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William Lawrence

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I. INTRODUCTION

Between the time of contract formation and the time for contract performance, a variety of communications or events might give one of the party's real concerns about whether the other party will be able or willing to fulfill its future contract performance obligations. These concerns prospectively impair, to varying degrees, the legitimate contract expectations of the concerned party. That party can now find itself in a position of insecurity that it would not have assumed if the concerns had been known before entering the contract.

The United Nations Convention on the International Sales of Goods (CISG) addresses this situation in Chapter 5 of Part III on provisions common to the obligations of both sellers and buyers.[1] It allows an aggrieved party to take specified actions prior to a breach, with the objective of enabling that party to initiate action to address the impairment.[2] One of the options is the Article 71 right of the aggrieved party to suspend performance that has become due on its part (*e.g.*, making an advance payment) to see if the

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[1] United Nations Convention on Contracts for the International Sale of Goods pt. III, ch. 5, § 1, Apr. 11, 1980, S. TREATY DOC. NO. 98-9, 1489 U.N.T.S. 3 [hereinafter CISG].

[2] *Id.*

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impairment can be resolved before proceeding.[3] The more drastic action is for the aggrieved party to avoid (cancel) the contract under Article 72.[4]

This Paper analyzes the treatment of the remedies of suspension and avoidance under the CISG. Although Article 72 treatment of avoidance is on solid footing, the approach to suspension in Article 71 leaves a great deal to be desired. Without question, the availability of suspension can be an effective remedy. However, in my opinion, which is contrary to the stated positions of nearly all other commentators that have addressed the issue, Article 71 undercuts the suspension remedy so severely as to question whether it has any real distinction from the Article 72 requirements on avoidance.

II. CISG PROVISIONS ON AVOIDANCE AND SUSPENSION

A. Avoidance: Article 72

The CISG statement granting the right to invoke avoidance is straightforward: "If prior to the date for performance of the contract, it is clear that one of the parties will commit a fundamental breach of contract, the other party may declare the contract avoided."[5] Thus, in appropriate cases, an aggrieved party is not required to wait until such an impairment ripens into a present breach in order to avoid the contract.[6]

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[3] *Id.* art.71.

[4] *Id.* art. 72. Article 73 also provides for avoidance in the context of instalment contracts—both avoidance of an individual instalment and avoidance of the remainder of the contract following a breach by a party on a single instalment. Because the second of these two categories involves avoidance with respect to all future deliveries, the less drastic remedy of suspension is also available to aggrieved parties. Several decisions recognize that, in an instalment contract, the aggrieved party might act under either article [71 or 73] as to future instalments. UNCITRAL, *Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods*, 30 J.L. & COM. (Special Issue) 1, 339 (2012) [hereinafter UNCITRAL Digest].

[5] "Article 72 offers protection against a future breach of contract." PETER SCHLECHTRIEM, COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALES OF GOODS (CISG) 532–33 (2d ed. 1998) [hereinafter SCHLECHTRIEM, COMMENTARY 2d].

[6] Mercédeh Azeredo da Silveira, *Anticipatory Breach under the United Nations Convention on Contracts for the International Sale of Goods*, 2005 NORDIC J. COM. L. 2005(2) at 2 ("without the need to wait until the breach materializes on the date when performance is due"); Trevor Bennett, *in* COMMENTARY ON THE INTERNATIONAL SALES LAW 526 (C.M. Bianca & M.J. Bonnell eds., 1987) ("should not have to wait until the date fixed for performance has elapsed"); Sieg Eiselen, *Remarks on the Manner in Which the Principles of European Contract Law May Be Used to Interpret or Supplement*

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Because the fundamental breach standard is imposed for avoidance even in cases of present breach,[7] the use of the same standard in Article 72 on anticipatory breach is not surprising. In either instance, the right of avoidance is predicated on the establishment of a fundamental breach by the other party.[8] Article 25 states the applicable standard: "A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as to substantially deprive him of what he is entitled to expect under the contract . . . ."[9] The right of an aggrieved party to cancel the contract for a present or a prospective breach is not taken lightly.[10]

Although Articles 49(1)(a) and 64(1)(a) on present breach and Article 72(1) on anticipatory breach state the required showing of fundamental

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Articles 71 and 72 of the CISG, *in* GUIDE TO ARTICLES 71 AND 72 (Sept. 2002) ("without having to wait until performance become due"); Ulrich Magnus, *The Remedy of Avoidance of Contract Under CISG—General Remarks and Special Cases*, 25 J.L. & COM. 423, 424–25 (2006) ("If a fundamental breach has occurred, the immediate right to terminate the contract accrues and may be immediately exercised by the aggrieved party in the form and within the period required by the CISG."); Peter Schlechtriem, *Calculation of Damages in the Event of Anticipatory Breach under the CISG*, PACE-IICL CISG DATABASE, cisgw3.law.pace.edu/cisg/biblio/schlechtriem20.html (last updated Sept. 9, 2008) [hereinafter Schlechtreim, *Calculation of Damages*] ("need not wait until the breach actually occurs").

[7] *See* CISG, *supra* note 1, art. 49(1)(a); CISG, *supra* note 1, art. 64(1)(a).

[8] In addition to fundamental breach as a means to qualify for avoidance, the CISG articles on present breach also give a right to avoid in relation to a Nachfrist notice. *See* CISG, *supra* note 1, art. 49(1)(b); CISG, *supra* note 1, art. 64(1)(b). Articles 47 and 63 present this remedy, which is reflective of German law, in allowing aggrieved buyers and sellers, respectively, to fix an additional reasonable time for performance by the breaching party. If a breaching seller then does not deliver the goods within the fixed time, Article 49(1)(b) gives the buyer the right to avoid the contract in Article 49(1)(b). If a breaching buyer does not perform its obligations of taking the goods or paying the price within the designated time, Article 64(1)(b) allows the seller to declare the contract avoided. Due to the prospective nature of anticipatory repudiation, this type of notice is not relevant to Article 72. In these cases an aggrieved party can avoid only when a forthcoming fundamental breach is clear.

[9] Article 25 concludes with an exception for cases that otherwise fall within the basic standard: ". . . unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result." CISG *supra* note 1, art. 25. Damages, of course, are available as a remedy in any case of breach, whether or not fundamental.

[10] Oberlandesgericht [OLG Köln] [Higher Regional Court] Oct. 14, 2002, INTERNATIONALES HANDELSRECHT [IHR] 15 (2003) (Ger.); PETER SCHLECHTRIEM, UNIFORM SALES LAW—THE UN-CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALES OF GOODS 94 (1986) ("a remedy of last resort") [hereinafter SCHLECHTRIEM, UN-CONVENTION]; Azeredo da Silveira, *supra* note 6, at 23 ("[A]voidance of the contract under the CISG is clearly a remedy of *extrema ratio*."); Anna Kazimierska, *The Remedy of Avoidance under the Vienna Convention on the International Sale of Goods*, *in* REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG) 1999–2000, 150 (2001) ("last resort remedies, due to the drastic effects, which result from their exercise"); Magnus, *supra* note 6, at 424 ("[A]voidance under the CISG is a remedy of last resort, or an *ultima ratio* remedy, which should not be granted easily.").

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breach differently, the differences really only reflect the respective time perspectives involved.[11] Under Articles 49(1)(a) and 64(1)(a), only a failure by a breaching party that *already* "amounts to a fundamental breach" can qualify, whereas Article 72(1) requires that it be "clear that one of the parties *will commit* a fundamental breach."[12]

With respect to present breach, the most difficult cases to analyze are those in which the breaching party has performed but fallen short of completing all of its contractual obligations. The detriment to the aggrieved party must be identified and a determination must be made as to whether that detriment substantially deprives the aggrieved party of its contractual expectation.[13] The aggrieved party must be cautious in making these determinations, because if it decides wrongly that the breach is fundamental and avoids the contract, it will itself become the aggressor and commit a breach by avoiding the contract without the right to take that course of action.[14] By comparison, the easiest cases for finding a fundamental present

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[11] *See* CISG, *supra* note 1, art. 49(1)(a); CISG, *supra* note 1, art. 64(1)(a); CISG, *supra* note 1, art. 72(1).

[12] *See* CISG, *supra* note 1, at art. 49(1)(a); CISG, *supra* note 1, at art. 64(1)(a); CISG, *supra* note 1, at art. 72(1) (emphases added). *See also* CHENGWEI LIU, REMEDIES IN INTERNATIONAL SALES: PERSPECTIVES FROM CISG, UNIDROIT PRINCIPLES AND PECL 297 (Marie Stefanini Newman ed., 2007) ("CISG Art. 72 applies only where future performance is *still due.*") (emphasis added).

[13] *See* CISG, *supra* note 1, art. 25.

[14] The observation also applies in the context of anticipatory repudiation under Article 72. *See* Bennett, *supra* note 6, at 528 ("[H]is action may be invalid and lead to the result that his own subsequent non-performance amounts to a breach and possibility for damages."); FRITZ ENDERLEIN & 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 290 (1992) ("If a party declares the contract avoided without a fundamental breach of contract by the other party being anticipated, the former commits a fundamental breach of contract."); JOHN HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 437 (3d ed. 1999) [hereinafter HONNOLD, UNIFORM LAW 3d], https://cisgw3.law.pace.edu/cisg/biblio/honnold.html ("A's wrongful declaration of avoidance may constitute a repudiation giving B the right to avoid the contract under Article 72(1)."); Joseph Lookofsky, *The 1980 United Nations Convention on Contracts for the International Sale of Goods*, *in* INTERNATIONAL ENCYCLOPAEDIA OF LAWS: CONTRACTS 1, 149 (J. Herbots & R. Blanplain eds.) (Supp. 2000), http://www.cisg.law.pace.edu/cisg/biblio/lookofsky.html#p149 ("[A] party who fails to perform by virtue of an avoidance not justified under article 72 will itself commit a (perhaps fundamental) breach."). *See also* Shuttle Packaging Sys. v. Tsonakis, No. 1:01-CV-691, 2001 WL 34046276 (W.D. Mich. Dec. 17, 2001) (buyer that avoided a contract on which the seller did not commit a fundamental breach, committed a fundamental breach itself); Roser Techs., Inc. v. Carl Schreiber GmbH, No. 11cv302 ERIE, 2013 WL 4852314 (W.D. Pa. Sept. 10, 2013) (buyer that repudiated the contract by wrongfully sending a notice of cancellation fundamentally breached the contract).

breach occur when the breaching party has not provided any performance, and has not shown any inclination to cure its breach. A complete deprivation of everything that the aggrieved party was entitled to receive is the most obvious form of a fundamental breach.

Article 72(1) is the same, except that the impairment is prospective. The breach, having not yet occurred, must be measured for its prospective impact. It must be clear that a fundamental breach will occur. This clarity is the most obvious when one party, in advance of its time for performance, states definitively that it will not perform at all.[15] The deprivation of entitlement under the contract then is total. In the absence of a sufficient statement, the only other basis to be clear that a fundamental breach will occur is for actions to be taken that will preclude performance by one party, such as the bankruptcy of a buyer or a seller wrongfully selling unique goods to a third buyer.[16]

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[15] *See* PETER SCHLECHTRIEM & INGEBOR SCHWENZER, COMMENTARY ON THE UN CONVENTION ON INTERNATIONAL SALE OF GOODS (CISG) 971 (3d ed. 2010) ("A definite refusal to perform is considered as a stronger indication for the breakdown of the contract.") [hereinafter SCHLECHTRIEM & SCHWENZER, COMMENTARY 3d]; Magellan Int'l Corp. v. Salzgitter Handel GmbH, 76 F. Supp. 2d 919, 921 (N.D. Ill. 1999) (seller stated it would "no longer feel obligated" to perform and would "sell the material elsewhere"); Guangdong AAA New Technology Co. v. CCC S.A. (China v. Switz.), Chinese International Economic and Trade Arbitration Commission (CIETAC) (Oct. 2007), https://cisgw3.law.pace.edu/cases/071000c1.html; Epheteia Lamia [Ephet.] [Court of Appeals] 63/2006 (Greece) (seller refused to deliver sunflower seeds because the market had changed); Schiedsgericht Hamburger Freundschaftliche Arbitrage [Arbitral Tribunal] Dec. 29, 1998, NEUE JURISTISCHE WOCHENSHRIFT-RECHTSPRECHUNGS-REPORT ZIVILRECHT (NJW-RR) 780, 1999, CLOUT No. 293 (Ger.) (demands exceeding agreed upon terms made as a condition for delivery).

