

THE RIGHT OF SUSPENSION AND STOPPAGE IN TRANSIT (AND NOTIFICATION THEREOF)

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I. HISTORY AND OUTLINE OF ARTICLE 71

A. History

International private law has long recognized the right of contracting parties to suspend performance upon an anticipatory breach of the contract. Originally, the draft convention of 1978 only provided for suspension where the grounds for suspension were not known at the time the contract was drawn up. Article 62 of the 1978 draft convention, which later became the current Article 71,¹ further stipulated that the breaching party's conduct must offer "good grounds" for the other party to conclude that the breaching party will not perform a substantial part of its obligations under the contract. The final wording of the Article was the product of long deliberations.²

The original draft text provided by the United Nations Commission on International Trade Law reads as follows:

Article 62 [current Article 71]

- (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

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1. Except where otherwise noted, all references herein to Convention articles refer to the current version of the CISG.

2. Legislative History 1980 Vienna Diplomatic Conference, G. Report of the First Committee, U.N. Doc. A/CONF.97/11 (1980).

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.

The Federal Republic of Germany,³ Canada, and Australia⁴ proposed amendments to the draft text prior to the 27th meeting. Only Germany's proposed amendment to paragraph one⁵ was adopted in a 50-18 vote by the First Committee. The text subsequently appeared thus:

(1) A party may suspend the performance of his obligations if it is reasonable to do so because, after the conclusion of the contract, it becomes apparent that a serious deficiency 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.

After closing the deliberations on draft Article 62, the Committee turned its attention to an amendment submitted by Egypt, which sought to reduce Article 62's perceived subjectivity. Another amendment was submitted by Italy. Both amendments were rejected in a tied vote (19-19). Instead of accepting the amendments, an eleven-nation *ad hoc* working group was formed to consider the wording of draft Articles 62 and 63 (current Articles 71 and 72). The working group submitted the following version of draft Article 62(1) at the 37th meeting.

(1) A party may, if it is reasonable to do so, suspend the performance of his obligations when, after the conclusion of the contract, it appears 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.

This version was intended to offer contract parties a more objective means of evaluating their right to suspend contract performance under the Article. This text was changed again by oral amendment at the 38th meeting. Finally, the entire and definitive texts of draft Articles 62 and 63 (current Articles 71 and 72) were adopted unanimously, 35-0.

3. U.N. Doc. A/CONF.97/C.1/L.187.

4. U.N. Doc. A/CONF.97/C.1/L.224.

5. U.N. Doc. A/CONF.97/C.1/L.187.

B. Outline

In essence, sales contracts are a type of reciprocal contract or a contract with two “synallagma.” The seller offers certain goods for sale, and the purchaser, as the seller’s counterpart, offers payment for the goods. Traditionally, delivery and payment are performed simultaneously: the buyer pays immediately upon receipt of the goods from the seller. In international trade, however, the typically significant distance between contract parties makes simultaneous performance difficult. Nevertheless, modern trade law is based upon the same principle as is provided for in Article 58. In many instances, however, the parties prepare performance long before they have secured the counter-performance. Article 71 offers one approach for addressing this discrepancy in the simultaneous performance created by the shipment of goods. In particular, Article 71 makes a synallagmatic link between two parties’ performance a prerequisite for applicability.⁶

Delivery prior to payment presents the same dilemma as payment prior to delivery. In the first case, the seller cannot be sure if the buyer will indeed pay the contracted purchase price; in the latter, the buyer remains uncertain as to whether the seller will indeed deliver the goods. A system of documentary credits and international terms of contract have been developed by trade and followed by trade law in an attempt to untangle this Gordian knot. This system affords contract parties a basis for what they can reliably expect, allowing them to provide for “standard” trade solutions. These solutions come into play when one party has already fulfilled its obligation (i.e., shipped the goods or made a payment). In such cases, documents of title can prevent the breaching party from receiving goods which he has not paid for or from paying for goods which are not delivered.

Article 71 offers both the seller and the buyer instruments which take effect even earlier, before the goods have been shipped or payment has been made (Article 71(1)), or while the goods are still in transit (Article 71(2)).⁷ Article 71 thus handles the risks that are connected with a non-simultaneous fulfillment and helps to put the parties into a position that is similar to the situation of a concurrent fulfillment, in addition to the system of documentary credits or similar instruments.

6. Hof van Beroep Gent, Belgium, 26 Apr. 2000; Oberlandesgericht Dresden, Germany, 27 Dec. 1999; CLOUT Case No. 275 [Oberlandesgericht Düsseldorf, Germany, 24 Apr. 1997].

7. Court of Arbitration of the International Chamber of Commerce, Award No. 9187, June 1999.

The key feature of Article 71 is that it does not require an actual breach of contract to have occurred in order for the non-breaching party to exercise its rights. At the point in time when a non-breaching party decides to exercise its rights under Article 71, the relationship between the parties may not be as sound as at the outset, but neither of the parties may yet have breached the contract. In order to suspend one's performance under the CISG, it must be apparent that the other party will not ultimately fulfil a substantial part of its obligations. Thus, the breach of contract needs merely to be anticipated. The threshold of certainty with regard to repudiation was the main issue in drafting this provision (see Part I.A). In the end, the Conference agreed on the language quoted above.

Assuming that the parties have not expressly opted out of Article 71, or agreed upon another contractual term in this regard (per Article 6),⁸ Article 71 gives both the seller and the buyer the right to suspend performance prior to the dispatch of the goods, while granting the seller the additional right to stop the goods in transit. Immediate notice must be given in any case (Article 71(3)). These rights under Article 71 are important tools for both the seller and the buyer. They offer security to all contracting parties and allow the CISG to live up to the "delivery vs. payment" principle set out in Article 58.

Article 71 does not offer provisions for the avoidance of a contract. This issue is dealt with in Articles 72 and 73.⁹ Article 71 does, however, allow a non-breaching party to suspend future deliveries or payments under an instalment contract.

