



ANTICIPATORY BREACH UNDER THE UNITED NATIONS CONVENTION ON CONTRACTS FOR  
THE INTERNATIONAL SALE OF GOODS\*

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## I. INTRODUCTION

Intricate issues of contract law stem from a rather plain question: is one party, suspecting that the other party will not fulfill his obligations in compliance with the terms of the contract, entitled, prior to the date agreed upon for performance, to suspend his own performance and demand additional guarantees, or even to avoid the contract?

International uniform law envisages a number of situations in which a breach is said to have occurred prior to the time agreed upon for performance. In the area of international sales contracts, arts. 71, 72, and 73(2) of the United Nations Convention on Contracts for the International Sale of Goods (hereafter "CISG"), applicable to both the buyer and the seller, lay down, on the one hand, the situations in which an anticipatory breach is deemed to have occurred and, on the other hand, the remedies available to the aggrieved party. In other words, these provisions designate the circumstances in which, even though no breach of contract has yet been committed and the time for performance of the obligation has not yet elapsed, a party may, in order to protect his own interests, temporarily stop complying with his contractual obligations or completely free himself from those obligations. In this respect, arts. 71, 72, and 73(2) CISG differ from arts. 49 and 64 CISG, which govern the right of the aggrieved party to avoid the contract when performance is overdue, that is when the other party has actually committed a fundamental breach of contract.

Art. 71 and art. 72 CISG differ in their purpose, their conditions of application, and the solutions that they provide. Art. 72 CISG is based on the Anglo-American doctrine of anticipatory breach and authorizes the innocent party to declare the contract avoided, without the need to wait until the breach materializes on the date when performance is due, if it is clear that the other party will commit a fundamental breach of contract. Art. 71 CISG, on the other hand, merely authorizes the innocent party to suspend performance if it becomes apparent that the other party will not perform a substantial part of his obligations. In other words, whereas art. 72 CISG is aimed at the termination of the contractual relationship and the release of the parties of their obligations, art. 71 CISG is aimed at keeping the contract intact and on foot. Art. 73(2) CISG, in turn, deals with the issue of anticipatory breach in the specific context of installment contracts.

The UNIDROIT Principles of International Commercial Contracts (hereafter "UNIDROIT Principles") and the Principles of European Contract Law (hereafter "PECL"), represent, like the CISG, attempts to "promote the unification and/or harmonization of international commercial law."<sup>1</sup> Today, at the international and European level, the UNIDROIT Principles and the PECL respectively constitute, in the field of transnational commercial contracts, the two sources of non-binding or soft law<sup>2</sup> most commonly referred to. These two sets of Principles are largely inspired by the CISG. Indeed, the Governing Council of UNIDROIT recognized, in its introduction to the UNIDROIT principles, that "to the extent that the UNIDROIT Principles address issues also

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1 Harry M. Flechtner, *The CISG's Impact on International Unification Efforts: The UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law*, in *The 1980 Uniform Sales Law - Old Issues Revisited in the Light of New Experiences* 169, 169 (Franco Ferrari ed., Guiffre 2003).

2 See the Preamble to the UNIDROIT Principles 2004, as well as art. 1:101(1) and (2) PECL.

covered by the CISG, they follow the solutions found in that Convention.”<sup>3</sup> In fact, the CISG was “an obligatory point of reference in the preparation of the UNIDROIT Principles.”<sup>4</sup> Similarly, the CISG was, for the drafters of the PECL, “a particularly fruitful source of ideas.”<sup>5</sup> With these considerations in mind, the present study will attempt, beyond the boundaries of comparative analysis, to draw conclusions regarding the impact of the CISG, with respect to the issue of anticipatory breach, on both the UNIDROIT Principles, and the PECL.

## II. SUSPENSION OF PERFORMANCE

### 1. Purpose and Rationale of the Rule

Granting one party the right to declare himself released from his contractual obligations whenever he suspects that his contracting partner will breach the contract would contradict two of the main aims the CISG is striving to achieve – on the one hand, that of keeping international commercial contracts intact as long as possible so as to promote good faith, loyalty, and seriousness in international transactions, and, on the other hand, that of avoiding an overload of transnational litigation. Nevertheless, the drafters of the CISG considered that the party who is under the contractual obligation of performing the contract first or under the obligation of performing preparatory acts, deserves protection if it is highly likely that the other party will not perform a substantial part of his obligations. Indeed, the drafters believed that if it appears that one party will not perform his obligations, “it would be inappropriate for the other party to be required to continue with his performance of the contract, which could result in his suffering an irrevocable loss.”<sup>6</sup> Thus, in particular, the seller who has agreed to deliver goods on credit ought to be protected in cases in which, prior to the time of delivery, the buyer becomes insolvent or has otherwise manifested that he is unable to pay for the goods. Similarly, the buyer who has agreed to pay the price of the goods prior to their delivery ought to be protected in cases in which, prior to the time of payment, the seller’s insolvency or some other circumstance makes it apparent that he will not deliver the goods.

Consequently, the drafters have agreed that if it is highly likely that one party will commit a substantial breach of contract (but not necessarily a fundamental breach in the sense of art. 25 CISG), art. 71 CISG should protect the other party by authorizing him to suspend performance. In other words, the party – buyer or seller -whose interests are threatened by the other party’s potential failure to comply with his contractual or conventional obligations may be temporarily released from his obligation to perform the contract.

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3 Governing Council of UNIDROIT, Introduction to the UNIDROIT Principles (1994), available online at <<http://www.jus.uio.no/lm/unidroit.international.commercial.contracts.principles.1994.commented/2>>. This is for the most part, but not in all instances, the case.

4 Michael Joachim Bonell, *The UNIDROIT Principles of International Commercial Contracts and the Vienna Sales Convention – Alternative or Complementary Instruments?*, in *Unif. L. Rev.* 29, 30 (1996).

5 Commission of European Contract Law, *Principles of European Contract Law Parts I and II Combined and Revised* xxv (Ole Lando and Hugh Beale eds., 2000).

6 Trevor Bennett, *Comments on Article 71*, in Cesare Massimo Bianca & Michael Joachim Bonell, *Commentary on the International Sales – The 1980 Vienna Sales Convention* 513, 518 (Giuffrè 1987), available online at <<http://www.cisg.law.pace.edu/cisg/biblio/bennett-bb71.html>>; see also Joseph Lookofsky, *The 1980 United Nations Convention on Contracts for the International Sale of Goods*, in *International Encyclopedia of Laws – Contracts*, Suppl. 29, 147 (J. Herbots & R. Blanpain eds., Kluwer Law International 2000).

## 2. Grounds for Suspension & Types of Performances Subject to Suspension

### a. Grounds for Suspension of Performance

According to art. 71(1) CISG, "a party may suspend the performance of his obligations if, after the conclusion of the contract, it becomes apparent that the other party will not perform a substantial part of his obligations as a result of: (a) a serious deficiency in his ability to perform or in his creditworthiness; or (b) his conduct in preparing to perform or in performing the contract." Thus, the parameters, under art. 71 CISG, on which the right of the innocent party to suspend performance of his obligations depend, are the following: (i) the fact that it becomes apparent that a breach will be committed, closely linked to the issue of the degree of certainty that the said breach will occur; (ii) the magnitude of the future breach; and (iii) the various possible indicia that the breach will be committed.

Regarding parameter (i), as stated above, art. 71(1) CISG provides that "a party may suspend the performance of his obligations if, *after the conclusion of the contract*, it becomes apparent that the other party will not perform a substantial part of his obligations" (emphasis added). The incapacity to perform must be objectively recognizable;<sup>7</sup> in other words, a neutral observer of the concerned international commercial branch, in the same circumstances, would conclude that there are "objective grounds showing substantial probability of non-performance."<sup>8</sup> Indeed, "the apparent inability to perform must not only induce subjective fears with regard to the performance of the contract but it must also enable objective observers to foresee non-performance."<sup>9</sup> In sum, art. 71 CISG requires, on the one hand, that an objective and reasonable observer would conclude that it is highly likely that one party will fail to perform a substantial part of his obligations<sup>10</sup> and, on the other hand, that "the party wishing to suspend performance could hold [the relevant information] to be true. If the party suspending performance could hold the information available to be true, the risk falls to the other party."<sup>11</sup>

Provided, as required under art. 71 CISG, that the incapacity to perform has become apparent only after the conclusion of the contract, the innocent party may suspend performance of his obligations even if the circumstances that caused the said incapacity already existed at the time of the conclusion of the contract.<sup>12</sup> Indeed, "the aim of the proposal that led to the present formulation was to permit a suspension of performance even when the circumstances that made

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7 Fritz Enderlein & 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* 285 (Oceana Publications 1992), available online at <<http://www.cisg.law.pace.edu/cisg/biblio/enderlein.html>>; Jelena Vilus, *Provisions Common to the Obligations of the Seller and the Buyer*, in *International Sale of Goods: Dubrovnik Lectures* 239, 241 (Petar Sarcevic & Paul Volken eds., Oceana Publications 1986), available online at <<http://www.cisg.law.pace.edu/cisg/biblio/vilus.html>>; John O. Honnold, *Uniform Law for International Sales Under the 1980 United Nations Convention* 430 (3rd ed., Kluwer Law and Taxation Publishers 1999), available online at <<http://www.cisg.law.pace.edu/cisg/biblio/honnold.html>>.

8 Honnold, *supra* note 7, at 430.

9 Peter Schlechtriem, *Uniform Sales Law - The UN-Convention on Contracts for the International Sale of Goods* 94 (Manz 1986), available online at <<http://www.cisg.law.pace.edu/cisg/biblio/schlechtriem.html>>.

10 Karl H. Neumayer & Catherine Ming, *Convention de Vienne sur les Contrats de Vente Internationale de Marchandises* 461 (Cedidac 1993).

11 Liu Chengwei, *Remedies for Non-Performance: Perspectives from CISG, UNIDROIT Principles & PECL* § 9.2 (2003), available online at <<http://www.cisg.law.pace.edu/cisg/biblio/chengwei.html>>.

12 Neumayer/Ming, *supra* note 10, at 459.

the obligor's performance doubtful had existed before, but had not become apparent until after the conclusion of the contract."<sup>13</sup> If it was already apparent at the conclusion of the contract that one party would not be able to perform, the other party may not suspend performance.<sup>14</sup> "If those circumstances were generally apparent but not in fact known by the party wishing to suspend performance, it is not clear whether the article would be held to be applicable, but probably it would be held not to be."<sup>15</sup> Indeed, given, on the one hand, the duty of each party, at the time of the conclusion of the contract, to examine the creditworthiness of the other party, and, on the other hand, the fact that the incapacity to perform must be objectively recognizable, it seems that the right to suspend performance should not be available if one party's defective economic situation was generally apparent but not in fact known to the other party.<sup>16</sup> "A party would have the right to suspend performance only if he was aware of the bad economic situation of the other party at the conclusion of the contract and can prove that the other party's economic situation considerably worsened."<sup>17</sup>

The text of the Convention does not provide specific criteria for determining the degree of certainty required for reaching the conclusion that a party "will not" perform a substantial part of his obligations. Nevertheless, given that the applicability of art. 71(1) CISG is to be founded on objective considerations, "strictly construed, the language of the article seems to require that the likelihood of the apprehended non-performance amount to a virtual certainty by normal business standards."<sup>18</sup> Absolute certainty is however not a requirement under art. 71 CISG. First, "it must be remembered that the cases in which it can be stated with absolute certainty that a particular "deficit" will lead to an inability to perform are very infrequent."<sup>19</sup> The party seeking suspension is frequently incapable of assessing precisely the probability that a non-performance will occur, but he is merely in a position to assert, based on a party-subjective appreciation of the circumstances, that it is likely that such non-performance will occur. Second, "circumstances that make it 'apparent' that the other party will not perform need not establish a certainty of non-performance since the initial appearance may be modified by clarification of the situation or by the removal of the initial barriers to performance,"<sup>20</sup> given adequate assurance of performance may be provided (see article 71(3) CISG, *infra* II.4). Third, one should note that, as discussed in detail hereafter (*infra* II.6.), the degree of certainty that a breach will be committed, required under art. 71 CISG,

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13 Schlechtriem, *supra* note 9, at 92. The proposal, which corresponded to art. 73(1) of the Convention relating to a Uniform Law on the International Sale of Goods (hereafter "ULIS"), was intended to prevent the party likely not to perform his obligations from insisting on performance by the other party, maintaining that his situation had not deteriorated after the conclusion of the contract but was already unsatisfactory before that date since he had previously failed to perform his obligations to third parties.

14 Schlechtriem, *supra* note 9, at 93.

15 Bennett, *supra* note 6, at 524.

16 Enderlein/Maskow, *supra* note 7, at 285, according to whom "the right to suspend performance must not lead to a situation where contracts are thoughtlessly concluded. In spite of the inclusion of the circumstances existing at the conclusion of the contract, the first party still has the obligation to examine the creditworthiness of the other party."

17 Chengwei, *supra* note 11, § 9.2.

18 Bennett, *supra* note 6, at 522.

19 Schlechtriem, *supra* note 9, at 94. Even though the formulation in art. 62(1) of the 1978 Draft (counterpart of the actual art. 71(1) CISG) - which provided that the deterioration must give "good grounds to conclude" that the other party will not perform - was considered too subjective, the present formulation should not indicate a restriction to the sole cases in which non-performance is absolutely certain (see A/Conf. 97/C.1/SR.37 at 11§ 95 (= O.R. 431)). In the opinion of the Canadian delegate, there is not even an appreciable difference between the formulation "it becomes apparent" and "good grounds to conclude that the other party will not perform" (see A/Conf. 97/C.1/SR.38 at 2 § 8 (= O.R. 433); see also A/Conf.97/C.1/SR.37 at 12 § 104 (= O.R. 432)).

20 Honnold, *supra* note 7, at 430.

is lower than the degree of certainty required under art. 72 CISG, which provides for avoidance of the contract in case of anticipatory (fundamental) breach. In conclusion, art. 71 CISG does not require absolute certainty that a breach will occur.

As to the magnitude of the breach (parameter (ii)), art. 71(1) CISG requires, in order for one party to be entitled to suspend performance of his obligations, that it becomes apparent that the other party will fail to perform "a substantial part of his obligations." The right to suspend depends on how important the obligation is to the party relying on it.<sup>21</sup> Nevertheless, as a general rule, the "performance of 'relatively minor' (cf. 320(2) German Civil Code) obligations may not be forced by suspending one's own performance."<sup>22</sup> As explained below (*infra* II.6.), it is however not necessary that the suspected breach be fundamental in the sense of art. 25 CISG.<sup>23</sup> In other words, art. 71 CISG "enables the Convention to provide for a party to suspend performance where the other party's breach, while substantial, may not be sufficiently fundamental to justify avoidance."<sup>24</sup> The importance, for the obligee, of the jeopardized obligation must however have been recognizable to the obligor at the time of the conclusion of the contract.<sup>25</sup>

Finally, as to the various possible indicia that a breach will be committed (parameter (iii)), art. 71(1)(a) CISG mentions, in the first place, a "serious deficiency in [the] ability to perform."<sup>26</sup> Such deficiency can relate to both the seller and the buyer. The cause of the deficiency is irrelevant; it does not have to be the result of anybody's fault nor does anybody have to be responsible for it.<sup>27</sup> "There may be a deficiency in the ability of a party to perform a contract even if the party's financial situation is excellent."<sup>28</sup> The said deficiency may be either subjective (for example insolvency,<sup>29</sup> non-performance of other parallel contracts,<sup>30</sup> or expiration of a license) or objective (for example forthcoming strike, fire in the manufacturer's factory, official public order having an impact on the contract or its performance, such as the prohibition to export currency from the buyer's country or embargo measures).<sup>31</sup> A deficiency in the buyer's ability to perform, for instance, "can be the result of a FOB business where there is insufficient storage room on

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21 Schlechtriem, *supra* note 9, at 93.

22 Schlechtriem, *supra* note 9, at 93. Several decisions point out that the buyer's submissions to the court failed to indicate that the seller would not perform a substantial part of his obligations: GERMANY Oberlandesgericht [OLG] [Provincial Court of Appeal] Dresden, 27 December 1999, 2 U 2723/99, available online at <<http://cisgw3.law.pace.edu/cases/991227g1.html>>; SWITZERLAND Zürich Handelskammer [ZHK] [Zürich Chamber of Commerce], Arbitral award No. 273/95, 31 May 1996, available online at <<http://cisgw3.law.pace.edu/cases/960531s1.html>>.

23 Bennett, *supra* note 6, at 521. GERMANY Landgericht [LG] [District Court] Berlin, 15 September 1994, 52 S 247/94, available online at <<http://cisgw3.law.pace.edu/cases/940915g1.html>>.

24 Bennett, *supra* note 6, at 519.

25 Schlechtriem, *supra* note 9, at 94.

26 See GERMANY OLG Hamm, 23 June 1998, 19 U 127/97 (CLOUT case No. 338), available online at <<http://cisgw3.law.pace.edu/cases/980623g1.html>> and SWITZERLAND ZHK Arbitral award No. 273/95, *supra* note 22.

27 Enderlein/Maskow, *supra* note 7, at 286-287.

28 Enderlein/Maskow, *supra* note 7, at 286-287.

29 See AUSTRIA Oberster Gerichtshof [OGH] [Supreme Court], 12 February 1998, 2 Ob 328/97t (CLOUT case No. 238), available online at <<http://cisgw3.law.pace.edu/cases/980212a3.html>>, according to which art. 71(1)(a) CISG covers cases in which a party is subject to an insolvency proceeding or has completely ceased to pay but not in which payment is slow.

30 See BELGIUM Tribunal Commercial [District Court] Bruxelles, 13 November 1992, A.R. 2700/90, available online at <<http://www.cisg.law.pace.edu/cisg/wais/db/cases2/921113b1.html>>, which recognizes the applicability of the Convention and the right of the seller to suspend delivery because the buyer failed to pay the price under a prior contract, but which fails to cite art. 71 CISG.

31 Neumayer/Ming, *supra* note 10, at 460.

board a ship.”<sup>32</sup> A deficiency in the seller’s ability to perform may be made apparent, for example, by recurrent delays in deliveries in violation of mandatory contractual deadlines, or by the delivery of damaged goods to the buyer or even to third parties if the existence of the defects causes serious doubts regarding the performance of the contract, for example if the defects indicate a lack of command of the technique required.<sup>33</sup> In Germany, the buyer was found to be entitled to suspend his obligations on the basis of the seller’s inability to deliver goods free of restrictions imposed by the seller’s supplier.<sup>34</sup>

The “serious deficiency in [a party’s] creditworthiness,” mentioned in art. 71(1)(a) CISG as a second possible circumstance that may make it apparent that a breach will be committed,<sup>35</sup> “should be interpreted broadly and cover the event where the economic situation of a guarantor or provider of a guarantee deteriorates.”<sup>36</sup> Just like the deficiency in a party’s ability to perform, a deficiency in creditworthiness can relate to both parties: “not only to the buyer who is obligated to pay the price of the goods, but also to the seller who may find himself incapable of financing manufacture of the sold goods. The creditworthiness of the buyer may even play a role when he is the one to perform first, e.g., in the case of advance payment or the opening of a letter of credit.”<sup>37</sup> A serious deficiency in the buyer’s creditworthiness can become manifest, for example, through delays in or the absence of payments due with respect to other orders.<sup>38</sup> If, as a result of this deficiency, it becomes apparent that the buyer will not be able to pay the price of the goods that are to be delivered by virtue of the contract in question, the seller is released from his obligation to manufacture and/or deliver those goods. “However, a deficiency in the creditworthiness of the buyer is no reason for suspending performance when the financial situation of the buyer has not changed since the conclusion of the contract and when there are growing doubts on the part of the seller in regard to setting the buyer a time limit for payment.”<sup>39</sup>

Art. 71(1)(b) CISG refers to the defaulting party’s “conduct in preparing to perform or in performing the contract.”<sup>40</sup> This paragraph is to be understood in the light of arts. 32 and 34 CISG, on the one hand, regarding the seller’s obligations, and arts. 54, 60, and 65 CISG, on the

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32 Enderlein/Maskow, *supra* note 7, at 286.