[16] *Secretariat Commentary No. 2 on Article 63 of the 1978 Draft [counterpart of CISG Article 72]*, JOHN HONNOLD, DOCUMENTARY HISTORY OF THE UNIFORM LAW FOR INTERNATIONAL SALES 433 (3d ed. 1989) [hereinafter HONNOLD, DOCUMENTARY HISTORY] ("The future fundamental breach may be clear either because of the words or actions of the party which constitute a repudiation of the contract or because of an objective fact, such as the destruction of the seller's plant by fire or the imposition of an embargo or monetary controls which will render impossible future performance."). *See also* ENDERLEIN & MASKOW, *supra* note 14, at 290 ("Art. 72 thus combines in one rule the refusal to perform and an anticipated objective impossibility to perform.").

"The preconditions of paragraph (1) [of Section 72—clear fundamental breach] were found to have been satisfied in the following circumstances in regard to the buyer: the buyer failed to pay for prior shipments; the buyer failed to open a letter of credit; the buyer failed to open a conforming letter of credit; the buyer had failed to pay for a consignment and failed to provide an adequate assurance of performance. . . . [Comparably] in regard to the seller: the seller failed to reduce the price and to commit to deliver fashion goods on time; the seller deliberately terminated delivery of the goods; the seller refused to give effect to a requirement that a whole ship be chartered exclusively for the transport of the goods; the seller refused to commit to a date for delivery and advised the buyer to purchase substitute goods; the seller declared that it was impossible to find the goods and the possibility of finding replacement goods

Cases of anticipatory repudiation that fall somewhat short of these bright-line tests can pose the same issue that arises under present breach when the breach is only partial. Suppose, for example, that prior to the time set for performance, one of the parties repudiates only part of its contractual obligations or insists upon some unilateral modification of a term of the contract as a condition to its willingness to perform under the contract. As with a comparable present partial breach, the detriment to the aggrieved party must be identified and a determination must be made as to whether that detriment would substantially deprive the aggrieved party of the contractual expectation to which it is entitled.

B. Suspension: Article 71

With such a high standard required to avoid a contract prospectively under Article 72, many parties in international sales contracts will seek an alternative remedy when they are not certain of (but nevertheless have serious reservations about) the other party's willingness or ability to perform. Suspension becomes attractive because it allows the aggrieved party to withhold further performance on its part, while seeing whether the other party will remove the impairment. If not, the other party will breach, and suspension will have allowed the aggrieved party not to have incurred any further expenses in its own performance. Article 71(1) purports to provide such a remedy. It states, in part, that "[a] party may suspend the performance of his obligations if, after the conclusion of the contract, it becomes apparent that the other party will not perform a substantial part of his obligations . . . ."[17]

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was low; the seller provided flawed sketches for the manufacturing of the goods and provided no adequate assurance of improving them in time." UNCITRAL Digest, *supra* note 4, at 336.

[17] CISG, *supra* note 1. Article 71(1) continues as follows:

"as a result of:

(a) a serious deficiency in the ability to perform or in his creditworthiness; or

(b) his conduct in preparing to perform or in performing the contract.").

As noted, scholars have previously indicated that "[t]he various grounds for endangerment which give rise to the right of suspension are described in such wide terms as to cover virtually all sorts of disturbance." SCHLECHTRIEM & SCHWENZER, COMMENTARY 3d, *supra* note 15, at 951. For this reason, these subsections are not further analyzed.

See Bundesgericht [BGer] [Federal Supreme Court], July 17, 2007, 4C.94/2006 (Switz.) (party that cannot satisfy the criteria of Article 71, but who nonetheless suspends its performance, will breach the contract by failing to go forward in meeting its contract obligations).

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As the discussion below explains, the remedy provided in Article 71(1) is largely illusory. The problem is that the drafting for the remedy of suspension limits its availability to circumstances that are equivalent to (or at least closely resemble) the restraints in Article 72 on the remedy of avoidance. The basic premise advanced in this Paper is that the CISG is far too constrained in permitting the remedy of suspension.

C. Comparing Availability of Suspension and Avoidance

A quick reading of Articles 71 and 72 would certainly lead to the conclusion that the two articles state quite different requirements for suspension and avoidance. A reader familiar with Article 2 of the Uniform Commercial Code ("U.C.C.") would likely draw the conclusion that the two provisions create remedies that correlate to U.C.C. Sections 2-609 and 2-610.[18] The impression of distinctive requirements is enhanced by the separation of the two concepts into two distinct articles in the CISG and by the use of different language in both articles.[19]

Article 71 on suspension restricts the remedy to circumstances in which "it becomes apparent that the other party will not perform a substantial part of his obligations," whereas Article 72 on avoidance allows for the remedy in circumstances in which "it is clear that one of the parties will commit a fundamental breach of contract."[20] These statements of the prerequisites for availability of the respective remedies both include two distinct elements. The distinctions in the drafting of the two articles center on the phrases

[18] Professor Farnsworth, one of the U.S. delegates to the Vienna Conference, reportedly claimed that U.C.C. Section 2-609 had inspired Article 71. *See* Tatsiana Seliazniova, *Prospective Non-Performance or Anticipatory Breach of Contract (Comparison of the Belarusian Approach to CISG Application and Foreign Legal Experience)*, 24 J.L. & COM. 111, 128 (2004) (citing E. Allan Farnsworth, *The Vienna Convention: An International Law for the Sale of Goods*, *in* PRIVATE INVESTORS ABROAD: PROBLEMS AND SOLUTIONS 121, 135 (Martha L. Landweher ed., 1983)). Be that as it may, the subsequent discussion in the text of this Article will show that the drafting of Article 71 limits the availability for suspension far more that U.C.C. Section 2-609 does. *See infra* notes 68–96 and accompanying text.

[19] Several commentators draw upon this separation and the language differences as support of their argument that the drafters must have intended different standards. *See infra* notes 36, 46, & 64 and accompanying text.

[20] CISG, *supra* note 1, art. 71 & 72.

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"becomes apparent" versus "it is clear" as well as a "substantial part of his obligations" versus "fundamental breach of contract."[21]

With respect to the "becomes apparent" versus "it is clear" standards, both of them are prospective, as they concern something indicating that a breach will occur in the future. The focus here is on the required degree of certainty that the anticipated breach will occur. Both standards force the aggrieved party to predict that under the current circumstances a breach will occur.[22] The additional elements of "substantial part" vs. "fundamental breach" are also prospective: they both concern a breach that will occur in the future. The focus of those elements is on the extent of the impairment of the other party's interests that the expected breach will impose.

1. "Becomes Apparent" vs. "It is Clear"

The difference between clear and apparent is neither clear nor apparent. Something is clear when it is "unmistakable," "free from doubt," and synonymous with "absolute" or "evident";[23] it is apparent when it is "clear or manifest to the understanding."[24] "Apparent" could also suggest something "not actually being what appearance indicates."[25] Most of the distinction between "apparent" and "clear" dissolves, however, upon recognition that the degree of clarity required in Article 72 is not absolute.[26]

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[21] *Compare* CISG, *supra* note 1, art. 71, *with* CISG, *supra* note 1, art. 72.

[22] HENRY GABRIEL, CONTRACTS FOR THE SALE OF GOODS: A COMPARISON OF U.S. AND INTERNATIONAL LAW 217 (2d ed. 2009) ("Both articles are concerned with predicting whether there will be a breach."); LIU, *supra* note 12, at 268 ("concerned with predicting"); INGEBORG SCHWENZER, CHRISTIANA FOUNTOULAKIS & MARIEL DIMSEY, INTERNATIONAL SALES LAW: A GUIDE TO THE CISG 508, 518–19 (2012) (explaining that Article 71(1) "requires a prediction" and "[l]ike Article 71(1) CISG, it [Article 72] requires a prediction"); Bennett, *supra* note 6, at 522 ("predict that a non-performance is likely to occur"); Seliazniova, *supra* note 18, at 126 ("hypothetical future breach situation").

[23] *Clear*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11 ed. 2013).

[24] *Apparent*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11 ed. 2013) (The dictionary also uses both "apparent" and "clear" as synonyms of "evident," which it defines as "clear to the vision or understanding.").

[25] *Id.*

[26] ENDERLEIN & MASKOW, *supra* note 14, at 291 ("There need *not*, however, be *absolute certainty*."); FRANCO FERRARI & MARCO TORSELLO, INTERNATIONAL SALES LAW—CISG IN A NUTSHELL 457–58 (2d ed. 2018) ("Article 72 CISG does not require absolute certainty that a breach will be committed."); GABRIEL, *supra* note 22, at 216 ("The standard to invoke the rule appears to be that there is a very high probability that there will be a fundamental breach rather than complete certainty."); HONNOLD, UNIFORM LAW 3d, *supra* note 14, at 437 ("even though such a declaration [repudiation] does

The bright-line tests of renunciation of contract obligations, or of actions that make subsequent performance impossible, provide the degree of certainty required in order to invoke avoidance.[27] Because the time for contract performance in Article 72 is in the future, the offending party conceivably might become willing and able to perform by that time. For example, he might retract his repudiation, reacquire the unique goods of the contract from persons to whom they were wrongfully sold, or overcome the obstacles of bankruptcy.[28] Absolute pre-breach certainty would be an unworkable standard. Instead, we have bright-line tests from which we are willing to infer sufficient certainty. Consequently, use of the term "clear" in Article 72 does not mean the complete certainty that the term suggests.

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not make it absolutely 'clear' . . . ."); Azeredo da Silveira, *supra* note 6, at 24–25 ("[A]rt. 72 does not require absolute and unshakable certainty that a breach will be committed."); Kazimierska, *supra* note 10, at 97 ("not required to be absolutely certain"); LIU, *supra* note 12, at 284 ("no absolute certainty is required"); Djakhongir Saidov, *Anticipatory Breach and Instalment Contracts—Articles 71–73*, *in* UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 922 (Stefan Kröll, Loukas A Mistelis & Maria del Pilar Perales Viscasillas eds., 2d ed. 2018) ("[It] is a probability standard and therefore absolute certainty in prognosis is not required."); M. Gilbey Strub, *The Convention on the International Sale of Goods: Anticipatory Repudiation Provisions and Developing Countries*, 38 INT'L & COMP. L. Q. 475, 493, 498 (1989) ("need not establish non-performance with absolute certainty") ("[I]f a party's declared refusal fails to make non-performance absolutely 'clear,' a party's demand for additional or varying terms can hardly be considered to make non-performance 'clear' either."). *See* Downs Investments Pty. Ltd. v. Perwaja Steel SDN BHD [2000] QSC 421 (Austl.); P. v. P., Case No. S2/97, SCHIEDSGERICHT DER BÖRSE FUR LANDWIRTSCHAFTLICHE PRODUKTE [Arbital Tribunal-Wien] Oct. 12, 1997, http://www.unilex.info/cisg/case/346; LANDGERICHT [LG Berlin] [Regional Court], Sept. 30, 1992, 99 O 123/92, http://www.unilex.info/cisg/case/79 (discussing avoidance in stating that "[t]he court held that the probability of a future breach of contract has to be very high and obvious to everybody, but did not require almost complete certainty"). *But see* Jelena Vilus, *Provisions Common to the Obligations of the Seller and the Buyer*, *in* INTERNATIONAL SALES OF GOODS: DUBROVNIK LECTURES 244 (Petar Šarčević & Paul Volken eds., 1986) ("The party intending to declare the contract avoided must be absolutely sure that there is indeed a fundamental breach of contract.").

