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# ADEQUATE ASSURANCE OF PERFORMANCE UNDER THE UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS AND THE UNIFORM COMMERCIAL CODE

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**Abstract** This article compares and contrasts the doctrine of adequate assurance of performance under the US Uniform Commercial Code (the UCC) and the UN Convention on Contracts for the International Sale of Goods (the CISG). The article argues that, in the context of the CISG, the mechanism of adequate assurance found in the UCC is a *faux ami*. Despite some similarities, the doctrine of adequate assurance regulated in the CISG is distinct and serves different functions to its UCC counterpart.

**Keywords:** transnational commercial law, anticipatory breach, adequate assurance, breach of contract, avoidance of a contract, Uniform Commercial Code, sale of goods, *faux ami*, UN Convention on Contracts for the International Sale of Goods (CISG), UNIDROIT Principles of International Commercial Contracts (PICC), contract law.

## I. INTRODUCTION

The concept of ‘anticipatory breach of contract’ refers to an expectation of a breach of contract which arises before performance is due. This expectation may be justified if the words or conduct of the promisor make it clear that future performance will not be given (renunciation). Anticipatory breach may also arise in the case of prospective incapacity, namely, a situation in which the promisor is willing to perform but appears to be incapable of effecting the promised performance in the future. All legal systems allow for a *suspension* of performance by the promisee if there are significant doubts as to whether the promisor will perform their side of the bargain.<sup>1</sup> However, the right to *avoid* the contract in such a case is not universally accepted.

The right of avoidance based on anticipatory breach originates in English law<sup>2</sup> and was enunciated in the landmark case of *Hochster v de la Tour*.<sup>3</sup> It was held in this case that after the renunciation of the agreement by one party, the other party ‘should be at liberty to consider himself absolved from any future performance of it, retaining his right to sue for any damage he has suffered from the breach’ rather than ‘remaining idle and laying out money in preparations which must be useless’.<sup>4</sup> The rule articulated in *Hochster v de la Tour* was confirmed in the area of English sales law in the case of *Cehave NV v Bremer*

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<sup>1</sup> For an overview see I Schwenzler, P Hachem, Ch Kee, *Global Sales Law* (OUP 2012) 548–59.

<sup>2</sup> For a thorough analysis of the doctrine of anticipatory breach under English law see Q Liu, *Anticipatory Breach* (Hart Publishing 2011). For the history of the evolution of the doctrine see Sir MJ Mustill, ‘Anticipatory Breach of Contract: The Common Law at Work’ in *Butterworth Lectures 1989–90* (Butterworths 1990).

<sup>3</sup> (1853) 2 El & Bl 678 reported in 188 ER 922.

<sup>4</sup> *Hochster v de la Tour* (1853) 2 El & Bl 678 reported in 188 ER 922 at 927 per Lord Campbell. For a detailed analysis of the ideas underlying the doctrine of anticipatory breach see F Dawson, ‘Metaphors and Anticipatory Breach of Contract’ (1981) 40 Cambridge LJ 83.

*Handelsgesellschaft mbH (The Hansa Nord)*<sup>5</sup> in 1976. Lord Denning stated in this case that: ‘If the one party, before the day on which he is due to perform his part, shows by his words or conduct that he will not perform it in a vital respect when the day comes, the other party is entitled to treat himself as discharged.’<sup>6</sup> Following English law, the right of avoidance for anticipatory breach has gained acceptance in other common law jurisdictions, as well as in some civil law jurisdictions.<sup>7</sup> It has also found its way into international law instruments, of which the UN Convention on Contracts for the International Sale of Goods<sup>8</sup> (the CISG) is the prime example.<sup>9</sup>

The rationale for the right to avoid the contract prior to the date set for performance focuses primarily on the need to promote economic efficiency.<sup>10</sup> Where it is clear that one party will not perform, it would be a waste of resources for the innocent party to perform their side of the bargain. Furthermore, by exercising the right of avoidance before performance is due, the innocent party gains an opportunity to enter into another transaction at an earlier stage, which can potentially save further costs. Apart from economic efficiency, the right to avoid the contract based on anticipatory breach contributes to maintaining a fair balance between the interests of both parties.<sup>11</sup> Expecting the innocent party to perform their obligations where it is clear that the other party will not do what was promised to do in return would create a disparity in the level of protection offered to each of the parties.

Regardless of its benefits, the doctrine of anticipatory breach exposes the innocent party to significant risk. Avoidance based on anticipatory breach is often predicated on an element of speculation. In many cases, the innocent party cannot be absolutely certain that the breach will occur. The promisor’s conduct may be inconsistent. The promisor may express their willingness to perform while at the same time being unable to do so. As a result, the promisor may convey ambiguous signals to the promisee. Although there may be objective reasons to believe that the promisor will not perform (because, for example, they have become insolvent or failed to perform other, similar contracts), it might also be the case that the promisor has, in fact, made special arrangements to ensure that the contract in question will be performed despite these circumstances. These ambiguities may lead to two different consequences for the promisee. First, in the case of prospective incapacity, where the promisee believes that the contract will not be performed by the promisor and therefore avoids the contract, they may, themselves, be held liable for a breach if their anticipation proves to be unfounded. Second, where the promisee believes that the contract will not be performed by the promisor but nonetheless fails to avoid the contract, they may find themselves in breach of the duty to mitigate when the breach actually occurs. The doctrine of anticipatory breach thus has the potential to create uncertainty and instability in commercial transactions.

The problems of uncertainty and instability raised by the doctrine of anticipatory breach have been addressed in the US Uniform Commercial Code (the UCC). A major innovation introduced into the UCC was the right to demand adequate assurance of due performance

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<sup>5</sup> [1976] QB 44 (CA).

<sup>6</sup> *ibid* 60.

<sup>7</sup> For an overview of the civil law jurisdictions which have adopted the doctrine of avoidance for anticipatory breach, as well as those jurisdictions which still do not recognize this doctrine, see Schwenger, Hachem, Kee (n 1) 744.

<sup>8</sup> United Nations Convention on Contracts for the International Sale of Goods (adopted 11 April 1980, entered into force 1 January 1988) 1489 UNTS 3 (CISG).

<sup>9</sup> See arts 71, 72 and 73(2) CISG.

<sup>10</sup> See eg D Saidov, ‘Anticipatory Non-Performance and Underlying Values of the UNIDROIT Principles’ (2006) 11 *Uniform Law Review* 795, 798–9; Mustill (n 2) 42; JW Carter, A Phang, S-Y Phang, ‘Performance Following Repudiation: Legal and Economic Interests’ (1999) 15 *Journal of Contract Law* 100, 107–9, 121; L Vold, ‘The Tort Aspect of Anticipatory Repudiation’ (1928) 41 *Harvard Law Review* 343, 368–70; JW Carter, ‘Adequate Assurance of Due Performance’ (1996) 10 *Journal of Contract Law* 1, 6.

<sup>11</sup> Saidov, ‘Anticipatory Non-Performance and Underlying Values of the UNIDROIT Principles’ (n 10) 800.

(section 2-609 UCC). The right to demand adequate assurance is a form of self-help, a non-judicial mechanism which serves to clarify the blurred situations in which the innocent party may find themselves in the event of anticipatory breach.<sup>12</sup> By using this mechanism, the party whose sense of security is impaired can suspend their own performance and any necessary preparations with a legitimate excuse for the resulting delay and can demand adequate assurance that the other party will perform as agreed. Where adequate assurance is not provided within a reasonable time, the suspending party can exercise the remedies for a breach of contract without running the risk of being held liable for a breach themselves.