33 Neumayer/Ming, *supra* note 10, at 461.

34 GERMANY OLG Hamm, 19 U 127/97, *supra* note 26; AUSTRIA OLG Linz, 23 May 1995, 1R 64/95-34, available online at <<http://cisgw3.law.pace.edu/cases/950523a3.html>>, see also AUSTRIA OGH, 6 February 1996, 10 Ob 518/95 (CLOUT case No. 176) (Aus.), available online at <<http://cisgw3.law.pace.edu/cases/960206a3.html>>.

35 See AUSTRIA OGH, 2 Ob 328/97t, *supra* note 29.

36 Chengwei, *supra* note 11, § 9.2.

37 Chengwei, *supra* note 11, § 9.2. See also HUNGARY Arbitration Court of the Chamber of Commerce and Industry of Budapest, Arbitral award VB/94124, 17 November 1995, available online at <<http://cisgw3.law.pace.edu/cases/951117h1.html>>, in which the seller was found entitled to suspend performance of his obligations on the grounds that the buyer had failed to open an effective bank guarantee (the bank guarantee had been opened with a date that had already expired); CHINA International Economic & Trade Arbitration Commission, Arbitral award CISG/1996/11, 27 February 1996, available online at <<http://cisgw3.law.pace.edu/cases/960227cl.html>>.

38 See BELGIUM Rechtbank [District Court] van Koophandel Hasselt, 1 March 1995, A.R. 3641/94, available online at <<http://cisgw3.law.pace.edu/cases/950301b1.html>>, and BELGIUM Tribunal Commercial Bruxelles, A.R. 2700/90, *supra* note 30 (not citing art. 71), which found the seller entitled to suspend his obligations given the buyer’s seven-month delay in payment, respectively non-payment, of the price under earlier sales contracts.

39 Chengwei, *supra* note 11, § 9.2.

40 The following cases cite subparagraph (b): NETHERLANDS Rb [District Court] ’s Hertogenbosch, 9981/HAZA 95-2299, 2 October 1998, available online at <<http://cisgw3.law.pace.edu/cisgwais/db/cases2/981002n1.html>>; HUNGARY Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, Arbitral award Vb 94131, 5 December 1995 (CLOUT case No. 164), available online at <<http://cisgw3.law.pace.edu/cases/951205h1.html>>; GERMANY LG Berlin, 52 S 247/94, *supra* note 23.

other hand, regarding the buyer's obligations. Indeed, not only the contract, but also the Convention, may impose the performance of preliminary acts, such as the making of shipment arrangements (art. 32 CISG), the handing over of documents (art. 34 CISG), the opening of a letter of credit (art. 64 CISG), or the supplying of specifications for goods (art. 65 CISG).<sup>41</sup> Thus, the following have, for instance, been held to fall under art. 71(1)(b) CISG: a promisor's supply of non-conforming goods in the current contract,<sup>42</sup> a failure to provide a bank guarantee as agreed,<sup>43</sup> and the non-payment of the price.<sup>44</sup> Furthermore, the conduct referred to in art. 71(1)(b) CISG "may also refer to the fulfillment of other contracts . . . and is independent of the financial situation...It may also cover the use of certain unfitting raw materials in performing obligations under similar contracts."<sup>45</sup> For example, "a buyer who has contracted for precision parts, which he intends to use immediately upon delivery, may discover that, although there has been no deterioration in the seller's ability to perform and deliver parts of the quality required, defective deliveries are being made to buyers with similar needs. If the reason for these defective deliveries is that the seller has been using raw material from a particular source and if the seller is proposing to use material from that source for the contract in question, the buyer will be entitled to suspend his performance."<sup>46</sup> In sum, the failure to perform necessary preliminary acts may constitute, in compliance with art. 71(1)(b) CISG, a valid ground for suspension of performance, by the innocent party, of his obligations. In certain circumstances, the failure mentioned in art. 71(1)(b) CISG may even constitute a breach of contract sufficiently fundamental to entitle the aggrieved party to avoid the contract (arts. 49(1)(a) and 64(1)(a) CISG) or to initiate the *Nachfrist* procedure (arts. 47(1) and 63(1) CISG). Nevertheless, even in such cases, if the aggrieved party still wishes to pursue performance of the contract or if the grounds for avoidance of the contract are unclear, suspension of his own performance rather than avoidance of the contract remains available to this party,<sup>47</sup> provided that this choice is not more detrimental to the defaulting party (see *infra* II.6.).

b. *Types of Performances Subject to Suspension*

Art. 71 CISG "relates to any party and any obligation."<sup>48</sup> If the conditions of art. 71 CISG are satisfied, both (advance) performance of the contract and acts regarding preparation of the performance of the contract, imposed by the contract itself or by the Convention, may be

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41 See for example GERMANY LG Berlin, 52 S 247/94, *supra* note 23.

42 GERMANY LG Berlin, 52 S 247/94, *supra* note 23.

43 HUNGARY Arbitral award VB/94124, *supra* note 37.

44 HUNGARY Arbitral award VB/94131, *supra* note 40.

45 Chengwei, *supra* note 11, § 9.2; see also Lookofsky, *supra* note 6, at 148. By contrast, Yinghao Yang, *Suspension Rules Under Chinese Contract Law, the UCC and the CISG: Some Comparative Perspectives*, in 18(7) *China Law & Practice* 23 (Euromoney Publications 2004), available online at <<http://www.cisg.law.pace.edu/cisg/biblio/yang.html>>, maintains that there is nothing in the text of the CISG that can support the view that art. 71(1)(b) CISG goes beyond the promisor's conduct directly connected to the current contract; in particular, he points out that "in almost all reported cases where CISG 71(1)(b) was applied, 'conduct' has been interpreted as those actions directly related to the current contract," whereas in cases in which the buyer's non-payment of previous orders was referred to, the court applied the "creditworthiness" standard of art. 71(1)(a) CISG, rather than art. 71(1)(b) CISG. Yang concludes that "if the conduct is not directly related, then the promisee can only rely on CISG 71(1)(a)."

46 Bennett, *supra* note 6, at 520.

47 Honnold, *supra* note 7, at 427.

48 Enderlein/Maskow, *supra* note 7, at 284.

suspended by the innocent party, buyer or seller,<sup>49</sup> provided that there is a reciprocal relationship between the obligation suspended and the counter-performance.<sup>50</sup> Indeed, "what are required are not only acts in performance of the contract, but also those in preparation of performance which, therefore, can also be suspended"<sup>51</sup>. Thus, the seller is entitled not only to delay the delivery (arts. 31-34 CISG) but also to interrupt the manufacture of the goods or their procurement if he becomes aware of the buyer's impending insolvency or if it simply becomes apparent that the buyer will not pay the price. Similarly, the buyer may not only delay the payment of the price but also suspend the establishment of a letter of credit (arts. 54-59 CISG) or the organization of the taking over of the goods (art. 60 CISG) if, for example, it becomes apparent that the seller will not deliver the goods, or if the seller has been delivering defective goods to other buyers with similar needs, using raw material from a particular source that the seller intends to use also for the contract in question. More precisely, in cases of deficiency in the seller's ability to perform, "by suspending performance the buyer will render it unnecessary to make a prepayment, to establish a letter of credit to cover the price of future deliveries or to take preliminary steps such as the making of shipping arrangements or the handing over of documents."<sup>52</sup> Furthermore, one may hold that art. 71 CISG also allows the suspension of the seller's obligation to deliver substitute goods under art. 46 CISG, i.e., an obligation which presupposes an earlier breach of contract. Indeed, "it is quite logical to include the obligation to deliver substitute goods if it has become doubtful as a consequence that the price will be paid."<sup>53</sup>

In conclusion, the remedies available to the innocent party, under art. 71 CISG, are limited to suspension of performance of the contract (including, for the seller, the obligation to deliver substitute goods), and suspension of performance of duties to be fulfilled in preparation of performance of the contract. The seller, for example, is not authorized to dispose of goods held for the buyer, nor is the buyer authorized to purchase goods to replace those that ought to be provided by the seller.<sup>54</sup> According to art. 75, such remedies are available solely when the contract has been avoided.

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49 Schlechtriem, *supra* note 9, at 93. The suspending party does not breach the contract if the suspension is rightful; see GERMANY LG Stendal, 12 October 2000, 22 S 234/94 (F.R.G.), available online at <<http://cisgw3.law.pace.edu/cisg/text/001012g1german.html>>, according to which suspension is not a breach but a unilateral right to modify the time for performance; ICC award No. 8786, January 1997, available online at <<http://cisgw3.law.pace.edu/cases/978786i1.html>>, which stated that the buyer would not have breached if he had exercised the right to suspend.

50 GERMANY OLG Dresden, 2 U 2723/99, *supra* note 22.

51 Enderlein/Maskow, *supra* note 7, at 284.

52 Bennett, *supra* note 6, at 519-520.

53 Enderlein/Maskow, *supra* note 7, at 284.

54 Honnold, *supra* note 7, at 427.

### 3. Prevention of the Handing Over of Goods Already Dispatched

#### a. Right of the Seller to Stop Goods in Transit

Unlike the first paragraph of art. 71 CISG, applicable to both the seller and the buyer, the second paragraph of the same provision<sup>55</sup> only relates to the seller.<sup>56</sup> This paragraph deals with cases in which, after the goods have been dispatched, it becomes apparent (or, as the law formulates, "evident") that the buyer will not perform his obligation to pay the price. The seller is authorized to suspend performance of his obligation to deliver the goods by preventing the carrier from handing them over to the buyer, even if the buyer holds a document, such as an ocean bill of lading, which entitles him to obtain them and even if they were originally sold on terms granting the buyer credit after receipt of the goods.<sup>57</sup> Clearly, the provision is useful only if, on the one hand, the threat of non-payment is discovered after the goods have been dispatched but before they are handed over, and, on the other hand, "the seller has not retained control over the goods, as by the retention of a negotiable bill of lading (art. 58(2))".<sup>58</sup>

The right to stop goods in transit "is available without regard to whether risk of loss has passed to the buyer."<sup>59</sup> The general rules on the transfer of the risk to the buyer provide the following: if the contract of sale involves carriage of the goods, the risk passes at the time when the goods are handed over to the first carrier (art. 67(1) CISG); in respect of goods sold in transit, the risk passes to the buyer at the time of the conclusion of the contract (art. 68 CISG); in cases that do not fall within arts. 67 and 68 CISG, the risk passes to the buyer when he takes over the goods (art. 69 *ab initio* CISG). Such rules do not affect the right of the seller, if the conditions of art. 71(2) CISG are satisfied, to prevent the handing over of the goods to the buyer. Indeed, first, the object of the provisions on the passing of the risk and that of art. 71(2) CISG differ: the rules on the passing of the risk concern cases of accidental loss of or damage to the goods, whereas art. 71(2) CISG addresses situations in which it appears that the buyer will not be able to pay the price. Thus, the circumstances leading to the passing of the risk to the buyer are independent from those in which the seller has a right to suspend performance of his obligation to deliver the goods (obligation which the seller is capable of performing but voluntarily decides not to perform). Second, art. 71(2) and the provisions on the passing of the risk are to be considered complementary provisions: if, after the time defined under arts. 67(1), 68, or 69 CISG as the time when the risk passes to the

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55 Art. 71(2) provides that "if the seller has already dispatched the goods before the grounds described in the preceding paragraph become evident, he may prevent the handing over of the goods to the buyer even though the buyer holds a document which entitles him to obtain them. The present paragraph relates only to the rights in the goods as between the buyer and the seller."

56 The proposal that the buyer, too, should be granted the right to revoke a money transfer order (formulated as follows: "If a party has already dispatched the goods or sent the money (including having had issued a letter of credit) for the goods before the grounds mentioned in paragraph (1) become evident, he may prevent the handing over of the goods or the payment of the money even though the other party holds a document that entitles him to delivery of the goods or payment of the money, as the case may be. This paragraph relates only to rights in the goods or in the money as between the buyer and the seller."), was rejected during the drafting of the CISG "because there was fear of a serious impairment of the international payment transactions and because in many countries the non-payment of a cheque constitutes a criminal act. No such protection is needed in the case of the opening of a letter of credit because the seller usually cannot have access to the letter of credit before having delivered" (Secretariat Commentary on art. 62 of the 1978 Draft [draft counterpart of art. 71 CISG], § 10, available online at <<http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-71.html>>; Chengwei, *supra* note 11, § 9.3.

57 Secretariat Commentary on art. 62 of the 1978 Draft, *supra* note 56, § 10.

58 Honnold, *supra* note 7, at 423.

59 Honnold, *supra* note 7, at 432.

buyer, it becomes apparent that the buyer will not pay the price of the goods purchased, the provisions on the transfer of the risk only compel the buyer to pay the price, but do not grant any direct protection to the seller. Indeed, by stating that the risk is transferred to the buyer for example when the goods are handed over to the first carrier or at the time the contract is concluded, arts. 67 and 68 CISG only provide that, after this point in time, even if the goods are accidentally damaged or lost, the buyer is compelled to pay their price; but arts. 67(1), 68, and 69 CISG do not grant the seller the right to take measures to ensure that the buyer will pay the sum due, nor do these provisions provide any remedy in case the payment never occurs. Consequently, art. 71(2) and the provisions on the passing of the risk must be read in conjunction: after the time defined as the time when the risk passes to the buyer, the latter is bound by the obligation to pay the price; additionally, if it appears that the buyer will not perform his obligation, the seller may instruct the carrier not to hand the goods over to the buyer. "For similar reasons domestic rules that "property" or "title" has passed to the buyer may not undermine the narrow and specific rights conferred by Article 71(2)."<sup>60</sup> Such issues are excluded from the scope, *ratione materiae*, of the Convention (art. 4(b) CISG).

b. *Limitation of the Impact of the Seller's Instructions*

Art. 71(2) *in fine* CISG indicates that this paragraph "relates only to the rights in the goods as between the buyer and the seller." In other words, the seller's right to prevent delivery of the goods to the buyer neither impairs the rights of third persons to whom the buyer has resold the goods or who have obtained title in the goods, nor does it affect the relationship between the carrier and the buyer.

First, under the CISG, "the seller loses the right to order the carrier not to hand over the goods if the buyer has transferred the document to a third party who has taken it for value and in good faith."<sup>61</sup> The relationship between the buyer and his obligee remains intact.<sup>62</sup> The applicable domestic rules protecting the property rights of good faith purchasers determine whether the said third party has acquired rights in the goods overriding the seller's right, under the CISG, to prevent delivery to the buyer.<sup>63</sup> In this respect, "the most common situation referred to in art. 71 is the case in which the goods are in transit. In such circumstances there is a common law institution called 'stoppage in transitu' which the seller can use when the buyer has delivered the documents to a third person. This is clear from the formulation of art. 71 which emphasizes that 'the present paragraph relates only to the rights in the goods as between the buyer and the seller.' The view is held that in such cases the seller cannot claim the goods from a third party on the basis of the Convention, but he might do so under the applicable national law."<sup>64</sup> In other words, the seller may exercise his rights against third parties only if domestic rules on secured transactions

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60 Honnold, *supra* note 7, at 432.

61 Secretariat Commentary on art. 62 of the 1978 Draft, *supra* note 56, § 11; Chengwei, *supra* note 11, § 9.3; Albert H. Kritzer, Guide to Practical Applications of the United Nations Convention on Contracts for the International Sale of Goods 461 (Kluwer Law and Taxation Publishers 1988).

62 Enderlein/Maskow, *supra* note 7, at 288, according to whom "if an obligee of the buyer has the goods or if he has pledged title in the goods from a document, the rights of the seller are not governed by the CISG but by the otherwise applicable domestic law;" see also Lookofsky, *supra* note 6, at 149.

63 Honnold, *supra* note 7, at 433.

64 Vilus, *supra* note 7, at 243-244.

permit it.<sup>65</sup> In this respect, Honnold nonetheless states that "even a third party who holds documents that control delivery may not have rights under domestic law that would cut off the seller's right to the goods. The essential point is that domestic law can be expected to honor the seller's rights against the buyer established by article 71(2) CISG and give the seller as much protection against third persons as domestic law accords to other persons in the seller's position."<sup>66</sup>

Second, the seller's right to stop the goods in transit does not affect the relationship between the carrier and the buyer, and "whether the carrier or warehouse keeper must follow the seller's order depends on the freight or warehouse contract, hence, on domestic law."<sup>67</sup> Indeed, the question whether the carrier is obligated or allowed to follow the instructions of the seller where the buyer holds a document which entitles him to claim them is governed by the terms of the contract concluded for carriage as well as the appropriate law of the form of transport in question.<sup>68</sup> Under the CISG, there is no obligation compelling the carrier to comply with the seller's request for stoppage.<sup>69</sup> Consequently, the carrier may be precluded, given his obligations under municipal and international law, from withholding the goods from the buyer. In such circumstances, the effective operation of art. 71(2) CISG could be quite limited.<sup>70</sup> If the carrier and the seller are bound by a contractual relationship, "giving relevant orders to the carrier or forwarding agent in question"<sup>71</sup> remains the only available device for the seller to exercise his right to stoppage and thus prevent the handing over of the goods to the buyer. "Otherwise, [the seller] would have to call in a court."<sup>72</sup> "If the buyer's country has acceded to the CISG, or if the domestic rules of that country also provide for a right to stop the goods in transit, the seller may try to enforce this right through the courts, e.g. by ways of distress or temporary injunction."<sup>73</sup> Otherwise, if the carrier voluntarily stops the goods in transit, he may expose himself to a claim for damages from the buyer.<sup>74</sup> Consequently, to protect the carrier, the seller should require the buyer to deliver the documents to the seller or to the carrier<sup>75</sup> (see arts. 62 and 71(2) CISG), or directly, on the basis of the right to stop performance, request the buyer not to take measures against the carrier.<sup>76</sup>

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65 Schlechtriem, *supra* note 9, at 94.

66 Honnold, *supra* note 7, at 433.

67 Schlechtriem, *supra* note 9, at 94; see also Lookofsky, *supra* note 6, at 149.

68 Secretariat Commentary on art. 62 of the 1978 Draft, *supra* note 56, § 12; Kritzer, *supra* note 61, at 461. Indeed, the rules governing the carrier's obligation to follow the consignor's orders to withhold the goods from the consignee depend on the selected mode of transportation, and on the applicable international conventions and national laws; Chengwei, *supra* note 11, § 9.3; Honnold, *supra* note 7, at 433, consequently holds that "the carrier, of course, can have no objection to delivering the goods to the person who is entitled to them if the procedures suggested above protect the carrier against third party claims. (In any case the carrier is normally entitled to receive any unpaid freight before delivering the goods.)"

69 Chengwei, *supra* note 11, § 9.3.

70 Bennett, *supra* note 6, at 520-521.

71 Chengwei, *supra* note 11, § 9.3.

72 Enderlein/Maskow, *supra* note 7, at 288.

73 Enderlein/Maskow, *supra* note 7, at 288.

74 Chengwei, *supra* note 11, § 9.3.

75 Honnold, *supra* note 7, at 433.

76 Chengwei, *supra* note 11, § 9.3.

#### 4. Notice of Suspension and Adequate Assurance of Performance

##### a. Notice of Suspension

According to art. 71(3) CISG, a party who has either suspended performance before dispatch of the goods in compliance with paragraph (1), or stopped the goods in transit pursuant to paragraph (2), must immediately give notice of the suspension to the other party. Thus, even though one party may suspend the contract without prior notification of intention to suspend, he is compelled to inform the other party of the suspension immediately after it has taken place.<sup>77</sup> Such notice allows the recipient to provide the party suspending performance with adequate assurance of performance, and thus reinstate the latter's obligation to resume performance.

The notice is subject to art. 27 CISG and consequently need not be received by the addressee to become effective: it is effective upon dispatch.<sup>78</sup> In other words, the risk of transmission of the notice is borne by the addressee. However, given that the purpose of the notice of suspension is to allow the addressee to provide adequate assurance of performance and thus allow the parties to communicate and cooperate in order to maintain the contract on foot, it is in the interest of the party suspending performance to ensure that the notice of suspension is received by the addressee.

Similarly, even though the party notifying suspension of performance is under no obligation to indicate, in the notice, the grounds for suspension, "it may be inferred from the principle of good faith that grounds should be stated so as to enable the other party to decide what action is to be taken."<sup>79</sup>

Scholarly writings have pointed out that if the aggrieved party fails to give notice of suspension, he does not lose the right to suspend performance, but he may have to satisfy the claims for damages by the other party.<sup>80</sup> On the other hand, courts uniformly conclude that in the absence of due notice, the aggrieved party may not only have to satisfy the other party's claims for damages, but moreover may no longer rely on his right to suspend performance.<sup>81</sup> Furthermore, "if the party suspending performance neglects to send notice, the other party may have the right to...avoid the contract if he can show that, had he been promptly notified, he would have produced adequate

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77 BELGIUM Hof van Beroep [Appellate Court] Gent, 26 April 2000, 1997/AR/2235, available online at <<http://cisgw3.law.pace.edu/cases/000426b1.html>>, which points out that notice is not "immediate" when related to deliveries made seven and fourteen months before.

