

ISSUES ARISING UNDER ARTICLES 64, 72 AND 73 OF THE UNITED  
NATIONS CONVENTION ON CONTRACTS FOR THE  
INTERNATIONAL SALE OF GOODS

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INTRODUCTION

The work of UNCITRAL in forwarding the dissemination of national case law and arbitral awards and in promoting case commentaries and digests is not merely desirable; it is, rather, an essential feature of continuing uniformity. No matter how difficult it may be to shape uniform law, to manage the project within tight time limits, to make compromises and to excise subject matter that might slow the proceedings or even halt them, and to work upon national governments to secure the maximum number of adoptions of uniform conventions, the coming into force of a uniform law convention cannot be regarded as a culminating event leading to merely consequential matters. It has to be just a stage in a continuing process of convergence of the various perceptions of the text as seen through national lenses, which is essential if that Convention is to avoid the fate of being a lifeless document recording a paper rather than a real commitment to uniformity of law. We do not have an International Commercial Court, so other strenuous means have to be adopted to give effect to Article 7(1) of the UN Sales Convention and to impart continuing uniformity to that Convention.

The role of case law in the work of continuing uniformity is a matter of absorbing interest. Case law in the common law tradition plays a vitally important role in legal development. The subtle rules of precedent are designed to discipline and to confine, within the bounds of organic progression and predictability, judicial law-making, though they do not justify it. The constitutional legitimacy of the common law judiciary in making law would benefit from closer consideration. The part played by case law within civilian systems has been much more muted, but, from the extremes of treating it as an unacceptable method of making law, its necessary role in complementing aging codes and special statutes is now widely appreciated.

One of the challenges facing the international legal community in the handling of case law will be to find the right balance between civilian and common law traditions. For example, if we are to take seriously Article 7(1)

and its instruction to interpret the Convention with regard to its international character and to the need to promote uniformity in its application, then we should consider carefully the role (if any) of precedent; we should also take a long look at judicial style. It is not enough to do what the English courts have done when interpreting international statutes compared to U.K. statutes, namely, to depart from a literal approach to interpretation and adopt instead a more purposive approach.<sup>1</sup> That would ignore the important supportive role of case law itself.

Take precedent first. Let me pose just two questions (there could of course be many more). First, a national court, for example, an Italian court, is considering the application of Article 64. Counsel brings to its attention cases from, for example, France and Germany. The two streams of case law are inconsistent. There are more German cases than French, but the French cases include a decision of the Cour de Cassation, whereas the German cases do not include any decisions of the Bundesgerichtshof. What is the Italian court to do if it is to take seriously its Article 7(1) duty? Should it follow the greater number of cases or should it defer to the highest national court? And does the answer to this question turn upon the size of the country concerned? And how should judicial decisions be balanced against arbitral awards? A further question concerns cases that cite decisions from other jurisdictions. Should they be treated as being more persuasive because they are rendered in an internationalist spirit? Taking all of these questions together, the overriding issue is, above all, one of determining how case law is to be weighed and selected to drive the uniform project. As the body of case law grows, even the most internationally minded courts will be hard pressed to handle it. In such a competitive environment, the best reasoned cases are the most likely to commend themselves to a court or arbitrator. It would not be unduly optimistic to expect a process of natural selection to develop.

The second question is whether national courts (and arbitrators) need to work toward a common style. Take the case of decisions of the French Cour de Cassation and compare them to decisions of common law courts. The Cour de Cassation gives very tightly reasoned, formula-driven and delphic judgments. Even apart from the historical legacy that explains the role of the Court, it may be argued that the Court has to decide in this way, for how else could it handle the very heavy burden of *pourvois en cassation* with which it has to deal. Common law systems introduce rigorous controls on the appeal

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1. *Stag Line Ltd. v. Foscolo Mango & Co.*, [1932] A.C. 328 (H.L.) (U.K.); *Fothergill v. Monarch Airlines Ltd.*, [1980] 2 All E.R. 696 (H.L.) (Eng.).

process. For example, it is only in exceptional cases that an appeal can be taken to the House of Lords in the United Kingdom; the court handles only about 50-60 cases in any year. The result of this greater selectivity in common law countries is that their courts have more rhetorical scope to persuade, though they have fewer occasions on which to do so.

Common law cases are therefore much more discursive than civil law cases. They commonly recite the case law history, so they may thereby anchor the decision in the great historical stream of legitimacy. They are rhetorical and explicatory. Especially at the trial level, they contain exhaustive statements of the facts, largely to avoid the need for any retrial if a higher court reverses the decision on a point of law.