Article 71 therefore presents sellers with a dual weapon. Not only can a seller suspend his performance if he anticipates a breach by the buyer before the goods are shipped (see Part II), but he can also stop the goods after shipment (i.e., during transit (so-called "stoppage in transit," see Part III)). While courts have elaborated in great detail on the first remedy, suspension before shipment, no cases have yet addressed stoppage in transit under the CISG. Even though the right of stoppage is internationally recognised, this issue is not normally discussed in the context of Article 71. A number of practical questions arise in connection with this, such as how the right to stop goods in transit fits or interacts with the issue of documents or the transfer of ownership.

8. CLOUT Case No. 311 [Oberlandesgericht Köln, Germany, 8 Jan. 1997].

9. The non-breaching party may choose between the remedies provided by either Article 71 or Article 73. CLOUT Case No. 238 [Oberster Gerichtshof, Austria, 12 Feb. 1998].

II. SUSPENSION OF PERFORMANCE

Both the seller and the buyer may suspend performance under a contract governed by the CISG under certain conditions (Article 71(1)). This provision allows either party to suspend performance if and when it becomes apparent that the other party will not fulfil a substantial part of its contractual obligations. Article 71(1) provides two main grounds for suspension:

- a) a serious deficiency in the ability to perform or in the credit-worthiness of the other party; or
- b) the conduct in preparing to perform or in performing the contract.

Accordingly, the criteria for invoking Article 71(1) are (i) non-fulfillment of a substantial part of the contractual obligations in the future (Part II.A) and (ii) a high likelihood that the breach of contract will actually occur (Part II.B). These criteria can be triggered by the occurrence of either of the grounds listed above. Finally, these preconditions must become apparent only after the conclusion¹⁰ of the contract, and the non-breaching party must notify the breaching party immediately of the non-breaching party's intention to suspend performance.¹¹

A. Non-Fulfillment of a Substantial Part of Contractual Obligations

A party to a contract governed by the CISG can only assert its Article 71(1) right to suspend performance in the event of an anticipated repudiation by the other party. In contrast to some national legal systems, such as Switzerland's, the CISG does not differentiate between breaches of main and subsidiary obligations, nor does it require the breaching party to be at fault for the breach. At the same time, not every breach of contract is sufficient to trigger the right to suspend performance. The anticipated breach must affect a substantial part of the obligations under the contract.¹² Accordingly, a

10. Article 71 excludes all legal remedies available under the applicable national law regarding facts that become apparent after the conclusion of the contract. *Id.*

11. This obligation does not apply if the breaching party explicitly declared that it would not fulfill its future obligations. *See* Court of Arbitration of the International Chamber of Commerce, Award No. 8574, Sept. 1996.

12. *Rechtbank's-Hertogenbosch*, Netherlands, 2 Oct. 1998 (Malaysia Dairy Industries Pte. Ltd. v. Dairex Holland BV); CLOUT Case No. 164 [Arbitration Court of the Chamber of Commerce and Industry of Budapest, Hungary, Award No. VB/94131, 5 Dec. 1995] (declaring suspension rightful because the buyer refused to pay the purchase price).

breach of a minor secondary obligation, or an insubstantial breach of a principal obligation, will not suffice to suspend performance under Article 71(1). On the other hand, Articles 71 and 72 do not require the breach to be a fundamental one, in the same sense as Article 25.¹³ If an initially non-fundamental breach turns into a fundamental breach over time, the non-breaching party is entitled to suspend full performance. This is premised on the correspondence of a suspension of all obligations over a longer time period with a factual avoidance of the contract (see Part IV).¹⁴

The determination of what constitutes a substantial breach must be made on a case-by-case basis (Article 8). The primary point of reference for the scope of the contract is the parties' underlying intent, provided that each party was, or had reason to be, fully aware of the other's intent upon signing the contract. In the absence of a sufficient basis for judging the parties' aware of each other's prior intent, a court or tribunal must apply an objective standard of interpretation. This will be based on how a reasonable person, albeit one familiar with the relevant trade, would interpret the contract language in the same situation, hence it is known as the "reasonable person standard" in the Anglo-American tradition.¹⁵ In applying this standard, the court or tribunal must take all relevant facts into account.¹⁶

B. High Degree of Likelihood

As Article 71 applies when the breach has not yet occurred, the remedy anticipates the breach of a substantial part of the contractual obligations. For all its focus on future probability, however, anticipatory breach can only be determined in light of the present situation. Whether or not a breach of contract will occur at a future date cannot be assessed with certainty, given the inherent uncertainty in assessing future events. Even if a party explicitly states that it will not fulfil its obligations, there is still a chance that it will fulfil them after all, since the reasons for the statement may be extremely varied.¹⁷ The importance of an accurate assessment is especially significant

13. Landgericht Berlin, Germany, 15 Sept. 1994.

14. *Id.*; CHRISTOPH BRUNNER, UN-KAUFRECHT—CISG. KOMMENTAR ZUM ÜBEREINKOMMEN DER VEREINTEN NATIONEN ÜBER DEN INTERNATIONALEN WARENKAUF VON 1980 art. 71 n.12 (2004); Shuttle Packaging Systems v. Tsonakis, No. 1:01-CV-691, 2001 U.S. Dist. LEXIS 21630, *1 (W.D. Mich. Dec. 17, 2001) (United States District Court for the Western District of Michigan) (holding suspension rightful in the event of fundamental breach).

15. Zürich Chamber of Commerce, Switzerland, Award No. ZHK 273/95, 31 May 1996.

16. BRUNNER, *supra* note 14, at art. 8 n.6.

17. In practice, however, such a statement will normally suffice for suspension, and most probably

in light of the consequences of a wrongful suspension of performance (see Part V.B).