It has been claimed that the right to demand adequate assurance as designed by the drafters of the UCC constitutes ‘the most innovative and commercially sensible development in contract law in the twentieth century’.<sup>13</sup> As such, it has also gained acceptance beyond the Code.<sup>14</sup> The CISG introduced the doctrine of adequate assurance in Articles 71 and 72. Article 72 CISG regulates the right to avoid the contract where the occurrence of a future breach is clear. This provision does not have an equivalent in the UCC. Article 71 CISG regulates the right to suspend performance where it becomes apparent that the promisor will not perform a substantial part of their obligations. In such a case, the promisee must give the promisor a chance to provide adequate assurance. Contrary to section 2-609 UCC, Article 71 CISG does not specify the consequences of a failure by the promisor to provide adequate assurance. In particular, the provision does not explicitly allow the promisee to avoid the contract where adequate assurance is not provided. As such, the right to request assurance under Article 71 CISG cannot offer the same benefits as its UCC counterpart. For this reason, it has been claimed in the literature that the provisions of the CISG on anticipatory breach should be amended with a UCC-type clause stating that the failure to provide adequate assurance within a reasonable time shall entitle the promisee to treat the contract as repudiated.<sup>15</sup> Alternatively, it has been argued that there is a gap in the Convention regarding the consequences of a failure to adequately respond to a request for assurance. It has been proposed that this gap could be filled by reference to Article 7.3.4 of the UNIDROIT Principles of International Commercial Contracts (the PICC).<sup>16</sup> Article 7.3.4 of the PICC, similarly to section 2-609 UCC, states that where adequate assurance is not provided within a reasonable time, the party demanding it may terminate the contract.

The need for clarity regarding the consequences of a failure to provide adequate assurance under the CISG has become critically important in light of the current COVID-19 crisis, which has led many businesses to consider suspension or avoidance of a contract based on anticipated non-performance. This article offers a novel approach to the interpretation of the

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<sup>12</sup> MJ Borden, ‘The Promissory Character of Adequate Assurances of Performance’ (2010) 76 Brooklyn Law Review 167, 206; R Beheshti, ‘Anticipatory Breach of Contract and the Necessity of Adequate Assurance under English Law and the Uniform Commercial Code’ [2018] Lloyd’s Maritime and Commercial Law Quarterly 276, 283; MW Sargis, ‘The Uniform Commercial Code Section 2-609: A Return to Certainty’ (1980) 14 The John Marshall Law Review 113, 120.

<sup>13</sup> RJ Robertson Jr, ‘The Right to Demand Adequate Assurance of Due Performance: Uniform Commercial Code Section 2–609 and Restatement (Second) of Contracts Section 251’ (1988–89) 38 Drake Law Review 305, 353.

<sup>14</sup> In the US, the mechanism of adequate assurance has also been regulated in section 251 of the Restatement (Second) of Contracts. It has found further support in the case law – see eg *Norcon Power Partners v Niagara Mohawk Power Co* 705 NE 2d 656 (NY 1988).

<sup>15</sup> M Gilbey Strub, *The Convention on the International Sale of Goods: Anticipatory Repudiation Provisions and Developing Countries*, (1989) 38 International and Comparative Law Quarterly 475, 498. See also W Lawrence, ‘Serious Deficiencies in the Drafting of Article 71 of the CISG on Suspension Due to Prospective Impairment of Contract Expectations’ (2020) 39 Journal of Law and Commerce 39.

<sup>16</sup> See S Eiselen, ‘Remarks on the Manner in which the UNIDROIT Principles of International Commercial Contracts May Be Used to Interpret or Supplement Articles 71 and 72 of the CISG’ in J Felemegas (ed), *An International Approach to the Interpretation of the United Nations Convention on Contracts for the International Sale of Goods (1980) as Uniform Sales Law* (CUP 2009) 210.

doctrine of adequate assurance under the CISG. It argues that, in the context of the CISG, the mechanism of adequate assurance found in the UCC is a *faux ami*.<sup>17</sup> Despite some similarities, the doctrine of adequate assurance regulated in the Convention is distinct and serves different functions to its UCC counterpart. Consequently, the lack of a right to avoid the contract when adequate assurance is not provided under the CISG does not amount to a gap that needs to be filled. Rather, it results from the different purpose the procedure regulated in the Convention is meant to serve.

Throughout this article, the terms ‘promisee’ and ‘the innocent party’ will be used to describe the party to a contract who suspects that the other party will not perform their side of the bargain. The terms ‘promisor’ and ‘the party under suspicion’ will be used to describe the party to a contract whose breach is anticipated.

## II. DEMAND FOR ADEQUATE ASSURANCE UNDER THE UCC

The Uniform Commercial Code, first published in 1952, is one of uniform acts which have been introduced in order to harmonize the law applicable to commercial transactions across the United States. The doctrine of adequate assurance of due performance was introduced into the UCC by Karl Llewellyn, who served as the principal drafter of Article 2 UCC governing sales law.<sup>18</sup> The general idea behind the solutions promoted by Llewellyn was to make ‘commercial law and practice clear, sane *and safe*’.<sup>19</sup> Llewellyn questioned a unitary approach to sales law and believed that there is a need for a separate set of rules for mercantile and non-mercantile situations.<sup>20</sup> He argued that merchants need rules they can rely on, i.e. rules which produce predictable results.<sup>21</sup> He emphasized that commercial law should be functional<sup>22</sup> – it should guide business persons in conducting their business affairs and enable them to plan ahead.<sup>23</sup> Only clear and rational legal rules and certainty in their application can adequately protect the interests of commercial actors and promote sound business practices.<sup>24</sup> The mechanism of adequate assurance of due performance was meant to serve these goals by eliminating the potential uncertainty and instability caused by the doctrine of anticipatory breach. It was based on the idea that by concluding a contract, the parties promise that they will give each other ‘no reasonable grounds for insecurity in regard to [their] continuing ability and willingness to

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<sup>17</sup> The term *faux amis* has been used in the literature to describe concepts adopted in uniform law which have similar names but different meanings to concepts used in domestic legal systems – see part IV of this article.

<sup>18</sup> It has been pointed out by Garvin that although ‘adequate assurance may be one of Llewellyn’s creations, ... it was rooted in firmly established common-law principles’. For a broader analysis of the common-law origins of the doctrine of adequate assurance, see LT Garvin, ‘Adequate Assurance of Performance: Of Risk, Duress, and Cognition’ (1998) 69 *University of Colorado Law Review* 71, 76ff.

<sup>19</sup> State of New York Law Revision Committee Report, Hearings on the Uniform Commercial Code 108 (1954), at 112 (emphasis in original).

<sup>20</sup> State of New York Law Revision Committee Report, Hearings on the Uniform Commercial Code 108 (1954). See also JQ Whitman, ‘Commercial Law and the American Volk: A Note on Llewellyn’s German Sources for the Uniform Commercial Code’ (1987) 97 *Yale Law Journal* 156, 163; IM Hillinger, ‘The Article 2 Merchant Rules: Karl Llewellyn’s Attempt to Achieve the Good, the True, the Beautiful in Commercial Law’ (1985) 73 *The Georgetown Law Journal* 1141, 1147–8.

<sup>21</sup> K Llewellyn, ‘The Modern Approach to Counselling and Advocacy – Especially in Commercial Transactions’ (1946) 46 *Columbia Law Review* 167, 178.

<sup>22</sup> See K Llewellyn, ‘On the Good, the True, the Beautiful, in Law’ (1942) 9 *University of Chicago Law Review* 224, 229.

<sup>23</sup> Llewellyn, ‘The Modern Approach to Counselling and Advocacy – Especially in Commercial Transactions’ (n 21) 178.

