



**United Nations Commission
on International Trade Law**

**UNCITRAL Digest of case law on the United Nations
Convention on the International Sale of Goods***

Chapter V

**Provisions Common to the Obligations of the Seller
and of the Buyer**

Section I

Anticipatory Breach and Instalment Contracts

1. Section 1 includes three articles. Under the first two articles, an aggrieved party may suspend its obligations (article 71) or avoid the contract (article 72) before the time for performance is due if the conditions of these articles are satisfied. Where the parties have entered into a contract by which the goods are to be delivered in instalments, an aggrieved party may avoid the contract with respect to a single instalment, future instalments, or the contract as a whole as provided in the third article (article 73).

* The present digest was prepared using the full text of the decisions cited in the Case Law on UNCITRAL Texts (CLOUT) abstracts and other citations listed in the footnotes. The abstracts are intended to serve only as summaries of the underlying decisions and may not reflect all the points made in the digest. Readers are advised to consult the full texts of the listed court and arbitral decisions rather than relying solely on the CLOUT abstracts.

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.

1. Article 71 authorizes a seller or a buyer to suspend performance of its obligations under the sales contract if it is unlikely to receive the substantial benefit 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 The right continues until the conditions for suspension no longer exist, there is a right to avoid the contract, or the other party gives adequate assurance of performance in accordance with article 71 (3).⁴ The Convention's rules on the right to suspend displace domestic sales law rules that permit the suspension of a party's obligation.⁵

¹ Landgericht Stendal, Germany, 12 October 2000, available on the Internet at <http://cisgw3.law.pace.edu/cisg/text/001012g1german.html> (suspension not breach but a unilateral right to modify time for performance); ICC award No. 8786, January 1997, Unilex (buyer would not breach if it had exercised right to suspend).

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).

³ ICC award No. 9448, July 1999, Unilex (buyer not entitled to suspend obligation to pay after it had taken delivery of goods even though less goods were delivered than contracted for).

⁴ Landgericht Stendal, Germany, 12 October 2000, available on the Internet at <http://cisgw3.law.pace.edu/cisg/text/001012g1german.html> (suspension not breach but a unilateral right to modify time for performance).

⁵ CLOUT case No. 238 [Oberster Gerichtshof, Austria, 12 February 1998] (see full text of the decision).

2. The right to suspend under article 71 is to be distinguished from the right to avoid the contract under article 72.⁶ Unlike the avoidance of a contract, which terminates the obligations of the parties (see article 81), the suspension of contractual obligations recognizes that the contract continues but 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 for a single performance and to instalment contracts governed by article 73. When the preconditions of both articles are satisfied, the aggrieved party may choose between suspending performance and avoiding the contract with respect to future instalments under article 73 (2).⁷ If a party chooses to suspend performance with respect to future instalments it must give a notice in accordance with article 71 (3).⁸

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.⁹

Preconditions of suspension

5. A party is entitled to suspend its obligations under paragraph (1) of article 71¹⁰ if it becomes apparent that the other party will not perform a substantial part of its obligations¹¹ and if the non-performance is the result of either of the causes set out in subparagraphs (a)¹² and (b).¹³ It is not necessary that the failure amount to a fundamental breach.¹⁴

⁶ ICC award No. 8786, January 1997, Unilex (buyer did not suspend obligations but avoided contract under art. 72 (1)); ICC award No. 8574, September 1996, Unilex (buyer's purchase of substitute goods not a suspension of its obligations).

⁷ CLOUT case No. 238 [Oberster Gerichtshof, Austria, 12 February 1998].

⁸ Federation Chamber of Commerce and Industry, Arbitration award No. 302/1996, Russia, 27 July 1999, published in *Rozenberg, Praktika of Mejdunarodnogo Commercheskogo Arbitrajnogo Syda: Haychno-Practicheskij Commentarij 1999–2000*, No. 27 [141–147].

⁹ CLOUT case No. 311 [Oberlandesgericht Köln, Germany, 8 January 1997] (see full text of the decision).