[27] The bright-line tests for avoidance are a repudiation by the other party or actions that make that party's future performance impossible. *See supra* notes 14–16 and accompanying text.

[28] SCHLECHTRIEM, UN-CONVENTION, *supra* note 10, at 95 ("Moreover, another reason for not requiring a higher degree of certainty under Article 71(1) is that otherwise, a serious refusal to perform would never be 'certain' enough under Article 72(3) since an obligor can always change his intentions until the time for performance."). For discussion of Article 72(3), *see* note 74 *infra*. *See also* HONNOLD, UNIFORM LAW 3d, *supra* note 14, at 429 ("[C]ircumstances that make it 'apparent' that the other party will not perform need not establish a certainty of non-performance since the initial appearance may be modified by clarification of the situation or by the removal of the initial barriers to performance.").

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The UNICITRAL draft of Article 71 presented to the delegates at the Vienna Convention[29] allowed an aggrieved party to suspend its performance when it had "good grounds to conclude that the other party will not perform a substantial part of his obligations."[30] Some of the delegates, primarily from developing nations, voiced concerns that under the provision as drafted, suspension could be based too much on the aggrieved party's subjective assessment of the other party's ability or willingness to perform.[31] The wording ultimately was changed to "it becomes apparent" in an effort to apply a more objective standard.[32]

As the discussion below demonstrates,[33] in turning to the requirement of "apparent that the other party will not perform a substantial part of his obligations," the delegates pushed the required showing for suspension into a standard comparable to the "becomes clear" standard for avoidance.

Most commentators addressing the issue disagree with that last statement.[34] They nearly unanimously contend that the degree of certainty required under Article 71 is less than the standard for avoidance.[35] This

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[29] For a compilation of studies, deliberations, and decisions that led to the CISG, see HONNOLD, DOCUMENTARY HISTORY, *supra* note 16. For a good summation of the process leading to Article 71 and 72, see Bennett, *supra* note 6, at 513–18.

[30] *Anticipatory Breach and Installment Contracts: Article 62(1)*, *in* HONNOLD, DOCUMENTARY HISTORY, *supra* note 16, at 389.

[31] HONNOLD, UNIFORM LAW 3d, *supra* note 14, at 428.

[32] *Id.* Due to the prospective nature of the suspension and avoidance remedies, the aggrieved party has to predict that the anticipated breach will occur. Several commentators have pointed out that, even though Article 71 requires the use of an objective standard to govern the prediction, the process inevitably involves the inclusion of subjective reasoning. *See, e.g.*, Azeredo da Silveira, *supra* note 6, at 5 ("The party seeking suspension is frequently incapable of assessing precisely the probability that a non-performance will occur, but he is merely in a position to assert, based on a party-subjective appreciation of the circumstances, that it is likely that such non-performance will occur."); Bennett, *supra* note 6, at 514 ("[A]s the article makes provision for situations in which breaches of contract are anticipated only, its operation will inevitably involve some subjective assessment on the part of a suspending party."); Seliazniova, *supra* note 18, at 126 ("The party will estimate the ensuing events on the basis of his subjective view influenced by an objective test."). Because Article 72 also requires an assessment of what is likely, the same observation about the role of subjective influence applies there as well: The interests of the suspending party "are mainly defined subjectively by the party itself. But the seriousness of the infringement, the fundamentality of the breach, is determined objectively." Magnus, *supra* note 6, at 436.

[33] *See infra* notes 38–42 and accompanying text.

[34] "[T]he majority of authors who have examined the question have come to the conclusion that 'standards for suspension are less rigorous than the standards for avoidance under article 72.'" Azeredo da Silveira, *supra* note 6, at 21 (quoting HONNOLD, UNIFORM LAW 3d, *supra* note 14, at 430).

[35] ENDERLEIN & MASKOW, *supra* note 14, at 286 ("[T]he standards of Article 71 are less strict than those of Article 72."); FERRARI & TORSELLO, *supra* note 26, at 457 ("It is apparent that the degree of

conclusion is influenced largely by the separation of the standards into two different articles in the CISG in which each standard is stated differently, and assuming therefore that the drafters must have intended some difference.[36] Their argument is further supported by the statement of the respective standards in the French version of the CISG. The French text uses the term *il apparait* (said to be the same as *il est etabil*), whereas it uses stronger language of *il est manifeste* in Article 72.[37]

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certainty required for the application of Article 72 CISG is higher than that required under Article 71 CISG."); GABRIEL, *supra* note 22, at 217 ("[R]equirements for avoidance under Article 72 are more stringent . . . ."); HONNOLD, UNIFORM LAW 3d, *supra* note 14, at 437 ("[S]tandards for suspension are less rigorous than the standards for avoidance under Article 72."); LIU, *supra* note 12, at 268 ("[T]he preconditions for the more drastic remedy of avoidance are more stringent . . . ."); Azeredo da Silveira, *supra* note 6, at 5–6 ("[T]he degree of certainty that a breach will be committed, required under art. 71 CISG, is lower than the degree of certainty required under art. 72 CISG . . . ."); Bennett, *supra* note 6, at 528 (Avoidance requires "a greater certainty than is required for the application of Article 71."); Eiselen, *supra* note 6, at 3 ("Article 72 requires a higher standard of prospective certainty . . . ."); Harry M. Flechtner, *Remedies Under the New International Sales Convention: The Perspective from Article 2 of the U.C.C.*, 8 J.L. & COM. 53, 94 (1988) ("As could be expected, suspension under Article 71 requires less certainty concerning a future breach than does avoidance under Article 72.") [hereinafter Flechtner, *Remedies*]; Lookofsky, *supra* note 14, at 147 ("somewhat easier to suspend than avoid"); Keith A. Rowley, *A Brief History of Anticipatory Repudiation in American Contract Law*, 69 U. CIN. L. REV. 565, 634 (2001) ("less certainty"); Seliazniova, *supra* note 18, at 128 ("less certainty"); Strub, *supra* note 26, at 494 ("less stringent"); Yinghao Yang, *Suspension Rules Under Chinese Contract Law, the UCC and the CISG: Some Comparative Perspectives*, PACE-IICL CISG DATABASE, www.cisg.law.pace.edu/cisg/biblio/yang.html (last updated Oct. 12, 2004) ("lower degree of certainty than contract avoidance").

In some of his earliest work, Professor Schlechtriem did not see any difference between the two standards. SCHLECHTRIEM, UN-CONVENTION, *supra* note 10, at 95 ("In my opinion, the different formulations do not require different degrees of certainty—such a requirement would hardly be practicable anyway."). For his more recent opinion, *see infra* note 36. *See also* Saidov, *supra* note 26, at 892–93 ("Although such a distinction may be possible in theory, it is doubtful whether it is workable in practice.").

[36] HONNOLD, UNIFORM LAW 3d, *supra* note 14, at 428 (The conference "took pains to preserve different language authorizing these different remedies."); PETER SCHLECHTRIEM & PETRA BUTLER, UN LAW ON INTERNATIONAL SALES 185 (2009) (explaining that the Article 71(1) threshold is "not as high as for an anticipatory breach under Article 72(1) CISG"); SCHLECHTRIEM & SCHWENZER, COMMENTARY 3d, *supra* note 15, at 954 ("[T]he threshold in Article 71 is lower . . . . Otherwise, Article 72, which allows for avoidance of the contract in cases of fundamental anticipatory breach, would be redundant."); Azeredo da Silveira, *supra* note 6, at 18 ("These distinctions in terminology convey substantive differences between the two provisions."); Bennett, *supra* note 6, at 522 ("This different wording was deliberately adopted by the Vienna Conference on the basis that . . . a difference of meaning was involved.").

[37] HONNOLD, UNIFORM LAW 3d, *supra* note 14, at 428 n.4 ("See also the other official language versions: in French 'il *apparait*' (Art. 71) v. 'il est *manifeste*' (Art. 72); in Spanish '*manifesto*' (Art. 71) v. '*patente*' (Art. 72)."); Azeredo da Silveira, *supra* note 6, at 21 ("The difference in terminology was . . . consciously drafted and is also found in the French and Spanish versions of the CISG."); Bennett, *supra* note 6, at 522 ("This different wording was deliberately adopted by the Vienna Convention on the basis

Even if one concedes that the drafters intended a difference, the question concerning the extent of the difference remains. Most writers have described Article 71 as requiring "virtual certainty" or "substantial probability,"[38] or have indicated that, compared with the requirement of "clear" in Article 72, the Article 71 standard is "somewhat easier" or "a slightly lesser probability."[39] These academic descriptions demonstrate that the difference between "becomes apparent" and "it is clear" is close to de minimus.[40] Sometimes, commentators have hedged their statements about the different

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that, at least in the French text, a difference of meaning was involved."); Lookofsky, *supra* note 14, at 147 (states that the French terms are "*il apparait*" (Art. 71) vs. "*une partie essentielle*" (Art. 72)).

[38] LARRY A. DIMATTEO ET AL., INTERNATIONAL SALES LAW: A CRITICAL ANALYSIS OF CISG JURISPRUDENCE 124 (2005) ("narrowness of the preconditions for suspension of performance"); ENDERLEIN & MASKOW, *supra* note 14, at 285 ("high degree of probability of non-performance"); FERRARI & TORSELLO, *supra* note 26, at 452 ("[T]he prevailing view requires that the likelihood of a breach amount to a virtual certainty by normal business standards."); HONNOLD, UNIFORM LAW 3d, *supra* note 14, at 429 ("substantial probability of non-performance"); SCHLECHTRIEM, COMMENTARY 2d, *supra* note 5, at 533 ("high degree of probability"); SCHLECHTRIEM & SCHWENZER, COMMENTARY 3d, *supra* note 15, at 957–58 ("Although virtual certainty cannot be required, a high degree of probability is essential in order to prevent the creditor relying on Article 71 based on rash allegations."); Azeredo da Silveira, *supra* note 6, at 4 ("substantial probability"); Bennett, *supra* note 6, at 522 ("Strictly construed, the language of the article seems to require that the likelihood of the apprehended non-performance amount to a virtual certainty by normal business standards."); Eiselen, *supra* note 6, at 3 ("very high degree of probability"); Robert Koch, *The Concept of Fundamental Breach of Contract under the United Nations Convention on Contracts for the International Sale of Goods (CISG)*, *in* REVIEW OF THE CONVENTION FOR THE INTERNATIONAL SALE OF GOODS (CISG) 305 (1999) [ed. Pace] ("high degree of probability"); Saidov, *supra* note 26, at 895 ("requiring a 'high' or 'substantial' degree of likelihood") (footnotes omitted); Strub, *supra* note 26, at 494 ("a high degree of probability of non-performance"). *See also* Oberster Gerichtshof [OGH] [Supreme Court] Feb. 12, 1998, 2Ob328/97t, https://www.ris.bka.gv.at/Dokumente/Justiz/JJT_19980212_OGH0002_0020OB00328_97T0000_000/JJT_19980212_OGH0002_0020OB00328_97T0000_000.pdf (Austria) (high probability of breach) [hereinafter OGH 2Ob328/97t]; LANDGERICHT BERLIN [LG Berlin] [Regional Court], Sept. 30, 1992, 99 O 123/92, http://www.unilex.info/cisg/case/79 (Ger.) (obvious to everybody).

[39] LIU, *supra* note 12, at 269 ("somewhat easier to suspend than avoid"); Lookofsky, *supra* note 14, at 147 ("a slightly lesser probability than one which is 'clear'").