Before adopting the final version of draft Article 62 (current Article 71), the Conference and Committee broadly discussed the extent of clarity and the factors for evaluating the potentiality of a future breach (see Part I.A). Prior to the final version, the draft convention based contract interpretation on the more subjective “good grounds” standard. Obviously, no prediction of future events can avoid an element of uncertainty, and there are no absolutely objective means for projecting the future. By including the phrase “becomes apparent,” the Conference and Committee, therefore, have shifted towards an objective approach to evaluating anticipatory breaches. Like the objective approach to determining materiality, determinations of the probability of a material breach are based on the assumed perspective of a hypothetical reasonable but knowledgeable person in the same situation.

While a party’s suspicions of the other party’s breach are necessarily based on past observation, the breach itself is projected into the future. Here, the potential victim must assess the likelihood of a future breach, based only on the facts and circumstances at hand. It is not easy to determine the point at which a party should assume anticipatory breach, as the determination of a degree of likelihood is, by definition, vague.

Clearly, the mere possibility that the other party might at some point breach the contract is insufficient grounds for suspension of performance. The intrinsic uncertainty of future events, however, also makes certainty an unacceptable standard, and so a valid degree of likelihood must be defined. A high degree of likelihood is sufficient to protect the interests of all parties,¹⁸ but this degree need not be insurmountably high.¹⁹

Again, this rather vague term must be determined along the lines of the “reasonable person” test, which relies more on objective, common-sense analysis than on the parties’ subjective intentions (Article 8(2)). This analysis is necessary since subjective fears and premonitions do not constitute a rational background for planning decisions, and therefore cannot by themselves be sufficient grounds for a legitimate suspension of performance.²⁰

also for avoidance.

18. CLOUT Case No. 238 [Oberster Gerichtshof, Austria, 12 Feb. 1998].

19. BRUNNER, *supra* note 14, at art. 71 n.13; Rainer Hornung, *Anticipatory Breach and Installment Contracts (Arts. 71-73)*, in COMMENTARY ON THE UN-CONVENTION ON INTERNATIONAL SALES OF GOODS (CISG) 701-44 n.17 *et seq.* (Peter Schlechtriem & Ingeborg Schwenzer eds., 2d ed. 2005).

20. Hornung, *supra* note 19.

C. Article 71(1) in Practice

A non-breaching party must be able to make an informed, reasonable decision as to whether to suspend its contracted performance. Should a court find a suspension of performance improper, the suspending party can be held liable for damages resulting from the suspension (see Part V.B).

The CISG text enumerates the possible grounds for suspension in broad terms. These are ultimately tied to the factual situation and the conduct of the breaching party. Factual reasons for the suspension of the contract include deficiencies in the breaching party's ability to fulfil the contract, as well as deficiencies in that party's credit-worthiness (Article 71(1)(a)). Deficiency in the ability to fulfil the contract may result from strikes, a drop in production due to fire or some other catastrophic event, or legal or political impediments, such as an embargo.²¹ Deficiencies in a party's credit-worthiness can manifest themselves in insolvency proceedings against the party. Non-fulfillment of earlier contracts can be sufficient grounds for suspension, but mere delay in incremental performance under an instalment contract²² is not, unless the non-fulfillment of an instalment results in a fundamental breach.²³ In general, a court or tribunal may only consider a party's credit-worthiness when payment by the principal creditor appears to be at risk.²⁴

Article 71(1)(b) gives a party the right to suspend performance if the other party's performance or preparations to perform indicate that that party will not be able to perform a substantial part of its obligations (e.g., if a debtor provides insufficient or inappropriate evidence of resources, licences, or means for fulfillment).²⁵

1. Judgments and Awards: Sufficient Grounds for Suspension

Jurisprudence in numerous countries includes examples in support of a contract party's suspension of performance.

In a case before the Landgericht (Upper District Court) Berlin (Germany), the court upheld the buyer's suspension of payment because the seller had

21. The right to suspend performance also applies in cases falling under Article 79 CISG. See BRUNNER, *supra* note 14, at art. 71 nn.11 & 15.

22. CLOUT Case No. 238 [Oberster Gerichtshof, Austria, 12 Feb. 1998].

23. Zürich Chamber of Commerce, Switzerland, Award No. ZHK 273/95, 31 May 1996.

24. BRUNNER, *supra* note 14, at art. 71 n.16.

25. *Id.* at n.17.

refused to deliver certain items.²⁶ The Oberlandesgericht (Provincial Supreme Court) Hamm (Germany) upheld another buyer's suspension of payment where the buyer's failure to receive the goods was due to their sudden unavailability.²⁷ The seller was unable to show that the goods had gone missing before the transfer of risk.

The Supreme Court of Austria has held that a seller may suspend delivery in response to a buyer's non-compliance with its duty to issue a letter of credit.²⁸ Because this refusal touches on the buyer's obligation to pay the purchase price (Article 54), the seller may rely on Article 61 *et seq.* In this case, however, the failure to issue the letter of credit was caused by the seller himself, who failed to provide the necessary information as agreed, and so the consequences of Article 80 applied as well. The seller could not suspend his obligations under the contract since he was ultimately responsible for the other party's failure to provide the letter of credit.

In an arbitral award rendered by the Hungarian Chamber of Commerce and Industry Court of Arbitration, the non-payment of instalments when due was deemed sufficient grounds for the suspension of the duty of subsequent performance.²⁹

In a case decided by the Rechtbank van Koophandel, Hasselt (Belgium),³⁰ a buyer ordered winter fashion goods from a seller. The buyer made a partial payment after delivery and placed a second order for summer clothing goods. The seller refused to deliver the second order. The buyer claimed damages resulting from the non-delivery. The court upheld the seller's suspension of performance, at least until the buyer performed its duty of payment with respect to the first delivery, which was already seven months overdue.³¹

2. *Judgments and Awards: Insufficient Grounds for Suspension*

Conversely, courts in many cases have held that a party was not entitled to suspend performance under Article 71(1).

