



**RIGA
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A Legal and Economic Analysis of the Concept of Anticipatory Breach under the CISG

BACHELOR THESIS

AUTHOR: Seema Murtuza
LL.B 2020/2021 year student
Student number B018004

SUPERVISOR: Laura Ratniece
PhD

DECLARATION OF HONOUR:

I declare that this thesis is my own work, and that all references to, or quotations from, the work of others are fully and correctly cited.

(Signed)

RIGA, 2021

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ABSTRACT

Contractual remedies are traditionally available after the breach of a contract, but can a party suspecting non-performance prior to the date of performance entitled to seek for remedies? The United Nations Convention on the International Sale of Goods (CISG), regulates the doctrine of anticipatory breach in Articles 71-73, outlining the circumstances in which an anticipatory breach is deemed to occur and the remedies available to the aggrieved party. The Convention entitles the innocent party to the right to suspend or avoid but it contains unambiguous terms in need for interpretation. Additionally, the doctrine of anticipatory breach begs the questions of economic efficiency, a fundamental aim of the CISG. In that regard, this research paper uses a legal doctrinal and economic analysis of law to interpret Article 71-2 and determine whether it reduces the transaction cost of the parties.

Keywords: anticipatory breach, avoidance, CISG, transaction costs, suspension.

SUMMARY

The main interest of parties to a contract is the performance of the contract, however, breaches of inevitable and the aggrieved party must be entitled to the adequate remedies. Traditional remedies for breach of contract regulate the recourse of the innocent party after the date of performance has passed, however, should an innocent party be tied to a contract without any recourse to remedies when it is evident prior to the date of performance that the opposing party will default? Several issues of contract law arise from this question and it is regulated differently across different jurisdiction.

The CISG is a promulgation of international sales law, with the aim of promoting international trade by removing barriers and reducing transaction costs. It has its own unique regime for the regulation of anticipatory breach. Specifically, Article 71 and 72, outlines the innocent party's right to suspend performance or avoidance the contract depending on the circumstances. This thesis is based on the interpretation of Article 71-2 to clarify the circumstances under which these rights embodies therein can be exercised. Additionally, there will be an analysis of these provision from an economic perspective to determine whether they are in conformity with the aim of reducing transaction cost of the parties. In that regard this thesis will use the legal doctrinal and economic analysis of law methodologies. Relevant case law, scholarly literature and commentary, and official documents like the drafting history will be used to comprehensively interpret these provisions using the autonomous interpretation guidelines embodied in Article 7(1) of the CISG. Additionally, the theory of transaction costs will be used in conjunction with the general principles of the CISG for the economic analysis of law.

In that regards, this thesis consists of three Chapters. The first chapter will address the transaction cost reducing aims of the CISG embodied in its preamble and define the concept of transaction costs. The tools aimed of the CISG that facilitates its aims of reducing transaction costs are its autonomous interpretation and the general principles of the Convention, specifically the principles of, *favour contractus*, reasonableness and a fair balance of the interests of the parties. Thus, this chapter will include discussions on autonomous and uniform interpretation and will define the relevant principles and highlight how they reduce transaction costs of the parties.

The second chapter includes interpretation of the different element in Article 71-2, using legal doctrinal research. Scholarly literature and case law will be used to ascertain the meaning of terms such as "apparent", "substantial", "immediately" "clear", "if time allows", and "reasonable", among others. This chapter highlights that interpretation of these terms are conducted on a case-by-case basis using the objective evaluation of a reasonable person. Case law in this chapter also reflects that both 'apparent' and 'clear' require a high degree of prognosis that is not satisfied by mere suspicion. Finally, it is also clarified that there is a general duty to notify the defaulting before suspension or avoidance.

Lastly, the third chapter is interdisciplinary, and seeks to answer whether Article 71-2 reduce transaction costs by reflecting the aims outlined in Chapter 1. Additionally, this chapter also comments on whether, transaction costs are reduced through uniform, autonomous interpretation of Article 71-2. In that regards, the author concludes that interpretation of Articles 71 and 72 is conducted autonomously as courts do not recourse to domestic law

definitions to clarify the ambiguous terms therein. Rather courts define these terms on a case-by-case basis using the objective evaluation of a reasonable person. However, uniformity in court decisions was not evident as courts refrain from using foreign precedents in their judgements. Further, it was concluded that both Article 71 and 72 is economically viable and reduces the transaction cost of the party by reflecting the principles of *favour contractus*, reasonableness and fair balance of party interests.

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INTRODUCTION

Globalization has contributed to far-reaching integration of the global community, and today, contractual relationships can exist between nations at two different corners of the globe. These types of cross-border contracts are subject to greater uncertainty as markets are constantly fluctuating, causing the circumstances to change to the detriment of the contract. There may be changes in interest rates, amendment of legislations, strikes as well as death of key personnel that threaten the execution of contract, resulting in a contracting party repudiating the contract. When such circumstances occur, it is unreasonable to expect the innocent party to wait till the date of performance to seek remedies, and more prominently it would be inefficient to bind an innocent party to a fruitless contract. With these considerations in mind, the United Nations Convention on Contracts for the International Sale of Goods (hereinafter, Convention or CISG),¹ which aims to facilitate international trade via the reduction of transaction costs,² incorporated the Anglo-American doctrine of anticipatory breach.

The doctrine of anticipatory breach is included in Chapter V, Section I of the Convention and provides the innocent party with relief in the event of a future/fundamental breach by entitling them to either suspend performance in retaliation or avoid the contract altogether. The CISG is unique in its regulation of anticipatory breach as it distinguishes between the right to suspend and the right to avoid. The provisions under investigation in this thesis are drafted using many unambiguous terms, which require interpretation in order to determine when they can be invoked and what their implications are. Uniform and autonomous interpretation of these provision are vital in realizing the Convention's aim of reducing transaction cost of parties. Additionally, enabling pre-mature termination and suspension of contracts before an actual breach can conflict with the Convention's aims of promoting economic utility as parties may recourse to expensive remedies. Thus, the core of the problem addressed by this paper is the interpretation of Articles 71 and 72 to ascertain if they reflect the principles of the CISG that are aimed at reducing transaction costs and to establish whether they are interpreted uniformly and autonomous to promote legal certainty. While there is a plethora of scholarly discussions on the interpretation of Article 71 and 72 and the differences between them, there is a paucity of literature analyzing the economic implications of the doctrine of anticipatory breach for the transaction costs of the parties.

Thus, this paper is an analysis of Articles 71 and 72 of the CISG from an economic perspective. The research questions addressed in the paper are: 1) Is the interpretation of Articles 71-72 autonomous and uniform? 2) Do Articles 71 and 72 conform with the Convention's general principles aimed at reducing transaction cost?

The questions outlined will be research by employing a qualitative legal doctrinal research and interdisciplinary economic analysis of law using both primary and secondary sources. Doctrinal legal research refers to a 'research in law',³ conducted through the study of

¹ The United Nations Convention on Contracts for the International Sale of Goods, adopted in Venna 11th April 1980; entered into force in 1st January 1988 after its adoption in Vienna, 1980. Official text of the Convention is available at: <https://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf>, accessed 5th May 2020.

² Lisa Spagnolo, *CISG Exclusion and Legal Efficiency*, (Hague: Kluwer Law International, 2014), p. 48, accessed 3rd March 2021 at: <https://media.wolterskluwer.com/pdfs/TableOfContentPDF/6568.pdf>.

³ Khusal Vibute and Filipos Aynalem, "Legal Research Methods: Teaching Material," *Justice and Legal System Research Institute* (2009): p. 70.

laws, cases and scholarly materials as a whole. This method is adequate for establishing how the courts and scholars have interpreted Article 71-72 and although it is criticized for being ‘too provincial from an international perspective,’⁴ this thesis analyses case law and commentaries from different jurisdictions to provide a well-rounded and international perspective. Doctrinal research is also ideal for clarifying ambiguities in law by placing them in a logical context and describing their relationship with the other laws.⁵ This function of doctrinal research facilitates the interpretation of Articles 71 and 72 to ascertain their relationship with the context and aims of the CISG. In addition to doctrinal research, the methodology of economic analysis of law will also be employed in Chapter 3 of the thesis to determine the compliance of Articles 71 and 72 with the transaction cost reducing aims of the CISG. Although economic analysis of law is criticized for ignoring ‘justice’,⁶ justice is not the main aim of laws governing trade. Economic analysis “encourages the creation of legal rules that facilitate the maximization of society’s welfare”.⁷ Business persons want to maximize profits while minimizing costs, and these goals can be achieved by economically viable laws that facilitate contracting and reduce transaction costs by balancing the interest of the parties to the extent that lengthy negotiations can be avoided. Since, the CISG is aimed at promoting international trade by reducing costs associated with international contracting, an economic analysis of law is the appropriate method for determining if the anticipatory breach regime reduces the transaction costs of the parties.⁸

The paper has two aims: first, to gain a comprehensive insight into Article 71 and 72 of the CISG to determine if they are being interpreted in compliance with Article 7(1). Second, the paper seeks to analyze Article 71 and 72 from an economic perspective in order to establish whether they are reflecting the transaction cost reducing aims of the Convention. In that regard the objectives are to firstly, analyze the interpretative guidelines in Article 7(1) and the basic principles of the Convention to determine how they reduce transaction costs. The second objective is to discuss relevant scholarly writings and case law on Article 71 and 72 to ascertain how scholars and courts define ambiguous terms. The final objective is to critically examine Article 71 and 72 to establish whether they are interpreted to promote legal certainty and reduce transaction costs.

Despite the extensive body of scholarly discussions on the CISG, there is a paucity of literature that analyses the CISG from an economic perspective. As such, this paper aims to build on the existing literature by exploring the concept of anticipatory breach from an economic perspective, and determining its implications for contracting parties. However, this paper owing to the constraint of length will limit its analyses to standard contracts. Installment contract are excluded from the scope of the paper. Additionally, since the aim is to compare

⁴ Jan M. Smits, “What is Legal Doctrine? On the Aims and Methods of Legal-Dogmatic Method,” in *Rethinking Legal Scholarship: A Transatlantic Dialogue*, ed. R van Gestel, H Micklitz & El Rubin (New York: Cambridge University Press, 2017): pp. 207-228, Maastricht European Private Law Institute Working Paper No. 2015/06: p. 4. Accessed electronically on 4th May 2021 at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2644088.

⁵ Paul Chynoweth, “Legal Research,” in *Advanced Research Methods in the Built Environment*, eds. Andrew Knight and Les Ruddock (UK: Wiley-Blackwell, 2008): p. 29.

⁶ Richard A. Posner, *Economic Analysis of Law*, 6th edition, (New York: Aspen Publishers, 2003): p.27.

⁷ Jason N.E. Varuhas, “Law and Economics: Net Benefit or Deadweight Loss,” *New Zealand Business Law Quarterly* 12 (2006): p. 293.

⁸ Louis Kaplow and Steven Shavell, “Economic Analysis of Law,” in *Handbook of Public Economics* vol. 3, 1st edn, eds. Alan Auerbach and Martin Feldstein (North Holland: Elsevier, 2002). Accessed 4th May at: http://www.law.harvard.edu/programs/olin_center/papers/pdf/251.pdf.

interpret and analyze the right to suspend and the right to avoid, Article 71(2) regulating the seller's right to stop goods in transit will not be discussed in this paper because it has no comparable counterpart in Article 72.

This thesis consists of three chapters. The first chapter is devoted to an introduction into Article 7 and the general principles of the CISG to establish how these tools reduce the transaction costs of the parties. In the second chapter there will be a discussion of Article 71 and 72 of the CISG, and the terms therein will be interpreted by virtue of qualitative doctrinal research that uses scholarly writing, legal commentaries and case law. Lastly, in the third chapter, there will be an economic analysis of Article 71 and 72 from an interdisciplinary perspective using the concept of transaction costs. In the final chapter, Articles 71 and 72 will be analyzed from an economic perspective to determine if the general principles outlined in Chapter is reflected in these provisions and to determine if court interpret them autonomously and uniformly to promote legal certainty. The thesis ends with a conclusion outlining the answers to the research questions posed.

CHAPTER 1 – UNDERLYING PRINCIPLES OF THE CISG: A MECHANISM TO MINIMIZE TRANSACTION COSTS

The CISG is a product of the second wave of globalisation that was initiated after the second World War and is still on-going. Post-World War two, the world witnessed a surge in international trade,⁹ bringing along with it novel legal concerns of private international law unaddressed at that time. The CISG is a result of over a decade of work conducted by the United Nations Commission on International Trade Law (UNCITRAL), to create a uniform sales law with a common frame of reference.¹⁰ In an attempt to harmonise the laws applicable to international sale of goods, and after the failure of the CISG's predecessors, the Uniform Law on the Formation of Contracts for the International Sale of Goods ("ULF")¹¹ and the Uniform Law for the International Sale of goods ("ULIS"),¹² the UNCITRAL embarked on the journey to the CISG. The CISG amalgamates common law and civil law traditions and is unique for creating an instrument spearheaded by the aim of reducing transaction costs.

While the drafters did not make explicit reference to the economic aims of reducing transaction cost during every stage of the process, these aims were apparent from the beginning. When the UNCITRAL initiated the review of ULIS and ULF to create what would ultimately be the CISG, the Secretary General highlighted the economic purpose of this exercise by stating that:

the unification process is desirable *per se* only when there is an economic need and when unifying measures would have a beneficial effect on the development of international trade.¹³

The transaction cost reducing aim of the CISG can also be derived from its preamble. The preamble of the CISG, *inter alia*, states that:

(...) the adoption of uniform rules which govern contracts for the international sale of goods (...) would contribute to the removal of legal barriers in international trade and promote the development of international trade.

Before delving into the discussion on mechanism used by the CISG to reduce transaction costs of the parties it is crucial to define the concept of transaction costs and clarify what it means for laws to facilitate the reduction of transaction costs. Transaction cost is a concept first introduced by Noble-prize winning economist, Professor Ronald Coase in his paper "The Nature of the Firm" in 1937. Coase describes transaction costs as the 'cost of using the pricing

⁹ Our World in Data. Trade and Globalisation, available on: <https://ourworldindata.org/trade-and-globalization#trade-from-a-historical-perspective>. Accessed 3rd March 2021.

¹⁰ John O. Honnold, *Documentary History of the Uniform Law for International Sales* (Deventer: Kluwer, 1989): p.1.

¹¹ Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods, adopted at The Hague on 1st July 1964, official text available at: <https://www.unidroit.org/instruments/international-sales/international-sales-ulfc-1964-en>, accessed 5th May 2021.

¹² *Convention relating to a Uniform Law on the International Sale of goods*, adopted at Hague on 1st July 1964 entered into force in 1972, now replaced by the CISG, official text available at: <https://www.unidroit.org/instruments/international-sales/international-sales-ulis-1964>, accessed on 14th October 2020.

¹³ United Nations The General Assemble Official Records, *Report of the Secretary-General*, 21st session, Annex 3 (Agenda Item 88), UN Doc A/6396, in UNCITRAL Yearbook Vol I.

mechanism', i.e. the market.¹⁴ These costs include production costs, costs associated with negotiating, concluding and monitoring contracts as well as the cost of enforcing the contract.¹⁵ Examples of transaction costs are the time, money, legal fees and resources spend negotiating, monitoring and enforcing a contract.

Coase theorem presents the idea of costless contracting aimed at removing or minimizing transaction costs.¹⁶ High transaction costs in cross-border contracts such as lengthy discussions on applicable law, and the need to negotiate all the possible contingencies make these contracts more expensive.¹⁷ International transacting can be facilitated if *ex ante* transaction costs at the drafting and negotiating stage are reduced.¹⁸ Coase proposes that legal allocation of rights will be redundant in the wake of party autonomy unless they are representative of the parties' will and reduce their transaction costs.¹⁹ This is because unless transaction costs are zero parties will exercise their party autonomy to negotiate the transaction cost reducing outcome.²⁰ Hence, in situations where an agreement is difficult to attain (like in international transactions) in order to be effective, laws must reduce transaction cost of the parties and reflect their interests.

The reference made to 'uniform rules' and 'removal of legal barriers' in the preamble expresses the transaction costs reducing aims of the CISG. This is because uniform rules increase legal certainty of the parties and reduce transaction costs associated with negotiating applicable law and jurisdictional clauses.²¹ Additionally removing legal barriers enhances contracting in international trade by eliminating legal costs as such: linguistic, informational, and investigation costs that are incurred by a party that have to familiarize themselves with foreign laws. These costs the expansion of trade and business beyond borders.

Furthermore, aims of the CISG also include promoting 'equality and mutual benefit' in the promotion of trade.²² Equality and mutual benefit refers to balancing the interest of the buyer and seller to ensure that the Convention does not favour one at the expense of the other; hence one party does not have to incur more costs than the other. A fair balance of the parties' interest is reflected in the neutral provisions of the CISG that safeguards the interest of both parties and does not grant undue discretion to either.²³ If the CISG is acceptable for both the parties, it will reduce transaction costs as they will not make efforts to opt out of the Convention by virtue of Article 6.

¹⁴ Ronald H. Coase, "The Nature of the Firm," *Economica* 4, no. 16 (1937): p. 390.

¹⁵ *Ibid*; Donald A. Wittman, *Economic Foundations of Law and Organization* (Cambridge: Cambridge University Press, 2006): p. 34.

¹⁶ Donald A. Wittman, *Economic Foundations of Law and Organization* (Cambridge: Cambridge University Press, 2006): p. 34.

¹⁷ Gilles Cuniberti, "Is the CISG Benefiting Anybody?," *Vanderbilt Journal of Transnational Law* 29 (2006): p. 1515, available at: https://www.academia.edu/18493432/Is_the_CISG_Benefiting_Anybody. Accessed 3rd March 2021; Ebel Berghuis and Frank A.G den Butter, "The transaction costs perspective on international supply chain management; evidence from case studies in the manufacturing industry in the Netherlands," *International Review of Applied Economics* 31, no. 3 (2017), accessed 3rd March 2021, doi.org/10.1080/02692171.2017.1324409.

¹⁸ Spagnolo, *supra* note 2, p. 28.

¹⁹ Ronald H. Coase, "The Problem of Social Cost," *Journal of Law and Economics* 3 (1960):pp. 4-6, accessed 5th May 2021 at: <https://www.law.uchicago.edu/files/file/coase-problem.pdf>.

²⁰ *Ibid*.

²¹ Ingeborg H. Schwenzer and Peter Schlechtriem, *Commentary on the UN Convention on the International Sale of Goods (CISG)*, 4th ed. (Oxford: Oxford University Press, 2016): p. 6.

²² Preamble, CISG.

²³ Schwenzer, *supra* note 21, p. 106 §11.

However, the Convention will be unsuccessful if it does not reduce transaction costs and promote legal certainty through autonomous and uniform interpretation. These interpretative guidelines outlined in Article 7 and how they reduce transaction costs will be discussed in the proceeding chapter. Additionally, it is recognised that there are opinions,²⁴ proposing that the interpretation of the CISG must be in-line with the guidelines set in the 1969 Vienna Convention on the Law of Treaties.²⁵ However, even if the guidelines of the VCLT, specifically Article 31(2) was used, and the preamble of the CISG was used to interpret the Convention,²⁶ a similar conclusion could be reached as the preamble of the CISG also makes references to the aim of reducing transaction costs of the parties.

1.1 - CISG: an autonomous system

The interpretative requirements of the CISG outlined in Art. 7 promote the transaction cost reducing aims of the Convention. This is because, the CISG should be interpreted in isolation from interpretative norms of public international law outlined in the 1969 Vienna Convention of the Law of Treaties, which is only applicable with respect to Part IV of the Convention.²⁷ All other rights and duties of the parties outlined in the convention is to be interpreted using the *lex specialis* interpretative norms embodied in Article 7 of the CISG.²⁸ This section will analyse how interpretative requirements in Article 7(1) reduces the transaction costs of the parties.

Article 7 (1) sets the tone for the general interpretation of the Convention's text by stating that regards must be given to 1) its international character, 2) uniformity in the application of the Convention and 3) observance of good faith in international trade law. The first criterion eliminates the *homeward trend* because international character presupposes an *autonomous* interpretation that is free from nationalistic influences of domestic law.²⁹ Homeward trend refers to the 'natural' tendency of courts and lawyers trained in a specific jurisdiction to resort to their domestic law for the interpretation of the CISG, this practice is explicitly barred under the CISG.³⁰ Barring the homeward trend enhances legal certainty and

²⁴ Marianna Roth and Richard Happ, "Interpretation of the CISG According to Principles of International Law," *International Trade and Business Law Annual* 4 (1995): pp.11. Available at Hein Online.

²⁵ Vienna Convention on the law of Treaties, adopted in Vienna 23 May 1969, entered into force, 27 January 1980. Official text of the convention available at: https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf, accessed 7th April 2021.

²⁶ *Ibid.*, p.14 §2.

