48 CISG is mirrored by the buyer's right to require repair under Article 46(3) CISG. Finally the buyer should also be allowed to cure deficiencies in his performance like an inaccurate letter of credit.

#### 4. Impediments

Under Article 79 CISG a party is not liable for a failure to perform 'due to an impediment beyond his control'. This exemption does not affect the maintenance of the contract, but only the claim for damages as Article 79(5) CISG clarifies. In all cases without an objective impossibility, the other party may still require performance. If the impediment is only temporary, the right to performance is not enforceable 'for the period during which the impediment exists'. The impediment could also cause other non-performances such as a delay, wrong delivery or defects in the goods. Here, the buyer may still claim his rights under Article 46 CISG to delivery, replacement or repair.<sup>63</sup> Of course, he could also avoid the contract, if the failure amounts to a fundamental breach. Furthermore an impediment to substantial restitution hinders the avoidance of the contract (Article 82 CISG).

#### 5. Anticipatory Breach

The possibility to avoid the contract before the date of performance seems to run counter to the principle of *favor contractus*. Yet the CISG provisions for anticipatory breach in Articles 71-73 CISG establish a process of communication between the parties which may, on the contrary, revive an endangered contractual relation. In particular, the right to suspend under Article 71 CISG may stabilize a difficult situation of contractual implementation, where the reliance of one party is disturbed. Moreover Article 72 CISG aims to clarify an uncertain situation of performance, one that may result in dissolu-

<sup>62</sup> Honnold *Uniform Law for International Sales* supra fn 18 at § 247.

<sup>63</sup> Stoll, H and Gruber, G in Schlechtriem & Schwenger *Commentary* supra fn 45 at Art 79 para 46.

tion but first serves an implementation of the contract. An avoidance under Article 72(2) CISG presupposes a notice to the other party 'in order to permit him to provide adequate assurance of his performance'. To enable an adequate reaction the notice has to specify the threat of a fundamental breach in sufficient detail. Given electronic forms of communication the restriction 'if time allows' should not be given much weight anymore.<sup>64</sup> If the party accepts the offered assurance, its right to avoid the contract ceases.<sup>65</sup> But what constitutes, in case of disapproval, an 'adequate assurance' according to Articles 71(3) and 72(2) CISG? Adequacy depends on the circumstances. A bank guarantee is surely enough to show creditworthiness but won't help a buyer awaiting special goods. One may not even exclude mere statements if the threat was caused by a statement as well.<sup>66</sup> The assurance has to react openly to the threats and fears of the other party and should not try to veil the problems. Yet, absolute security is simply not possible prior to performance. In favor of the contract an assurance should be held 'adequate' if it is *prima facie* convincing. The suspecting party has to prove that it is not. Anticipatory breach marks a troubled risk allocation through disturbances in the contractual implementation. The provisions allow the parties to find a new balance of interests.<sup>67</sup>

#### V. TO MAINTAIN A CONTRACT IS TO FAVOR COMMUNICATION.

Our safari through the main parts of the CISG expounded numerous conflicts resolved in favor of the contract. The fundamental conflict in contract formation arises between security – including reliance – and freedom of will. Party autonomy may overrule formal security as in Articles 11 or 29 CISG. Or reliance may outweigh a full autonomy of will as in Articles 16, 18 or 19 CISG. Either way, the CISG interpretes the action of the parties in such a way as to promote the emerging contract. Implementing the contract efficiently may collide with fair allocation. The CISG tries to determine vague allocations

<sup>64</sup> Honnold *Uniform Law for International Sales* supra fn 18 at § 398.

<sup>65</sup> Hornung, R in Schlechtriem & Schwenger *Commentary* supra fn 45 at Art 72 para 21.

<sup>66</sup> Bennett, T in Bianca/Bonell *Commentary* supra fn 9 at 523.