In one 1992 case before the Oberlandesgericht Hamm, a buyer had ordered 200 tons of wrapped bacon. The seller later informed the buyer that

26. Landgericht Berlin, Germany, 15 Sept. 1994.

27. CLOUT Case No. 338 [Oberlandesgericht Hamm, Germany, 23 June 1998].

28. CLOUT Case No. 176 [Oberster Gerichtshof, Austria, 6 Feb. 1996].

29. CLOUT Case No. 164 [Arbitration Court of the Chamber of Commerce and Industry of Budapest, Hungary, Award No. Vb 94131, 5 Dec. 1995].

30. Rechtbank van Koophandel Hasselt, Belgium, 1 Mar. 1995.

31. *See also* Tribunal de Commerce de Bruxelles, Belgium, 13 Nov. 1992 (upholding the seller's right to suspend performance pending payment for the previous delivery).

the bacon would be delivered unwrapped. The buyer accepted this without objection. The buyer accepted four of the ten scheduled deliveries, but refused to take delivery of the last six, arguing that the bacon delivered by the seller was not packed according to hygienic standards and thus would not get through customs. Furthermore, the court held in the same case that a failure to comply with respect to supplying a small part of the goods (here, 420 kg of the contracted 22,400 kg) is not sufficient ground to suspend performance, since it cannot be considered a substantial part of the obligations.³² Article 71(1) provides parties to a sales contract the right to suspend performance before shipment and delivery of the goods. Neither party may suspend its performance upon the buyer's receipt of the goods.³³

As mentioned at Part I.B above, one prerequisite for the applicability of Article 71(1) is reciprocity between the performance to be suspended and the claims asserted against the breaching party.³⁴ In a case where the buyer was unable to show a synallagmatic or contractual link between non-conforming deliveries and non-payment, the Hof van Beroep, Gent (Belgium), denied the buyer the right to suspend performance under Article 71(1).³⁵

In other cases, it was the seller who has tried to suspend performance. In one case, the Supreme Court of Austria was presented with the question of when a serious deficiency exists in the ability to perform in cases of lack or loss of creditworthiness under Article 71(1)(a). The Court found a serious deficiency in creditworthiness in light of insolvency proceedings or the seizure of payments or delivery. Late payments alone were not considered sufficient. The withdrawal of a transfer order was likewise insufficient to establish the party's insolvency with a degree of likelihood high enough to satisfy Article 71(1). The company's alleged substantial financial deterioration since the conclusion of the contract was held to be a national law issue to be addressed at a later stage of the proceedings.³⁶

In another case before the Rechtbank's-Hertogenbosch, Netherlands,³⁷ a seller refused delivery of dairy products, but was unable to demonstrate the

32. CLOUT Case No. 227 [Oberlandesgericht Hamm, Germany, 22 Sept. 1992].

33. Court of Arbitration of the International Chamber of Commerce, Award No. 9187, June 1999.

34. Hof van Beroep Gent, Belgium, 26 Apr. 2000; Oberlandesgericht Dresden, Germany, 27 Dec. 1999; CLOUT Case No. 275 [Oberlandesgericht Düsseldorf, Germany, 24 Apr. 1997].

35. Hof van Beroep Gent, Belgium, 26 Apr. 2000; *see also* Oberlandesgericht Dresden, Germany, 27 Dec. 1999.

36. CLOUT Case No. 238 [Oberster Gerichtshof (Supreme Court), Austria, 12 Feb. 1998].

37. Rechtbank's-Hertogenbosch, Netherlands, 2 Oct. 1998 (Malaysia Dairy Industries Pte. Ltd. v. Dairex Holland BV).

buyer's unwillingness to perform a substantial part of its obligations. Thus, the court held that the seller was not entitled to suspend performance.

D. Time of Knowledge by the Party Entitled to Suspend

The non-breaching party is entitled to suspend the contract as soon as it becomes apparent that the other party will not fulfil a substantial part of his obligations, but he can only rely on those instances that became apparent after the conclusion of the contract.

Each contractual party is obliged to gather enough information on the other party in order to reasonably determine whether the other party is physically and/or financially capable of performance. However, a party cannot be expected to consider every possible issue in detail. The distances involved in international trade and transport make detailed fact-finding between parties very expensive and difficult. While more complex transactions, such as joint ventures, are preceded by extensive investigations, parties to a sale rarely have the funds or time to conduct in-depth research. A party's degree of knowledge of the other party must be considered in light of the specific contract and the connected facts and their context.

III. STOPPAGE IN TRANSIT

A. Article 71(2) in the Context of Sales Law and the Trade Environment

Under Article 71(2), a seller may prevent the transfer of goods from the carrier to the buyer in the event of an anticipatory breach by the buyer, even if the goods have already been shipped. This right corresponds to the pre-CISG legal principle of "stoppage in transit." Stoppage in transit is a right possessed solely by the seller, and it is effective only between the seller and the buyer. The rights and obligations of the seller (and shipper in the context of the contract of carriage) towards the carrier are unaffected by Article 71(2). The CISG only addresses the permissibility of a conveyance, not the possibility thereof. Article 71(2) merely confirms that a seller is not in breach of a sales contract when, under the circumstances listed in Article 71, he prevents the carrier from handing over the purchased goods to the buyer at destination. Whether and under what conditions the seller is able to enforce that right in the context of international trade, transportation or insolvency, is not addressed here; these determinations depend on the principles governing other fields of law (e.g., property law, transportation law, insolvency law) within the framework applicable under the pertinent conflict-of-laws rules.

It is worth noting that the seller is entitled to exercise the right of stoppage in transit *even if* the documents of title or ownership have already been transferred to the buyer.