Now, this question of style, as well as the question of precedent, goes to the heart of the UNCITRAL case law project. May I, as a common lawyer, utter the following *cri de coeur*? How can I write intelligently about case law from different national legal traditions when so many of those cases give sparse reasons for their decisions and often assert propositions in a conclusive, rather than a reasoned, way? If, to take a hypothetical example, a court were to simply assert that there cannot be a fundamental breach of a time obligation, then any commentator finds himself in the position of having to make bricks without straw. However, if that national court were to go further and say that the reason for its rule is that there exists in the Convention a separate procedure for dealing with non-timely performance, then one might disagree with the reasoning—but at least there would be a reason to contest. The fate of such laconic case law is to be banished from the main text of commentaries and consigned to an obscure place in the footnotes. If a more discursive style of judgment were to emerge, the case law would be enriched and the weight of the legal culture surrounding the Convention increased. It would no longer be possible, if it ever was, to classify cases as right or wrong. A more nuanced, relative reading would be required.

All of this is some slight introduction to my treatment of Articles 64 and 72-73.<sup>2</sup> I propose to provide an analysis of these provisions and then to graft on a discussion of the case law. Much of the case law cannot be discussed at any length because it says so very little and is so much dependent upon the special facts of each case. Some of the case law decided under the

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2. The analysis of particular provisions of a statute or convention has the merit of throwing a powerful analytical light upon the language of the text but the disadvantage of impeding an overall assessment of the role of the provisions and the principles they set out in the statute or convention as a whole. I have kept the number of cross-references to a minimum, since other articles are the subject of commentaries by other commentators.

Convention is weak if not downright wrong. Any commentator should not be afraid to say so. Generations of English academic lawyers were perhaps a little too ready to defer to superior judicial wisdom and couch their criticisms in the type of mandarin language associated with the British Civil Service. Those days are happily behind us. Academic commentators can serve the development of case law by avoiding the subservient suggestions of yesteryear and adopting instead a forthright and constructive critical tone. Just as no trial court likes its judgments to be overturned by a higher court, no courts like to be told by academic commentators that they are wrong. Indeed, they might point to the important responsibility served by academic commentators in promoting uniform interpretation under Article 7(1) and say with some justice that no one ever criticises academic commentators for their failure to speak with a collective, if not necessarily uniform, voice. And who, in any case, criticises the academic community?

#### ARTICLE 64

- (1) The seller may declare the contract avoided:
  - (a) if the failure by the buyer to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or
  - (b) if the buyer does not, within the additional period of time fixed by the seller in accordance with paragraph (1) of article 63, perform his obligation to pay the price or take delivery of the goods, or if he declares that he will not do so within the period so fixed;
- (2) However, in cases where the buyer has paid the price, the seller loses the right to declare the contract avoided unless he does so:
  - (a) in respect of late performance by the buyer, before the seller has become aware that performance has been rendered; or
  - (b) in respect of any breach other than late performance by the buyer, within a reasonable time:
    - (i) after the seller knew or ought to have known of the breach; or
    - (ii) after the expiration of any additional period of time fixed by the seller in accordance with paragraph (1) of article 63, or after the buyer has declared that he will not perform his obligations within such an additional period.

Article 64 is a complex provision. Broadly, it seeks to accomplish two things. First, it recites the seller's right to avoid the contract where the buyer has committed a fundamental breach or, in response to a timely notice, has failed to perform within the additional period of time set by the seller. To this extent, Article 64(1) functions as an index provision: the rule of fundamental breach is set out in Article 25 and the procedure for dealing with non-timely performance is prescribed by Article 63. Second, Article 64(2) also deals with loss of the seller's right to avoid the contract that could otherwise be exercised

further to Article 25 or Article 63. Article 64(2), which applies to cases where the buyer has paid the price, in this respect corresponds to Article 49, which deals with the loss of the buyer's right to avoid. Unlike Article 49, however, there is no further provision dealing with the loss of the seller's right of avoidance. For buyers, there is also Article 82, which concerns the buyer's loss of the right of avoidance when this is due to his inability to make restitution of the goods in substantially the same condition in which he received them. Since the price is fungible, and on avoidance the seller is not bound to repay the price in the very form in which it was paid, there is no need for any provision like Article 82 to complement Article 64.

Since Articles 25 and 63 are the subject of other commentaries, I shall focus mainly on the seller's loss of the right to avoid. Nevertheless, it is worth observing that the prospects of a fundamental breach being committed are probably greater on the part of the seller, who is after all the characteristic performer, than on the part of the buyer. Courts are generally reluctant to treat payment on the due date as a fundamental breach. Late delivery by the seller is inherently more damaging to buyers than the late taking of delivery by buyers is to sellers. Late delivery often has damaging effects on a buyer that is forced to default on sub-sales, suffering loss of business reputation, or to stop its manufacturing processes. On the other hand, a buyer that takes late delivery may cause a seller cash flow and storage problems, which are of lesser intensity than the corresponding problems of the buyer. This view is supported by the Secretariat Commentary, where it states that "[i]t would seem that in most cases the buyer's failure would amount to a fundamental breach as it is defined in article [25] only after the passage of some period of time."<sup>3</sup> There are of course exceptions. A clear case of fundamental breach arises where, for example, a buyer, infringing EU competition rules, conducts an unlawful parallel importing operation into the EU and does not dispatch the goods to the contractually agreed destination outside the EU.<sup>4</sup> Furthermore, given the importance of letters of credit as establishing security to give the seller the confidence to proceed with performance, a refusal to establish a timely letter of credit might, in an appropriate case, properly be treated as a fundamental breach.<sup>5</sup> Finally, a continuing failure to pay and payment on the

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3. Text of Secretariat Commentary on Article 60 of the 1978 Draft Convention on Contracts for the International Sale of Goods art. 60, ¶ 5 [hereinafter Secretariat Commentary].