²⁷ Paul Volken, "The Vienna Convention: Scope, Interpretation, and Gap-filling," in *International Sale of Goods: Dubrovnik Lectures*, eds. Petar Sarcevic and Paul Volken (New York: Oceana, 1986): p. 38. Accessed 5th May 2021 at: <https://iicl.law.pace.edu/cisg/scholarly-writings/vienna-convention-scope-interpretation-and-gap-filling>.

²⁸ *Ibid.*

²⁹ Philip Hackney, "Is the United Nations Convention on the International Sale of Goods Achieving Uniformity?" *Louisiana Law Review* 61(2) (2001) pp. 475, 482, accessed 8th April 2021 at: <https://digitalcommons.law.lsu.edu/lalrev/vol61/iss2/7/>; Franco Ferrari, "Applying the CISG in a Truly Uniform Manner: *Tribunale di Vigevano* (Italy)," *Uniform Law Review/ Revue de Droit Unifrome* 1 (2001) p. 203, accessed 7th April 2021, available at: <https://198.105.44.141/cisg/biblio/ferrari4.html>.

³⁰ Shani Salama, "Pragmatic Responses to Interpretative Impediments: Article 7 of the CISG, an Inter-American Application," *University of Miami Inter-American Law Review* 38 (1) (2006): 231, accessed 7th April 2021, available at: <https://repository.law.miami.edu/cgi/viewcontent.cgi?article=1083&context=umialr>; Diesel tram case, *BV BA G-2 v. AS, C.B.*, A/00/00665, 25th April 2001, Rechtbank Van Koophandel [Belgian District Court], translation available at: <https://iicl.law.pace.edu/cisg/case/belgium-april-25-2001-rechtbank-van-koophandel-district-court-bv-ba-g-2-v-cb-translation> accessed, 8th April, 2021; Materials for bullet proof vests case, 4505, 2009, Polimeles Protodikio [Greek Multi-member Court of First Instance], accessed on 8th April 2021 at:

reduces transaction costs of the parties as it prevents them from being subject to foreign, potentially unfavourable provisions in domestic laws.

The second criterion is an admonition for courts using the CISG to follow international precedents set forth by foreign courts.³¹ Having a uniform application globally, removes the problems associated with jurisdiction, because regardless of the forum, foreign precedent can be used and relied on, making it less likely for parties to be affected by unique interpretations of the Convention. This eliminates the problem of forum shopping, as every jurisdiction must interpret the Convention uniformly taking into consideration the jurisprudence in other contracting states. This practice is specifically evident in the Italian court judgements of the *Sheets of vulcanized rubber used in manufacture of shoe soles (Shoe soles)* and *Porcelain tableware* case, as the court referred to about forty different foreign judgements and awards in its decision.³²

The final criterion embodied in Art. 7(1) is the adherence to the principle of good faith in international law while interpreting the Convention. There are conflicting positions on the role of good faith in the Convention. Some scholars propose that good faith is an interpretative tool for courts and tribunals interpreting the Convention and does not affect the conduct of the parties.³³ This position is derived drafting history of the Convention which highlights that application of good faith to the behaviours of the parties is excluded due to the ‘statesman like compromise’ between the civil and common law legal systems as an attempt reconcile the difference in the application and implication of good-faith obligations in their respective jurisdictions.³⁴ This view was also upheld by *ICC Arbitration Case No. 861*, where the tribunal held that no obligation for the parties may be derived from the need to promote good faith.³⁵

<https://iicl.law.pace.edu/cisg/case/greece-2009-polimeles-protodikio-multi-member-court-first-instance>; *MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostino S.p.A.*, 97-4250, June 29th 1998, [US Circuit Court], accessed 8th April 2021, available at: <https://iicl.law.pace.edu/cisg/case/united-states-june-29-1998-circuit-court-mcc-marble-ceramic-center-inc-v-ceramica-nuova>; *St. Paul Insurance Co. v. Neuromed Medical Systems*, OO Civ. 934 (SHS), 26th March 2002, [New York District Court], accessed on 8th April 2021, available at: <https://iicl.law.pace.edu/cisg/case/united-states-march-26-2002-district-court-st-paul-guardian-insurance-company-and>.

³¹ *Sheets of vulcanized rubber used in manufacture of shoe soles (Shoe soles) case*, *Rheinland Versicherungen v. Atlarex S.r.l. and Allianz Subalpina S.p.A.*, 405, July 12th 2000, Tribunale de Vigrvano [Italian District Court], translation available at: <https://iicl.law.pace.edu/cisg/case/italy-july-12-2000-tribunale-district-court-rheinland-versicherungen-v-atlarex-srl-and>, accessed 8th April 2021. The Italian court in this case based its decision on the case law from Germany, Austria, the Netherlands, US, France and Switzerland to promote uniformity.

³² *Ibid*; Alexander S. Komarov, “Internationality, Uniformity and Observance of Good Faith in Interpretation of CISG: Some Remark on Article 7(1),” *Journal of Commerce* 25 (75) (2005): p. 81. Accessed 5th May 2021 at: <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/komarov.pdf>; *Porcelain tableware case*, *Al Palazzo S.r.l.v. Bernardaud di Limoges S.A.*, 3065, November 26th 2002, [Italian District Court], accessed 5th May 2021 at: <https://iicl.law.pace.edu/cisg/case/italy-november-26-2002-tribunale-district-court-al-palazzo-srl-v-bernardaud-di-limoges-sa>.

³³ Stefan Kröll, Loukas A. Mistelis and Pilar P. Viscasillas, *UN Convention on Contracts for the International Sale of Goods (CISG): Commentary*, 1st edn. (München: Beck/Hart, 2011): “Article 7 §24,”; Schwenger, *supra* note 21, p.128 §17.

³⁴ Edward Allan Fransworth, “The Eason-Weinmann Colloquium on International and comparative Law: Duties of Good Faith and Fair Dealing under the UNIDROIT Principles, Relevant International Conventions and National Laws,” *Tulane Journal of International and Comparative Law* 3 (1994): p. 55, available at Hein online.

³⁵ *Industrial equipment*, *ICC Arbitration Case No. 8611 of 1997*, 8611/Hv/JK, accessed 8th April 2021 at: <https://iicl.law.pace.edu/cisg/case/case-report-does-not-identify-parties-proceedings-3>.

However, there are other scholars that propose that good faith also governs the conduct of the party during the negotiation, conclusion and performance of the contract.³⁶ Case decisions also reinforce this position as in the *Equipment case*, the International Commercial Arbitration Court at the Russian Federation Chamber of Commerce and Industry (Russian Chamber of Commerce), decided that parties to a contract had an obligation to act in good faith, which was violated when the buyer failed to communicate to the seller difficulties that will impede performance.³⁷ More prominently, in the *Candies and Sweets* case the Mexican Commission for the Protection of Foreign Trade states that Article 7 also imposes an obligation for the parties to behave in accordance with good faith, which was breached by the buyer when they acted in bad faith by lying about the country specific legal restrictions to produce a non-conforming letter of credit.³⁸ Additionally, case law also categorises the obligation to inform about standard clauses as a good faith obligation.³⁹ These case decisions highlight that there is both scholarly opinion and case law extending the obligation to observe good faith in Article 7(1) to governing the conduct of the parties. This emerging practice, although contrary to the drafting history, is in line with the dynamic interpretation of the Convention to accommodate the changes in international commerce.⁴⁰ However, it must be considered that all the case decisions extending the scope of good faith come from civil law jurisdictions, and owing to the prominence of this doctrine in the civil law legal system, this practice could be attributed to the homeward trend.⁴¹

Nonetheless, the Convention's official records clarify that the obligation of good faith is enshrined in the entire Convention and is sometimes a pre-requisite to exercise other rights guarantee in the Convention.⁴² The official commentary makes reference to examples such as right of the seller to remedy a non-conformity, the duty to preserve (Article 85), non-

³⁶ Gary F. Bell, "How the fact of Accepting Good Faith as a General Principle of the CISG Will Bring More Uniformity," *Cornell Review of the CISG* (2005-06): 3-22 at p. 18, accessed 5th May 2021 at: <https://iicl.law.pace.edu/cisg/bibliography/bell-gary-f-4>; Fritz Enderlein and Dietrich Maskow, *International Sales Law: United Nations Convention on Contracts for the International Sale of Goods: Convention on the Limitation Period in the International Sale of Goods: Commentary* (New York: Oceana, 1992): p. 56, accessed 5th May at: https://iicl.law.pace.edu/sites/default/files/bibliography/fritz_enderlein_dietrich_maskow.pdf.

³⁷ *Equipment case*, 96/1998, November 24 1998, The International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, accessed 5th May at: <https://iicl.law.pace.edu/cisg/case/russian-federation-november-24-1998-translation-available>.

³⁸ *Candies and Sweets case*, Dulces Luisi, S.A. de C.V. v. Seoul International Co. Ltd. Y Seoulia Confectionery Co. M/115/97, November 30th 1998, Comisión para la Protección del Comercio Exterior de México [Mexican Commission for the Protection of Foreign Trade], accessed 5th May at: <https://iicl.law.pace.edu/cisg/case/mexico-november-30-1998-dulces-luisi-sa-de-cv-v-seoul-international-co-ltd-y-seoulia>.

³⁹ *Machinery case*, VII ZR 60/01, 31st October 2001, Bundesgerichtshof [Federal Supreme Court], accessed 5th May at: <https://iicl.law.pace.edu/cisg/case/germany-bger-bundesgerichtshof-federal-supreme-court-german-case-citations-do-not-ident-29>.

⁴⁰ Kröll/Mistelis/Viscasillas, *supra* note 33, Article 7 §26.

⁴¹ Michael Bridge, "Good Faith, the Common Law, and the CISG," *Uniform Law Review* 22 (1) (2017):p. 98, accessed 5th May, <https://doi.org/10.1093/ulr/unw059>.

⁴² Disa Sim, "The Scope and Application of Good Faith in the Vienna Convention on Contracts for the International Sale of Goods," LL.M diss., (Harvard Law School, 2001), accessed 8th April 2021, at: https://iicl.law.pace.edu/sites/default/files/cisg_files/sim1.html#int; United Nations. *Commentary on the Draft Convention on Contract for the International Sale of Goods prepared by the Secretariat* ("Secretariat Commentary"), A/CONF.97/5, p. 17-18, accessed 8th April, available at: <http://www.cisg-online.ch/index.cfm?pageID=644#Article%207>.

revocability of an offer (Article 16 (2)(b), duty to co-operate (Article 80), among other things.⁴³ Thus, this shows the conduct of the parties can indirectly be governed by the principle of good faith. The observance of good faith by the parties, reduce transaction costs of the parties, because the overarching theme in the examples outlines above is that it aims to reduce transaction cost of the parties by encouraging behaviours that reduce costs and balance the interest of parties by promoting reasonable behaviour.

Thus, for the purposes of this paper, uniformity and international character of the judgements will be the criteria used to analyse case law. The obligation of good faith will be invoked only with respect to the conduct of the parties, to discuss the rights and obligations it gives rise to. Alongside, uniformity and autonomy of the CISG, general principles also guide the interpretation of the Convention. These principles and their implications on the transaction costs of the parties will be discussed in the proceeding section

1.2 – Gap-filling through General Principles – Article 7(2)

The CISG, owing to the large number of contracting parties, is lauded for being one of the most successful legislation in international private law; it is a symbol of diplomatic agreement between civil and common law countries following over a decade of negotiation. However, the CISG is reflective only of the knowledge, experience and problems in international contracting up until 1980. Article 7(2) plays a gap-filling role in the Convention to address interpretations of issues not explicitly governed by the Convention, it is also a formula put in place to ensure the Convention can evolve to fit the emerging needs instead of becoming obsolete in the wake of new developments.⁴⁴ The Convention categorises gaps into two categories: internal and external, it is the former that is of interest for the purposes of this paper.⁴⁵ Internal gaps are those which are within the sphere of the Convention but not deliberately governed by it, and such gaps must be filled by recourse to the general principles on which the Convention is based.⁴⁶ *Only* in the absence of general principles regulating an issue qualifies it as an external gaps, which can be filled by recourse to applicable law rules.⁴⁷

The general principles are used to fill internal gaps in the Convention to ensure uniformity, and are often referred to as the ‘spirit of the CISG’,⁴⁸ because they provide great insight into the fundamental cornerstones of the Convention. These principles reduce transaction costs of the parties that is why Chapter 3 will analyse if the anticipatory breach regime of the Convention is reflective of them. As such a discussion on the general principles of the Convention under Art.7(2) is warranted and while there are many principles embedded

⁴³ *Ibid.*, *Secretariat Commentary*.

⁴⁴ Schwenger, *supra* note 21, p. 133 §28.

⁴⁵ External gaps are outside the scope of the Convention and are governed by the conflict of law rules of the forum.

⁴⁶ CISG, Article 7(2).

⁴⁷ Mark N. Rosenberg, “The Vienna Convention: Uniformity in Interpretation for Gap-Filling – An Analysis and Application,” *Australian Business Law review* 20 (1992): 450, accessed 8th April 2021 at: <https://iicl.law.pace.edu/cisg/bibliography/vienna-convention-uniformity-interpretation-gap-filling-analysis-and-application>.

⁴⁸ Camilla Baasch Andersen, “General Principles of the CISG – Generally Impenetrable?” in *Sharing International Commercial Law across National Boundaries: Festschrift for Albert H. Kritzer on the Occasion of his Eightieth Birthday*, ed. Camilla B. Andersen and Ulrich G Schroeter (Wildy: Simmons & Hill Publishing 2008): 26, accessed 8th April 2021 at: https://iicl.law.pace.edu/sites/default/files/cisg_files/andersen6.html#28.

into the CISG,⁴⁹ the principle of *favour contractus*,⁵⁰ balance of party interests,⁵¹ and reasonability is relevant for the discussion in this paper.

First, *favour contractus* means in favour of the contract and refers to the Convention's attempt at preserving the contract by enabling termination as an *ultima ratio* remedy.⁵² The Convention has strict prerequisites for avoiding the contract,⁵³ this promotes economic utility because termination results in economic loss due to the immense amount of time and money invested in international contracts.⁵⁴ Additionally, storage and reshipment costs associated with re-establishing the status quo also makes avoidance of international contracts expensive.⁵⁵ Thus, this principle *favour contractus* promotes efficiency and reduces transaction costs as avoidance of international contract increase costs of the parties, and if granted frequently, would deter parties to engage in international trade.

Second, there is a general principle of balancing the interest of the parties in the Convention. The CISG provisions are neutral and fairly deal with the parties to a contract. Although this principle is not identified in UNCITRAL's case digest, its presence is derived from the content of several different provisions and is further reinforced by statement of States during the drafting procedure,⁵⁶ writings of scholars,⁵⁷ and advisory opinions from the CISG's

⁴⁹ United Nations Commission on International Trade Law. *Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods (2016)*, (UNCITRAL digest 2016) accessed 8th April 2021, available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/cisg_digest_2016.pdf. General principles of the CISG outlined in the 2016 UNCITRAL digest are: party autonomy; good faith; privity of contract, estoppel; place of payment of monetary obligations; currency of payment; burden of proof; full compensation; informality; dispatch of communications; mitigation of damages; binding usages; set-off; right to withhold performance and the principle of simultaneous exchange of performances; right to interest; costs of one's own obligations; changed circumstances and right to renegotiate; and *favour contractus*.

⁵⁰ *Ibid.*; Frozen meat case, 4C.179/1998, 28th October 1998, Schweizerisches Bundesgericht Fédéral (Swiss Federal Supreme Court), §2 b accessed 8th April 2021, available at: <https://iicl.law.pace.edu/cisg/case/switzerland-october-28-1998-bundesgericht-federal-supreme-court-ek-1-und-v-f-translation>.

⁵¹ CISG-Advisory Council Opinion No. 21, *Delivery of Substitute and Repair under the CISG* (4th February 2020), §3.6, accessed 8th April 2021, available at: <http://cisgac.com/opinion-no-21-Delivery%20of%20Substitute%20Goods%20and%20Repair%20under%20the%20CISG/>.

⁵² Ulrich Magnus, "General Principles of UN-Sales Law," *Max-Planck - Institute for foreign and international Private Law Rabels Zeitschrift for foreign and international Private Law Hein Kötz in honour of his 60th Birthday*, 59 (3-4) (1995), accessed 11th April 2021, at: <https://iicl.law.pace.edu/cisg/scholarly-writings/general-principles-un-sales-law>.

⁵³ André Janssen, and Olaf Meyer, *CISG Methodology*, (München: Sellier European Law Publishers GmbH, 2009) p.274, accessed April 11, 2021 on ProQuest Ebook Central.

⁵⁴ Bertram Keller, "Favor Contractus Reading the CIG in Favor of the Contract," in *Sharing International Commercial Law across National Boundaries: Festschrift for Albert H. Kritzer on the Occasion of his Eightieth Birthday*, ed. Camilla B. Andersen and Ulrich G Schroeter (Wildy: Simmons & Hill Publishing 2008): 249, accessed 8th April 2021 at: <https://iicl.law.pace.edu/sites/default/files/bibliography/keller1.pdf>.

⁵⁵ Bzhar Abdullah Ahmed and Hassan Mustafa Hussien, "Avoidance of Contract as a Remedy under CISG and SGA: Comparative Analysis," *Journal of Law, Policy and Globalization* 61 (2017): 130, accessed 8th April 2021 at: <https://core.ac.uk/download/pdf/234651394.pdf>.

⁵⁶ UNCITRAL. Report of the Working Group, 1st session, A/CN.9/35/1970, in UNCITRAL yearbook [1968-70] Vol 1, §6, accessed 8th April at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/yb_1968_1970_e.pdf. Statement of Czech Republic: 'the smooth flow of international commerce depended in large part on the maintenance of a balance between sellers and buyers.'

⁵⁷ Ingeborg Schwenzer, "The CISG – A fair balance of the interests of the seller and the buyer," in *CISG and Latin America: regional and global perspectives*, eds. Ingeborg Schwenzer et al. (The Hague: Eleven International Publishing, 2016): 79-91, accessed 8th April 2021, at: <https://edoc.unibas.ch/42342/>; John O. Honnold, *Uniform Law for International Sales Under the 1980 United Nations Convention*, 3rd ed, (The Netherlands: Kluwer Law International, 1999): p. 76, accessed 8th April, at: <https://iicl.law.pace.edu/cisg/bibliography/honnold-john-o-us>

Advisory Council (AC),⁵⁸ who make explicit references to this principle. The interest of both parties is taken into consideration in the Convention to ensure post-contractual [*ex post*] efficiency by reducing transaction costs during performance. Predicted *ex post* costs influence the conclusion of the contract at the *ex-ante* stage,⁵⁹ and reduced *ex post* costs promotes international trade. An example of this fair balance of rights can be seen in Article 46 of the Convention which gives the Seller the right to repair non-conforming goods unless the non-conformity amounts to a fundamental breach, in which event, the Buyer can ask for substitute goods. These safeguards in the provisions ensure that no party is faced with high economic burdens while trading in the uncertain international environment.

Finally, the principle of reasonableness is a general principle of the CISG and is considered to be to a fundamental principle of the CISG.⁶⁰ There are references to this principle in thirty-seven provisions of the CISG.⁶¹ According to Van der Velden, reasonableness includes an ‘ethical standard’,⁶² Bonell refers it as ‘due diligence’⁶³ and Honnold states that reasonableness is closely tied to the normal and acceptable practice in the trade concerned.⁶⁴ Although, the Convention does not explicitly regulate reasonableness, recourse can be made to the definition in Article 8(2), which defines a reasonable person as a person of the same kind in similar circumstances. Article 8(2) does not define an abstract reasonable person, rather, recourse is made to the conduct and understanding of a diligent businessman with the relevant technical and trade knowledge as the parties to the contract.⁶⁵ The principle of reasonableness reduces the transaction cost of the parties as it can be read into every provision of the CISG, preventing recourse to domestic laws when ambiguities in interpretation occur.⁶⁶ Minimizing recourse to domestic law has the effect of reducing transaction costs as legal costs associated with learning a foreign law is removed and legal certainty is ensured.

With the interpretative guidelines and general principles of the CISG is clarified, an analysis Article 71-72 can be conducted. The proceeding chapter will include a comprehensive analysis of the elements in Article 71-72 of the Convention.

7; Michael Bridge, “Avoidance for Fundamental Breach of Contract under the UN Convention on the International Sale of Goods,” *International and Comparative Law Quarterly* 59 (4) (2010): 911-940, <https://doi.org/10.1017/S0020589310000473>.

⁵⁸CISG-Advisory Council Opinion No. 18, *Set-off under the CISG* (2nd February 2018), §1.3, accessed 8th April 2021, available at <http://www.cisgac.com/opinion-no-18/>; supra 23 [A-C opinion 21] §3.52.

⁵⁹ Spagnolo, *supra* note 2, p. 28.

