

Article 71

(1) 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.

(2) 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.

(3) A party suspending performance, whether before or after dispatch of the goods, 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.

INTRODUCTION

1. Article 71 authorizes a seller or a buyer to suspend performance of its obligations under the sales contract if the party is unlikely to receive a substantial part of the counter-performance promised by the other party. The suspending party does not breach the contract if the suspension is rightful.¹ If, however, the suspension is not authorized by article 71, the suspending party will breach the contract when it fails to perform its obligations.² The right to suspend exists until the time for performance is due, but once the date for performance has passed the aggrieved party must look to other remedies under the Convention.³ Other courts have, however, held that there is a gap in the Convention, and that a general right to withhold performance in order to enforce proper performance may be founded on the general principles contained in articles 71, 81, 85 and 86.⁴ Under article 71, the right continues until the conditions for suspension no longer exist,⁵ there is a right to avoid the contract, or the other party gives adequate assurance of performance in accordance with article 71 (3).⁶ The Convention's rules on the right to suspend displace domestic sales law rules that permit the suspension of a party's obligation.⁷

2. The right to suspend under article 71 is to be distinguished from the right to avoid the contract under article 72.⁸ Unlike avoidance of the contract, which terminates the obligations of the parties (see article 81), the suspension of contractual obligations recognizes that the contract continues and encourages mutual reassurance that both parties will perform. The preconditions for exercise of the right to suspend and the right to avoid differ, as do the obligations with respect to communications between the two parties.

3. The right to suspend under article 71 applies both to contracts of sale calling for a single delivery and to instalment contracts governed by article 73. When the

preconditions of both articles are satisfied, the aggrieved party may choose between suspending performance under article 71 and avoiding the contract with respect to future instalments under article 73 (2).⁹ If a party chooses to suspend performance with respect to future instalments it must give a notice in accordance with article 71 (3).¹⁰

4. The parties may agree, pursuant to article 6, to exclude application of article 71 or to derogate from its provisions. One decision found that by agreeing to take back equipment, repair it, and then redeliver it promptly, the seller had implicitly agreed to derogate from article 71, and therefore could not suspend its obligation to redeliver the equipment because of the buyer's failure to pay past debts.¹¹

PRECONDITIONS OF SUSPENSION

5. A party is entitled to suspend its obligations under paragraph (1) of article 71¹² if it becomes apparent that the other party will not perform a substantial part of its obligations¹³ and if the non-performance is the result of the causes set out in subparagraphs (a)¹⁴ or (b).¹⁵ It is not necessary that the failure amount to a fundamental breach.¹⁶ A declaration that a party will not perform its duty to take delivery entitles the other party to withhold performance.¹⁷ Usually the performances in question must arise from the same contract, but if non-performance is threatened under a different contract that is linked closely enough to the contract in question, a party is entitled to suspend performance.¹⁸

6. A party was found to be entitled to suspend its obligations when confronted with the following circumstances: seller's refusal to perform with respect to certain items;¹⁹ seller's inability to deliver goods free of restrictions imposed by seller's supplier;²⁰ seller's delivery of non-conforming goods under an instalment contract;²¹

buyer's failure to pay for the goods;²² buyer's non-payment or delayed payment of the price under one or more earlier sales contracts;²³ buyer's failure to open an effective bank guarantee.²⁴ A buyer's failure to open a letter of credit gives rise to the right to avoid the contract under article 64 and the buyer is not limited to the remedies of articles 71 and 72.²⁵ A party was held entitled to delay payment where the seller's preparation for performance clearly indicated that it would not be able to perform in time after payment.²⁶ Where a party has breached the contract, the other party is entitled to withhold performance until such time as the breach is remedied. This right is not found in article 71, but is based on the general principles of reciprocity found in articles 71, 58 and 86 of the Convention.²⁷

7. A buyer was found not to be entitled to suspend its obligations in the face of the following circumstances: the seller's non-conforming delivery of only 420 kg out of 22,400 kg;²⁸ partial delivery by the seller;²⁹ prior non-conforming deliveries where the buyer sought to suspend payment for current conforming deliveries,³⁰ refusal to open a letter of credit where the contract did not provide for such an obligation,³¹ refusal to pay a disputed sum stemming from a former contract.³² Several decisions observe that buyer's submissions to the court failed to indicate that the seller would not perform a substantial part of its obligations.³³ Where a party relies on a serious deficiency in the creditworthiness of the other party, it must prove that fact as well as the fact that the serious deficiency did not exist at the time of contracting, i.e., that the other party's creditworthiness deteriorated after the conclusion of the contract.³⁴ The right to suspend is aimed at enforcing the contract. In one case a court held that where a buyer had lost interest in enforcing the contract, as demonstrated by the fact that the buyer had made cover purchases, that party was not entitled to invoke article 71.³⁵