4. CLOUT Case No. 154 [Cour d'appel de Grenoble, France, 22 Feb. 1995], available at <http://cisgw3.law.pace.edu/cases/950222f1.html>.

5. Downs Investments Pty. Ltd. v. Perjawa Steel SDN BHD, (2000) Q.S. Ct. R. 421 (Austl.).

due date are not the same thing at all; a finding of fundamental breach is more likely in the former case.<sup>6</sup>

The rules governing the loss of the seller's right to avoid are laid down in a rather complex form in Article 64(2). There is, regrettably, a shortage of case law under this provision,<sup>7</sup> so that the meaning of the text has to be taken largely as a matter of first impression. A preliminary point to make is that the loss of the right to avoid has greater prominence in this Convention than in its predecessor, ULIS, since a major part was played in ULIS by *ipso facto* (or automatic) avoidance,<sup>8</sup> for which there is no scope in the UN Convention. The elimination of *ipso facto* avoidance is to be welcomed. It introduced uncertainty into matters of avoidance and impinged upon the autonomy of the contracting parties, which is such a marked feature of the present Convention. A further, unstated feature of Article 64—somewhat different in this respect from the buyer's corresponding provision of Article 49<sup>9</sup>—is that, in the event of a fundamental breach or other event of avoidance, the seller is not bound to serve any preliminary notice upon the buyer, such as the *mise en demeure* of French law. Nor does the seller have to go to court for leave to avoid the contract. Instead, the principle of autonomy is served by having the seller move straight to a declaration of avoidance. The right of avoidance under the Convention is quite tightly circumscribed, so that no need for formal or judicial controls upon its exercise can be made out. Furthermore, the Convention, by its exclusion of such technicalities, thus reveals itself as an instrument that can equally be administered by both arbitrators and courts.

As expressed in Article 64—and avoiding as far as possible its layout and punctuation—the seller loses the right to avoid, as against a buyer who has paid the price, in the following two cases, the second of which divides into three sub-cases:

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6. See *Shuttle Packaging Systems v. Tsonakis*, No. 1:01-CV-691, 2001 W.L. 34046276, \*1 (W.D. Mich. Dec. 17, 2000).

7. *But see* CLOUT Case No. 104 [Court of Arbitration of the International Chamber of Commerce, Case No. 7197, 1992], where the Court of Arbitration merely observes that, further to Article 64(1), the seller would have been entitled to avoid its contract with the buyer had it done so within a reasonable time and served upon the buyer an Article 26 notice of avoidance.

8. See Convention Relating to a Uniform Law on the International Sale of Goods (ULIS) arts. 61-62 (The Hague, July 1, 1964).

9. Somewhat different in the sense that the buyer must under Articles 39 and 43 serve a notice specifying defects or third party claims upon the goods or (within limits) lose the right to rely upon a breach of the seller's obligations in Articles 35 and 41-42. The Convention does not explicitly provide that these notices must be served prior to a notice of avoidance or that they may not be served together. Indeed the text of Article 48, which declares that provision to be subject to Article 49, suggests that the buyer may indeed do that.

CASE (a): when the buyer has in fact performed late and the seller has become aware of that performance;

CASE (b): where Case (a) does not apply, within a reasonable time after (i) the seller knew or ought to have known of the buyer's breach, *or* (ii) the seller has fixed an additional period of reasonable time for performance under Article 63 and this period has expired, *or* (iii) the buyer has declared that it will not perform its obligations within the additional period of time fixed by the seller under Article 63.<sup>10</sup>

The first point to take, before examining Article 64(2), is that, where the buyer has not paid the price he may be treated as being in continuing breach of contract; the provisions on the loss of the right to avoid are appropriate only in those cases where the right to avoid has fully and finally accrued. As far as installment contracts go, Article 64(2) does not apply where the full contract price has not been paid, but only the price of one or more installments. Article 73(2) deals with cases of a seller seeking to avoid for the future on the basis of the buyer's conduct regarding completed or accrued installments.<sup>11</sup> It provides for the seller<sup>12</sup> to exercise this right of avoidance of the contract as a whole within a reasonable time.