B. Aspects of the Principle of Stoppage in Transit

As of this writing, there is no case law concerning Article 71(2). Its relation to the potential obstacles mentioned above—possession, documents of title, and the lack of binding effect against carriers and subcontractors—has yet to be defined in practice. The most significant questions regarding stoppage in transit may arise not in connection with sales law, but out of the various areas of crossover between sales law and other fields of law that affect sales and transportation in a default or insolvency environment. It is in this capacity, within the full complexity of the international trade system, that Article 71(2) will truly be put to the test. The list of issues covers the following aspects:

- Under Article 71(2), the seller must have become aware of the buyer's anticipatory breach, pursuant to the elements listed in Article 71(1)(a) and (b), only **after the dispatch of the goods**. If the seller was aware of the likely breach before shipment, a court or tribunal is likely to deem him to have forfeited his Article 71(2) right of suspension, since he continued to perform in light of the buyer's likely non-performance. However, many cases are not so clear-cut in practice: some facts known before dispatch might have given sufficient reason to suspend performance pursuant to Article 71(1), but additional factors may come to light only after dispatch. Would the seller have forfeited his rights by performing and dispatching the goods, or would he be able to point to the new factors to show his lack of prior knowledge and thereby be allowed under the CISG to stop the goods in transit?
- Article 71(2) allows a seller to **prevent the "handing over"** of the goods to the buyer. "Handing over" in this sense is not the same as "handing over" in the sales law context of delivery³⁸ but rather refers to the transfer of possession under the contract of carriage (i.e., the delivery of the cargo to the consignee/receiver). In other words, Article 71(2) gives a seller the right to stop delivery in a window of time between the seller's "handing over" to the carrier (under sales law) and the carrier's "handing over" to the receiver/buyer (under the contract of carriage).

38. See, e.g., Article 31 CISG; FCA, FOB, CIF, CFR, CPT, CIP in INCOTERMS 2000: ICC OFFICIAL RULES FOR THE INTERPRETATION OF TRADE TERMS (ICC Publication No. 560, 1999).

- The question then arises of how to define when delivery has been effected in a given scenario. Under a CIF contract, for example, the seller appoints a carrier to deliver the goods to the consignee at a designated site; the seller then **delivers to a carrier appointed by the buyer**. The “named place” in INCOTERMS is usually not the place where the goods are physically “handed over” to the buyer, but a previous place in the logistical chain, where the seller’s shipping arrangements are completed and the arrangements are from that point on taken over by the buyer. Does CIF’s “named place” correspond to the place of the “handing over” in Article 71(2), or does Article 71(2) only apply upon delivery of the goods or cargo at the final destination? The latter possibility seems more plausible; otherwise, the place of “handing over” under Article 71(2) would overlap with the “handing over” designations in Article 31 and A4/B 4 INCOTERMS (FOB, FCA). Instead, the term must refer to the actual transfer of custody to the buyer at the final destination. If this final destination is a warehouse or a site controlled by a third party, however, the goods still would not technically have been delivered to the buyer. It is unclear at what point the rights conferred by Article 71(2) effectively cease to exist in this case. The outcome might very well coincide with the rules for goods sold and shipped on an FOB, FCA or FAS basis.
- Sales law traditionally provides for a **transfer of risk** from the seller to the buyer. In both the F- and the C-terms of INCOTERMS, as well as under Article 67, the risk passes from the seller to the buyer with the handing over of the goods to the first carrier/sea carrier (i.e., at the same time as the period, in which stoppage can be invoked, starts). This means that in all stoppage cases the risk will have been transferred to the buyer. Will the seller have to re-assume the risk once he invoked its rights under Article 71(2)? If yes, does this re-transfer of the risk back to the seller take place at the time of the invoking of the rights under Article 71(2), or will the initial transfer of risk be suspended in a case of stoppage, with the effect that the seller re-assumes full risk over the goods, as if no transfer had ever happened?
- The right of stoppage in transit exists even where the buyer holds **documents that entitle him to control over the goods**. Transportation law provides for numerous types of transport documents which enable the holder to exercise some control over the goods in transit³⁹ and, ultimately, entitle the holder to request delivery of the goods.⁴⁰ In the hands of a buyer, these

39. Bill of lading, sea waybill, air waybill, CMR consignment note.

40. This right is conferred to the bill of lading, or the negotiable transport document as referred to in the drafting project on a convention on the carriage of goods by sea currently prepared by Working Group III of UNCITRAL. See UNCITRAL, Working Group III (Transport Law), Transport Law: Draft

documents confer the power to control the goods and demand delivery of them at the destination, regardless of whether the purchase price has already been paid in accordance with the applicable sales law. Despite the fact that sales law provides a default rule of a delivery-against-payment⁴¹ or documents-against-payment, trade practices allow transport documents to reside with the buyer well before payment of the purchase price. In such situations, sales law, in the form of Article 71(2), might override the principle, accepted in trade, that such documents are the “key to the cargo” and in fact constitute—as such—control over the goods during transit and a “key” for their delivery of the goods at the destination to the rightful receiver.

- The right of stoppage in transit only arises once the goods have been dispatched (i.e., handed over to the carrier pursuant to Article 31). Upon dispatch, the seller discharges his contractual obligation to “deliver,” as the goods have been entrusted to the carrier for transportation to the buyer’s delivery destination. Therefore, the right of stoppage in transit is a right to suspend the performance of the contract despite its performance, or in other words, a **“suspension of performance after performance.”** Stoppage in transit nullifies the effect of the seller’s prior performance and treats the legal situation as if the seller had not yet performed the contract, albeit only where the dispatch itself constitutes performance under the sales contract.⁴² Where performance depends on the delivery of the goods only at the buyer’s premises (D-terms INCOTERMS 2000), the sales contract is not performed with the dispatch of the goods. It remains unclear whether stoppage after dispatch by the D-term-seller amounts to a stoppage in the sense of Article 71(2) or, rather, a general suspension of performance in the sense of Article 71(1). The answer to this question will determine the relevant point for knowledge of an anticipatory breach for suspension purposes.