⁶⁰ CISG-Advisory Council Opinion No. 17, *Limitation and Exclusion Clauses in CISG Contracts* (16th October 2015), §1.10, accessed 8th April 2021, available at <http://cisgac.com/opinion-17/>; Peter Schlechtriem, *Uniform Sales Law: The UN Convention on Contracts for the International Sale of Goods* (Vienna: Manz, 1986): 1-120, accessed 8th April 2021 at: <https://iicl.law.pace.edu/cisg/bibliography/schlechtriem-peter-germany-104>.

⁶¹ CISG Pace Law Database. Overview on Reasonableness, accessed 8th April 2021, at: <https://iicl.law.pace.edu/cisg/page/reasonableness>.

⁶² Frans J.A. Van der Velden, “The Law of International Sales: The Hague Conventions 1964 and the UNCITRAL Uniform Sales Code 1980.” in *Hague-Zagreb Essays Five: On the Law of International Trade*, ed. J.A Wade and C.C.A., (Voskuil, Dordrecht, Martinus Nijhoff Publishers, 1985).

⁶³ Michael Joachim Bonell, “Article 7: Interpretation, Gap-filling,” in: *Bianca-Bonell Commentary on the international sales law: the 1980 Vienna Sales Convention*, eds Massimo Bianca and Michael Jochim (Guiffre: Milan, 1987): p. 82, accessed 5th March 2021 at: <https://iicl.law.pace.edu/cisg/scholarly-writings/comments-article-7-bianca-bonell-commentary> .

⁶⁴ Honnold, *supra* note 57, p.101.

⁶⁵ Franco Ferrari, "Interpretation of Statements and Conduct under the Convention for the Internationale Sale of Goods (CISG) in the Light of Case Law," *International Business Law Journal* 2003, no. 1 (2003):p. 98.

⁶⁶ Overview on Reasonableness, *supra* note, 61.

CHAPTER 2 – THE ANTICIPATORY BREACH REGIME OF THE CISG

The doctrine of anticipatory breach refers to right of a party to seek remedy for breach of executory contracts, prior to the date of performance when it is evident implicitly or explicitly that will be non-performance. This doctrine can be traced backed to 18523, England in the *Hochster v. De La Tour*, 2 El. & Bl. 678 case where it was decided that a party can sue for breaches prior to the date of performance if actions of the other party makes it evident that they will not be able to satisfy performance.⁶⁷ This Anglo-American doctrine originates in English common law and is foreign to civil law legal system.⁶⁸ Nonetheless, it is included in the CISG to protect the genuine interests of an innocent party.

Contract law is the law of reciprocal promises which results in breach when the promisor fails to perform on the day when performance is due. This poses no problems in domestic contract as both parties due to their proximity are able to perform simultaneously. However, in international transactions, simultaneous performance is not usually possible owing to the distance between the parties. In many cases, performance is initiated before receiving the counter-performance. This is the case when a seller buys raw materials or prepares shipping and payment documents before receiving the payment. As such, the doctrine of anticipatory breach deals with issues arising in non-simultaneous performance to put the parties in a position such as the one where performance would be concurrent.⁶⁹ This brings stability in international trade as it prevents unjust enrichment.

That is why, alongside remedies for traditional contract breaches, the CISG also includes remedies for anticipatory breach. These remedies are available to both parties and are embodied in Section V, Articles 71-73 of the Convention. Article 71 deals with an imminent breach, Article 72 deals with an imminent fundamental breach and Article 73 regulates anticipatory breach for instalment contracts. Instalment contracts and the laws applicable to them lay outside the scope of this paper and it is Article 71-72 that are of interest to the discussion in this paper. Under the Convention the innocent party has access to the remedy of suspending their performance or avoiding the contract, depending on the circumstances. However, these remedies seem to be counterintuitive to the aims of the Convention which are to reduce transaction costs, improve certainty and preserve contracts. Hence, this chapter will study Article 71-2 to ascertain how they are interpreted by courts and scholars. The interpretation in this chapter will be used as a frame of reference while discussing the effect of Article 71- 2 on the transaction costs of the parties in Chapter 3.

⁶⁷ Colin P. Campbell, "The Doctrine of Anticipatory Breach," *Central Law Journal* 60, (1905): p. 64, accessed 12th April on Hien Online.

⁶⁸ M. Gilbey Strub, "The Convention on the International Sale of Goods: Anticipatory Repudiation Provisions and Developing Countries," *International and Comparative Law Quarterly* 38 (3) (1989): p. 477, accessed 5th May 2021 at: https://www.jstor.org/stable/759686?seq=1#metadata_info_tab_contents.

⁶⁹ Alexander von Ziegler, "The Right of Suspension and Stoppage in Transit (and Notification Thereof)," *Journal of Law and Commerce* 25 (2005-06): p. 355 (353-374), accessed 5th May 2021 at: <https://iicl.law.pace.edu/cisg/scholarly-writings/right-suspension-and-stoppage-transit-and-notification-thereof#20>.

2.1– Suspension of performance – Article 71

Article 71 is the introductory article in chapter V, section I of the Convention and it deals with the parties' *right to suspend performance* in the event of an *apparent* future breach. The provision also lists examples of situations when suspension will be possible and includes a duty to notify. There are several ambiguous elements in this Article that require further clarification. For instance, the meaning of 'suspend', 'apparent', or 'immediate' is not elaborated qualitatively or quantitatively in the Convention. Thus, this section will analyse the right to suspend performance, the circumstances justifying its invocation and its legal consequences.

2.1.1 Right to suspend: what and when?

The right to suspend is the right of an innocent party to pause their obligations under the contract when there is a suspicion that the other party will default; suspension of performance is not considered a breach of the contract.⁷⁰ Suspension does not nullify the contract, but merely puts a pause to it. There is a broad scope of obligations that can be suspended and innocent party does not have to suspend synallagmatic obligations, rather acts in preparation of performance,⁷¹ as well as primary and ancillary obligations can be suspended. Examples of acts in preparation for performance that can be suspended are the obligations to procure goods, establish a letter of credit or make shipping arrangements. Example of primary obligations that can be suspended are the obligation to deliver goods (Articles 31-34) or pay prices (Articles 54-59),⁷² and examples of ancillary duties that can be suspended are the duty to deliver substitute goods (Article 46) when the buyer's ability to pay is in doubt,⁷³ the duty to provide information to facilitate manufacture or information regarding port and time of delivery.⁷⁴ Since the right to suspend is not limited to reciprocal obligations, this shows that there is a wide scope of obligation that can be suspended by an innocent party. This is highlighted in the *Waste containers* case where Hungarian Chamber of Commerce and Industry Court of Arbitration decided that seller was entitled to refuse repair defects when the buyer's ability to pay is in doubt.⁷⁵ This broad scope provides flexibility and is desirable because it enables the innocent party to motivate performance by suspending the obligation which will be of most interest to the defaulting party.

With respect to when the right to suspend can be invoked, there is a general consensus that Article 71 regulates breaches prior to the performance date, but there are opinions that it also has a gap filling role pursuant to Article 7(2). According to the Advisory Council of the CISG, Article 71 establishes a general principle of withholding performance until proper

⁷⁰ Enderlein/Maskow, *supra* note 36, p. 284; Granite Rock case, 22 S 234/94, 12 October 2000, Landgericht Stendal [German Regional Court], accessed 5th May at: <https://iicl.law.pace.edu/cisg/case/germany-lg-aachen-lg-landgericht-district-court-german-case-citations-do-not-identify-190>.

⁷¹ Strub, *supra* note 68; von Ziegler, *supra* note 69; Schwenger *supra* note 21, p. 1007.

⁷² Honnold, *supra* note 57, p. 427.

⁷³ Enderlein/Maskow, *supra* note 36, p. 284.

⁷⁴ Kröll/Mistelis/Viscasillas, *supra* note 33, Article 71 §30.

⁷⁵ Waste Containers case, Vb 94131, 5th December 1995, Arbitration Court of the Hungarian chamber of Commerce and Industry, accessed 5th May at: <https://iicl.law.pace.edu/cisg/case/hungary-december-5-1995-translation-available>.

performance is enforced;⁷⁶ this is in-line with the theory of simultaneous performance. This interpretation is also reflected in the 2005 Austrian court of second instance in the *Recycling machine* case and the Polish Supreme Court judgement in the *Shoe Leather* case where Article 71 was applied indirectly as a general principle to an executed contract entitling the buyer to withhold payment until there was substitute delivery.⁷⁷ This extends the right to withhold performance as a remedy for contract breaches, in addition to the right to: avoid (Article 25), request substitute delivery (Article 46) and request damages (Articles 74-6). Extending the right to suspend by considering it to be a general principle of the CISG overly broadens the scope of this provision. Under the CISG suspension is not available as a remedy for breach of executed contracts, it is only available as a remedy for anticipatory breach of executory contracts. As such, the interpretation supplemented above creates new rights and obligations and may conflict with the requirements of uniform interpretation in Article 7.⁷⁸ Thus, it is submitted that the application of the remedies for anticipatory breach be limited to executory contracts only. Thus, as established, the right to suspend is a right that entitles an innocent party to pause their obligations for breaches of contract prior to the date of performance. The proceeding section will discuss the pre-requisites for invoking this right.

2.1.2 Pre-conditions to suspend

In order to rightfully suspend obligations, the innocent party must establish that: 1) a *substantial* part of the obligation will not be performed *and* 2) non-performance is a result of the circumstances outlined in subparagraph (a) and (b) of Article 71. Both the requirements are cumulative and must be met in order to suspend performance.

First, the right to suspend is available when the anticipated breach affects a *substantial* part of the obligation under the contract. There is no definition of a *substantial* part of obligations in the Convention, though, scholars define ‘substantial’ as significant primary obligations under the contract, not including minor secondary obligations.⁷⁹ This interpretation is supported by the German court of appeal in the *Frozen bacon* case where it was found that non-conformity in 420 kg of frozen bacon from the total of 22,400 kg is ‘only a minor part’ and could not be considered to be a ‘substantial part of the obligation.’⁸⁰ Similarly, the Swiss cantonal court’s judgment in the *Machine* case established that the Buyer could suspend its obligations if the seller postponed delivery because postponing showed an inability to deliver

⁷⁶ CISG-Advisory Council Opinion No. 5, *The buyer’s right to avoid the contract in case of non-conforming goods or documents* (7th May 2005), §4.19, accessed 5th May 2021 at: http://www.cisgac.com/file/repository/CISG_Advisory_Council_Opinion_No_5.pdf.

⁷⁷Leather to manufacture shoes case, Spoldzielnia Pracy "A" in N. v. GmbH & Co. KG in B., V CSK 456/06, 11th May 2007, Polish Supreme Court [Trail Court], accessed 5th May at: <https://iicl.law.pace.edu/cisg/case/poland-may-11-2007-supreme-court-trial-court-spoldzielnia-pracy-n-v-gmbh-co-kg-b>; Recycling Machine case, 4 Ob 179/05k, 8th November 2005, Oberster Gerichtshof [Austrian Supreme Court], accessed 5th May 2021 at: <https://iicl.law.pace.edu/cisg/case/austria-november-8-2005-oberster-gerichtshof-supreme-court-austrian-case-citations-do-not>.

⁷⁸ See chapter 3 for in depth discussion.

⁷⁹ von Ziegler, *supra* note 69, p. 358.

⁸⁰ Frozen bacon case, 19 U 97/91, 22nd September 1992, Hamm Oberlandesgericht [German Court of Appeal], accessed 5th May 2020 at: <https://iicl.law.pace.edu/cisg/case/germany-oberlandesgericht-hamburg-oberlandesgericht-olg-provincial-court-appeal-german-25>.

on time.⁸¹ Hence, in this case the requirement of timely delivery was essential and considered to be a substantial obligation, the breach of which entitled the innocent party to suspend. This shows that there is no concrete test for the determination of a substantial obligation.

Generally, the determination of a substantial breach must be done on a case-by-case basis,⁸² and the analysis must consider the: whole contract, underlying intent, and expectations of the party, using the objective and reasonable standards of Article 8. Deploying the interpretative methods of Article 8 precludes the subjective assessment of the creditor, rather, the interpretation of an objective and reasonable person, familiar with the relevant trade will be prioritised.⁸³ Thus, there is no requirement for the obligation at risk to be equivalent to the obligation suspended, rather what is relevant is whether the importance of an obligation can be objectively determined.⁸⁴ A breach of a duty to ensure confidentiality can be a substantial breach using an objective assessment.⁸⁵ Thus, a substantial breach is determined using the standard of a reasonable person and can include secondary and ancillary obligations as well.

Additionally, there must be a synallagmatic and legal connection between the right at risk and the right suspended. As established by the decision of the German court of appeal in its 1999 *Chemical Products case* there must be a mutual and reciprocal relationship between the obligation suspended and the counter-performance.⁸⁶ Additionally, as reiterated by the Belgian appellate court in its *Plastic bags case*, there must be a ‘legal connection’ and ‘sufficient mutual interdependence of agreements’.⁸⁷ This means that a party cannot suspend performance for a breach that is not arising out of their contractual relationship. This is shown by the German court of appeal’s judgment in the *Printed works case*, where it was decided that the seller could not use the buyer’s inability to open a letter of credit as a ground for suspension because it was not required contractually.⁸⁸ In the same vein, suspension cannot be invoked for obligations that cannot be legally connected to a party, this includes the actions of sister companies, as well. Thus, if the sister company sends in defective goods this doesn’t allow the innocent party to suspend acceptance and payment for goods coming in from the main company.⁸⁹ Finally, suspension must be ‘mutual’ and ‘proportionate’ to the obligation at risk.⁹⁰ The requirement of mutuality and proportionality of the right suspended as the right at risk was established by the German Court of Appeal in the *Shoes (Italy v Germany)* judgement, where

⁸¹ Machine Case, Proz, Nr. 433/02, 10th March 2003, Appenzell Kantonsgericht [Swiss Canton Court], accessed 5th May 2021 at: <https://iicl.law.pace.edu/cisg/case/switzerland-march-10-2003-kantonsgericht-canton-court-translation-available>.

⁸² Kröll/Mistelis/Viscasillas, *supra* note 33, Article 71 §5; von Ziegler, *supra* note 69, p. 358.

⁸³ Von Ziegler, *supra* note 69, p.359.

⁸⁴ Schwenger, *supra* note 21, p. 10007 §12.

⁸⁵ Kröll/Mistelis/Viscasillas, *supra* note 33, art 71 §8; Schwenger, *supra* note 21, p. 1007 §12.

⁸⁶ Chemical products case, 2 U 2723/99, 27th December 1999, Dresden Oberlandesgericht [German Court of Appeal], accessed 5th May 2021 at: <https://iicl.law.pace.edu/cisg/case/germany-december-27-1999-oberlandesgericht-court-appeal-german-case-citations-do-not>.

⁸⁷ Plastic bags case, *BV BA. J.P. v. S. Ltd.*, 1997/AR/2235, 26th April 2000, Ghent Hof Van Beroep [Belgian Appellate Court] accessed 5th May 2021 at: <https://iicl.law.pace.edu/cisg/case/belgium-april-26-2000-hof-van-beroep-appellate-court-bv-ba-jp-v-s-ltd-translation>.

⁸⁸ Printed work case, 16 U 106/12, 24th April 2013, Köln Oberlandesgericht [German Court of Appeal], accessed 5th May on: <https://iicl.law.pace.edu/cisg/case/germany-oberlandesgericht-hamburg-oberlandesgericht-olg-provincial-court-appeal-german-87>.

⁸⁹ Plastic bags case, *supra* note 87.

⁹⁰ Shoes case (*France v Germany*), 17 U 136/03, 20th July 2004, Oberlandesgericht Karlsruhe [German court of appeal] accessed 5th May 2021 at: <https://iicl.law.pace.edu/cisg/case/germany-oberlandesgericht-hamburg-oberlandesgericht-olg-provincial-court-appeal-german-148>.

the buyer was unable to suspend complete payment with respect to partial delivery, and they were only entitled to suspend payment with respect to the outstanding delivery.⁹¹ As such, before suspending performance, the innocent party must ensure that the right being suspended and the right at risk have a legal connection, i.e. has been contractually agreed upon or can be derived from pre-contractual negotiations, and that the obligation suspended is proportionate to the obligation at risk.

Second, the Convention lists circumstances when the innocent party will have a right to suspend and outlines: 1) serious deficiency in the *ability* to perform or lack of *creditworthiness* in Article 71(1)(a) and 2) conduct while performing the contract in Article 71(1)(b). With regards to the ability to perform and creditworthiness in Article 71(1)(a), some scholars state that the deficiency in the ability to perform concerns the seller strictly while the latter concerns the buyer,⁹² however, other scholars argue that both parts of Article 71(1)(a) can be applied equally to both parties.⁹³ It is the latter view that is more persuasive as a seller's creditworthiness can affect their ability to perform, and a creditworthy buyer may be unable to perform due to external factors. The seller's inability to perform can result from strikes in factories,⁹⁴ official notices, export prohibitions and trade embargos,⁹⁵ whereas their lack of creditworthiness can be established if they are unable to purchase raw materials from suppliers to manufacture goods. For the buyer, inability to perform can result from situations such as the inability to arrange shipment, insurance, or letter of credit.⁹⁶ A buyer's lack of creditworthiness can be established if they have gone bankrupt, or fallen back on payments to the seller with respect to other contracts.⁹⁷ There is also a wide interpretation of creditworthiness advanced by Enderlein & Maskow, which proposes that a deterioration in the economic situation of the guarantor also qualifies the seller to suspend performance under the ambit of this provision.⁹⁸

Article 71(1)(b) refers to the *conduct* while performing the contract. Undoubtedly the conduct of the parties is independent of their financial position,⁹⁹ and refers to actions such as obtaining: materials, licenses or permits.¹⁰⁰ However, there are disagreements regarding the interpretation of the term 'conduct', and scholars are divided between a restrictive and expansive interpretation. The restrictive interpretation follows the "directly related" theory and scholars in favour of this interpretation state that the conduct in performance of the *current*

⁹¹ Ibid; Shoes case (*Italy v Germany*), 6 U 87/96, 24th April 1997, Düsseldorf Oberlandesgericht [German Court of Appeal, accessed 5th May 2021 <https://iicl.law.pace.edu/cisg/case/germany-oberlandesgericht-hamburg-oberlandesgericht-olg-provincial-court-appeal-german-202>].

⁹² Trevor Bennett, "Comments on Article 71," In *Bonell, Bianca-Bonell Commentary on the international sales law: the 1980 Vienna Sales Convention*, eds Massimo Bianca and Michael Joachim (Guiffre: Milan, 1987):510-20, (Bennett I) accessed 5th May at: <https://iicl.law.pace.edu/cisg/scholarly-writings/comments-article-71-bianca-bonell-commentary>.

⁹³ Enderlein/Maskow, *supra* note 36, p. 287.

⁹⁴ Bennett I, *supra* note 92, p. 523.

⁹⁵ Enderlein/Maskow, *supra* note 36, p.287.

⁹⁶ Pre-expander and block mould equipment for manufacture of polystyrene products case, *Masonville Plastics (B.C.) Ltd. V. Kurtz GmbH*, C993594, Supreme Court of British Columbia, accessed 6th May 2021 at: <https://iicl.law.pace.edu/cisg/case/canada-august-21-2003-supreme-court-british-columbia-mansonville-plastics-bc-ltd-v-kurtz>.

⁹⁷ Bennett I, *supra* note 92, p. 520.

⁹⁸ Enderlein/Maskow, *supra* note 36, p. 286.

⁹⁹ Enderlein/Maskow, *supra* note 36, p. 287.

¹⁰⁰ Kröll/Mistelis/Viscasillas, *supra* note 33, Article 71 §23.

contract is relevant,¹⁰¹ whereas the expansive interpretation extends the view that conduct can also include the fulfilment of other *similar* contracts.¹⁰² For instance, under the expansive interpretation, if a seller uses defective materials in the performance of similar contracts resulting in non-conformity based on quality then it would give the buyer the right to suspend performance.¹⁰³ The expansive interpretation is more in line with the spirit of the CISG as it does not forcefully tie a party to a contract that will inevitably be defaulted. However, courts interpret conduct to be those directly related to their obligation under the relevant contract.¹⁰⁴ This reduces the grounds on which the innocent party can rely on to suspend performance protecting the defaulting party.

Even if the grounds for suspension outlined in the preceding paragraphs are identified, the right cannot be exercised unless there is a *serious* deficiency in the ability to perform. The seriousness and the probability required for a potential breach will be discussed in the next section.