<sup>24</sup> *ibid*.

perform'.<sup>25</sup> The absence of insecurity has thus been seen as an implicit contractual term.<sup>26</sup> The right to demand adequate assurance is regulated in section 2-609 UCC, which states:

(1) A contract for sale imposes an obligation on each party that the other's expectation of receiving due performance will not be impaired. When 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.

(...)

(4) 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.

As indicated in the provision, there must be 'reasonable grounds for insecurity' on the innocent party's side for the mechanism of adequate assurance to apply. One major objection to the mechanism of adequate assurance is that it may lead to an extension of the parties' rights and obligations under the contract. A demand for adequate assurance requires the promisor to do more than was originally promised under the contract; for example, if the contract provided for sale on open account, but subsequent events cause insecurity on the side of the promisee, the promisor may be required to offer greater security under section 2-609.<sup>27</sup> Consequently, the need to provide such assurance may significantly increase the cost of trading. For these reasons, the right to demand adequate assurance has been limited to situations in which there are reasonable grounds for the promisee's sense of security to be impaired.

What constitutes an adequate assurance depends on the circumstances. If the performance by the seller-manufacturer is uncertain because of a strike in their factory, for example, they may be required to provide proof that the strike has been settled. Meanwhile, where the seller has lost a source of raw materials which are necessary for manufacturing the goods, they may need to show that another source of raw materials has been secured. In other instances, the promisor may be required to provide an irrevocable letter of credit issued by a bank. In general, the promisor must therefore provide evidence of specific facts or actions that remove the threat that the contract will not be performed. To qualify as 'adequate', assurance must give the innocent party a reasonable sense of security that performance will be forthcoming. In contracts between merchants, the adequacy of assurance is assessed based on commercial rather than legal standards.<sup>28</sup> In some cases, a mere promise by a party with a good business reputation that the contract will be performed may constitute a sufficient assurance.<sup>29</sup> In the case of *Louisiana Power & Light Co v Allegheny Ludlum Industries Inc.*,<sup>30</sup> a written declaration that the promisor will perform their side of the bargain was considered an adequate assurance given that the parties had been involved in an ongoing business relationship for about

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<sup>25</sup> See the 1941 draft of section 2 UCC: An Act Relating to Sales of Personal Property and to Contracts for the Sale Thereof, and to Rights, Obligations, and Remedies Arising out of Such Sales or Contract and in Connection with Financing or Other Transactions Commonly Associated Therewith, and to Make Uniform the Law of Such Matters § 16-C (1941[?]), reprinted in E Slusser Kelly and A Puckett (eds), 1 Uniform Commercial Code Confidential Drafts 3, 73 (1995). In fact, the draft lacks a date. However, based on its context, it is placed in 1941.

<sup>26</sup> Garvin, (n 18) 90.

<sup>27</sup> JJ White, RS Summers, *Uniform Commercial Code* (6<sup>th</sup> edn, Thomson Reuters 2010) 278, § 7-2.

<sup>28</sup> Section 2-609(2).

<sup>29</sup> Official Comment, para 4.

<sup>30</sup>(1981) 517 F Supp 1319.

five years. A far more sophisticated form of assurance may be required from a party who is known to cut corners.<sup>31</sup>

The mechanism of adequate assurance regulated in section 2-609 UCC is considered to be ‘a logical corollary’<sup>32</sup> of the doctrine of anticipatory breach. It constitutes an objective instrument to determine whether the promised performance will be forthcoming. The right to demand adequate assurance implements the same policies as the doctrine of anticipatory breach. It contributes to economic efficiency by providing the innocent party with a relative guarantee as to whether the contract will be performed.<sup>33</sup> Receiving adequate assurance increases the innocent party’s confidence and incentivizes them to perform their side of the bargain, which in most cases is beneficial and efficient.<sup>34</sup> If no adequate assurance is provided, the innocent party may avoid unnecessary costs and channel its resources somewhere else without running the risk of being held liable for a breach of contract.<sup>35</sup> The adequate assurance mechanism thus increases a sense of security in commercial transactions which, in turn, promotes voluntary exchange. Furthermore, this mechanism meets the expectations of business-persons<sup>36</sup> by endorsing communication and cooperation between the parties.<sup>37</sup> The adequate assurance procedure is also justified in the context of the duty to mitigate. Under the doctrine of mitigation, the innocent party is expected to take reasonable steps to minimize the scope of the loss suffered. As explained above, the doctrine of anticipatory breach raises the risk of the promisee being held liable for a breach of the duty to mitigate if they do not avoid the contract and continue to perform their obligations, even though it is clear that the promisor will not perform their side of the bargain. The mechanism of adequate assurance incentivizes the promisee to clarify at an early stage whether the promised performance will be forthcoming and, consequently, whether there is a need to take steps to minimize the loss by avoiding further expenditure linked to the performance of their own obligations.<sup>38</sup>

### III. ADEQUATE ASSURANCE UNDER THE CISG

The CISG lacks pedigree in domestic legal systems, which has been seen both as a weakness and an opportunity. Article 7(1) CISG states that the Convention should be interpreted with regard to ‘its international character and to the need to promote uniformity in its application’. The reference to the need to promote uniformity in the application of the Convention signifies that the Convention should be interpreted in the same way in each jurisdiction. The CISG thus requires an autonomous interpretation.<sup>39</sup> To be qualified as autonomous, an interpretation

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<sup>31</sup> Official Comment, para 4.

<sup>32</sup> Beheshti (n 12) 286.

<sup>33</sup> GS Crespi, ‘The Adequate Assurance Doctrine after U.C.C. 2–609: A Test of the Efficiency of the Common Law’ [1993] Villanova University Law Review 179, 183–4.

<sup>34</sup> D Saidov, ‘Art 71’ in S Kröll, L Mistelis and P Perales Viscasillas (eds), *UN Convention on Contracts for the International Sales of Goods (CISG): A Commentary* (CH Beck/Hart/Nomos 2018) para 50.

<sup>35</sup> Garvin (n 18) 113.

<sup>36</sup> Report of the New York Law Revision Commission, Hearing on Art 2 of the Uniform Commercial Code (1954) 153; R Cosway, ‘Sales – A Comparison of the Law in Washington and the Uniform Commercial Code (Part IV)’ (1961) 36 Washington Law Review 50, 83–4.

<sup>37</sup> Robertson (n 13) 316; CR Taylor, ‘Self-Help in Contract Law: An Exploration and Proposal’ (1998) 33 Wake Forest Law Review 839, 884.

<sup>38</sup> See eg *Rockingham County v Luten Bridge Co* (1929) 22 III 35 F 2d 301.

<sup>39</sup> See eg F Ferrari, ‘Have the Dragons of Uniform Sales Law Been Tamed?: Ruminations on the CISG’s Autonomous Interpretation by Courts’ in C Baasch Andersen and UG Schroeter (eds), *Sharing International Commercial Law across National Boundaries: Festschrift for Albert H Kritzer on the Occasion of his Eightieth Birthday* (Wildy, Simmons and Hill Publishing, 2008) 134; M Gebauer, ‘Uniform Law, General Principles and Autonomous Interpretation’ (2000) 5 Uniform Law Review 683; HM Flechtner, ‘The Several Texts of the CISG

cannot proceed by reference to the meanings assigned to particular concepts in domestic legal systems.<sup>40</sup> Rather, the terms and concepts used in the CISG should be ‘interpreted in the context of the Convention itself ... by reference to the Convention’s own system and objectives’.<sup>41</sup>

#### A. *The general model of anticipatory breach under the CISG*

The doctrine of anticipatory breach has been regulated in Articles 71, 72 and 73(2) CISG. Article 71 gives the innocent party a right to *suspend* performance, whereas Article 72 provides the possibility to *avoid* the contract for anticipatory breach. Article 73(2) regulates the right of avoidance for anticipatory breach in the specific context of instalment contracts. As opposed to Articles 71 and 72, Article 73(2) CISG applies where a breach of contract has already been committed, i.e. where the promisor has failed to perform his obligations in respect of past instalments, which gives the promisee good grounds to conclude that future instalments will also not be performed. Article 73(2) does not provide an opportunity for the promisor to offer assurance of performance. Even if the promisor does provide assurance, the promisee is entitled to avoid the contract with respect to future instalments.<sup>42</sup> The doctrine of adequate assurance is therefore not relevant in the cases of anticipatory breach covered by Article 73(2) CISG. Consequently, this provision will not be analyzed in the following part of this article.