[40] Seliazniova, *supra* note 18, at 128 ("[I]t is necessary to emphasize that the barrier between the standard of 'apparency,' used in Article 71, and 'clearness,' determining the right to declare a contract avoided, is very fragile."). Some decisions based on Article 71 have set exceedingly high requirements in determining that the aggrieved party could not suspend. *See, e.g.*, OGH 2Ob328/97t, *supra* note 38 (explaining that Article 71 was not available even though the buyer did not pay and cancelled a bank payment order that it showed the seller); Hof Leeuwarden 31 augustus 2005, 0400549 (Auto-Moto S.R.O/Pedro Boat B.V.) (Neth.) (discussing how the buyer could not suspend its payment obligation, even though the seller breached in not passing title to the goods and, although title passed in the meantime, damages for the delay could not be assured).

standards with terms like "arguably" and "likely."[41] None of the commentators have suggested that a substantial difference in the degree of required certainty separates the two articles. This analysis thus shows that, despite the general conclusion that Article 72 requires a higher showing of probability of breach, the same commentators themselves agree through their explanations that the extent of the difference with the Article 71 requirement is instead incredibly narrow.

2. "Substantial Part" vs. "Fundamental Breach"

Article 71 on suspension restricts the remedy to circumstances in which "it becomes apparent that the other party will not perform a substantial part of his obligations,"[42] whereas Article 72 on avoidance requires that "it is clear that one of the parties will commit a fundamental breach of contract."[43] Thus, in addition to addressing the degree of certainty required in order to invoke either remedy, an adequate showing must also address the extent of the prospective impairment.

Although not discussed as extensively by the commentators as "apparent" versus "clear," the nearly unanimous consensus is that Article 72 on avoidance requires more: the breach has to be more serious for avoidance as compared to suspension.[44] Here again the commentators sometimes use

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[41] LIU, *supra* note 12, at 269 ("Art. 72 arguably requires 'a greater certainty'"); Azeredo da Silveira, *supra* note 6, at 18 ("seem to differ"); Bennett, *supra* note 6, at 528 ("It requires that it be clear that the breach will be committed, and in this respect arguably requires a greater certainty than is required for the application of Article 71."); Eiselen, *supra* note 6, at 3 ("seems to be"); Flechtner, *Remedies*, *supra* note 35, at 94 ("appears that"); Lookofsky, *supra* note 14, at 147 ("presumably intended"); Strub, *supra* note 26, at 494 ("must be assumed"); Yang, *supra* note 35, at 6 ("[a]rguably lower degree of certainty than contract avoidance"). Another authority states succinctly the tenuous nature of this assessment: "Note, for example, that different language, and a presumably higher burden to the party taking advantage of anticipatory breach, is used in Article 72, thus leading the observer to conclude that 'becomes apparent' is somehow different from the rather restrictive clarity that is required in Article 72." Mark S. Walter, *Drafting Contracts to Deal with Insecurity and Prospective Breach (Articles 71, 72, 73(2))*, *in* DRAFTING CONTRACTS UNDER THE CISG 413, 419 (Harry M. Flechtner, Ronald A. Brand & Mark S. Walter eds., 2008).

[42] CISG, *supra* note 1, art. 71.

[43] *Id.* art. 72.

[44] GABRIEL, *supra* note 22, at 217 ("[T]he requirements for avoidance under Article 72 are more stringent than those for suspension under Article 71, both as to the seriousness of the predicted breach and the probability that the breach will occur."); LIU, *supra* note 12, at 270 ("[T]he consequences of the threatened breach need not be as serious under Article 71."); Azeredo da Silveira, *supra* note 6, at 18

hedge terms like "arguably" and "presumably"[45] and refer to the drafters' use of two different articles and terms.[46] This time the French versions of the terms, however, do not indicate, as they did in the context of "apparent" versus "clear," a difference in the two statements.[47]

("[T]he breach needs to be more 'serious' to trigger the more drastic remedy of avoidance of the contract (art. 72 CISG) rather than mere suspension of performance (art. 71 CISG)."); Bennett, *supra* note 6, at 519 (The "separateness" of the two Articles can "provide for a party to suspend performance where the other party's breach, while substantial, may not be a sufficiently fundamental to justify avoidance." *Id.*); Eiselen, *supra* note 6, at 3 ("Suspension as provided for in Article 71 is less drastic in that it is only a temporary remedy . . . ."); Lookofsky, *supra* note 14, at 147 (explaining that the suspension standard is "to denote something less than a 'fundamental breach'").

See also Flechtner, *Remedies*, *supra* note 35, at 94 ("It also appears that, compared to the requirements for avoidance under Article 72, the consequences of the threatened breach need not be as serious to trigger suspension under article 71."). Flechtner subsequently tempered his views somewhat. *See infra* notes 46–47. *See also* SCHLECHTRIEM & BUTLER, *supra* note 36, at 185 ("In practice the difference, however, the difference [sic] will not matter greatly.").

[45] LIU, *supra* note 12, at 269 ("is presumably intended to denote something *less than a 'fundamental breach'*") & (Article 72 "arguably requires 'a greater certainty' than the '*apparent*' test attached to the application of Art. 71."); Azeredo da Silveira, *supra* note 6, at 5 ("seems to require"); Lookofsky, *supra* note 14, at 147 ("presumably intended to denote something less than a 'fundamental breach'. . . .").

[46] SCHLECHTRIEM, UN-CONVENTION, *supra* note 10, at 92 ("Even though, in practice the difference between an (expected) violation of a 'substantial part of the obligations' . . . and a 'fundamental breach'. . . will hardly be distinguishable, it must be assumed that such a differentiation is, in principle, possible: for one, the Egyptian motion to make the expectation of a 'fundamental breach' the prerequisite for suspending performance under Article 71(1) was rejected."); SCHLECHTRIEM & SCHWENZER, COMMENTARY 3d, *supra* note 15, at 954 ("[T]he threshold in Article 71 is lower . . . . Otherwise, Article 72, which allows for avoidance of the contract in cases of fundamental anticipatory breach, would be redundant."); Bennett, *supra* note 6, at 519 ("The separateness of these two provisions is significant.") (*accord* LIU, *supra* note 12, at 266); Saidov, *supra* note 26, at 888 ("The only guideline that can be inferred from the Convention itself is that an anticipated failure to perform 'a substantial part of the obligations' does not have to amount to a 'fundamental breach' as defined by Art. 25 and referred to in Art. 72.").

Professor Flechtner took the following initial position: "[T]he drafters would not have used two different phrases ('fundamental breach' as opposed to non-performance of 'a substantial part of his obligations'), and in particular, two different adjectives describing the seriousness of the breach ('fundamental' as opposed to 'substantial'), had they not intended to distinguish the seriousness of the threatened breach that would satisfy the standards of the respective articles." Harry M. Flechtner, *The Several Texts of the CISG in a Decentralized System: Observations on Translations, Reservations and Other Challenges to the Uniformity Principle in Article 7(1)*, 17 J.L. & COM. 187, 190 (1998) [hereinafter Flechtner, *Several Texts*]. For an explanation of Flechtner's discovery that this argument was at the least much harder to make under the French text, *see infra* note 47.

[47] *See* Flechtner, *Several Texts*, *supra* note 46, at 192 ("In the French version, both Article 71 and Article 72 use the same adjective to describe the seriousness of a threatened breach that would trigger their provisions. In both, the standard is a breach or non-performance that is '*essentielle*,' i.e., Article 71 states that, to justify suspension, a party must threaten non-performance of '*une partie essentielle de ses obligations*,' and Article 72 requires a threat of '*une contravention essentielle au contrat*' to warrant avoiding the contract.").

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Even though the drafters stated the applicable standards in two different sections and in different terms, close examination of the drafting of the provisions shows again that a distinction either does not exist or at most is quite narrow. The decisions for aggrieved parties is heightened further by the difficulty encountered in just trying to determine whether a breach is fundamental: "A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party *as substantially to deprive him of what he is entitled to expect under the contract*."[48] The requirement for suspension under Article 71 is remarkably similar: "[I]t becomes apparent that the other party *will not perform a substantial part of his obligations*."[49] The legitimate expectation of a contracting party is that the other party will perform the obligations undertaken in the contract. Article 25 (and thus Article 72 through its use of the defined term) and Article 71 both refer to breaches that will lead to a substantial encroachment on those expectations. Thus, even though the stated standards in Articles 71 and 72 use different terms, they are really the same. Article 72 applies Article 25 by using the defined term as the standard for avoidance, whereas Article 71 uses the essence of that definition as the requirement for suspension.[50]

The case law does not provide much clarity. Several cases have found a right to suspend under circumstances in which the underlying impairment might easily have constituted a fundamental breach.[51] These cases, of course,

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[48] CISG, *supra* note 1, art. 25 (emphasis added).

[49] *Id.* art. 71 (emphasis added).

[50] The workability of this approach is further undercut by the difficulty encountered in just trying to determine whether a breach is fundamental. Two commentators have noted this difficulty as follows: "The extent of injury that counts as a 'substantial deprivation' is not self-evident. . . . [T]he seriousness of breach is inevitably contestable in particular cases." CLAYTON P. GILLETTE & STEVEN D. WALT, THE UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS: THEORY AND PRACTICE 196 (2d ed. 2016).

[51] *See* Oberster Gerichtshof [OGH] [Supreme Court] Feb. 6, 1996, 10 Ob 518/95, https://www.ris.bka.gv.at/Dokumente/Justiz/JJT_19960206_OGH0002_0100OB00518_9500000_000/JJT_19960206_OGH0002_0100OB00518_9500000_000.pdf (Austria) (because it was certain that the seller could not meet its obligation to deliver the goods, as it was unable to get approval from its supplier to export the liquid gas to Belgium, the buyer could suspend its procurement of a letter of credit); Rechtbanken van Koophandel [Kh.] [Commerce Tribunal] Hasselt, Mar. 1, 1995, No. A.R. 3641/94, http://unilex.info/cisg/case/269 (Belg.) (discussing that payment for only a partial amount for goods delivered under the first order justified seller in suspending delivery of the goods in the second order); Mansonville Plastics (B.C.) Ltd. v. Kurtz GmbH, [2003] B.C.J. No. 1958 (Can. B.C. Sup. Ct.) (discussing the failure of a buyer to open a letter of credit); Oberlandesgericht [OLG Frankfurt] [Higher Regional Court] Oct. 6, 2004, 21 U 24/04, http://cisgw3.law.pace.edu/cases/041006g1.html (Ger.) (explaining that a buyer's failure to settle

are not helpful in drawing insights into when suspension is permitted in the absence of the satisfaction of the requirements of Article 72. Actually, the case law has not done much of anything to address this critical distinction. "Very few of the cases provide an insight into how the courts and tribunals are analyzing the matter of insecurity and prospective breach."[52] This inadequacy of the case law is easy to understand; the CISG is far too nebulous in articulating a meaningful distinction between suspension and avoidance. Like the buyers and sellers, the courts and tribunals have also been cut off from meaningful guidance.

In conclusion, the CISG separates the remedies of suspension and avoidance into two different Articles, and those Articles state the requirements for the availability of each remedy through different wording. As subsection II.C.1 of this Paper demonstrates, however, even though most commentators conclude that the comparison of the standards governing the probability of future breach (whether the breach is "apparent" or "clear") indicates that the Article 72 standard requires a higher degree of probability, close scrutiny of their statements shows that they all describe the Article 71 standard as requiring nearly the same degree of high probability as in Article 72. Furthermore, subsection II.C.2 of this Paper demonstrates that, although not recognized by most of the commentators, the provisions of the CISG themselves show that the requirements of both Articles concerning the seriousness of the breach require the essential aspects of a fundamental breach. The inescapable conclusion is that, despite forty years of attempts by scholars and tribunals to define or to distinguish the standards of Articles 71 and 72, we are left with a distinction lacking a defined difference. The

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its previous debts, and its refusal to do so, entitled the seller to hold back subsequent delivery); Bundesgerichtshof [BGH] [Federal Court of Justice] Nov. 27, 2007, INTERNATIONALES HANDELSRECHT [IHR] 2008, 49–53 (Ger.) (explaining that a buyer's declaration that it would not perform its duty to take delivery justified seller in suspending its obligation); Oberlandesgericht [OLG Hamm] [Higher Regional Court] June 23, 1998, RECHT DER INTERNATIONALEN WIRTSCHAFT [RIW], 1999, 785–87 (Ger.) (discussing an instance where a seller no longer possessed the goods covered by the contract); Oberlandesgericht [OLG] [Higher Regional Court] Karlsruhe, July 20, 2004, INTERNATIONALES HANDELSRECHT [IHR] 6/2004, 246–51 (Ger.) (discussing an instance where a buyer could not meet its delivery obligations because its supplier could only deliver the goods after the agreed upon delivery date); Roser Techs., Inc. v. Carl Schreiber GmbH, No. 11cv302 ERIE, 2013 WL 4852314 (W.D. Pa. Sept. 10, 2013) (discussing a case where a seller was entitled to suspend its delivery performance after the buyer repudiated its obligation by wrongfully sending notices of cancellation).