2.1.3 Standard of prognosis for suspension

As discussed above, Article 71 covers situations when it is ‘apparent’ that there will be a breach of the contract. But the Convention provides no definition for what *apparent* means. Scholars propose that apparent refers to a *high (real) likelihood* of breach.¹⁰⁵ This interpretation is supported by the *travaux préparatoires* of the CISG. The drafting history of the CISG shows that during the Vienna Diplomatic Conference, drafters intended on narrowing the grounds for suspension by amending the clause from ‘good grounds to conclude’ that a substantial breach will occur to ‘it becomes apparent’ that a substantial breach will occur.¹⁰⁶ This is because the earlier provision was criticised for being subjective and for the discretion it gives to the innocent party.¹⁰⁷ As such the drafters intended the clause to include an objective evaluation of a reasonable person,¹⁰⁸ precluding the ‘subjective fear’ of an overly anxious party. Thus, it is submitted that there must be more than mere suspicion for invoking the right to suspend.

Court practice corroborates this interpretation, because the Austrian Supreme Court in the *Umbrellas case*, held that a singular delay in payment was not sufficient to establish the required serious lack of creditworthiness, and also rejected the view that a cancellation of bank

¹⁰¹ Yinghao Yang, “Suspension Rules under Chinese Contract Law, the UCC and the CISG: some Comparative Perspectives,” *China Law & Practice* 18(7) (2004): 23-27, accessed 5th May at: <https://iicl.law.pace.edu/cisg/bibliography/suspension-rules-under-chinese-contract-law-ucc-and-cisg-some-comparative>.

¹⁰² Enderlein/Maskow, *supra* note 36, p. 287; Bennett I *supra* note 92, p.520.

¹⁰³ Enderlein/Maskow, *supra* note 36, p.287.

¹⁰⁴ Yang, *supra* note 101.

¹⁰⁵ Bennett I, *supra* note 92, p. 518; Enderlein/Maskow, *supra* note 36, p. 285; Kröll/Mistelis/Viscasillas, *supra* note 33, Art 71 §19.

¹⁰⁶ Legislative History of the 1980 Vienna Diplomatic Conference. *Summary Records of Meetings of the First Committee* (34th Meeting) §55, accessed 5th May on: https://iicl.law.pace.edu/sites/default/files/cisg_files/Meeting34.html.

¹⁰⁷ *Ibid.*

¹⁰⁸ Legislative History of the 1980 Vienna Diplomatic Conference. *Summary Records of Meetings of the First Committee* (27th Meeting) §10, accessed 14th April on: https://iicl.law.pace.edu/sites/default/files/cisg_files/Meeting27.html; Honnold, *supra* note 57, p. 430; von Ziegler *supra* note 69, p. 359.

payment order was sufficient to show that the buyer intended to fall back on its obligations.¹⁰⁹ This reinforces that minor interruptions in the contractual performance does not signal the breach of a substantial obligation under Article 71(1).

As soon as it is apparent that a substantial breach may occur, the innocent party is entitled to suspend performance. However, this right can only be validly relied on when the innocent party gained knowledge of their counterpart's inability to perform after the conclusion of the contract.¹¹⁰ If the innocent party had knowledge of the deficiency to perform prior to the conclusion of the contract, then they cannot rely on it for suspending their performance, and it is expected that they have willingly assumed the risk.¹¹¹ In that regard, even if the situation impeding performance existed before the conclusion of the contract, but only became apparent to the innocent party after the conclusion of the contract, they can validly rely on the right to suspend. Hence, what is determinative here is the time when the innocent party was made to know about the inability of their counter-part to perform. This is because a thorough examination and due diligence is expensive in international settings, and would be overly burdensome on the innocent party.¹¹² This does not, however, completely nullify the obligation to examine the creditworthiness of the other party prior to the conclusion of the contract.¹¹³ Parties are expected to conduct a basic examination of the circumstances of the other party, as would be conducted by a reasonable person.¹¹⁴ If an apparent weak economic situation existed at the time contract conclusion but was unknown to the innocent party due to their failure to examine and inquire, then they cannot invoke the right to suspend performance.¹¹⁵ This ensures that the right to suspend is not abused by an innocent party by using circumstances that were known or should have been known at the time of contract conclusion.

Nonetheless, the creditor is still entitled to their right of suspension for the further deterioration of a weak economic situation that existed and was known by the creditor at the time of contract conclusion.¹¹⁶ This was the stance of the Supreme Court of France in the *Perfume* case where it was decided that a seller aware of the buyer's insolvency was entitled to suspend performance, because the buyer's conduct in failing to pay at two different instances revealed a greater degree of economic difficulty than what was apparent prior to the conclusion of the contract.¹¹⁷ In any case, the decision to suspend performance must be followed by a notice of suspension, pursuant to Article 73(3). The next section discusses the duty to notify.

¹⁰⁹ Umbrellas case, 2 Ob 328/97t, Oberster Gerichtshof, 12th February 1998, [Austrian Supreme Court], accessed 5th May 2021 at: <https://icclaw.pace.edu/cisg/case/austria-ogh-oberster-gerichtshof-supreme-court-austrian-case-citations-do-not-generally-28>.

¹¹⁰ Enderlein/Maskow, *supra* note 36, p. 285.

¹¹¹ Kröll/Mistelis/Viscasillas, *supra* note 33, Article 71 §18.

¹¹² Legislative History of the 1980 Vienna Diplomatic Conference. *Summary Records of Meetings of the First Committee (26th Meeting)* p. 376 §64 [Statement of Mr. Vinding Kruse (Danish delegation)] (27 March 1980), accessed 5th May 2021 at: <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/a-conf-97-19-ocred-eng.pdf>; Von Ziegler *supra* note 69, p. 363.

¹¹³ *Ibid.*

¹¹⁴ Kröll/Mistelis/Viscasillas, *supra* note 33, Article 71 §17; Enderlein/Maskow, *supra* note 36, p.286.

¹¹⁵ Bennett I, *supra* note 92, p. 524.

¹¹⁶ Kickboard/Scoters case, 4C.94/2006, July 17th 2007, Bundesgericht [Swiss Federal Supreme Court], accessed 5th May 2021 at: <https://icclaw.pace.edu/cisg/case/switzerland-july-17-2007-bundesgericht-federal-supreme-court-translation-available>.

¹¹⁷ Perfume case, *Soci t  Mim v. Soci t  YSLP*, 356-FS-P+B, 20th February 2007, Cour De Cassation [French Supreme Court], accessed 5th May 2021 at: <https://icclaw.pace.edu/cisg/case/france-cour-de-cassation-supreme-court-soci%C3%A9t%C3%A9-mim%C3%A2%C2%85-v-soci%C3%A9t%C3%A9-yslp>.

2.1.4 Legal effect of suspension

The suspension of obligations by a party sets off two requirements. First, there is an *immediate* obligation to send a notice outlining the intention to suspend. Second, in the event of assurance, suspension must be ceased, pursuant to Article 71 (3).

Article 71(3) imposes an *immediate* duty to notify as soon as the intention to suspend has been established. This means that the notice must be sent ‘without any avoidable delay.’¹¹⁸ Various court decisions establish that, thirteen days,¹¹⁹ several months,¹²⁰ or three years,¹²¹ cannot be considered immediate. This shows that the time limit to send out the notification is short. The receipt of the suspension notification follows the mail-box rule enshrined in Article 27 of the Convention and as such, notice is effective on dispatch.¹²² With regards to the form and content of the notice, there is no criteria outlined in the Convention. However, it is desirable for the notice to include the grounds for suspension in order to enable adequate assurance by the offending party. The requirement to include the ground for suspension within the notice was also reiterated by the local court of Germany in the *Shoes case (Italy v Germany)* where the seller was obliged to send a notice informing the buyer of the intention to suspend as well as about ‘about any existing or arisen doubts’.¹²³ The duty to notify can also be satisfied implicitly. This is because, in the *Polystyrene products* case, the Supreme court of British Columbia decided that seller’s request for bank documentation and statement that timely shipping of goods and shipping arrangement were contingent of these documents, sufficed as a notice for suspension.¹²⁴ Furthermore, the appellate court of Belgium in the *Plastic bags* case held that a letter refusing to accept delivery of defective goods under a separate contract also sufficed.¹²⁵ This highlights that there is a duty for the innocent party to notify their intention to suspend the contract without any delay, either explicitly or implicitly.

While the nature and time-limits of a notice is clear, there are diverging opinions on the necessity to give a notice of suspension. Court decisions, require a notice of suspension as a pre-requisite for exercising the right of suspension and a failure to do so bars the creditor from suspending.¹²⁶ However, the prevailing view in literature is that a notice is not necessary to invoke suspension, and a lack of notice does not remove the right to suspend, but rather can be used as a ground for claiming damages by the debtor.¹²⁷ The view of the court is more persuasive in light of the aims of the CISG which is to preserve the contract and balance interests’ of the parties. This is because, the duty to notify informs the other party about the suspension, facilitating timely and speedy dialogue that can lead to resumption of duties.

¹¹⁸ Schwenger, *supra* note, 21, p. 1015.

¹¹⁹ Furniture case, 4 O 101/00, 29th May 2001, Darmstadt Landgericht [German Regional Court] accessed 5th May 2021 at: <https://iicl.law.pace.edu/cisg/case/germany-lg-aachen-lg-landgericht-district-court-german-case-citations-do-not-identify-42>.

¹²⁰ Plastic bag case, *supra* note 87.

¹²¹ Granite rock case, *supra* note 70.

¹²² Von Ziegler *supra* note 69, p. 371.

¹²³ Shoes case (Italy v Germany), *supra* note 91.

¹²⁴ Pre-expander and block mould equipment for manufacture of polystyrene products case, *supra* note 96.

¹²⁵ Plastic bag case, *supra* note 87.

¹²⁶ Fashion Products case, Arbitral Award 11 849/2003, 1st January 2003, ICC International Court of Arbitration; Shoes case (Italy v Germany), *supra* note 91; Furniture case, *supra* note 119.

¹²⁷ Kröll/Mistelis/Viscasillas, *supra* note 33, Article 71 §38; Schwenger, *supra* note 21, p. 1016 (“a damages claim can be initiated by the party against who performance has been suspended if the grounds for suspension did not exist.”).

Owing to the distance in international contracts, in the absence of a notice, it is unlikely the other party will be aware of the suspending party's intention to suspend. This can lead to ineffective allocation of resources when the grounds for suspension did not exist in reality. Notification also enables the other party to reassure their performance which facilitates the contract completion.

The second consequence of suspension is that the breaching party can provide assurance of performance which ceases the innocent party's suspension. This is an optional safeguard for the defaulting party who may exercise this right when there has been a wrongful suspension. However, the implications of this provision are more severe with regards to the innocent party, because, in the event of an adequate assurance, they are obligated to resume performance. By virtue of an assurance, the debtor can establish that the perceived threat is non-existence or reassure the creditor that the circumstances affecting performance has been remedied.¹²⁸ If the former is established, and the debtor can show that no breach existed, then the conduct of the creditor in suspending their performance is a breach of contract entitling the debtor to seek damages.¹²⁹ The form and content of the assurance is not provided in the Convention and there is no court practice to substitute this lacuna in the law.¹³⁰ However, scholars assert that assurance is aimed at re-establishing the grounds for suspension and requires concrete evidence or actions taken to address the threat perceived by the debtor.¹³¹ The determination of an adequate assurance depends on the facts of the case, for instance, if suspension was a result of strike at the seller's factory, then the end of the strike qualifies as adequate assurance. In the same vein, if performance was suspended due to a declaration of the party, a subsequent statement re-confirming his commitment to the contract suffices. Similarly, for a lack of creditworthiness, a bank guarantee is an adequate assurance. It must be highlighted that the assurance must directly address the performance at risk. For instance, a buyer, contracting for high quality parts to assemble a technology machine, suspending performance following a letter from seller stating inability to deliver on time, cannot accept seller's reassurance to deliver goods of desired quality and a bank guarantee confirming reimbursement of advanced payments if goods are non-conforming, as an adequate assurance.¹³² This is because, the obligation at risk was the obligation to deliver at the agreed time, not the obligation to deliver conforming goods.

Additionally, assurances are intended on giving the innocent party a reasonable security of performance,¹³³ thus, the subjective assessment of the debtor is irrelevant, and the objective standards of Article 8 should be used to determine adequacy. In any case, assurance is not intended to communicate perfect performance, hence, delayed performance can also qualify as adequate performance, if the contract is not time sensitive.¹³⁴ However, there are disagreements whether mere statement and reassuring words constitute as adequate assurance. Some argue

¹²⁸ Mercédeh Azeredo da Silveira, "Anticipatory Breach under the United Nations Convention on Contracts for the International Sale of Goods," *Nordic Journal of Commercial Law* (2) (2005): p. 13 accessed 5th 2021 at: <https://journals.aau.dk/index.php/NJCL/article/view/3046/2573>; Enderlein/Maskow, *supra* note 36, p. 289.

¹²⁹ da Silveira, *supra* note 128, p. 32.

¹³⁰ UNCITRAL Digest 2016, *supra* note 49, Article 71 §11.

¹³¹ Honnold, *supra* note 57, p. 433.

¹³² United Nations. *Secretariat Commentary to Article 71*, accessed 5th May 2021 at: <https://iicl.law.pace.edu/cisg/page/article-71-secretariat-commentary-closest-counterpart-official-commentary>.

¹³³ *Ibid.*

¹³⁴ Kröll/Mistelis/Viscasillas, *supra* note 33, Article 71 §52; Enderlein/Maskow, *supra* note 36, p. 289.

that a mere declaration of intent to not default is not sufficient,¹³⁵ however, others argue that promises can suffice as adequate reassurance if the debtor is of good reputation and has performed previously.¹³⁶ It is suggested that it is the latter view that is more persuasive and in line with principles enshrined in Article 9 of the Convention, regarding past practices. Another safeguard for the debtor, is the obligation of the innocent party to not demand excessive reassurance, which would be excessively burdensome and would provide avenue for the creditor to escape the contract when it becomes less efficient for them.¹³⁷ This is in line with the Convention's aim of balancing the interest of the parties.

In the event of an adequate assurance performance is re-established, however, if adequate assurance is not given, then the lack of co-operation can be considered to be evidence for a future fundamental breach of the contract allowing avoidance pursuant to Article 72 of the Convention.¹³⁸ Article 72 and its elements will be discussed in the proceeding section.

2.2 Avoidance as a remedy for anticipatory breach

Article 72 is the logical continuation of Article 71, but while still addressing anticipatory breach, it leads to different consequences. Article 71 regulates the right to suspend performance, whereas Article 72 regulates the *ultima ratio* remedy of avoidance for an anticipatory fundamental breach. *A priori*, this provision seems to be contrary to the Convention's aim of preserving contracts by enabling termination prior to an actual breach. However, it is undesirable and unfair to bind a party to a contract when it is clear that there will be a fundamental breach of the contract.¹³⁹ The elements and standards set in Article 72 will be analysed to ascertain when avoidance is justified; these elements will also be contrasted with Article 71 where relevant. The Convention puts forward two conditions for invoking the right to avoid. The first condition addresses the degree of certainty (clear) required, and the second condition addresses the magnitude of the breach (fundamental) required for avoidance.

2.2.1 Prognosis for avoidance: subjective vs objective

Article 72 states that avoidance is justified when it is *clear* that there will be a fundamental breach of contract. Undoubtedly, the degree of likelihood embodied in Article 72 is significantly higher than that of Article 71, owing to the severity of the remedy. The convention does not define what clear means. Black's law dictionary defines clear as: "plain; evident; free from doubt or conjecture."¹⁴⁰ When something is clear, it represents a high degree

¹³⁵ Da Silveira, *supra* note 128, p. 31; Honnold, *supra* note 57, p. 434.

¹³⁶ Schwenzer, *supra* note, 21, p. 1022; Kröll/Mistelis/Viscasillas, *supra* note 33, Article 71 §53.

¹³⁷ Kröll/Mistelis/Viscasillas, *supra* note 33, Article 71 §54.

¹³⁸ Harry M. Flechtner, "Remedies Under the New International Sales Convention: The Perspective from Article 2 of the U.C.C.," *Journal of Law and Commerce* 8 (1988): p. 93, accessed 5th may 2021 at: <https://iicl.law.pace.edu/cisg/scholarly-writings/remedies-under-new-international-sales-convention-perspective-article-2-ucc>; Enderlein/Maskow, *supra* note 36, p. 290; Bennett I, *supra* note 92, p. 524.

¹³⁹ Trevor Bennett, "Comments on Article 72," In Bonell, Bianca-Bonell *Commentary on the international sales law: the 1980 Vienna Sales Convention*, eds Massimo Bianca and Michael Jochim (Guiffre: Milan, 1987): p.527 accessed 5th May at: <https://iicl.law.pace.edu/cisg/scholarly-writings/comments-article-72-bianca-bonell-commentary> (Bennett II).

¹⁴⁰ Henry Campbell Black, *Black's Law Dictionary* 2nd ed, (New Jersey: The Lawbook Exchange, 1995), accessed 5th May at: <https://thelawdictionary.org/clear/>.

of probability but it not absolute certainty.¹⁴¹ This is complaint with the interpretation of the German district court in the *Shoes case (Italy v Germany)*, where a Seller was entitled to avoid contract when the buyer failed to produce a security of payment, in light of the fact that there were two previously delayed payments which were completed only after a court decision.¹⁴² In this case, the court reiterated that certainty was not necessary, but rather the probability of breach must be ‘obvious to everybody’, implying the standard of a reasonable person.¹⁴³ Similar to the Article 71(1), the subjective fear of an overly cautious and insecure creditor is not sufficient.¹⁴⁴ Thus, under Article 72, a clear fundamental breach entails a high degree of certainty from an objective perspective.

2.2.2 Magnitude of the breach

Unlike Article 71(1), Article 72(1) does not specify the nature of events that give rise to avoidance, thus the grounds are not restricted to particular circumstance.¹⁴⁵ Instead, the fundamental breach test in Article 25 is used to determine when avoidance is justified. Article 25 defines a fundamental breach as a two-pronged test: 1) detriment that deprives essential contractual interest, 2) foreseeability test. A brief discussion of the two elements is warranted for the purposes of clarifying how Article 72 is distinguished from Article 71.

First, the notion of detriment is wider than damage, and detriment is not necessarily limited to damages. Rather, alongside suffering a detriment, the aggrieved party must have lost its interest,¹⁴⁶ or ‘main benefit of the contract’ making it useless for them to be bound by the contract.¹⁴⁷ These interests of the party must be outlined in the contract, and can include both primary and ancillary obligations.¹⁴⁸ However, they could also include expectations of the other party not explicitly spelled out in the contract. Thus, reputational losses or consequential damages are also sufficient.¹⁴⁹ Additionally, the determination of what is an essential interest can also be supplemented by the conduct and pre-contractual negotiations between parties which makes it evident that the breaching party was aware of the interests of the aggrieved party.¹⁵⁰ This reinforces the broad scope of a substantial detriment under the Convention.

¹⁴¹ Larry A. DiMatteo, et al, “The Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence,” *Norwegian Journal of International Law and Business* 24(2) (2004): p. 415, accessed 5th May 2021, at: <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1577&context=njilb>; Schwenger, *supra* note 21, p. 1031.

¹⁴² *Shoes case (Italy v Germany)*, *supra* note 91.

¹⁴³ *Ibid.*

¹⁴⁴ da Silveira, *supra* note 128, p. 25.

¹⁴⁵ Kröll/Mistelis/Viscasillas, *supra* note 33, Article 72 §2.

¹⁴⁶ da Silveira, *supra* note 128, p. 28.

¹⁴⁷ UNCITRAL Digest 2016, *supra* note 49, Article 25 §10.

¹⁴⁸ Cobalt Sulphate case, VII ZR 51/95, 3rd April 1996, Bundesgerichtshof [German Federal Supreme Court], accessed 5th May 2021 at: <https://iicl.law.pace.edu/cisg/case/germany-bger-bundesgerichtshof-federal-supreme-court-german-case-citations-do-not-identi-5>.

¹⁴⁹ Christoph J.H. Brunner and Benjamin Leisinger, “Article 25 [Definition of “Fundamental Breach”, in *Commentary on the UN Sales Law (CISG)*, eds. Christoph J.H. Brunner and Benjamin Gottlieb, (Haywards Heath: Kluwer Law International, 2019):pp. 166; Andrew Babiak, “Defining ‘Fundamental Breach’ under the United Nations Convention on Contract for the International Sale of Goods,” *Temple International and Comparative Law Journal* 6 (1992): p. 120, accessed 5th May 2021 at: https://iicl.law.pace.edu/sites/default/files/bibliography/andrew_babiak.pdf.

¹⁵⁰ Franco Ferrari, “Fundamental Breach Under the UN Sales Convention: 25 Years of Article 25 CISG,” *Journal of Law and Commerce* 25 (2006):p. 493, available at Hein Online; Babiak *supra* note 149, p. 120.

