



**Anticipatory Avoidance of Contract:  
CISG and Egyptian Law Compared**

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## 1 Introduction

The United Nations Convention on Contracts for the International Sale of Goods (the Convention or CISG) was signed in Vienna in 1980 and became effective on January 1, 1988. CISG applies to contracts for the international sale of goods, i.e. contracts concluded between parties whose places of business or habitual residences are in two different states. The Convention aims at promoting international commerce by removing legal barriers in sale of goods transactions between international traders. To date, 77 States have adopted the CISG.<sup>1</sup> This Convention entered into force in Egypt on January 1, 1988.

Contracts for the sale of goods are also regulated by Egyptian law. There are two kinds of such contracts under the present Egyptian law, civil (non-commercial) and commercial contracts. The former Egyptian Commercial Code for the year 1883 had no provision relating to the sale of goods contract. Therefore, the Egyptian Civil Code governed both non-commercial and commercial sale of goods contracts.

The new Egyptian Commercial Code (ECC) No. 17 for the year 1999 has reformed the field. In Articles 88-118, it governs the commercial sale contract: Articles 88-103 include general rules and Articles 104-118 govern special types of sales contracts, including the supply contract. However, ECC is not all inclusive. According to ECC Article 2, the Civil Code shall apply in absence of a commercial rule in the Commercial Code. Accordingly, the non-commercial sale of goods contract is entirely governed by the Civil Code. In addition, the commercial sale of goods contract is basically governed by the (new) Commercial Code; and, in absence of any rule in this code, resort shall be made to the Civil Code.

CISG deals with anticipatory avoidance of contract. In general, 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 – under CISG Article 72 - declare the contract avoided. The party intending to declare the contract avoided must give reasonable notice to the other party, in order to allow him to provide adequate assurance of his performance. Nevertheless, such notice is not necessary, if time does not allow for providing it, or if the other party has declared that he will not perform his obligations.

CISG also particularly governs anticipatory avoidance of installment contracts. 'The contract calls for the delivery by instalments if it requires or authorizes the delivery of goods in separate lots'.<sup>2</sup> CISG Article 73(2) clearly says: 'If one party's failure to perform any of his obligations in respect of any

<sup>1</sup> See the United Nations Commission on International Trade Law (UNCITRAL), at: [http://www.uncitral.org/uncitral/en/uncitral\\_texts/sale\\_goods/1980CISG\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html).

<sup>2</sup> The Secretariat Commentary on the [1978] Draft Convention on Contracts for the International Sale of Goods (Document A/CON.97/5, article 64, para. 1, available at: [http://www.uncitral.org/pdf/a\\_conf.97\\_5-ocred.pdf](http://www.uncitral.org/pdf/a_conf.97_5-ocred.pdf)).

instalment gives the other party good grounds to conclude that a fundamental breach of contract will occur with respect to future instalments, he may declare the contract avoided for the future, provided that he does so within a reasonable time.<sup>3</sup>

In its Article 223, the Egyptian draft Civil Code explicitly regulated the anticipatory avoidance of contracts. It stated: 'In synallagmatic contracts, if one of the parties suffers a decrease in his assets after the contract is concluded, or his creditworthiness is reduced so that there are fears that he will not be able to perform his obligation, the other party – if he has to perform first – may not perform until the first party performs what he undertook or provides adequate assurance for such performance. Where this obligation is not performed or the assurance is not provided within a reasonable time termination of the contract may be requested'.<sup>4</sup>

However, the present Egyptian Civil Code does not recognize the anticipatory avoidance doctrine.<sup>5</sup> Generally, given the inherent uncertainty in assessing future events, it is impossible to know with certainty prior to the time of performance that the party in difficulty will commit a breach.<sup>6</sup> As a result, the Egyptian legislator explicitly recognizes termination of contracts on the ground of actual breach only. Article 157(1) of the Egyptian Civil Code says: 'In synallagmatic contracts, if one of the parties fails to perform his obligation, the other party may, after serving a warning upon him, request performance of the contract or its termination, with damages in either case if needed'. According to the general rules of the Civil Code, the creditor must not himself be in default and must be able to restore the status *quo ante*, too.<sup>7</sup>

Nevertheless, the Egyptian Civil Code includes some provisions that indirectly cover anticipatory breach of contract. Article 220 governs situations in which a party declares that he will not perform his obligation. Articles 220 and 273 deal with circumstances in which a party will not be able to

<sup>3</sup> In cases of anticipatory breach, CISG (Article 71) also entitles the aggrieved party the right to suspend performance of his obligations.

<sup>4</sup> See: Sami, Asma' Medhat, *Al-Faskh Ka-Jaza' Lil-Ikhlal Bel-Eltizam fi A'qd Attawreed Wifqa Leqanoun Ettijarah* [Avoidance as a Penalty for the Failure to Perform the Obligation in the Supply Agreement Under Commercial Code - in Arabic], *Al-Muhamah* [Legal Profession Journal, issued by the Egyptian Bar Association], Issue No. 2 (2002), 602-612, at 608.

<sup>5</sup> Abd El-Hamid, Khaled Ahmad, *Fask' a'aqd al be' al dawli lel badae' wefkan le itefakeyet Vienna l'am 1980* [The Avoidance of the Contract for International Sale of Goods according to the Vienna Convention 1980 - in Arabic], Doctoral thesis Cairo University, 2d ed., 2001, notes 193, 201, also available at: [http://www.cisg.law.pace.edu/cisgarabic/middleeast/abd\\_El\\_Hamid.htm](http://www.cisg.law.pace.edu/cisgarabic/middleeast/abd_El_Hamid.htm).

<sup>6</sup> von Ziegler, Alexander, The Right of Suspension and Stoppage in Transit (and Notification Thereof), 25 *Journal of Law and Commerce* (2005-06), 353-374, at 358, also available at: <http://www.cisg.law.pace.edu/cisg/biblio/ziegler.html>.

<sup>7</sup> Islam, Muhammad Wohidul, Dissolution of Contract in Islamic Law, *Arab Law Quarterly*, Vol. 3 No. 4 (1998), at 336-368, at 359-360. Amkhan, Adnan, Termination for Breach in Arab Contract Law, 10 *Arab Law Quarterly* (1995), 17-30, at 20-22. Sami, *supra* note 4, at 606-609.

perform his obligation in due date. This paper will clarify whether the aggrieved party may avoid the contract in such cases or not.

The new Egyptian Commercial Code has reformed the anticipatory avoidance ("termination", in the context of ECC) of the sale of goods contract, in that it has put an end to halting future performance. Like CISG, ECC governs the contract for the sale of goods by installments. Concerning the anticipatory avoidance of installment contract, ECC Article 97 says in part: 'If it is agreed that the thing sold shall be delivered by installments, the buyer may request termination if the seller fails to perform one of the deliveries in the time agreed upon'.<sup>8</sup> ECC Article 117 deals, in a clearer way, with the concept of anticipatory avoidance with respect to the supply contract. It states *in toto*: 'If either party fails to perform his obligations relating to one of the periodic supplies, the other party may not terminate the contract unless such failure to perform causes gross harm to him or weakens confidence in the ability of the defaulting party to continue performing subsequent supplies on a regular basis'.

ECC differentiates between local and international commercial sale of goods contracts. ECC Article 88/2 subjects the international commercial sale of goods contract to international conventions effective in Egypt, i.e. CISG, and international commercial practice. The local commercial sale of goods contract is governed by the ECC rules as augmented with Civil Code rules.

According to the ECC's memorandum, CISG was one of the instruments with which ECC has been influenced.<sup>9</sup> The aim of this paper is to see to which extent do Articles 97 & 117 ECC plainly harmonize with CISG with respect to anticipatory avoidance. All respective rules of the Egyptian Civil Code (e.g. Articles 220 & 273) will also be tackled.

In accordance, this paper will examine the requirements for anticipatory avoidance in section two and all legal effects resulting from meeting such requirements under both CISG and Egyptian law, in section 3.