78 Schlechtriem, *supra* note 9, at 94.

79 Chengwei, *supra* note 11, § 9.4. The following statements or acts have been found to constitute sufficient notice: the buyer refused to pay the costs of warehousing furniture when it had earlier agreed to contribute to these costs (GERMANY OLG Hamm, 19 U 127/97, *supra* note 26); a letter from the buyer to the seller in which the buyer refused to accept non-conforming items and offered to return them (GERMANY LG Berlin, 52 S 247/94, *supra* note 23). On the other hand, there was insufficient notice in the following circumstances: the buyer failed to pay the price (GERMANY LG Stendal, 22 S 234/94, *supra* note 49); a letter with mentioning defects under other contracts (BELGIUM Hof van Beroep Gent, 1997/AR/2235, *supra* note 77).

80 Chengwei, *supra* note 11, § 9.4.

81 UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods, ad art. 71 CISG, A/CN.9/SER.C/DIGEST/CISG/71 (8 June 2004). See GERMANY LG Stendal, 22 S 234/94, *supra* note 49; RUSSIA Federation Chamber of Commerce and Industry arbitration award No. 302/1996, 27 July 1999, in 27 Rozenberg, *Praktika of Mejdunarodnogo Commercheskogo Arbitrajnogo Syda: Haychno-Practicheskij Commentarij (1999-2000)*; GERMANY Amtsgericht [AG] [Petty District Court] Frankfurt a.M., 31 January 1991, 32 C 1074/90-41 (CLOUT case No. 51), available online at <<http://www.cisg.law.pace.edu/cisg/wais/db/cases2/910131g1.html>>, in which the buyer was entitled to damages given the seller's failure to give immediate notice that he was suspending delivery.

assurance. The suspension is no longer justified, from the moment the assurance would have barred the right to suspend performance, and, from that moment, constitutes a breach of contract.”<sup>82</sup>

b. *Adequate Assurance of Performance*

Pursuant to art. 71(3) CISG, a party who has suspended performance “must continue with performance if the other party provides adequate assurance of his performance.” In this respect, “even though there is no express requirement under the CISG, the suspending party should inform the other party that he considers the offered assurance adequate and will continue with performance.”<sup>83</sup> For the assurance provided to be adequate, it must show either that the circumstances that led to the suspension never existed, that these circumstances have been overcome (“give reasonable security to the first party ... that the other party will perform”<sup>84</sup>), or that “the first party will be compensated for all his losses from going forward with his own performance.”<sup>85</sup> In the second alternative (adequate assurance that the circumstances that led to the suspension have been overcome), the party required to give adequate assurance of performance must provide evidence of concrete facts or action removing the threat that he “will not perform a substantial part of his obligations.”<sup>86</sup> Merely reassuring the party who suspended performance that the obligation will be performed or reiterating the existence of the obligation is insufficient.<sup>87</sup> Clearly, offering immediate performance or performing without delay satisfies the condition set out by art. 71(3) CISG. But a vast range of other steps may be undertaken to provide adequate assurance of performance. For example, the buyer may bring the proof that he has reestablished current payments in cases where the threat of non-payment had emanated from the fact that the buyer had suspended payment of his current obligations.<sup>88</sup> The buyer may also require the issuance by a bank of an irrevocable letter of credit in favor of the seller.<sup>89</sup> He may offer a guarantee by a reputable bank or other such party that the latter would pay if the buyer failed to do so, or even offer a security interest in sufficient goods owned by the buyer to assure the seller of reimbursement.<sup>90</sup> Similarly, for example, in cases of threats to continued performance by the seller resulting from a strike or the loss of a source of necessary materials, the seller may show that the strike has been settled or that a new source of materials has been obtained for the manufacture of the goods.<sup>91</sup> Also, “if export of the goods sold was prohibited, but the seller later obtained an export license, the requirement of adequate assurance would be fulfilled.”<sup>92</sup> Finally, if performance was suspended by a party because the other party had declared that he would not perform his contractual obligations, a new statement of the latter, indicating that he intends and is able to perform, will be considered adequate assurance of performance.<sup>93</sup> In all cases,

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82 Schlechtriem, *supra* note 9, at 94-95.

83 Enderlein/Maskow, *supra* note 7, at 290.

84 Kritzer, *supra* note 61, at 461.

85 Secretariat Commentary on art. 62 of the 1978 Draft, *supra* note 56, § 13; Kritzer, *supra* note 61, at 461.

86 Honnold, *supra* note 7, at 434.

87 Honnold, *supra* note 7, at 434.

88 Honnold, *supra* note 7, at 434.

89 Honnold, *supra* note 7, at 434.

90 Secretariat Commentary on art. 62 of the 1978 Draft, *supra* note 56, § 13.

91 Honnold, *supra* note 7, at 434.

92 Chengwei, *supra* note 11, § 9.5.

93 Chengwei, *supra* note 11, § 9.5.

”developing an adequate solution to such problems calls for good faith consultation between the parties.”<sup>94</sup>

Given the fact that suspension of performance by one party is authorized, under art. 71(1) CISG, only if there is a threat of non-performance of ”a substantial part” of the other party’s obligations, the former might be under the obligation to restore performance, even if the assurance of performance provided in compliance with art. 71(3) CISG shows that performance might not be complete nor perfect. Indeed, the assurance provided is to be considered adequate, in the sense of art. 71(3) CISG, even if it indicates that the performance will not be in absolute conformity with the contractual terms, provided that the non-conformity is insubstantial.<sup>95</sup> Thus, for example, adequate assurance is considered to have been provided even if it shows that the performance will be slightly delayed. In such a case, however, the aggrieved party remains entitled to claim damages on the basis of art. 74 CISG.<sup>96</sup>

The Convention does not address the question whether, after adequate assurance of performance has been provided, the party who previously suspended performance is compelled to resume performance of his obligations within the initial time-frame specified in the contract. Nevertheless, there seems to be a consensus, among legal scholars, that the answer to this question is negative. Schlechtriem holds that the time for delivery may be prolonged: ”if the buyer unexpectedly offers payment or adequate assurances of performance according to article 71(3), the seller who cannot meet the initial delivery date because of his justified suspension is not in fault. He is therefore not liable for the late performance to the extent the delay corresponds to the suspension of preparations.”<sup>97</sup> Similarly, in Bennett’s opinion, ”there seems to be a clear implication that the seller is entitled to a reasonable adjustment of the date of supply to take account of the suspension.”<sup>98</sup> Honnold, in turn, maintains that ”it seems that, at least in some circumstances, the right to ‘suspend’ performance must carry with it an extension of the time for continued performance ... The problem calls for a reasonable adjustment to the new situation.”<sup>99</sup> Thus, for example, the suspending party may extend the period for performance by the time that has passed since he has interrupted his preparatory work.<sup>100</sup>

If the request for adequate assurance of performance is justified and the non-performing party fails to provide assurance of performance or if the assurance provided is inadequate, the innocent party may continue to suspend performance of the contract or of obligations that ought to be fulfilled in preparation of performance of the contract, such as, for example, the production of a good.<sup>101</sup>

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94 Honnold, *supra* note 7, at 434.

95 Honnold, *supra* note 7, at 433-434

96 Honnold, *supra* note 7, at 435.

97 Schlechtriem, *supra* note 9, at 93.

98 Bennett, *supra* note 6, at 522-523.

99 Honnold, *supra* note 7, at 435, which provides the following example: ”Suppose that a contract made on June 1 requires the seller to manufacture goods to the buyer’s specifications and deliver them on September 1. On July 1, before the seller has had time to manufacture the goods, the seller is entitled under Article 71(1) to suspend performance. The seller immediately notifies the buyer of the suspension but the buyer does not provide adequate assurance of his performance until August 15. If completion of manufacture would require a month the right of ‘suspension’ would be nullified if the seller must deliver the goods by September 1.”

100 Chengwei, *supra* note 11, § 9.5.

101 Honnold, *supra* note 7, at 436; Jacob S. Ziegel, *The Remedial Provisions in the Vienna Sales Convention: Some Common Law Perspectives*, in Matthew Bender, *International Sales: The United Nations Convention on Contracts for the International Sale of Goods 9-1, 9-35* (Galston & Smit ed., 1984), available online at <<http://www.cisg.law.pace.edu/cisg/biblio/ziegel6.html>>.

Furthermore, given that a party who failed to respond with assurances of performance has thus made it clear that he will not perform (see *infra* II.6.), if the nature of the non-performance is such as to constitute a fundamental breach of contract, the innocent party may avoid the contract for anticipatory fundamental breach of contract, in compliance with the requirements of art. 72 CISG (see *infra* III.). It is however important to stress that, as explained hereafter in detail (*infra* II.6.), this is true only if the suspected breach is, in itself, fundamental in the sense of art. 25 CISG.<sup>102</sup> Indeed, "a failure to provide an adequate assurance does not automatically provide a right of avoidance and there is *therefore no mechanism by which a party may demand an assurance of performance and treat a failure to respond with an adequate assurance as a fundamental breach*"<sup>103</sup> (emphasis added). In other words, in all cases in which the suspected breach is not fundamental, the contract survives the threat of non-performance and the absence of adequate assurance of performance. Consequently, if the suspected breach is not fundamental, it is only if the defaulting party does not perform at the time agreed upon by the parties (or fixed by the Convention) for performance, and if such non-performance constitutes a fundamental breach of contract, that the aggrieved party may declare the contract avoided (arts. 25, 49, 64, and 81 CISG). In any case, whether the contract be or be not declared avoided, if the failure to provide adequate assurance of performance causes the party suspending performance to suffer damages, these may, as stated above, be recovered, on the basis of art 74 CISG.<sup>104</sup>

If the party requested to provide adequate assurance of performance brings evidence that the alleged grounds for suspension in fact never existed or that suspension was not justified, the suspending party may be held liable for having breached the contract by suspending performance

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However, Harry M. Flechtner, *Remedies Under the New International Sales Convention: The Perspective from Article 2 of the U.C.C.*, in 8 J. L. & Com. 53, 95 (1988), holds that the answer to the question whether, if adequate assurance is not forthcoming, the aggrieved party may continue to suspend his performance indefinitely, should be negative. He maintains that "permitting indefinite suspension where the threatened breach is not fundamental, therefore, would undermine Article 72, which permits avoidance only where it is clear that a fundamental breach will occur. Two solutions are possible: (1) Article 71 could be construed to require that the suspending party either avoid the contract or end its suspension within a reasonable time after demanding adequate assurances; (2) the standards for the seriousness of the threatened breach in Articles 71 and 72 could be treated as equivalent. Neither solution, however, is supported by the text of the Convention." In turn, Yang, *supra* note 45, states that the fact that the CISG is silent as to the consequences of the failure to provide assurance of performance is a "troubling loophole," and that "without a contractual provision giving [the promisee] the right to cancel the contract, he would probably have to resume the contract performance even after asserting the suspension right."

102 In such a case, art. 71 CISG was initially the only provision applicable, given that, even though the breach suspected was of fundamental nature, it was merely apparent, but not clear, that it would occur. However, if the requested party fails to provide adequate assurance, then it becomes clear, in the sense of art. 72 CISG, that a breach will be committed, and the contract may be avoided on the basis of this provision.

103 Chengwei, *supra* note 11, § 9.5; see also John. W. Carter, *Party Autonomy and Statutory Regulation: Sale of Goods*, 6 Journal of Contract Law 93, 106 (North Ryde NSW 1993), available online at <<http://www.cisg.law.pace.edu/cisg/biblio/carter3.html>>. It is however important to note that this opinion departs from that of other authors: Enderlein/Maskow, *supra* note 7, at 290, maintain that "if the other party provides no assurance, this can be seen as an indication of an anticipatory, fundamental breach of contract, and the party empowered to suspend performance of his obligations can avoid the contract under art. 72. He may, however, also wait until the time for performance has passed and, in the case of non-performance, avoid the contract under articles 49 or 64;" Similarly, Bennett, *supra* note 6, at 524, asserts that "frequently, ... a failure to provide an adequate assurance will justify a conclusion that a fundamental breach will be committed and avoidance for anticipatory breach will be possible;" Finally, Honnold, *supra* note 7, at 436 also states that "B's failure to respond with assurances of performance may make it 'clear' that B will commit a fundamental breach of contract - a ground for avoiding the contract under Article 72;" he nevertheless adds that "such failure to provide assurances will not always justify avoidance" (footnote 17).

104 See art. 81(1), according to which the party who declares the contract avoided retains the right to claim any damages resulting from the breach of the contract by the other party; Kritzer, *supra* note 61, at 462; Vilus, *supra* note 7, at 244; Secretariat Commentary on art. 62 of the 1978 Draft, *supra* note 56, § 16.

of his obligations in the absence of legitimate grounds. More particularly, depending on the obligation suspended, "if the first party. . . refuses to perform his obligations unfoundedly, he [may commit] a fundamental breach of contract."<sup>105</sup> The other party is consequently entitled to claim all the remedies made available by the Convention in cases of breach of contract. He may for example claim damages, "not only ... because of the delay but also because of the costs incurred in providing additional assurances."<sup>106</sup>

Various events can put an end to a party's right, under art. 71 CISG, to suspend his obligation to perform. Indeed, the obligation to perform may remain suspended only until the other party performs his obligations, until this party provides adequate assurance of performance of his obligations, until the first party declares the contract avoided (if the conditions of arts. 72, 49 or 64 CISG are met, see *infra* III.),<sup>107</sup> or until the period of limitation applicable to the contract has expired.<sup>108</sup>

## 5. Impact of the CISG on Subsequent Uniform Sets of Principles

Art. 7.3.4 UNIDROIT Principles provides that "a party who reasonably believes that there will be a fundamental non-performance by the other party may demand adequate assurance of due performance and may meanwhile withhold [his] own performance. Where this assurance is not provided within a reasonable time the party demanding it may terminate the contract." Similarly, art. 8:105(1) PECL states that "a party who reasonably believes that there will be a fundamental non-performance by the other party may demand adequate assurance of due performance and meanwhile may withhold performance of [his] own obligations so long as such reasonable belief continues." Although these two provisions provide, just like art. 71 CISG, for mechanisms of suspension of the creditor's obligations, their conditions of application differ from those of art. 71 CISG.

Indeed, whereas under art. 71(1) CISG, a sufficient condition, for the creditor to be entitled to suspend his obligations, is that it be "apparent that the other party will not perform a substantial part of [his] obligation," under art. 7.3.4 UNIDROIT Principles and art. 8:105(1) PECL, it is necessary that the creditor reasonably believe that there will be a fundamental non-performance for termination to be triggered. The wording of the latter provisions consequently reveals that the drafters of the two sets of principles considered that the party who fears that a breach will be committed may stop performing his own obligations and thus take action to protect his interests only if the suspected breach is of fundamental nature, that is only if the suspected breach would be such as to deprive the aggrieved party of his interest in the contract. In other words, under the

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105 Chengwei, *supra* note 11, § 9.2.

106 Enderlein/Maskow, *supra* note 7, at 289.

107 Prior to the date on which one party is required to perform, the other party may declare the contract avoided only if the conditions of art. 72 CISG are met (see *infra* III.), whereas after the date on which the former is required to perform, the latter may declare the contract avoided only if the conditions of art. 49 or 64 CISG are satisfied. Furthermore, avoidance of one or more installments of a contract for delivery of goods by installments is governed by art. 73 CISG (see *infra* IV.). See GERMANY LG Stendal, 22 S 234/94, *supra* note 49.

108 As explained in the Secretariat Commentary on article 62 of the 1978 Draft, *supra* note 56, § 5, "under the Convention on the Limitation Period in the International Sale of Goods, art. 8, that period would be four years. That Convention does not prescribe as to whether the rights under the contract are terminated or whether it is the right of a party to commence an action to enforce such a right which is terminated."

UNIDROIT Principles and the PECL, unless the suspected breach is fundamental, a party may not, prior to the time when the breach actually occurs, back out of his obligations, even if it is clear that a breach will be committed.

In conclusion, rather than being compared to art. 71(1) CISG, art. 7.3.4 UNIDROIT Principles and art. 8:105 PECL should be examined together with art. 72(2) CISG, according to which "if time allows, the party intending to declare the contract avoided must give reasonable notice to the other party in order to permit him to provide adequate assurance of his performance" (see *infra* III.3.).

## 6. Hierarchy and Interplay Between the Right to Suspend Performance and the Right to Avoid the Contract

Art. 71 and art. 72 CISG do not only clearly differ in their wording and in the remedies they provide; they also seem to differ in their conditions of application. Whereas art. 71 CISG requires the future breach to be a non-performance of a "substantial part" of the debtor's obligation, art. 72 CISG requires the future breach to be "fundamental" in the sense of art. 25. Also, whereas art. 71 CISG purports to be applicable only if it "becomes apparent" that the breach will be committed, art. 72 CISG purports to be applicable only if it is "clear" that the breach will be committed. These distinctions in terminology convey substantive differences between the two provisions.

First, regarding the nature or gravity of the suspected breach, "the drafters would not have used two different phrases ('fundamental breach' as opposed to non-performance of 'a substantial part of his obligations'), and, in particular, two different adjectives describing the seriousness of the breach ('fundamental' as opposed to 'substantial'), had they not intended to distinguish the seriousness of the threatened breach that would meet the standards of the respective articles."<sup>109</sup> In other words, the breach needs to be more "serious" to trigger the more drastic remedy of avoidance of the contract (art. 72 CISG) rather than mere suspension of performance (art. 71 CISG). Logically, this statement means that if the more onerous conditions of art. 72 CISG are satisfied, then so are those of art. 71 CISG. In other words, it seems that when it is clear that a fundamental breach of contract will be committed, the aggrieved party is entitled to choose between suspending performance of his obligations and avoiding the contract. Some authors thus hold that "if the expected non-performance were at the same time a fundamental breach of contract, the obligor would have a choice between suspension of performance under article 71, or avoidance of the contract under article 72."<sup>110</sup> Indeed, according to these authors, "if an anticipatory breach occurs, the innocent party may want to enforce specific performance in which case [he] would make use of [his] right to suspend performance under article 71 rather than to

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109 Harry M. Flechtner, *The Several Texts of the CISG in a Decentralized System: Observations on Translations, Reservations and other Challenges to the Uniformity Principle in Article 7(1)*, 17 J. L. & Com. 187, § II.A. (1998), available online at <<http://www.cisg.law.pace.edu/cisg/biblio/flecht1.html>>. See also Lookofsky, *supra* note 6, at 148, according to whom "a promisee's prospective failure to perform a 'substantial part' of [his] obligations, although obviously significant, is presumably intended to denote something less than a 'fundamental breach.'" See GERMANY LG Berlin, 52 S 247/94, *supra* note 23.

110 Enderlein/Maskow, *supra* note 7, at 286.

avoid the contract under article 72 even if [he] is entitled to do so.”<sup>111</sup> It seems, however, that it is only in theory that the innocent party benefits from such a choice. As explained in the following paragraphs, such a solution could be unreasonable in that it could lead to unfair results, and consequently be prohibited (indirectly) by art. 77 CISG (mitigation of losses) and the general principle of reasonableness.