8. A seller was found not entitled to suspend its obligations where the buyer had not paid the purchase price for two deliveries and the buyer had cancelled a bank payment order.³⁶ Suspension was also found unjustified where the seller had not established that the buyer would be unable to take delivery or to pay for the goods, notwithstanding that the goods might not conform with health standards issued by the government in the buyer's place of business.³⁷

Notes

¹ CLOUT case No. 432 [Landgericht Stendal, Germany, 12 October 2000] (stating that suspension under article 71 is not a breach, but the exercise of a unilateral right to modify time for performance) (see full text of the decision).

² CLOUT case No. 51 [Amtsgericht Frankfurt a.M., Germany, 31 January 1991] (buyer entitled to damages because seller failed to give immediate notice that it was suspending delivery); CLOUT Case No. 936 [Bundesgericht, Switzerland, 17 July 2007], English translation available on the Internet at www.cisg.law.pace.edu (seller failed to substantiate its claims of the failing creditworthiness of the buyer).

³ CLOUT case No. 630 [Court of Arbitration of the International Chamber of Commerce, Zurich, Switzerland, July 1999] (buyer not entitled to suspend obligation to pay after it had taken delivery of goods even though lower quantity of goods were delivered than contracted for).

⁴ Oberster Gerichtshof, Austria, 8 November 2005, English translation available on the Internet at www.cisg.law.pace.edu (the principle of simultaneous performance justifies the suspension by a party of its performance in the case of breach); CLOUT case No. 1080 [Supreme Court, Poland, 11 May 2007] (Shoe leather case), English translation available on the Internet at www.cisg.law.pace.edu (purchaser who is entitled to and is insisting on delivery of substitute goods, is entitled to suspend performance).

⁵ Supreme Court of British Columbia, Canada, 21 August 2003 (Mansonville v. Kurtz), available on the Internet at www.cisg.law.pace.edu (seller suspended performance due to failure of buyer to open letter of credit, but failed to perform when the failure was corrected).

STOPPAGE IN TRANSIT

9. Paragraph (2) of article 71 authorizes a seller that has already dispatched the goods to stop the handing over of the goods to the buyer. In two cases, reliance on article 71 to justify a stoppage in transit was rejected, because the sellers had either failed to give the requisite notice or failed to prove that there was a well-grounded fear of non performance.³⁸

NOTICE OF SUSPENSION

10. Paragraph (3) of article 71 requires a suspending party to give notice of the suspension immediately³⁹ to the other party.⁴⁰ The paragraph does not specify what constitutes notice. The following statements or acts have been found to be sufficient notice: buyer's refusal to pay the costs of warehousing furniture when it had earlier agreed to contribute to these costs;⁴¹ a letter in which the buyer refused to accept non-conforming items and offered to return them.⁴² The following circumstances have been found not to constitute sufficient notice: buyer's failure to pay the price;⁴³ a letter from the buyer complaining of defective goods delivered under different contracts than the one as to which it claimed to be suspending performance.⁴⁴

11. Paragraph (3) does not expressly state the sanction for failing to give immediate notice of suspension. Decisions uniformly conclude that in the absence of due notice the aggrieved party may not rely on its right to suspend performance.⁴⁵ One decision held further that the seller breached the contract by suspending delivery without immediately giving notice of the suspension to the buyer, and that the buyer was therefore entitled to damages.⁴⁶

ADEQUATE ASSURANCE OF PERFORMANCE

12. Paragraph (3) requires a party that has suspended its performance to end its suspension and resume performance if the other party gives adequate assurance that it will perform. The paragraph does not elaborate on the form and manner of this assurance and does not state when the assurance must be given. There are no reported cases addressing adequate assurance under this paragraph.⁴⁷

⁶ CLOUT case No. 432 [Landgericht Stendal, Germany, 12 October 2000], also available on the Internet at www.cisg.law.pace.edu (suspension is not breach but the exercise of a right to modify time for performance).

⁷ Oberlandesgericht Köln, Germany, 24 April 2013, *Internationales Handelsrecht* 2015, 60 = CISG-online No. 2480, in the same sense CLOUT case No. 238 [Oberster Gerichtshof, Austria, 12 February 1998] (see full text of the decision).