[52] Walter, *supra* note 41, at 421.

linguistics of the two articles present a semantic non-conflict. The result of tying the same high standard to both articles precludes Article 71 suspension from being a remedy available to address lesser degrees of impairment.

III. THE DEFICIENCIES OF ARTICLE 71

A. General

One of the basic underlying policies of the CISG is to keep deals together.[53] Reflecting this objective, the CISG allows a sales contract to be terminated properly only under the most egregious circumstances. In cases of prospective impairment of expectations, the Convention implements this restrictive approach to termination by permitting avoidance of the contract only in cases of fundamental breach.[54]

This policy is well founded, particularly in international sales transactions. The extensive differences in legal and political systems, business ethics, economic systems, language, and customs involved in domestic trade make misunderstandings and disputes significantly more probable in the international arena.[55] In addition, they can cause heightened difficulties in minimizing transactional costs for a party that result from a breach of contract.[56] For example, a seller that learns that its buyer, due to some defects in the delivered goods, has terminated the contract after the goods have arrived at a distant foreign destination can be placed in a very difficult position to protect its interests in the rejected goods. A seller with no agent or storage facilities in the buyer's country, and little understanding

[53] Azeredo da Silveira, *supra* note 6, at 2, 13; Eiselen, *supra* note 6, at 2.

[54] Articles 47 and 63 establish the right to make a Nachfrist notice that extends the time for the breaching party to perform. If the performance is not forthcoming, the aggrieved party can avoid the contract. CISG, *supra* note 1, art. 49(1)(b) & art. 64(1)(b). For further explanation, *see supra* note 8 and accompanying text. The CISG does not provide any comparable provisions with respect to prospective impairment cases. An aggrieved party then can avoid only when a forthcoming fundamental breach is clear.

[55] Schlechtriem, *Calculation of Damages*, *supra* note 6, at 1 ("The so-called anticipatory breach of contract occurs frequently in international commerce.").

[56] For an economic analysis, see GILLETTE & WALT, *supra* note 50, at 5.06[1].

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of the market or culture of the buyer's country, is at a major disadvantage in attempting to resell the goods there.[57]

With avoidance available only for cases of fundamental breach, most parties with prospectively impaired expectations need an alternative, less onerous remedy. The need is particularly acute in international sales transactions. Consider a seller that receives information from a reliable source suggesting that financial setbacks to the buyer could impair the buyer's ability to make payments for the goods. Obviously, the seller would like to resolve this issue satisfactorily before shipping the goods to a foreign land a considerable distance away. Alternatively, it might be the buyer that wants to hold off on making an advanced payment after comparable information suggests the seller might now lack the financial capacity to complete the manufacturing of the goods. When these types of cases do not reach the level of an anticipatory repudiation, an appropriate alternative protection for the aggrieved party is to allow that party to delay its own performance until the issue creating the impairment is resolved. Rather than avoiding the contract, the aggrieved party suspends the performance of the contract obligations. Clearly, between the two, avoidance is the significantly more drastic remedial response to an impairment.

A comparison of the legal consequences that follow the assertion of either of these two remedies demonstrates their widely disparate natures. Successfully invoked, avoidance terminates the contract, thereby releasing both parties from any further obligations under the contract.[58] The effect of a suspension is far less drastic. It simply allows an aggrieved party that has a contract performance coming due to delay its performance.[59] For example, if

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[57] Jacob Ziegel, *The Remedial Provisions in the Vienna Sales Convention: Some Common Law Perspectives*, *in* INTERNATIONAL SALES: THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 9–12 (Nina M. Galston & Hans Smit eds., 1984) ("It is a matter of balancing the buyer's concern for predictability and certainty against the seller's need for protection against contracts canceled on minor or capricious grounds, particularly where the goods have already been tendered to the buyer and there is no readily available alternative market or they can only be disposed of at great cost to the seller.").

[58] CISG, *supra* note 1, art. 81(1). *See also* CISG Chapter V, Section V on the effects of avoidance. Most of these provisions (Articles 81–84) address requirements of restitution following an avoidance.

[59] ENDERLEIN & MASKOW, *supra* note 14, at 283 ("It is a logical condition for the suspension of performance of an obligation that the *obligation to perform is already due*. . . . What are required are not only acts of performance of the contract, but also those in *preparation of performance* which, therefore, can *also be suspended*."); FERRARI & TORSELLO, *supra* 26, at 450–51 ("The CISG thus appears to be based on the general principle that, in the event of contracts that do not provide for simultaneous

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a contract requires the buyer to pay in advance or to provide a letter of credit, sufficient impairment of the buyer's expectations that the seller subsequently will perform its contract obligations should enable the buyer to delay going forward with its own performance. Similarly, if the seller's expectations that the buyer will pay for the goods are sufficiently impaired, the seller could suspend by delaying its shipment of the goods.[60] In either case, when the impairment is removed, the contract obligations of the suspending party resume.[61] Unlike avoidance, suspension does not rupture the contractual relationship.[62]

Just as the avoidance remedy allows an aggrieved party to terminate a contract without having to wait for a present breach to occur, a suspension

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performance by both parties, the party bound to perform first deserves protection if it is likely that the other party will commit a breach of contract."); LIU, *supra* note 12, at 272 ("Based on the anticipation of future breach by the other party of his obligation that is not yet due, the threatened party may suspend his own performance already due."); SCHLECHTRIEM & BUTLER, *supra* note 36, at 186 ("'Suspension' of the performance of the obligation means first and foremost the retention of the creditor's own due performance, more exact: the retention of the performance which is necessary to fulfill the creditor's part of the contract, for example, the delivery, the dispatch of the goods, the transfer of ownership, the payment of the purchase price, the taking of delivery."); SCHLECHTRIEM & SCHWENZER, COMMENTARY 3d, *supra* note 15, at 950 ("Article 71 emphasizes the principle of concurrent performance: a party should not be obliged to perform if it is sufficiently obvious that the promised counter-performance will not be rendered or not be conforming to the contract.").

[60] Article 71(2) even allows an impaired seller under designated circumstances to stop the delivery of goods already in transit. A prerequisite to use of the provision is the seller must be able to satisfy the requirements of Article 71(1). For discussion of Article 71(2), see SCHLECHTRIEM & SCHWENZER, COMMENTARY 3d, *supra* note 15, at 960–67.

[61] For discussion of this requirement, provided in Article 71(3), *see infra* notes 70–74 and accompanying text.

[62] Many cases have held that Article 71 does not provide a right to suspend with respect to a performance that is already due. *See, e.g.*, Case No. 9448 of 1999, 2000 ICAB 103 (ICC Int'l Ct. Arb.) (goods already delivered, no right to withhold payment for deliveries already completed); Hoven van Beroep (HvB) [Court of Appeal] Gent (Belg.), 26 April 2000, [BU B.A. S.P. v. S. Ltd.) (same); OBERLANDESGERICHT [Higher Regional Court] [OLG Dusseldorf], Nov. 18, 1993, 6 U 228/92, http://cisgw3.law.pace.edu/cases/931118g1.html (Ger.); RB Utrecht, 18 juli 2007, 219436/ HA ZA 06-2279, https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBUTR:2007:BB0049 (Neth.) (Article 71 requires a prospective breach); Russia 24 May 2004 Arbitration proceeding 97/2004, PACE-IICL CISG DATABASE, http://cisgw3.law.pace.edu/cases/041223r1.html, n.3.4.1 (purchase price may not be withheld in case of defective delivery).

See also SCHLECHTRIEM & SCHWENZER, COMMENTARY 3d, *supra* note 15, at 952 ("The non-breaching party receiving defective delivery must fully perform its counter-obligation and is restricted to the remedies granted by Article 45, 61 [on present breach]. Metaphorically speaking, Article 71 can only be used as a sword, not as a shield: the creditor will be able to prevent performance of the contract by way of suspension but has no possibility to refuse its own performance if it has received defective performance.").

permits a sufficiently impaired party to delay its performance rather than having to perform and subsequently seek a remedy if the offending party later commits the expected breach.[63] Because suspension is so much less serious than avoidance, one would anticipate that the suspension remedy would be readily available over a much wider range of prospective impairments than coverage under the avoidance remedy.

Article 71 does not preserve this distinction of the seriousness between avoidance and suspension. The CISG does provide for avoidance and suspension in separate articles dealing with impaired expectations, using different language with respect to each remedy. As the discussion in Part II of this Paper demonstrates, however, the standards articulated in Article 71 undercut the availability of suspension as a separate remedy by pushing the requirements for its application to the level of what Article 72 requires for avoidance. For the most part, suspension is not an independent remedy based on criteria distinct from avoidance.

Many commentators point to the far greater seriousness in the consequences of avoidance to explain why the drafters separated it and suspension into two different Articles.[64] The argument is that the distinct legal consequences require two separate sections and standards in order to

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[63] "It [suspension] protects the creditor from knowingly exposing itself to the risk of not receiving anything in return for what it has performed." SCHLECHTRIEM & SCHWENZER, COMMENTARY 3d, *supra* note 15, at 950.

[64] FERRARI & TORSELLO, *supra* note 26, at 456 (avoidance is "the more trenchant right"); GILLETTE & WALT, *supra* note 50, at 5–29 ("[T]he function of Article 71 as a means of generating information implies that an apparent failure to perform a 'substantial part' of one's obligation need not amount to an apparent 'fundamental breach.'"); JOHN HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALE UNDER THE 1980 UNITED NATIONS CONVENTION 552 (Harry M. Fletchner ed., 4th ed. 2009) [hereinafter HONNOLD, 4th ed.] ("This differing language means that greater certainty of future performance is required in order to justify final avoidance of the contract under article 72 than is required for the less radical remedy of suspension under Article 71."); LIU, *supra* note 12, at 270 ("[T]he consequences of the threatened breach need not be as serious to trigger suspension under Article 71."); SCHLECHTRIEM, UN-CONVENTION, *supra* note 10, at 95 ("To some extent, differences in the standards of certainty were accepted and justified on the grounds that the remedy in Article 71 differs in seriousness from the remedy in Article 72(1)."); Eiselen, *supra* note 6, at 3 ("[T]he majority seems to be that Art. 72 requires a higher standard of prospective certainty than Art. 71(1) mainly due to the more drastic nature of the remedy under Art. 72(1), namely avoidance."); Strub, *supra* note 26, at 497 ("The committee settled on 'it appears' in preference to 'it is clear' because of its intention that the criterion entitling a party suspension be less stringent than that of avoidance since suspension was the less severe remedy."); "Both articles [71 & 72] are concerned with predicting whether there will be a breach, but the preconditions for the more drastic remedy of avoidance are more stringent than those for suspension, both as to the seriousness of the predicted breach and the probability that the breach will occur." UNCITRAL Digest, *supra* note 4, at 336.

tailor each remedy to reflect the degree of seriousness of each of them. Articles 71 and 72 indeed do suggest the form of two independent remedies, but the substance of the two articles does not support that result. As the discussion in Part II of this paper shows, the fundamental breach requirement in Article 72 (defined in Article 25) necessitates a showing of substantial deprivation to the aggrieved party of its contractual expectation. The requirement for suspension in Article 71 simply states the content of the definition of fundamental breach: a demonstration that "the other party will not perform a substantial part of his obligations," *i.e.*, precisely the basis of the aggrieved party's contract expectations.[65] Article 71 cannot meet the objective of providing a separate remedy for cases of less serious consequences by limiting its availability to criteria comparable to what is required for the more serious remedy of avoidance.