## 2 Requirements for Anticipatory Avoidance

CISG Article 72 entitles an aggrieved party to anticipatorily avoid the contract for the sale of goods in general, regardless of whether it is a single delivery or an installment contract. Furthermore, CISG Article 73 includes special rules on anticipatory avoidance of installment contracts. Thus, with regard

<sup>8</sup> It further says: '... such termination does not apply to deliveries already performed unless the separation of the thing sold would cause gross harm to the buyer'. This provision is comparable to CISG Article 73(3) which clearly says: "A buyer who declares the contract avoided in respect of any delivery may, at the same time, declare it avoided in respect of deliveries already made or of future deliveries if, by reason of their interdependence, those deliveries could not be used for the purpose contemplated by the parties at the time of the conclusion of the contract."

<sup>9</sup> Sami, *supra* note 4, at 602.

to an installment contract, the aggrieved party might avoid the contract as to future installments, either by virtue of CISG Article 72 or 73. This has also been emphasized in the real praxis. According to the *Zürich* Chamber of Commerce, Switzerland, for instance, '[f]or the Arbitral Tribunal it is clear that [seller's] deliberate stop of supplies to [buyers] was a fundamental breach by the seller under Art. 30 Vienna Convention, namely an anticipatory repudiation of an installment contract under Arts. 49, 72 and 73 Vienna Convention'.<sup>10</sup>

ECC does not address the anticipatory avoidance of single delivery contracts. It only covers the anticipatory avoidance of installment contracts, particularly the supply contract which is dealt with by ECC as a special type of (commercial) sale of goods contract. ECC Articles 97 & 117 explicitly allow anticipatory termination of contract as to future installments or supplies. Besides, the Egyptian Civil Code governs some aspects of anticipatory breach of contract.

Anticipatory avoidance under CISG Article 72 requires: a. a breach of contract by party becomes clear prior to the date for performance, and b. such breach shall be fundamental in nature. This paper will now address these requirements under the CISG (Articles 72 & 73(1)) in comparison with the Egyptian law.

## 2.1 Clarity of Anticipatory Breach

### 2.1.1 Degree of Clarity of Anticipatory Breach

CISG Article 72/1 lays down the principal prerequisite for a rightful anticipatory avoidance of contract: it must be 'clear' prior to the date for performance that the debtor (buyer or seller) will commit a fundamental breach. On one hand, '[a] mere suspicion, even a well-founded one, is not

<sup>10</sup> Award No. ZHK 273/95, 31 May 1996, available at: <http://cisgw3.law.pace.edu/cases/960531s1.html>. See also: Helsinki Court of Appeal, Decision No. S 96/1215, 30 June 1998, available at: <http://cisgw3.law.pace.edu/cases/980630f5.html>, '[i]t is the understanding of the [buyer] that also Article 72(2) CISG is applicable in this case. Through non-conforming delivery, the [seller] has given the [buyer] grounds to assume that also the forthcoming deliveries in installments would constitute a fundamental breach of contract. The [buyer] was clearly entitled to declare the contract avoided as defined in CISG Article 73.' *Schiedsgericht der Börse für landwirtschaftliche in Wien* (Arbitral Court of the market for farm products - Vienna), Austria, Award No. S 2/97, 10 Dec. 1997, available at: <http://cisgw3.law.pace.edu/cases/971210a3.html#vii>, '[t]he regulations of the CISG are contained in Arts. 72 and 73, which both provide for anticipated breach of contract as a reason for the avoidance of contract'.

sufficient.<sup>11</sup> Further, it does not suffice if 'it becomes apparent' that the debtor will commit a (fundamental) breach- a standard that would suffice under CISG Article 71.<sup>12</sup>

On the other hand, a complete certainty of a fundamental breach is not required;<sup>13</sup> a very high probability that there will be a fundamental breach would rather suffice in this field.<sup>14</sup> In the words of the *Landgericht Berlin, Kammer für Handelssachen 99, Germany*, '[z]war sind an die Offensichtlichkeit einer zukünftigen Vertragsverletzung hohe Anforderungen im Hinblick auf den Grad ihrer Wahrscheinlichkeit zu stellen. Doch ist eine an Sicherheit grenzende Wahrscheinlichkeit nicht erforderlich. Vielmehr bedarf es einer sehr hohen naheliegender Wahrscheinlichkeit, die allgemein einleuchtet'.<sup>15</sup>

Unlike CISG Article 72, CISG Article 73(2) entitles the aggrieved party to avoid the contract with respect to future performance of an installment contract even if it is not 'clear' that there will be a

<sup>11</sup> Liu, Chengwei, *SUSPENSION OR AVOIDANCE DUE TO ANTICIPATORY BREACH: Perspectives from Arts. 71/72 CISG, the UNIDROIT Principles, PECL and Case Law*, [2nd edition: Case annotated update (May 2005)], 4.4, available at: <http://www.cisg.law.pace.edu/cisg/biblio/liu9.html#cciv>. von Ziegler, *supra* note 6, at 359. Abd El-Hamid, *supra* note 5, note 209. Seliazniova, Tasiana, Prospective Non-Performance or Anticipatory Breach of contract (Comparison of the Belarusian Approach to CISG Application and Foreign Legal Experience), 24 *J. L. & Com.* 2004-2005, 111-140, , at 128, also available in: *HeinOnline*.

<sup>12</sup> Bennett, Trevor, in: Bianca-Bonell, *Commentary on the International Sales Law*, Giuffrè: Milan (1987), 525-530, at 528. Eiselen, Sieg, *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*, September 2002, para. g., available at: <http://www.cisg.law.pace.edu/cisg/principles/uni71,72.html#er>. Rowley, Keith A., A Brief History of Anticipatory Repudiation in American Contract Law, 69 *University of Cincinnati Law Review* (Winter 2001), at 565-639, at 634, also available at: <http://www.cisg.law.pace.edu/cisg/biblio/rowley.html>.

<sup>13</sup> Schlechtriem, Peter, *Uniform Sales Law - The UN-Convention on Contracts for the International Sale of Goods*, Manz, Vienna: 1986, at 96, also available at: <http://www.cisg.law.pace.edu/cisg/biblio/slechtriem.html#a71>. Schnyder, A. K. / Straub, R. M., Vorweggenommene Vertragsverletzung und Verträge über aufeinander folgende Lieferungen, in: Honsell, H. (Ed.), "Kommentar zum UN-Kaufrecht. Übereinkommen der Vereinten Nationen über Verträge über den Internationalen Warenkauf (CISG)" [Commentary on the CISG article by article - in German] [ - by C. Brunner, T. Dornis, W. Ernst, B. Gsell, C. Hurni, T. Koller, R. Lauko, U. Magnus, W. Melis, A. K. Schnyder, H. Schönle, K. Siehr, R. M. Straub, R. H. Weber], Springer-Verlag Berlin Heidelberg, 2<sup>nd</sup> ed. (2010), at 879. Liu, *supra* note 11, 4.4.

<sup>14</sup> Abd El-Hamid, *supra* note 5, note 206.

<sup>15</sup> Decision No. 99 O 123/92, 30 Sept. 1992, available at: <http://www.cisg-online.ch/cisg/urteile/70.htm>.

fundamental breach of the contract in the future.<sup>16</sup> The *Schiedsgericht der Börse für Landwirtschaftliche Produkte - Wien* (Arbitral Court of the market for farm products – Vienna), Austria, concluded that ‘a less strict standard is to be applied to the level of probability with which equal fundamental breaches of contract are to be expected on future installments after the breaches of duty so far, as is demanded in the case of Art. 72 CISG’; ‘the term "good grounds" in Art. 73(2) presupposes the least level of probability for the assumption of a future breach of contract, it suffices when for the reasons ascertained a defect in the performance of the future installments will occur with "predominant probability"’.<sup>17</sup> The authority of this award might also be persuasive to other arbitral tribunals and domestic courts.