A further preliminary point about the application of Article 64(2) only to those cases where the buyer has paid the price introduces a very difficult point about the intersection of international sales law and national insolvency laws.<sup>13</sup> The Convention, as is well known, does not deal with the passing of property between seller and buyer.<sup>14</sup> Nevertheless, one of the effects of avoidance is mutual restitution between the parties.<sup>15</sup> This means that, upon avoidance, whether for seller or buyer breach, the goods have to be restored to the seller. Now, since the rules in Article 64(2) apply only where the buyer has paid the price, and since the non-paying buyer is therefore in a state of continuing breach so that the seller's right of avoidance remains open so long as the price remains unpaid, it follows that the goods might be delivered to the buyer and remain for a significant period in the buyer's possession before the seller's eventual declaration of avoidance for non-payment. In some

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10. The distinction between (a) and (b) is not a simple distinction between time and other breaches.

11. See Secretariat Commentary, *supra* note 3, art. 64, ¶¶ 7-8.

12. Article 73(2) applies to both seller and buyer breach.

13. See Leif Sevón, *Obligations of the Buyer Under the UN Convention on Contracts for the International Sale of Goods*, in *INTERNATIONAL SALE OF GOODS: DUBROVNIK LECTURES 227* (Petar Sarcevic & Paul Volken eds., 1986). See also Jacob S. Ziegel, Report to the Uniform Law Conference of Canada on the Convention on Contracts for the International Sale of Goods 130 (July 1981).

14. CISG art. 4(b).

15. See CISG art. 81(2).

countries, the possession of goods is seen as evidence of ownership so that a retained title in the goods by the seller might be ineffectual because it operates as a fraud on the buyer's other creditors. Under English law, the seller's right to recover title to the goods upon termination, in those cases where the contract contains no reservation of title clause, may not be exercised once the goods have been delivered to the buyer.<sup>16</sup> The seller may still terminate but will have, instead of an *in rem* claim for the recovery of the goods, a mere personal claim against the buyer. The Convention elsewhere shows sensitivity to personal claims not being allowed to trench upon third property rights. Thus the seller's right to suspend performance,<sup>17</sup> in cases that are understood as stoppage of the goods in transit, even though the buyer holds a document that entitles him to collect them from a carrier or warehouseman, applies only as between seller and buyer.<sup>18</sup> This case should be seen as an example of the Convention retreating where national insolvency regimes intervene. The Convention deals only with the bilateral relations of seller and buyer.<sup>19</sup>

In those cases where Article 64(2) does apply, the division between Case (a) and Case (b) is not a simple division between time and non-time breaches. Case (a) will have only a limited role to play. If performance does in fact take place before the seller wakes up to its right of avoidance, then it must have been unlikely that the buyer's breach was fundamental in the first place, and the existence of a fundamental breach must be the major instance falling within this case. Case (a), it might be added, amounts to implied recognition that late performance can constitute a fundamental breach without the additional time allowance machinery of Article 63 being brought into play. The case might, however, also apply where the seller has fixed an additional period for performance and the buyer has in fact performed, but after the expiration of that period.

Case (b)(i) must concern a fundamental breach committed by the buyer as defined by Article 25 or such other breach as the parties, taking advantage of their Article 6 rights, have agreed should be sufficient to give rise to avoidance rights. Case (b)(ii) alerts the seller to the fact that it is not enough

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16. See *R.V. Ward Ltd. v. Bignall*, [1967] 1 Q.B. 534 (C.A.) (U.K.).

17. This is not really a case of suspension at all. The seller has already delivered the goods by shipping them or delivering them into a warehouse. Rather, it is a case where the seller is permitted to undo his own performance.

18. CISG art. 71(2).

19. See the opening flush of Article 4: "The Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. . . ." CISG art. 4. See also Ziegel, *supra* note 13, at 130, arguing that avoidance and the proprietary effect of avoidance are two different matters, the Convention applying only to the former.

to fix an additional period of time under Article 63; it must also step in and avoid the contract or start the process all over again. This provision may be seen as one of a number in the Convention that implicitly recognise the principle of waiver and so give it life as a general principle on which the Convention is based, as provided for in Article 7(2). Case (b)(iii) recognises that an anticipatory repudiation of contract, taking the form of a renunciation, has a limited life span. A seller who does not then intervene promptly to avoid the contract will, as in case (b)(ii), have to start the process all over again or else wait for a further renunciation by the buyer. Again, the principle of waiver is recognised. Case (b)(iii) is reminiscent of the famous dictum of an English judge that an unaccepted repudiation is a thing writ in water.<sup>20</sup>

#### 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.

Article 72 deals with what a common lawyer would call anticipatory repudiation (or, more loosely, anticipatory breach) of the contract, though the provision does not use the word “anticipatory.” A beneficial consequence of this is that there is no need to embark upon discussion of something that in the past has taxed the common law mind. Does the party whose future breach is manifest commit a present breach of an implied term of the contract? The implied term, if it has to have a label, would be a duty of fidelity to the contract—the actual language of it is very hard to pin down—and it would be implied at common law and not under statute. The alternative, classical approach—which looks increasingly anachronistic—is to treat the repudiation as an offer to rescind the contract on terms, this offer being “accepted” as and when the other contracting party terminates the contract.<sup>21</sup> The reference

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20. Asquith L.J. in *Howard v. Pickford Tool Co.*, [1951] 1 K.B. 417 (C.A.) (U.K.).