The Secretariat's commentary to Article 25 outlines that an analysis of fundamental breach depends on the circumstances of the case, and various factors may be relevant, namely, monetary value of contract, damages caused by the breach and the extent to which the breach affects the innocent party's activities.¹⁵¹ In that regard, bankruptcy often qualifies as a fundamental breach, especially if the bankruptcy results in inability to purchase raw materials, or pay for the goods after delivery.¹⁵² However, monetary interests are not always prioritised, and more importantly, detriment is not synonymous to damages. Rather the expected, qualitative, non-monetary interests and advantages created by the contract is relevant.¹⁵³ A detriment to the expectation under the contract is interpreted restrictively, for instance, in the *Cobalt sulphate case* the court did not classify non-reparable defects in the goods as a breach of the essential interests under the contract because the Buyer could reasonably resell the goods, albeit at a lower price and claim damages.¹⁵⁴ This shows that minor inconveniences does not meet the high threshold required.

When it is clear that there will be a fundamental breach, it is irrelevant where the breach stems from. In that regard, Article 72 has a wide scope of application. This approach contrary to the approach taken under the US law is reinforced by the legislative history of Article 72, where proposals: to limit anticipatory avoidance to the creditor's conduct and express renunciation of contract, to include specific grounds for anticipatory avoidance was rejected.¹⁵⁵ Additionally the Secretariat's commentary also makes references to both 'words and actions' of a party (conduct) as well as other 'objective facts' that justifies avoidance such as destruction of a plant, or impossibility of performance due to governmental regulations.¹⁵⁶ As such, it is not necessary that a possible fundamental breach is a result of the breaching part's conduct, external circumstances that make a future breach plausible is also sufficient.¹⁵⁷ The wider application was adopted because it is counterintuitive to enable avoidance when breach is a result of the conduct and make the debtor wait till the date of performance when other circumstances point to the existence of a clear fundamental breach.¹⁵⁸ The broad scope of Article 72 contrasts the narrow scope of application in Article 71 (1) which clearly outlines circumstances for suspension all of which have connection to the conduct of the party. The broader scope of application is justified because it is counteracted with the strict test of fundamental breach.

Fundamental breach on behalf of the buyer under the ambit of Article 72 has been satisfied in situations that make it clear that the: buyer will not be able to pay for the goods,

¹⁵¹ United Nations. *Secretariat Commentary to Article 72*, accessed 5th May 2021 at: <https://iicl.law.pace.edu/cisg/page/article-25-secretariat-commentary-closest-counterpart-official-commentary>.

¹⁵² Enderlein/Maskow, *supra* note 36, p. 291.

¹⁵³ Darren Peacock, "Avoidance and the Notion of Fundamental Breach under the CISG: An English Perspective," *International Trade and Business Law Review* 8 (2003), accessed 5th May 2021 at: <http://classic.austlii.edu.au/au/journals/IntTBLawRw/2003/4.html>.

¹⁵⁴ Cobalt Sulphate case, *supra* note 148.

¹⁵⁵ United Nations Commission on International Trade Law Yearbook V, (1974) *Texts of comments and proposal by representatives on Articles 71-101 (A/CN.9/87, annex II)*, proposal of the United States of America and Comments of France and Hungary, p.68-9, accessed 5th May 2021 at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/yb_1974_e.pdf.

¹⁵⁶ United Nations. *Secretariat Commentary to Article 72*, accessed 5th May 2021 at: <https://iicl.law.pace.edu/cisg/page/article-72-secretariat-commentary-closest-counterpart-official-commentary>.

¹⁵⁷ Bennett II, *supra* note 139, p. 526; Kröll/Mistelis/Viscasillas, *supra* note 33, Article 72 §2.

¹⁵⁸ Bennett II, *supra* note 139, p. 526.

owing to a delay in past payments paired with their inability to produce a security,¹⁵⁹ failure to issue a contractually agreed upon letter of credit timely also suffices as it shows clear indications of that a buyer will not perform its obligations under the contract.¹⁶⁰ However, failure to pay one payment in the absence of any indication to show the buyer intends to violate their payment obligations is not a fundamental breach.¹⁶¹ In the *Garments case* decided by the New York District court, it was decided that failure to pay at four difference instances amount to a fundamental breach, and a payment of less than 20% of the total amount due substantially deprives Seller from the right expected under the contract.¹⁶² This reflects that in order to avoid a severe and repeated non-performance is required, in the absence of which it is only the right to suspend that is available.

With respect to the breaches by the seller, in one case, courts have established situations when the court decided that the seller's demand for amending essential contract terms and threatening to sell the raw materials elsewhere was a fundamental breach.¹⁶³ Additionally, in the *Clothing case* the failure of the seller to deliver samples on time led to fundamental anticipatory breach because the delayed samples would prevent timely delivery of the final goods if the samples were rejected and alterations were required (as was the situation in the *Clothing case*).¹⁶⁴ While, delayed delivery does not usually amount to fundamental breach, the *Clothing case* involved goods of a seasonal nature, and a delayed delivery of seasonal/fashion products amounts to a fundamental breach.¹⁶⁵ Additionally, conduct that harms the interests of the party that has been made known also constitutes of fundamental breach. This was evident in *Case 238/1998* when the Russian Chamber of Commerce declared the seller's refusal to charter a whole vessel for the transport of the buyer's cargo a fundamental breach.¹⁶⁶ This was because, owing to quality concerns and nature of the goods (food products), it was an essential interest of the buyer to have their goods be delivered in exclusively.¹⁶⁷ Additionally, conduct

¹⁵⁹ Garment (women's knit pants, dresses and tops) case, *Doolim Corp. v. R Doll, LLC, et al.* No. 08 Civ. 1587 (BSJ)(HBP), 29th May 2009, [New York District Court], accessed 5th May at: <https://iicl.law.pace.edu/cisg/case/united-states-state-minnesota-county-hennepin-district-court-fourth-judicial-district-71>; Shoes Case (Italy v Germany), *supra* note 91.

¹⁶⁰ Scrap Steel case, *Downs Investments Pty Ltd (ACN 010 729 567) (in voluntary liquidation) (formerly known as Wanless Metal Industries Pty Ltd) v. Perwaja Steel SDN BHD*, Case 10680 of 1996, 17th November 2000, [Australian Supreme Court], accessed 5th May 2021 at: <https://iicl.law.pace.edu/cisg/case/australia-november-17-2000-supreme-court-downs-investments-pty-ltd-acn-010-729-567>; CD-R and DVD-R production line systems case, CISG/2007/03, October 2007, China International Economic and Trade Arbitration Commission [CIETAC], accessed 5th May 2021 at: <https://iicl.law.pace.edu/cisg/case/china-october-2007-translation-available>.

¹⁶¹ Aluminium case, *Soinco v. NKAP*, ZHK 273/95, 31st May 1996, Zürich Chamber of Commerce, accessed 5th May at: <https://iicl.law.pace.edu/cisg/case/switzerland-may-31-1996-soinco-v-nkap-translation-available>.

¹⁶² Garments (women's knit pants, dresses and tops) case, *supra* note 159.

¹⁶³ Steel bars case, *Magellan International Corporation v. Salzgitter Handel GmbH*, 99 C 5153, 7th December 1999, Illinois District Court, accessed 5th May 2021 at: <https://iicl.law.pace.edu/cisg/case/united-states-state-minnesota-county-hennepin-district-court-fourth-judicial-district-39>: "the seller sought to substitute a bill of lading with FRC, bill of lading, due to the protections provided was of essential interest to the buyer."

¹⁶⁴ Clothing case, Arbitral award no: 8789 of January 1997, International Chamber of Commerce, accessed 5th May 2021 at: <https://iicl.law.pace.edu/cisg/case/court-arbitration-international-chamber-commerce-1>.

¹⁶⁵ *Ibid.*

¹⁶⁶ Case no: 238/1998, 7th June 1999, The International Commercial Arbitration Court at the Russian Federation Chamber of Commerce and Industry, accessed 5th May 2021 at: <https://iicl.law.pace.edu/cisg/case/russian-federation-june-7-1999-translation-available>.

¹⁶⁷ *Ibid.*

of the seller such as failure to deliver claiming *force majeure* incorrectly,¹⁶⁸ and inability to confirm a definite delivery date while suggesting the buyer to purchase substitutes from another source also amounts to fundamental breach.¹⁶⁹ These examples show that there is a wide range of circumstances that can give rise to a fundamental breach and a case-by-case analysis is required in order to determine this.

Generally, a statement by either party stating that they will not perform amounts to a fundamental breach, even if they perform in future.¹⁷⁰ Such declarations are considered to be absolute and in these circumstances, there is no requirement of notice of the intention to avoid by the innocent party pursuant to Article 72(3). In the same vein, there is no excuse for non-performance of contractual conditions, if the contract was conditional on a time sensitive delivery, or delivery of specific quality any threat to the condition will constitute as a fundamental breach.¹⁷¹ Finally, there is also an unequivocal consensus among scholars that failure to reassure under Article 71(3)) is a clear indication of non-performance, and if the non-performance concerns an essential interest then the innocent party may suspend performance.¹⁷²

Foreseeability is the second element for a fundamental breach. It relates to the ability of the breaching party, or any other reasonable person to be able to predict that their conduct or circumstances may breach a vital interest of the innocent party. Foreseeability is an excuse that can be used by the breaching party to prevent the aggrieved party from avoiding the contract; this is aimed at balancing the interests of the parties.¹⁷³ As such, some scholars state that in order to establish a fundamental breach, the only requirement is a substantial detriment has been suffered, foreseeability is but a conditional defence that can be invoked by the breaching party to nullify avoidance.¹⁷⁴ Hence, foreseeability seeks to balance the interest of a creditor who would be unable to predict the serious consequences of a breach.

The foreseeability test is two-pronged, there are subjective as well as objective elements.¹⁷⁵ As such, both the foreseeability of the breaching party as well as the determination of a reasonable party in the same situation with same knowledge must be considered. This is because at times an overly astute merchant may be able to foresee more than his peers.¹⁷⁶

¹⁶⁸ Compound fertilizer case, CISG/1996/05, 30th January 1996, China International Economic and Trade Arbitration Commission [CIETAC], accessed 5th May at: <https://iicl.law.pace.edu/cisg/case/china-january-30-1996-translation-available>.

¹⁶⁹ Caffeine case, CISG 1996/15, 29th March 1996, China International Economic and Trade Arbitration Commission [CIETAC], accessed 5th May at: <https://iicl.law.pace.edu/cisg/case/china-march-29-1996-translation-available#Opinion%20of%20the%20Arb%20Trib>.

¹⁷⁰ CD-R and DVD-R production line systems case, *supra* note 160. Kröll/Mistelis/Viscasillas, *supra* note 33, Article 25 §30.

¹⁷¹ Harry M. Flechtner, “Transcript of a Workshop on the Sales Convention: Leading CISG Scholars Discuss Contract Formation, Validity, Excuse for Hardship, Avoidance, Nachfrist, Contract Interpretation, Parole Evidence, Analogical Application, and Much More,” *Journal of Law and Commerce* 18 (1999): p.254, accessed 5th May 2021 at: <https://iicl.law.pace.edu/cisg/bibliography/transcript-workshop-sales-convention-leading-cisg-scholars-discuss-contract>.

¹⁷² Sunflower seeds case, 63/2006, 2006, Lamia Efetio [Greek Court of Appeals], accessed 5th May 2021 at: <https://iicl.law.pace.edu/cisg/case/greece-2006-efetio-court-appeals>; da Silveira, *supra* note 128, p.31; Enderlein/Maskow, *supra* note 36, p. 290; Bennett II, *supra* note 139, p. 528.

¹⁷³ Leonardo Graffi, “Case Law on the Concept of “Fundamental Breach” in the Vienna Sales Convention,” *International Business Law Journal* (2003) (3): p. 340. Available at Hein Online.

¹⁷⁴ Babiak, *supra* note 149, p.118.

¹⁷⁵ Ahmed/Hussain *supra* note 55, p. 129.

¹⁷⁶ Michael Will, “Comments on Article 25,” In *Bonell, Bianca-Bonell Commentary on the international sales law: the 1980 Vienna Sales Convention*, eds. Massimo Bianca and Michael Jochim (Guiffre: Milan, 1987): p.219,

Similarly there may be some unsophisticated parties whose lack of experience make them unable to see a harm,¹⁷⁷ in these circumstances the subjective understanding of the party is relevant, as an objective test would not be fair. However, solely relying on a subjective test poses the risk a breaching party arguing that they did not foresee the detriment, thus, the objective determination of a reasonable merchant in the same situation is used to prevent the abuse of the foreseeability test. The objective tests of foreseeability required the determination of a reasonable person of ‘the same kind’, and in ‘same circumstances’. Such a person for the purposes of this Article is a merchant that meets industry’s intellectual and professional standards,¹⁷⁸ to be of the same kind, refers to the fact that this merchant has to be in the same business conducting similar functions and operations,¹⁷⁹ and to be in similar circumstances refer to the market condition that the breaching party is confronted with.¹⁸⁰ The two tests for foreseeability is cumulative as such both the subjective and objective needs to be established in order to successfully raise an objection to avoidance.

Extensive discussions of foreseeability is restricted to literature, and there is a paucity of case law of anticipatory avoidance or avoidance in general where the foreseeability test was implemented. In these cases, courts and tribunals often base their decisions on the presence of a substantial detriment and the gravity of the economic loss suffered.¹⁸¹ Analysis of foreseeability is more prevalent under Article 74 while awarding damages. This reinforces the idea that foreseeability is not a necessary element for establishing fundamental breach, but is rather a tool that can be used by the breaching party to negate a claim of avoidance. After it is clear that a fundamental breach will occur, the innocent party may declare the contract avoided after they have communicated their intention to avoid to the defaulting party.

2.2.3 Article 72(2) – manifestation of the intent to avoid

Article 72(2) outlines the innocent party’s duty to notify the breaching party. This enables the breaching party to provide assurances if the suspicions are unfounded and thus preserves the contract. The duty to notify embodied in Article 72(2) must be distinguished from Article 26, because the former refers to the obligation of the innocent party to notify the opposing party regarding their *intention* to avoid the contract due to a suspected fundamental breach, whereas the latter refers to the notice by virtue of which the contract is avoided and ceases to exist. In that regard, the aim of Article 72(2) is to promote communication and co-operation as, a notice will provide the allegedly breaching party an opportunity to provide reassurance, which may restore the confidence of the innocent party.¹⁸² The references made to adequateness of the assurance under Article 72(2) is not different from adequate assurance pursuant to Article 71(3), as such the discussion in section 2.1.4 of the paper is applicable here.

accessed 5th May at: <https://iicl.law.pace.edu/cisg/scholarly-writings/comments-article-25-bianca-bonell-commentary#i>.

¹⁷⁷ Babiak, *supra* note 149, p.122.

¹⁷⁸ Will, *supra* note 176, p. 219.

¹⁷⁹ This interpretation is more in line with the French text which refers to “de même qualité” as pointed out by Egypt during the drafting procedure. Legislative History of the 1980 Vienna Diplomatic Conference. *Summary Records of Meetings of the First Committee (6th Meeting)* p. 261 §30 (14th March 1980), accessed 5th May 2021 at: <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/a-conf-97-19-ocred-eng.pdf>.

¹⁸⁰ Will, *supra* note 176, p. 219.

¹⁸¹ Graffi, *supra* note 173, p. 340.

¹⁸² Kröll/Mistelis/Viscasillas, *supra* note 33, Article 72 §18-9.

Under Article 72 (2), there is only a duty to notify the intention to avoid ‘if time allows’ and if it is ‘reasonable(ness)’ in Article 72 (2). Firstly, the innocent party must give a notice of avoidance, ‘if time allows’. Scholars argue that this element has no relevance in the wake of modern-day communication technology where communication and notices can be sent within minutes.¹⁸³ However, the drafters included this element to cover situations where a notice would be redundant because it’s main aim which is to receive assurance by the breaching party is not possible. This refers to situations when the period between the notice and the date of performance is so close that adequate assurance cannot be given.¹⁸⁴ Since, the rationale of the notice outlining the intent to avoid is for the defaulting party to give adequate assurance, then if assurance becomes impossible, the duty to give notice also ceases. Secondly, notice is not required if the delay caused while sending the notice and waiting for assurance results in an injury to the interest of the innocent party.¹⁸⁵ Secondly, the notice must be ‘reasonable’. A notice is reasonable when there is a possibility of assurance of performance, and is unreasonable where there is absolute certainty that there will be a fundamental breach.¹⁸⁶ As such situations where there is little chance of assurance, such as the outbreak of a war, or burning down of a factory, there will be no need for a notice of intention to avoid. When the notice stating the intent to avoid is sent, there are two possible courses of action. First, adequate assurance is provided by the defaulting party which results in the continuance of the contractual relationship. Second, there is no assurance given or inadequate assurance given, in this case the innocent party is entitled to avoid the contract,¹⁸⁷ as the lack of assurance makes it clear that a fundamental breach will occur.¹⁸⁸ Once, the contract is avoided, the contractual relationship ceases, and parties can initiate claims for damages.

¹⁸³ Honnold, *supra* note 57, p. 440 Enderlein/Maskow, *supra* note 36, p. 262.

¹⁸⁴ Da Silveira, *supra* note 128, p. 30

¹⁸⁵ *Ibid.*

¹⁸⁶ Enderlein/Maskow, *supra* note 36, p. 293.

¹⁸⁷ Garments (women’s knit pants, dresses and tops) case, *supra* note 159.

¹⁸⁸ da Silveira, *supra* note 128, p. 31

CHAPTER 3 – RECONCILIATION OF THE CISG’S ANTICIPATORY BREACH REGIME WITH ITS ECONOMIC AIMS

There is a stark disparity between the trade patterns predicted by the Heckscher-Ohlin-Vanek theorem and the actual volume of international trade.¹⁸⁹ This gap in trade is attributed to the prevalence of transaction costs in international trade which is not taken into account in the model.¹⁹⁰ Transaction costs refers to the additional costs of negotiating, drafting, concluding and enforcing contracts in international trade.¹⁹¹ These include the costs of information gathering, bargaining, supervising and enforcing the contract.¹⁹² The international market is characterized by parties that are not in close proximity of each other, and the distance between the parties aggravate transaction costs due to the high: information gathering, reselling and reshipping costs.¹⁹³ Thus, international trade can be facilitated by eradicating or minimizing these costs. One way of reducing transaction costs in through comprehensive default contract law rules that relieves the parties from the need to have lengthy negotiations to cover as many contingencies as possible.¹⁹⁴ The CISG was envisioned to be economically viable for parties engaging in international trade because of its promulgation of efficient default rules that would not require negotiation.¹⁹⁵

The doctrine of anticipatory breach raises the question of efficiency because it holds a party liable for a promise prior to the date of performance. While it is indeed counterintuitive to hold a party liable for non-performance prior to the date of performance, practical reasons¹⁹⁶ and expediency, are often used as justification for this doctrine by common law scholars.¹⁹⁷ Indeed, barriers to performance in international trade are inevitable owing to the differences in political and socio-economic environment.¹⁹⁸ While such barriers do not justify the termination or suspension of the contract, it is impractical and uneconomic to tie businesses to contracts that will almost certainly not be materialised. Similarly, it is also undesirable to tie a party to a contract until the date of performance when circumstances prior to the date of performance highlight that substantial obligations under the contract will be defaulted. In these cases, reasons of expediency justify the suspension of performance until adequate assurance is given in order to ensure the innocent party does perform in vain.

¹⁸⁹Elli Heckscher and Bertil Ohlin, “The Effect of Foreign Trade on the Distribution of Income,” in *Heckscher-Ohlin Trade*, ed. Harry Flam and M. June Flanders (Cambridge, MA: MIT Press, 1991).

¹⁹⁰ Frank A.G. den Butter and Robert H.J. Mosch, “Trade, Trust and Transaction Costs,” *Tinbergen Institute Discussion Paper* TI 2003-082/3 (2003): p. 2, accessed 5th May 2001, at: <https://papers.tinbergen.nl/03082.pdf>.

¹⁹¹ Dieter Schmidtchen, Roland Kirstein and Alexander Neuzing, “Conflict of Laws Rules and International Trade: A Transaction Costs Approach,” *Center for the Study of Law and Economics Discussion Paper* 2001-01 (2004): p. 2, accessed 5th May 2021, at: https://www.econstor.eu/obitstream/10419/23042/1/2004-01_conflict.pdf.

¹⁹² *Ibid.*

¹⁹³ Larry A. DiMatteo and Daniel Ostas, “Comparative Efficiency in International Sales Law,” *American University International Law Review* 26(2) (2011): p. 378, accessed 5th May 2021 at: <https://core.ac.uk/download/pdf/235401386.pdf>.

¹⁹⁴ *Ibid.*, p. 391.

¹⁹⁵ *Ibid.*, p. 375.

¹⁹⁶ Alfred Rothschild, “Anticipatory Repudiation and Its Nullification – State and Federal Courts Symposium in Federal Jurisdiction,” *Iowa Law Review* 31 (1945-1946): p. 385, available at Hein Online.

¹⁹⁷ Djakhongir Saidov, “Anticipatory Non-Performance and Underlying Values of the UNIDROIT Principles,” *Uniform Law review* 11(4) (2006): p. 796, <https://doi.org/10.1093/ulr/11.4.795>.