The test of the right to anticipatory avoidance under 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 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 a fear.’<sup>18</sup>

This (subjective) criterion is much more flexible than the (objective) one adopted by CISG Article 72. CISG Article 73(2) – contrary to CISG Article 72 – deals with a situation of an actual breach of contract.<sup>19</sup> In its Award No. VB/94124, 17 Nov. 1995, the Hungarian Chamber of Commerce and Industry Court of Arbitration pointed out that ‘*die Bankgarantie als eine Sicherung, zu deren Beibringung die beklagte Partei ... verpflichtet war. Da sie aber dieser Pflicht nicht nachgekommen ist, war die klagende Partei aufgrund des Art. 71.1.b. berechtigt, ihre Lieferungsspflichten auszusetzen. Demzufolge kann man in dieser Beziehung nicht von Vertragsverletzung der klagenden Partei sprechen. Durch dieses vereinbarungswidrige Verhalten der beklagten Partei war auch die*

<sup>16</sup> Secretariat Commentary, *supra* note 2, article 64, para. 5, ‘[i]t 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 instalment 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 article 63 [draft counterpart of CISG article 72].’ See also: Bridge, Michael G., Issues Arising Under Articles 64, 72 and 73 of the United Nations Convention on Contracts for the International Sale of Goods, 25 *Journal of Law and Commerce* (2005-06), 405-421, at 420, also available at: <http://www.cisg.law.pace.edu/cisg/biblio/bridge1.html#art72>. Koch, Robert, The Concept of Fundamental Breach of Contract under the United Nations Convention on Contracts for the International Sale of Goods (CISG), *Review of the Convention on Contracts for the International Sale of Goods (CISG) 1998*, Kluwer Law International (1999), 177-354, at 310, also available at: <http://www.cisg.law.pace.edu/cisg/biblio/koch.html>.

<sup>17</sup> Award No. S 2/97, 10 Dec. 1997, available at: <http://cisgw3.law.pace.edu/cases/971210a3.html#vii>

<sup>18</sup> Secretariat Commentary, *supra* note 2, article 64, para. 6.

<sup>19</sup> Honnold, John O., *Uniform Law for International Sales Under the 1980 United Nations Convention*, 3rd ed., Deventer: Kluwer Law International (1999), at 442. Azeredo da Silveira, Mercédéh, Anticipatory Breach under the United Nations Convention on Contracts for the International Sale of Goods, *Nordic Journal of Commercial Law*, Issue 2005 #2, , at 45, also available at: [http://www.njcl.utu.fi/2\\_2005/article1.pdf](http://www.njcl.utu.fi/2_2005/article1.pdf).

*Vertragskündigung der Gegenpartei ... aufgrund des Art. 73.2. berechtigt*'.<sup>20</sup> The seller was entitled to declare the contract avoided according to Art. 73(2) CISG; the buyer's actual breach of his obligation to issue a bank guarantee gave the seller good reasons to conclude that the buyer would not pay with respect to future deliveries.

Whereas CISG Article 73(2) gives both buyer and seller the right to declare the anticipatory avoidance of contract,<sup>21</sup> ECC Article 97 explicitly gives such right to the buyer only. ECC Article 117 authorizes only the importer to anticipatorily avoid the contract, too. However, ECC also governs a situation of (non-anticipatory) termination of supply contract for actual non-performance that occurs after the performance deadline; here, it applies to both parties of the contract. If either party (supplier or importer) already failed to perform any of his obligations relating to one of the periodic supplies at the due time, the other party might request termination of the contract provided that such failure causes him gross harm.<sup>22</sup>

In either case, the right to avoid / terminate the contract by the buyer / importer prior to the date of performance is preceded with an actual failure by the seller / supplier to perform. Under ECC Article 97, the mere fact that the seller failed to give a certain delivery in the time agreed upon authorizes the buyer to terminate the contract for the future deliveries. However, under the surface, this entails that such failure to perform by the seller makes the buyer suspicious about the future deliveries. Under ECC Article 117, the failure by the supplier to deliver any periodic supply does not *per se* entitles the importer to anticipatorily terminate the supply contract. Rather, this Article explicitly states that such a failure weakens confidence in the supplier's ability to continue performing subsequent supplies on a regular basis. Otherwise, the importer cannot terminate the contract.

Since ECC Articles 97 and 117 do not deal with the single delivery contract, both are well comparable to CISG Article 73(2). With regard to installment contracts, both CISG (Article 73(2)) and ECC obviously require that the right of anticipatory avoidance of contract be preceded by an actual breach. Still, the aggrieved party may – under CISG Article 72 - anticipatorily avoid the contract even if no actual breach is committed. As we have already said, with regard to an installment contract, the aggrieved party might avoid the contract as to future installments, either by virtue of CISG Article 72 or 73(2).<sup>23</sup>

Under CISG Article 73(2), it suffices if one party fails to perform any of his obligations with respect to any installment, be it non-performance, late performance or non-conformity. Under ECC Article 117,

<sup>20</sup> Available at: <http://www.unilex.info/case.cfm?id=217>.

<sup>21</sup> Schlechtriem, *supra* note 13, at 96, '[t]his provision is concerned with successive deliveries, not instalment payments. By analogy, however, Article 73(2) can also apply to missed payments if they coincide with instalment deliveries. Otherwise, the entire contract may be avoided under Article 72. Article 73(2) is also applicable to other breaches by the buyer, such as not taking delivery of an instalment'.

<sup>22</sup> Article 117.

<sup>23</sup> See *supra* note 10 and the accompanying text.



by contrast, the supplier's failure to perform shall be in the form of non-delivery of any periodic supply. In this case, late or non-conforming delivery will not suffice.<sup>24</sup>

Like CISG Article 73(2), ECC Article 117 adopts a subjective criterion, i.e. the supplier's failure to perform one of the periodic supplies weakens confidence in his ability to continue performing subsequent supplies on a regular basis. Thus, the importer shall establish that the supplier's failure to perform a periodic supply is a proof of a serious deficiency in the supplier's creditworthiness; i.e., the supplier will not be able to perform future supplies.

This serious deficiency in the supplier's creditworthiness does not however mean insolvency or bankruptcy.<sup>25</sup> Under Article 273 of the Egyptian Civil Code which is applicable to both non-commercial and commercial sale contracts, declaring the supplier insolvent or bankrupt renders all outstanding supplies due. Under Article 157(1) of the Egyptian Civil Code, the importer may immediately request the performance of the contract or its termination and, in either case, damages if needed.

### 2.1.2 Causes Leading to the Clarity of Anticipatory Breach

CISG Article 72, contrary to CISG Article 71, does not stipulate that the anticipated breach be clear as a consequence of any particular conduct or circumstances.<sup>26</sup> The most important element of CISG Article 72 is that a fundamental breach will be committed, whatever the cause of clarity would be.<sup>27</sup> Such clarity might – just like CISG Article 71 - result from '(a) a serious deficiency in [the debtor's] ability to perform or in his creditworthiness; or (b) his conduct in preparing to perform or in performing the contract'.<sup>28</sup> Still, it can also be a consequence of any other circumstances.

A party is found to be entitled to anticipate breach of contract when confronted with the following circumstances: the non-performance by the buyer of his obligations under prior contracts;<sup>29</sup> the

<sup>24</sup> Sami, *supra* note 4, at 607.

<sup>25</sup> *Ibid*, at 608.

<sup>26</sup> Bennett, *supra* note 12, at 528. Liu, *supra* note 11, 2.2.

<sup>27</sup> Schnyder / Straub, in : Honsel, *supra* note 13, at 876. Azeredo da Silveira, *supra* note 19, at 26. Liu, *supra* note 11, 2.2.

<sup>28</sup> Abd El-Hamid, *supra* note 5, note 207. Liu, *supra* note 11, 4.4.