21. Both approaches are evident in the well-known case of *Maredelanto Compania Naviera S.A. v. Bergbau-Handel G.M.B.H.*, [1971] 1 Q.B. 164 (C.A.) (U.K.), where Lord Denning M.R. treats the breach of contract as occurring when the renunciation occurs (“the renunciation itself is the breach”). *Id.* at 196. Alternatively, Megaw L.J. recites the classical view that the renunciation only becomes a breach when accepted by the other party as terminating the contract (“the breach is the repudiation once it has been

above to an unaccepted repudiation being a thing writ in water evokes the idea of an offer lapsing, leaving behind not even a breach of contract. By the expedient of stating a rule that runs parallel to Article 25 and draws upon it, the Convention avoids any difficulties of this nature. It is not clear, however, whether the rule of anticipatory repudiation in Article 72 concerns only avoidance or may implicitly be extended so as to give rise to a damages claim under Article 74.

To justify avoidance under Article 72(1), it must be “clear” that one of the parties will commit in the future a fundamental breach of contract.<sup>22</sup> A consequence of this provision is that there is no need, where the expected non-performer is the seller, for the buyer to serve a notice of defect as required in the case of a present breach. A consequence of this distinction between anticipatory and present repudiation is that courts should be astute to prevent buyers from invoking Article 72 and anticipatory repudiation when instead they should have invoked Article 64 and have complied with the notice of defect requirements in Article 39.<sup>23</sup>

The requirement that it be “clear” there will be a fundamental breach raises a number of difficulties. First of all, does the word “clear”<sup>24</sup> suggest that probability must exist at a higher level than the mere balance of probabilities? This question is consequential upon the larger question whether the Convention deals at all with procedural matters including the burden of proof. It is submitted that there is no reason to introduce in this case a higher standard of proof than the normal civil standard.<sup>25</sup> If the view is taken that anticipatory repudiation is a present breach of contract—and not some probable future breach treated fictitiously as a present breach—at least in the case of renunciation as opposed to incapacity, then this is an argument for retaining the conventional civil standard of proof. Again, since the word “clear” refers to a future fundamental breach, a strict approach to the word is inappropriate since, first, the occurrence of a fundamental breach is not just a question of fact but one of mixed fact and law, and second, fundamental breach is hard enough to establish when the breach takes place without raising the standard any higher in the case of anticipatory repudiation. Another argument in favour of the normal civil standard is that this standard plainly

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accepted”). *Id.* at 209.

22. This issue gave rise to discussion during the drafting process.

23. See CLOUT Case No. 124 [Bundesgerichtshof, Germany, 15 Feb. 1995].

24. In the French version, *manifeste*.

25. It may be significant that the possibility of a higher standard is nowhere mentioned in *Magellan International Corp. v. Salzgitter Handel G.M.B.H.*, 76 F. Supp. 2d 919 (N.D. Ill. 1999) (U.S.).

applies in cases arising under Article 73, where future installments can be avoided as a result of present and past breaches concerning earlier installments. Article 73 is an application of anticipatory repudiation principles in the specialised context of installment contracts. There should be no difference concerning the standard of proof required in the two cases falling in Articles 72 and 73. National decisions on letters of credit and the fraud exception to payment, which might suggest a high standard is appropriate in some civil cases, arise out of the need to maintain the integrity of bank payment systems and do not therefore supply an appropriate analogy.

If Article 72 is read, nevertheless, so as to require a high standard of proof,<sup>26</sup> the justification might be that it points to a preference for the suspension mechanism of Article 71 to be used instead of avoidance in Article 72. This view would conform to the choice of different language in Articles 71 (“apparent”) and 72 (“clear”). Even if this approach were to be adopted, it should still be at least arguable that a less strict interpretation of “clear” would be appropriate in those cases where a party is seeking adequate assurance of performance from the other, since the provision of such assurance is a far less destructive outcome than the avoidance of the contract.<sup>27</sup> Finally, even if the conclusion is that the probability standard required by Article 72 is the normal civil standard, the type of proof required might be seen as a different matter.<sup>28</sup> The use of the word “clear” might therefore justify proof having to be presented in a particular cogent form, for example, by means of written rather than oral evidence.<sup>29</sup>

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26. See Landgericht Berlin, Germany, 30 Sept. 1992, available at <http://cisgw3.law.pace.edu/cases/920930g1.html>, where the court required the probability of a future breach (as opposed to a fundamental breach) of contract to be very high and obvious to everybody, without however having to be almost completely certain. This seems a rather literal interpretation of “clear.”