According to Article 71(1) CISG:

A party may suspend the performance of his obligations if, after the conclusion of the contract, it becomes apparent that the other party will not perform a substantial part of his obligations as a result of:

- (a) a serious deficiency in his ability to perform or in his creditworthiness; or
- (b) his conduct in preparing to perform or in performing the contract.

Article 72(1) CISG, on the other hand, provides that:

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.

The prerequisites for invoking the right to suspend performance and the right of avoidance based on anticipatory breach clearly differ. In order to suspend performance, the innocent party must prove that the future occurrence of a breach ‘became apparent’ and that the expected breach will concern ‘a substantial part’ of the promisor’s obligations. In comparison, an avoidance for anticipatory breach is only possible where ‘it is clear’ that the promisor will commit ‘a fundamental breach’ of contract. The concept of fundamental breach has been defined in Article 25 CISG. According to this provision, a fundamental breach occurs where the failure to perform results in such a detriment to the promisee as substantially to deprive them of what they are entitled to expect under the contract. It has been clarified in the literature

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in a Decentralized System: Observations on Translations, Reservations and Other Challenges to the Uniformity Principle in Article 7(1)’ (1997–98) 17 *Journal of Law and Commerce* 187; RA Hillman, ‘Applying the United Nations Convention on Contracts for the International Sale of Goods: The Elusive Goal of Uniformity’ (1995) *Cornell Review of the Convention on Contracts for the International Sale of Goods* 21.

<sup>40</sup> Gebauer (n 39) 686–7.

<sup>41</sup> Gebauer (n 39) 686–7.

<sup>42</sup> L Chengwei, *Remedies for Non-Performance: Perspectives from CISG, UNIDROIT Principles & PECL* (Juris Net 2007) para 10.2.



that in order to constitute a fundamental breach, the failure to perform has to be so intense that ‘the purpose of the contract could not be fulfilled anymore’.<sup>43</sup> The threshold for avoidance for anticipatory breach set out in Article 72(1) CISG is therefore very high.

Article 71(1) CISG, regulating the suspension of performance, does not require the anticipated breach to be fundamental. Instead, the breach should cover a ‘substantial part’ of the promisor’s obligations. The concept of a ‘substantial part’ of a party’s obligations has not been defined in the CISG. Nevertheless, it is commonly accepted that a ‘substantial part’ of obligations constitutes a lower threshold than the requirement of a fundamental breach.<sup>44</sup> In one case, for example, the court stated that the buyer’s failure to provide a bank’s confirmation that the letter of credit would be opened as soon as the goods were examined does not constitute a fundamental breach of contract; nevertheless, it is sufficient to justify a suspension of performance.<sup>45</sup> Similarly, the court emphasized that a fundamental breach is not required for a rightful suspension of performance under Article 71 CISG in a case in which the seller refused to perform only with respect to certain items.<sup>46</sup>

The probability standard adopted in Article 72(1) (‘it is clear’) is also stricter than its counterpart in Article 71(1) (‘it becomes apparent’).<sup>47</sup> Although it is accepted that the standard of ‘being clear’ used in Article 72(1) CISG does not require complete certainty that a fundamental breach will occur, a very high degree of probability is required.<sup>48</sup> It has been explained in one case that the future occurrence of a fundamental breach must be ‘obvious to everybody’ to justify avoidance of a contract under Article 72(1).<sup>49</sup> The probability standard adopted in Article 71(1), according to which a breach must ‘become apparent’, at least theoretically,<sup>50</sup> requires a lower degree of likelihood than the standard of ‘being clear’. It is usually defined as a ‘high’ or ‘substantial’ degree of likelihood assessed from the perspective of a reasonable person in the position of the suspending party.<sup>51</sup> In sum, the preconditions for suspension of performance are easier to satisfy than the preconditions for avoidance for anticipatory breach.

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<sup>43</sup> B Keller, ‘Favor Contractus. Reading the CISG in Favour of the Contract’ in Baasch Andersen and Schroeter (n 39) 258.

<sup>44</sup> See eg T Bennett, ‘Art 71’ in CM Bianca and MJ Bonell, *Commentary on the International Sales – The 1980 Vienna Sales Convention* (Giuffrè 1987) para 3.1; M Azeredo da Silveira, ‘Anticipatory Breach Under the United Nations Convention on Contracts for the International Sale of Goods’ (2005) *Nordic Journal of Commercial Law* 1, 6.

<sup>45</sup> Germany 21 September 1995 District Court Kassel (*Wooden poles case*), available at: <<https://cisg-online.org/search-for-cases?caseId=6167>>.

<sup>46</sup> Germany 15 September 1994 District Court Berlin (*Shoes case*), available at: <<http://www.unilex.info/cisg/case/218>>.

<sup>47</sup> D Saidov, ‘Art 72’ in S Kröll, L Mistelis and P Perales Viscasillas (eds), *UN Convention on Contracts for the International Sales of Goods (CISG): A Commentary* (CH Beck/Hart/Nomos 2018) para 7; P Huber, ‘Art 72’ in HP Westermann (ed), *Münchener Kommentar zum BGB. Band 4* (CH Beck 2019) para 7; Azeredo da Silveira (n 44) 5–6.

<sup>48</sup> See eg Germany 30 September 1992 District Court Berlin (*Shoes case*), available at: <<http://www.unilex.info/cisg/case/79>>; Saidov, ‘Art 72’ (n 47) para 7; T Bennett, ‘Art 72’ in CM Bianca and MJ Bonell, *Commentary on the International Sales – The 1980 Vienna Sales Convention* (Giuffrè 1987) para 2.2; J Lookofsky, *Understanding the CISG. A Compact Guide to the 1980 United Nations Convention on Contracts for the International Sale of Goods* (Kluwer Law International 2017) para 6.11.

<sup>49</sup> Germany 30 September 1992 District Court Berlin (*Shoes case*), available at: <<http://www.unilex.info/cisg/case/79>>.

<sup>50</sup> Some authors claim that the difference between the two probability standards is difficult to draw in practice – see eg P Schlechtriem, *Uniform Sales Law – The UN-Convention on Contracts for the International Sale of Goods* (Manz 1986) 96; Saidov, ‘Art 72’ (n 47) para 7.

<sup>51</sup> For a detailed analysis of the relevant case law see Saidov, ‘Art 71’ (n 34) paras 19–26.

## B. Adequate assurance under Article 71(3) CISG

### 1. The general rules

The mechanism of adequate assurance has been regulated in both Article 71(3) CISG, concerning the suspension of performance, and Article 72(2) CISG, concerning the right of avoidance for anticipatory breach. This section will focus on Article 71(3) and the next section will consider Article 72(2) CISG.

Article 71(3) CISG states:

A party suspending performance, whether before or after dispatch of the goods, must immediately give notice of the suspension to the other party and must continue with performance if the other party provides adequate assurance of his performance.