First, if the conditions of art. 72 CISG are met, the innocent party, who envisages the suspension of the performance of his obligations under art. 71 CISG until the time for performance by the other party has expired, should take art. 77 CISG into consideration, and conclude that the “contract should definitely be avoided where an immediate avoidance would mitigate the losses.”<sup>112</sup>

Second, suspending performance rather than avoiding the contract could violate the principle of reasonableness, which is “a general principle of the CISG.”<sup>113</sup> Given the fact that the CISG does not define this concept, Kritzer maintains that the PECL’s definition, “which fits the manner in which this concept is used in the CISG,”<sup>114</sup> ought to be taken into consideration. Pursuant to art. 1:302 PECL, “reasonableness is to be judged by what persons acting in good faith and in the same situation as the parties would consider to be reasonable. In particular, in assessing what is reasonable the nature and purpose of the contract, the circumstances of the case, and the usages and practices of the trades or professions involved should be taken into account.”<sup>115</sup> Coming close to the definition of reasonableness under art. 1:302 PECL, Honnold states that under the CISG, “what is ‘reasonable’ can appropriately be determined by ascertaining what is normal and acceptable in the relevant trade.”<sup>116</sup> Van der Velden, in turn, interprets the concept of reasonableness as entailing, among other things, an ethical standard of behavior leading one to be judicious and fair.<sup>117</sup>

In the light of this definition of the concept of reasonableness, even though there is no doubt that if the conditions of art. 72 CISG are satisfied, those of art. 71 CISG are *a fortiori* met, the innocent party’s choice to suspend performance of his obligations rather than avoid the contract could be inadmissible. Indeed, in cases where the non-performing party is not at fault (the suspected non-performance does not depend on his conduct and will), given that suspension of performance by the other party does not free the non-performing party from his obligation to comply with the

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111 Sieg Eiselen, Remarks on the Manner in which the UNIDROIT Principles of International Commercial Contracts May Be Used to Interpret or Supplement Articles 71 and 72 of the CISG (2002), available online at <<http://www.cisg.law.pace.edu/cisg/principles/uni71,72.html#er>>, and Remarks on the Manner in which the Principles of European Contract Law May Be Used to Interpret or Supplement Articles 71 and 72 of the CISG (2002), available online at <<http://www.cisg.law.pace.edu/cisg/peclcomp71,72.html>>, who maintains that “in certain circumstances, a party may be entitled to rely on either article 71 or article 72.”

112 Enderlein/Maskow, *supra* note 7, at 292; see also Bennett, *supra* note 6, at 528 *et seq.*

113 Albert H. Kritzer, Overview Comments on Reasonableness, available online at <<http://www.cisg.law.pace.edu/cisg/text/reason.html>>. Schlechtriem, *supra* note 9, at 39, also states that “the rule that the parties must conduct themselves according to the standard of the ‘reasonable person’ . . . must be regarded as a general principle of the Convention.”

114 Kritzer, *supra* note 113.

115 See also Commission on European Contract Law, *Comment and Notes on PECL 1:302*, in Principles of European Contract Law: Parts I and II 126, 127 (Ole Lando and Hugh Beale eds., Kluwer Law International 2000), available online at <<http://www.cisg.law.pace.edu/cisg/text/reason.html>>.

116 Honnold, *supra* note 7, at 101.

117 Frans J.A. van der Velden, *The Law of International Sales: The Hague Conventions 1964 and the UNCITRAL Uniform Sales Code 1980 – Some Main Items Compared*, in Hague-Zagreb Essays 4 on the Law of International Trade 46, 52 (Voskuil & Wade eds., Nijhoff 1983).

terms of the contract, merely suspending rather than avoiding the contract could lead to unfairly detrimental consequences for the non-performing party and could, in that sense, be "unreasonable." For example, this is the case if a party suspends performance until the date fixed by the contract for performance and a fundamental breach occurs at that time, allowing the party who had suspended performance to seek specific performance by the other party (art. 46 and 62 CISG). This is unfairly detrimental to the latter party, who was not at fault at the outset, and who would have been freed from all his obligations, had the contract been initially avoided in compliance with art. 72 CISG. In such a situation, suspension of performance by the aggrieved party should therefore be considered contrary to general considerations of reasonableness.

The same reasoning is applicable if both the conditions of art. 71 CISG and those of art. 73 CISG are satisfied. Indeed, "the right to suspend under article 71 applies both to contracts of sale for a single performance and to installment contracts governed by article 73. When the preconditions of both articles are satisfied, the aggrieved party may choose between suspending performance and avoiding the contract with respect to future installments under article 73(2),"<sup>118</sup> provided that opting for suspension of performance is not more detrimental to the defaulting party than avoiding the contract with respect to the said future installments.

Now, if both art. 71 and art. 72 CISG are available because, on the one hand, the conditions of art. 72 CISG are satisfied, and, on the other hand, the innocent party is, in the light of the above considerations regarding reasonableness, entitled to choose either remedy, this party will often start by suspending performance of his own obligations. In this manner, first, the innocent party is able to protect himself without delay (art. 71 CISG does not require that notice of suspension be given prior to the moment when suspension actually takes place, whereas art. 72 CISG requires that the innocent party give the other party reasonable notice of his intent to declare the contract avoided). Second, by merely suspending performance of his obligations, the innocent party gives the other party a last chance to perform in compliance with the terms of the contract before putting an end to it. Consequently, "if there is any doubt on whether, due to the conduct of the other party or the prevailing circumstances, there is an anticipatory breach objectively speaking, a party should rather exercise the right to suspend performance under article 71 CISG and require an adequate assurance from the other party than issue a notice of avoidance under article 72(2)."<sup>119</sup> "It is a safer option because the giving of a notice of avoidance in terms of art. 72(2) under circumstances where it is not warranted may in itself constitute an anticipatory breach entitling the other party to avoid the contract."<sup>120</sup> Hence, it is often only after one party has suspended performance of his obligations and only if the other party fails to provide adequate assurance of performance, that the former will avoid the contract. Notice of suspension given by the innocent party should therefore, in cases in which both art. 71 and art. 72 CISG are available, preferably comply with the requirements of both provisions:<sup>121</sup> such notice should indicate that

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118 The UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods, *supra* note 81; AUSTRIA OGH, 2 Ob 328/97t, *supra* note 29. In this case, if the innocent party chooses to suspend performance with respect to future installments, it must give notice in accordance with art. 71(3) CISG (RUSSIA Federation Chamber of Commerce and Industry arbitration award No. 302/1996, *supra* note 81).

119 Eiselen, Remarks on the Manner in which the UNIDROIT Principles of International Commercial Contracts May be Used to Interpret or Supplement Articles 71 and 72 of the CISG, *supra* note 111.

120 Chengwei, *supra* note 11, § 9.6.2; see also Eiselen, *supra* note 111.

121 Trevor Bennett, *Comments on Article 72*, in Cesare Massimo Bianca & Michael Joachim Bonell, *Commentary on the International Sales - The 1980 Vienna Sales Convention* 525, 529 (Giuffrè 1987), available online at <<http://www.cisg.law.pace.edu/cisg/biblio/bennett-bb72.html>>.

the party giving the notice has suspended performance of his obligations and that he intends to avoid the contract in case of failure, by the other party, to provide adequate assurance of performance. If the party who received the notice provides adequate assurance of performance, the other party is compelled to resume performance and is prohibited from declaring the contract avoided.

The second issue relates to the question whether the degree of certainty required under art. 71 CISG that a breach of contract will occur, is lower than that required under art. 72 CISG. This issue has been profusely debated. The wording used in the two provisions is not the same: art. 71 CISG requires that "it [become] apparent" that the debtor will not perform a substantial part of his obligations, whereas art. 72 CISG requires that it be "clear that one of the parties will commit a fundamental breach." Nevertheless, some authors maintain that both provisions require the same degree of certainty, i.e., in both cases, the innocent party must have attained a degree of virtual or quasi certainty that a breach will occur. Schlechtriem, for example, maintains that "the different formulations do not require different degrees of certainty – such a requirement would hardly be practicable anyway. . . The decisive factor in all three provisions – arts. 71, 72(1) and 73(2) – is whether a reasonable person would be convinced that a breach of contract is certain to occur."<sup>122</sup> On the other hand, the majority of authors who have examined the question have come to the conclusion that "standards for suspension are less rigorous than the standards for avoidance under article 72."<sup>123</sup> The difference in terminology was, according to these authors, consciously drafted<sup>124</sup> and is also found in the French and Spanish versions of the CISG.<sup>125</sup> Some court decisions also seem to hold the view that art. 72 CISG requires a higher standard of prospective certainty than art. 71 CISG.<sup>126</sup> "This approach is also supported by the provisions of articles 7.3.3 and 7.3.4 of the UNIDROIT Principles, where there is a clearly formulated difference in the requirements. In terms of article 7.3.3, it is required that it be clear that there will be a

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122 Schlechtriem, *supra* note 9, at 96.

123 Honnold, *supra* note 7, at 437; see also Enderlein/Maskow, *supra* note 7, at 286, who hold that under art. 72, "a greater certainty than in article 71 regarding the right to suspend performance of obligations is required;" Bennett, *supra* note 121, at 528; Eiselen, Remarks on the Manner in which the UNIDROIT Principles of International Commercial Contracts May be Used to Interpret or Supplement Articles 71 and 72 of the CISG, *supra* note 111; Anton K. Schnyder & Ralf Michael Straub, in *Kommentary zum UN-Kaufrecht*, Rn 24, Rn 25 (Honsell ed., Springer 1997), who hold that this is the proper interpretation when due regard is paid to the history and drafting of art. 71 and art. 72 CISG; Flechtner, *supra* note 101, at 94; Lookofsky, *supra* note 6, at 148.

124 See Jacob S. Ziegel, Report to the Uniform Law Conference of Canada on Convention on Contracts for the International Sale of Goods, available online at <<http://www.cisg.law.pace.edu/cisg/text/ziegel71.html>>, according to whom art. 71 CISG was intended to be invoked more easily than art. 72 CISG; see also Lookofsky, *supra* note 6, at 148, according to whom a comparison of the terms of art. 71 "with the rules set forth in article 72 indicates that the Convention makes it somewhat easier to suspend than avoid."

125 The French version of art. 71(1) is the following: "Une partie peut différer l'exécution de ses obligations lorsqu'il *apparaît*, après la conclusion du contrat, que l'autre partie n'exécutera pas une partie essentielle de ses obligations;" in turn, art 72(1) reads: "Si, avant la date de l'exécution du contrat, il est *manifeste* qu'une partie commettra une contravention essentielle au contrat, l'autre partie peut déclarer celui-ci résolu." The Spanish version of art. 71(1) provides: "Cualquiera de las partes podrá diferir el cumplimiento de sus obligaciones si, después de la celebración del contrato, *resulta manifiesto* que la otra parte no cumplirá una parte sustancial de sus obligaciones;" in turn, art. 72(1) reads: "Si antes de la fecha de cumplimiento fuere *patente* que una de las partes incurrirá en incumplimiento esencial del contrato, la otra parte podrá declararlo resuelto."

126 The clearest example where this has been applied is ICC award No. 8786, *supra* note 49. See also AUSTRIA Schiedsgericht der Börse für landwirtschaftliche in Wien [Arbitral Tribunal - Vienna] S 2/97, 10 December 1997, available online at <<http://cisgw3.law.pace.edu/cases/971210a3.html>>. In SWITZERLAND *Zivilgericht Saane* [District Court], 20 February 1997, T 171/95 (CLOUT case No. 261), available online at <<http://cisgw3.law.pace.edu/cases/970220s1.html>>, and SWITZERLAND ZHK Arbitral award No. 273/95, *supra* note 22, reliance on art. 72 CISG was rejected due to a lack of evidence that there was an intention to repudiate; it was not clear that a breach would be committed.

fundamental non-performance, whereas in terms of article 7.3.4 there need only be a reasonable belief on the part of the innocent party that there will be a fundamental non-performance.”<sup>127</sup> At the time of the drafting of the CISG, such difference was “accepted and justified on the grounds that the remedy in article 71(1) differs in seriousness from the remedy in article 72(1). Under article 71(1), the suspension applies only to obligations still to be performed and leaves the contract intact, whereas, under article 72(1), an avoidance of the contract is possible.”<sup>128</sup> Indeed, art. 71 CISG allows one party to suspend performance not only if the threat of non-performance by the other party concerns the obligation to pay the price, to accept delivery of the goods, or to deliver the goods, but also if the non-performance relates to acts to be performed in a view to paying the price, accepting the delivery, or delivering the goods. Art. 71 CISG is used as a tool available to the innocent party to put pressure on the other party by momentarily – until adequate assurance of performance is provided – suspending performance of his obligations. Under art. 72 CISG, the innocent party’s aim is not to compel the other party to comply with his obligations; the goal is not, like under art. 71 CISG, to “save” the contract, but rather to put an end to it.

The third issue concerns the consequences of the failure to provide adequate assurance of performance, given that art. 71 CISG does not specify them. As stated above (*supra* II.4.), opinions vary as to what these consequences are and therefore as to the interplay between art. 71 and art. 72 CISG. Is a failure or a refusal to provide adequate assurance of performance in itself a fundamental breach authorizing avoidance under art. 72 CISG, or does such failure only make it clear that the breach suspected under art. 71 CISG will be committed? If one party fails to provide adequate assurance of performance, is the other party only entitled to continue suspending performance of his obligations, or does he have an additional right to consider the contract repudiated by the other party?

Many authors maintain that in case of failure to provide assurance of performance in compliance with art. 71(3) CISG, the innocent party is entitled to invoke art. 72 CISG on anticipatory repudiation and thus declare the contract avoided.<sup>129</sup> The author of the present paper agrees with the opinion of other authors, who hold that “a failure to provide an adequate assurance does not automatically provide a right of avoidance and there is therefore no mechanism by which a party may demand an assurance of performance and treat a failure to respond with an adequate assurance as a fundamental breach.”<sup>130</sup> Thus, the statement according to which “under art. 71 the party seeking assurance of performance is only entitled to suspend his own performance pending the provision of the sought assurance [, and] it is only if adequate assurance is not furnished that he is entitled to avoid the contract”<sup>131</sup> is accurate only if the suspected breach is of fundamental

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127 Eiselen, Remarks on the Manner in which the UNIDROIT Principles of International Commercial Contracts May be Used to Interpret or Supplement Articles 71 and 72 of the CISG, *supra* note 111.

128 Schlechtriem, *supra* note 9, at 95-96.

129 As stated above, Enderlein/Maskow, *supra* note 7, at 290, maintain that “if the other party provides no assurance, this can be seen as an indication of an anticipatory, fundamental breach of contract, and the party empowered to suspend performance of his obligations can avoid the contract under art. 72. He may, however, also wait until the time for performance has passed and, in the case of non-performance, avoid the contract under articles 49 or 64.” Similarly, Bennett, *supra* note 6, at 524, asserts that “frequently, . . . a failure to provide an adequate assurance will justify a conclusion that a fundamental breach will be committed and avoidance for anticipatory breach will be possible.” Finally, Honnold, *supra* note 7, at 436 also states that “B’s failure to respond with assurances of performance may make it ‘clear’ that B will commit a fundamental breach of contract – a ground for avoiding the contract under Article 72,” but he nevertheless indicates that “such failure to provide assurances will not always justify avoidance” (note 17).

130 Chengwei, *supra* note 11, § 9.5; Carter, *supra* note 103.

131 Ziegel, *supra* note 124.

nature. If the non-performing party fails to provide assurance of performance and the suspected breach is not of fundamental nature, the innocent party is only entitled to continue to suspend performance of the contract or of obligations that ought to be fulfilled in preparation of performance of the contract (*supra* II.4.; see however footnote 101).

This view is supported by a comparative analysis of the CISG and the relevant provisions of the UNIDROIT Principles. Under art. 7.3.4 UNIDROIT Principles, if the innocent party reasonably suspects – but is not necessarily certain – that the other party will commit a fundamental non-performance, the former may demand adequate assurance of performance from the latter. In case of failure by the latter to provide such assurance of performance within a reasonable period of time, the innocent party is entitled to terminate the contract. A close connection is thus established, in the UNIDROIT Principles, between one party's failure to provide adequate assurance of performance in cases in which it is not "clear" that a breach will be committed, and the other party's corresponding right to avoid the contract. This mechanism however clearly departs from the hierarchy established between art. 71 and art. 72 CISG. First, art. 71 CISG, which – like art. 7.3.4 UNIDROIT Principles – authorizes suspension of performance in cases in which it is not "clear" but merely "apparent" that a breach will be committed, does not mention any right of one party to declare the contract avoided in case of failure by the other party to provide assurance of performance. Second and most importantly, in case of failure by one party to provide adequate assurance of performance, art. 7.3.4 UNIDROIT Principles authorizes the other party to avoid the contract only if the suspected non-performance is of fundamental nature. Consequently, even though the failure to provide, under art. 71 CISG, adequate assurance may – just like under art. 7.3.4 UNIDROIT Principles – make it "clear," in the sense of art. 72 CISG, that a breach will be committed, such a failure does not in itself constitute a fundamental breach, nor does it transform the suspected mere breach into a fundamental breach. In conclusion, under the CISG, if the breach initially suspected is not fundamental, avoidance of the contract is prohibited, even in cases of failure to provide adequate assurance of performance.

### III. AVOIDANCE PRIOR TO THE DATE FOR PERFORMANCE

#### 1. Purpose and Rationale of the Provision

One of the fundamental purposes of the Convention is to maintain international commercial contracts intact and to allow their performance even in adverse circumstances, in order to promote loyalty and good faith in international commercial transactions. Therefore, the Convention was drafted so as to permit avoidance of international sales contracts only in cases in which, clearly, continuation would cause one party or both parties irreparable harm. In other words, arts. 49 and 64 CISG authorize the buyer and the seller respectively to avoid the contract only if the other party has committed a fundamental breach of contract in the sense of art. 25 CISG. In sum, avoidance of the contract under the CISG is clearly a remedy of *extrema ratio*.

*A priori*, art. 72 CISG seems to contradict the spirit of the Convention. First, this provision authorizes one party to avoid the contract when no breach has actually occurred and the time for performance has not yet elapsed. Second, art. 72 CISG is not limited to cases of objective impossibility of performance but is also applicable in cases of subjective inability to perform (see *infra* III.2.). Consequently, even though art. 72 CISG provides that the contract may, in theory, be

avoided only if it is objectively "clear" or certain that a fundamental breach will occur, the risk remains that a contract be avoided even though the difficulties faced by one party in the performance of his obligations would in fact have been overcome before the time agreed upon by the parties for performance.

Art. 72 CISG is nevertheless the result of a compromise that satisfied the member states. The drafters came to the conclusion that if, at one point in time before the time agreed upon for performance, it is objectively "clear" that a fundamental breach will be committed, the interests of the party threatened by the breach ought to be primarily protected. Indeed, the drafters considered that art. 71 CISG (right to suspend performance, *supra* II.) might not grant sufficient protection if the suspected breach is of fundamental nature, and they considered that the protection of the threatened interests requires that the innocent party be entitled to declare the contract avoided, for example, so as to expeditiously enter into another contract, or remove uncertainty regarding financial commitments.<sup>132</sup> However, with regard to the principle according to which avoidance of contract is a remedy of last resort, the drafters complied with "the desire expressed by developing countries to permit the party whose breach is presumed to provide assurances and thereby to prevent the avoidance (article 72(2))."<sup>133</sup>

## 2. Conditions of Avoidance of the Contract

Pursuant to art. 72(1) CISG, "if prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach of contract, the other party may declare the contract avoided." Given the fact that avoidance of contract is a remedy of *extrema ratio*, in particular when based on the prospect of a breach (rather than on a breach that has actually taken place), art. 72 CISG precisely circumscribes the two conditions that ought to be satisfied for one party to be authorized to declare the contract avoided. The first condition relates to the degree of certainty that a breach will be committed. The second condition concerns the nature and magnitude of the breach.

### a. Degree of Certainty That a Breach Will Occur

Art. 72(1) CISG requires, as a first condition, that the party who intends to declare the contract avoided ensure that it is "clear" that the other party will commit a fundamental breach of contract. "A mere suspicion, even a well-founded one, is not sufficient."<sup>134</sup> Even though art. 72 CISG does not explicitly identify the degree of clarity or certainty that ought to be reached, a higher degree of clarity is required for the application of art. 72 CISG than for the application of art. 71 CISG (see considerations above, *supra* II.6.). Nevertheless, scholars and courts agree that art. 72 CISG does

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132 Bennett, *supra* note 121, at 527-528.

