

CHAPTER IV. PROVISIONS COMMON TO THE OBLIGATIONS  
OF THE SELLER AND OF THE BUYER

SECTION I. ANTICIPATORY BREACH AND  
INSTALMENT CONTRACTS

*Article 62*

[Suspension of performance]

(1) A party may suspend the performance of his obligations if it is reasonable to do so because, after the conclusion of the contract, a serious deterioration in the ability to perform or in the creditworthiness of the other party or his conduct in preparing to perform or in actually performing the contract gives good grounds to conclude that the other party will not perform a substantial part of his obligations.

(2) If the seller has already dispatched the goods before the grounds described in paragraph (1) of this article 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. This 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 to the other party thereof and must continue with performance if the other party provides adequate assurance of his performance.

PRIOR UNIFORM LAW

ULIS, article 73.

Commentary

1. Article 62 describes the extent to which a party may suspend the performance of his obligations because of the existence of good grounds to conclude that the other party will not perform a substantial part of his obligations.

*Right to suspend performance, paragraph (1)*

2. Paragraph (1) provides that a party may suspend the performance of his obligations if it is reasonable to do so because after the conclusion of the contract a serious deterioration of the other party's ability or willingness to perform "gives good grounds to conclude that the other party will not perform a substantial part of his obligations."

3. The deterioration must have been in the other party's ability to perform or in his creditworthiness or must be manifested by his conduct in preparing to perform or in actually performing the contract in question. It is not enough that the other party's performance in respect of other contracts raises questions as to his future performance in this contract. However, defective performance in other contracts might contribute to a decision that his current conduct gave "good" grounds

to conclude he will not perform a substantial part of his obligations in this contract. Moreover, the buyer's failure to pay his debts on other contracts may indicate a serious deterioration of his creditworthiness.

4. The circumstances which justify suspension may relate to general conditions so long as those general conditions affect the other party's ability to perform. For example, the outbreak of war or the imposition of an export embargo may give good grounds to conclude that the party from that country will not be able to perform his obligations.

5. It should be noted that there must be good grounds to conclude that he will not perform a substantial part of his obligations. There is no right to suspend if the other party's performance is apt to be deficient in less than a substantial way. A party who suspends his performance without good grounds to conclude that the other party will not perform a substantial part of his obligations would himself be in breach of the contract.

6. These rules are illustrated by the following examples:

*Example 62A:* Buyer fell behind in his payments to Seller in respect of other contracts. Even though the late payments were in respect of other contracts, such late payments might indicate a serious deterioration in Buyer's creditworthiness authorizing Seller to suspend performance.

*Example 62B:* Buyer contracted for precision parts which he intended to use immediately upon delivery. He discovered that, although there had been no deterioration in Seller's ability to manufacture and deliver parts of the quality required, defective deliveries were being made to other buyers with similar needs. These facts alone do not authorize Buyer to suspend his performance. However, if the cause of Seller's defective deliveries to other buyers was the result of using a raw material from a particular source, Seller's conduct in preparing to use the raw material from the same source would give Buyer good grounds to conclude that Seller would deliver defective goods to him also.

7. The question may arise as to whether the parties have impliedly derogated from this article under the provisions of article 5 by using a particular form of contract. For example, if payment is to be made by means of an irrevocable letter of credit, the issuer of the credit is required to pay a draft drawn on it if accompanied by the proper documents even though the buyer has good grounds to believe that the goods are seriously defective.<sup>1</sup> Similarly, it may be that where the buyer has assumed the risk of payment before inspection of the goods, as in a contract of sale on CIF or similar cash against documents terms, that risk is not to be evaded by a demand for assurance.

8. If the criteria discussed in paragraphs 2 to 4 above are met, the party "may suspend the performance of his obligations". A party who is authorized to suspend performance is freed both from the obligation to render performance to the other party and from the obligation to prepare to perform. He is not obligated to incur additional expenses for which it is reasonable to assume he will never be compensated.

9. If an obligation is suspended for a period of time and then reinstated pursuant to article 62 (3), the date required for performance will be extended for the period of the suspension. This principle is illustrated by the following examples:

*Example 62C:* Under the contract of sale, Seller was required to deliver the goods by 1 July. Because of reasonable doubts of Buyer's creditworthiness, on 15 May Seller suspended performance. On 29 May Buyer provided adequate assurances that he would pay for the goods. Seller must now deliver the goods by 15 July.

*Example 62D:* As in example 62C, Seller was required to deliver the goods by 1 July. Because of doubts of Buyer's creditworthiness, on 15 May Seller suspended performance. On 29 May Buyer provided adequate assurances that he would pay for the goods and Seller delivered on 15 July. However, Buyer contended that the deterioration in his creditworthiness after the conclusion of the contract were not such as to give Seller "good grounds" that he would not pay. If Buyer can sub-

<sup>1</sup> Uniform customs and practice for documentary credits (1974), (ICC publication No. 290), art. 9. However, in some legal systems the buyer may be able to obtain a court order directing the bank not to pay under an irrevocable letter of credit where there was fraud, forgery or some other defect not apparent on the face of the documents.

stantiate this claim — before a court or arbitral tribunal if necessary — Seller must reimburse Buyer for any damages he suffered because he furnished the assurances and because of late delivery.