¹⁰ The following decisions recognize the applicability of the Convention and the right to suspend but fail to cite art. 71; *Maglificio Dalmine v. Coveres*, Tribunal Commercial de Bruxelles, Belgium, 13 November 1992, Unilex (seller entitled to suspend delivery because buyer failed to pay price under prior contract).

¹¹ Oberlandesgericht Dresden, Germany, 27 December 1999, Unilex (noting that there must be a mutual, reciprocal relationship between the obligation suspended and the counter-performance).

¹² 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); Arbitration award No. 273/95, Zürich Handelskammer, Switzerland, 31 May 1996, Unilex.

¹³ The following cases cite subparagraph (b): *Malaysia Dairy Industries v. Dairex Holland*, Rb 's-Hertogenbosch, the Netherlands, 2 October 1998, Unilex; CLOUT case No. 164 [Arbitration—Arbitration Court attached to the Hungarian Chamber of Commerce and Industry,

6. A party was found to be entitled to suspend its obligations in the following circumstances: seller's refusal to perform with respect to certain items;¹⁵ seller's inability to deliver goods free of restriction imposed by seller's supplier;¹⁶ buyer's failure to pay for the goods;¹⁷ buyer's non-payment or delayed payment of the price under one or more earlier sales contracts;¹⁸ buyer's failure to open an effective bank guarantee.¹⁹ 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 72.²⁰

7. A buyer was found not entitled to suspend its obligations in the following circumstances: seller's nonconforming delivery of only 420 kg out of 22,400 kg,²¹ buyer had received partial delivery;²² buyer had received the goods invoiced and the nonconformity related to goods delivered under a different contract.²³ 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.²⁴

8. A seller was found not entitled to suspend its obligations in the following circumstances: the buyer had not paid the purchase price for two deliveries and that

Hungary, 5 December 1995] (see full text of the decision); Landgericht Berlin, Germany, 15 September 1994, Unilex.

¹⁴ Landgericht Berlin, Germany, 15 September 1994, Unilex. But see *Shuttle Packaging Systems v. Tsonakis*, [Federal] Western District Court of Michigan, United States, 17 December 2001, 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).

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

¹⁶ CLOUT case No. 338 [Oberlandesgericht Hamm, Germany, 23 June 1998] (citing art. 71 (1) (a)); Oberlandesgericht Linz, Austria, 23 May 1995, available on the Internet at <http://cisgw3.law.pace.edu/cases/950523a3.html>, affirmed on other grounds, CLOUT case No. 176 [Oberster Gerichtshof, Austria, 6 February 1996].

¹⁷ CLOUT case No. 164 [Arbitration—Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, Hungary, 5 December 1995] (citing art. 71 (1) (b), court found seller justified in suspending its obligation to repair non-conforming goods) (see full text of the decision). See also ICC award No. 8611, 23 January 1997, Unilex (noting that seller's failure occurred before it would have been entitled to suspend performance under art. 71 (1) (b) because of buyer's non-payment).

¹⁸ *J.P.S. BVBA v. Kabri Mode BV*, Rechtbank van Koophandel Hasselt, Belgium, 1 March 1995, Unilex (seven-month delay in payment); *Maglificio Dalmine v. Coveres*, Tribunal Commercial de Bruxelles, Belgium, 13 November 1992, Unilex (without citing art. 71).

¹⁹ Arbitral award VB/94124, Hungary, 17 November 1995, Unilex (bank guarantee opened with a date that had already expired).

²⁰ CLOUT case No. 176 [Oberster Gerichtshof, Austria, 6 February 1996] (see full text of the decision); but see Arbitral award VB/94124, Hungary, 17 November 1995, Unilex (right to suspend under art. 71 when ineffective bank guarantee opened).

²¹ CLOUT case No. 227 [Oberlandesgericht Hamm, Germany, 22 September 1992] (see full text of the decision).