133 Schlechtriem, *supra* note 9, at 95.

134 Chengwei, *supra* note 11, § 9.6.2; see also Commission on European Contract Law, *Comment and Notes on PECL 9:304*, in *Principles of European Contract Law: Parts I and II* 416, 417 (Ole Lando and Hugh Beale eds., Kluwer Law International 2000), available online at <<http://www.cisg.law.pace.edu/cisg/text/peclcomp72.html>>.

not require absolute and unshakable certainty that a breach will be committed.<sup>135</sup> In a 1992 German decision, the *Landgericht* (District Court) Berlin stated that, under art. 72 CISG, a very high degree of probability is required ("*eine an Sicherheit grenzende Wahrscheinlichkeit*").<sup>136</sup> In fact, it transpires from the mechanisms provided for in art. 72(2) and (3) CISG that absolute certainty is not required. Art. 72(2) CISG envisages the possibility that adequate assurance of performance be provided and the contract be eventually performed, even if it was initially "clear" that a breach would be committed. In turn, art. 72(3) CISG indicates that a party's declaration "that he will not perform his obligations" empowers the other party to declare the contract avoided even though the declaration of the repudiating party does not make it absolutely "clear" that he will not change his mind and perform by the due date.<sup>137</sup> The mechanisms provided for in art. 72(2) and (3) CISG also show that it is precisely at the time of the declaration of avoidance that it must be objectively clear that a breach will be committed. In other words, the innocent party is not compelled to ensure that, at all times until the moment fixed for performance, there will be objective certainty that a breach will occur. Otherwise, the only situations covered by art. 72 CISG would be those in which it has become impossible for one party to perform his obligations; art. 72(2) and (3) CISG would never be enforced and would consequently have remained a dead letter. After all, "an anticipatory, fundamental breach of contract is, except when there is an express statement by the obligor, a presumption which is based on objective factors"<sup>138</sup> at a particular moment in time.

In any case, the suspicion that a fundamental breach of contract will be committed must be objectively founded. Indeed, as explained above (*supra* II.6.), just as the contract may not be suspended, under art. 71 CISG, on the basis of one party's merely subjective fear, under art. 72 CISG, *a fortiori*, the contract may not be avoided on the basis of such subjective fear. Rather, objective grounds must show that it is "clear that one of the parties will commit a fundamental breach of contract."<sup>139</sup> It is important to note here that the failure to provide, in compliance with art. 72(3) CISG, adequate assurance of performance (see *infra* III.3.), makes it objectively clear that a breach will be committed. Indeed, the Secretariat has articulated that "the failure by a party to give adequate assurance that he will perform when properly requested to do so under [Draft] article 62(3) [counterpart of the current art. 71(3)] may help make it 'clear' that he will commit a fundamental breach."<sup>140</sup> Scholars similarly maintain that it is "possible to conclude that the promisor's failure to provide adequate assurance in accordance with paragraph (2) of article 72

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135 Chengwei, *supra* note 11, § 9.6.2; GERMANY LG Berlin, 30 September 1992, 99 O 123/92, available online at <<http://cisgw3.law.pace.edu/cases/920930g1.html>>, in which the court held that for avoidance, the probability of a future breach must be very high, but almost complete certainty is not required; GERMANY OLG Düsseldorf, 14 January 1994, 17 U 146/93 (CLOUT case No. 130), available online at <<http://cisgw3.law.pace.edu/cases/940114g1.html>>. One decision stated that a claim of anticipatory repudiation must be supported by the conditions "(1) that the defendant intended to breach the contract before the contract's performance date and (2) that such breach was fundamental" (UNITED STATES Federal District Court, Northern District of Illinois, 7 December 1999 (CLOUT case No. 417)).

136 GERMANY LG Berlin, 52 S 247/94, *supra* note 23; see also GERMANY OLG Düsseldorf, 18 November 1993, 6 U 228/92, available online at <<http://cisgw3.law.pace.edu/cases/931118g1.html>>; GERMANY LG Krefeld, 28 April 1993, 11 O 210/92, available online at <<http://cisgw3.law.pace.edu/cases/930428g1.html>>; AUSTRALIA Supreme Court of Queensland, 17 November 2000, Civil Jurisdiction No. 10680 of 1996, available online at <<http://cisgw3.law.pace.edu/cases/001117a2.html>>.

137 Honnold, *supra* note 7, at 438.

138 Enderlein/Maskow, *supra* note 7, at 291.

139 Robert Koch, *The Concept of Fundamental Breach of Contract under the United Nations Convention on Contracts for the International Sale of Goods (CISG)*, in *Review of the Convention on Contracts for the International Sale of Goods (CISG)* 1998 177, 306 (Kluwer Law International 1999).

140 Secretariat Commentary on article 63 of the 1978 Draft [draft counterpart of art. 72 CISG] § 2, available online at <<http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-72.html>>.

makes it 'clear' that he will commit a fundamental breach."<sup>141</sup> Thus, if one party suspects that the other will commit a fundamental breach of contract and requests assurance of performance in compliance with art. 71(3) CISG, the latter party's failure to provide such assurance makes it "clear," in the sense of art. 72(1) CISG, that the breach will be committed.

Under art. 72 CISG, as opposed to art. 71 CISG, "there is no requirement that the anticipated breach be clear as a result of any particular conduct or circumstances."<sup>142</sup> Indeed, whereas art. 71 CISG specifies the circumstances that may cause one party not to perform a substantial part of his obligations, art. 72 CISG does not list the situations that may lead to the conclusion that a fundamental breach will be committed. Under the latter provision, "it is sufficient that [the breach] be clear whatever the clarity results from."<sup>143</sup> In other words, the future occurrence of a fundamental breach may be made manifest, just as under art. 71 CISG, by a serious deficiency in the debtor's ability to perform or in his creditworthiness, or may follow from his conduct in preparing to perform or in performing the contract, but it may also result from other circumstances not expressly mentioned in the text of the law.<sup>144</sup>

According to the Secretariat's Commentary on the draft of art. 63 (counterpart of the current art. 72 CISG<sup>145</sup>), "the future fundamental breach may be clear either because of the words or actions of the party which constitute a repudiation of the contract or because of an objective fact, such as the destruction of the seller's plant by fire or the imposition of an embargo or monetary controls which will render impossible future performance."<sup>146</sup> Indeed, art. 72 "combines in one rule the refusal to perform and an anticipated objective impossibility to perform."<sup>147</sup> In the absence of objective circumstances making performance impossible (such as insolvency of the obligor or the initiation of bankruptcy proceedings<sup>148</sup>), the contract may also be avoided for a number of

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141 Koch, *supra* note 139, at 305; see also, for the same conclusion, Bennett, *supra* note 6, at 524; Kritzer, *supra* note 61, at 466, who maintains that "the failure by a party to give adequate assurances that he will perform when properly requested to do so under article 71(3) may help make it 'clear' that he will commit a fundamental breach." See also the decisions of GERMANY OLG Düsseldorf, 17 U 146/93, *supra* note 135, and of GERMANY LG Berlin, 99 O 123/92, *supra* note 135, in which both courts held that failure to provide adequate assurance by the buyer made it clear that he would not pay the purchase price.

142 Bennett, *supra* note 121, at 528.

143 Bennett, *supra* note 121, at 528.

144 This assertion is not in agreement with the view expressed by Koch, *supra* note 134, at 306, according to whom the causes of the non-performance under art. 72 CISG are strictly the same as those mentioned under art. 71(1) CISG; indeed, Koch holds (in agreement with Hans G. Leser, Commentary on the UN Convention on the International Sale of Goods, ad art. 72, n. 21 (Peter Schlechtriem ed., 1998)) that in both cases, there must be objective grounds showing a high degree of probability that the promisor will not perform a substantial part of his obligations as a consequence of a serious deficiency in his ability to perform or in his creditworthiness, or as a result of his conduct in preparing to perform or in performing the contract.

145 The wording of the draft art. 63 and the current art. 72(1) are identical, with the one exception that the current text refers to "a fundamental breach of contract", whereas the draft art. 63 referred to "a fundamental breach;" the Secretariat Commentary on the draft art. 63 is consequently of primary relevance to the interpretation of the current art. 72 CISG.

146 Secretariat Commentary on Article 63 of the 1978 Draft, *supra* note 140, § 2; Kritzer, *supra* note 61, at 466, who specifies that even though the imposition of an embargo or monetary controls which renders future performance impossible justifies the other party's avoidance of the contract under art. 72 CISG, the non-performing party may be excused from damages by virtue of art. 79 CISG.

147 Enderlein/Maskow, *supra* note 7, at 291. Hans Stoll, Zur Haftung bei Erfüllungsverweigerung im Einheitlichen Kaufrecht 618 *et seq.*, (RabelsZ, 1988), criticizes such combination because, in his view, different conclusions have to be drawn when it comes to the right of the entitled party to claim damages: there would be an immediate right to claim damages in cases of refusal, by the debtor, to perform, whereas in other cases, such claim would not be available before the performance is due, and/or there would be no such claim at all of the obligor is not liable under art. 79 or 80 CISG.

148 Enderlein/Maskow, *supra* note 7, at 291.

”subjective reasons” which make it clear, in the sense of art. 72 CISG, that a breach will be committed. The Secretariat Commentary, scholarly writings, and case law have articulated the following few examples of circumstances – which are not objective circumstances leading to an absolute certainty that performance has, forever, become impossible – in which the innocent party is entitled to consider that it is ”clear,” in the sense of art. 72(1) CISG, that a fundamental breach will be committed.

Firstly, the contract may be avoided by one party if, as expressly envisaged by art. 72(3) CISG, the other party repudiates the said contract, either through his actions, or by declaring that he will not perform his obligations or that his performance will be defective.<sup>149</sup> For example, the seller or the buyer is deemed to have repudiated the contract if he declares that he will not perform his obligations, or if he denies the very existence of the sale contract.<sup>150</sup> Also, the seller is deemed to have repudiated the contract if he resells to a third party the goods that he had contracted to deliver to the buyer, or if he resells either the plant where he had pledged himself to manufacture the goods for the buyer, or the machines with which he had agreed to produce the goods for the buyer.<sup>151</sup> Thus, for instance, allegations, if proved, that the seller stated he would ”no longer feel obligated” to perform and would ”sell the material elsewhere” entitle the buyer to avoid the contract.<sup>152</sup> It is important to note here that if the aggrieved party does not respond to repudiation by declaring the contract avoided, he may be obliged to accept performance if the party who repudiated the contract changes his mind.

Secondly, Schlechtriem maintains that ”the frequent cases in which a demand for new terms or alleged contract violations by the other side are used as a pretext for not performing one’s own obligations” constitute, ”in most cases,” a ground for immediate avoidance.<sup>153</sup> ”This proposition was probably intended to govern situations in which one party (A) demands new terms from the other (B), coupled with an unconditional declaration that A ‘will not perform’ [his] obligations. Avoidance by B should not be triggered if A informs B of the need to negotiate a modification of their agreement (cf. art. 29). In any event, a response by B that goes beyond a notice of suspension of B’s counter-performance and a request for assurance (art. 71) may be hazardous since it may provide grounds for A to avoid the contract on the ground that B has repudiated under art. 72(1).”<sup>154</sup>

Finally, the precondition of paragraph (1), that it be ”clear” that a fundamental breach will be committed, has been found to be satisfied in the following circumstances: the buyer failed to pay for prior shipments;<sup>155</sup> the buyer failed to open a letter of credit;<sup>156</sup> the seller failed to reduce the

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149 In this respect, it is important to note that if one party declares that it will not perform its obligations, but eventually does so in compliance with the terms of the contract, the other party may not be held liable for having declared the contract avoided and such declaration brings the contract to an end.

150 Chengwei, *supra* note 11, § 9.6.2.

151 Honnold, *supra* note 7, at 438.

152 UNITED STATES Federal District Court, Northern District of Illinois, *supra* note 130.

153 Schlechtriem, *supra* note 9, at 95.

154 Honnold, *supra* note 7, at 438.

155 GERMANY OLG Düsseldorf, 17 U 146/93, *supra* note 135; GERMANY LG Berlin, 52 S 247/94, *supra* note 23.

156 AUSTRALIA Supreme Court of Queensland, *supra* note 136.

price and to commit to deliver fashion goods on time;<sup>157</sup> the seller deliberately stopped delivering the goods.<sup>158</sup>

b. *Magnitude of the Suspected Breach*

The second condition imposed by art. 72(1) CISG for the innocent party to be entitled to declare the contract avoided is that the suspected breach be fundamental in the sense of art. 25 CISG. This condition applies to both suspected defective performances and suspected delayed performances, if the time for performance is of the essence of the contract or if the contract stipulates that a delay in performance constitutes a fundamental breach of contract.

According to art. 25 CISG, "a breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result." An example of anticipatory fundamental breach often encountered is bankruptcy.<sup>159</sup> The history of art. 25 CISG indicates that the term "so as substantially to deprive him of what he is entitled to expect under the contract" does "not refer to the extent of the damage, but instead to the importance of the interests which the contract and its individual obligations actually create for the promisee."<sup>160</sup> Consequently, there is a fundamental breach of contract only if the aggrieved party, as a result of the breach, not only loses interest in the performance of the contract, but also suffers a detriment.<sup>161</sup> Consequently, there is no anticipatory fundamental breach in the following situations: the seller has held back the goods;<sup>162</sup> the seller expressed an interest in stopping deliveries but also agreed to continue negotiations;<sup>163</sup> the buyer failed to pay one installment.<sup>164</sup>

c. *Declaration of Avoidance*

If the conditions of art. 72(1) CISG are satisfied and notice of avoidance has been given (see *infra* III.3.), the innocent party may declare the contract avoided. "There is no time limit for such declaration. If the entitled party first decides to wait, he may avoid the contract at any time before the period for performance expires,"<sup>165</sup> provided that the conditions of art. 72(1) CISG are satisfied at the time of the declaration. Given its prompt effect, a declaration of avoidance cannot be withdrawn once it has become effective.<sup>166</sup>

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157 ICC award No. 8786, *supra* note 49.

158 SWITZERLAND ZHK Arbitral award No. 273/95, *supra* note 22.

159 Enderlein/Maskow, *supra* note 7, at 291; Vilus, *supra* note 7, at 244.

160 Hossam El-Saghir, *Editorial remarks regarding the comparison of art. 8:103 PECL and art. 25 CISG*, in *Guide to Article 25 - Comparison with Principles of European Contract Law (PECL)*, available online at <<http://www.cisg.law.pace.edu/cisg/text/peclcomp25.html>>; Peter Schlechtriem, *Commentary on the UN Convention on the International Sale of Goods (CISG) 177* (Clarendon Press 1998).

161 El-Saghir, *supra* note 160.

162 SWITZERLAND Zivilgericht Saane, T 171/95, *supra* note 126.

163 ICC award No. 8574, September 1996, available online at <<http://cisgw3.law.pace.edu/cases/968574i1.html>>.

164 SWITZERLAND ZHK Arbitral award No. 273/95, *supra* note 22.

165 Enderlein/Maskow, *supra* note 7, at 292.

166 Enderlein/Maskow, *supra* note 7, at 292.

"If a party declares the contract avoided without a fundamental breach of contract by the other party being anticipated, the former commits a fundamental breach of contract"<sup>167</sup> and is compelled to accept the latter's performance. Indeed, if, at the time performance was due, no fundamental breach would in fact have occurred, the original expectation that a breach would be committed may not have been "clear," and the declaration of avoidance may consequently be void. In such a case, the party who attempted to avoid would be in breach of the contract given his own failure to perform.<sup>168</sup> In other words, the action of the party who declared the contract avoided "may be invalid and lead to the result that his own subsequent non-performance amounts to a breach and possible liability for damages."<sup>169</sup> Consequently, the declaration of avoidance is to be considered as wrongful and may in turn constitute a repudiation of the contract, giving the other party the right to avoid the contract in accordance with art. 72(1) CISG.<sup>170</sup>

### 3. Advance Notice of Intent to Avoid the Contract and Adequate Assurance of Performance

#### a. Advance Notice of Intent to Avoid the Contract

Pursuant to art. 72(2) CISG, "if time allows, the party intending to declare the contract avoided must give reasonable notice to the other party in order to permit him to provide adequate assurance of his performance." "The notice of the party intending to declare the contract avoided demanding that the other party provide adequate assurance of the performance, as art. 72(2) CISG allows in such a case, seems to be the best solution to relieve the former party from doubts about occurrence of the other party's breach and reduces the risk he would otherwise be taking."<sup>171</sup> Thus, the notice of the innocent party requesting adequate assurance of performance primarily serves two purposes. First, for the party who suspects without certainty that a breach will be committed, it does not compel him to wait until the date of performance, unable to protect his interests, and then incur losses if the other party eventually does not perform. Second, the obligation of giving notice in compliance with art. 72(2) CISG and the opportunity thus granted to the non-performing party to provide adequate assurance of performance prevent hasty declarations of avoidance in cases in which it eventually appears that the other party would have performed his obligations in compliance with the terms of the contract. Thus, the obligation of giving notice protects the party wishing to avoid the contract from wrongfully declaring the contract avoided and consequently being held liable in damages.

The notice is subject to art. 27 CISG. It does not need to be received by the addressee to become effective. Therefore, "if it is lost, the party entitled to avoid the contract does not lose that right. But he should in his own interest make sure that the notice reaches the other party."<sup>172</sup>

Art. 72(3) CISG provides a first exception to the general obligation to give notice of intent to avoid the contract. Indeed, this paragraph states that "the requirements of the preceding paragraph do not apply if the other party has declared that he will not perform his obligations." Thus, if a party has repudiated the contract (which is, according to Schlechtriem, the most

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167 Enderlein/Maskow, *supra* note 7, at 291; Bennett, *supra* note 121, at 528.

168 Kritzer, *supra* note 61, at 466; Lookofsky, *supra* note 6, at 150.

169 Bennett, *supra* note 121, at 528.

170 Honnold, *supra* note 7, at 438.

171 Chengwei, *supra* note 11, § 9.7.1.

172 Enderlein/Maskow, *supra* note 7, at 293.

frequent situation), the other party may declare the contract avoided without having first given notice of his intent to do so<sup>173</sup> (for a more detailed analysis of the consequences of a repudiation of the contract, see *infra* III.6.). Also, "since [art. 72(3)'s] exception also covers the frequent cases in which a demand for new terms or alleged contract violations by the other side are used as a pretext for not performing one's own obligations, immediate avoidance still remains an option in most cases."<sup>174</sup> Nonetheless, one should remember that declaring the contract avoided, if it has been repudiated by the other party, is a right, not an obligation. If the aggrieved party does not avoid the contract, and if the debtor of the obligation changes his mind, the latter may still perform the contract.<sup>175</sup>

The obligation to give notice, under art. 72(2) CISG, suffers a second exception: the party who intends to declare the contract avoided is under no obligation of giving reasonable notice if time does not allow it. As a general rule, "given the sophisticated means of communication, it is hardly imaginable that time would not allow to give notice to the other party of the intended avoidance of the contract."<sup>176</sup> Nevertheless, two situations may be envisaged in which one ought to consider that time does not allow the party wishing to avoid the contract to give notice of his intent. First, the contract may be declared avoided without prior notice of intent, if such notice would result in a delay which would be prejudicial to the interests of the innocent party. Second, sending a notice of intent is not a condition to the declaration of avoidance if the time-span between the moment when notice would have been given and the expiration of the time for performance would be too short for the addressee of the notice to provide adequate assurance of performance in compliance with art. 72(2) CISG.<sup>177</sup> In other words, notice to the other party is unnecessary in cases where the delivery date is so near that adequate assurance could not be provided in time. Indeed, "the object of the notice requirement is to enable the other party to provide adequate assurance of his performance. If that has become impossible, then the necessity to give notice must surely fall away."<sup>178</sup> Notice must be "reasonable," and it is reasonable only if the addressee has a chance to provide assurance of performance.<sup>179</sup> "Where there is little chance that the other party can still provide security – for example, where a delivery cannot be made because of war – notice will often be unnecessary."<sup>180</sup> Consequently, the following conclusion may be reached: notice of one party's intent to avoid the contract is unnecessary in all situations in which it is objectively certain that a

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173 Schlechtriem, *supra* note 9, at 95. In CHINA International Economic & Trade Arbitration Commission, Arbitral award CISG/1996/05, 30 January 1996, available online at <<http://cisgw3.law.pace.edu/cases/960130cl.html>>, the Arbitral Tribunal held that by declaring in a fax that "... It is impossible to deliver the goods. We will try to find other sources, but because it is hard to find such goods, the possibility is low ... Due to the above reasons, [buyer] needs to make arrangements for non-delivery (including bank guarantee, etc.)," the seller had clearly expressed that he would not perform his delivery obligation. The Tribunal concluded that in such circumstances, according to art. 72(3) CISG, the party intending to declare the contract avoided (the buyer) needed not notify the other party.

