

Article 72

(1) 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.

(2) 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.

(3) The requirements of the preceding paragraph do not apply if the other party has declared that he will not perform his obligations.

INTRODUCTION

1. Article 72 entitles a seller or a buyer to avoid the contract if it becomes clear before the date for performance that the other party will commit a fundamental breach. However, article 49 rather than article 72 applies if, at or after the date for performance, a party's failure to perform or non-conforming performance occurs and amounts to a fundamental breach.¹ Thus a buyer who has not declared the contract avoided before the date for performance may not avoid the contract under article 72 but must act instead under articles 45 and 49.²

2. The right of an aggrieved party to avoid the contract under article 72 is to be distinguished from the right to suspend its obligations under article 71.³ Both articles are concerned with predicting whether there will be a breach but the preconditions for the more drastic remedy of avoidance are more stringent than those for suspension, both as to the seriousness of the predicted breach and the probability that the breach will occur. The notification requirements of the two provisions also differ. Article 72 requires "reasonable" prior notice only if time allows, and excuses the notice if the other party has declared that it will not perform; article 71, in contrast, requires immediate notice of suspension with no exceptions.⁴

3. Article 72 entitles an aggrieved party to avoid a contract before the date for performance if the contract is for (inter alia) a single delivery, while article 73 provides special rules on avoidance with respect to future instalments if the contract is an instalment contract. Several decisions recognize that, in an instalment contract, the aggrieved party might act under either article as to future instalments.⁵

PRECONDITIONS FOR AVOIDANCE

4. Paragraph (1) sets out the principal precondition for a rightful avoidance under article 73: it must be clear prior to the date for performance that the party required to perform will commit a fundamental breach. A very high probability that there will be a fundamental breach rather than complete

certainty is required.⁶ In some instances a number of facts together may provide a clear indication that there will be a fundamental breach.⁷ One decision has stated that a claim of anticipatory repudiation must allege "(1) that the defendant intended to breach the contract before the contract's performance date and (2) that such breach was fundamental".⁸

5. A party that declares that it will not perform its obligations satisfies this precondition.⁹ Allegations, if proved, that the seller stated it would "no longer feel obligated" to perform and would "sell the material elsewhere" would entitle the buyer to avoid the contract.¹⁰ Conditioning delivery on new demands beyond those agreed upon is an anticipatory repudiation of the contract.¹¹

6. The preconditions of paragraph (1) were also found to have been satisfied in the following circumstances in regard to the buyer: the buyer failed to pay for prior shipments;¹² the buyer failed to open a letter of credit;¹³ the buyer failed to open a conforming letter of credit;¹⁴ the buyer had failed to pay for a consignment and failed to provide an adequate assurance of performance.¹⁵ In one case a lower court held in an instalment sale that the seller was entitled to avoid the contract under article 72 due to the unwarranted attempt by the buyer to cancel the contract; on appeal it was held that article 73 was more appropriate, but with the same result.¹⁶

7. The preconditions of paragraph (1) were also found to have been satisfied in the following circumstances in regard to the seller: the seller failed to reduce the price and to commit to deliver fashion goods on time;¹⁷ the seller deliberately terminated delivery of the goods,¹⁸ the seller refused to give effect to a requirement that a whole ship be chartered exclusively for the transport of the goods,¹⁹ the seller refused to commit to a date for delivery and advised the buyer to purchase substitute goods,²⁰ the seller declared that it was impossible to find the goods and the possibility of finding replacement goods was low,²¹ the seller provided flawed sketches for the manufacturing of the goods and provided no adequate assurance of improving them in time.²²

8. The preconditions were found not satisfied in the following circumstances: the seller held back the goods because

of a dispute between the parties;²³ the seller expressed an interest in stopping deliveries but also agreed to continue negotiations;²⁴ the buyer failed to pay one instalment.²⁵

NOTICE OF INTENT TO AVOID

9. Where the requirements of article 72 (1) have been met, paragraph (2) of article 72 requires the aggrieved party to give the other party prior notice that he intends to avoid the contract, in order to permit the other side a chance to provide adequate assurances that he will perform.²⁶ This notice is required, however, only “if time allows”. This notice is different from the declaration of avoidance governed by article 26, which must also be given if the aggrieved party does not receive adequate assurances and decides to proceed to avoidance.²⁷ One decision concluded

that if the aggrieved party is relying on article 72 it must declare the contract avoided prior to the date for performance.²⁸ Where a party fails to give notice of its intention to avoid the contract due to anticipatory breach, it loses the right to do so.²⁹