*Stoppage in transit, paragraph (2)*

10. Paragraph (2) continues the policy of paragraph (1) in favour of a seller who has already shipped the goods. If the deterioration of the buyer's creditworthiness gives the seller good grounds to conclude that the buyer will not pay for the goods, the seller has the right as against the buyer to order the carrier not to hand over the goods to the buyer even though the buyer holds a document which entitles him to obtain them, e.g., an ocean bill of lading, and even if the goods were originally sold on terms granting the buyer credit after receipt of the goods.

11. The seller loses his right to order the carrier not to hand over the goods if the buyer has transferred the document to a third party who has taken it for value and in good faith.

12. Since this Convention governs the rights in the goods only between the buyer and the seller,<sup>2</sup> the question whether the carrier must or is permitted to follow the instructions of the seller where the buyer has a document which entitles him to obtain them is governed by the appropriate law of the form of transport in question.<sup>3</sup>

*Notice and adequate assurances of performance, paragraph (3)*

13. Paragraph (3) provides that the party suspending performance pursuant to paragraph (1) or stopping the goods in transit pursuant to paragraph (2) must immediately notify the other party of that fact. The other party can reinstate the first party's obligation to continue performance by giving the first party adequate assurance that he will perform. 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.

*Example 62E:* The contract of sale provided that Buyer would pay for the goods 30 days after their arrival at Buyer's place of business. After the conclusion of the contract Seller received information which gave him reasonable grounds to doubt Buyer's creditworthiness. After he suspended performance and so notified Buyer, Buyer offered either (1) a new payment term so that he would pay against documents, or (2) a letter of credit issued by a reputable bank, or (3) a guarantee by a reputable bank or other such party that it would pay if Buyer did not, or (4) a security interest in sufficient goods owned by Buyer to assure Seller of reimbursement. Since any one of these four alternatives would probably give Seller adequate assurances of being paid,<sup>4</sup> Seller would be required to continue performance.

*Example 62F:* The contract of sale called for the delivery of precision parts for Buyer to use in assembling a high technology machine. Seller's failure to deliver goods of the requisite quality on the delivery date would cause great financial loss to Buyer. Although Buyer could have the parts manufactured by other firms, it would take a minimum of six months from the time a contract was signed for any other firm to be able to deliver substitute parts. The contract provided that Buyer was to make periodic advance payments of the purchase price during the period of time Seller was manufacturing the goods.

When Buyer received information giving him good grounds to conclude that Seller would not be able to deliver on time, Buyer notified Seller that he was suspending any performance due the Seller. Seller gave Buyer written assurances that he would deliver goods of the con-

tract quality on time and offered a bank guarantee for financial reimbursement of all payments made under the contract if he failed to meet his obligations.

In this case Seller has not given adequate assurance of performance. Seller's statements that he would perform, unless accompanied by sufficient explanations of the information which caused Buyer to conclude that Seller would not deliver on time, were only a reiteration of his contractual obligation. The offer of a bank guarantee of reimbursement of payments under the contract was not an adequate assurance to a Buyer who needs the goods at the contract date in order to meet his own needs.

14. The first party's obligation to perform remains suspended until either (1) the other party performs his obligations, (2) adequate assurances are given, (3) the first party declares the contract avoided, or (4) the period of limitation applicable to the contract has expired.<sup>5</sup>

15. Prior to the date on which the other party was required to perform, the first party could declare the contract avoided only if the criteria of article 63 were met. After the date on which the other party was required to perform, the first party could declare the contract avoided only if the criteria of article 45 or 60 were met. Avoidance of one or more instalments of a contract for delivery of goods by instalments is governed by article 64.

16. If the party suspending performance suffers damages because the other party did not provide adequate assurances as required by this article, he may recover any damages he may have suffered, whether or not he declares the contract avoided.<sup>6</sup> For example, if the buyer in example 62F declared the contract avoided and purchased substitute goods elsewhere at a higher price, he can recover the difference between his repurchase price and the cover price.<sup>7</sup>

<sup>2</sup> Article 62 (2) expressly states that it relates only to the rights in goods as between the buyer and the seller. This reflects the general principles expressed in article 4.

<sup>3</sup> The rules governing the carrier's obligation to follow the consignor's orders to withhold delivery from the consignee differ between modes of transportation and between various international conventions and national laws.

<sup>4</sup> The offer of a security interest would be an adequate assurance only if the national law in question allowed such interests and provided a procedure on default which was adequate to assure the creditor prompt reimbursement of his claim.

<sup>5</sup> Under the Convention on the Limitation Period in the International Sale of Goods, art. 8, that period would be four years. That Convention does not prescribe as to whether the rights under the contract are terminated or whether it is the right of a party to commence an action to enforce such a right which is terminated.

<sup>6</sup> Article 66 (1) preserves the right of a party who declares the contract avoided to claim any damages which may occur from the breach of contract.

<sup>7</sup> Article 71. If the buyer did not declare the contract avoided, the measure of damages would be calculated according to article 70.