Contrary to section 2-609 UCC, Article 71(3) CISG uses the phrase ‘adequate assurance of performance’ rather than ‘adequate assurance of *due* performance’. An assurance may thus be considered sufficient even where the possibility of a minor breach remains.<sup>52</sup> At the same time, it is arguable that the ‘adequacy’ of assurance should be assessed more strictly under Article 72(2) than under Article 71(3) CISG because the circumstances justifying a request for assurance under the former provision are more severe.<sup>53</sup>

Article 71(3) CISG explicitly indicates the consequences of the *provision* of adequate assurance by the promisor in response to the suspending party’s demand. In such a case, the right of suspension terminates, thus the suspending party must continue with performance of their side of the bargain. However, contrary to section 2-609 UCC, Article 71(3) CISG does not specify the consequences of a *failure* to provide adequate assurance. In particular, it does not explicitly allow the suspending party to avoid the contract where adequate assurance is not provided. Unlike section 2-609 UCC, Article 71 CISG does not introduce a time limit for the suspension of performance. It is therefore submitted that where adequate assurance is not offered, the suspending party may continue with the suspension of performance unless and until the grounds which triggered the right to suspend cease to exist. Alternatively, the suspending party can invoke Article 72 CISG and avoid the contract as long as the preconditions set out in this provision are satisfied. Finally, once the time for performance has passed and an actual breach has occurred, the suspending party may avoid the contract under Article 49 or Article 64 CISG.

### 2. Consequences of a failure to provide assurance

It was explained in the previous part of this article that the rationale for introducing the adequate assurance procedure into the UCC was to eliminate the uncertainty that normally accompanies the exercise of remedies in the case of anticipatory breach. Section 2-609 UCC eliminates this uncertainty by stating that a failure to provide adequate assurance within a reasonable time, not exceeding 30 days, constitutes a repudiation of the contract. The lack of a time limit in Article 71(3) CISG, as well as the fact that the provision does not entitle the promisee to avoid the

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<sup>52</sup> See Saidov, ‘Art 71’ (n 34) para 52.

<sup>53</sup> M Bridge, ‘Issues Arising under Articles 64, 72 and 73 of the United Nations Convention on Contracts for the International Sale of Goods’ (2005–06) 25 *Journal of Law and Commerce* 405, 418.

contract where adequate assurance is not provided, seems to prevent the adequate assurance mechanism from satisfying its very function.

This issue was raised during the preparatory works on Article 62(3) of the draft CISG of 1978,<sup>54</sup> the equivalent of the current Article 71(3) CISG. At the 1980 Diplomatic Conference, the delegates from Canada and Australia submitted a joint proposal to add an additional provision following Article 62 of the 1978 draft (Article 62 *bis*). The proposed new provision was intended to clarify that a ‘failure ... to provide adequate assurance of performance within a reasonable period of time shall entitle the party requesting the assurance to avoid the contract’.<sup>55</sup> The aim of the proposed amendment was to deal ‘with a practical problem to which Article 62 did not provide a definite solution’.<sup>56</sup> The delegate from Canada argued that:

It should be made clear that if a party did not receive adequate assurance of the other party’s ability to perform, he was entitled to avoid the contract and not merely suspend performance. If, for example, a buyer heard rumours that the seller from whom he had ordered equipment for a hydroelectric installation might be unable to build the items concerned and did not receive any assurance from the latter, suspension of performance would merely delay the entire project still further.<sup>57</sup>

The delegate from Australia argued that ‘without the joint proposal, the text would prejudice the rights of the non-defaulting party by leaving him in a position of intolerable uncertainty’.<sup>58</sup> Nevertheless, the joint proposal was rejected. The delegates opposing the proposal claimed that the CISG is based on the idea that avoidance should only be allowed in the case of a fundamental breach and ‘the exact circumstances’ justifying avoidance ‘should not be specifically defined in each Article’.<sup>59</sup> Rather, it should be left to the courts to decide whether the circumstances of a given case are sufficient to justify avoidance.<sup>60</sup>

The uncertainty arising from the content of Article 71(3) CISG has led some authors to claim that a failure to provide adequate assurance by the promisor makes it ‘clear’ that a breach will occur.<sup>61</sup> Accordingly, a mere failure to provide assurance is sufficient to satisfy the probability standard required for avoidance under Article 72 CISG. It is submitted that this argument is unfounded. Similarly to the assessment of the severity of the breach justifying avoidance, the assessment of the probability that the breach will occur is conducted on a case-by-case basis. The courts take all the circumstances into account to determine whether the future occurrence of a breach is ‘clear’. Such circumstances include, for example, the likelihood of obtaining substitute goods where the goods agreed upon in the contract are no longer able to be found by the seller;<sup>62</sup> the fact that the buyer failed to pay for prior shipments;<sup>63</sup> the number of prior instalments for which payment was missing;<sup>64</sup> the fact that the reason for withholding the

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<sup>54</sup> See Official Records, A/CONF.97/19, p 52.

<sup>55</sup> Official Records, A/CONF.97/19, p 129.

<sup>56</sup> Official Records, A/CONF.97/19, p 377 (per Ziegel).

<sup>57</sup> Official Records, A/CONF.97/19, p 377.

<sup>58</sup> Official Records, A/CONF.97/19, p 378.

<sup>59</sup> Official Records, A/CONF.97/19, p 378 (per Ferraro).

<sup>60</sup> Official Records, A/CONF.97/19, p 378.

<sup>61</sup> See eg Azeredo da Silveira (n 44) 16.

<sup>62</sup> China 30 January 1996 CIETAC Arbitration proceeding (*Compound fertilizer case*), available at: <<https://cisg-online.org/search-for-cases?caseId=7044>>.

<sup>63</sup> Germany 14 January 1994 Appellate Court Düsseldorf (*Shoes case*), available at:

<<http://www.unilex.info/cisg/case/84>>; Germany 30 September 1992 District Court Berlin (*Shoes case*), available at: <<http://www.unilex.info/cisg/case/79>>; United States 29 May 2009 US District Court, Southern District of New York (*Doolim Corp v R Doll, LLC, et al*), available at: <<http://www.unilex.info/cisg/case/1451>>.

<sup>64</sup> Switzerland 31 May 1996 Zurich Arbitration proceeding (*Soinco v NKAP*), available at: <<http://www.unilex.info/cisg/case/396>>.

goods by the seller was a dispute which arose between the parties concerning the manner and final date of performance;<sup>65</sup> and the fact that although the seller stated that they intend not to deliver the goods, they agreed to continue negotiations with the buyer.<sup>66</sup>

These examples show that the court needs to examine the entire spectrum of circumstances in order to determine the probability that a breach will occur. A failure of the promisor to provide adequate assurance can be seen as one such circumstance considered in the court's assessment. However, there is no ground for giving it priority over the other circumstances of the case and regarding it as the decisive factor which determines that the future occurrence of the breach is 'clear' and thus that the requirements for avoidance stated in Article 72 are satisfied. Certainly, neither the wording of Articles 71 and 72, nor of any other provision of the Convention, justify the overarching significance of the failure to provide assurance as compared to other circumstances of a given case.

It has also been argued that a failure to provide adequate assurance requested under Article 71(3) CISG amounts to a renunciation.<sup>67</sup> According to this argument, an explicit refusal by the promisor to provide adequate assurance is tantamount to a 'refusal to perform', as regulated in Article 72(3) CISG, while a mere failure to provide the assurance constitutes an implied refusal to perform. According to Article 72(3) CISG, the promisee can avoid the contract without prior notice to the promisor where the promisor 'has declared that he will not perform his obligations'.