ADEQUATE ASSURANCE OF PERFORMANCE

10. As was just noted, the purpose of the notice required under article 72 (2) is to allow the recipient an opportunity to provide adequate assurance of performance.³⁰ The Convention does not prescribe the form assurance must take. There is no requirement that the aggrieved party post a bond.³¹ In one case the failure of the buyer to provide an adequate assurance upon request was held to satisfy the requirements of article 72.³²

Notes

¹ Bundesgerichtshof, Germany, 24 September 2014, *Neue Juristische Wochenschrift* 2015, 867 = CISG-online No. 2545 (para. 33).

² CLOUT case No. 171 [Bundesgerichtshof, Germany, 3 April 1996]; CLOUT case No. 124 [Bundesgerichtshof, Germany, 15 February 1995].

³ Arbitration Court of the International Chamber of Commerce, January 1997 (Arbitral award No. 8786), Unilex (buyer did not suspend obligations but avoided contract under article 72 (1)); Arbitration Court of the International Chamber of Commerce, September 1996 (Arbitral award No. 8574), Unilex (buyer’s purchase of substitute goods not a suspension of its obligations).

⁴ Arbitration Court of the International Chamber of Commerce, September 1996, (Arbitral award No. 8574), Unilex (noting differences as to notice).

⁵ Helsinki Court of Appeal, Finland, 30 June 1998 (EP S.A.v. FP Oy), Unilex (where two separate orders for skincare ointment were to be filled from the same batch of product and there was a fundamental breach with respect to the quality of the first delivery, the aggrieved buyer could avoid as to the second delivery either under either article 72 or, if the two orders constituted instalments of an instalment contract, under article 73 (2)); Zürich Handelskammer, Switzerland, 31 May 1996 (Arbitration award No. 273/95), Unilex (fundamental breach as to future instalments is covered by both articles 72 and 73).

⁶ Landgericht Berlin, Germany, 30 September 1992, Unilex (very high probability rather than complete certainty required). See also Schiedsgericht der Börse für Landwirtschaftliche Produkte—Wien, Austria, 10 December 1997 (Arbitration award No. S2/97), Unilex (“good grounds” under article 73 means high probability, a less severe test than that found in article 72 (1)).

⁷ China International Economic and Trade Arbitration Commission, People’s Republic of China, (CD-R and DVD-R production systems case), English translation available on the Internet at www.cisg.law.pace.edu; CLOUT Case No.993 [Denmark 17 October 2007, Højesteret [Supreme Court] (Zweirad Technik v. C. Reinhardt A/S)].

⁸ CLOUT case No. 417 [U.S. District Court, Northern District of Illinois, United States, 7 December 1999] (citing articles 25 and 72) (see full text of the decision).

⁹ See article 72 (3) (excusing the aggrieved party from giving the other side an opportunity to provide adequate assurances of his performance, as normally required under article 72 (2), “if the other party has declared that he will not perform his obligations”). See also China International Economic and Trade Arbitration Commission, People’s Republic of China, October 2007 (CD-R and DVD-R production systems case), English translation available on the Internet at www.cisg.law.pace.edu; Court of Appeals of Lamia, Greece. 2006 (docket No. 63/2006) (Sunflower seed case), English translation available on the Internet at www.cisg.law.pace.edu (seller refusing to deliver sunflower seeds due to changes in the market).

¹⁰ CLOUT case No. 417 [U.S. District Court, Northern District of Illinois, United States, 7 December 1999].

¹¹ CLOUT case No. 293 [Schiedsgericht der Hamburger freundschaftlichen Arbitrage, Germany, 29 December 1998] (see full text of the decision).

¹² CLOUT case No. 130 [Oberlandesgericht Düsseldorf, Germany, 14 January 1994], *affirming with modifications*, Landgericht Krefeld, 28 April 1993; Landgericht Berlin, Germany, 30 September 1992, Unilex; U.S. District Court, Southern District of New York, United States, 29 May 2009 (Doolim Corp. v. R Doll, LLC), available at 2009 WL 1514913 and available on the Internet at www.cisg.law.pace.edu (continued failure to pay for previous consignments of garments and opening of letter of credit).