<sup>29</sup> In its Decision No. 11 O 210/92, 28 April 1993 (available at: <http://www.unilex.info/case.cfm?id=85>), the *Landgericht Krefeld*, Germany concluded that the seller had the right to declare the second contract avoided under Art. 72(1) and (2) CISG, since the buyer had not yet performed under the prior contract although the seller had requested several times to do so and had even commenced a legal action, a thing that made it clear that the buyer would not pay the purchase price under the second contract and would thereby commit a fundamental breach of contract. This ruling has been affirmed by the *Oberlandesgericht Düsseldorf* in its Decision No. 17 U 146/93, 14 Jan. 1994, available at: <http://www.unilex.info/case.cfm?id=84>.

buyer's refusal to establish a letter of credit;<sup>30</sup> the buyer's serious delays in payment of the price;<sup>31</sup> the seller's deliberate stop of supplies to buyers;<sup>32</sup> the seller's delayed delivery of defective samples;<sup>33</sup> and the loss of either party's creditworthiness due to being subject to an insolvency proceedings.<sup>34</sup>

Obviously, insolvency is one of the circumstances that may – under CISG - indicate that there will be a fundamental breach prior to the date for performance. The Egyptian law also deals with the situation in which a contracting party is declared insolvent or bankrupt. According to Article 273 of the Egyptian Civil Code which is applicable to both non-commercial and commercial sale contracts, if the debtor adjudged insolvent or bankrupt, he shall lose his right in the maturity period. This maturity period is originally given to the debtor based on trust in his creditworthiness.<sup>35</sup> Thus, the creditor logically expect that the insolvent debtor will not be able to perform his obligation when it is due under the contract. This is an obvious situation of anticipatory breach of contract. The aggrieved

<sup>30</sup> In its Decision No. Civil Jurisdiction 10680 of 1996, 17 Nov. 2000 (available at: <http://www.unilex.info/case.cfm?id=472>), the Supreme Court of Queensland, Australia, stated that '[t]he refusal to establish a timely letter of credit was clearly a fundamental breach within the meaning of Article 25 and Article 64(1)(a) of the Convention. ... Such a failure would also justify termination [under article 72 CISG]'.

<sup>31</sup> In its Decision No. AR 3641/94, 1 Mar. 1995 (available at: <http://www.unilex.info/case.cfm?id=269>), the *Rechtbank van Koophandel, Hasselt* - Belgium pointed out that the buyer's serious delay in payment, namely over seven months, could reasonably lead to the suspicion that it would not perform in the future. Likewise, in its Decision of 20 February 2007 (available at: <http://www.unilex.info/case.cfm?id=1186>), the *Cour de Cassation - Chambre Commerciale*, France concluded that the buyer's previous serious delays in payment and its belonging to a seriously indebted group had led the seller reasonably to believe that the other party would not perform in the future.

<sup>32</sup> In its Award No. ZHK 273/95, 31 May 1996 (available at: <http://www.unilex.info/case.cfm?id=396>), the *Zürich Handelskammer* concluded that 'it is clear that [seller's] deliberate stop of supplies to [buyers] was a fundamental breach by the seller under Art. 30 Vienna Convention, namely an anticipatory repudiation of an installment contract under Arts. 49, 72 and 73 Vienna Convention'. Likewise, in its Decision No. 2 Ob 328/97t, 12 Feb. 1998 (available at: <http://www.unilex.info/case.cfm?id=385>), the *Oberster Gerichtshof*, Austria pointed out that '[e]in schwerwiegender Mangel der Kreditwürdigkeit, wie er hier von der klagenden Partei geltend gemacht wird, ist etwa gegeben, wenn ... der Schuldner seine Zahlungen oder Lieferungen eingestellt hat'.

<sup>33</sup> In its Award No. 8786 of January 1997 (available at: <http://www.unilex.info/case.cfm?id=463>), the ICC Court of Arbitration - Zurich concluded that 'with its delayed delivery of defective samples Claimant has itself caused the impossibility of delivery of the products at the date agreed upon. By informing Defendant that it would not meet the delivery deadline Claimant committed an anticipatory and fundamental breach of contract'.

<sup>34</sup> In its Decision No. 2 Ob 328/97t, 12 Feb. 1998 (available at: <http://www.unilex.info/case.cfm?id=385>), the *Oberster Gerichtshof*, Austria pointed out that '[e]in schwerwiegender Mangel der Kreditwürdigkeit, wie er hier von der klagenden Partei geltend gemacht wird, ist etwa gegeben, wenn über das Vermögen des Schuldners ein Insolvenzverfahren eröffnet worden ist'.

<sup>35</sup> Abd El-Hamid, *supra* note 5, note 199.

creditor may immediately request (specific) performance by the debtor of his obligations.<sup>36</sup> He may also demand immediate termination of the contract; i.e. before the time originally agreed upon.

With regard to installment contracts, CISG and ECC define the cause of anticipatory breach.<sup>37</sup> The actual non-performance of an installment 'gives the other party good grounds to conclude that a fundamental breach of contract will occur with respect to future instalments'<sup>38</sup> or 'weakens confidence in the ability of the defaulting party to continue performing subsequent supplies on a regular basis'.<sup>39</sup>

## 2.2 Fundamental Non-Performance

With respect to the breach anticipated by either party, the Convention distinguishes between the right of an aggrieved party to anticipatorily avoid the contract under CISG Article 72 and the right to suspend his obligations under CISG Article 71. In order to suspend either party's performance, it suffices that 'the other party will not perform a substantial part of his obligations'.<sup>40</sup> In order to anticipatorily avoid the contract by the aggrieved party, by contrast, it shall be clear that the other party 'will commit a fundamental breach of contract'.

Thus, 'a promisee's prospective failure to perform a "substantial part" (in Art. 71) of its obligations, although obviously significant, is presumably intended to denote something less than a "fundamental breach" (in Art. 72)'.<sup>41</sup> Under both Articles of the CISG, however, the minor breach anticipated by a contracting party does entitle the other party neither a right of suspension of performance nor anticipatory avoidance of contract.<sup>42</sup>

<sup>36</sup> In addition, the failure by the debtor to provide the debt securities agreed upon or decrease of such securities by his own deed or for a cause not related to him (but not by the creditor's deed, see: Decision of the court of cassation, Egypt, No. 67 for the judicial year 35, 11 Feb. 1969, available (in Arabic) in the Arab Legal Network at: <http://www.eastlaws.com/Ahkam/AhkamHokmSearch.aspx>) constitute themselves situations of anticipatory breach of contract. Therefore, Article 273 of the Egyptian Civil Code equates these situations with the case of the debtor's bankruptcy or insolvency.

<sup>37</sup> Koch, *supra* note 16, at 311.

<sup>38</sup> Article 73/2 CISG.

<sup>39</sup> Article 117 ECC.

<sup>40</sup> Decision of the *Landgericht Berlin*, Germany, No. 52 S 247/94, 15 Sept. 1994, available at: <http://www.unilex.info/case.cfm?id=218>, 'Danach [dh, nach Artikel 71 CISG] kann eine Vertragspartei die Erfüllung ihrer Pflichten aussetzen, wenn sich nach Vertragsabschluß herausstellt, daß die andere Partei einen wesentlichen Teil ihrer Pflichten nicht erfüllen wird, was sich aufgrund des Verhaltens bei der Vorbereitung der Erfüllung oder bei der Erfüllung des Vertrages ergeben kann. Dazu bedarf es nicht notwendig einer wesentlichen Vertragsverletzung im Sinne des Art. 25 CISG'.

<sup>41</sup> Liu, *supra* note 11, 2.2.

<sup>42</sup> *Ibid*, 1.

According to CISG Article 71(3), '[a] party suspending performance ... must immediately give notice of the suspension to the other party and must continue with performance if the other party provides adequate assurance of his performance.' Failure to provide such adequate assurance may not in itself authorize the aggrieved party to declare the contract avoided under CISG Article 72.<sup>43</sup> However, if this failure makes it clear that the suspected breach is fundamental, the contract can be avoided on the ground of anticipatory breach.<sup>44</sup>

CISG Article 73(1) authorizes a party to declare a contract avoided with regard to a single installment where the other party has committed a fundamental breach in respect of that installment. CISG Article 73(2) further provides that the failure of one party to perform any of his obligations under the contract in respect of any installment can give the other party good grounds to conclude that a fundamental breach will occur with respect to future installments. Consequently, the other party may declare the contract avoided with regard to these future installments.