²² ICC award No. 9448, July 1999, Unilex (buyer not entitled to suspend obligation to pay after it had taken delivery of goods even though less goods than contracted for); CLOUT case No. 275 [Oberlandesgericht Düsseldorf, Germany, 24 April 1997] (buyer not entitled to suspend payment for those goods not delivered).

²³ *BVBA J.P. v. S. Ltd.*, Hof van Beroep Gent, Belgium, 28 April 2000, available on the Internet at <http://www.law.kuleuven.ac.be/int/tradelaw/WK/2000-04-28.htm>.

²⁴ Oberlandesgericht Dresden, Germany, 27 December 1999, Unilex; Arbitration award No. 273/95, Zurich Handelskammer, Switzerland, 31 May 1996, Unilex.

the buyer had cancelled a bank payment order;²⁵ 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.²⁶

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. There are no reported cases applying this paragraph²⁷.

Notice of suspension

10. Paragraph (3) of article 71 requires the suspending party to give notice of the suspension immediately²⁸ to the other party.²⁹ 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,³⁰ a letter in which the buyer refused to accept nonconforming items and offered to return them.³¹ However, there was insufficient notice in the following circumstances: buyer's failure to pay the price,³² a letter with respect to defects under other contracts.³³

11. Paragraph (3) does not state expressly 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 performance³⁴.

²⁵ CLOUT case No. 238 [Oberster Gerichtshof, Austria, 12 February 1998] (art. 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).

²⁶ *Malaysia Dairy Industries v. Dairex Holland*, Rb 's-Hertogenbosch, the Netherlands, 2 October 1998, Unilex (buyer offered to take delivery of the goods in Free Trade zone).

²⁷ 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 notice).

²⁸ *BV BA. J.P. v. S. Ltd.*, Hof van Beroep Gent, Belgium, 28 April 2000, available on the Internet at <http://www.law.kuleuven.ac.be/int/tradelaw/WK/2000-04-28.htm> (notice not "immediate" when related to deliveries made seven and 14 months before).

²⁹ See ICC award No. 8611, 23 January 1997, Unilex (notice not necessary under circumstances in case).

³⁰ CLOUT case No. 338 [Oberlandesgericht Hamm, Germany, 23 June 1998].

³¹ Landgericht Berlin, Germany, 15 September 1994, Unilex.

³² Landgericht Stendal, Germany, 12 October 2000, available on the Internet at <http://cisgw3.law.pace.edu/cisg/text/001012g1german.html> (suspension not breach but a unilateral right to modify time for performance).

³³ *BV BA. J.P. v. S. Ltd.*, Hof van Beroep Gent, Belgium, 28 April 2000, available on the Internet at <http://www.law.kuleuven.ac.be/int/tradelaw/WK/2000-04-28.htm> (citing art. 73 (1) for implicit affirmation of this point).

³⁴ Landgericht Stendal, Germany, 12 October 2000, available on the Internet at <http://cisgw3.law.pace.edu/cisg/text/001012g1german.html> (party may not rely on para. (1)); Federation Chamber of Commerce and Industry arbitration award No. 302/1996, Russia, 27 July 1999, published in *Rozenberg, Praktika of Mejdunarodnogo Commercheskogo Arbitrajnogo Syda: Haychno-Practicheskiy Commentariy* 1999–2000, No. 27 [141–147]; CLOUT case No. 51 [Amtsgericht Frankfurt a.M., Germany, 31 January 1991] (seller may not rely on right to stop

One decision concluded 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.³⁵

Adequate assurance of performance

12. Paragraph (3) requires a party that has suspended its performance to end its suspension and continue to perform 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.³⁶

goods in transit pursuant to para. (2)).

³⁵ CLOUT case No. 51 [Amtsgericht Frankfurt a.M., Germany, 31 January 1991].

³⁶ A similar reference to adequate assurance is made in art. 72 (2) and cases under that provision may be found relevant. ICC award No. 8786, January 1997, Unilex; CLOUT case No. 130 [Oberlandesgericht Düsseldorf, Germany, 14 January 1994] (see full text of the decision).