174 Schlechtriem, *supra* note 9, at 95; Chengwei, *supra* note 11, § 9.6.3.

175 Enderlein/Maskow, *supra* note 7, at 293.

176 Enderlein/Maskow, *supra* note 7, at 292.

177 Enderlein/Maskow, *supra* note 7, at 292.

178 Sieg Eiselen, Remarks on the Manner in which the UNIDROIT Principles of International Commercial Contracts May be Used to Interpret or Supplement Articles 71 and 72 of the CISG and Remarks on the Manner in which the Principles of European Contract Law May Be Used to Interpret or Supplement Articles 71 and 72 of the CISG, *supra* note 111. There are however strong contrary views on this issue; see, for example, GERMANY LG Düsseldorf, 9 July 1992, 31 O 223/91, available online at <<http://cisgw3.law.pace.edu/cases/920709g1.html>>.

179 Enderlein/Maskow, *supra* note 7, at 292-293, who maintain that "in the very interest of the obligee, it should be reasonable in most cases to give notice of an avoidance of contract. This is contradicted by circumstances only where there is absolute certainty of future fundamental breaches of contract ... Even in the event of the other party's bankruptcy, his receiver could prefer fulfillment to avoidance of the contract."

180 Chengwei, *supra* note 11, § 9.6.3; see also Schlechtriem, *supra* note 9, at 95.

fundamental breach will be committed. In any event, "if there is doubt on whether the innocent party should have informed or not, the court ought to rule in favor of the innocent party, i.e., that there was no duty to inform."<sup>181</sup>

b. *Adequate Assurance of Performance*

As mentioned earlier, the object of the obligation to give notice of intent to declare the contract avoided is "to permit [the other party] to provide adequate assurance of his performance" (art. 72(2) CISG). "What constitutes an adequate assurance varies depending on the circumstances, including the standing and integrity of the promisor, his previous conduct in relation to the contract, and the nature of the event that creates uncertainty as to his ability and willingness to perform."<sup>182</sup> As a general rule, an assurance of performance is deemed adequate if it gives reasonable security to the creditor of the obligation either that the debtor will perform or that the creditor will be compensated for all losses incurred in executing his own performance. As stated above, a reassuring statement, i.e., a mere statement of intention and ability to perform will generally be considered insufficient.<sup>183</sup> "In most instances, a new term of payment against documents, a guarantee by a reputable bank, or a letter of credit issued by a reputable bank will be required."<sup>184</sup> "If there is serious doubt as to the seller's performing of his obligations, he could also provide a guarantee of performance. He could also explain in which way he can and will deliver the goods in time, in the agreed quality and free from third party rights or claims (e.g., use of sub-contractors, increase in the production capacity, cancellation of other obligations to deliver, acquisition of licenses, etc.)."<sup>185</sup>

"The absence of an assurance of performance in response to a notice under . . . paragraph [(2)] would normally tend to make it clear that a breach is going to occur"<sup>186</sup> (see *supra* III.2.). Consequently, in all cases in which the innocent party is under the obligation to give notice of his intent to declare the contract avoided, the failure of the other party to provide adequate assurance of performance is a necessary and sufficient condition for the avoidance of the contract. In other words, with the exception of cases of repudiation of the contract and cases in which time does not allow the party who intends to declare the contract avoided to give reasonable notice to the other party, the former may declare the contract avoided if and only if the debtor of the obligation fails to provide adequate assurance of performance. A parallel may therefore be established between the obligation to provide adequate assurance of performance, with regard to anticipated non-delivery, non-payment, or failure to take delivery, under art. 72(2) CISG, and the *Nachfrist* procedure under arts. 49(1)(b) and 64(1)(b) CISG. The purpose of both mechanisms is the same, namely to give the obligor a last chance to perform his obligation and thus "remove the

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181 Eiselen, Remarks on the Manner in which the UNIDROIT Principles of International Commercial Contracts May be Used to Interpret or Supplement Articles 71 and 72 of the CISG and Remarks on the Manner in which the Principles of European Contract Law May Be Used to Interpret or Supplement Articles 71 and 72 of the CISG, *supra* note 111.

182 Koch, *supra* note 139, at 305-306.

183 Koch, *supra* note 139, at 306; Honnold, *supra* note 7, at 434 by analogy.

184 Koch, *supra* note 139, at 306.

185 Enderlein/Maskow, *supra* note 7, at 292-293.

186 Bennett, *supra* note 121, at 528, who adds that "the giving of notice under paragraph (2) will be in the interests of the party proposing to declare the contract avoided because its effect will be to establish whether it is in fact 'clear' that the fundamental breach will be committed, thereby removing the risk of liability arising in consequence of an invalid declaration" (p. 530); Koch, *supra* note 134, at 305; Kritzer, *supra* note 61, at 466; decisions of GERMANY OLG Düsseldorf, *supra* note 130 and GERMANY LG Berlin, *supra* note 130.

performance obstacles which give rise to the right to avoidance. While the 'Nachfrist-type' procedure eliminates uncertainty when performance is overdue, the adequate assurance procedure eliminates uncertainty concerning performance that is not yet due."<sup>187</sup> Both mechanisms aim at maintaining the contract on foot.

#### 4. Consequences of the Avoidance of the Contract

The declaration results in prompt avoidance of the contract; no agreement by the other party, nor any assistance by the courts is required.<sup>188</sup> Furthermore, "a party which exercises a right to terminate the contract for anticipatory non-performance has the same rights as on termination for actual non-performance and is therefore entitled to exercise any other remedies available to actual non-performance, including damages, except that damages are not recoverable where the non-performance at the due date would be excused"<sup>189</sup> (arts. 74 to 76 CISG). Thus, the consequences of a declaration of avoidance include, on the one hand, the right to claim restitution of whatever the avoiding party has supplied or paid under the contract (art. 81(2) CISG), and, on the other hand, the right to recover damages (art. 81(1) CISG).

Regarding damages, in all cases in which a party wrongfully repudiates the contract, the other party, who declared the contract avoided, is allowed to resell or repurchase the goods that were the object of the first contractual agreement, regardless of the fact that the party who repudiated the contract might change his mind and eventually offer to perform his obligations within the time-frame set by the contract. "In addition, by virtue of article 75, a reasonably prompt resale or repurchase (even prior to the date for performance) may fix the damages for which the repudiating party will be liable."<sup>190</sup> Furthermore, even when it is clear that a fundamental breach of contract will occur, the duty to mitigate the loss, mentioned under art. 77 CISG, may require the party who intends to invoke that breach to take measures to protect his interests, to reduce his loss, including loss of profit, resulting from the breach, even prior to the contract date for performance.<sup>191</sup> Thus, for instance, "if it is clear that a non-delivery of goods amounting to a fundamental breach is going to occur and that the amount of the losses expected to result from the breach is greater if prompt action is not taken to make alternative arrangements for the supply

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187 Koch, *supra* note 139, at 308.

188 Enderlein/Maskow, *supra* note 7, at 292.

189 Chengwei, *supra* note 11, § 9.6.1; see also Commission on European Contract Law, *supra* note 134, at 418. Lookofsky, *supra* note 6, at 150, nevertheless points out that the Convention itself contains no specific rule regarding an immediate action for damages in case of anticipatory fundamental breach. He stresses that Section II of Chapter V of the Convention deals with damages in cases of actual breach (damages being based, under the CISG, on the failure of a party to perform his obligations under the contract or the Convention; see art. 45 and 61). He concludes that "if an action for damages under articles 74-76 is to be based upon a 'breach by anticipatory repudiation,' we might say that a CISG promise to perform in the future 'by implication includes an engagement not deliberately to compromise the probability of performance. . .'. The CISG protects the expectation interest of the promisee in general, and the promisee should be entitled that his performance expectation be protected against anticipatory repudiation as well."

190 Honnold, *supra* note 7, at 439.

191 See Secretariat Commentary on art. 63 of the 1978 Draft, *supra* note 140, § 4. The match-up indicates that paragraph (1) of art. 63 of the 1978 Draft and paragraph (1) of art. 72 CISG are substantially identical. Paragraphs (2) and (3) of the Official Text are new; see the match-up, available online at <<http://www.cisg.law.pace.edu/cisg/text/matchup/matchup-d-72.html>>. See also Kritzer, *supra* note 61, at 466; Leser, *supra* note 144, at 541; Lookofsky, *supra* note 6, at 150. Leif Sevón, *Obligations of the Buyer under the UN Convention on Contracts for the International Sale of Goods*, in *International Sale of Goods: Dubrovnik Lectures 203, 228* (Petar Sarcevic & Paul Voken eds., Oceana Publications 1986), however, states that "as the seller may even resort to a requirement for performance after the buyer's breach has amounted to a fundamental breach, it can hardly be assumed that the buyer could, at this stage, require the seller to take steps to mitigate his damage."

of the goods, the obligation to mitigate losses requires avoidance action under article 71 even before the breach has occurred.”<sup>192</sup>

In case of wrongful declaration of avoidance (i.e., if the conditions of art. 72(1) CISG were in fact not satisfied, for instance, if it appears that in fact it was not “clear” that a breach would occur, or the suspected breach was not of fundamental nature), the party who declared the contract avoided is under the obligation to accept performance by the other party, and may be considered by the latter as having repudiated the contract under art. 72(1).<sup>193</sup>

## 5. Impact of the CISG on Subsequent Uniform Sets of Principles

The wording of art. 9:304 PECL<sup>194</sup> is almost identical to that of art. 7.3.3 UNIDROIT Principles.<sup>195</sup> Furthermore, the notion of anticipatory breach adopted by these two provisions is very close to that of art. 72(1) CISG. The rationale of all three provisions is the same: a party to a contract cannot reasonably be expected to continue to be bound by it if it has become clear that the other party will commit a fundamental breach, cannot or will not perform at the due date.<sup>196</sup> Furthermore, in all three sets of rules and principles, “any fundamental non-performance is regarded as a breach of contract, whether the performance was possible or not. Thus where substantial performance becomes impossible, even if such impossibility results from circumstances beyond the control of the obligor, non-performance or mal-performance is still regarded as a breach.”<sup>197</sup> As a consequence, all three provisions “are said to establish the principle that a non-performance which is to be expected is to be equated with a non-performance which occurred at the time when performance fell due.”<sup>198</sup>

Art. 7.3.3 UNIDROIT Principles and art. 9:304 PECL are largely inspired by art. 72 CISG, not only with respect to the notion of anticipatory breach on which they are founded, but also with respect to the conditions of avoidance that each provision lays out. In all three cases, “anticipatory non-performance” means “an obvious unwillingness or inability to perform where the failure in performance would be fundamental within art. 8:103”<sup>199</sup> PECL. Furthermore, under the UNIDROIT Principles, the PECL, and the CISG, the party faced with an anticipatory non-performance may terminate the contract at any time, provided that two conditions are satisfied. First, the inability or unwillingness to perform must be manifest; a mere suspicion, even well-founded, is insufficient.<sup>200</sup> Under the UNIDROIT Principles and the PECL, however, mere doubts as to the ability or willingness to perform allow the creditor of the performance to demand assurance of performance under art. 7.3.4, respectively art 8:105; meanwhile, he may withhold

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192 Bennett, *supra* note 121, at 529.

193 Honnold, *supra* note 7, at 438.

194 According to art. 9:304 PECL, “where prior to the time for performance by a party it is clear that there will be a fundamental non-performance by it, the other party may terminate the contract.”

195 According to art. 7.3.3 UNIDROIT Principles, “where prior to the date for performance by one of the parties it is clear that there will be a fundamental non-performance by that party, the other party may terminate the contract.”

196 Chengwei, *supra* note 11, § 9.6.1.

197 Eiselen, Remarks on the Manner in which the UNIDROIT Principles of International Commercial Contracts May be Used to Interpret or Supplement Articles 71 and 72 of the CISG, *supra* note 111.

198 Chengwei, *supra* note 11, § 9.6.1.

199 Commission on European Contract Law, *supra* note 134, at 417.

200 Commission on European Contract Law, *supra* note 134, at 417.

performance of his own obligations<sup>201</sup> (see *infra* for a more detailed analysis of this specificity of the UNIDROIT Principles and the PECL). Second, the threatened non-performance must be fundamental in the sense of art. 25 CISG, respectively art. 7.3.1 UNIDROIT Principles and 8:103 PECL.

The provisions of the CISG regarding anticipatory avoidance of the contract however differ, in various respects, from those of the UNIDROIT Principles and the PECL. First, the scope of application of art. 72(1) CISG seems to be narrower than that of art. 7.3.3 UNIDROIT Principles and of art. 9:304 PECL. Indeed, some authors maintain that whereas art. 72(1) CISG requires that the debtor of the obligation be the author ("will commit") of the fundamental breach, the conditions of art. 9:304 PECL and art. 7.3.3 UNIDROIT Principles are satisfied if it is clear<sup>202</sup> that "there will be" a fundamental non-performance, regardless of the identity of the author of the non-performance. Nevertheless, this distinction does not hold an important place beyond the boundaries of a theoretical comparative analysis.<sup>203</sup>

Second, the interplay between provisions governing suspension of performance and provisions governing avoidance of the contract differs between the CISG, on the one hand, and the UNIDROIT Principles and PECL, on the other hand. As explained above (*supra* II.5.), even though the UNIDROIT Principles and the PECL grant to the innocent party, as does art. 71(1) CISG, a right to suspend performance of his obligations, in the context of the two sets of non-binding principles, such right may only be exercised if the suspected breach is of fundamental nature. Consequently, the innocent party benefits from no remedy (similar to that provided by art. 71 CISG) if the suspected breach is not of fundamental nature. Furthermore, the difference, between cases of suspension of performance and cases of avoidance of the contract, in the required degree of certainty that a breach will occur, seems to be clearer in the UNIDROIT Principles and in the PECL than in the CISG. Whereas art. 7.3.3 UNIDROIT Principles and art. 9:304 PECL, pertaining to the avoidance of the contract, require that it be objectively clear that a fundamental non-performance will occur, art. 7.3.4 UNIDROIT Principles and art. 8:105 PECL, pertaining to the suspension of performance, only require that there be a subjective reasonable belief, on the part of the innocent party, that there will be a fundamental non-performance.<sup>204</sup> As to the provisions of the CISG, both art. 71 and art. 72 CISG require that the future occurrence of the breach be objectively recognizable, but the degree of certainty that a breach will occur, is higher under art. 72 CISG than under art. 71 CISG. The drafters of the two sets of non-binding Principles have thus avoided an on-going debate similar to the one opposing the two formulations "it is clear," under art. 72 CISG, and "it becomes apparent," under art. 71(1) CISG, that a breach will be committed.

Third, the CISG's approach to avoidance of the contract is more lenient than that of the UNIDROIT Principles and the PECL. Indeed, under art. 72(2) and (3) CISG, the innocent party

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201 Commission on European Contract Law, *supra* note 134, at 417; Chengwei, *supra* note 11, § 9.6.2.

202 For examples of situations in which it is clear that a fundamental breach will be committed, see *supra* III.2.

203 Eiselen, Remarks on the Manner in which the UNIDROIT Principles of International Commercial Contracts May be Used to Interpret or Supplement Articles 71 and 72 of the CISG and Remarks on the Manner in which the Principles of European Contract Law May Be Used to Interpret or Supplement Articles 71 and 72 of the CISG, *supra* note 111.

204 Eiselen, Remarks on the Manner in which the UNIDROIT Principles of International Commercial Contracts May be Used to Interpret or Supplement Articles 71 and 72 of the CISG and Remarks on the Manner in which the Principles of European Contract Law May Be Used to Interpret or Supplement Articles 71 and 72 of the CISG, *supra* note 111.

is under the obligation, when time allows it, to give to the other party notice of his intent to declare the contract avoided, unless the other party has clearly announced his intention not to perform his obligations. As already mentioned, the object of the notification is to grant the addressee a last chance to provide adequate assurance of performance and thus prevent a declaration of avoidance. Under art. 7.3.3 UNIDROIT Principles and art. 9:304 PECL, there is no such obligation.<sup>205</sup> Indeed, "a party is not obligated to inform the other party, but may as a precaution require an adequate assurance of due performance, failing which that party is entitled to terminate the agreement"<sup>206</sup> (art. 7.3.4 UNIDROIT Principles and art. 8:105 PECL).

Fourth, the UNIDROIT Principles and the PECL establish a close connection between suspension of performance and avoidance of the contract, which is absent from the CISG. According to art. 7.3.4 UNIDROIT Principles and art. 8:105 PECL, a party who reasonably believes that there will be a fundamental non-performance by the other party may demand adequate assurance of performance and meanwhile may withhold performance of his own obligations; if the requested assurance is not provided within a reasonable time, the party who demanded it may terminate the contract. There is thus a "close connection between the provisions of article 7.3.3 and 7.3.4"<sup>207</sup> UNIDROIT Principles, as well as "between the provisions of article 9:304 and 8:105"<sup>208</sup> PECL. If a party is uncertain as to whether there will be a fundamental breach, but reasonably suspects that it may occur, that party is, according to art. 7.3.4 UNIDROIT Principles and art. 8:105 PECL, entitled to demand an adequate assurance of performance from the other party. Failure to provide such assurance is a sufficient ground, under art. 7.3.4 UNIDROIT Principles and art. 8:105 PECL, to terminate the contract.<sup>209</sup> "In other words, if the aggrieved party does not receive adequate assurance of performance and still believes on reasonable grounds that performance will not be forthcoming, it may terminate the contract ... The other party's failure to give the assurance requested is itself treated as a fundamental non-performance under the two sets of Principles, giving the aggrieved party the right to terminate the contract and also a right to damages where the deemed non-performance is not excused."<sup>210</sup> More precisely, the failure to provide adequate assurance of performance turns a reasonable subjective belief that a breach could occur into an objective certainty or clarity (required under art. 7.3.3 UNIDROIT Principles and art. 9:304 PECL for avoidance of the contract), which authorizes the innocent party to declare the contract avoided. Such a close connection between suspension of performance and avoidance of the contract is absent from the CISG for the following reason.

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205 Eiselen, Remarks on the Manner in which the UNIDROIT Principles of International Commercial Contracts May be Used to Interpret or Supplement Articles 71 and 72 of the CISG and Remarks on the Manner in which the Principles of European Contract Law May Be Used to Interpret or Supplement Articles 71 and 72 of the CISG, *supra* note 111.

206 Chengwei, *supra* note 11, § 9.6.3; see also Eiselen, Remarks on the Manner in which the UNIDROIT Principles of International Commercial Contracts May be Used to Interpret or Supplement Articles 71 and 72 of the CISG and Remarks on the Manner in which the Principles of European Contract Law May Be Used to Interpret or Supplement Articles 71 and 72 of the CISG, *supra* note 111.

207 Eiselen, Remarks on the Manner in which the UNIDROIT Principles of International Commercial Contracts May be Used to Interpret or Supplement Articles 71 and 72 of the CISG, *supra* note 111.

208 Eiselen, Remarks on the Manner in which the Principles of European Contract Law May Be Used to Interpret or Supplement Articles 71 and 72 of the CISG, *supra* note 111.

209 See Eiselen, Remarks on the Manner in which the UNIDROIT Principles of International Commercial Contracts May be Used to Interpret or Supplement Articles 71 and 72 of the CISG, *supra* note 111.

210 Chengwei, *supra* note 11, § 9.7.2; see UNIDROIT, Official Commentary on Art. 7.3.4, § 3, available online at <<http://www.cisg.law.pace.edu/cisg/principles/uni71,72.html>>, and Commission on European Contract Law, *Comment and Notes on PECL 8:105*, in Principles of European Contract Law: Parts I and II 370, 371 (Ole Lando and Hugh Beale eds., Kluwer Law International 2000), available online at <<http://www.cisg.law.pace.edu/cisg/text/peclcomp71.html#8:105>>.

Whereas the provisions of the UNIDROIT Principles and the PECL governing suspension and avoidance of the contract both apply only if the (objectively or subjectively) suspected breach is fundamental, under the CISG, only art. 72 CISG, governing avoidance of the contract, requires that the suspected breach be of fundamental nature. For the innocent party to be entitled to suspend the contract, in compliance with art. 71 CISG, it is sufficient that it be apparent that a breach of a substantial part of the debtor's obligations will be committed. Thus, the suspected breach, under art. 71 CISG, is generally not of fundamental nature and, as explained above (*supra* II. 4. and 6.), the failure to provide adequate assurance of performance in compliance with art. 71(3) CISG does not, in itself, constitute a fundamental breach.<sup>211</sup> Such failure only makes it clear that a breach will be committed but does not modify the nature of that breach. It is therefore logical that art. 71 CISG does not provide a right, for the innocent party, to avoid the contract if the other party has failed to provide adequate assurance of performance. Under the UNIDROIT Principles and the PECL, even if it is initially not objectively "clear" that a breach will be committed, given that the suspected breach is fundamental, the drafters have agreed that failure to provide adequate assurance of performance should authorize the innocent party to declare the contract avoided.