¹⁹⁸ Bennett II, *supra* note 139, p. 527.

Another justification for the doctrine of anticipatory breach is there is an implied duty to not impair the expectation that the contract will be performed.¹⁹⁹ Anticipatory breach impairs this expectation, diminishing the innocent party's reliance on the contract, and creates insecurity, and uncertainty.²⁰⁰ Such uncertainties increase transaction costs as more effort and resources are required to collect information and monitor performance. The doctrine of anticipatory breach regulates this uncertainty by clearly outlining the course of action to be taken by the innocent party in order to protect their interests under the contract. Legal certainty regarding the consequences for an anticipatory breach facilitates the reduction of transaction costs.²⁰¹ Additionally, remedies for anticipatory breach also prevent resource wastage and promote economic efficiency.²⁰² These functions of the doctrine justify its presence in the Convention.

Although the general doctrine of anticipatory breach is economic and reduces transaction costs, these conclusions cannot be extrapolated to the doctrine of anticipatory breach in the CISG. This is because the anticipatory breach regime of the CISG *albeit* based on the similar Anglo-American doctrine is unique to itself. Common law countries like Australia,²⁰³ does not have any counter-part to the right to suspend, and although the Uniform Commercial Code²⁰⁴ in the United States does include the right to suspend and avoid for anticipatory breach, unlike the CISG it does not differentiate between the two remedies.²⁰⁵ Similarly, civil law countries like France and Belgium does not recognise the doctrine of anticipatory breach.²⁰⁶ Thus, using Professor Larry DiMatteo's classification of the rules in the CISG, anticipatory breach in the CISG can be classified as rules that are based on one legal system but has been modified to be interpreted autonomously under the CISG.²⁰⁷ This chapter explores the CISG's position in the regulation of anticipatory breach to analyse whether it is economic and reduces the transaction costs of the parties without imposing any undue burden on either party. This will be done through an analysis of Article 71 and 72 to determine whether they are interpreted uniformly and reflect the principles identified in Chapter 1 of the paper.

¹⁹⁹ Kröll/Mistel/Viscasillas, *supra* note 33, Introduction to Article 71-73 §2.

²⁰⁰ Joseph M. Lookofsky and Herbert Bernstein, *Understanding the CISG in Europe*, 2nd ed, (Holland: Kluwer Law International, 2003):p. 132.

²⁰¹ Hanna Almlöf and Per-Olof Bjuggren, "A regulation and transaction cost perspective on the design of corporate law," *European Journal of Law and Economics* 47 (2019): p. 416, accessed 5th May 2021 at: <https://link.springer.com/article/10.1007/s10657-019-09620-x#ref-CR64>.

²⁰² Kröll/Mistel/Viscasillas, *supra* note 33, Introduction to Article 71-73, §3.

²⁰³ Legislative history of the CISG, (27th meeting), *supra* note 108.

²⁰⁴ United States of America. Uniform Commercial Code (1952), § 2-610, §2-703, §2-711, accessed 5th May 2021 at: <https://www.law.cornell.edu/ucc/2>.

²⁰⁵ Bennett I, *supra* note 92, p. 519.

²⁰⁶ Günther H. Treitel, "Remedies for Breach of Contract," *International Encyclopaedia of comparative Law* (7) (1976): p. 139 §176 ("anticipatory breach has no precise counterpart in civil law"); Simon Whittaker, "How does French law deal with anticipatory breaches of contract?" *The International and Comparative Law Quarterly* 45(3) (1996): p. 662, accessed 5th May 2021, https://www.jstor.org/stable/760685?seq=1#metadata_info_tab_contents; Allen & Overy. Hardship and anticipatory breach revisited. Belgian civil law concepts? Accessed 5th May 2021 at: https://www.jstor.org/stable/760685?seq=1#metadata_info_tab_contents <https://www.allenoverly.com/en-gb/global/news-and-insights/publications/hardship-and-anticipatory-breach-revisited--belgian-civil-law-concepts>.

²⁰⁷ DiMatteo/Ostas, *supra* note 193, p. 377.

3.1 Suspending the contract: a deadweight loss or efficient remedy?

The first remedy available for an anticipatory breach is the right to suspend performance. This enables the innocent party to pause their obligation when it is apparent that a substantial part of the contract will not be performed. The CISG is unique for differentiating between suspension and avoidance. Such a distinction is desirable as it promotes performance by restricting termination only to a fundamental breach, and reserving suspension to all other breaches. This allows the innocent party to protect itself against future breaches without resorting to costly remedies such as avoidance. This section will analyse whether suspension reduces transaction costs by two aspects. First, it will be analysed whether the principles of *favour contractus*, reasonableness, and fair balance of parties' interest are reflected in the provision. Second, it will be analysed whether the provision is interpreted uniformly and autonomously to promote legal certainty.²⁰⁸

With regards to the principle outlined in Chapter 1. The pre-emptive remedy of the right to suspend respects the principle of *favour contractus and reasonableness* in three ways. First, Article 71 requires breach of a *substantial* part of the obligations. This is determined using an objective assessment on a case-by-case basis. Objective analysis preserves the contract because setting the standard of judgment to that of a reasonable person prevents an overly demanding party from endangering performance for minor instabilities. Secondly, the contract is preserved by the restricted grounds for suspension outlined in Article 71(1) (a) and (b). The Convention allows suspension if the grounds for suspension arises from the conduct of the party or due to a lack creditworthiness. This facilitates performance of the contract as only grave circumstances enable a party to exercise their right to suspend. Thirdly, a high degree of probability of a future breach is required for an innocent party to suspend performance; minor interruptions do not qualify.²⁰⁹ The higher standard of prognosis under Article 71(2) compared to the previous standard of 'good grounds to conclude' removes subjectivity.²¹⁰ The drafters intention is adopting the objective test of an *apparent* breach was to ensure that this remedy is invoked only in the presence of genuine doubts regarding contractual performance.²¹¹ The objective assessment reflects the principle of reasonableness and preserves the contract by not placing excessive confidence on the subjective assessment of the innocent party which can be abused.²¹² Finally, the principle of *favour contractus* is reflected in the duty to notify and resume performance when adequate assurance is given. The duty to immediately notify promotes communication and co-operation by informing the breaching party about the suspicions of the innocent party.²¹³ This facilitates dialogue and preserves the contract when adequate assurance is given. The preservation of the contract through the inclusion of objective standards reduces transaction costs as termination of a contract in international trade is expensive and undue suspension is also inefficient as it delays the contract.

²⁰⁸ See Chapter 1.

²⁰⁹ See above at pp. 22-23

²¹⁰ Legislative history of the CISG (34th Meeting), *supra* note 106.

²¹¹ Kröll/Mistelis/Viscasillas, *supra* note 33, Article 71§15.

²¹² Legislative history of the CISG (27th Meeting), *supra* note 108, §10 (Statement of Mr. Inaamulah (Pakistan)); Bennett I, *supra* note 92, p. 514.

²¹³ Kröll/Mistelis/Viscasillas, *supra* note 33, Article 72§1.

In addition to *favour contractus* and reasonableness, the right to suspend also reflects the principle of fair balance of the interests through default rules which would be desirable by the parties. First, the broad interpretation of *substantial breach* in Article 71 reflects this principle. This is because a broad interpretation furthers the innocent party's interest by not restricting the right to suspend to a breach of primary obligations. While an objective evaluation of a substantial breach protects the defaulting parties from an overly cautious evaluation, the broad interpretation furthers the interest of the innocent party in circumstances where the breach anticipated may not be the primary obligation but rather a secondary or ancillary obligation such as the duty to ensure confidentiality. Secondly, the Convention enables an innocent party to suspend performance for breach that existed at the time of contract conclusion if the innocent party was unaware of it. This balances the interest of an innocent party in the event that the defaulting party acted in bad faith and failed to reveal information. While there is indeed an obligation to investigate prior to contract conclusion, through investigation is not feasible in international trade and would be burdensome on the innocent party. However, a basic duty to research exists and a party cannot suspend performance based on information that was easily available prior to the contract conclusion. Thus, a fair balance approach protecting the two parties has been implemented by not making a detailed investigation compulsory but at the same time preventing suspension for circumstances that should have been known at the time of contract conclusion by any reasonable party.²¹⁴ Finally, balance of interests is reflected in the duty to notify; suspension is an unilateral act and not subjecting it to any safeguards would disproportionately affect the interests of the defaulting party in the event the suspicion was unfounded or could be rectified. The duty to notify, protects the innocent party from wrongful suspension and the possibility to assure protects the defaulting party by providing them with an opportunity to re-establish the contract performance.

Although, theoretically the right to suspend is an efficient remedy, there is potential leeway for abuse. This right can be abused when a party is unsure about their own performance by relying on the potential instability of other party. This is especially true when a party from a developing country is involved, because characteristics in their environment such as political and economic instability can almost always be used to invoke suspicion.²¹⁵ These abuses can be circumvented by the Convention's high standard of prognosis and consequences for invoking suspension wrongfully. However, in order for the Convention's safeguards to be effective, courts interpreting and applying the Convention must apply it uniformly and take into considerations these potential abuses. As such, analysis of the court's interpretation is necessary to determine if they compliant with Article 7(1) of the Convention.

The analysis of case law in Chapter 2 reflects the following findings. In general, there is an autonomous interpretation of the terms in Article 71 as court do not tend to make recourse to their domestic law to supplement the interpretation, rather standard of objective person and a case by case analysis guides the interpretation of the courts. This was evident in the *Pre-expander and block mould equipment for manufacture of polystyrene products* case, when the Supreme Court of British Columbia stated that it was 'unnecessary' to consider British

²¹⁴ Kröll/Mistelis/Viscasillas, *supra* note 33, Article 71 §17.

²¹⁵ Strub, *supra* note 68, p. 477-478.

Columbia law because it was clear the dispute was regulated by Article 71 of the CISG.²¹⁶ This highlights that courts are aware of the homeward trend and consciously avoid it.

The situation is different with regards uniformity in the interpretation of Article 71. None of the cases analysed in Chapter 2 Section 1 use foreign judgments as precedents in their own decisions. There is however, a practice, of courts to use references to commentaries in their judgments. But it is submitted that reference to commentaries is not sufficient references to foreign judgments are required to ensure uniformity in interpretation.

With regards to interpretation of Article 71, three cases were identified during research for significantly deviating from the common practice. Firstly, in the *Umbrellas* case, the Austrian Supreme Court deviates from the general court practice that acknowledges that failure to pay entitles a seller to suspend future performance,²¹⁷ and instead held that failure to pay for previous delivery and the cancellation of payment order does not reflect a serious lack of creditworthiness.²¹⁸ It is submitted that the right to suspend in this case was interpreted too strictly because facts of the *Umbrellas* case would cause a reasonable person to doubt the buyer's willingness to perform, entailing the seller to suspend performance. Such a suspension would be in line with the expectations of businessmen. Secondly, in the *Recycling Machines and Shoe Leathers* case, the courts basing their decision of AC opinion no. 5 apply the right to suspend to an executed contract by claiming that Article 71 creates a general right to without performance until counter-performance has been received. It is submitted, respectfully, that these judgements disproportionately broaden the scope of the right to suspend, which is a remedy that applies only to anticipatory breaches.

In summary, Article 71 reduces transaction costs of the parties because it reflects the principles from Chapter 1 and it is interpreted autonomously by the courts and although, diverging decisions exist they are very few. Thus, this provision is compliant with the economic aims of the Convention. The proceeding section will include a similar analysis for Article 72.

3.2 Avoidance and termination for anticipatory non-performance: deadweight loss or efficient remedy?

Article 72 gives the right to avoid the contract if it is clear that there will be a fundamental breach. This provision is an extension of the right to suspend and includes a stricter remedy in order to further protect the innocent party. Although, termination of contract is generally undesirable, a party whose legitimate interest under the contract is threatened must have recourse to remedies to ensure fair and reasonable allocation of risks.²¹⁹ Default rules with fair and reasonable allocation of risks are desirable to parties, reducing negotiation costs. Therefore, there is a need for the remedy to avoid for anticipatory fundamental breach. However, the right for pre-emptive avoidance can be abused by the innocent party to get out

²¹⁶ Pre-expander and block mould equipment for manufacture of polystyrene products case, *supra* note 96.

²¹⁷ Fashion goods (clothing) J.P.S BVBA v. Kabri Mode BV, 1st March 1995, Hasselt Rechtbank Van Koophandel [Belgian District Court], accessed 5th May 2021, at: <https://iicl.law.pace.edu/cisg/case/belgium-march-1-1995-rechtbank-van-koophandel-district-court-jps-byba-v-kabri-mode-by>; Refrigerators and deep-freezers case, ATT v. Armco, 24/13-95, International Court of Arbitration of the Chamber of Commerce and Industry of the Republic of Belarus, accessed 5th May 2021 at: <https://iicl.law.pace.edu/cisg/case/belarus-october-5-1995-att-v-armco-translation-available>; Waste containers case *supra* note 75.

²¹⁸ *Umbrellas* case, *supra* note 109.

²¹⁹ Kröll/Mistelis/Viscasillas, *supra* note 33, Introduction to Article 71-73 §3.

of bargains that becomes unprofitable by using the unstable position of the defaulting party. This may specially affect parties that come from developing countries, that is why there needs to be safeguards to prevent abuse and preserve the contract. This section will be an analysis of Article 72 to ascertain if it reflects the principles of *favour contractus*, reasonableness and provides a fair balance of interest. Additionally, practice of courts will be commented on to conclude where they are compliant with the interpretative guides set in Article 7(1).

The principle of *favour contractus* can be identified in Article 72 in three ways. First, the provision states that the future breach must be *clear*. The high standard of prognosis and the objective standards therein,²²⁰ is a barrier to avoidance that keeps contracts foot until it is undoubtful (not absolutely certain) that performance is endangered. The reasonableness standard is used to determine whether a fundamental breach is clear, this removes the possibility of abuse and reduces transaction costs by preventing the costly undoing of a contract. Second, the contract is preserved through the stringent standards of Article 25 which incorporates the test of a fundamental breach. According to this test, minor breach does not suffice as a substantial detriment to the essential interests under the contract. The stringent requirements for fundamental breach discourage avoidance and prevents economic wastes resulting from: dissolution of the contract, litigation to claim damages, and contracting costs with a new party. Finally, and most prominently, the duty to notify the intention to avoid also preserves the contract. This is because unless time does not allow and it is unreasonable to do so, a notice outlining the intention to avoid is a prerequisite to exercise the right to avoid for an anticipatory breach. The notification of avoidance is a final safeguard and ensures communication and co-operation between the parties which can result in adequate assurance preserving the contract.

Article 72 also balances the interests of parties in the following ways. First, the interests of the defaulting party are protected because the clarity of a fundamental breach must be ‘obvious to everybody’,²²¹ thus the objective standard is employed to protect against abuse and maintain a balance between the two parties, and the requirement that the prognosis be clear but not absolutely certain balances the interest of the innocent party. Secondly, to exercise anticipatory avoidance there must be a fundamental breach, the two-pronged test of fundamental breach strikes a fair balance between the interests of the two parties. This is because the first element covers the existent of detriment which is not limited to damages and can include anything that breaches the innocent party’s essential interest under the contract. This is favourable to the innocent party as it protects the true essential interest of the innocent party which might not always coincide with the primary obligations. Secondly, the foreseeability test protects the fair interests of a defaulting party that could not have foreseen the detriment, this is a defence that can invoked by the buyer to nullify the avoidance, safeguarding them from a unilateral termination of contract. Finally, the duty to notify also balances the interests of the parties, this is because although there is an obligation to inform the defaulting party of the intention to avoid, it is conditional on the reasonableness to notify and only required if time allows. The possibility to not notify in urgent and time sensitive situations protects the interests of the innocent party. The defaulting party’s interest are protected because the existence of the exceptions to the duty to notify will be determined using

²²⁰ Shoes case (Italy v Germany), *supra* note 91.

²²¹ Shoes case (Italy v Germany), *supra* note 91.

the ‘reasonable person standard’²²² which prevents an innocent party from bypassing the duty to notify and unilaterally declaring the contract avoided without sending a notice outlining the intention to avoid.

The economic safeguard of Article 72 will not be realised if they are not properly interpreted and implemented by the courts. Court and tribunals interpret Article 71, autonomously by determining a future fundamental breach on a case-by-case basis using objective standards. With regards to uniformity, similar to Article 71, there is a paucity of cases involving Article 72 referring to foreign case law. An analysis of the cases in Chapter 2 Section 2, reveals that only one case (*Clothing*) case refers to a foreign caselaw to determine was is a fundamental breach leading to anticipatory avoidance. In general, however, courts do not use the precedence of foreign CISG cases, this was evident in the *Steel bars* case, where the District Court of Illinois states in the footnotes, that were no opinion of United State courts that deal with the Article 72. The District Court of Illinois restricted its investigation was to domestic case law and did not consider the plethora of cases on Article 72 from other jurisdictions.

In summary, it is submitted that Article 72 reflects the principles identified in the first Chapter. Additionally, Article 72 is also interpreted autonomously by the courts and similar to the conclusion for Article 71, there is a paucity of case law under Article 72 using foreign judgements. Thus, it is submitted that Article 72 is economic and reduces transaction costs, and although there is an absence of uniformity, autonomous interpretation ensures the required legal certainty.

²²²Strub, *supra* note 68, p. 499.

CONCLUSION

This thesis investigates the regulation of anticipatory breach in the CISG, specifically, the right to suspend, and the right to avoid. The research questions were aimed at firstly, checking if the provisions reduce transaction costs by autonomous and uniform interpretation and secondly, if they reflect the transaction cost reducing principles of the Convention. This investigation was necessary to clarify the ambiguous terms in Article 71 and 72 and to ascertain whether the doctrine of anticipatory breach conflicts with the Convention's aims of reducing transaction costs by enabling the contract to be paused and terminated prior to a breach. In order to address the doctrine's ambiguity and economic efficiency problem a legal doctrinal and economic analysis of Article 71 and 72 was employed. These methods were chosen because it facilitates the definition of ambiguous terms through a doctrinal study of legal scholarship and case law and also enables an economic analysis of Articles 71-72 to determine if there are in conformity with the Convention's aims.

In that regards, the following findings have been made for the first research question. The Convention lacks any clear definitions to the terms: 'apparent', 'substantial' 'adequate' and 'clear', rather scholars attempt to define them through comparison. For instance, clear demands a standard of probability higher than apparent. In the same vain, a substantial breach in Article 71 is lower than a fundamental breach required in Article 72. A close analysis of cases in Article 71 reveals the following. First with regards to the general right of suspension, there is a broad scope of obligations that can be suspended in retaliation to a potential risk. But it is required that there is a legal connection and proportionality between the right at risk and the right suspended. A *substantial* breach under Article 71, is determined on a case by case basis. Generally, though, there is no need for the obligation at breach to be a primary obligation is can be secondary or ancillary obligation as well, such as the duty to ensure confidentiality. Next, the provision states that it must be *apparent* that there will be a breach of a substantial obligation. Apparent reflects a high likelihood which is determined from an objective perspective. Finally, Article 71 imposes an obligation to notify the breaching party of the innocent party's intention to suspend performance. This notification must be immediate, meaning without any delay. Regarding the necessity to notify, scholars are of the opinion that there is no necessity to notify, and in the event of a wrongful suspension damages will be sufficient. However, court practice establishes that notification is a necessary prerequisite to suspend performance. Notification can be both implicit or explicit and must be followed by assurance. Suspension ceases in the presence of adequate assurance. Adequacy of assurance is determined on a case-by-case basis but an adequate assurance must directly address the performance at risk by providing a reasonable security of performance, thus a declaration of an intention to not default is not sufficient.

With regards to the interpretation of Article 72, these are the relevant findings. Firstly, under Article 72 it must be *clear* that there will be a fundamental breach. The definition of clear is not provided, but in comparison, it is a standard higher than the one required for suspension in Article 71. Clarity requires a high and objective degree of probability that is obvious, but not absolutely certain. Secondly, the provision refers to *fundamental breach*. Under Article 72 the fundamental breach should not be limited to the conduct of the breaching party and can also be a result of other objective facts. Using the fundamental breach test in Article 25, a substantial detriment and foreseeability is required to avoid a contract. Finally,

there is an obligation for the innocent party to notify the intent to avoid when it is reasonable and if time allows. In that regards, the duty to notify is more relaxed under Article 72 compared to Article 7. Under Article 72, if the gravity of the circumstance makes it evident that there is no possibility of assurance then notification will be unreasonable and unnecessary. Additionally, if the time between the date of notification and the date of performance is so close that an adequate assurance cannot be provided, notification will not be required. Finally, with regards to the adequacy of assurance under Article 72, the classification of an adequate performance under Article 72 is the same as its classification in Article 71.