<sup>67</sup> A special security interest may arise in trade relations with developing countries, cf Strub, MG (1989) 'Anticipatory Breach and Developing Countries' (38) *International & Comparative Law Quarterly* 475.

as in Article 55 CISG and extends the possible modes of performances as in Article 51(2) CISG. Here efficient performance supports the contractual bond, whereas Article 39 CISG tries to enable efficient reactions to non-performance. Correspondingly, the CISG conceptualizes avoidance as the *ultima ratio* of non-performance.<sup>68</sup> A party has to prove a fundamental breach or fix an additional period for performance. The right to cure or to provide adequate assurance upholds the contract even if some expectations of the other may be disappointed. Along with the formula of 'unreasonable inconvenience'<sup>69</sup> a general line of *favor contractus* in non-performance might be formulated: The aggrieved party has nonetheless to tolerate reasonable deviations or variations of performance in order to allow for implementation and to uphold the contractual relation.

Different normative reasons like autonomy, security or efficiency favor the contract at one moment and threaten to dissolve it in the next. But one element always speaks in favor of the contract: the demand for communication.<sup>70</sup> The contract opens a particular bond between the parties. Parties communicate along patterns they themselves set up at the beginning of the contractual relation. A contract is a discrete form of communication. Especially in international and transnational relations with different legal systems involved, the contract is the primary law of the parties. Notwithstanding the severability of an arbitration clause, the existence of a valid contract nevertheless facilitates an autonomous dispute resolution. The *lex contractus* structures the communication between the parties. To maintain the contract is to favor communication. Beyond the distinct consequences of the diverse provisions of the CISG discussed above, the principle *favor contractus* reveals some general effects of contractual communication.

## 1. Interpretation

Contracts require interpretation at every stage of their existence. Legal notions like 'acceptance', 'performance' or 'breach' already guide the perception of contractual facts. A legal judgement always construes the contract in

<sup>68</sup> German Supreme Court, 3 April 1996 (*Cobalt sulphate case*) supra fn 51.

<sup>69</sup> Cf Articles 34, 37, 48, 86 CISG.

<sup>70</sup> Honnold *Uniform Law for International Sales* supra fn 18 at § 100 demonstrates the demand to communicate in provisions through the entire Convention.

light of the entire situation. The CISG offers in Article 8 CISG three steps for interpretation. First, statements and conduct of a party relevant to the contract should be interpreted 'according to his intent'. If this subjective approach fails 'intent' is replaced by the understanding of a 'reasonable person'. Finally 'all relevant circumstances' should be taken into consideration. What effect could *favor contractus* have on interpretation? Arbitral tribunals tend to interpret arbitration agreements '*in favorem validitatis*'.<sup>71</sup> As the arbitration agreement guarantees an undisrupted procedural communication, whenever possible an interpretation should uphold its validity.<sup>72</sup> Regarding the communicational task of contracts in general a similar rule might apply to material contracts. An interpretation should 'give effect to all terms' of the contract (Article 4.5 UP). In conflicting situations, such an *effet utile* should prevail over a *contra preferentem*-rule. *Favor contractus* appears as '*favor negotii*' to foster communicative bonds. In favor of its validity, an interpretation of the contract may also supply omitted terms as Article 4.8 UP demands. Its determination should follow the line of negotiations and subsequent conduct of the parties according to Article 8(3) CISG. A 'reasonable person' in international trade would try to favor an existing contractual bond.

## 2. Cooperation

Cooperative conduct fosters the implementation of a contract. Cooperation includes a duty to communicate essential facts relevant for performance or concerning the goods. The buyer may accept a different mode of performance. The seller may provide information about the usage of the goods. Cooperation and communication are strongly interrelated. Cooperation needs some form of communication. Yet communication is only successful if the parties show a minimum of cooperation. The duty to cooperate is itself considered to be a general principle underlying the CISG.<sup>73</sup> As cooperation could in theory embrace all and nothing, the 'inconvenience-formula' of the cure

<sup>71</sup> Fouchard, P; Gaillard, E and Goldman, B (1999) *International Commercial Arbitration* Kluwer at no 1466.

<sup>72</sup> Berger, KP (1993) *International Economic Arbitration* Kluwer at 500.