⁸ 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).

⁹ CLOUT case No. 238 [Oberster Gerichtshof, Austria, 12 February 1998].

¹⁰ Tribunal of International Commercial Arbitration at the Federation Chamber of Commerce and Industry, Russian Federation, 27 July 1999 (Arbitral award No. 302/1996), *Rozenberg, Praktika of Mejdunarodnogo Commercheskogo Arbitrajnogo Syda: Haychno-Practicheskij Commentariy* 1999-2000, No. 27 [141-147].

¹¹ CLOUT case No. 311 [Oberlandesgericht Köln, Germany, 8 January 1997] (see full text of the decision).

¹² The following decision recognizes the applicability of the Convention and the right to suspend but fails to cite article 71: Tribunal Commercial de Bruxelles, Belgium, 13 November 1992 (Maglificio Dalmine v. Coveres), Unilex (seller entitled to suspend delivery because buyer failed to pay price under prior contract).

¹³ Oberlandesgericht Dresden, Germany, 27 December 1999, Unilex (noting that there must be a mutual, reciprocal relationship between the obligation suspended and the counter-performance).

¹⁴ The following cases cite subparagraph (a): CLOUT case No. 338 [Oberlandesgericht Hamm, Germany, 23 June 1998]; CLOUT case No. 238 [Oberster Gerichtshof, Austria, 12 February 1998] (remand to consider further allegation of uncreditworthiness); Zürich Handelskammer, Switzerland, 31 May 1996 (Arbitration award No. 273/95), Unilex; Kantonsgericht, Appenzell Ausserrhoden, Switzerland, 10 March 2003, English translation available on the Internet at www.cisg.law.pace.edu (preparations for performance by the seller clearly showed that it would not be able to perform within the 14 day period after payment).

¹⁵ The following cases cite subparagraph (b): Rb Arrondissementsrechtbank 's-Hertogenbosch, the Netherlands, 2 October 1998 (Malaysia Dairy Industries v. Dairex Holland), Unilex; CLOUT case No. 164 [Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, Hungary, 5 December 1995] (see full text of the decision); Landgericht Berlin, Germany, 15 September 1994, Unilex.

¹⁶ Landgericht Berlin, Germany, 15 September 1994, Unilex. But see CLOUT case no. 578 [U.S. District Court, Western District of Michigan, United States, 17 December 2001 (Shuttle Packaging Systems v. Tsonakis)], also in 2001 Westlaw 34046276, 2001 US Dist. LEXIS 21630 (aggrieved party must show fundamental breach to be entitled to suspend; seller entitled to suspend non-competition clause because buyer's failure to pay was a fundamental breach); Netherlands Arbitration Institute, the Netherlands, 15 October 2002 (Arbitral award No. 2319), Unilex (suspension of future deliveries under the contract due to non-conformity of first consignments).

¹⁷ CLOUT case No. 1234 [Bundesgerichtshof, Germany, 27 November 2007], English translation available on the Internet at www.cisg.law.pace.edu (party insisting on payment of supplemental consulting fees to which it was not entitled gave an indication that it would not perform).

¹⁸ Rechtbank Arnhem, the Netherlands, 29 July 2009, English translation available on the Internet at www.cisg.law.pace.edu (party suspending delivery of bus where payment on contracts for previous buses still outstanding); 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 (well-grounded fears that buyer would not pay for garments due to defaults on earlier consignments). See, however, the decision of the Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 13 April 2006, English translation available on the Internet at www.cisg.law.pace.edu (a party may not withhold payment where it anticipates the future failure to perform of the other party).

¹⁹ Landgericht Berlin, Germany, 15 September 1994, Unilex (citing article 71 (1) (b)).

²⁰ CLOUT case No. 338 [Oberlandesgericht Hamm, Germany, 23 June 1998] (citing article 71 (1) (a)); Oberlandesgericht Linz, Austria, 23 May 1995, English translation available on the Internet at www.cisg.law.pace.edu, affirmed on other grounds, CLOUT case No. 176 [Oberster Gerichtshof, Austria, 6 February 1996].

²¹ High People's Court of Zhejiang Province, People's Republic of China, 18 April 2011, (Balance Industry Co. Ltd v. Cixi Chenyang Package Co. Ltd), (2011) *Zhe Shang Wai Zhong Zi* No. 11 Civil Judgment (revocation of letter of credit on account of non-conforming goods delivered under two previous contracts between the same parties), available on the Internet at www.ccmt.org.cn. Similarly, Netherlands Arbitration Institute, the Netherlands, 15 October 2002 (Arbitral award No. 2319), Unilex (suspension of future deliveries under the contract due to non-conformity of first consignments).