One major flaw of this argument is that Article 72(3) CISG refers to a declaration of the promisor that he 'will not perform his obligations'. The provision of adequate assurance does not constitute a part of the promisor's obligations. An obligation to provide the assurance certainly does not arise from the sales contract. The question of adequate assurance comes into play only at the stage of performance of the contract. Article 71(3) CISG also does not impose on the promisor an obligation to provide the assurance. The provision merely states that the promisee must continue with their performance *if* the promisor provides adequate assurance; the provision of adequate assurance is thus a *right* of the promisor. There may be many reasons for the promisor to fail to provide the assurance. In particular, the promisor may question the validity of the promisee's feeling of insecurity. It has been emphasized that Article 72(3) CISG should be interpreted strictly. It can only apply in the case of definite and unambiguous refusal to perform the promisor's obligations.<sup>68</sup> In principle, a refusal to provide adequate assurance, whether explicit or implied, does not constitute such a declaration.

Avoidance for anticipatory breach based solely on a failure to provide adequate assurance would have been possible if there were an explicit regulation allowing for that in the Convention. An analogy can be drawn with the *Nachfrist* mechanism regulated in Articles 47 and 63 CISG. The *Nachfrist* procedure gives the promisee a right to fix an additional period of time for the promisor to perform their obligations.<sup>69</sup> Both a *Nachfrist* notice and a demand for adequate assurance aim to preserve the contract by giving the promisor an opportunity to prevent the exercise of remedies by the promisee. A basic difference between the two

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<sup>65</sup> Switzerland 20 February 1997 District Court Saane (*Spirits case*), available at: <<http://www.unilex.info/cisg/case/403>>.

<sup>66</sup> ICC Arbitration Case No 8574 of 1 September 1996 (*Metal concentrate case*), available at: <<http://www.unilex.info/cisg/case/521>>.

<sup>67</sup> Ch Fountoulakis, 'Art 71' in P Schlechtriem and I Schwenzer (eds.), *Commentary on the UN Convention on the International Sale of Goods* (OUP 2016) para 56.

<sup>68</sup> Saidov, 'Art 72' (n 47) para 27.

<sup>69</sup> For a more general analysis see P Huber, 'CISG – The Structure of Remedies' (2007) 71 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 13, 20–1.

mechanisms is that the *Nachfrist* is applicable when performance is overdue, while the adequate assurance procedure applies when performance is not yet due.<sup>70</sup>

As far as the *Nachfrist* procedure is concerned, it is explicitly stated in Article 64(1)(b) CISG that if the buyer does not perform their obligations within the fixed period or declares that they will not do so within the fixed period, the seller may declare the contract avoided. Similarly, Article 49(1)(b) explicitly states that if the seller does not deliver the goods within the additional period of time fixed by the buyer, or if they declare that they will not do so within the fixed period, the buyer may declare the contract avoided. These provisions have been interpreted strictly. For instance, given that the text of Article 49(1)(b) refers only to cases of *non-delivery*, giving the seller a *Nachfrist* notice in the case of delivery of *non-conforming* goods does not entitle the buyer to avoid the contract after expiration of the fixed period.<sup>71</sup> The promisor's failure to respond to the *Nachfrist* notice in an adequate manner thus gives the promisee a right to avoid the contract, but only under specific circumstances explicitly indicated in Articles 49(1)(b) and 64(1)(b) of the Convention.

Given the similarities between the *Nachfrist* procedure and the adequate assurance procedure, the systematic interpretation of the Convention requires that similar conditions apply to both mechanisms. Analogously to the solutions adopted in the *Nachfrist* procedure, a failure to provide assurance per se could only justify avoidance of a contract if (and to the extent that) this was explicitly stated in the Convention. A provision analogous to Convention Articles 49(1)(b) and 64(1)(b) would be required to achieve this result. In the absence of such a provision, the failure to provide adequate assurance may only be seen as one of the circumstances examined to determine whether the occurrence of the anticipated breach was clear. In other words, a failure to provide assurance per se cannot justify avoidance of a contract. However, it may influence the assessment of the probability that the breach will occur.

Consequently, in some instances, avoidance will not be justified even though the assurance requested by the promisee was not provided. By way of example, it may be that the provided assurance is not adequate, yet it constitutes a clear sign that the promisor has the intention and ability to perform. A 'comfort letter' from a parent company stating that the promisor will perform their side of the bargain may in some cases constitute such an indication, even where – from the perspective of the promisee – it will not qualify as a satisfactory assurance.<sup>72</sup> In such a situation, the failure to provide an *adequate* assurance does not 'make it clear' that the contract will not be performed, thus it does not justify avoidance of the contract based on Article 72(1) CISG. The promisee should rather ask the promisor to provide an alternative security for their performance, as long as time allows and doing so does not cause unreasonable inconvenience and uncertainty to the promisee.<sup>73</sup>

On the other hand, in a situation in which the promisee asks the promisor to provide a bank guarantee as an assurance, and does so after the promisor had already failed to pay for a previous delivery and failed to provide another bank guarantee explicitly required by the contract, provision of an invalid bank guarantee will normally 'make it clear' that the contract will not be performed.<sup>74</sup> It follows that a failure to provide assurance under Article 71(3) CISG does not automatically 'make it clear' that a breach will occur. Rather, it constitutes one of the circumstances examined in order to determine the likelihood of a breach.

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<sup>70</sup> See also R Koch, 'The Concept of Fundamental Breach of Contract under the United Nations Convention on Contracts for the International Sale of Goods (CISG)' Pace Review of the Convention on Contracts for the International Sale of Goods (Kluwer Law International 1999) 177, 309.

<sup>71</sup> For the justification for this solution see J Honnold, *Uniform Law for International Sales Under the 1980 United Nations Convention* (Kluwer Law International 1999) 313–314.

<sup>72</sup> This example is given in a slightly different context by Saidov – see Saidov, 'Art 72' (n 47) para 25.

<sup>73</sup> Fountoulakis, 'Art 72' in Schlechtriem and Schwenzer (n 67) para 32.

<sup>74</sup> Compare Saidov, 'Art 72' (n 47) para 25.

### 3. *The adequate assurance procedure as a failed legal transplant*

Based on the above analysis, it is difficult to avoid the conclusion that the adequate assurance mechanism regulated in Article 71(3) CISG is an example of a failed legal transplant, a legal concept which serves a certain purpose in one legal system but cannot serve the same purpose when moved to another legal system because of its incompatibility with the existing legal framework. The adequate assurance mechanism regulated in section 2-609 UCC operates in the shadow of the perfect tender rule adopted in the UCC,<sup>75</sup> which allows the buyer to immediately reject non-conforming goods independent of the seriousness of the non-conformity. The solutions adopted in Article 2 UCC concentrate on the need to provide speedy and convenient remedies to the promisee. Consequently, the adequate assurance procedure regulated in the UCC operates within a very different system of remedies than that adopted in the Convention. Analogously to the right to cure by the seller,<sup>76</sup> the possibility to provide adequate assurance based on section 2-609 UCC may be seen as an instrument limiting the harsh consequences of the perfect tender rule.

On the other hand, the system of remedies adopted in the Convention is based on the principle of *favor contractus* which has been identified as one of the general principles underlying the Convention.<sup>77</sup> The principle prioritizes keeping the contract alive; in case of a breach of contract, the parties are encouraged to maintain their relationship and find a solution. Avoidance should be seen as a last resort.<sup>78</sup> It follows that the adequate assurance procedure cannot provide the same benefits under the CISG as it does under the UCC, simply because the Convention generally adopts a much higher threshold than the UCC for avoidance of a contract.