- Depending on the applicable laws pertaining to transportation and property, the seller might be deemed to have relinquished control over the goods or cargo by means of the dispatch, which would therefore have **transferred possession to the buyer.** Under such a regime, the contract of carriage effectively empowers the buyer to dispose of the cargo during transit. This transfer of control usually requires a full set of transport documents (bills of lading, sea waybills, air waybills, CMR consignment notes) and will—in some circumstances—be transferred to the consignee once the carrier has

convention on the carriage of goods [wholly or partly] [by sea], U.N. Doc. A/CN.9/WG.III/WP.56 (28 Nov.-9 Dec. 2005).

41. See A1 and B1 in INCOTERMS 2000, *supra* note 38.

42. See Article 31 CISG; F- and C-terms in INCOTERMS 2000, *supra* note 38.

announced the goods' arrival to the consignee (i.e., the buyer). Because most legal regimes confer possession on the entity that effectively controls the goods, the seller's right of stoppage will, in most circumstances, be directed against the rightful possessor of the goods. In this respect, then, sales law conflicts with the principle of possession.

- Under principles of transportation law, the buyer will at some point acquire the **right to request delivery**. The consignee is exclusively vested of this right as soon as the legal prerequisites are met, and the shipper (scil. seller) has no recourse to prevent the consignee from exercising this right. The CISG, however, allows the seller—as a matter of sales law—to intercept the cargo before actual delivery to the buyer/consignee, even where the seller has lost control over the cargo and its delivery by the carrier to the buyer. Moreover, the right to request delivery—under the contract of carriage—is effectively a symbol of control over the cargo and therefore another factor that a court or tribunal could base its decision to acknowledge a transfer of possession to the buyer. Article 71(2) allows the seller to “reclaim” possession, even if the seller has in some way lost control and possession during the course of the transaction.

- In a contract of sale, the seller promises to transfer ownership of the purchased goods to the buyer. Sales law is silent, however, on the precise means by which ownership may be transferred. Various legal systems worldwide have devised different rules for the transfer of ownership: some place great weight on contractual clauses, while others require the use of documents of title or some other mechanism for the transfer of ownership, such as the transfer of possession (*traditio*).⁴³ In many cases, **ownership over the goods has been transferred to the buyer** well before delivery; hence, stoppage in transit under Article 71(2) would be directed against a party who has become the goods' rightful owner. How would Article 71(2) operate against the owner-buyer? Does it amount to an automatic nullification of the transfer of ownership, since the earlier transfer of ownership had been based on a transfer which has now been suspended by the stoppage in transit? Does the stoppage in transit trigger a sort of retrocession of ownership, or does ownership rest with the buyer while the goods are somehow retained by the seller like a pledged good or a lien?

- Insolvency proceedings might extend their effect to the cargo in transit. The **buyer's insolvency regime** might claim jurisdiction over such cargo.

43. See ALEXANDER VON ZIEGLER ET AL., *TRANSFER OF OWNERSHIP IN INTERNATIONAL TRADE* (1999).

Thereby the goods are used to satisfy the ultimate interests of the buyer's creditors and/or the buyer's receivership scheme. Which of the two will override the other: Article 71(2)'s right of stoppage or the insolvency scheme? A sales contract binds the insolvent buyer, and, thereby, the insolvency scheme. Thus the seller's rightful suspension of performance under Article 71(2) may retroactively restrict the claims raised by the insolvency scheme. In fact, however, different nation's insolvency laws may take a different view of the seller's rights during transit, and might not recognise the claim made by the seller to stop the goods before delivery to the buyer. As a result, the goods might in the end represent lost assets for the seller, leaving the seller to assume the role of a mere additional creditor (for the purchase price) in the insolvency proceedings against the buyer.

- The seller's right under Article 71(2) might also be in **conflict with other interests**: a carrier might want security for the freight, costs, and other expenditures it is likely to incur by complying with the seller's request to stop shipment. Can the carrier place and enforce a lien on the cargo? The goods might be resold by the buyer before they can be stopped in transit. What are the second buyer's rights? What if the goods are delivered not to the buyer in the strict sense, but to its independent business entity or joint venture partnership? What if tax or customs authorities are involved and are able to claim rights to the goods for some reason? What if creditors have received an interest in the cargo as security? Whose rights and interests will prevail?

Isolated and kept within its context, Article 71(2)'s right of stoppage in transit seems to be able in certain circumstances to secure the purchase price after the seller has performed his duty to dispatch the goods. The system of Article 71(2) recalls the basic principle of the synallagma of Article 58. Both parties' performance are subject to simultaneous performance: the goods are to be exchanged against payment. The seller can withhold delivery of the goods by the carrier to the buyer until payment of the purchase price (Article 58(2)). Thanks to the clarity of Article 71(2) in the mere scales context, it is no surprise to find a paucity of CISG-case law on the subject. This should not lead one to falsely assume that Article 71(2) is unproblematic. However, its problems arise in its co-existence with other legal principles affected by the exercise of such a right in practice. All of these interfaces lie outside of the scope of the CISG.

IV. TIME FRAME AND DURATION OF SUSPENSION OR STOPPAGE

The right to suspend a performance of contract or the right to stop goods in transit exists as soon as it becomes apparent that one of the parties will not

perform a substantial part of its obligations. As mentioned above, the exercise of this right is necessarily based on a prognosis of future events in light of the current situation and taking the breaching party's past behaviour into account.

While Article 71 offers rules on the grounds and prerequisites for suspending performance or stoppage in transit, it does not provide any guidelines on the time frame or duration of these rights.