Thus, in response to the first research question, it is submitted that, courts abide by the requirement of autonomous interpretation by using the standard of a reasonable person and by conducting a case-by-case analysis. This shows that courts do not extrapolate definition of similar concepts from their domestic law. Regarding the uniformity of the interpretation, it is alarming that there is a paucity of case law on Articles 71-72 using foreign precedents. Nonetheless, even in the absence of uniformity, transaction costs are still reduced as legal certainty is reinforced by the prevalence of autonomous interpretation. Lastly, it must be stressed that these conclusions are made based on the cases reported in the Pace CISG database and UNCITRAL case digest of 2016. As such, it may not accurately represent the true practice of courts owing to the fact that case law from several jurisdictions are not uploaded onto the Pace CISG database, and the last digest was published half a decade ago.

With regards to the second research question, these are the core findings. First, international transactions are classified with parties situated in differing social, economic and political environment. These environments are highly volatile and it is very likely that prior to the contract performance changes in these environments or the situation of the party may occur which may threaten performance. In these cases, the doctrine of anticipatory breach provides relief to the innocent party by not tying them to a contract that will not materialize and entitling them to shift allocation of their resources to prevent wastage. This reduces transaction costs, and justifies the existence of the doctrine of anticipatory breach under the Convention.

To answer the second research question. It is submitted that both Article 71 and 72 reflect transaction cost reducing principles of the Convention, specifically the principles of *favor contractus*, reasonableness and fair balance of parties' interests. First, the principle of *favor contractus* and reasonableness goes hand in hand, and the objective standard of reasonableness is a tool used to preserve the contract and prevent abuse by the innocent party. This is reflected by the fact that the subjective assessment is irrelevant for determining whether an apparent substantial breach or clear fundamental breach exists. The objective assessment prevents abuse and protects contracts until the perceived suspicion reaches the high level required under these Articles. Second, the principle of *favor contractus* is also reflected in the restricted grounds for avoidance and suspension and the duty to notify. This is because Article 71 clearly outlines the ground grounds for suspension and Article 72 uses Article 25's stringent test of fundamental breach to decide when avoidance is justified. These restricted grounds prevent recourse to the doctrine of anticipatory breach for minor inconveniences, keeping the contract intact. Finally, the duty to notify which is common to both Articles preserves the contract because it is a pre-requisite to avoiding the contract or suspending performance. A notice facilitates communication which can enable assurance by the defaulting party eradicating the need for suspension or avoidance.

Articles 71-72 also fairly balance the interests of the parties in the following ways. First for the invocation of these rights, a breach must be obvious to a reasonable person, this protects the defaulting party. In the same vein the interests of the innocent party are protected by giving them a margin of appreciation while establishing what is a substantial or fundamental breach. Under Article 71, substantial breach is not limited to a primary obligation and can include ancillary and secondary obligations as well. Similarly, substantial detriment under Article 72 does not reflect monetary damages, instead it refers to the expectations of the innocent party under the contract. This protects the legitimate interests of the innocent party. Secondly, interests are balance because under Article 71, the innocent party is not precluded from exercising the right to suspension when circumstances preventing performance existed during contract conclusion but the innocent party was not aware of them. This protects the interests of an innocent party when a defaulting party acting in bad faith and does not disclose information. However, if the inability of the defaulting party to perform was obvious and could be easily establish through an investigation, then the innocent party can no longer rely on these circumstances to suspend performance. This protects the defaulting party from abuse by an innocent party. The third example of the balance of party's interest can established by the fact that under Article 72, a defaulting party cannot be held liable for a detriment that was not foreseeable, this protects a party who could not have either subjectively or objectively foreseen the detriment. This balances the interest of the defaulting party by giving them a defence against avoidance. The interest of the innocent party is also protected as lack of foreseeability must be objective. Finally, both Articles 71 and 72 include a duty to notify. This is the most prominent economic safeguard in the anticipatory breach regime as it fosters communication and co-operation between parties which can result in assurance and performance. This balances the interest of the parties as it makes the defaulting party aware of the intentions of the innocent party to suspend/avoid and provides them with the opportunity to assure. The innocent party's interests are safeguarded as the duty to notify prevents the innocent party from having to incur damages for wrongful suspension/avoidance.

Thus, the Convention's anticipatory breach provisions although drafted ambiguously promotes legal certainty as it has been defined autonomously in literature and caselaw. Additionally, it is concluded that the Convention's anticipatory breach regime promotes its economic aims and reduces transaction costs of the parties by reflecting the basic principles of the Convention. This makes Article 71-72 economically viable. The findings of this paper can be used to build on the economic analysis of the CISG and future research can be conducted on the implications of high shipping and storage costs in international trade on the seller's right to stop goods in transit under Article 71(2).

BIBLIOGRAPHY

PRIMARY SOURCES

LEGISLATION

1. Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods, adopted at The Hague on 1st July 1964, official text available at: <https://www.unidroit.org/instruments/international-sales/international-sales-ulfc-1964-en>, accessed 5th May 2021.
2. *Convention relating to a Uniform Law on the International Sale of goods.*, adopted in Hague on 1st July 1964 entered into force in 1972, now replaced by the CISG, official text available at: <https://www.unidroit.org/instruments/international-sales/international-sales-ulis-1964>, accessed 5th May 2021.
3. United Nations Convention on the Contracts for International Sale of Goods. Vienna (1980), available on: <https://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf>, accessed: 28th September 2020.
4. United States of America. Uniform Commercial Code (1952), § 2-610, §2-703, §2-711, accessed 5th May 2021 at: <https://www.law.cornell.edu/ucc/2>
5. Vienna Convention on the Law of Treaties, Vienna (1969), official text available at: https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf, accessed on 7th April 2021.

CASE LAW

6. Candies and Sweets case. *Dulces Luisi, S.A. de C.V. v. Seoul International Co. Ltd. Y Seoulia Confectionery Co.* M/115/97. November 30th 1998. Comisión para la Protección del Comercio Exterior de México [Mexican Commission for the Protection of Foreign Trade]. Accessed 5th May at: <https://iicl.law.pace.edu/cisg/case/mexico-november-30-1998-dulces-luisi-sa-de-cv-v-seoul-international-co-ltd-y-seoulia>.
7. Fashion goods (clothing). *J.P.S BVBA v. Kabri Mode BV*, 1st March 1995. Hasselt Rechtbank Van Koophandel [Belgian District Court]. Accessed 5th May 2021, at: <https://iicl.law.pace.edu/cisg/case/belgium-march-1-1995-rechtbank-van-koophandel-district-court-jps-bvba-v-kabri-mode-bv>.
8. Garments (women's knit pants, dresses and tops) case. *Doolim Corp. v. R Doll, LLC, et al.* No. 08 Civ. 1587 (BSJ)(HBP). 29th May 2009. [New York District Court]. Accessed 5th May at: <https://iicl.law.pace.edu/cisg/case/united-states-state-minnesota-county-hennepin-district-court-fourth-judicial-district-71>.
9. Industrial equipment case. ICC Arbitration Case No. 8611 of 1997. 8611/Hv/JK. Accessed 8th April 2021 at: <https://iicl.law.pace.edu/cisg/case/case-report-does-not-identify-parties-proceedings-3>.
10. Leather to manufacture shoes case. *Spoldzielnia Pracy "A" in N. v. GmbH & Co. KG in B.*, V CSK 456/06. 11th May 2007. Polish Supreme Court [Trail Court]. Accessed 5th May at: <https://iicl.law.pace.edu/cisg/case/poland-may-11-2007-supreme-court-trial-court-spoldzielnia-pracy-n-v-gmbh-co-kg-b>.

11. Materials for bullet proof vests case. 4505, 2009. Polimeles Protodikio [Greek Multi-member Court of First Instance]. Accessed on 8th April 2021 at: <https://iicl.law.pace.edu/cisg/case/greece-2009-polimeles-protodikio-multi-member-court-first-instance>.
12. *MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostino S.p.A.* 97-4250. June 29th 1998. [US Circuit Court]. Accessed 8th April 2021, available at: <https://iicl.law.pace.edu/cisg/case/united-states-june-29-1998-circuit-court-mcc-marble-ceramic-center-inc-v-ceramica-nuova>.
13. Perfume case. *Société Mim v. Société YSLP*. 356-FS-P+B. 20th February 2007. Cour De Cassation [French Supreme Court]. Accessed 5th May 2021 at: <https://iicl.law.pace.edu/cisg/case/france-cour-de-cassation-supreme-court-soci%C3%A9t%C3%A9-mim%C3%A2%C2%85-v-soci%C3%A9t%C3%A9-yslp>.
14. Plastic bags case. *BV BA. J.P. v. S. Ltd.*, 1997/AR/2235. 26th April 2000. Ghent Hof Van Beroep [Belgian Appellate Court]. Accessed 5th May 2021 at: <https://iicl.law.pace.edu/cisg/case/belgium-april-26-2000-hof-van-beroep-appellate-court-bv-ba-jp-v-s-ltd-translation>.
15. Pre-expander and block mould equipment for manufacture of polystyrene products case. *Masonville Plastics (B.C.) Ltd. V. Kurtz GmbH*. C993594. Supreme Court of British Columbia. Accessed 6th May 2021 at: <https://iicl.law.pace.edu/cisg/case/canada-august-21-2003-supreme-court-british-columbia-mansonville-plastics-bc-ltd-v-kurtz>.
16. Porcelain tableware case. *Al Palazzo S.r.l.v. Bernardaud di Limoges S.A.* 3065. November 26th 2002. [Italian District Court]. Accessed 5th May 2021 at: <https://iicl.law.pace.edu/cisg/case/italy-november-26-2002-tribunale-district-court-al-palazzo-srl-v-bernardaud-di-limoges-sa>.
17. Refrigerators and deep-freezers case. *ATT v. Armco*. 24/13-95. International Court of Arbitration of the Chamber of Commerce and Industry of the Republic of Belarus. Accessed 5th May 2021 at: <https://iicl.law.pace.edu/cisg/case/belarus-october-5-1995-att-v-armco-translation-available>.
18. Scrap Steel case. *Downs Investments Pty Ltd (ACN 010 729 567) (in voluntary liquidation) (formerly known as Wanless Metal Industries Pty Ltd) v. Perwaja Steel SDN BHD*. Case 10680 of 1996. 17th November 2000. [Australian Supreme Court]. Accessed 5th May 2021 at: <https://iicl.law.pace.edu/cisg/case/australia-november-17-2000-supreme-court-downs-investments-pty-ltd-acn-010-729-567>.
19. Sheets of vulcanized rubber used in manufacture of shoe soles case. *Rheinland Versicherungen v. Atlarex S.r.l. and Allianz Subalpina S.p.A.* 405. July 12th 2000. Tribunale de Vigrvano [Italian District Court]. Translation available at: <https://iicl.law.pace.edu/cisg/case/italy-july-12-2000-tribunale-district-court-rheinland-versicherungen-v-atlarex-srl-and>, accessed 8th April 2021.
20. Steel bars case. *Magellan International Corporation v. Salzgitter Handel GmbH*. 99 C 5153. 7th December 1999. [Illinois District Court]. Accessed 5th May 2021 at: <https://iicl.law.pace.edu/cisg/case/united-states-state-minnesota-county-hennepin-district-court-fourth-judicial-district-39>.
21. *St. Paul Insurance Co. v. Neuromed Medical Systems*. OO Civ. 934 (SHS). 26th March 2002. [New York District Court]. Accessed on 8th April 2021, available at:

- <https://iicl.law.pace.edu/cisg/case/united-states-march-26-2002-district-court-st-paul-guardian-insurance-company-and>.
22. Sunflower seeds case. 63/2006. 2006. Lamia Efetio [Greek Court of Appeals]. Accessed 5th May 2021 at: <https://iicl.law.pace.edu/cisg/case/greece-2006-efetio-court-appeals>.
 23. Frozen bacon case. 19 U 97/91. 22nd September 1992. Hamm Oberlandesgericht [German Court of Appeal]. Accessed 5th May 2020 at: <https://iicl.law.pace.edu/cisg/case/germany-oberlandesgericht-hamburg-oberlandesgericht-olg-provincial-court-appeal-german-25>.
 24. Waste Containers case. Vb 94131. 5th December 1995, Arbitration Court of the Hungarian chamber of Commerce and Industry. Accessed 5th May at: <https://iicl.law.pace.edu/cisg/case/hungary-december-5-1995-translation-available>.
 25. Compound fertilizer case. CISG/1996/05. 30th January 1996. China International Economic and Trade Arbitration Commission [CIETAC]. Accessed 5th May at: <https://iicl.law.pace.edu/cisg/case/china-january-30-1996-translation-available>.
 26. Cobalt Sulphate case. VII ZR 51/95. 3rd April 1996. Bundesgerichtshof [German Federal Supreme Court]. Accessed 5th May 2021 at: <https://iicl.law.pace.edu/cisg/case/germany-bger-bundesgerichtshof-federal-supreme-court-german-case-citations-do-not-identi-5>.
 27. Aluminium case. *Soinco v. NKAP*, ZHK 273/95. 31st May 1996. Zürich Chamber of Commerce. Accessed 5th May at: <https://iicl.law.pace.edu/cisg/case/switzerland-may-31-1996-soinco-v-nkap-translation-available>.
 28. Clothing case. Arbitral award no: 8789 of January 1997. International Chamber of Commerce. Accessed 5th May 2021 at: <https://iicl.law.pace.edu/cisg/case/court-arbitration-international-chamber-commerce-1>.
 29. Shoes case (Italy v Germany). 6 U 87/96. 24th April 1997. Düsseldorf Oberlandesgericht [German Court of Appeal]. Accessed 5th May 2021 <https://iicl.law.pace.edu/cisg/case/germany-oberlandesgericht-hamburg-oberlandesgericht-olg-provincial-court-appeal-german-202>.
 30. Umbrellas case. 2 Ob 328/97t. 12th February 1998. Oberster Gerichtshof [Austrian Supreme Court]. Accessed 5th May 2021 at: <https://iicl.law.pace.edu/cisg/case/austria-ogh-oberster-gerichtshof-supreme-court-austrian-case-citations-do-not-generally-28>.
 31. Frozen meat case. 4C.179/1998, 28th October 1998. Schweizerisches Bundesgericht fédéral (Swiss Federal Supreme Court). §2 b. Accessed 8th April 2021. Available at: <https://iicl.law.pace.edu/cisg/case/switzerland-october-28-1998-bundesgericht-federal-supreme-court-ek-l-und-v-f-translation>.
 32. Equipment case. 96/1998. November 24 1998. The International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry. Accessed 5th May at: <https://iicl.law.pace.edu/cisg/case/russian-federation-november-24-1998-translation-available>.
 33. Case no: 238/1998. 7th June 1999. The International Commercial Arbitration Court at the Russian Federation Chamber of Commerce and Industry. Accessed 5th May 2021 at: <https://iicl.law.pace.edu/cisg/case/russian-federation-june-7-1999-translation-available>.

34. Chemical products case. 2 U 2723/99. 27th December 1999. Dresden Oberlandesgericht [German Court of Appeal]. Accessed 5th May 2021 at: <https://iicl.law.pace.edu/cisg/case/germany-december-27-1999-oberlandesgericht-court-appeal-german-case-citations-do-not>.
35. Granite Rock case. 22 S 234/94. 12 October 2000. Landgericht Stendal [German Regional Court]. Accessed 5th May at: <https://iicl.law.pace.edu/cisg/case/germany-lg-aachen-lg-landgericht-district-court-german-case-citations-do-not-identify-190>.
36. Furniture case. 4 O 101/00. 29th May 2001. Darmstadt Landgericht [German Regional Court]. Accessed 5th May 2021 at: <https://iicl.law.pace.edu/cisg/case/germany-lg-aachen-lg-landgericht-district-court-german-case-citations-do-not-identify-42>.
37. Machinery case. VII ZR 60/01. 31st October 2001. Bundesgerichtshof [Federal Supreme Court]. Accessed 5th May at: <https://iicl.law.pace.edu/cisg/case/germany-bger-bundesgerichtshof-federal-supreme-court-german-case-citations-do-not-ident-29>.
38. Shoes case (France v Germany). 17 U 136/03. 20th July 2004. Oberlandesgericht Karlsruhe [German court of appeal]. Accessed 5th May 2021 at: <https://iicl.law.pace.edu/cisg/case/germany-oberlandesgericht-hamburg-oberlandesgericht-olg-provincial-court-appeal-german-148>.
39. Recycling Machine case. 4 Ob 179/05k. 8th November 2005. Oberster Gerichtshof [Austrian Supreme Court]. Accessed 5th May 2021 at: <https://iicl.law.pace.edu/cisg/case/austria-november-8-2005-oberster-gerichtshof-supreme-court-austrian-case-citations-do-not>.
40. Kickboard/Scooters case, 4C.94/2006, July 17th 2007, Bundesgericht [Swiss Federal Supreme Court], accessed 5th May 2021 at: <https://iicl.law.pace.edu/cisg/case/switzerland-july-17-2007-bundesgericht-federal-supreme-court-translation-available>.
41. CD-R and DVD-R production line systems case. CISG/2007/03. October 2007. China International Economic and Trade Arbitration Commission [CIETAC]. Accessed 5th May 2021 at: <https://iicl.law.pace.edu/cisg/case/china-october-2007-translation-available>.
42. Printed work case. 16 U 106/12. 24th April 2013. Köln Oberlandesgericht [German Court of Appeal]. Accessed 5th May on: <https://iicl.law.pace.edu/cisg/case/germany-oberlandesgericht-hamburg-oberlandesgericht-olg-provincial-court-appeal-german-87>.
43. Fashion Products case. Arbitral Award 11 849/2003. 1st January 2003. ICC International Court of Arbitration.
44. Diesel tram case. *BV BA G-2 v. AS, C.B.*, A/00/00665, 25th April 2001. Rechtbank Van Koophandel [Belgian District Court]. Accessed on 8th April 2021 at: <https://iicl.law.pace.edu/cisg/case/belgium-april-25-2001-rechtbank-van-koophandel-district-court-bv-ba-g-2-v-cb-translation>.
45. Machine Case. Proz, Nr. 433/02. 10th March 2003. Appenzell Kantonsgericht [Swiss Canton Court]. Accessed 5th May 2021 at: <https://iicl.law.pace.edu/cisg/case/switzerland-march-10-2003-kantonsgericht-canton-court-translation-available>.
46. Caffeine case. CISG 1996/15. 29th Mach 1996. China International Economic and Trade Arbitration Commission [CIETAC]. Accessed 5th May at:

<https://iicl.law.pace.edu/cisg/case/china-march-29-1996-translation-available#Opinion%20of%20the%20Arb%20Trib>.

OFFICIAL DOCUMENTS

47. Legislative History of the 1980 Vienna Diplomatic Conference. *Summary Records of Meetings of the First Committee (27th Meeting)* §10, accessed 14th April on: https://iicl.law.pace.edu/sites/default/files/cisg_files/Meeting27.html
48. Legislative History of the 1980 Vienna Diplomatic Conference. *Summary Records of Meetings of the First Committee (26th Meeting)* p. 376 §64 [Statement of Mr. Vinding Kruse (Danish delegation)] (27 March 1980), accessed 5th May 2021 at: <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/a-conf-97-19-ocred-eng.pdf>
49. Legislative History of the 1980 Vienna Diplomatic Conference. *Summary Records of Meetings of the First Committee (6th Meeting)* p. 261 §30 (14th March 1980). Accessed 5th May 2021 at: <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/a-conf-97-19-ocred-eng.pdf>.
50. UNCITRAL. Report of the Working Group, 1st session, A/CN.9/35/1970, in UNCITRAL yearbook [1968-70] Vol 1, §6, accessed 8th April at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/yb_1968_1970_e.pdf.
51. United Nations Commission on International Trade Law Yearbook V, (1974) *Texts of comments and proposal by representative on Articles 71-101 (A/CN.9/87, annex II)*, proposal of the United States of America and Comments of France and Hungary, p.68-9, accessed 5th May 2021 at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/yb_1974_e.pdf.
52. United Nations Commission on International Trade Law. *Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods (2016)*, accessed 8th April 2021, available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/cisg_digest_2016.pdf.
53. United Nations The General Assemble Official Records, *Report of the Secretary-General*, 21st session, Annex 3 (Agenda Item 88), UN Doc A/6396, in UNCITRAL Yearbook Vol I.
54. United Nations. *Commentary on the Draft Convention on Contract for the International Sale of Goods prepared by the Secretariat* (“Secretariat Commentary”), A/CONF.97/5, p. 17-18, accessed 8th April, available at: <http://www.cisg-online.ch/index.cfm?pageID=644#Article%207>
55. United Nations. *Secretariat Commentary to Article 71*, accessed 5th May 2021 at: <https://iicl.law.pace.edu/cisg/page/article-71-secretariat-commentary-closest-counterpart-official-commentary>.
56. United Nations. *Secretariat Commentary to Article 72*, accessed 5th May 2021 at: <https://iicl.law.pace.edu/cisg/page/article-72-secretariat-commentary-closest-counterpart-official-commentary>.