In conclusion, it appears that even though the UNIDROIT Principles and the PECL seem to have installed a more strict standard than the CISG in that they do not grant the innocent party any remedy if the suspected breach is not fundamental, it is easier for the innocent party, under these Principles than under the CISG, to declare the contract avoided. Also, if it is "clear," under the UNIDROIT Principles or the PECL, that a fundamental non-performance will occur, "there is no requirement to give notice as is the case with article 72 of the CISG."<sup>212</sup> Hence, the structure of the UNIDROIT Principles and the PECL allow the innocent party to enter rapidly into another contractual relationship and thus preserve his commercial interests.

Regarding the effects of contract termination, the UNIDROIT Principles and the PECL share some common rules with the CISG. Like art. 81(1) *ab initio* CISG, art. 7.3.5(1) UNIDROIT Principles and art. 9:305(1) PECL provide that both parties are released from their obligation to execute future performances and lose the right to claim future performances. Thus, in all three systems, in case of avoidance of the contract, "both parties are released from their obligations to carry out the contract: the seller need not deliver the goods and the buyer need not take delivery or pay for them."<sup>213</sup> Furthermore, art. 9:305(2) PECL and art. 7.3.5(3) UNIDROIT Principles stipulate, like art. 81(1) *in fine* CISG, that "avoidance does not affect any provision of the contract for the settlement of disputes or any other provision of the contract governing the rights and obligations of the parties consequent upon the avoidance of the contract", such as, for example, the right to seek damages for breach of contract (expressly mentioned under art. 7.3.5(2) UNIDROIT Principles). Indeed, "an avoidance only 'redirects' the main obligations of the contract; it does not void the contract *ab initio*. Under article 81 CISG, damage claims for breach, dispute-settlement mechanisms (arbitration clauses), liquidated damages and penalty clauses, etc. are not affected by avoidance (article 81 sentence two)."<sup>214</sup>

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211 This opinion is not unanimous. See *supra* II.6..

212 See Eiselen, Remarks on the Manner in which the UNIDROIT Principles of International Commercial Contracts May be Used to Interpret or Supplement Articles 71 and 72 of the CISG, *supra* note 111.

213 Secretariat Commentary on art. 66 of the 1978 Draft [draft counterpart of art. 81 CISG] § 2, available online at <<http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-81.html>>.

214 Schlechtriem, *supra* note 9, at 107.

There is, however, an important difference, regarding the effects of contract termination, between the PECL, on the one hand, and the CISG and the UNIDROIT Principles, on the other hand. Under the CISG and the UNIDROIT Principles, restitution subsequent to termination is the rule, whereas under the PECL, it is the exception. "While the CISG [and the UNIDROIT Principles tend] to eliminate the consequences of an already partially performed contract, the PECL tends to maintain the exchange when it is satisfactory for both parties."<sup>215</sup> Art. 81(2) CISG stipulates that "a party who has performed the contract either wholly or in part may claim restitution from the other party of whatever the first party has supplied or paid under the contract. If both parties are bound to make restitution, they must do so concurrently."<sup>216</sup> Art. 7.3.6(1) UNIDROIT Principles provides the same general principles, however moderated by paragraph (2) of the same provision: "on termination of the contract either party may claim restitution of whatever [he] has supplied, provided that such party concurrently makes restitution of whatever [he] has received. If restitution in kind is not possible or appropriate allowance should be made in money whenever reasonable. However, if performance of the contract has extended over a period of time and the contract is divisible, such restitution can only be claimed for the period after termination has taken effect." In other words, as a general rule, all that has been exchanged in compliance with the contract must be restituted after termination: each party can claim restitution of whatever he has paid or supplied under the contract, and if both parties have to make restitution, restitution must be made concurrently.<sup>217</sup> On the contrary, under the PECL, a restitution duty exists only when "one party has conferred a benefit on the other party without receiving the promised counter-performance in exchange."<sup>218</sup> Indeed, the termination of a contract in compliance with the provisions of the PECL does not undo what has taken place before termination: the performances received must neither be returned, nor must restitution of their value be made. It stems from arts. 9:305, 9:307, and 9:308 PECL, that restitution subsequent to termination is appropriate only in certain circumstances, namely when the property transferred has become useless, as a consequence of the termination, for the party who received it (art. 9:306 PECL), and when a party, by performing his contractual obligation, has conferred a benefit upon his co-contracting party, but has not received the corresponding counter-performance (arts. 9:307 and 9:308 PECL).

The rules of the CISG, on the one hand, and those of the PECL and the UNIDROIT Principles, on the other hand, also differ with respect to the effects of the impossibility, for a party, to restitute the goods received in substantially the same condition as when they were delivered. Under the CISG, if a party is unable to restitute the goods in substantially the same condition as when he received them, he is prohibited from avoiding the contract. Indeed, according to art. 82(1) CISG, "the buyer loses the right to declare the contract avoided [...] if it is impossible for him to make restitution of the goods substantially in the condition in which he received them." In other words, "the ability to return the goods received in substantially the condition in which one received them is 'a prerequisite for avoiding the contract [...]'"<sup>219</sup> Nevertheless, art. 82(2) CISG,

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215 Francesco G. Mazzotta, Commentary on CISG Article 81 and its PECL Counterparts, § 3, available online at <<http://www.cisg.law.pace.edu/cisg/text/peclcomp81.html#er>>.

216 The right of a party to claim, under art. 81(2) CISG, restitution may however be "limited by other rules which fall outside the scope of the Convention, such as bankruptcy or other insolvency procedures, and/or exchange control laws or other restrictions on the transfer of goods or funds [preventing] the transfer of the goods or money to the demanding party in a foreign country" (Mazzotta, *supra* note 215, at § 1).

217 Mazzotta, *supra* note 215, at § 1.

218 Mazzotta, *supra* note 215, at § 2.

219 Mazzotta, *supra* note 215, at § 2.

which deals with the issue of allocation of risk of loss of the goods before avoidance of the contract, provides three exceptions to the general rule stated under art. 82(1) CISG. The buyer is entitled to declare the contract avoided, even if he cannot make restitution of the goods in compliance with art. 82(1) CISG, if (a) the damages to the goods are not due to the buyer's act or omission; (b) the deterioration or consumption of the goods results from the examination as required by art. 38 CISG; or (c) the goods are sold in the normal course of business or consumed or transformed by him in the normal course of use before he discovered, or should have discovered, their lack of conformity. Under art. 9:309 PECL, a party may, after termination of the contract, recover a reasonable amount for the value of the performance rendered to the other party, if the former has rendered a performance and has not received payment or counter-performance for it, and if that performance cannot be refunded by the other party. Similarly, art. 7.3.6(1) UNIDROIT Principles provides that "if restitution in kind is not possible or appropriate allowance should be made in money whenever reasonable." Restitution in kind is, for example, not appropriate when the aggrieved party has received part of the performance and wants to retain that part.<sup>220</sup> "The purpose of specifying that allowance should be made in money 'whenever reasonable' is to make it clear that allowance should only be made if, and to the extent that, the performance received has conferred a benefit on the party claiming restitution."<sup>221</sup> In conclusion, with the exception of the three specific cases mentioned above, the CISG, which addresses, in art. 82 CISG, the issue of termination, does not allow the avoidance of the contract if the goods cannot be restituted. On the contrary, under the PECL and the UNIDROIT Principles, restitution is not a prerequisite to termination (art. 9:309 PECL and 7.3.6 UNIDROIT Principles).

"Neither the Convention, nor the PECL [ , nor the UNIDROIT Principles] have any specific provisions dealing with: (i) the expenses incurred in making restitution; (ii) the rights acquired by third parties; (iii) the location where the restitution must be made and (iv) the buyer's responsibility when the goods that must be returned are destroyed after the effective date of a declaration of avoidance."<sup>222</sup>

As to damages, according to art. 81(1) CISG, art. 7.4.1 UNIDROIT Principles, and art. 8:102 PECL, the fact that a party has resorted to the avoidance remedy does not deprive him of his right to claim damages (unless, under art. 7.4.1 UNIDROIT Principles and art. 8:101(2) and 8:108 PECL, the non-performance at the due date would have been excused).

Regarding the issue of computation of damages, art. 74 CISG provides that "damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract." Although not expressly stated, the principle of full

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220 UNIDROIT, *Official Commentary on Art. 7.3.6 (1994)*, available online at <<http://www.jus.uio.no/lm/unidroit.international.commercial.contracts.principles.1994.commented/7.3.6>>.

221 UNIDROIT, *supra* note 220, which provides the following illustration: "A, who has contracted to excavate B's site, leaves it after only half the work has been performed. B, who then terminates the contract, will have to pay A a reasonable sum for the work done, measured by the value that work has for B."

222 Mazzotta, *supra* note 215, at § 2.

compensation is an underlying principle of the CISG.<sup>223</sup> This principle is laid down in art. 7.4.2(1) UNIDROIT Principles and art. 9:502 PECL. Furthermore, the foreseeability test contained in art. 74 CISG is also an element taken into account in the two sets of non-binding Principles, under art. 9:504 PECL, respectively art. 7.4.4 UNIDROIT Principles. Nevertheless, whereas the CISG loosely requires that the loss be foreseen as a "possible consequence" of the breach, under the UNIDROIT Principles and the PECL, the loss suffered must be a "likely result" of the non-performance. Thus, "there is a distinct difference in the wording resulting in a different standard to be applied by the CISG, on the one hand, and the [UNIDROIT Principles] and PECL, on the other hand. Hence, the [UNIDROIT Principles] and the PECL cannot serve as a persuasive authority to clarify a real question concerning a matter which, despite being expressly settled in the Convention, arguably remains ambiguous."<sup>224</sup>

To the question whether the amount of damages should be reduced by any advantage from which the creditor benefited as a result of the debtor's breach, art. 7.4.2(1) UNIDROIT Principles brings a positive answer. The CISG and the PECL provide no express rule governing the issue. Nevertheless, the Official Commentary on art. 9:502 PECL clearly points out that "the aggrieved party must bring into account in reduction of damages any compensating gains which offset [his] loss."<sup>225</sup> In the context of the CISG, the answer is generally affirmative on the basis of the principle of full compensation, and "the mechanisms of both PECL and [UNIDROIT Principles] can be used as persuasive authority in confirming the solution predominantly favored under the regime of the CISG."<sup>226</sup>

## 6. Art. 72 CISG – A Provision Aiming at Protecting the Interests of One Party or at Penalizing the Behavior of the Other?

Art. 72 CISG is the successor of art. 76 ULIS, which provided that "where prior to the date fixed for performance of the contract it is clear that one of the parties will commit a fundamental breach of the contract, the other party shall have the right to declare the contract avoided." Art. 72 CISG is the only provision of the Convention which authorizes the buyer and the seller to avoid the contract for fundamental breach by the other party before the time for performance by the

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223 See the following relevant cases: AUSTRIA OGH, 14 January 2002, 7 Ob 301/01t, available online at <<http://cisgw3.law.pace.edu/cases/020114a3.html>>; AUSTRIA OGH, 28 April 2000, 1 Ob 292/99v, available online at <<http://cisgw3.law.pace.edu/cases/000428a3.html>>; GERMANY OLG Hamburg, 26 November 1999, 1 U 31/99, available online at <<http://cisgw3.law.pace.edu/cases/991126g1.html>>; AUSTRIA Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft [Arbitral Tribunal - Vienna] SCH-4318, 15 June 1994, available online at <<http://cisgw3.law.pace.edu/cases/940615a4.html>>. See also Victor Knapp, *Comments on Article 74 CISG*, in Cesare Massimo Bianca & Michael Joachim Bonell, *Commentary on the International Sales – The 1980 Vienna Sales Convention* 538, 543 (Giuffrè 1987), available online at <<http://cisgw3.law.pace.edu/cisg/biblio/enderlein-art74.html>>

224 Friedrich Blase & Philipp Höttler, *Remarks on the Damages Provisions in the CISG, Principles of European Contract Law (PECL) and UNIDROIT Principles of International Commercial Contracts (UPICC) § 2 (2004)*, available online at <<http://www.cisg.law.pace.edu/cisg/biblio/blase3.html>>.

225 Commission on European Contract Law, *Comment and Notes on PECL 9:502*, in *Principles of European Contract Law: Parts I and II* 535, 539 (Ole Lando and Hugh Beale eds., Kluwer Law International 2000), available online at <<http://www.cisg.law.pace.edu/cisg/text/peclcomp74.html#cnpc>>, which reads: "The aggrieved party must bring into account in reduction of damages any compensating gains which offset its loss; only the balance, the net loss, is recoverable. Similarly, in computing gains of which the aggrieved party has been deprived, the cost it would have incurred in making those gains is a compensating saving which must be deducted to produce a net gain."

226 Blase/Höttler, *supra* note 224, at § 3.

latter party has elapsed. It thus complements arts. 49 and 64 CISG, which authorize the buyer, respectively the seller, to avoid the contract when performance is overdue.

Art. 72(1) CISG's primary purpose is to protect the interests of the party for whom it has become objectively "clear," after the conclusion of the contract, that the other party will commit a fundamental breach. Indeed, this provision allows the former to terminate the contract and thus avoid the losses he would have suffered, had he performed his own obligations and waited until the date agreed upon for the other party's performance, and had this other party failed to perform his obligations. Furthermore, art. 72(2) CISG protects "the interests of a party who has reason to believe that the other will be unable or unwilling to perform the contract at the due date but who cannot or may be reluctant to terminate the contract immediately in case it transpires that the other party would after all have performed. Consequently, it enables a party who reasonably believes that there will be a fundamental non-performance by the other party to demand an assurance of performance from the other party and in the meantime to withhold [his] own performance."<sup>227</sup>

In addition, considering art. 72(3) CISG, one may conclude that art. 72 CISG was also drafted to prevent the party who regrets having entered the contractual relationship, from declaring himself discharged from his obligations or from acting as if he were released from his contractual obligations. In this perspective, art. 72 CISG also serves as a legal basis for penalizing the party who repudiates the contract. Indeed, if one party repudiates the contract, the other party need not give him reasonable notice of his intent prior to declaring the contract avoided. Consequently, the law does not grant to the party who repudiates the contract the possibility to provide adequate assurance of performance – or merely to declare that he has changed his mind, i.e., that he is willing and capable of performing his obligation – and thus to prevent the avoidance of the contract. Therefore, even if the party who declared that he would not perform the contract changes his mind and eventually performs his obligations in compliance with the terms of the contract, the other party may not be held liable for having declared the contract avoided. Indeed, in case of repudiation of the contract by the obligor, "the obligee does not have to wait and see whether the obligor changes his mind; he can avoid the contract immediately. In such a case, the declaration of an intended non-performance of the contract is irrevocable."<sup>228</sup> In other words, if a party repudiates the contract, he bears the risk that the contract be at any time avoided. Consequently, "where A's avoidance responds to B's wrongful repudiation and therefore is clearly justified (art. 72(3)), A's declaration of avoidance makes it possible for A to resell (or repurchase) the goods called for by the initial contract; A need not be concerned lest B change [his] mind and tender performance."<sup>229</sup>

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227 Chengwei, *supra* note 11, § 9.7.1.

228 Enderlein/Maskow, *supra* note 7, at 293.

229 Honnold, *supra* note 7, at 439.

## IV. ANTICIPATORY BREACH IN INSTALLMENT CONTRACTS

### 1. Introduction to Installment Contracts

"The contract calls for the delivery by installments if it requires or authorizes the delivery of goods in separate lots."<sup>230</sup> It is not necessary that the contract provide for delivery of similar goods (the goods do not have to be fungible) at all times<sup>231</sup> or that there be an agreement that the goods be delivered on fixed dates. In fact, the contract may well provide for deliveries of various sorts of goods or for partial deliveries; furthermore, instead of having contractually fixed dates for delivery, the contract may allow that deliveries be asked for when needed.<sup>232</sup>

Art. 73 CISG is only applicable to contracts providing for the delivery of goods by installments.<sup>233</sup> More particularly, art. 73 CISG "is concerned with successive deliveries, not installment payments. By analogy, however, article 73(2) can also apply to missed payments if they coincide with installment deliveries ... Article 73(2) is also applicable to other breaches by the buyer, such as not taking delivery of an installment."<sup>234</sup>

### 2. Purpose of the Rule

Art. 51 CISG grants to the buyer the right to partially avoid the contract, on the basis of arts. 46 to 50 CISG, "if the seller delivers only a part of the goods or if only a part of the goods delivered is in conformity with the contract." The second paragraph of the same provision further stipulates that "the buyer may declare the contract avoided in its entirety only if the failure to make delivery completely or in conformity with the contract amounts to a fundamental breach of the contract." Thus, first, "article 51 is not specifically directed at contracts which provide for deliveries of goods

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230 Secretariat Commentary on art. 64 of the 1978 Draft [draft counterpart of art. 73 CISG], available online at <<http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-73.html>>; Chengwei, *supra* note 11, § 10.1. For a similar statement in the case law, see ICC award No. 9887, August 1999, available online at <<http://cisgw3.law.pace.edu/cases/999887i1.html>> (chemical substance); SWITZERLAND Hg. K. Zürich, 30 November 1998, HG 950357 (CLOUT case No. 251), available online at <<http://cisgw3.law.pace.edu/cases/981130s1.html>> (lambskin coats); GERMANY Schiedsgericht der Hamburger freundschaftlichen Arbitrage [Arbitral Tribunal], 29 December 1998 (CLOUT case No. 293), available online at <<http://cisgw3.law.pace.edu/cases/981229g1.html>> (cheese); SPAIN Audiencia Provincial [Appellate Court] de Barcelona, 3 November 1997, 729/96-B (CLOUT case No. 246), available online at <<http://cisgw3.law.pace.edu/cases/971103s4.html>> (manufactured springs); SWITZERLAND Hg. K. Zürich, 5 February 1997, HG 95 0347 (CLOUT case No. 214), available online at <<http://cisgw3.law.pace.edu/cases/970205s1.html>> (sunflower oil); FRANCE Cour d'appel [CA] [Appeal Court] Grenoble, 22 February 1995, 93/3275 (CLOUT case No. 154), available online at <<http://cisgw3.law.pace.edu/cases/950222f1.html>> (jeans); CHINA Chansha Intermediate Peoples' Court Economic Chamber case No. 89, 18 September 1995, available online at <<http://cisgw3.law.pace.edu/cases/950918c1.html>> (molybdenum iron alloy); GERMANY LG Ellwangen, 21 August 1995, 1 KfH O 32/95, available online at <<http://cisgw3.law.pace.edu/cases/950821g2.html>> (peppers); ICC award No. 8128, 1995, available online at <<http://cisgw3.law.pace.edu/cases/958128i1.html>> (chemical fertilizer).

231 SWITZERLAND Hg. K. Zürich, HG 950357, *supra* note 230.

232 Enderlein/Maskow, *supra* note 7, at 294; see also Bennett, *supra* note 121, at 534.

233 Thus, "if a party commits a breach of contract, and the obligee wishes to draw conclusions for other contracts, he may probably do so on the basis of article 72" (Enderlein/Maskow, *supra* note 7, at 294).

234 Schlechtriem, *supra* note 9, at 96.

by installments, that is, in separate lots.”<sup>235</sup> Instead, art. 51 CISG is applicable where the contract intended the goods to be delivered as a whole, but the seller failed to deliver part of the goods or delivered goods that were in part defective. Second, art. 51 CISG grants only to the buyer the right to protect his interests in case of breach by the seller. Finally, art. 51 CISG does not address the issue of anticipatory breach in installment contracts, but only governs the right to terminate the part of the contract affected by the breach or the entire contract if the breach, even though pertaining only to part of the goods that ought to be delivered, amounts to an actual fundamental breach of the entire contract.

As far as installment contracts are concerned, art. 73(2) CISG deals specifically with the possibility to avoid the contract with respect to future installments, if the breach of one installment indicates “the probability of a breach of installment obligations not yet due.”<sup>236</sup> This article appears as a necessary complement to art. 51 CISG: art. 73 CISG deals specifically with installment contracts and grants rights to both the buyer and seller, except in paragraph (3).<sup>237</sup>

Paragraphs (1) and (3) of art. 73 CISG do not address situations of anticipatory breach and their analysis is consequently beyond the scope of the present paper.