To sum, the Convention entitles the aggrieved party to declare the contract avoided when the anticipated breach is fundamental in the sense of CISG Article 25.<sup>45</sup> This is completely concordant with the right to avoid in cases of actual breach of contract under CISG Articles 49 & 64. It should however be noted that, whereas avoidance based on actual breach of contract occurs after the date of performance, the anticipatory avoidance is declared by the aggrieved party prior to the date of performance. In its Decision No. VIII ZR 18/94, 15 Feb. 1995, the *Bundesgerichtshof*, Germany, stated that the right to anticipatory avoidance may be exercised up until the date for performance. Yet since the machine had been delivered to the buyer, the court concluded that buyer was entitled to avoid the contract only under the prerequisites stipulated in CISG Articles 45 & 49.<sup>46</sup>

By making avoidance conditional on fundamental breach of contract, whether anticipatory or actual, the Convention makes avoidance a remedy of last resort.<sup>47</sup> That is to say, the keeping the contract

<sup>43</sup> Schlechtriem, *supra* note 13, at 96, 'the refusal of the obligor to provide "adequate assurance" following a notice under Article 71(3) should not in itself be regarded as "clear" evidence of an impending breach of contract'. Strub, Gilbey, *The Convention on the International Sale of Goods: Anticipatory Repudiation Provisions and Developing Countries*, 38 *International and Comparative Law Quarterly* (1989), 475-501, at 498, also available at: <http://www.cisg.law.pace.edu/cisg/biblio/strub.html>, '[a] failure to respond to a request for assurances is too vague to merit avoidance under the text of Article 72'.

Contra: Bennett, *supra* note 12, at 524, '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.'

<sup>44</sup> Compare: Honnold, *supra* note 19, at 436, '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'.

<sup>45</sup> It says: '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.'

<sup>46</sup> Available at: <http://www.unilex.info/case.cfm?id=107>.

<sup>47</sup> Schlechtriem, *supra* note 13, at 95.

intact is a principle upon which CISG is based. Accordingly, the *Zürich* Chamber of Commerce, Switzerland, in its Award No. ZHK 273/95, 31 May 1996, concluded that ‘the failure by a buyer to perform one installment (i.e., paying the price for one installment) gives the seller the right to avoid the contract only where the buyer’s breach is a fundamental breach ....’<sup>48</sup>

Pursuant to ECC Article 117, the anticipatory termination suggests that the supplier’s failure to perform one of the periodic supplies weakens confidence in his ability to continue performing subsequent supplies on a regular basis. Though this provision does not include the term ‘fundamental breach’, the inability by the supplier to continue performing subsequent supplies on a regular basis means that the importer will be deprived of what he reasonably intended to get under the contract.<sup>49</sup>

Under ECC Article 97, the failure by the seller to perform any installment gives the buyer the right to terminate the contract for future installments, too. Such a failure gives the buyer reasons to expect a fundamental breach of contract by the seller, i.e. fear of non-performance of coming installments.<sup>50</sup> In addition, in order to terminate the contract for (actual) breach under the Egyptian Civil Code, the breach shall have a certain degree of seriousness. In order to decide whether or not the breach at issue is serious enough to warrant termination, the court shall take into account the initial intent of the parties when the contract was concluded as well as all the circumstances relating to this contract. Thus, the court shall consider, *inter alia*, the nature of the contractual obligation breached (whether a subsidiary or essential one) and the significance of the part of contract not performed.<sup>51</sup> Obviously, this Egyptian Civil Code test compares well to the fundamental breach test of CISG Article 25.

### 3 Legal Effects

Once the prerequisites mentioned in CISG Articles 72 & 73(2) or ECC Articles 97 & 117 are met, the aggrieved party may avoid / terminate the contract prior to the date for performance. Beside avoidance / termination of contract, this paper will show in the following pages whether or not the

<sup>48</sup> Available at: <http://cisgw3.law.pace.edu/cases/960531s1.html>.

<sup>49</sup> Sami, *supra* note 4, at 607.

<sup>50</sup> Amkhan, *supra* note 7, at 24-25.

<sup>51</sup> In principle, a judicial judgment is required for effecting termination as a remedy of (actual) breach of contract (see: Amkhan, *supra* note 7, at 23. Sami, *supra* note 4, at 610). However, the judge enjoys a wide margin of discretion in this regard; ‘the judge may reject the request for termination if that which the debtor has failed to perform is of little importance in relation to the obligation as a whole’ (Article 157(2) of the Egyptian Civil Code). Besides, the contracting parties may deprive the judge of his discretionary powers in deciding upon termination; ‘the parties may agree that in case of non-performance of the contractual obligations, the contract will be terminated *ipso facto* without a judicial judgment. Such an agreement does not release the parties from the obligation of serving a warning, unless the parties explicitly agree that such a warning will be dispensed with’ (Article 158 of the Egyptian Civil Code).

aggrieved party has to give an advanced notice of his intent to avoid or terminate the contract. It will also demonstrate whether or not the other party can evade avoidance / termination of contract through providing adequate assurance of performance.

### 3.1 Avoidance of the Contract Prior to the Date for Performance

CISG Articles 72 & 73(2) authorize the aggrieved party to declare the contract avoided when the suspected breach is fundamental. The aggrieved party may exercise this right to anticipatory avoidance up until the date for performance. In the words of the *Bundesgerichtshof*, Germany, '[d]amit war die Vertragserfüllung durch beide Parteien auf die Zeit Ende November 1991 festgesetzt, so daß die Beklagte ihr sich aus Art.72 CISG ergebendes Aufhebungsrecht auch nur bis zu diesem Zeitpunkt geltend machen konnte.'<sup>52</sup>

Unlike CISG Articles 49(2) & 64(2), CISG Article 72 itself does not explicitly provide for a certain period of time during which anticipatory avoidance should be declared. Nevertheless, such an avoidance shall happen within a reasonable time. The notice of avoidance must give the other party the time necessary for providing adequate assurance.<sup>53</sup>

'Fundamental' is more severe than 'substantial'<sup>54</sup>- which is the standard stated in CISG Article 71 for suspension of performance.<sup>55</sup> Thus, if it is clear that a fundamental breach of contract is going to occur, the aggrieved party may choose either to avoid the contract or to suspend performance of his obligations.<sup>56</sup> According to the *Oberster Gerichtshof*, Austria, '[d]as Aussetzungsrecht gemäß Art 71 UNK besteht unabhängig neben dem Recht zur Aufhebung des Vertrages in bezug auf Teillieferungen

<sup>52</sup> Decision No. VIII ZR 18/94, 15 Feb. 1995, available at: <http://www.unilex.info/case.cfm?id=107>.

<sup>53</sup> Schnyder / Straub, in : Honsel, *supra* note 13, at 889.

<sup>54</sup> Karton, Joshua D. H., *Contract Law in International Commercial Arbitration: the Case of Suspension of Performance*, available at: [http://works.bepress.com/joshua\\_karton/5/](http://works.bepress.com/joshua_karton/5/), 1 - 46, at 28.

<sup>55</sup> According to Article 161 of the Egyptian Civil Code, if in contracts obligatory on both parties the mutual obligations shall be due for fulfillment each of the two contracting parties may refrain from performing his obligation if the other contracting party does not perform his obligation. Thus, contrary to CISG Article 71, the invocation of the suspension right given to each contracting party by Article 161 of the Egyptian Civil Code is limited to the time of performance rather than in advance.

<sup>56</sup> Schnyder / Straub, in : Honsel, *supra* note 13, at 923. Eiselen, *supra* note 12, para. d. von Ziegler, *supra* note 6, at 356.

*eines Sukzessivlieferungsvertrages; die vertragstreue Partei kann zwischen der Geltendmachung des einen oder des anderen Rechtsbehelfs wählen*.<sup>57</sup>

Under CISG Article 77, however, '[a] party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss'. Thus, if the requirements of anticipatory avoidance of contract are satisfied, the aggrieved party should immediately declare the contract avoided where an avoidance mitigates the loss.<sup>58</sup> Under these circumstances, the aggrieved party might not suspend performance of his obligations.<sup>59</sup>

With regard to anticipatory breach in installment contracts, CISG Article 73(2) (contrary to CISG Article 72) does not authorize the aggrieved party to declare the entire contract avoided. Rather, it allows the aggrieved party to do so only for the future. Likewise, ECC Articles 97 & 117 entitle the buyer / importer to terminate the contract for future installments or deliveries only. Under both instruments (namely, CISG Article 73(3) and ECC Article 97), however, such termination could also apply to deliveries already performed if the item sold is inseparable.