Since Article 71 basically makes suspension available only when a fundamental breach is clear, it thereby reduces suspension to simply a lesser response available for an aggrieved party that qualifies to avoid the contract.[66] As a result, suspension under the CISG is pretty much limited only to cases that also support avoidance as the remedy of last resort. Suspension under Article 71 essentially is just an alternative remedy to avoidance under Article 72 for fundamental breach.[67]

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[65] *See* CISG, *supra* note 1, art. 71(1).

[66] Some commentators observe that if the aggrieved party is in doubt as to whether the other party's impairment rises to the level of fundamental breach, the safer approach is to invoke the right of suspension instead. *See* HONNOLD, UNIFORM LAW 3d, *supra* note 14, at 426 ("[I]f grounds for avoidance are not clear, the aggrieved party will prefer a less drastic approach such as suspension of its own performance."); LIU, *supra* note 12, at 294 ("[I]t remains advisable for the threatened party to decide to wait and first suspend the performance, especially when there are still doubts as to the seriousness of the conditions impeding performance."); Eiselen, *supra* note 6, at 3 ("It is the safer option because the giving of notice of avoidance in terms of Article 72(2) under circumstances in where it is not warranted may in itself constitute an anticipatory breach entitling the other party to avoid the contract.").

Because both remedies end up applying the same rigid standard, this advice misses the mark, as does the contention that Article 71 is broader in scope than Article 72. *See* LIU, *supra* note 12, at 270 ("very broad"); Strub, *supra* note 26, at 496 ("The final assessment of the right to suspend is that it is very broad."); Vilus, *supra* note 26, at 242 ("The provisions [of Art. 71] give rather broad power."); Ziegel, *supra* note 57, at 9–33 ("[T]he right to suspend conferred by Art. 71 is a very broad one.").

[67] *See* Yang, *supra* note 35, at 2 ("If the assertion of suspension required the same degree of likelihood of a breach, the procedure becomes practically meaningless.").

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B. Notice and Adequate Assurances

A comparison of Article 71 with UCC Section 2-609 is helpful, not for the purpose of advocating the adoption of the UCC provisions into the CISG, but rather to illustrate the degree of flexibility and expansive application possible with respect to suspension as a remedy for prospective impairment of expectations. An aggrieved party under the UCC invokes the section 2-609 right to suspend by making a demand for adequate assurances of performance from the other party.[68] The rationale is that the other party is thereby notified that it has impaired expectations of the aggrieved party and must now clear up the impairment through sufficient reassurances in order to reinstate the aggrieved party's contract obligations. If those assurances are forthcoming, the party that suspended is no longer impaired and must end its suspension by going forward with its performance.[69]

Article 71 also references adequate assurances. A party that suspends its performance must immediately thereafter provide notice to the other party.[70] The purpose of this provision is also to make the recipient aware of its alleged transgression and to give the recipient an opportunity to provide assurances sufficient to alleviate the impairment.[71] The suspending party then "must

[68] U.C.C. § 2-609(2) (AM. L. INT. & UNIF. L. COMM'N 2020).

[69] *Id.* (stating, "[w]hen reasonable grounds for insecurity arise with respect to the performance of either party the other may in writing demand adequate assurance of due performance and until he receives such assurance may if commercially reasonable suspend any performance for which he has not already received the agreed return").

[70] "A party suspending performance, whether before or after dispatch of the goods, must immediately give notice of the suspension to the other party . . . ." CISG *supra* note 1, art. 71(3). *See also* Award No. CISG/1989/02 (China Int'l Econ. and Trade Arb. Comm. 1989) (no notice of suspension or avoidance); LANDGERICHT [LG] [Regional Court] Darmstadt, May 29, 2001, 4 O 101/00, http://cisgw3.law.pace.edu/cases/010529g1.html (Ger.) (buyer sent a notice of complaint, but failed to give notice of suspension); Amtsgericht [AG] [District Court] Frankfurt, Jan. 31, 1991, 32 C 1074/90-41, CLOUT No. 51, http://cisgw3.law.pace.edu/cases/910131g1.html (Ger.) (failure to give immediate notice of suspending delivery opened seller to damages); Case No. 2319 of 2002, Arbitral Award (Neth. Arb. Inst.), http://cisgw3.law.pace.edu/cases/021015n1.html (suspension of future deliveries under the contract due to non-conformity of the first consignments).

[71] Case law holds that a failure of the suspending party to provide notice deprives it of the right to rely upon its suspension. Case No. 8574 of 1996, 2-2000 ICAB 57 (ICC Int'l Ct. Arb.) (purchase of goods in substitution for the goods under contract did not suspend buyer's obligations); Amtsgericht [AG] [District Court Frankfurt], Jan. 31, 1991, 32 C 1074/90-41, http://cisgw3.law.pace.edu/cases/910131g1.html (Ger.) (notice held to be *an absolute* necessary prerequisite for the right to suspend); Landgericht [LG] [Regional Court] Stendal, Oct. 12, 2000, INTERNATIONALES HANDELSRECHT [IHR]: ZEITSCHRIFT FÜR DIE WIRTSCHAFTSRECHTLICHE PRAXIS 30–34, Feb. 2001 (Ger.) (requirement to give notice not

continue with performance if the other party provides adequate assurance of his performance."[72] Article 72 provides a comparable opportunity for the impairing party to provide adequate assurances[73] to end the effectiveness of a notice of avoidance.[74]

Giving an impairing party the opportunity to provide adequate assurances often can open an effective way to address the concerns of an aggrieved party and overcome obstacles to both parties proceeding with their contract performance. Unfortunately, the drafting of Article 71 restricts its availability in ways that do not allow for access to the benefits that could result from the role of adequate assurances. Consider how the use of adequate assurances by an alleged offending party can clarify a misunderstanding of the suspending party. The latter party might be mistaken in its concerns or have an exaggerated level of apprehension that might be alleviated with a simple reassurance from knowledgeable parties. Adequate assurances can work this way, and they often do under approaches like UCC Section 2-609. The problem under the CISG is that the aggrieved party's right to invoke the opportunity for adequate assurances under Article 71(3) is not available unless the aggrieved party can first satisfy the exceptionally high standard for the availability of the right to suspend stated in Article 71(1).[75] A simple misunderstanding will not often rise to the level of an apparent breach of a substantial part of a contract obligation.

Rather than contesting the availability of the suspension process in such circumstances, the obvious practical approach, under even the CISG, would

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satisfied by just failing to pay the purchase price); Russia 27 July 1999 Arbitration proceeding 302/1996, PACE-IICL CISG DATABASE, http://cisgw3.law.pace.edu/cases/990727r1.html (last updated Dec. 20, 2006) (Article 71 not available because seller never notified buyer of the suspension due to buyer's failure to obtain a letter of credit.).

[72] CISG, *supra* note 1, art. 71(3).

[73] The inclusion of provisions on notice and the opportunity to provide adequate assurances of performance further coalesces the requirements of Articles 71 and 72. *See* CISG, *supra* note 1, art. 71 & art. 72.

[74] "[T]he party intending to declare the contract avoided must give reasonable notice to the other party in order to permit him to provide adequate assurance of his performance." CISG, *supra* note 1, art. 72(2). Article 72, however, includes two exceptions to the obligation to provide notice and give the other party the opportunity to provide assurances. The obligation applies only "[i]f time allows." It has been pointed out that with modern methods of fast communication, this exception does not have very much effect. HONNOLD, UNIFORM LAW 3d, *supra* note 14, at 440. The second limitation is that notice and opportunity for assurances "do not apply if the other party has declared that he will not perform his obligations." CISG, *supra* note 1, art. 72(3). The policy is that the declaration is definitive when compared to grounds of avoidance based on actions that make further performance impossible.

[75] *See* CISG, *supra* note 1, art. 71(1). *See also infra* notes 71–75 and accompanying text.

simply be to provide the assurances when they can so easily overcome the misunderstanding. Many other cases, however, are not so simplistic. The impairing party may choose not to provide assurances, but rather ignore the notice of impairment or attack the propriety of the suspension itself. In these circumstances, the failure to provide adequate assurances will not justify the continuation of the suspension unless suspension was appropriate under Article 71(1). If the suspension was not justified because it was not founded on both the requisite probability of a breach and seriousness of the breach, the refusal to provide adequate assurances for any impairment that the aggrieved party claims does not have any legal consequences to the other party. That impairing party simply takes the position that the suspension was ill-founded and that Article 71 consequently imposes no obligation to respond with assurances. If that position of the alleged offender is accurate, the aggrieved party will have breached its contract obligations by suspending rather than performing and, if serious enough, the breach might even be fundamental.[76] The opportunity for successful circumvention of providing assurances in these cases is greatly enhanced by the excessively high requirements to have a right to suspend in the first place.

Consider a strike by its employees before the seller has begun or finished manufacturing the goods to be delivered under the contract. Arguably, the buyer could then suspend by withholding a prepayment, delaying its procurement of a letter of credit, or holding off on preliminary steps like making shipping arrangements. The rub is that the aggrieved party can suspend its performance in such a contract only if, because of the strike, "it becomes apparent that the other party will not perform a substantial part of his obligations as a result thereof."[77] The inability of an aggrieved party to assess either the duration of the strike or how it will affect the seller's ability to deliver often will pose an insurmountable burden to meet the Article 71(1) tests.

Even more tenuous might be the circulation of information that could affect either party.[78] Indications of possible export controls, prospective legislative and administrative measures, impending bankruptcy, or numerous

[76] Azeredo da Silveira, *supra* note 6, at 16.

[77] *See* CISG, *supra* note 1, art. 71(1).

[78] Yang, *supra* note 35, at 6 ("Among business people in the same industry, rumour usually spreads quickly of trouble, or rumours of trouble, at a particular firm.").

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other possible complicating factors could cause great concern to a contracting party required to commit resources to its performance.[79] The illustrative effects of all of these examples are, of course, highly dependent on the underlying facts of each case. The point here is only to highlight that a contracting party can face an insurmountable burden to establish that an event, rumor, or information received shows that it has "become apparent that the other party will not perform a substantial part of his obligations."[80]

Given the drafting of the provisions,[81] the CISG arguably provides an offending party an opportunity to remove the impairment, but does not thereby give the aggrieved party a right to demand assurances of performance. The issue concerning demand is largely irrelevant in light of the failure of the CISG to articulate any legal consequences for a failure of an impairing party to provide assurances, whether by foregoing the opportunity to provide assurances or by ignoring an actual demand for assurances. As the discussion below shows, the important issue posed centers on the consequences of not providing adequate assurances.[82]

Section 2-609(4) is a provision in the UCC that deals with the situation when adequate assurances demanded by the aggrieved party are not forthcoming: "After receipt of a justified demand failure to provide within a reasonable time not exceeding thirty days such assurance of due performance as is adequate under the circumstances of the particular case is a repudiation of the contract."[83] The impairing party thus cannot evade substantial consequences from a suspension simply by ignoring the demand or by providing insufficient assurances, because the UCC provision then escalates the case into one for avoidance of the contract.

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[79] Some of these types of events might be sufficient to invoke Article 79 on excuse due to unanticipated circumstances. This approach would provide an excuse from performing, and thus, unlike suspension, end the contractual relationship.

[80] CISG, *supra* note 1, art. 71(1). Saidov, *supra* note 26, at 895 (Due to the requirement of a very high degree of likelihood imposed under the Article 71 standard, "[t]his probably means that a [sic] even a well-founded suspicion is unlikely to be sufficient."). *See also* FERRARI & TORSELLO, *supra* note 26, at 457 ("Mere suspicion, even if well-founded, is therefore not enough.").