²² CLOUT case No. 164 [Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, Hungary, 5 December 1995] (citing article 71 (1) (b), court found seller justified in suspending its obligation to repair non-conforming goods) (see full text of the decision). See also Arbitration Court of the International Chamber of Commerce, 23 January 1997 (Arbitral award No. 8611), Unilex (noting that seller's failure to perform occurred before it would have been entitled to suspend performance under article 71 (1) (b) because of buyer's non-payment).

²³ CLOUT case No. 1255 [Rechtbank van Koophandel Hasselt, Belgium, 1 March 1995] (J.P.S. BVBA v. Kabri Mode BV), (seven-month delay in payment); Tribunal Commercial de Bruxelles, Belgium, 13 November 1992 (Maglificio Dalmine v. Coveres), Unilex (without citing article 71); Rechtbank Arnhem, the Netherlands, 29 July 2009, English translation available on the Internet at www.cisg.law.pace.edu (party suspending delivery of bus where payment on contracts for previous buses still outstanding); 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 (well-grounded fears that buyer would not pay for garments due to defaults on earlier consignments).

²⁴ Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, Hungary, 17 November 1995 (Arbitral award No. VB/94124), Unilex (bank guarantee opened with a date that had already expired).

²⁵ CLOUT case No. 176 [Oberster Gerichtshof, Austria, 6 February 1996] (see full text of the decision); but see Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, Hungary, 17 November 1995 (Arbitral award No. VB/94124), Unilex (right to suspend under article 71 when ineffective bank guarantee opened).

²⁶ Kantonsgericht, Appenzell Ausserrhoden, Switzerland, 10 March 2003, English translation available on the Internet at www.cisg.law.pace.edu (preparations for performance by the seller clearly showed that it would not be able to perform within the 14 day period after payment).

²⁷ Oberster Gerichtshof, Austria, 8 November 2005, English translation available on the Internet at www.cisg.law.pace.edu (the principle of simultaneous performance justifies the suspension by a party of its performance in the case of breach); CLOUT case No. 1080 [Supreme Court, Poland, 11 May 2007] (Shoe leather case), English translation available on the Internet at www.cisg.law.pace.edu, (purchaser who is entitled to and is insisting on delivery of substitute goods, is entitled to suspend performance).

²⁸ CLOUT case No. 227 [Oberlandesgericht Hamm, Germany, 22 September 1992] (see full text of the decision).

²⁹ CLOUT case No. 630 [Arbitration Court of the International Chamber of Commerce, July 1999 (Arbitral award No. 9448)] (buyer not entitled to suspend obligation to pay after it had taken delivery of goods even though it did not receive the full quantity contracted for); CLOUT case No. 275 [Oberlandesgericht Düsseldorf, Germany, 24 April 1997] (buyer not entitled to suspend payment for part of goods not delivered).

³⁰ Hof van Beroep Gent, Belgium, 26 April 2000 (BV BA. J.P. v. S. Ltd), available on the Internet at www.law.kuleuven.be.

³¹ Oberlandesgericht Köln, Germany, 24 April 2013, *Internationales Handelsrecht* 2015, 60 = CISG-online No. 2480.

³² Ibid.

³³ Oberlandesgericht Dresden, Germany, 27 December 1999, Unilex; Zurich Handelskammer, Switzerland, 31 May 1996 (Arbitration award No. 273/95), Unilex, Arbitration Court of the International Chamber of Commerce, 2003 (Arbitration award No. 11849), available on the Internet at www.cisg.law.pace.edu; also available in Unilex, (buyer had no particular reason to believe that seller would not perform on time).

³⁴ CLOUT Case No. 936 [Bundesgericht, Switzerland, 17 July 2007], English translation available on the Internet at www.cisg.law.pace.edu (seller failed to substantiate its claims of the failing creditworthiness of the buyer).

³⁵ CLOUT case No. 1231 [Oberlandesgericht; Köln, Germany, 19 May 2008], English translation available on the Internet at www.cisg.law.pace.edu (cover purchases destroys the synallagmatic relationship between performance and counter-performance).

³⁶ See High People's Court of Tianjin Municipality, People's Republic of China, 23 March 2007, (Canada Teda Enterprises Inc. v. Shanxi Weite Food Co. Ltd), (2006) *Jin Gao Min Si Zhong Zi* No. 148 Civil Judgment (holding that mere delay in previous payments of price was not a ground for suspension of delivery of goods), available on the Internet at www.ccmt.org.cn. Similarly, CLOUT case No. 238 [Oberster Gerichtshof, Austria, 12 February 1998] (article 71 (1) (a) covers cases where a party is subject to an insolvency proceeding or has completely ceased to pay but not where payment is slow).