27. In one case, CLOUT Case No. 130 [Oberlandesgericht Düsseldorf, Germany, 14 Jan. 1994] (on appeal from Landgericht Krefeld, Germany, 28 Apr. 1993), available at <http://cisgw3.law.pace.edu/cases/940114g1.html>, the parties agreed that the seller was entitled to demand adequate assurance where the buyer had been late in making payment under a previous contract. This goes beyond the text of Article 72(2) and amounts to a type of extended set-off in a Convention where set-off in the form of compensating money claims has, for the most part in the case law, been treated as falling outside the Convention. For a rejection of set-off in these or similar circumstances (the award is unclear on the facts), see CLOUT Case No. 293 [Schiedsgericht der Hamburger Freundschaftliche Arbitrage, Germany, 29 Dec. 1998], available at <http://cisgw3.law.pace.edu/cases/981229g1.html>.

28. This reconciliation of standard and quality of proof sometimes arises in English law, for example, in the case of rectification of contracts. See *Joscelyne v. Nissen*, [1970] 2 Q.B. 86 (C.A.) (U.K.).

29. In many cases, the matter will be dealt with as an ordinary evidential matter. See Landgericht Krefeld, Germany, 28 Apr. 1993 (which was later upheld by the Oberlandesgericht Düsseldorf, Germany, 14 Jan. 1994, except as to the amount of the seller’s damages (see *supra* note 27), for example, where a party’s failure to perform a prior contract satisfied the test of anticipatory repudiation of the present

Second, must the party purporting to avoid the contract for future breach be actually aware at the time of this purported avoidance that the other party will go on to commit a fundamental breach, or may that party take a chance without current proof and hope to be vindicated by future appearances and events?<sup>30</sup> This is an issue that has generated significant difficulties of a conceptual kind in English and Australian case law. In principle, unless the notion of good faith interpretation of the Convention under Article 7(1) compels the provision to be interpreted differently, it is difficult to see any need for an avoiding party in this case to put his declaration of avoidance on the correct ground. Article 26 does not require reasons to be given for an effective declaration of avoidance. The requirement to give notice of defect so as to effectuate the curing of defective performance ought not to apply to anticipatory renunciation and cannot apply to incapacity.

The third question concerns what is meant by an anticipated fundamental breach. It will include renunciation, namely, the case of the party who by words or conduct makes it clear that future performance will not be given. However, does it also cover the case of prospective incapacity, where the performing party with the best will in the world appears at the relevant time to be incapable of effecting future performance whilst expressing a willingness to do so? The answer is clearly yes because the two types are separated in clauses (2) and (3) of Article 72. Nevertheless, so far as fundamental breach may catch both incapacity and renunciation, it may not catch them in equal measure. To the extent that intentional contract-breaking is factored into the definition of fundamental breach in Article 25, this suggests that the test of fundamental breach when applied to incapacity may be harder to satisfy than in the case of renunciation. The very language of breach in Article 25 and in provisions that are dependent upon it is hard to reconcile with the language of non-performance used elsewhere in the Convention.

A fourth question, following from the incapacity issue, concerns the party whose incapacity would shield it from liability in damages for non-performance, on the ground that it could claim an exemption under Article 79.

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contract). In a case of this nature, the precise meaning of “clear” is unlikely to make a difference.

30. The need to look at future events in the area of anticipatory repudiation is a marked feature of English case law; charterparty contracts have been a particularly fertile source of disputes in this area. For a recent example on how damages should be assessed when a contract is terminated for anticipatory repudiation, in circumstances where the contract might lawfully have been terminated by the defendant at a later time if the contract had run its course, see *Golden Strait Corp. v. Nippon Yusen Kubishka Kaisha*, [2005] Lloyd’s Rep. 443 (Comm.) (Eng.), *aff’d*, [2005] 2 Lloyd’s Rep. 747 (Civ.) (Eng.). Issues of this nature would of course be dealt with under Article 74 of the Convention.

Just as a party claiming exemption may still have committed a fundamental breach under Article 25, so too that party should remain subject to the regime in Article 72.

A fifth question presented by Article 72(1) concerns its relationship to the mitigation rule in Article 77. To the extent that the latter rule requires a claimant to mitigate loss, does this mean that a party is positively required to avoid a contract if, by moving expeditiously, he can stem the flow of future losses that will be caused by the other party and thus reduce his own eventual claim for damages under Article 77? This is a matter that has received quite intensive treatment under English law, where, to simplify matters somewhat, the conclusion is that the rule is one of mitigation of *damages* and not one of mitigation of *loss*, the result of this being that the injured party's right to terminate a contract for anticipatory repudiation is not conditioned at all by the mitigation principle.<sup>31</sup> Although Article 77 is in a section of the Convention dedicated to damages, there is at least a strong argument that the rule it enunciates controls the exercise of the right to avoid under Article 72. The Secretariat Commentary implies this when stating that the mitigation rule "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."<sup>32</sup>

Article 72(2) requires the party who intends to avoid the contract to give the other an opportunity to provide adequate assurance of his performance, but only if "time allows." This is subject to the proviso in Article 72(3) that it does not include cases of renunciation. Renunciation ought to include the case of the contracting party who declines to perform unless the terms of the contract are altered to his advantage.<sup>33</sup> Article 72(2), then, deals only with cases of prospective incapacity. The first and obvious question now raised is what is it that time supposedly allows. In principle, it ought not to be up to the time when the avoiding party is next bound to perform: that party is able to protect itself by suspending performance under Article 71. Another significant question under Article 72 concerns the meaning of adequate assurance, a notoriously vague idea<sup>34</sup> taken from Article 2 of the Uniform

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31. See *Tredegar Iron and Coal Co. Ltd. v. Hawthorn Bros. & Co.*, [1902] 18 T.L.R. 716 (C.A.) (Eng.); *White & Carter (Councils) Ltd. v. McGregor*, [1962] A.C. 413 (H.L.) (appeal taken from Scot.).

