

Article 63

[Avoidance prior to the date for performance]

If prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach, the other party may declare the contract avoided.

PRIOR UNIFORM LAW

ULIS, article 76.

Commentary

1. Article 63 provides for the special case where prior to the date for performance it is clear that one of the parties will commit a fundamental breach. In such a case the other party may declare the contract avoided immediately.

2. 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.¹ The failure by a party to give adequate assurances that he will perform when properly requested to do so under article 62 (3) may help make it "clear" that he will commit a fundamental breach.

¹ 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 article 63, the non-performing party may be excused from damages by virtue of article 65.

3. A party who intends to declare the contract avoided pursuant to article 63 should do so with caution. If at the time performance was due no fundamental breach would have occurred in fact, the original expectation may not have been "clear" and the declaration of avoidance itself be void. In such a case, the party who attempted to avoid would be in breach of the contract for his own failure to perform.

4. Where it is in fact clear that a fundamental breach of contract will occur, the duty to mitigate the loss enunciated in article 73 may require the party who will rely upon that breach to take measures to reduce his loss, including loss of profit, resulting from the breach, even prior to the contract date of performance.²

² See the commentary on article 73 and especially examples 73 A and 73 B.