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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.

1. Article 72 entitles a seller or a buyer to avoid the contract if it becomes clear before the date for performance that the other party will commit a fundamental breach. Article 49 rather than article 72 applies if, at or after the date for performance, a party's failure to perform or nonconforming performance amounts to a fundamental breach. Thus, a buyer who has not declared the contract avoided before the date for performance may not avoid the contract under article 72 but must act instead under articles 45 and 49.¹

¹ CLOUT case No. 171 [Bundesgerichtshof, Germany, 3 April 1996]; CLOUT case No. 124 [Bundesgerichtshof, Germany, 15 February 1995].

* 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.

2. The right of an aggrieved party to avoid the contract under article 72 is to be distinguished from the right to suspend its obligations under article 71.² Both articles are concerned with predicting whether there will be a breach but the preconditions for the more drastic remedy of avoidance are more stringent than those for suspension, both as to the seriousness of the predicted breach and the probability that the breach will occur. The notification requirements also differ. Article 72 requires “reasonable” prior notice only if time allows and excuses the notice if the other party has declared that it will not perform, while article 71 requires immediate notice of suspension with no exceptions.³

3. Article 72 entitles an aggrieved party to avoid a contract before the date for performance if the contract is for a single sale, while article 73 provides special rules on avoidance of future instalments if the contract is an instalment contract. Several decisions recognize that where the parties have on-going relations the aggrieved party might act under either article as to future instalments or contracts.⁴

Preconditions for avoidance

4. Paragraph (1) sets out the principal precondition for a rightful avoidance: it must be clear prior to the date for performance that the party required to perform will commit a fundamental breach. A very high probability that there will be a fundamental breach rather than complete certainty is required.⁵ One decision has stated that a claim of anticipatory repudiation must allege “(1) that the defendant intended to breach the contract before the contract's performance date and (2) that such breach was fundamental”.⁶

5. A party that declares that it will not perform its obligations satisfies this precondition.⁷ Allegations, if proved, that the seller stated it would “no longer feel obligated” to perform and would “sell the material elsewhere” would entitle the buyer to avoid the contract.⁸ Conditioning delivery on new demands beyond those agreed upon is an anticipatory repudiation of the contract.⁹

² 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).

³ ICC award No. 8574, September 1996, Unilex (noting differences as to notice).

⁴ *EP S.A. v FP Oy*, Helsinki Court of Appeal, Finland, 30 June 1998, Unilex (where two separate orders for skincare ointment made from same mixture the aggrieved buyer could avoid second contract under either article 72 or under article 73 (2)); Arbitration award No. 273/95, Zürich Handelskammer, Switzerland, 31 May 1996, Unilex (fundamental breach as to future instalments is covered by both arts. 72 and 73).

⁵ Landgericht Berlin, Germany, 30 September 1992, Unilex (very high probability rather than complete certainty required). See also Arbitration award No. S2/97, Schiedsgericht der Börse für Landwirtschaftliche Produkte—Wien, Austria, 10 December 1997, Unilex (“good grounds” under art. 73 means high probability, a less severe test than that found in art. 72 (1)).

⁶ CLOUT case No. 417 [Federal District Court, Northern District of Illinois, United States, 7 December 1999] (citing arts. 25 and 72) (see full text of the decision).

⁷ See art. 72 (3) (excusing the aggrieved party from giving prior notice “if the other party has declared that he will not perform his obligations”).

⁸ CLOUT case No. 417 [Federal District Court, Northern District of Illinois, United States, 7 December 1999].

⁹ CLOUT case No. 293 [Arbitration—Schiedsgericht der Hamburger freundschaftlichen

6. The preconditions of paragraph (1) were also found to have been satisfied in the following circumstances: the buyer's failure to pay for prior shipments;¹⁰ the buyer's failure to open a letter of credit;¹¹ the seller's failure to reduce price and to commit to deliver fashion goods on time;¹² the seller's deliberate termination of delivery of goods.¹³

7. The preconditions were found not satisfied in the following circumstances: where the seller had held back the goods;¹⁴ where the seller expressed an interest in stopping deliveries but also agreed to continue negotiations;¹⁵ the buyer's failure to pay one instalment.¹⁶

Notice of intent to avoid

8. Paragraph (2) of article 72 requires the aggrieved party to give the other party prior notice of the aggrieved party's intent to avoid the contract if time allows.¹⁷ This notice is different from the declaration of avoidance governed by article 26.¹⁸ One decision concluded that if the aggrieved party is relying on article 72 it must declare the contract avoided prior to the date for performance.¹⁹

Adequate assurance of performance

9. The party intending to avoid the contract must give notice of this intent in order to permit the other party to provide adequate assurance of performance.²⁰ The Convention does not prescribe the form assurance must take. There is no requirement that the aggrieved party must post a bond.²¹

Arbitrage, 29 December 1998] (see full text of the decision).

¹⁰ CLOUT case No. 130 [Oberlandesgericht Düsseldorf, Germany, 14 January 1994], *affirming with modifications*, Landgericht Krefeld, 28 April 1993, Unilex; Landgericht Berlin, Germany, 30 September 1992, Unilex.

¹¹ Supreme Court of Queensland, Australia, 17 November 2000, [2000] QSC 421.

¹² ICC award No. 8786, January 1997, Unilex.

¹³ Arbitration award No. 273/95, Zürich Handelskammer, Switzerland, 31 May 1996, Unilex.

¹⁴ CLOUT case No. 261 [Bezirksgericht der Sanne, Switzerland, 20 February 1997].

¹⁵ ICC award No. 8574, September 1996, Unilex.

¹⁶ Arbitration award No. 273/95, Zürich Handelskammer, Switzerland, 31 May 1996, Unilex.

¹⁷ *EP S.A. v FP Oy*, Helsinki Court of Appeal, Finland, 30 June 1998, Unilex (timing and content of fax gave prior notice).

¹⁸ ICC award No. 8574, September 1996, Unilex (noting difference between art. 72 notice and declaration of avoidance and finding that declaration of avoidance was not timely); CLOUT case No. 130 [Oberlandesgericht Düsseldorf, Germany, 14 January 1994] (seller gave notice of intent to avoid followed by notice of avoidance when it heard nothing from buyer) (see full text of the decision).

¹⁹ CLOUT case No. 124 [Bundesgerichtshof, Germany, 15 February 1995].

²⁰ CLOUT case No. 130 [Oberlandesgericht Düsseldorf, Germany, 14 January 1994] (buyer failed to provide assurance when did not respond) (see full text of the decision).

²¹ ICC award No. 8786, January 1997, Unilex.