32. Secretariat Commentary, *supra* note 3, art. 63, ¶ 4.

33. See CLOUT Case No. 293 [Schiedsgericht der Hamburger Freundschaftliche Arbitrage, Germany, 29 Dec. 1998], available at <http://cisgw3.law.pace.edu/cases/981229g1.html>.

34. See JAMES J. WHITE & ROBERT S. SUMMERS, *UNIFORM COMMERCIAL CODE 199* (5th ed. 2000), referring to a party's "difficult task of determining the proper 'adequate assurances'" and expressing the aspiration "we hope that courts will follow common sense and reasonable business practices in determining

Commercial Code. The idea is also featured under Article 71. So far as the event or events that give rise to it are less severe than they are under Article 72, this suggests that the latter is more demanding as to what constitutes “adequate” assurance. Yet, we are still not closer to tracking down the meaning of the phrase.

A third question flowing on from this concerns the length of the reasonable notice<sup>35</sup> that the avoiding party has to give the other so that the latter may supply adequate assurance. This reasonable notice is calculated within the time frame defining the availability of adequate assurance of performance. It seems at first sight a fair inference that adequate assurance must be supplied prior to the due date of performance of the party giving it and must show that timely performance will be forthcoming. Note, however, that the provision calls for “adequate assurance of his performance” and not, as in the Uniform Commercial Code, “adequate assurance of due performance.” This suggests that the assurance may promise performance after the contractual performance date but not so late as to amount to a fundamental breach.<sup>36</sup> Support for this view stems from Article 72(1), where, it seems, the apprehended future breach need not eventuate on the contractual performance date. It may instead be portended in the form of renunciation or prospective incapacity stretching beyond that future date.

A fourth question concerns the party who does not give adequate notice to the other. It may be that no notice at all is given or that the notice given is insufficient. In the first of these two instances, it is not completely clear what the sanction is for failing to give notice. On one view, there is no alternative to the avoiding party having to sit and wait for performance to take place on the due date. The alternative, and better, view is that prospective incapacity, so long as it lasts, is a continuing condition that the avoiding party may invoke at any time before performance falls due. The avoiding party can sit tight and

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which assurances are adequate and which are not.” No guidelines are provided by Article 2-609 for adequate assurance of due performance. The making of excessive demands will in itself constitute an unlawful repudiation. They cite the case of *Pittsburgh Des Moines Steel Co. v. Brookhaven Manor Water Co.*, 532 F.2d 572 (7th Cir. 1976), where the seller went too far in demanding that the buyer pay the contract price into an escrow account and that its president give a personal guarantee of performance. It takes more than one extreme case to give meaning to an inherently vague idea that permits one party unilaterally to alter the terms of the contract.

35. Cf. the “immediate” notice that a party invoking suspension rights must give under Article 71(3). Cases on this stricter provision cannot safely be relied upon when determining the reasonable periods in Articles 72(2) and 73(2), though the extraordinary delay of the buyer in one Belgian case (*Hof van Beroep Ghent, Belgium*, 26 Apr. 2000, available at <http://cisgw3.law.pace.edu/cases/000426b1.html>) would also have fallen outside the temporal limits in Articles 72 and 73.

36. A similar question concerns the quality of a seller’s cure under Articles 37 and 48.

wait until it is too late for adequate assurance to be given, unless the good faith interpretation provided for under Article 7(1) demands otherwise, which it might well do.

If the notice given is insufficient, the position is very unclear. It may be treated as no notice at all, or it may be that time will be deemed added to the notice so that it becomes a reasonable notice. As difficult as this question might seem, the reality is that it will be overtaken by events, namely, the arrival of the due performance date and the commission by non-performance of a fundamental breach of contract.

### ARTICLE 73

(1) In the case of a contract for delivery of goods by instalments, if the failure of one party to perform any of his obligations in respect of any instalment constitutes a fundamental breach of contract with respect to that instalment, the other party may declare the contract avoided with respect to that instalment.

(2) If one party's failure to perform any of his obligations in respect of any 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.

(3) 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.

Article 73 does not flow very smoothly from Articles 71-72. It applies the principle of fundamental breach to installment contracts, treating separately the individual affected installment from the balance of the contract. There is however a relationship with Article 72 in that the delivery of a non-conforming installment may point so powerfully to the supply of future non-conforming installments as to justify the avoidance of the whole contract including those future installments.<sup>37</sup> This is the justification for treating installment contracts at this point in the Convention.