¹³ CLOUT case No. 631 [Supreme Court of Queensland, Australia, 17 November 2000]; China International Economic and Trade Arbitration Commission, People’s Republic of China, October 2007 (CD-R and DVD-R production systems case), English translation available on the Internet at www.cisg.law.pace.edu; Supreme Court of Queensland, Court of Appeal, Australia 12 October 2001 (Downs Investments v. Perwaja Steel), [2001] QCA 433 [2002] 2 Qd R 462 available on the Internet at www.cisg.law.pace.edu.

¹⁴ CLOUT Case No. 716 [China International Economic and Trade Arbitration Commission, People’s Republic of China, 16 December 1997].

¹⁵ U.S. District Court, Southern District of New York, United States, 29 May 2009 (Doolim Corp. v. R Doll, LLC), available at 2009 WL 1514913 and available on the Internet at www.cisg.law.pace.edu.

¹⁶ CLOUT Case No. 993 [Højesteret [Supreme Court], Denmark, 17 October 2007, (*Zweirad Technik v. C. Reinhardt A/S*)].

¹⁷ Arbitration Court of the International Chamber of Commerce, January 1997 (Arbitral award No. 8786), Unilex; U.S. District Court, Southern District of New York, United States, 29 May 2009 (*Doolim Corp. v. R Doll, LLC*), available at 2009 WL 1514913 and available on the Internet at www.cisg.law.pace.edu (continued failure to pay for previous consignments of garments and opening of letter of credit).

¹⁸ Zürich Handelskammer, Switzerland, 31 May 1996 (Arbitration award No. 273/95), Unilex.

¹⁹ CLOUT Case No. 473 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 7 June 1999 (Arbitral award No. 238/1998) (seller refused to satisfy the condition to find a conforming vessel for the exclusive transport of foodstuffs)].

²⁰ China International Economic and Trade Arbitration Commission, People's Republic of China, 29 March 1996 (caffeine case), English translation available on the Internet at www.cisg.law.pace.edu.

²¹ China International Economic and Trade Arbitration Commission, People's Republic of China, 30 January 1996 (compound fertilizer case), English translation available on the Internet at www.cisg.law.pace.edu.

²² Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 25 April 1995 (Arbitral award No. 161/1994) (computer equipment case) available on the Internet at www.cisg.law.pace.edu.

²³ CLOUT case No. 261 [Bezirksgericht der Sanne, Switzerland, 20 February 1997].

²⁴ Arbitration Court of the International Chamber of Commerce, September 1996 (Arbitral award No. 8574), Unilex.

²⁵ Zürich Handelskammer, Switzerland, 31 May 1996 (Arbitration award No. 273/95), Unilex.

²⁶ Helsinki Court of Appeal, Finland, 30 June 1998 (*EP S.A. v FP Oy*), Unilex (timing and content of fax gave prior notice); China International Economic and Trade Arbitration Commission, People's Republic of China, 1989 (Thai-made emulsion case), English translation available on the Internet at www.cisg.law.pace.edu.

²⁷ Arbitration Court of the International Chamber of Commerce, September 1996 (Arbitral award No. 8574), Unilex (noting difference between article 72 notice and declaration of avoidance, and finding that declaration of avoidance was not timely); CLOUT case No. 130 [Oberlandesgericht Düsseldorf, Germany, 14 January 1994] (seller gave notice of intent to avoid followed by notice of avoidance when it heard nothing from buyer) (see full text of the decision).

²⁸ CLOUT case No. 124 [Bundesgerichtshof, Germany, 15 February 1995].

²⁹ China International Economic and Trade Arbitration Commission, People's Republic of China, 1989 (Thai-made emulsion case), English translation available on the Internet at www.cisg.law.pace.edu.

³⁰ CLOUT case No. 130 [Oberlandesgericht Düsseldorf, Germany, 14 January 1994] (buyer failed to respond to demand for adequate assurance) (see full text of the decision).

³¹ Arbitration Court of the International Chamber of Commerce, January 1997, (Arbitral award No. 8786), Unilex.

³² U.S. District Court, Southern District of New York, United States, 29 May 2009 (*Doolim Corp. v. R Doll, LLC*), available at 2009 WL 1514913 and available on the Internet at www.cisg.law.pace.edu (continued failure to pay for previous consignments of garments and opening of letter of credit).