In all events, the right of anticipatory avoidance requires suspected fundamental breach of contract, whether under CISG Articles 72 & 73(2) or ECC Articles 97 & 117. Whereas this prerequisite is explicitly provided for in the CISG, it is concluded under Egyptian law from the augmentation of ECC Articles 97 & 117 with the Civil Code rules, as clarified earlier.<sup>60</sup>

Accordingly, if the aggrieved party declares the contract avoided without a fundamental breach of contract by the other party being anticipated, the avoidance is ineffective and the aggrieved party

<sup>57</sup> Decision of No. 2 Ob 328/97t, 12 Feb. 1998, available at: <http://www.unilex.info/case.cfm?id=385>. See also: Decision of the U.S. District Court, Southern District of New York, No. 08 Civ. 1587 (BSJ)(HBP), 29 May 2009, available at: <http://www.unilex.info/case.cfm?id=1451>, '[plaintiff] permissibly withheld delivery of the November and Surplus Garments to [defendant] because it became apparent that [defendant] would not be able to make any payments for those Garments. CISG art. 71(1). ... [plaintiff] also permissibly cancelled the contract and permanently withheld delivery of the November Garments and the Surplus Garments because [defendant's] persistent failure to pay for the garments it ordered demonstrated that it was unable or unwilling to pay the agreed upon price for these garments. CISG art. 72'.

<sup>58</sup> Secretariat Commentary, *supra* note 2, article 63, para. 4, '[w]here it is in fact clear that a fundamental breach of contract will occur, the duty to mitigate the loss enunciated in article 73 [draft counterpart of CISG article 77] 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'. Bridge, *supra* note 16, at 417. Bennett, *supra* note 12, at 529.

Contra: Schnyder / Straub, in : Honsel, *supra* note 13, at 890, 'Art. 77 zwingt die vertragstreue Partei nicht dazu, die Aufhebungserklärung unverzüglich nach Eintritt des Anfangstermins abzugeben. ... Da Art. 77 die Ersatzfähigkeit eines eingetretenen Schadens beschränkt – und damit allein die Folge, nicht aber die Grundlage der Ausübung eines Rechtsbehelfs – kann sich aus dieser Vorschrift keine Einschränkung der Geltendmachung des Rechts zur Vertragsaufhebung ergeben'.

<sup>59</sup> Azeredo da Silveira, *supra* note 19, at 19. Liu, *supra* note 11, 4.1.

<sup>60</sup> See, above, 2.2.

himself becomes the one committing the fundamental breach.<sup>61</sup> Both parties are not released from their obligations under the contract. The other party is not compelled to restate under CISG Article 81.

In such a case, the other party may choose to compel the aggrieved party to accept his performance.<sup>62</sup> Under the contract, the other party may also ask the aggrieved party to perform his obligations.<sup>63</sup> Furthermore, since CISG Article 72 – contrary to ECC Articles 97 & 117 - applies to both parties, the other party may declare the contract avoided prior to the date for performance.<sup>64</sup>

The aggrieved party might be liable to the other party for damages, too.<sup>65</sup> CISG Articles 75 & 76 makes the measures of damages available to the aggrieved party after the contract has been declared avoided. Both articles also permit the avoiding party to claim further damages recoverable under CISG Article 74. The duty of the other party to mitigate the loss under CISG Article 77 might be significant. Under CISG Article 80, the aggrieved party “may not rely on a failure of the other party to perform, to the extent such failure was caused by the first party’s [the aggrieved party’s] act or omission”.

Though Article 220 of the Egyptian Civil Code does not explicitly recognize the doctrine of anticipatory avoidance, it still regulates situations comparable to anticipatory breach. Article 220 covers, *inter alia*, performance of the obligation that might become impossible or non-beneficial by the debtor's act.

In principle, the creditor may ask the debtor to perform his contractual obligation, whether *per se* or in equivalent monetary compensation as an alternative. Under Articles 218 & 203/1 of the Egyptian Civil Code, the creditor must first of all serve upon the debtor a warning by official means, e.g. commencement of judicial proceedings.<sup>66</sup> With regard to commercial contracts, however, a registered letter, fax or telex may constitute sufficient warning according to ECC Article 58.

<sup>61</sup> Secretariat Commentary, *supra* note 2, article 63, para. 3, ‘[i]f 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.’ Liu, *supra* note 11, 2.2.

<sup>62</sup> Azeredo da Silveira, *supra* note 19, at 29.

<sup>63</sup> Schnyder / Straub, in : Honsel, *supra* note 13, at 893.

<sup>64</sup> Rowley, *supra* note 12, at 635. Liu, *supra* note 11, 4.1.

<sup>65</sup> Liu, *supra* note 11, 4.4. U.S. District Court of Illinois, Decision No. 99 C 5153, 7 Dec. 1999, available at: <http://www.unilex.info/case.cfm?id=423>.

<sup>66</sup> Amkhan, *supra* note 7, at 22.



This warning basically aims at placing the defaulting debtor legally in breach.<sup>67</sup> If the debtor's obligation becomes impossible or non-beneficial by his own act (e.g. if the seller destroys the thing sold), the creditor (the buyer) may claim damages without having to serve a warning upon the debtor.<sup>68</sup> The buyer must, however, file his suit claiming damages when or after the time of performance agreed upon is due,<sup>69</sup> though he might not request termination of contract under such circumstances.

Contrary to CISG, Article 273 of the Egyptian Civil Code does not explicitly recognize the right of anticipatory avoidance in situations of insolvency or bankruptcy. Rather, it authorizes the aggrieved party to react prior to the date for performance only. The insolvent debtor loses his right in the maturity period and his obligation will now be due. The creditor may therefore request performance by the debtor of his obligation immediately.<sup>70</sup> He does not need to wait until the time of performance, originally agreed upon, is due. The creditor may also request termination of the contract if the debtor fails to perform his obligation immediately. Thus, termination of the contract may happen before the time originally agreed upon. This is clearly close to anticipatory avoidance under CISG.<sup>71</sup>

### 3.2 Advanced Notice of Intent to Avoid

In order not to abuse his right of anticipatory avoidance,<sup>72</sup> the aggrieved party intending to declare the contract avoided should – under CISG Article 72(2) - give reasonable notice to the other party.<sup>73</sup> According to CISG Article 27, if such 'notice ... is given ... by means appropriate in the circumstances, a delay or error in the transmission of the [notice] or its failure to arrive does not deprive that party

<sup>67</sup> Amkhan, *supra* note 7, at 22. Decision of the court of cassation, Egypt, No. 2092 for the judicial year 57, 6 Mar. 1989, available (in Arabic) in the Arab Legal Network at: <http://www.eastlaws.com/Ahkam/AhkamHokmSearch.aspx>.

<sup>68</sup> This right of creditor has been emphasized in many Decisions of the court of cassation in Egypt. See, for instance: Decision No. 243 for the judicial year 37, 1 June 1972; Decision No. 497 for the judicial year 57, 28 Mar. 1990; Decision No. 1556 for the judicial year 56, 26 Mar. 1989; Decision No. 388 for the judicial year 57, 12 Dec. 1989; and Decision No. 3238 for the judicial year 71, 26 Dec. 2002, all of them are available (in Arabic) in the Arab Legal Network at: <http://www.eastlaws.com/Ahkam/AhkamHokmSearch.aspx>.

<sup>69</sup> Abd El-Hamid, *supra* note 5, note 194.

<sup>70</sup> *Ibid*, note 195.

<sup>71</sup> *Ibid*, note 199.

<sup>72</sup> Honnold, *supra* note 19, at 440. Liu, *supra* note 11, 2.1.