A suspension of obligations or the stoppage in transit under Article 71 ends when:

- a) the breaching party fulfils its contractual obligations,⁴⁴
- b) the breaching party provides for adequate assurance (Article 71(3)),
- c) the grounds for the suspension of the contract cease to exist, or
- d) the party entitled to suspension pursuant to Article 71(1)⁴⁵ fulfils its own obligations.⁴⁶

The fact that performance by the party entitled to suspend nullifies its right to suspend leads to the conclusion that the period for such performance will depend on the type of contract. After a stoppage pursuant to Article 71(2) this new performance is the new delivery of the goods after their stoppage pursuant to the initial trade terms or pursuant to a new agreement with the buyer. For EXW and FAS contracts, this will be with the seller's placement of the goods at the disposal of the seller;⁴⁷ for FCA, FOB, CIF, CFR, CPT, CIP⁴⁸ and Article 31, it will be with the dispatch (i.e., with the handing over of the goods to the carrier in the form prescribed in the terms). For the D-terms, performance may be said to begin with the placement of the goods at the buyer's disposal at the destination.

A. Duration of Suspension

Article 71 does not provide for a maximum duration for the suspension of the performance of the contract. Article 71(3) gives the breaching party the chance to end suspension by providing adequate assurance of future

44. Court of Arbitration of the International Chamber of Commerce, Award No. 9448, July 1999.

45. Fulfillment of the seller's obligation often amounts to the dispatch of the goods. The seller's performance is therefore not a factor ending the right of stoppage under Article 71(2), but an actual preclusion of that right. If the seller later chooses to perform, despite its initial rights under Article 71(2), however, those rights would cease to exist.

46. CLOUT Case No. 432 [Landgericht Stendal, Germany, 12 Oct. 2000].

47. See EXW, FAS and A4 in INCOTERMS 2000, *supra* note 38. According to the Conclusion to EXW, the seller cannot refuse shipment of the goods under the principles of Article 71(1) after accepting control of the goods at his premises.

48. See A4, FRA, FOB, CIF, CFR, CPT, CIP in INCOTERMS 2000, *supra* note 41.

performance. The CISG contains no further “time limitation” on the possible duration of suspension (see Part IV.B). This is especially significant in light of the preliminary nature of Article 71 rights. Indeed, the Convention’s drafters rejected a suggestion introduced during the final negotiations to limit suspension to thirty days.⁴⁹ The absence of a time limit means that suspension might result in factual avoidance of the contract, although Article 71 does not offer a provision for the avoidance of a contract (see Part I.B).

B. Assurance as a Means of Ending Suspension (Article 71 (3))

The suspending party is obliged to fulfil its obligations and cease the suspension if the other party offers sufficient and adequate assurance, such as a bank guarantee, pledge or bond (Article 71(3)).⁵⁰ The assurance must be sufficient to offer security to the non-breaching party that its performance will not lead to detriment and damages. Thus, the assurance must cover the value of outstanding payments or goods, or the damages anticipated in connection with the anticipated breach of contract.

The breaching party is free to decide the form of assurance, but it must be prepared to offer real security by issuing the assurance; mere promises will not suffice. The suspension ceases to be viable only upon the creation of the security and not merely by its being offered.⁵¹ Should the breaching party refuse to create a security, the right to suspend performance is not automatically converted into a right to avoid the contract under Article 72. Though not conclusive in and of itself, the breaching party’s refusal serves to indicate the party’s intentions, and suggests a fundamental breach that could allow the avoidance of the contract under Article 72.⁵²

V. LEGAL EFFECTS

A. Rightful Suspension

Rightful suspension of performance under the CISG has no other consequence than that which the term literally entails: a suspension of

49. Hornung, *supra* note 19, at art. 71 n.23.

50. Arbitration Court of the Chamber of Commerce and Industry of Budapest, Hungary, Award No. Vb 94124, 17 Nov. 1995; CLOUT Case No. 130 [Oberlandesgericht Düsseldorf, Germany, 14 Jan. 1994].

51. BRUNNER, *supra* note 14, at art. 71 n.25.

52. CISG art. 45; BRUNNER, *supra* note 14, at art. 71 n.25.

contractual obligations,⁵³ nothing more. A rightful interruption of performance obligations by virtue of Article 71 is not itself a breach of contract,⁵⁴ and will not automatically lead to an avoidance of the contract. In and of itself, a lapse of time will not change the legal effects from an Article 71-situation to an Article 72-situation. However, what begins as an inconsequential failure to perform may mushroom into a fundamental breach over time, and thus offer a basis for the avoidance under the contract.⁵⁵ The prerequisites of Article 25 and, in cases of anticipatory breach, Article 72, must be met before a non-breaching party can rightfully avoid a contract. Thus, even though Article 71 is to some degree a preliminary measure, the absence of deadlines might give it indefinite effect in some cases.

B. Wrongful Suspension

A wrongful suspension can have a severe effect on the suspending party. In view of the CISG's principle of full compensation and the permanent availability of all remedies,⁵⁶ an abuse of the right of suspension or stoppage can lead to substantial liability as a breach of contract. Such a breach allows the party affected by the wrongful suspension or stoppage to avoid the contract, assuming the prerequisites of Article 72 are met. A wrongful suspension of performance is usually a clear sign that the non-suspending party has reason to think that the suspending party will fail to comply with the contract to an extent that amounts to a fundamental breach.⁵⁷ In other words, the party being faced with a wrongful suspension has been substantially deprived of its expectations under the contract (see Article 25).

VI. NOTICE

Before a party can suspend its contractual obligations, it must immediately notify the other party (Article 71(3)).⁵⁸ In a judgment dated

53. BRUNNER, *supra* note 14, at art. 71 n.21; Hornung, *supra* note 19, at art. 71 n.31.

54. CLOUT Case No. 432 [Landgericht Stendal, Germany, 12 Oct. 2000].

55. See CLOUT Case No. 130 [Oberlandesgericht Düsseldorf, Germany, 14 Jan. 1994] (discussing a party's request for adequate assurance and subsequent declaration that the contract was void).

56. Hans Stoll & Georg Gruber, *Analysis of Damages (Arts. 74-77)*, in COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 745-93 n.1 (Peter Schlechtriem & Ingeborg Schwenzer eds., 2d ed. 2005); BRUNNER, *supra* note 14, at art. 71 nn.2 & 8.