[81] Article 71(3) provides that after a notice of suspension, the suspending party "must continue with performance if the other party provides adequate assurance of his performance." CISG, *supra* note 1, art. 71(3). Article 72(2) requires notice of avoidance to the other party "in order to permit him to provide adequate assurance of his performance." CISG, *supra* note 1, art. 72(2).

[82] *See infra* notes 85–88 and accompanying text.

[83] *See* UCC § 2-609(4) (AM. L. INT. & UNIF. L. COMM'N 2020).

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Article 71, in contrast, does not articulate any consequences to an impairing party that does not take advantage of the opportunity to provide assurances, other than to allow the suspension to continue. With any impairments that fall short of fundamental breach, Article 71 does not escalate the impairment into a repudiation.[84] Only if the impairment is sufficient enough to constitute a fundamental breach can an aggrieved party proceed to avoid the contract under Article 72.[85]

So where does this leave the aggrieved party that has been subjected to an impairment that does not rise to the level of a fundamental breach? At best, this approach allows the impaired party to delay its performance while it waits to see if the other party maintains its position until its breach becomes a present breach.[86] At worst, if the position of some commentators arguing that a suspension can only remain for a reasonable time is correct,[87] the right of suspension is only a right for the impaired party to withhold its

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[84] Flechtner, *Remedies*, *supra* note 35, at 93 ("Article 71 does not permit a party to treat the contract as repudiated if the other side fails to provide adequate assurances."). *But see* SCHLECHTRIEM & SCHWENZER, COMMENTARY 3d, *supra* note 15, at 966: "[M]ore convincing is the view that the debtor's non-providing of an adequate assurance amounts to an anticipatory fundamental breach of contract which entitles the creditor to avoid the contract (Article 72(3))."

[85] "The failure by a party to give adequate assurance that he will perform when properly requested to do so under [Draft] article 63(2) [counterpart of the current art. 71(3)] *may* help make it 'clear' that he will commit a fundamental breach." *Secretariat Commentary No. 2 on Article 63 of the 1978 Draft (emphasis added)*, *in* HONNOLD, DOCUMENTARY HISTORY, *supra* note 16, at 443.

[86] Landgericht [LG] [Regional Court] Stendal, Oct. 12, 2000, INTERNATIONALES HANDELSRECHT [IHR]: ZEITSCHRIFT FÜR DIE WIRTSCHAFTSRECHTLICHE PRAXIS 30–34, Feb. 2001 (Ger.) ("The entitlement to suspend performance remains until the [anticipatory] breach ceases to exist, until the other party commits a fundamental breach of contract, or until the other party provides adequate assurances of performance under Art. 71(3)."); ENDERLEIN & MASKOW, *supra* note 14, at 289 (may "wait until the time for performance has passed"); SCHLECHTRIEM, COMMENTARY 2d, *supra* note 5, at 531 ("If assurance is not given, the right of suspension continues."); Azeredo da Silveira, *supra* note 6, at 17 ("[T]he obligation to perform may remain suspended only until the other party performs his obligations, until this party provides adequate assurance of performance of his obligation, until the first party declares the contract avoided (if the conditions of arts. 72, 49 or 64 CISG are met), . . . or until the period of limitation applicable to the contract has expired.").

[87] Drawing upon Professor Honnold's observation that "[c]ontinued suspension of performance is closely akin to avoidance of the contract," Professor Flechtner notes that "[p]ermitting indefinite suspension where the threatened breach is not fundamental . . ., would undermine Article 72." Flechtner, *Remedies*, *supra* note 35, at 95 (quoting HONNOLD, UNIFORM LAW 3d, *supra* note 14, at 398). "In other words, indefinite suspension of performance would relieve the suspending party of its executory duties under the contract, just as avoidance does." *Id.* at 95 n.195. *Accord* Rowley, *supra* note 35, at 634 (quoting Flechtner).

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performance temporarily, with no further basis to address further the impairment of expected performance.

An alternative argument that has been advanced is the contention that when an offending party does not take advantage of its opportunity to provide adequate assurances under Article 71(3), the aggrieved party can treat that failure as a fundamental breach and avoid the contract.[88] Most commentators, however, do not state the proposition that definitively[89] and other authors flatly reject it.[90] The text of the Article 71 provisions on assurances and the

[88] ENDERLEIN & MASKOW, *supra* note 14, at 289 ("If the other party provides no assurance, this can be seen as an indication of an anticipatory, fundamental breach of contract, and the party empowered to suspend performance of this obligations can avoid the contract under art. 72."). The latest edition of a respected text presents a new argument based on a general principle derived from time limits in numerous provisions of the Convention: "Therefore, in order to correct the harsh result of Article 71, it seems adequate to apply a reasonable period within which the debtor must provide assurance and, if assurance is not provided in time, to allow for an avoidance of the contract." SCHLECHTRIEM & SCHWENZER, COMMENTARY 3d, *supra* note 15, at 964.

[89] HONNOLD, 4th ed., *supra* note 64, at 436 ("A party's failure to provide adequate assurance of its performance after it has received notice that the other side has justifiably suspended its performance under Article 71 *may* make it 'clear' that the party will commit a fundamental breach, thus giving the other side the right to avoid under Article 72.") (emphasis added); SCHWENZER ET AL., *supra* note 22, at 515 ("Opinions are divided: while some hold that failure to provide adequate assurances automatically constitutes an anticipatory fundamental breach (Art. 72 CISG), others suggest that this is not necessarily the case and that it will depend on the existence of further elements to decide whether the requirements of Article 72 CISG are fulfilled."); Bennett, *supra* note 6, at 523 ("Frequently, however, a failure to provide an adequate assurance will justify a conclusion that a fundamental breach will be committed and avoidance for anticipatory breach will be possible.") (emphasis added); Eiselen, *supra* note 6, at 4 (right to avoid under these circumstances "is debatable").

[90] Azeredo da Silveira, *supra* note 6, at 23 ("If the non-performing party fails to provide assurance of performance and the suspected breach is not of fundamental nature, the innocent party is only entitled to continue to suspend performance of the contract or of obligations that ought to be fulfilled in preparation of performance of the contract."); J.W. Carter, *Party Autonomy and Statutory Regulation: Sale of Goods*, PACE-IICL CISG DATABASE (last updated July 11, 2001), http://www.cisg.law.pace.edu/cisg/biblio/carter2.html ("Surprisingly there is no statement of the consequences of an inadequate assurance, and it should not be presumed that the failure to provide an assurance (or an adequate assurance) is enough to make it 'clear' that the other party will commit a fundamental breach. A failure to provide an adequate assurance does not automatically provide a right of avoidance and there is therefore no mechanism by which a party may demand an assurance of performance and treat a failure to respond with an adequate assurance as a fundamental breach."); Flechtner, *Remedies*, *supra* note 35, at 93 ("Article 71 does not permit a party to treat the contract as repudiated if the others side fails to provide adequate assurances."); Saidov, *supra* note 26, at 913 ("[T]he question of whether the suspending party has a right to avoid the contract is to be resolved solely to those [Art. 72] conditions."); Strub, *supra* note 26, at 497–98 ("[T]he refusal to provide adequate assurances 'should not in itself be regarded as "clear" evidence of an impending breach of contract.'") (quoting SCHLECHTRIEM, UN-CONVENTION, *supra* note 10, at 96). Professor Schlechtriem previously took this position: see SCHLECHTRIEM, COMMENTARY 2d, *supra* note 5, at 531 ("Whether or not a failure to provide adequate assurance after proper notice from the innocent

comments in the Commentary of the Secretariat[91] clearly do not support an automatic right to avoid whenever adequate assurances are not provided under Article 71(3).

The biggest problems with CISG Article 71 are its use of the term "becomes apparent" as the degree of necessary certainty of a breach and its use of the concepts of the definition of "fundamental breach" to state the required seriousness of the impairment of both suspension and avoidance.[92] Part II of this Paper demonstrates that this drafting radically restricts the availability of suspension as a remedy against impairments of expectations that do not rise to the level of fundamental breach. Despite the dilemma faced by many contracting parties in international sales transactions, they are denied a remedy for these impairments and must proceed with their performances even in the face of some strong doubts about whether the other party can or will perform.

Compared to Article 71, UCC Section 2-609 provides a much more generous opportunity to utilize the suspension remedy by using a standard for suspension that is considerably easier to satisfy than the standard for avoidance. In order to cancel the contract (avoidance under the CISG) due to an anticipated breach under UCC Section 2-610, the aggrieved party must establish a loss "which will substantially impair the value of the contract to [it]."[93] Suspension, on the other hand, is available in many cases of doubt as to whether performance by the other party subsequently will be forthcoming. A concerned party can initiate the suspension process "[w]hen reasonable grounds for insecurity arise with respect to the performance of the [other] party."[94]

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party already satisfies the requirements of Article 72 is a matter of dispute. The question should be answered solely by reference to the criteria in that article."). For a statement of his more recent position, see SCHLECHTRIEM & SCHWENZER, COMMENTARY 3d, *supra* note 15, at 964.

[91] "The failure by a party to give adequate assurance that he will perform when properly requested to do so under [Draft] article 63(2) [counterpart of the current art. 71(3)] *may* help make it 'clear' that he will commit a fundamental breach." *Secretariat Commentary No. 2 on Article 63 of the 1978 Draft (emphasis added)*, *in* HONNOLD, DOCUMENTARY HISTORY, *supra* note 16, at 443.

[92] *See supra* notes 23–52 and accompanying text.

[93] The concept of anticipatory repudiation in the UCC correlates strongly with CISG Article 72 and reflects the comparable bright-line test for determining the substantial impairment sufficient to justify cancellation of the contract. UCC § 2-610 (AM. L. INT. & UNIF. L. COMM'N 2020).

[94] UCC § 2-609(1) (AM. L. INT. & UNIF. L. COMM'N 2020).

Issues remain under Section 2-609 on how low a threshold will still be considered appropriate to constitute such reasonable grounds. This uncertainty is inevitable with a concept like suspension which is so fact-dependent. Guiding principles in such cases thus must be general. What is certain is that the floor on availability of UCC suspension is far lower that it is under the CISG. Despite its use of terms that appear to create distinct general standards of flexibility, the CISG in reality puts the floor on the availability of suspension on the doorstep of fundamental breach.[95]

C. The Drafting Process and Developing Nations

The process that led to the adoption of CISG Article 71 was very unfortunate.[96] The UNCITRAL draft of the Article presented to the delegates at the Vienna Convention authorized suspension when the aggrieved party had "good grounds to conclude that the other party will not perform a substantial part of his obligations."[97] Thus, the delegates started their deliberations with the unfortunate use of the concepts stated in the definition of "fundamental breach" as the basis to determine the required seriousness of the impairment for suspension to occur.[98]

The debate at the Convention then led to further derailment of suspension as a viable remedy under the CISG. The end result was the adoption of the "becomes apparent" standard in a purported attempt to make prior drafts of the requirement more objective. The concern for greater objectivity is curious in light of the prior drafting history. The original drafting derived from ULIS Article 73,[99] which required "good reason to fear that [the other party] will not perform a material part of his obligations."[100]

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[95] Yang, *supra* note 35, at 2 ("If the assertion of suspension required the same degree of likelihood of a breach, the procedure becomes practically meaningless.").

[96] *See* Bennett, *supra* note 6, at 513–18 (discussing the legislative history of CISG Article 71).

[97] HONNOLD, DOCUMENTARY HISTORY, *supra* note 16, at 389.

[98] *See supra* notes 44–52 and accompanying text.

[99] UNIDROIT Convention Relating to a Uniform Law on the International Sale of Goods, art. 73, July 1, 1964 (demonstrating ULIS was the end product of the initial effort to develop an international law on sales of goods but it was never widely adopted by many nation states).

[100] U.N. Secretary-General, *Issues Presented by Chapters IV to VI of the Uniform Law on the International Sale of Goods*, V Yearbook 80–94, U.N. Doc. A(8) A/CN.9/87, Annex IV (1974), *in* HONNOLD, DOCUMENTARY HISTORY, *supra* note 16, at 183.