SECONDARY SOURCES

BOOKS

57. Andersen, Camilla B. “General Principles of the CISG – Generally Impenetrable?” In *Sharing International Commercial Law across National Boundaries: Festschrift for Albert H. Kritzer on the Occasion of his Eightieth Birthday*, edited by Camilla B. Andersen and Ulrich G Schroeter, p. 26. Wildy: Simmons & Hill Publishing, 2008. Accessed 8th April 2021 at: https://iicl.law.pace.edu/sites/default/files/cisg_files/andersen6.html#28.
58. Bennett, Trevor. “Comments on Article 71.” In *Bonell, Bianca-Bonell Commentary on the International Sales Law: the 1980 Vienna Sales Convention*, edited by Massimo Bianca and Michael Jochim. Guiffre: Milan, 1987, pp. 510-20. Accessed 5th May at: <https://iicl.law.pace.edu/cisg/scholarly-writings/comments-article-71-bianca-bonell-commentary>. (Bennett I)
59. Bennett, Trevor. “Comments on Article 72.” In *Bonell, Bianca-Bonell Commentary on the international sales law: the 1980 Vienna Sales Convention*, edited by Massimo Bianca and Michael Jochim. Guiffre: Milan, 1987, pp.525-30. Accessed 5th May at: <https://iicl.law.pace.edu/cisg/scholarly-writings/comments-article-72-bianca-bonell-commentary> (Bennett II).
60. Black, Henry C. *Black’s Law Dictionary* 2nd edition. New Jersey: The Lawbook Exchange, 1995. Accessed 5th May at: <https://thelawdictionary.org/clear/>
61. Bonell, Michael J., “Article 7: Interpretation, Gap-filling.” In: *Bianca-Bonell Commentary on the international sales law: the 1980 Vienna Sales Convention*. Edited by Massimo Bianca and Michael Jochim. Guiffre: Milan, 1987, pp. 65-94. Accessed 5th March 2021 at: <https://iicl.law.pace.edu/cisg/scholarly-writings/comments-article-7-bianca-bonell-commentary> .
62. Brunner, Christoph J.H., and Benjamin Leisinger, “Article 25 [Definition of “Fundamental Breach].” In *Commentary on the UN Sales Law (CISG)*. Edited by Christoph J.H. Brunner and Benjamin Gottlieb. Haywards Heath: Kluwer Law International, 2019): p. 166.
63. Chynoweth, Paul. “Legal Research.” In *Advanced Research Methods in the Built Environment*, edited by Andrew Knight and Les Ruddock, p.29. UK: Wiley-Blackwell, 2008.
64. DiMatteo, Larry A., Lucien Dhooge, Stephanie Greene, Virginia Maurer. “The Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence.” *Norwegian Journal of International Law and Business* 24(2) (2004): 299 -440. Accessed 5th May 2021, at: <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1577&context=njilb>.
65. Enderlein, Fritz, and Dietrich Maskow. *International Sales Law: United Nations Convention on Contracts for the International Sale of Goods: Convention on the Limitation Period in the International Sale of Goods: Commentary*. New York: Oceana, 1992. Accessed 5th May at: https://iicl.law.pace.edu/sites/default/files/bibliography/fritz_enderlein_dietrich_maskow.pdf.

66. Heckscher, Elli and Bertil Ohlin. "The Effect of Foreign Trade on the Distribution of Income." In *Heckscher-Ohlin Trade*, edited by Harry Flam and M. June Flanders. Cambridge, MA: MIT Press, 1991.
67. Honnold, John O. *Uniform Law for International Sales Under the 1980 United Nations Convention*, 3rd ed. The Netherlands: Kluwer Law International, 1999. Accessed 8th April, at: <https://iicl.law.pace.edu/cisg/bibliography/honnold-john-o-us-7>.
68. Honnold, John O. *Documentary History of the Uniform Law for International Sales*. Deventer: Kluwer, 1989.
69. Janssen, André, and Olaf Meyer. *CISG Methodology*. München: Sellier European Law Publishers GmbH, 2009. Accessed April 11, 2021 on ProQuest Ebook Central.
70. Kaplow Louis, and Shavell, Steven., "Economic Analysis of Law." In *Handbook of Public Economics* Vol.3 1st edition, edited by Alan Auerbach and Martin Feldstein, p. 1661-1784. North Holland: Elsevier, 2002. Accessed 4th May at: http://www.law.harvard.edu/programs/olin_center/papers/pdf/251.pdf.
71. Keller, Bertram. "Favor Contractus Reading the CIG in Favor of the Contract." In *Sharing International Commercial Law across National Boundaries: Festschrift for Albert H. Kritzer on the Occasion of his Eightieth Birthday*, edited by Camilla B. Andersen and Ulrich G Schroeter, pp. 247-266. Wildy: Simmons & Hill Publishing, 2008. Accessed 8th April 2021 at: <https://iicl.law.pace.edu/sites/default/files/bibliography/keller1.pdf>.
72. Kröll, Stefan, Loukas A. Mistelis, and Pilar P. Viscasillas. "Article 7 §24." In *UN Convention on Contracts for the International Sale of Goods (CISG): Commentary*, edited by Loukas A. Mistelis and Pilar P. Viscasillas, 1st edn. München: Beck/Hart, 2011.
73. Lookofsky, Joseph M. and Herbert Bernstein. *Understanding the CISG in Europe*. 2nd edition. Holland: Kluwer Law International, 2003.
74. M. Smits, Jan M. "What is Legal Doctrine? On the Aims and Methods of Legal-Dogmatic Method." In *Rethinking Legal Scholarship: A Transatlantic Dialogue*, edited by R van Gestel, H Micklitz & El Rubin, pp. 207-208 at p.4. New York: Cambridge University Press, 2017. Maastricht European Private Law Institute Working Paper No. 2015/06. Accessed electronically on 4th May 2021 at: <https://ssrn.com/abstract=2644088>.
75. Posner, Richard A., *Economic Analysis of Law*, 6th edition. New York: Aspen Publishers, 2003.
76. Schlechtriem, Peter. *Uniform Sales Law: The UN Convention on Contracts for the International Sale of Goods*. Vienna: Manz, 1986, pp. 1-120. Accessed 8th April 2021 at: <https://iicl.law.pace.edu/cisg/bibliography/schlechtriem-peter-germany-104>.
77. Schwenger, Ingeborg H. "The CISG – A fair balance of the interests of the seller and the buyer." In *CISG and Latin America: regional and global perspectives*, edited by Ingeborg Schwenger et al. pp. 79-91. The Hague: Eleven International Publishing, 2016. Accessed 8th April 2021, at: <https://edoc.unibas.ch/42342/>.
78. Schwenger, Ingeborg H., and Peter Schlechtriem. *Commentary on the UN Convention on the International Sale of Goods (CISG)*, 4th ed. Oxford: Oxford University Press, 2016.
79. Spagnolo Lisa. *CISG Exclusion and Legal Efficiency*. The Netherlands: Kluwer Law International, 2014. Available on:

- <https://media.wolterskluwer.com/pdfs/TableOfContentPDF/6568.pdf>. Accessed 3rd March 2021.
80. Van der Velden, Frans J.A. “The Law of International Sales: The Hague Conventions 1964 and the UNCITRAL Uniform Sales Code 1980.” in *Hague-Zagreb Essays Five: On the Law of International Trade*, eds. John Anthony Wade and C.C.A. Voskuil, Dordrecht, Martinus Nijhoff Publishers, 1985.
81. Volken, Paul. “The Vienna Convention: Scope, Interpretation, and Gap-filling.” In *International Sale of Goods: Dubrovnik Lectures*, edited by Petar Sarcevic and Paul Volken, p. 38. New York: Oceana, 1986. Accessed 5th May 2021 at: <https://iicl.law.pace.edu/cisg/scholarly-writings/vienna-convention-scope-interpretation-and-gap-filling>.
82. Will, Michael. “Comments on Article 25,” In Bonell, *Bianca-Bonell Commentary on the international sales law: the 1980 Vienna Sales Convention*. Edited by Massimo Bianca and Michael Jochim. Guiffre: Milan, 1987, p.205-221. Accessed 5th May at: <https://iicl.law.pace.edu/cisg/scholarly-writings/comments-article-25-bianca-bonell-commentary#i>.
83. Wittman, Donald A. *Economic Foundations of Law and Organization*. Cambridge: Cambridge University Press, 2006.

JOURNALS

84. Ahmed, Bzhar A., and Hassan Mustafa Hussien. “Avoidance of Contract as a Remedy under CISG and SGA: Comparative Analysis.” *Journal of Law, Policy and Globalization* 61 (2017): 130. Accessed 8th April 2021 at: <https://core.ac.uk/download/pdf/234651394.pdf>.
85. Almlöf, Hanna and Per-Olof Bjuggren. “A regulation and transaction cost perspective on the design of corporate law.” *European Journal of Law and Economics* 47 (2019):407-433. Accessed 5th May 2021 at: <https://link.springer.com/article/10.1007/s10657-019-09620-x#ref-CR64>.
86. Babiak Andrew. “Defining ‘Fundamental Breach’ under the United Nations Convention on Contract for the International Sale of Goods.” *Temple International and Comparative Law Journal* 6 (1992): pp. 113-143. Accessed 5th May 2021 at: https://iicl.law.pace.edu/sites/default/files/bibliography/andrew_babiak.pdf.
87. Bell, Gary F. “How the fact of Accepting Good Faith as a General Principle of the CISG Will Bring More Uniformity.” *Cornell Review of the CISG* (2005-06): 3-22 at p. 18, Accessed 5th May 2021 at: <https://iicl.law.pace.edu/cisg/bibliography/bell-gary-f-4>.
88. Berghuis, Ebel and Frank A.G den Butter. “The transaction costs perspective on international supply chain management; evidence from case studies in the manufacturing industry in the Netherlands.” *International Review of Applied Economics* 31, no. 3 (2017). Accessed 3rd March 2021, doi.org/10.1080/02692171.2017.1324409.
89. Bridge, Michael. “Avoidance for Fundamental Breach of Contract under the UN Convention on the International Sale of Goods.” *International and Comparative Law Quarterly* 59 (4) (2010), pp. 911-40, <https://doi.org/10.1017/S0020589310000473>.
90. Bridge, Michael. “Good Faith, the Common Law, and the CISG.” *Uniform Law Review* 22 (1) (2017): pp. 98-115. Accessed 5th May, <https://doi.org/10.1093/ulr/unw059>.

91. Campbell, Colin P. "The Doctrine of Anticipatory Breach." *Central Law Journal* 60, (1905): pp. 64-69, accessed 12th April on Hien Online.
92. Coase, Ronald H. "The Nature of the Firm." *Economica* 4, no. 16 (1937): pp. 386–405. Accessed October 13th 2020, doi:10.1111/j.1468-0335.1937.tb00002.x.
93. Coase, Ronald H. "The Problem of Social Cost." *Journal of Law and Economics* 3 (1960):pp. 1-44. Accessed 5th May 2021 at: <https://www.law.uchicago.edu/files/file/coase-problem.pdf>.
94. Cuniberti, Gilles. "Is the CISG Benefiting Anybody?" *Vanderbilt Journal of Transnational Law* 29 (2006): p. 1515. Accessed 5th May at: https://www.academia.edu/18493432/Is_the_CISG_Benefiting_Anybody.
95. da Silveira, Mercédeh Azeredo. "Anticipatory Breach under the United Nations Convention on Contracts for the International Sale of Goods." *Nordic Journal of Commercial Law* (2) (2005): p. 7. Accessed 5th 2021 at: <https://journals.aau.dk/index.php/NJCL/article/view/3046/2573>.
96. DiMatteo Larry A. and Daniel Ostas. "Comparative Efficiency in International Sales Law." *American University International Law Review* 26(2) (2011): pp. 371-439. Accessed 5th May 2021 at: <https://core.ac.uk/download/pdf/235401386.pdf>.
97. Ferrari, Franco. "Interpretation of Statements and Conduct under the Convention for the Internationale Sale of Goods (CISG) in the Light of Case Law." *International Business Law Journal* 1 (2003): 96-107. Available at Hein Online.
98. Ferrari, Franco. "Applying the CISG in a Truly Uniform Manner: *Tribunale di Vigevano* (Italy)." *Uniform Law Review/Revue de Droit Unifrome* 1 (2001) p. 203. Accessed 7th April 2021, available at: <https://198.105.44.141/cisg/biblio/ferrari4.html>.
99. Ferrari, Franco. "Fundamental Breach Under the UN Sales Convention: 25 Years of Article 25 CISG." *Journal of Law and Commerce* 25 (2006):pp. 489-508. Available at Hein Online.
100. Flechtner, Harry M. "Remedies Under the New International Sales Convention: The Perspective from Article 2 of the U.C.C." *Journal of Law and Commerce* 8 (1988): pp. 53-108. Accessed 5th may 2021 at: <https://iicl.law.pace.edu/cisg/scholarly-writings/remedies-under-new-international-sales-convention-perspective-article-2-ucc>.
101. Flechtner, Harry M. "Transcript of a Workshop on the Sales Convention: Leading CISG Scholars Discuss Contract Formation, Validity, Excuse for Hardship, Avoidance, Nachfrist, Contract Interpretation, Parole Evidence, Analogical Application, and Much More." *Journal of Law and Commerce* 18 (1999): pp.191-258, accessed 5th May 2021 at: <https://iicl.law.pace.edu/cisg/bibliography/transcript-workshop-sales-convention-leading-cisg-scholars-discuss-contract>.
102. Fransworth, Edward, A. "The Eason-Weinmann Colloquium on International and comparative Law: Duties of Good Faith and Fair Dealing under the UNIDROIT Principles, Relevant International Conventions and National Laws." *Tulane Journal of International and Comparative Law* 3 (1994):55. Available at Hein online.
103. Graffi, Leonardo. "Case Law on the Concept of "Fundamental Breach" in the Vienna Sales Convention." *International Business Law Journal* (2003) (3): pp. 338-349. Available at Hein Online.
104. Hackney, Philip. "Is the United Nations Convention on the International Sale of Goods Achieving Uniformity?" *Louisiana Law Review* 61(2) (2001): pp. 473-486. Accessed 8th April 2021 at: <https://digitalcommons.law.lsu.edu/lalrev/vol61/iss2/7/>.

105. Komarov, Alexander S. "Internationality, Uniformity and Observance of Good Faith in Interpretation of CISG: Some Remark on Article 7(1)." *Journal of Commerce* 25 (75) (2005): pp. 75-85. Accessed 5th May 2021 at: <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/komarov.pdf>.
106. Magnus, Ulrich. "General Principles of UN-Sales Law." *Max-Planck - Institute for foreign and international Private Law Rabels Zeitschrift for foreign and international Private Law Hein Kötz in honour of his 60th Birthday*, 59 (3-4) (1995). Accessed 11th April 2021, at: <https://iicl.law.pace.edu/cisg/scholarly-writings/general-principles-un-sales-law>.
107. Peacock, Darren. "Avoidance and the Notion of Fundamental Breach under the CISG: An English Perspective." *International Trade and Business Law Review* 8 (2003): pp. 95-134. Accessed 5th May 2021 at: <http://classic.austlii.edu.au/au/journals/IntTBLawRw/2003/4.html>.
108. Rosenberg, Mark N. "The Vienna Convention: Uniformity in Interpretation for Gap-Filling – An Analysis and Application." *Australian Business Law review* 20 (1992): pp. 442-459. Accessed 8th April 2021 at: <https://iicl.law.pace.edu/cisg/bibliography/vienna-convention-uniformity-interpretation-gap-filling-analysis-and-application>.
109. Roth, Marianna and Richard Happ. "Interpretation of the CISG According to Principles of International Law." *International Trade and Business Law Annual* 4 (1995): pp.1-14. Available at Hein Online.
110. Rothschild, Alfred. "Anticipatory Repudiation and Its Nullification – State and Federal Courts Symposium in Federal Jurisdiction," *Iowa Law Review* 31 (1945-1946): pp. 383-395, Available at Hein Online.
111. Saidov, Djakhongir. "Anticipatory Non-Performance and Underlying Values of the UNIDROIT Principles." *Uniform Law review* 11(4) (2006): pp. 765-823, <https://doi.org/10.1093/ulr/11.4.795>
112. Salama, Shani. "Pragmatic Responses to Interpretative Impediments: Article 7 of the CISG, an Inter-American Application." *University of Miami Inter-American Law Review* 38 (1) (2006): pp. 231. Accessed 7th April 2021, available at: <https://repository.law.miami.edu/cgi/viewcontent.cgi?article=1083&context=umialr>.
113. Strub, M.G. "The Convention on the International Sale of Goods: Anticipatory Repudiation Provisions and Developing Countries." *International and Comparative Law Quarterly* 38 (3) (1989): pp. 475-501. Accessed 5th May 2021 at: https://www.jstor.org/stable/759686?seq=1#metadata_info_tab_contents.
114. Varuhas, Jason N.E. "Law and Economics: Net Benefit or Deadweight Loss." *New Zealand Business Law Quarterly* 12 (2006): pp. 270-294.
115. Von Ziegler, Alexander. "The Right of Suspension and Stoppage in Transit (and Notification Thereof)." *Journal of Law and Commerce* 25 (2005-06): pp. 353-374. Accessed 5th May at: <https://iicl.law.pace.edu/cisg/scholarly-writings/right-suspension-and-stoppage-transit-and-notification-thereof#20>.
116. Whittaker, Simon. "How does French law deal with anticipatory breaches of contract?" *The International and Comparative Law Quarterly* 45(3) (1996): pp. 662-667.
117. Yang, Yinghao. "Suspension Rules under Chinese Contract Law, the UCC and the CISG: some Comparative Perspectives." *China Law & Practice* 18(7) (2004): pp. 23-

27. Accessed 5th May at: <https://iicl.law.pace.edu/cisg/bibliography/suspension-rules-under-chinese-contract-law-ucc-and-cisg-some-comparative>.

CISG ADVISORY COUNCIL OPINION

118. CISG Pace Law Database. Overview on Reasonableness, accessed 8th April 2021, at: <https://iicl.law.pace.edu/cisg/page/reasonableness>.

119. CISG-Advisory Council Opinion No. 17, *Limitation and Exclusion Clauses in CISG Contracts* (16th October 2015). Accessed 8th April 2021, available at <http://cisgac.com/opinion-17/>.

120. CISG-Advisory Council Opinion No. 18, *Set-off under the CISG* (2nd February 2018). Accessed 8th April 2021, available at <http://www.cisgac.com/opinion-no-18/>.

121. CISG-Advisory Council Opinion No. 21. *Delivery of Substitute and Repair under the CISG* (4th February 2020). Accessed 8th April 2021, available at <http://cisgac.com/opinion-no-21-/Delivery%20of%20Substitute%20Goods%20and%20Repair%20under%20the%20CISG/>.

122. CISG-Advisory Council Opinion No. 5, *The buyer's right to avoid the contract in case of non-conforming goods or documents* (7th May 2005), §4.19, accessed 5th May 2021 at: http://www.cisgac.com/file/repository/CISG_Advisory_Council_Opinion_No_5.pdf.

OTHERS

123. Allen & Overy. Hardship and anticipatory breach revisited. Belgian civil law concepts? Accessed 5th May 2021 at: https://www.jstor.org/stable/760685?seq=1#metadata_info_tab_contents <https://www.allenoverly.com/en-gb/global/news-and-insights/publications/hardship-and-anticipatory-breach-revisited--belgian-civil-law-concepts>.

124. den Butter, Frank A.G. and Robert H.J. Mosch. "Trade, Trust and Transaction Costs." *Tinbergen Institute Discussion Paper TI 2003-082/3* (2003): p. 1- 21. Accessed 5th May 2001, at: <https://papers.tinbergen.nl/03082.pdf>.

125. Our World in Data. Trade and Globalisation, available on: <https://ourworldindata.org/trade-and-globalization#trade-from-a-historical-perspective>. Accessed 3rd March 2021.

126. Schmidtchen, Dieter, Roland Kirstein and Alexander Neuzing. "Conflict of Laws Rules and International Trade: A Transaction Costs Approach." *Centre for the Study of Law and Economics Discussion Paper 2001-01* (2004): p. 2-25, accessed 5th May 2021, at: https://www.econstor.eu/obitstream/10419/23042/1/2004-01_conflict.pdf.

127. Sim, Disa. "The Scope and Application of Good Faith in the Vienna Convention on Contracts for the International Sale of Goods," LL.M diss., (Harvard Law School, 2001), accessed 8th April 2021, at: https://iicl.law.pace.edu/sites/default/files/cisg_files/sim1.html#int.

128. Vibute Khusal, and Filipos Aynalem, “Legal Research Methods: Teaching Material,” *Justice and Legal System Research Institute* (2009).