<sup>73</sup> See also: Helsinki Court of Appeal, Finland, Decision No. S 96/1215, 30 June 1998, available at: <http://cisgw3.law.pace.edu/cases/980630f5.html>. Hof van Beroep [Appellate Court] Ghent, Belgium, Decision No. 2003/AR/2603, 11 Oct. 2004, available at: <http://cisgw3.law.pace.edu/cases/041011b1.html>.

of the right to rely on the [notice]'. Thus, what counts is that the notice is sent properly, no matter it is received or not.<sup>74</sup>

This notice aims at giving the other party the opportunity to provide adequate assurance of his obligation.<sup>75</sup> The aggrieved party has the right to demand adequate assurance. For instance, the mere fact that the seller made defective deliveries to other buyers with similar needs does not authorize the buyer to request assurance. However, if the cause of seller's defective deliveries to other buyers was the result of using a raw material from a particular source, the seller's conduct in preparing to use the raw material from the same source would give the buyer the right to demand adequate assurance.<sup>76</sup>

Nonetheless, the aggrieved party is not obliged to demand adequate assurance. In its Award No. 8786, Jan. 1997, the ICC Court of Arbitration – *Zürich*, Switzerland, concluded that '[b]ecause Claimant itself declared that it would not meet the delivery deadline Defendant was under no obligation to ask for a bond from Claimant in accordance with Art. 72 para. 2 CISG (Art. 72 para. 3 CISG), as Claimant has alleged'.<sup>77</sup>

This notice is also advantageous to the aggrieved party intending to declare the contract avoided. It will '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.'<sup>78</sup>

However, such notice is not required if time does not allow to give a notice (CISG Article 72(2)). Yet, with modern means of communication, it is difficult to imagine circumstances in which a prior notice could not be given by the aggrieved party.<sup>79</sup> It has to be kept in mind, however, that 'to comply with the paragraph the notice must be «reasonable» in order to permit the other party time to provide adequate assurance of his performance.'<sup>80</sup> Thus, if the agreed upon date of performance is so near that the other party will not be able to provide adequate assurance, there is no need to notify the other party<sup>81</sup>. In such a case, the notice is unreasonable.

Similarly, the advanced notice is not required 'if the other party has declared that he will not perform his obligations' (CISG Article 72(3)). As providing adequate assurance becomes unattainable in a

<sup>74</sup> Liu, *supra* note 11, 5.1.

<sup>75</sup> Eiselen, *supra* note 12, para. k.

<sup>76</sup> Secretariat Commentary, *supra* note 2, article 62, para. 6.

<sup>77</sup> Available at: <http://www.unilex.info/case.cfm?id=463>.

<sup>78</sup> Bennett, *supra* note 12, at 530. See also: Liu, *supra* note 11, 5.1. Azeredo da Silveira, *supra* note 19, at 29.

<sup>79</sup> Liu, *supra* note 11, 5.1. Abd El-Hamid, *supra* note 5, note 215.

<sup>80</sup> Bennett, *supra* note 12, at 529-530.

<sup>81</sup> Schlechtriem, *supra* note 13, at 95. Schnyder / Straub, in : Honsel, *supra* note 13, at 885. Strub, *supra* note 44, at 500.

timely manner, the need for giving a notice must fall away.<sup>82</sup> In its Decision No. 99 C 5153, 7 Dec. 1999,<sup>83</sup> the U.S. District Court of Illinois pointed out that seller declared that he would 'no longer feel obligated' to perform and would 'sell the material elsewhere'; hence, the buyer has the right to avoid the contract.

'[T]his exception also covers the frequent cases in which a demand for new terms or alleged contract violations by the other side [is] used as a pretext for not performing one's own obligations'.<sup>84</sup> This exception includes the case of the seller who makes delivery dependent on an additional counter-performance not agreed upon. For instance, it includes the situation in which the seller makes delivery of the second installment conditional on payment for all buyer's outstanding debts.

According to the Award of the *Schiedsgericht Hamburger Freundschaftliche Arbitrage*, Germany, 29 Dec. 1998, '[u]m eine solche unberechtigte Erfüllungsverweigerung handelt es sich auch dann, wenn die Verkäuferin nach Vereinbarung einer Vorkassielieferung ihre Lieferung von der Bezahlung anderweitiger Forderungen abhängig macht - wie hier. ....'<sup>85</sup> Likewise, in its Decision No. 99 C 5153, 7 Dec. 1999, the U.S. District Court of Illinois concluded that the seller's threat not to perform his contractual obligations if the letter of credit was not amended amounted to an anticipatory fundamental breach of contract under CISG Article 72.<sup>86</sup>

In such cases, 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.'<sup>87</sup> On the other hand, the aggrieved party may declare the contract avoided without giving of prior notice, 'and, hence, without the obligation to resume performance if and when the promisor provides adequate assurances'.<sup>88</sup>

CISG Article 73 does not require the aggrieved party to give prior notice of anticipatory avoidance to the other party. As this other party has already committed an actual breach, he does not deserve an opportunity to provide adequate assurance of his obligation. In its Decision No. S 96/1215, 30 June 1998, the Helsinki Court of Appeal, Finland, concluded that '[t]hrough non-conforming delivery, the [seller] has given the [buyer] grounds to assume that also the forthcoming deliveries in installments would constitute a fundamental breach of contract. The [buyer] was clearly entitled to declare the

<sup>82</sup> Eiselen, *supra* note 12, para. I.

<sup>83</sup> Available at: <http://www.unilex.info/case.cfm?id=423>.

<sup>84</sup> Schlechtriem, *supra* note 13, at 95.

<sup>85</sup> Available at: <http://www.unilex.info/case.cfm?id=394>.

<sup>86</sup> Available at: <http://www.unilex.info/case.cfm?id=423>.

<sup>87</sup> Azeredo da Silveira, *supra* note 19, at 27. See also: Strub, *supra* note 44, at 497. Abd El-Hamid, *supra* note 5, note 207.

<sup>88</sup> Rowley, *supra* note 12, at 634.

contract avoided as defined in CISG Article 73. Giving of prior notice of avoidance is not required in Article 73'.<sup>89</sup>

Nevertheless, the aggrieved party should use this right of avoidance 'within a reasonable time'<sup>90</sup> as from 'the failure to perform'.<sup>91</sup> It makes no difference here whether anticipatory avoidance is based on CISG Article 72 or 73(2).<sup>92</sup> In its Decision of 3 Nov. 1997, the *Audiencia Provincial de Barcelona*, Spain, concluded that the 48-hour period within which the buyer avoided following delivery of the last late installment received was deemed to be a 'reasonable time' to declare the contract avoided in accordance with CISG Articles 49 & 73.<sup>93</sup>

Like CISG Articles 49, 64 & 26, the declaration of anticipatory avoidance must be communicated by the aggrieved party to the other party. This requirement of CISG Article 26 also applies to anticipatory avoidance due to the refusal to provide adequate assurance.<sup>94</sup>

ECC Articles 97 & 117 do not themselves require the aggrieved party to give an advanced notice of intent to request termination of contract.<sup>95</sup> Nevertheless, the buyer / importer may not request termination of contract unless he serves a warning upon the debtor according to Article 218 of the Egyptian Civil Code. This warning aims at placing the defaulting debtor legally in breach.

Obviously, under CISG, giving of advanced notice by the party intending to avoid aims at giving the other party the opportunity to provide adequate assurance of his obligation. Under Egyptian law, by contrast, serving of warning aims at establishing the debtor's fault in performing his contractual obligation. This first step will enable the creditor to ask for contract termination.

Besides, the Egyptian Civil Code regulates the declaration by the debtor that he will not perform his obligation- a situation comparable to anticipatory breach under CISG. Under Article 220 of the Egyptian Civil Code which is applicable to both commercial and non-commercial contracts,

<sup>89</sup> Available at: <http://cisgw3.law.pace.edu/cases/980630f5.html>.

<sup>90</sup> Article 73/2 CISG.

<sup>91</sup> Secretariat Commentary, *supra* note 2, article 64, para. 5. Bennett, *supra* note 12, at 534

Contra: Azeredo da Silveira, *supra* note 19, at 44, '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>92</sup> Bridge, *supra* note 16, at 420.

<sup>93</sup> Available at: <http://www.unilex.info/case.cfm?id=313>.

<sup>94</sup> ICC Court of Arbitration, Award No. 8574, Sept. 1996, available at: <http://www.unilex.info/case.cfm?id=521>.

<sup>95</sup> Contra: Sami, *supra* note 4, at 608.

declaration by the debtor in writing that he does not intend to perform his obligation exempts the creditor from serving a warning upon the debtor.<sup>96</sup>

According to the Egyptian Civil Code rules, the creditor may not in principle claim damages unless he serves a warning upon the debtor. If the debtor declares in writing that he will not perform his contractual obligation, the creditor may logically claim damages without serving a warning upon the debtor.