<sup>73</sup> A proof would demand a discrete treatise. Indications could be found in Articles 32, 35, 39, 43, 48, 60, 65, 68 and 77 CISG. For a general duty to cooperate cf German Supreme Court, 31 October 2001, available at: <http://cisgw3.law.pace.edu/cases/011031g1.html>.

provisions could serve as a limitation. One party could demand that the other party cooperate as long as it would not result in 'unreasonable inconvenience or unreasonable expense'. Cooperation in general promotes contractual bonds and renders performance possible. Even after a breach has occurred, cooperation may be demanded. Correspondingly, Article 77 CISG obliges the aggrieved party to become active in order to mitigate damages. However, cooperation is its own principle and does not always work in favor of the contract. The most efficient form of mitigation for instance may demand a cover purchase and thus terminate the original contract.

### 3. Adaptation

Time changes. The situation for performance is never as it was at the time of contract formation. The CISG addresses the process of implementation in different modes of performance, including situations that involve additional periods of time and repaired goods. All these regulations change the original face of the contract. Here, obviously, *favor contractus* differs from *pacta sunt servanda*. But could one derive a general idea for changes of circumstances from the principle *favor contractus*? Treatment of hardship is still one of the most controversial themes in national and transnational contract law.<sup>74</sup> Hardship means that performance has become excessively more onerous but is still possible. After restating that contracts have to be observed, Section 6.2 UP and Article 6.111 PECL stress a duty to renegotiate, followed by an option of the court to adapt the contract to the new circumstances. The CISG rests silent on that topic. If the change of circumstances is becoming a real impediment, then Article 79 CISG applies.<sup>75</sup> Yet the all-or-nothing solution of Article 79(1) CISG does not save the contract. Hardship means that the contract has lost its equilibrium. A regulation in favor of the contract has to rebalance the contractual burdens. Which ways remain to resolve these situations in favor of an ongoing contractual relation under the CISG? One

<sup>74</sup> Cf Puelinckx, AH (2004) 'Frustration, Hardship, force Majeure, Imprévision, Wegfall der Geschäftsgrundlage, Changed Circumstances. A Comparative Study in English, French, German and Japanese Law' (3) *Journal of International Arbitration* 47, available at: <http://www.tldb.net>.

<sup>75</sup> Stoll, H and Gruber, G in Schlechtriem & Schwenger *Commentary* supra fn 45 at Art 79 para 30.

could read 'required by the contract' in Article 35 CISG to mean the general purpose of the contractual relation. Then the aggrieved party would have to accept a slight adaptation in order to maintain the entire relation. The contractual purpose is applied to the present situation and might lead to some adjustments of conformity. However, drastic situations of hardship are beyond the scope of an extensive reading of Article 35 CISG. As long as the changes remain within the limits of the 'inconvenience-formula' the cure provisions allow for slight adaptations. A division of loss between the parties could be achieved by applying Article 77 CISG 'in favor of the contract'. Mitigation then demands to adjust the contract or accept 'a reduction in the damages in the amount' which corresponds. This implicit obligation calls for cooperation but leaves the choice up to the aggrieved party. It may adapt performance or waive part of the right to damages. Yet the willingness of the party to renegotiate will increase with the amount of damages in question.

This reading of the CISG 'in favor of the contract' might enrage supporters of a more classical concept of the sanctity of contract. Yet a ship is more than the sum of its planks.<sup>76</sup> One could easily change some single planks without changing the character of the ship. Single items of the contract may vary over time without endangering its purpose and identity. Indeed, only a favorable interpretation, unforeseen cooperation or an adjustment may enable the contract still to reach its intended end. The idea of *favor contractus* suggests a more flexible understanding of contractual bonds.<sup>77</sup> To favor the contract means to keep the parties communicating over their common grounds. A contract is no straitjacket, but a vivid relation between living parties.

<sup>76</sup> Already Plutarch *Lives* Harvard University Press (1914), Theseus and Romulus at XXIII described the 'Ship of Theseus' as a philosophical paradigm for remaining identity. Cf also Hobbes, T (1655) *De Corpore* Crook at volume 2, chapter 11.

<sup>77</sup> Cf Honnold *Uniform Law for International Sales* supra fn 18 at § 99: 'In sum, various provisions of the Convention are inconsistent with a technical narrow view of "contract" and evince a broader view of the relationship between the parties to a sales transaction'.