57. BRUNNER, *supra* note 14, at art. 71 n.22.

58. CLOUT Case No. 432 [Landgericht Stendal, Germany, 12 Oct. 2000]; CLOUT Case No. 51 [Amtsgericht Frankfurt a.M., Germany, 31 Jan. 1991].

15 September 1995, the Landgericht Berlin (Germany) held that a refusal to accept delivery, combined with the offer to return the goods, was sufficient notice for Article 71(3).⁵⁹ The provision only specifies the contents and explicitness of the communication, not the means of giving notice.⁶⁰ The latter is provided under Article 27.⁶¹

Article 27 considers notice effective upon dispatch rather than receipt,⁶² unless the parties have agreed otherwise (Article 6). The question remains, however, as to what means of communication are sufficient to meet the requirements of Article 27.

A. Article 27—Sufficient Means of Communication

Article 27 provides that any notice, request or other communication must be imparted as soon as possible and by means appropriate to the immediate circumstances (Article 71(3)).⁶³ Article 27 does not, however, offer clear-cut criteria as to what means of communication need to be used.

The form of the means of communication must be determined primarily on the basis of the contractual provisions (Articles 6 and 8)⁶⁴ and of the usage between the parties as regards communication (Article 9).⁶⁵ Lacking contractual specification of the means of communication, the intention of the parties and the overall circumstances and facts must be considered.⁶⁶ Adequate means of communication might include a phone call, fax or certified mail. The decision should be primarily based on the settings and provisions of the contract. The sender must take into account any additional factors that might affect notice. Certain means of communication may be excluded in special circumstances, such as strikes or faulty infrastructure.

The recipient's location and technical facilities must also be considered. E-mail is not an appropriate means of notifying an addressee in a country with unreliable or non-existent e-mail service. Similarly, a sender should use an

59. Landgericht Berlin, Germany, 15 Sept. 1994.

60. Non-payment is not considered to be sufficient notification to cause the contract to be suspended under the CISG. CLOUT Case No. 432 [Landgericht Stendal, Germany, 12 Oct. 2000].

61. Peter Schlechtriem *in* COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) art. 27 n.3 (Peter Schlechtriem & Ingeborg Schwenzer eds., 2d ed. 2005); BRUNNER, *supra* note 14, at art. 71 n.1.

62. CLOUT Case No. 362 [Oberlandesgericht Naumburg, Germany, 27 Apr. 1999].

63. CLOUT Case No. 51 [Amtsgericht Frankfurt a.M., Germany, 31 Jan. 1991].

64. Landgericht Stuttgart, Germany, 13 Aug. 1991.

65. CLOUT Case No. 132 [Oberlandesgericht Hamm, Germany, 8 Feb. 1995].

66. *Id.*

alternative means of communication, such as a messenger service, where the only other method (e.g., the national postal service) is known to be unreliable.⁶⁷ The sender must also respond to the immediate situation. If postal workers are on strike, the sender must choose another form of communication to avoid the risk of non-delivery. The main criterion for the sender is that the chosen means of communication be reasonable.⁶⁸

The sender must also consider the means of “sending.” It is not enough for the sender to simply prepare a notice in writing. The notice must be “sent on its way” and its receipt verified if possible. Sending a fax without checking the automatic notification of receipt would not constitute a valid transfer of the risk of non-delivery of the communication.⁶⁹ In cases where it becomes clear that the recipient did not receive the documents, the sender must react by re-sending the documents or using an alternative method of communication.

Article 27 addresses only the risk of transport and not the content of the notification. Even though the language of the notification is crucial for the understanding of notification by the counterparty, this issue is not dealt with in Article 27, as the language chosen does not affect service itself. Depending on the language chosen, the recipient might not understand notification, a possibility that is relevant to the validity and efficacy of notice in general, but not to the issue of risk of service (see Articles 8 and 9).⁷⁰

B. Legal Consequences of Effective or Ineffective Notice

Suspension takes effect upon due notice, provided the other prerequisites of Article 71 are fulfilled. Failure to give notice of suspension does not result in the loss of the party’s right to suspend a contract under the CISG, but it may lead to liability for the other party’s damages.⁷¹ The Amtsgericht (Lower District Court) Frankfurt-am-Main (Germany) held that the right of suspension could not be rightfully exercised without due notice. As a result, the plaintiff was obliged to indemnify the defendant for its loss of profit. As with wrongful suspension, insufficient notice results in the liability of the sender;

67. Schlechtriem, *supra* note 61, at art. 27 n.7.

68. *Id.*

69. CLOUT Case No. 409 [Landgericht Kassel, Germany, 15 Feb. 1996].

70. CLOUT Case No. 132 [Oberlandesgericht Hamm, Germany, 8 Feb. 1995]; see CLOUT Case No. 432 [Landgericht Stendal, Germany, 12 Oct. 2000] (where the Court held that the notification is a prerequisite to the suspension under the CISG, in this case the notification was dispatched to late).

71. LIU CHENGWEI, REMEDIES FOR NON-PERFORMANCE: PERSPECTIVES FROM CISG, UNIDROIT PRINCIPLES & PECL § 9.4 (2003), available at <http://www.cisg.law.pace.edu/cisg/biblio/chengwei.html>.

the sender then bears the burden of proof that the notice was sent in a timely and appropriate fashion.⁷² In other cases, courts have held that if the sender does not provide due notice, it loses its right to rely on Article 71.⁷³

72. BRUNNER, *supra* note 14, at art. 71 n.1; Amtsgericht Kehl, Germany, 6 Oct. 1995; CLOUT Case No. 362 [Oberlandesgericht Naumburg, Germany, 27 Apr. 1999].

73. CLOUT Case No. 432 [Landgericht Stendal, Germany, 12 Oct. 2000]; CLOUT Case No. 409 [Landgericht Kassel, Germany, 15 Feb. 1996] (holding that the buyer had lost its rights to rely on a breach of contract because it failed to give notice in accordance with Article 39).