Clearly, under CISG, repudiation of contract by the debtor can be in any form. By contrast, this shall be in writing under Egyptian law. It is interesting to notice, however, that while CISG Article 72 entitles the aggrieved party the right to avoid the contract prior to the date for performance, Article 220 of the Egyptian Civil Code only discharges the creditor from his duty to serve a warning upon the debtor. The Egyptian Civil Code does not recognize the right of anticipatory avoidance in such a situation. It does not even authorize the aggrieved party to react prior to the date for performance. Rather, the aggrieved party shall file his suit (to claim damages) when or after the time for performance agreed upon is due.<sup>97</sup>

### 3.3 Provision of Adequate Assurance

The purpose of the advanced notice of intent to avoid required under CISG Article 72(2) is to allow the other party an opportunity to provide adequate assurance of performance. In its Award No. 8574 of Sept. 1996, the ICC Court of Arbitration stated that '[w]ith respect to anticipatory breach, CISG invests the potentially prejudiced Party with a has right of suspending (Article 71) or terminating avoiding in the parlance of CISG (Article 72) the contract. However, in order for the Party to suspend or terminate his performance, he must give immediate or reasonable, respectively, notice of the suspension or termination. ... These requisites ... [are] obviously motivated by a concern that the other Party is made clear of the position of its counter party, placing him in a position to provide assurance that he will in fact perform and thereby defeating the assumption of anticipatory breach and the concomitant threat to the orderly fulfillment of the contract.'<sup>98</sup> Therefore, giving this prior notice assures that CISG considers (anticipatory) avoidance of contract a remedy of last resort.<sup>99</sup>

<sup>96</sup> This right of the creditor has been emphasized by many Decisions of the court of cassation in Egypt. See, for instance: Decision No. 222 for the judicial year 33, 14 Feb.1967; Decision No. 3238 for the judicial year 71, 26 Dec. 2002, both of them are available (in Arabic) in the Arab Legal Network at: <http://www.eastlaws.com/Ahkam/AhkamHokmSearch.aspx>.

<sup>97</sup> Abd El-Hamid, *supra* note 5, note 194.

<sup>98</sup> Available at: <http://www.unilex.info/case.cfm?id=521>.

<sup>99</sup> Azeredo da Silveira, *supra* note 19, at 24.

CISG itself does not prescribe the form the assurance must take. Instead, the adequate assurance varies depending on the circumstances of each case,<sup>100</sup> particularly the nature of the event that creates the uncertainty as to the debtor's ability and willingness to perform his obligations.<sup>101</sup> 'For such an assurance to be "adequate", it must be such as will give reasonable security to the first party either that the other party will perform in fact, or that the first party will be compensated for all his losses from going forward with his own performance.'<sup>102</sup> Issuance of a letter of credit or a guarantee by a reputable bank would normally constitute an adequate assurance.<sup>103</sup>

In all events, adequate assurance must be provided by the other party prior to the date of his performance. Still, 'the assurance may promise performance after the contractual performance date but not so late as to amount to a fundamental breach'.<sup>104</sup> Likewise, 'an assurance of imperfect performance should preclude avoidance under Art. 72 as long as the performance that is assured would not constitute a fundamental breach'.<sup>105</sup>

If the failure to provide adequate assurance of performance suggests that a fundamental breach of contract is going to occur,<sup>106</sup> the aggrieved party may declare the contract avoided.<sup>107</sup> According to the *Oberlandesgericht Düsseldorf*, the seller was entitled to declare the contract avoided under CISG Article 72 due to the buyer's failure to provide security for performance of his obligation to pay the price.<sup>108</sup> On the other hand, if the other party provides adequate assurance of performance, the aggrieved party shall refrain from declaring the contract avoided. He shall also continue performing his obligations.<sup>109</sup>

<sup>100</sup> Liu, *supra* note 11, 5.1. Abd El-Hamid, *supra* note 5, note 219.

<sup>101</sup> Koch, *supra* note 16, at 305-306. Liu, *supra* note 11, 5.2.

<sup>102</sup> Secretariat Commentary, *supra* note 2, article 62, para. 13. See also: Koch, *supra* note 16, at 306. Liu, *supra* note 11, 5.2. von Ziegler, *supra* note 6, at 370. Seliarniova, *supra* note 11, at 131.

<sup>103</sup> Koch, *supra* note 16, at 306. Seliarniova, *supra* note 11, at 131.

<sup>104</sup> Bridge, *supra* note 16, at 418. See also: Abd El-Hamid, *supra* note 5, note 220.

<sup>105</sup> Liu, *supra* note 11, 5.2. See also: Abd El-Hamid, *supra* note 5, note 220. Seliarniova, *supra* note 11, at 132.

<sup>106</sup> Secretariat Commentary, *supra* note 2, article 63, para. 2, "[t]he failure by a party to give adequate assurances that he will perform when properly requested to do so under article 62(3) [draft counterpart of CISG article 71(3)] may help it "clear" that he will commit a fundamental breach". Bennett, *supra* note 12, at 528. Liu, *supra* note 11, 4.4. Koch, *supra* note 16, at 305.

<sup>107</sup> Abd El-Hamid, *supra* note 5, note 218. von Ziegler, *supra* note 6, at 370. Koch, *supra* note 16, at 303. Seliarniova, *supra* note 11, at 133.

Contra: Rowley, *supra* note 12, at 638, "[t]he CISG ... does not spell out the promisee's options if the promisor refuses to provide adequate assurance".

<sup>108</sup> Decision No. 17 U 146/93, 24 Jan. 1994, available at: <http://www.unilex.info/case.cfm?id=84>. For a similar conclusion, see also: *Landgericht Berlin*, Decision No. 99 O 123/92, 30 Sept. 1992, available at: <http://www.unilex.info/case.cfm?id=79>.

<sup>109</sup> Bennett, *supra* note 12, at 529. Liu, *supra* note 11, 5.2. Abd El-Hamid, *supra* note 5, note 219.

By contrast, CISG Article 73(2) and ECC Articles 97 & 117 do not stipulate for the possibility of providing adequate assurance of performance.<sup>110</sup> The feared fundamental breach is, in this case, preceded by an actual failure to perform an installment. Thus, the aggrieved party might not rely anymore on the commitment of the defaulting party. Rather, the aggrieved party may declare the contract avoided with respect to future installments even if the defaulting party provides adequate assurance of performance.<sup>111</sup>

## 4 Conclusion

Evidently, CISG covers anticipatory avoidance of both single delivery and installment contracts. By comparison, ECC regulates anticipatory termination of installment contracts only, particularly with regard to the supply contract. Both CISG and ECC require the anticipated breach be a fundamental one. Whereas CISG explicitly provides for this prerequisite (Articles 72 & 73(2)), it is concluded under Egyptian law from the reading of ECC Articles 97 & 117 as augmented with Civil Code rules.

Besides, both CISG (Article 73(2)) and ECC (Articles 97 & 117) require that non-performance by a party of an installment makes the other party suspicious about the performance of future installments, i.e. the fear that a fundamental breach of contract will be committed. By contrast, with regard to single delivery contracts, CISG (Article 72) does not stipulate that the anticipated fundamental breach be clear as a consequence of any particular conduct or circumstances; it rather suffices whatever the cause of clarity of such a breach.

Both CISG (Article 73(2)) and ECC also require that the right of anticipatory avoidance of installment contract be preceded by an actual non-performance. Accordingly, both instruments do not require the aggrieved party intending to declare the contract avoided to give an advanced notice to the other party. Under both instruments, the aggrieved party may also declare the contract avoided with respect to future installments even if the other party provides adequate assurance of performance. Again, under both instruments, such avoidance would apply to deliveries already made if the item sold is inseparable.

<sup>110</sup> Contra, without any legal justification: Sami, *supra* note 4, at 608.

<sup>111</sup> Azeredo da Silveira, *supra* note 19, at 46. Koch, *supra* note 16, at 311.

Contra, Bridge, *supra* note 16, at 421, according to him the rule of adequate assurance in CISG Article 72 might be considered a general principle upon which the convention is based in the sense of CISG Article 7/2; this principle can be used to fill the gap in CISG Article 73/2.