### 3. Grounds for Avoidance of Future Installments

According to art. 73(1) CISG, “in the case of a contract for delivery of goods by installments, if the failure of one party to perform any of his obligations in respect of any installment constitutes a fundamental breach of contract with respect to that installment, the other party may declare the contract avoided with respect to that installment.” Art. 73(2) CISG further provides that if one party’s failure to perform any of his obligations in respect of any installment gives the other party good grounds to conclude that a breach in respect of installments not yet due will occur, the latter may declare the contract avoided with regard to these future installments, provided that he does so within a reasonable time. Thus, art. 73(2) CISG sets forth three cumulative conditions that ought to be satisfied for the non-breaching party to be authorized to declare the contract avoided with respect to future installments. First, a breach of contract with respect to any of the installments must have occurred. Second, even though “the failure itself is not required to constitute a fundamental breach,”<sup>238</sup> it must give the non-breaching party “good grounds to conclude that a fundamental breach of contract will occur with respect to future installments.” In other words, there must be an anticipatory fundamental breach with respect to future installments. Third, the declaration of avoidance with respect to future installments must be made “within a reasonable time of the failure to perform” (this third condition will be addressed *infra* III.4.).<sup>239</sup>

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235 Trevor Bennett, *Comments on Article 73*, in Cesare Massimo Bianca & Michael Joachim Bonell, *Commentary on the International Sales - The 1980 Vienna Sales Convention* 531, 533 (Giuffrè 1987), available online at <<http://www.cisg.law.pace.edu/cisg/biblio/bennett-bb73.html>>.

236 Chengwei, *supra* note 11, § 10.1.

237 Bennett, *supra* note 235, at 533.

238 Bennett, *supra* note 235, at 534.

239 In the following decisions, the conditions of art. 73(2) CISG were considered satisfied and the aggrieved party entitled to declare the contract avoided for future installments: FRANCE [CA Grenoble, 93/3275](#), *supra* note 230, in which the buyer assured the seller that he would resell the goods in South America, but sold the first installment in Spain, interfering with the seller’s marketing there; the Court held that the fundamental breach committed by the buyer justified the seller’s

According to the first condition, a breach of contract with respect to any of the installments must have occurred. Thus, in contrast with the conditions of suspension and avoidance under arts. 71 and 72 CISG, neither a deficiency in the ability to perform or in the creditworthiness, nor a declaration of an intention not to perform is sufficient<sup>240</sup> for the conditions of art. 73(2) CISG to be satisfied. "It is doubtful whether the grounds [that allow the non-breaching party to conclude that a fundamental breach will occur] can derive from, say, the bankruptcy of the other party or a statement by him that he does not intend to perform his obligations with respect to future installments. In such a case the appropriate course would be to proceed under article 72, if it is otherwise applicable."<sup>241</sup> Thus, as far as future installments are concerned, art. 73(2) CISG does not support the view that a party's refusal to perform constitutes, in itself, a fundamental breach.<sup>242</sup> It is however not required that the failure itself constitute a fundamental breach. A mere breach may also lead to the conclusion that a fundamental breach will be committed in the future.<sup>243</sup> Indeed, "a breach which is not by itself fundamental may in its context, for example, a series of such breaches over a period of time, provide the necessary ground for concluding that a fundamental breach will occur. Nor is it a condition precedent to the applicability of the paragraph that avoidance action has been taken for the installment in which the failure occurred."<sup>244</sup>

The second condition, namely the condition that the failure by one party to perform any of his obligations in respect of any installment give the non-breaching party "good grounds to conclude that a fundamental breach of contract will occur with respect to future installments" is an application, to installment contracts, of art. 72 CISG regarding anticipatory breaches.<sup>245</sup> However, the terms "good grounds to conclude" set a less onerous and more subjective standard for avoidance than the objective standard of certainty that must be reached under art. 72 CISG,

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avoidance of the contract for future installments; GERMANY LG Ellwangen, 1 KfH O 32/95, *supra* note 230, in which the buyer had good grounds to believe that the seller would be unable to deliver peppers that satisfied food safety regulations; SWITZERLAND Hg. K. Zürich, HG 95 0347, *supra* note 230, in which the seller made no delivery despite taking payment; SWITZERLAND ZHK Arbitral award No. 273/95, *supra* note 22, in which the seller failed to deliver the first installment; GERMANY Schiedsgericht der Hamburger freundschaftlichen Arbitrage, *supra* note 230, in which the seller stated that he would not make further deliveries; HUNGARY Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, Arbitral award in case No. VB/97142, 25 May 1999 (CLOUT case No. 265), available online at <<http://www.uncitral.org/english/clout/MAL-thesaurus/MAL-abstract266-e.htm>>, in which the seller refused to deliver further cherries because of a dramatic increase in the market price for the cherries; SPAIN Audiencia Provincial de Barcelona, 729/96-B, *supra* note 230, in which late delivery of three installments caused disruption of the buyer's production; ICC award No. 9887, *supra* note 230, in which the seller delivered poor quality goods.

240 Enderlein/Maskow, *supra* note 7, at 296; Bennett, *supra* note 235, at 536 *et seq.*

241 Bennett, *supra* note 235, at 536-537.

242 Chengwei, *supra* note 11, § 10.2.

243 Enderlein/Maskow, *supra* note 7, at 296; Bennett, *supra* note 235, at 535.

244 Bennett, *supra* note 235, at 534-535.

245 Vilus, *supra* note 7, at 246-247. In the following cases, it was found that the seller had good grounds to avoid the contract: HUNGARY Arbitration award No. VB/94124, *supra* note 37, in which the failure to open a letter of credit gave good grounds to conclude that the buyer would not pay; FRANCE CA Grenoble, 93/3275, *supra* note 230, in which the buyer would continue to breach a contract term that prohibited the buyer from reselling the goods in specified markets. In CHINA International Economic & Trade Arbitration Commission, Arbitral award CISG/1996/01, 18 September 1996, available online at <<http://www.cisgw3.law.pace.edu/cases/960918cl.html>>, the Arbitral Tribunal held that, even though the buyer had not opened the letter of credit pertaining to the first installment within the time-frame set by the contract, given that he had clearly expressed his intention to open the letter of credit pertaining to the second installment and that he had not indicated any intention to decline to open the letters of credit for the remaining installments, the seller wrongly considered that there was an "anticipatory breach of contract."

according to which it must be "clear" that a fundamental breach of contract will be committed.<sup>246</sup> The Secretariat expressly pointed out that "it should be noted that article 64(2) [draft counterpart of CISG article 73(2)] permits the avoidance of the contract in respect of future performance of an installment contract even though it is not 'clear' that there will be a fundamental breach of the contract in the future as would be required by art. 63 [draft counterpart of CISG article 72]."<sup>247</sup> "The test of the right to avoid under article 64(2) [draft counterpart of CISG article 73(2)] is whether a failure to perform in respect of an installment gives the other party good reason to fear that there will be a fundamental breach in respect of future installments. The test does not look to the seriousness of the current breach. This is of particular significance where a series of breaches, none of which in itself is fundamental or would give good reason to fear a future fundamental breach, taken together does give good reason for such fear"<sup>248</sup> (for a more detailed comparative analysis of art. 72 and 73(2) CISG, see *infra* IV.6.)

#### 4. Declaration of Avoidance Within a Reasonable Period of Time

The condition according to which the creditor of the obligation must declare the contract avoided for the future within a reasonable period of time lacks clarity. First, it does not specify when the reasonable period of time starts running. Second, it does not define according to which parameters the period of time must be "reasonable."

As to the first issue, some commentators have advocated that the reasonable period of time starts running at the time of the occurrence of the failure to perform by the breaching party.<sup>249</sup> One could also imagine that the reasonable period of time should start at the time the aggrieved party discovers (or could have discovered) the breach. However, these solutions are problematic in cases in which it is not a specific event of non-performance but a series of non-conforming installments that constitute "good grounds to conclude that a fundamental breach of contract will occur," as well as in cases in which the past non-performance(s) involved non-delivery. Consequently, an appropriate solution seems to be to consider that the reasonable period of time starts running when the creditor of the obligation has acquired "good grounds" indicating that a fundamental breach will be committed.<sup>250</sup> "Such a standard is very uncertain, but it offers the only hope for dealing with the variety of circumstances that will arise."<sup>251</sup>

As to the parameters that ought to be taken into account to determine the period of time which is "reasonable," "the length of the interval between the latest and the next installment and/or its reception and payment"<sup>252</sup> should be taken into account.<sup>253</sup>

The declaration of avoidance is subject to art. 27 CISG.

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246 Koch, *supra* note 139, at 310; Honnold, *supra* note 7, at 443, available online at <<http://www.cisg.law.pace.edu/cisg/biblio/ho73.html>>; see also Chengwei, *supra* note 11, § 10.1.

247 Secretariat Commentary on Art. 64 of the 1978 Draft, *supra* note 230, § 5. The match-up between art. 64 of the 1978 Draft and the current art. 73 indicates that the two provisions are substantively the same.

248 Secretariat Commentary on Art. 64 of the 1978 Draft, *supra* note 230, § 6.

249 Bennett, *supra* note 235, at 534.

250 Flechtner, *supra* note 101.

251 Chengwei, *supra* note 11, § 10.2.

252 Enderlein/Maskow, *supra* note 7, at 296.

253 In SPAIN Audiencia Provincial de Barcelona, 729/96-B, *supra* note 230, the buyer who was entitled to avoid the contract as to future installments effectively avoided the contract when it gave notice to the seller within 48 hours of the third late delivery.

## 5. Impact of the CISG on Subsequent Uniform Sets of Principles

No counterpart to art. 73(2) CISG is found in the UNIDROIT Principles, which simply do not address the issue of anticipatory breaches in installment contracts. As regards the PECL, *a priori*, art. 9:302 seems to be the corresponding provision of art. 73 CISG, rather than that of art. 51 CISG. More precisely, art. 9:302 *ab initio* PECL seems to be the counterpart of art. 73(1) CISG,<sup>254</sup> and art. 9:302 *in fine* PECL seems to correspond to art. 73(3) CISG.<sup>255</sup> However, neither of these two provisions of the PECL addresses the issue of anticipatory breach in installment contracts.

## 6. Relationship Between General Principles Regarding Anticipatory Breach and Anticipatory Breach in Installment Contracts

Art. 72 and art. 73(2) CISG both govern situations of anticipatory breach. However, whereas the former authorizes avoidance of the entire contract, the latter provides for avoidance, in installment contracts, "for the future." Furthermore, the conditions of avoidance set forth by art. 72 CISG differ from those of art. 73(2) CISG. First, whereas art. 72 CISG applies only if it is "clear" that a fundamental breach of contract will be committed, art. 73(2) CISG merely requires that there be "good grounds to conclude that a fundamental breach of contract will occur." Second, whereas art. 72 CISG does not specify the circumstances that may lead to the conclusion that it is "clear" that a fundamental breach will be committed, art. 73(3) CISG requires that the suspected fundamental breach "have been preceded by, and indeed derived from, an actual failure to perform obligations."<sup>256</sup> Thus, under art. 73 CISG, "avoidance in respect of [future] installments is dependant on an anticipatory breach of contract the occurrence of which is not required to be "clear" as it is in article 72."<sup>257</sup>

The rationale underlying the difference of standard in the conditions of avoidance set by the two said articles is the following: in the context of the application of art. 73(2) CISG, a breach of contract has already been committed;<sup>258</sup> thus, one party has already violated one of his obligations with respect to one installment and this, in particular, constitutes a ground for the assumption that a fundamental breach will occur (some scholars call this "non-reliance approach based on an actual breach"<sup>259</sup>). In other words, art. 73(2) CISG takes into consideration the fact that,

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254 Under art. 9:302 PECL, it is appropriate to allow the aggrieved party to terminate in relation to the non-performed unit without affecting the rest of the contract, if the non-performance that has occurred is fundamental precisely regarding that specific "unit" of the contract, if the unit not performed does not affect the rest of the contract significantly, and if the non-performance is not likely to be repeated (Commission on European Contract Law, *Comment and Notes on PECL 9:302*, in *Principles of European Contract Law: Parts I and II* 411, 411-412 (Ole Lando and Hugh Beale eds., Kluwer Law International 2000), available online at <<http://www.cisg.law.pace.edu/cisg/text/peclcomp51.html>>).

255 If the non-performance is fundamental to the contract as a whole, art. 9:302 *in fine* allows termination of the "contract as a whole," the parties being, in this case, according to art. 9:305 PECL, released from all their future obligations (the rights and obligations that have accrued up to the time of termination remaining unchanged, except in the cases provided for in art. 9:306 and 9:308 PECL) (Christopher Kee, *Remedies for Breach of Contract where only Part of the Contract has been Performed: Comparison Between Provisions of CISG (Articles 51, 73) and Counterpart Provisions of the Principles of European Contract Law*, available online at <<http://www.cisg.law.pace.edu/cisg/text/peclcomp51.html>>).

256 Bennett, *supra* note 235, at 536-537.

257 Bennett, *supra* note 235, at 534.

258 Honnold, *supra* note 7, at 443.

259 Chengwei, *supra* note 11, § 10.2.

legitimately, the innocent party might no longer be able to rely on the other party's commitment, given the breach that has already occurred. Under this article, even if the debtor provides adequate assurance of performance, the creditor remains entitled to declare the contract avoided with respect to future installments if a breach has already been committed. Conversely, "neither the [debtor]'s failure to provide adequate assurance of performance on demand due to a deterioration of creditworthiness, nor his declaration that he will not perform, [alone,] give the [creditor] the right to avoid the contract. An actual failure to perform must instead be the basis for avoidance of future installments."<sup>260</sup>

One similarity between art. 72 and art. 73(2) CISG is, nevertheless, that in neither article does the law provide details regarding the degree of clarity or the strength of the grounds that may lead a party to believe that a fundamental breach will be committed, nor does the law describe the acts or circumstances that may cause or result in a fundamental breach of contract by one party.

A final distinction between art. 72 and art. 73(2) CISG must be pointed out: unlike art. 72 CISG, art. 73(2) CISG does not require that the declaration of avoidance be preceded by a notice of intention to the other party; rather, it is necessary, under art. 73(2) CISG, that the declaration of avoidance be made "within a reasonable time," "a requirement which is not included in article 72 at least in express terms."<sup>261</sup>

## V. CONCLUDING REMARKS

In view of the above analysis, one must conclude that arts. 71, 72, and 73(2) CISG bear witness to the fact that "the Convention aims at preserving the parties' commitments and at favoring the performance of their agreement, thus relying on a general principle of *favor contractus*."<sup>262</sup> More particularly, these provisions, pertaining to the issue of anticipatory breach of contract, may be counted among those contributing to one of the main purposes of the CISG, namely to allow performance of international sales contracts, even if such performance is imperfect, by inducing "the party in breach to spontaneously cure."<sup>263</sup> It is only in the exceptional situations in which it is clear that a fundamental breach will be committed, and generally only if the author of the future breach fails to provide adequate assurance of performance, that the other party - the innocent party - is authorized to declare the contract avoided.

Under art. 71 CISG, if it becomes apparent that one party will not perform a substantial part of his obligation, the other party may suspend performance of his obligations, "thus stimulating the breaching party's cure, though at the same time preventing the harshness of post-avoidance restitutions."<sup>264</sup> The innocent party is however compelled to restore performance if the other party provides adequate assurance of performance. Such assurance may be considered adequate even if

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260 Chengwei, *supra* note 11, § 10.2; see also Koch, *supra* note 139, at 311.

261 Bennett, *supra* note 235, at 537.

262 Marco Torsello, *Remedies for Breach of Contract Under the 1980 Convention on Contracts for the International Sale of Goods (CISG)*, in *Quo Vadis CISG?* 43, 85 (F. Ferrari ed., Paris/Brussels/Munich, 2005); see also Franco Ferrari, *Gap-Filling and Interpretation of the CISG: Overview of International Case Law*, in *International Business Law Journal* 221, 229 (2003), in which the author states that the "*favor contractus*" principle is one of the general principles on which the CISG is based.

263 Torsello, *supra* note 262, at 58.

264 Torsello, *supra* note 262, at 59.

it shows that performance might not be complete and perfect. Furthermore, the failure, by one party, to provide adequate assurance of performance does not constitute, in itself, a fundamental breach, and consequently does not authorize the other party to declare the contract avoided. In turn, the conditions that ought to be satisfied, under art. 72 CISG, for the innocent party to be entitled to declare the contract avoided, are more onerous than those of art. 71 CISG. They require that the future occurrence of the breach be objectively "clear" (rather than just "apparent") and that the suspected breach be of fundamental nature. Furthermore, in the case of art. 72 CISG, the innocent party must give notice to the other party prior to the declaration of avoidance, in order to allow the latter party to provide adequate assurance of performance. Finally, art. 73(2) CISG allows the avoidance of the contract for the future only if "one party's failure to perform any of his obligations in respect of any installment gives the other party good grounds to conclude that a fundamental breach of contract will occur with respect to future installments."

It stems from the comparative analyses conducted in chapters II, III, and IV that due to the "substantial, even pervasive"<sup>265</sup> influence of the CISG, the remedial systems of the UNIDROIT Principles and the PECL were also founded on the general principle that termination of the contract should be available to the aggrieved party in a limited number of cases, and only if the other party has committed or will commit a fundamental non-performance. Furthermore, in the absence of suspected fundamental non-performance, these two sets of Principles do not grant any protection to the innocent party. Finally, neither of these two sets of Principles addresses the issue of anticipatory breach in installment contracts; thus, even if the commission of a fundamental breach is suspected, the innocent party has no right to declare the contract avoided for future installments.

The remedial systems of the CISG, the UNIDROIT Principles, and the PECL are founded on a basic dichotomy regarding "the standard that parties have to comply with in order to satisfactorily perform the obligations stemming from the contract that they are bound to. This issue may be addressed either in positive terms, thus analyzing what the debtor is required to do in order to be discharged from his obligations, or in negative terms, by way of focusing on what degree of lack of performance triggers negative legal consequences for the non-performing party."<sup>266</sup> If the law imposes on the debtor a standard of perfect tender, any "mere breach" will entitle the creditor to seek avoidance of the contract. On the other hand, if, to satisfy the requirements of the law, the debtor is merely compelled to offer substantial performance, only "a fundamental breach" will allow the creditor to seek avoidance of the contract.

The provisions of the CISG, the UNIDROIT Principles, and the PECL relating to the issue of anticipatory breach authorize the avoidance of the contract only if the breach suspected is of fundamental nature. This indicates that the standard that the parties have to comply with in order to satisfactorily perform their obligations is a standard of substantial performance rather than a one of perfect tender. Indeed, even if the debtor has not fulfilled perfectly all of his obligations, avoidance of the contract is prohibited, so long as the breach is not fundamental. Similarly, the creditor of an obligation is prohibited from suspending performance of his obligations if assurance

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265 Flechtner, *supra* note 1, at 187.

266 Torsello, *supra* note 262, at 50; see also Clayton P. Gillette & Steven D. Walt, Sales Law - Domestic and International 189 *et seq.* (Foundation Press, 2002); Amin Dawwas, *Non-Performance and Damages under the CISG and the UNIDROIT Principles*, in 31 *Comparative Law Review* 225, 226 (1997).

of performance has been provided by the debtor, even if such assurance indicates that the performance will not be perfect, so long as the imperfection is insubstantial, that is, so long as the assurance provided indicates that the debtor will comply with substantial performance standards.

”While this ... solution reduces the possibility of strategic behavior on the part of the creditor,<sup>267</sup> it enhances that of strategic behavior on the part of the debtor, who may opportunistically perform his obligation in a way that, although substantially fulfilling the required standard, ranges below the average standard performance.”<sup>268</sup> Nevertheless, one may conclude that this solution favors the performance of the contract by limiting the right to avoid the contract and thus promotes good faith and efficiency in international commercial transactions.

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267 Indeed, if perfect tender were the standard the debtor was compelled to achieve, the creditor, seeking to discharge himself from his contractual obligations, would be in a position to ”opportunistically take advantage of the possibility to reject any tender which is less than perfect” (Torsello, *supra* note 262, at 51).

268 Torsello, *supra* note 262, at 51.

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