³⁷ Arrondissementsrechtbank 's-Hertogenbosch, the Netherlands, 2 October 1998 (Malaysia Dairy Industries v. Dairex Holland), Unilex (buyer offered to take delivery of the goods in Free Trade zone).

³⁸ CLOUT case No. 51 [Amtsgericht Frankfurt a.M., Germany, 31 January 1991] (unnecessary to decide whether seller entitled to stop goods in transit because seller failed to give required notice); CLOUT Case No. 936 [Bundesgericht, Switzerland, 17 July 2007], English translation available on the Internet at www.cisg.law.pace.edu (seller failed to substantiate its claims of the failing creditworthiness of the buyer).

³⁹ Hof van Beroep Gent, Belgium, 26 April 2000 (BV BA. J.P. v. S. Ltd), available on the Internet at www.law.kuleuven.be (notice not "immediate" when deliveries to which it related were made seven and 14 months earlier); Landgericht Darmstadt, Germany, 29 May 2001, English translation available on the Internet at www.cisg.law.pace.edu (buyer sent a notice of complaint, but failed to give notice of suspension of performance); Netherlands Arbitration Institute, the Netherlands, 15 October 2002 (Arbitral award No. 2319), Unilex (suspension of future deliveries under the contract due to non-conformity of first consignments); China International Economic and Trade Arbitration Commission, People's Republic of China, 1989 (Arbitral award No. CISG/1989/02), English translation available on the Internet at www.cisg.law.pace.edu (buyer failed to give notice of suspension of performance and only delivered the goods after two months had elapsed).

⁴⁰ See Arbitration Court of the International Chamber of Commerce, 23 January 1997 (Arbitral award No. 8611), Unilex (notice not necessary under circumstances of case); Arbitration Court of the International Chamber of Commerce, 2003 (Arbitral award No. 11849), available on the Internet at www.cisg.law.pace.edu and in Unilex (buyer had no particular reason to believe that seller would not perform on time and failed to give notice); Netherlands Arbitration Institute, the Netherlands, 15 October 2002 (Arbitral award No. 2319), available on the Internet at www.cisg.law.pace.edu (suspension of future deliveries under the contract due to non-conformity of first consignments).

⁴¹ CLOUT case No. 338 [Oberlandesgericht Hamm, Germany, 23 June 1998].

⁴² Landgericht Berlin, Germany, 15 September 1994, Unilex; Landgericht, Darmstadt, Germany, 29 May 2001, English translation available on the Internet at www.cisg.law.pace.edu (buyer sent a notice of complaint, but failed to give notice of suspension of performance).

⁴³ CLOUT case No. 432 [Landgericht Stendal, Germany, 12 October 2000], also available on the Internet at www.cisg.law.pace.edu (suspension not a breach but rather a unilateral right to modify time for performance).

⁴⁴ Hof van Beroep Gent, Belgium, 26 April 2000 (BV BA. J.P. v. S. Ltd), available on the Internet at www.law.kuleuven.be (citing article 73 (1) for implicit affirmation of this point).

⁴⁵ CLOUT case No. 432 [Landgericht Stendal, Germany, 12 October 2000], also available on the Internet at www.cisg.law.pace.edu (party may not rely on paragraph (1)); Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 27 July 1999 (Arbitral award No. 302/1996), *Rozenberg, Praktika of Mejdunarodnogo Commercheskogo Arbitrajnogo Syda: Haychno-Practicheskij Commentariy* 1999–2000, No. 27 [141–147], English translation available on the Internet at www.cisg.law.pace.edu; CLOUT case No. 51 [Amtsgericht Frankfurt a.M., Germany, 31 January 1991] (seller may not rely on right to stop goods in transit pursuant to paragraph (2)).

⁴⁶ CLOUT case No. 51 [Amtsgericht Frankfurt a.M., Germany, 31 January 1991].

⁴⁷ A similar reference to adequate assurance is made in article 72 (2), and cases construing that phrase under article 72 may be found relevant under article 71. Arbitration Court of the International Chamber of Commerce, January 1997 (Arbitral award No. 8786), Unilex; CLOUT case No. 130 [Oberlandesgericht Düsseldorf, Germany, 14 January 1994] (see full text of the decision).