Article 73(1) is relatively straightforward. Each delivery of an installment contract may be treated as though it were a severable part of that contract, with the result that a fundamental breach with regard to that installment gives rise to a right to avoid just that installment. The

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37. Article 73 does not preclude avoidance under Article 72 or even suspension under Article 71 according to Shuttle Packaging, 2001 WL 34046276, at \*1; *see also* Court of Arbitration of the International Chamber of Commerce, Award No. 9448, July 1999; CLOUT Case No. 238 [Oberster Gerichtshof, Austria, 12 Feb. 1998]; Court of Appeal Helsinki, Finland, 30 June 1998, *available at* <http://cisgw3.law.pace.edu/cases/980630f5.html>.

fundamental breach may be that of the seller or the buyer, but in practice is more likely to be the seller's breach. The notion of a fundamental breach with regard to a single installment is somewhat artificial since it appears to require the installment to be separated from the balance of the contract and a mechanically quantitative rather than a purposive or impressionistic test of fundamental breach to be applied to that installment. Article 73(1) cannot, however, be interpreted in such a literal way. For example, if a breach is committed with regard to an installment which has a critical, interdependent role with other installments, the avoidability of the affected installment should, in part, depend upon its relation to other installments.

Article 73(2) allows not just the faulty installment to be rejected, but also all future installments to be rejected too if non-performance in relation to an installment gives a party "good grounds" (are these the same as "reasonable grounds"?) to believe that a fundamental breach will also be committed with regard to "future installments." The test thus stated is different from the test laid down in Article 72(1),<sup>38</sup> requiring it to be "clear" that a fundamental breach will follow on from an anticipatory breach.<sup>39</sup> A Finnish court had occasion, in the case of a sale of skin products, to conclude that good grounds existed. Products of this type took many months to develop and goods already supplied revealed essential and irreversible quality defects.<sup>40</sup> In the case of late installments, it has been held by a Spanish appeals court that a buyer may give notice of avoidance for all future installments while retaining all installments the subject of delayed delivery.<sup>41</sup> As with notices served under Article 72, the notice of avoidance must be given within a reasonable time.<sup>42</sup> A French court has held that a seller who did not give a buyer a "brutale" (or abrupt) notice, but rather gave it the opportunity of finding another supplier, had nevertheless given a timely notice of avoidance.<sup>43</sup> This is commercially flexible and sensible. An unanswered question arising out the fundamental

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38. In Schiedsgericht der Börse für Landwirtschaftliche Wien, Austria, 10 Dec. 1997, the standard under Article 73 was expressed to be less strict than that under Article 72, though even "good grounds" (questionably) demanded a high probability of future breach.

39. The case of a buyer who, having taken delivery of some installments, refuses to take the balance of installments due under the contract, should be dealt with under Article 72 and not Article 73. See CLOUT Case No. 227 [Oberlandesgericht Hamm, Germany, 22 Sept. 1992].

40. Court of Appeal Helsinki, Finland, 30 June 1998, available at <http://cisgw3.law.pace.edu/cases/980630f5.html>.

41. See CLOUT Case No. 246 [Audiencia Provincial de Barcelona, Spain, 3 Nov. 1997], available at <http://cisgw3.law.pace.edu/cases/971103s4.html>.

42. *Id.* (48 hours of the last late installment in the series).

43. CLOUT Case No. 154 [Cour d'appel de Grenoble, France, 22 Feb. 1995], available at <http://cisgw3.law.pace.edu/cases/950222f1.html>.

breach test is whether all future installments should be under threat or just some of them. The answer is likely to be the former, or at least a critical mass whose non-delivery or non-acceptance would amount to a fundamental breach of the balance of the contract,<sup>44</sup> since Article 73(2)<sup>45</sup> does not present the option of avoiding just a limited number of future installments. Curiously, perhaps, the provision does not admit of the possibility of adequate assurance of performance. It is in the case of installment contracts above all that one might expect there to be time allowing for the serving of an adequate assurance notice. It would seem reasonable to draw down the adequate assurance rule in Article 72 with the aid of the Article 7(2) machinery for filling gaps in the Convention.

Finally, Article 73(3) allows limited retrospective avoidance, but only by the buyer, in the case of installments already accepted if these are unusable (because of interdependency) without the installment that the buyer is now avoiding. For the same reason, the buyer could also avoid interdependent future installments. The unusability of interdependent installments cannot be known only to the buyer. The purpose must also have been contemplated by the seller at the date of the contract, which sets up a link between this provision and Article 35(2). It also demonstrates consistency with the foresight required by Article 25 for the application of the fundamental breach test.

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44. Article 73(2) does not permit the current installment to be factored into the fundamental breach test as applied to the balance of the contract.

45. But Article 73(3) does in limited circumstances.