The different significance of the adequate assurance procedure in the CISG and the UCC may be linked to a more general belief, demonstrated in the Convention,<sup>79</sup> that not only the promisee, but also the promisor has an interest in performance worthy of protection. This interest continues to exist where the promisor has failed to perform their obligations. Common law jurisdictions typically concentrate on the *promisee's* performance interest. There is hardly any mention of the *promisor* having an interest in performance in the case law or the literature.<sup>80</sup> By emphasizing the promisor's interest in performance, the CISG comes close to solutions adopted in civil law jurisdictions, where importance is placed on the interests of the promisee and promisor, alike. This general approach is reflected in the wording of Article 71(3) CISG, which states that the promisee who suspends the performance of their obligations '*must*

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<sup>75</sup> Section 2-601 UCC.

<sup>76</sup> Section 2-508 UCC.

<sup>77</sup> B Keller, 'Favor Contractus. Reading the CISG in Favour of the Contract' (n 43) 247; U Magnus, 'Allgemeine Grundsätze im UN-Kaufrecht' (1995) 59 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 469, 483.

<sup>78</sup> See eg Italy 11 December 2008 District Court Forli, available at: <<http://www.unilex.info/cisg/case/1368>>; Germany 25 January 2008 Appellate Court Hamburg, available at: <<http://www.unilex.info/cisg/case/1352>>; Germany 3 April 1996 Supreme Court (*Cobalt sulphate case*), available at: <<http://www.unilex.info/cisg/case/182>>; Switzerland 28 October 1998 Supreme Court, available at: <<http://www.unilex.info/cisg/case/382>>; Austria 7 September 2000 Supreme Court, available at: <<http://www.unilex.info/cisg/case/473>>; Magnus, 'Allgemeine Grundsätze im UN-Kaufrecht' (n 77) 483; U Magnus, 'The Remedy of Avoidance of Contract under CISG – General Remarks and Special Cases' (2005) 25 *Journal of Law and Commerce* 423, 424; Huber (n 69) 17. This approach can be clearly seen in the CISG: see arts 25, 34, 37, 47, 48, 49, 63, and 64 – for a detailed analysis see Keller (n 43).

<sup>79</sup> Art 48 is the prime example.

<sup>80</sup> Treitel explains that: 'Anglo-American courts are, in the matter of termination, less concerned with the protection of the debtor than either German or French law. Their emphasis tends...to be on speedy and convenient remedies for the creditor.' See G Treitel, *Remedies for a Breach of Contract: A Comparative Account* (Clarendon Press 1988) 259.



*immediately give notice* of the suspension to the other party and must continue with performance if the other party provides adequate assurance of his performance' (emphasis added). The adequate assurance procedure regulated in Article 71(3) CISG *does* protect the interests of the promisee by ensuring that they can exercise the right of suspension without incurring the risk of being transformed into the breaching party due to their own failure to perform. However, the wording of the provision clearly emphasizes the role of the mechanism of adequate assurance in protecting the interests of the promisor by giving them a chance to stop the suspension of performance.

A different focus can be seen in the wording of section 2-609 UCC. The provision starts by declaring that each party has an obligation to ensure that the other party's 'expectation of receiving due performance will not be impaired'. It goes on to state that in cases in which the promisee has 'reasonable grounds for insecurity', they '*may ... demand* adequate assurance of due performance'. The demand for adequate assurance under section 2-609 UCC is thus shaped as a *right* of the promisee; the text of the provision unambiguously indicates that the procedure is meant to serve the promisee's interests by removing their sense of insecurity and does not put an emphasis on the need to protect the interests of the promisor. The different consequences of a failure to provide the assurance under the CISG and Article 2 UCC thus reflect a more general difference in the balancing of interests of both parties to a contract.

### C. Adequate assurance under Article 72(2) CISG

Article 72(2) CISG regulates the adequate assurance procedure applicable in cases in which it has become clear that a fundamental breach of contract will occur. The scope of application of the provision is limited to cases of prospective incapacity; the promisee does not need to give the promisor a chance to provide the assurance in the case of renunciation.<sup>81</sup> As pointed out earlier, the mechanism of adequate assurance regulated in Article 72(2) CISG does not have an equivalent in the UCC. As opposed to the procedure regulated in section 2-609 UCC, the solution adopted in Article 72(2) CISG is not meant to remove an uncertainty experienced by the promisee – a request for adequate assurance based on Article 72(2) CISG is only justified where the future occurrence of a fundamental breach has already become clear. The provision of adequate assurance functions as the promisor's defence against avoidance of the contract.<sup>82</sup> If the promisor fails to provide the assurance, they miss the opportunity to protect their own interests. Avoidance based on Article 72(1) CISG is conditional upon offering the promisor a chance to provide the assurance.<sup>83</sup>

The rationale for the adequate assurance procedure regulated in Article 72(2) CISG is that the party whose breach is anticipated may often be in a weaker position than the innocent party and this may lead to abuse. The requirement that the promisee must give the promisor a chance to provide assurance reduces the risk of the promisee taking advantage of the anticipatory breach doctrine to escape a bad bargain. The role of the adequate assurance mechanism as an instrument strengthening the position of the promisor can be clearly seen in the drafting history of Article 72 CISG. Article 63 of the draft CISG of 1978, the equivalent of the current Article 72 CISG, did not originally provide for an adequate assurance mechanism or a notification requirement. It merely stated: 'If prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach, the other party may

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<sup>81</sup> Art 72(3) CISG.

<sup>82</sup> M Bridge, *The International Sale of Goods* (OUP 2017) para 12.20.

<sup>83</sup> Some authors have argued that a failure to give notice does not eliminate the right of avoidance but merely triggers a claim for damages. For a critic of this view see Ch Fountoulakis, 'Art 72' in Schlechtriem and Schwenzer (n 67) para 19.

declare the contract avoided.<sup>84</sup> At the 1980 Diplomatic Conference, the provision generated significant opposition from developing countries, which were unfamiliar with the doctrine of anticipatory breach.<sup>85</sup> Their criticism focused on the fact that Article 63 of the draft placed the promisee in a very strong position. The delegates from developing countries argued that the provision penalizes the promisor too severely by denying them notice. Consequently, the promisor is left with no opportunity to provide adequate assurance and thus to prevent avoidance of the contract by the promisee which may put their interests at risk.<sup>86</sup> The Egyptian delegate asserted that the promisor should be given a chance to re-establish themselves. He explained that even in the case of bankruptcy, a receiver appointed by the court may be in a position to perform the contract and should have the right to do so.<sup>87</sup>

It was argued that the lack of mandatory notification and an opportunity to offer assurance may be particularly detrimental to businesses from developing countries. The economic and political conditions in these countries may create an impression that the situation of a contracting partner from one these countries is unstable.<sup>88</sup> A lack of an opportunity to provide assurance in order to prevent avoidance for anticipatory breach reduces the already weaker bargaining power of businesses originating from developing countries as compared to their international partners.<sup>89</sup> The delegates who were against a mandatory notification requirement claimed that it may be too burdensome on the promisee, who in some cases may need to take an immediate action to avoid losses.<sup>90</sup> As a compromise,<sup>91</sup> it was stated in the final draft of the provision that the innocent party must give reasonable notice to the promisor and permit them to provide adequate assurance ‘if time allows’.

The drafting history of Article 72 CISG unambiguously shows that the purpose of regulating the notification requirement in this provision, accompanied by the adequate assurance mechanism, was to protect the interests of the promisor. In fact, the drafters of the Convention were concerned that the procedure regulated in Article 72(2) CISG may put the interests of the innocent party at risk. It thus follows that the character of the adequate assurance mechanism under Article 72(2) CISG is completely different than that under section 2-609 UCC.