The Working Group,[101] at its fifth session in 1974, substituted the term "reasonable grounds to conclude that the other party will not perform a substantial part of his obligations."[102] Either of these two prior drafts would appear to provide a more objective standard than "becomes apparent" because the terms they used are more commonly associated with objective criteria.[103] The end result was the adoption of the "becomes apparent" standard in a purported attempt to make prior drafts on the requirement on certainty of breach more objective.[104]

This change was instigated in part by another issue that concerned many delegates with respect to Article 71. The use of the term "apparent" was to make it clear that suspension could not apply to conditions that the other party knew existed at the time of contract formation.[105] Professor Schlechtriem has stated the objective succinctly: "The aim of the proposal that led to the present formulation was to permit a suspension of performance even when the circumstances that made the obligor's performance doubtful had existed before, but had not become apparent until after the conclusion of the contract."[106]

The change to Article 71 can also be traced to adamant resistance of the developing nations to the draft presented to the delegates at the Vienna Convention. "From the developing countries' perspective, the anticipatory repudiation provisions reinforce their weaker bargaining power in the international trade setting."[107] Viewing the drafted provisions as subjective,

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[101] *See* Working Paper on the Hague Conventions of 1964, U.N. Comm'n on Int'l Trade Law Working Grp. on Sales, U.N. Doc. A/CN.9/WG.2/WP.2 (1970) (illustrating that the Working Group was composed of representatives of several nations that addressed provisions of ULIS in an effort to develop a revised draft of a law on international sales of goods).

[102] Rep. of the Working Grp. on the Int'l Sale of Goods on the Work of Its Fifth Session, U.N. Doc. A/CN.9/87, Annex I-IV (Jan. 1974), *in* HONNOLD, DOCUMENTARY HISTORY, *supra* note 16, at 184.

[103] CISG, *supra* note 1 (illustrating that the CISG itself uses the term "reasonable" or words derived from the term, such as "not unreasonable," in at least 22 of its Articles).

[104] HONNOLD, UNIFORM LAW 3d, *supra* note 14, at 428.

[105] *See, e.g.*, BUNDESGERICHT [BGer] [Federal Supreme Court] July 17, 2007, 4C.94/2006 (Switz.) (holding that seller could not suspend its deliveries based on an outstanding unpaid debt of over $7 million of which it was aware before entering into the contract); Bennett, *supra* note 6, at 515–16; Enderlein & Maskow, *supra* note 14, at 284.

[106] SCHLECHTRIEM, UN-CONVENTION, *supra* note 10, at 91; *see* BUNDESGERICHT [BGer], July 17, 2007 4C.94/2006 (Switz.) (holding that seller did not substantiate its claim that the creditworthiness of the buyer had deteriorated after the conclusion of the contract).

[107] Strub, *supra* note 26, at 477 (discussing the concerns of the developing nations); *see also* Saidov, *supra* note 26, at 884 ("It has been suggested that not only is there greater room for abuse (for the

they argued that suspension could be used to abuse trading parties from developing nations by exploiting less stable economic and political conditions in some developing nations.[108] They reinforced this claim by pointing out that these conditions could themselves facilitate the unjust escape of contracting partners simply through appearances of instability.[109] The developing nations proposed consolidating the concepts of suspension and avoidance into one section in order to apply the "it is clear" objective language to both concepts.[110] An *ad hoc* Working Group addressed the differences among the delegates.[111] This group adopted the current wording of Article 71 as a compromise solution, partly because of concerns that without a compromise, several developing nations might resist the adoption of the entire Convention.[112]

Another aspect of the developing-nation resistance to Article 71 was that they simply did not understand the remedy of suspension.[113] By the time of the adoption of the CISG, the concept of suspension of performance was well known among many developed nations of the West, but was largely unknown in developing countries.[114] Uncertainty about the concept itself thus contributed to the level of resistance to Article 71.[115] The ultimate disservice in this area to the developing nations was to draft the suspension remedy in a way that tends to heighten that uncertainty rather than alleviate it.

If the poor drafting had been cleaned up, the decision of the developing nations to resist a suspension remedy in the CISG would have been short-

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conditions of economic and political instability, which may be present in some such countries, may create an appearance of instability) but also the consequences of exercising the remedies may impose harsher consequences on business persons from developing countries where, for example, there may be particular difficulties with communication or storage facilities.").

[108] Strub, *supra* note 26, at 476.

[109] *Id.* at 476–77.

[110] U.N. Conference on Contracts for the International Sale of Goods, *Proposals and Amendments Submitted In the First Committee*, U.N. Doc. A/CONF.97/C.1/L.252, *reprinted in* HONNOLD, DOCUMENTARY HISTORY, *supra* note 16, at ¶ 14, 702. *See also* Strub, *supra* note 26, at 491.

[111] HONNOLD, DOCUMENTARY HISTORY, *supra* note 16, at 702. *See also* Strub, *supra* note 26, at 491.

[112] HONNOLD, UNIFORM LAW 3d, *supra* note 14, at 429.

[113] Strub, *supra* note 26, at 476–77.

[114] *Id.* at 476.

[115] *Id.* at 475.

sighted with respect to the interests of their own merchants.[116] Remedies for insecurity are not beneficial only to developed nations in their sales transactions with developing countries. Suspension is a self-help remedy equally available to all of the contracting parties. International sales transactions between developed and developing countries pose a particularly fertile ground for an expansive availability of suspension. With the potential for greater disparity posed in their experiences in world trade, in their understanding of commercial complexities, and in their need to address differing appearances, the likelihood of misconceptions between the parties becomes magnified substantially. A more readily available self-help remedy of suspension for these contracting parties and all other parties in international sales contracts would enable them to call a pause to further performance in light of prospective impairments.[117] The only other options are for an impaired party (from a developed or a non-developed nation) to proceed with its own performance or to make the more drastic decision to provide notice of an intent to avoid the contract.

IV. CONCLUSION

Suspension and avoidance are self-help remedies. The party feeling aggrieved does not seek relief through judicial action or arbitration. It has to make its decision on whether to suspend or avoid, and thus whether to take the risk of a subsequent challenge in a court or before an arbitrator. The consequences of the decision are particularly high under self-help because, if the remedy is implemented when it does not apply, the aggrieved party itself breaches by not proceeding with its performance, and that breach might be determined to be fundamental.[118] A party feeling impaired about the other party's ability or willingness to perform really needs guidance in selecting its option.

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[116] *See id.* at 478 ("[T]he developing countries' opposition to the suspension provision was perhaps unwarranted; the provision in fact is fairly protective of the repudiator.").

[117] An important area where the developing nations had a major impact on the final drafts of the impairment provisions of the CISG was the addition of the notice requirements in Articles 71 and 72. In the context of suspension, the requirement of prompt notice of suspension and the right to provide adequate assurances of performance give all parties a basis to demonstrate that the appearances to the other party are not as they appear or to correct the impairment.

[118] "If the suspension is not rightful, however, the suspending party will have breached the contract when that party fails to perform its obligations." GABRIEL, *supra* note 22, at 214.

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With avoidance tightly constrained as a remedy of last resort, contracting parties need a viable alternative to use as a lesser response to prospective impairment than avoidance. Parties in contracts under the CISG are ill-served in this regard. Although the CISG provides a remedy of suspension, it restrictively constrains its availability to cases at or nearly the same as the avoidance remedy of last resort. The policies generally recognized as underlying workable suspension are not reflected in the drafting of Article 71.

Many commentators on this subject appropriately turn to ascertaining the underlying intent of the drafters to find a difference between CISG suspension and avoidance. They tend, however, simply to infer that the drafters intended a difference in the requirements between suspension and avoidance because of the division of the two subjects into two separate Articles with different terms and because avoidance is conceptually recognized as a more serious remedy. They provide little assistance to parties engaged in international sales transactions. For the most part, their analysis ultimately supports my argument that whatever differences exist between Articles 71 and 72 are extremely narrow.[119] Applying conclusions based on traditional policies to a subject do not work well when the statutory language itself indicates a strong a movement away from tradition. A legal advisor in international sales consequently should be very conservative in recommending suspension in cases in which the availability of avoidance under Article 72 is questionable.

The case law applying CISG Articles 71 and 72 also does not provide sufficient guidance for parties to make their decisions on whether or not to suspend performance. The case law is far from consistent. Another commentator has noted that less than forty cases included in the UNCITRAL Digest address the legal terms in Articles 71 and 72, with many of the cases mere dicta.[120]

Very little of the current state of the law regarding suspension under Article 71 provides strong support for the reasoning that suspension is available as a lesser alternative remedy for parties that cannot qualify for

[119] Professor Fletchner has referred to "the clumsy fit between Articles 71 and 72, which were the subject of last-minute debate and tinkering at the Vienna diplomatic conference." Fletchner, *Remedies*, *supra* note 35, at 93–94 n.190. The intent of the drafters with respect to Article 71 appears to have been lost in the process.

[120] Walter, *supra* note 41, at 422.

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avoidance. Admittedly, suspension is an area of the law not easily determined. Factual circumstances in individual cases are critical. The problem with CISG Article 71 as an alternative remedy to avoidance is that it sets the floor of the threshold for suspension so high that it radically constrains its availability. The Article should have been drafted in a manner that would have loosened these constraints considerably to remove much of the uncertainty that inevitably accompanies the concept of suspension. Contracting parties and their advisors need much better signals about insecurities that qualify under Article 71, even though the insecurities would not constitute a basis for Article 72 avoidance. This deficiency of the drafting of Article 71 prevents suspension under the CISG from serving as a viable working remedy in actual practice.

As has already been noted in this same context,[121] advancing an argument that Article 71 should be amended is naive in the context of the reality with the CISG. Contracting parties and practitioners thus must consider ways to lessen the uncertainty and risk associated with CISG Article 71. These responses basically must occur at the contract formation stage.

One approach is to utilize Article 6, which allow allows parties to agree to derogate from specific provisions of the CISG. Reflecting the principle of freedom of contract, the parties can agree in advance on how they will handle a self-help remedy of suspension.[122] They could identify potential areas in which either party would feel insecure with respect to the other party's ability and willingness to perform their contract. Because a need to suspend depends upon how future events unfold after the parties form their contract and before its performance, the advantages to both buyers and sellers of clarifying suspension rights should make this approach amenable to both. Their agreement could be tailored to issues that have arisen in previous contracts like their own.[123]

Another response would be to eliminate much of the risk associated with circumstances that could pose issues concerning suspension. Full-blown documentary transactions that use irrevocable letters of credit illustrate this

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[121] Seliazniova, *supra* note 18, at 137.

[122] Oberlandesgericht [OLG] [Higher Regional Court] Köln, Jan. 8, 1997, 27 U 58/96, CLOUT No. 311, http://cisgw3.law.pace.edu/cases/970108g1.html (Ger.) (seller that agreed to derogate from Article 71 could not subsequently use it to suspend its obligation to redeliver goods when the buyer failed to pay past debts).

[123] For assistance on drafting, see Walter, *supra* note 41, at 422–27.

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approach. When the contracting parties do not deal face-to-face, the concern of the seller is to get paid before losing control of the goods. The irrevocable letter of credit resolves this concern directly by enabling the seller to be paid by its bank upon delivery of all of the required documents. The goods will already have been loaded on the carrier, but shipment pursuant to a negotiable bill of lading leaves the seller in control of the goods until it receives payment in exchange for the bill of lading, along with the other required documents.

The buyer's concern is about paying for the goods before determining whether they conform to the terms of the contract, which is exactly what happens when the seller's bank pays the seller under the bank's confirmation of the letter of credit. The buyer can protect itself by insisting on a right to have its agent inspect the goods as they are prepared for shipment. If the seller then cannot provide, as part of the documents required to be presented to the confirming bank, an authentication from the inspector that the goods conform, the confirming bank should not pay the seller and the seller has no inherent advantage.

The experience of academics and tribunals with the suspension remedy vividly reveals the significance of the deficiencies in the drafting of CISG Article 71. Hopefully, the suggestions provided here can help lessen the harm.

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