#### *D. The applicability of the PICC*

It has been suggested that Article 7.3.4 of the UNIDROIT Principles of International Commercial Contracts may be used to ‘interpret the interplay between Articles 72 and 71 CISG’ and to justify the promisee’s right of avoidance where the requested adequate assurance is not provided.<sup>92</sup> According to Article 7.3.4 PICC, ‘a party who reasonably believes that there will be a fundamental non-performance by the other party may demand adequate assurance of due performance and may meanwhile withhold its own performance. Where this assurance is not provided within a reasonable time the party demanding it may terminate the contract.’ Contrary to the CISG, the PICC combines the remedies of suspension and avoidance for anticipatory breach in a manner similar to the UCC. Furthermore, the PICC allows for a suspension of performance only where the anticipated breach is of a fundamental nature. For these reasons,

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<sup>84</sup> See Official Records, A/CONF.97/19, p 53.

<sup>85</sup> See Official Records, A/CONF.97/19, p 419. For a detailed analysis see Strub (n 15).

<sup>86</sup> See Official Records, A/CONF.97/19, pp. 129–31, 218–19, 374–7, 419–22; 431–3.

<sup>87</sup> Official Records, A/CONF.97/19, p 419–20.

<sup>88</sup> Strub (n 15) 477–8.

<sup>89</sup> Strub (n 15) 478.

<sup>90</sup> See Official Records, A/CONF.97/19, p 420–2.

<sup>91</sup> See a statement made by the delegate from Canada – Official Records, A/CONF.97/19, p 433.

<sup>92</sup> Eiselen (n 16).



Article 7.3.4 PICC may be more relevant to the interpretation of Article 72 than to that of Article 71 CISG. The solution adopted in Article 7.3.4 PICC could be referred to in cases in which a fundamental breach is anticipated but its occurrence is not ‘clear’. The promisee could then demand adequate assurance and avoid the contract if their request is not answered.

The Preamble of the PICC states that they may be used to interpret or supplement international uniform law instruments. On this basis, it has been claimed that the Principles may play a role in interpretation of the CISG.<sup>93</sup> The use of the Principles may be justified in two ways. First, the PICC may be considered a ‘general part’ of the transnational law of obligations.<sup>94</sup> In such a case, the CISG would be considered a branch of the same covering international sales contracts. Understood in this way, the PICC would apply in relation to those elements of an international sales contract which are not regulated by the CISG, such as vitiating factors.

Another way of applying the PICC in the context of the CISG is to consider the PICC as ‘external’ general principles of the CISG. Article 7 of the CISG indicates that the autonomous and international interpretation of the Convention has priority over the law applicable by virtue of the rules of private international law. Accordingly, if matters governed by the Convention are not expressly settled in it, they are to be settled in conformity with the general principles on which the Convention is based. It has been argued that the principles may be both ‘internal’ to the Convention and ‘external’ to it.<sup>95</sup> ‘External’ principles can be taken *inter alia* from other uniform law instruments, which is particularly justified where the two instruments can form a coherent body of rules using the same concepts for similar purposes.<sup>96</sup> This debate is of primary significance in relation to the role of the PICC as general principles of the CISG.<sup>97</sup>

The applicability of the PICC in the interpretation and supplementation of the CISG is not without controversy.<sup>98</sup> A detailed analysis of this issue is, however, beyond the scope of this article. What needs to be examined here is whether, assuming that the PICC can play a supplementary role in the interpretation of the CISG, a reference to the Principles in cases in which the occurrence of fundamental breach is anticipated but not yet ‘clear’ could entitle the promisee to avoid the contract where the adequate assurance is not provided.

It is submitted that such an outcome could not be reached. Regardless of whether the PICC are to be considered a ‘general part’ of the transnational law of obligations or ‘external’ general principles on which the CISG is based, they can only be of use where there is a gap or an ambiguity in the Convention. Article 72 CISG, regulating the right of avoidance for anticipatory breach, leaves no gap to be filled. For there to be a gap, the adequate assurance mechanism regulated in Article 72(2) CISG would need to be understood in the same way as the adequate assurance procedure known from the UCC, i.e. as an instrument meant to ensure certainty on the side of the promisee. However, as explained above, the purpose of Article 72(2) CISG is different; the provision applies where it is already clear that a fundamental breach will occur. It aims to offer the promisor an opportunity to re-establish themselves by providing

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<sup>93</sup> For an overview of the literature on this topic see Goode et al, *Transnational Commercial Law: Text, Cases and Materials* (OUP 2015) paras 8.50–8.55.

<sup>94</sup> R Michaels, ‘Preamble I: Purposes, legal nature and scope of the PICC; applicability by courts; use of the PICC for the purpose of interpretation and supplementation and as a model’ in S Vogenauer (ed), *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)* (OUP 2015) 31, para 18.

<sup>95</sup> Gebauer (n 39) 695–7.

<sup>96</sup> *ibid.*

<sup>97</sup> See Legal Guide to Uniform Legal Instruments in the Area of International Commercial Contracts (with a focus on sales) by the Hague Conference on Private International Law (‘HCCH’), the United Nations Commission on International Trade Law (‘UNCITRAL’) and the International Institute for the Unification of Private Law (‘Unidroit’), A/CN.9/1029, available at: <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/V20/011/78/PDF/V2001178.pdf?OpenElement>> paras 350–352.

<sup>98</sup> See Goode et al (n 93) paras 8.50–8.55.

assurance in order to prevent the promisee from avoiding the contract. The content of Article 72 CISG allows for this purpose to be fully satisfied. It is left to the promisor to decide whether or not they will make use of the chance to provide assurance. If they decide to do so and the assurance provided is adequate, the promisee cannot avoid the contract.

Article 72(2) CISG thus protects the interests of the promisor by offering them a choice: they can provide adequate assurance and prevent avoidance of the contract, or remain passive (or otherwise provide assurance of an unsatisfactory standard) and let the promisee continue with the avoidance procedure. Understood in this way, Article 72 CISG regulates the adequate assurance mechanism in an exhaustive manner and creates no gap for which supplementary interpretation would be required.

Article 7.3.4 PICC clearly assigns the same role to the adequate assurance procedure as section 2-609 UCC. The demand for assurance under Article 7.3.4 PICC aims to eliminate the uncertainty experienced by the promisee. This is plainly visible when one compares this provision to the directly preceding Article 7.3.3, which states: ‘Where prior to the date for performance by one of the parties it is clear that there will be a fundamental non-performance by that party, the other party may terminate the contract’. It has been explained in the Official Comment to the PICC that Article 7.3.4 protects the interests of the promisee in the event that the occurrence of a breach is not clear, but the promisee has reason to believe that the promisor will not perform.<sup>99</sup> In contrast to Article 7.3.3 PICC, Article 7.3.4 thus applies where there is still a possibility that the promisor will perform. The Official Comment continues by explaining that in such a case the promisee:

would often be in a dilemma. If it were to wait until the due date of performance, and this did not take place, it might incur loss. If, on the other hand, it were to terminate the contract, and it then became apparent that the contract would have been performed by the other party, its action will amount to non-performance of the contract, and it will be liable in damages ... Consequently, this Article enables a party who reasonably believes that there will be a fundamental non-performance by the other party to demand an assurance of performance from the other party.<sup>100</sup>

The rationale for introducing the right to demand assurance in Article 7.3.4 PICC was therefore similar to the rationale justifying the procedure adopted in section 2-609 UCC. At the same time, it was completely different to the rationale underlying Article 72(2) CISG. The claim that Article 7.3.4 PICC can be used to supplement the interpretation of Article 72(2) CISG is based on a false assumption that the two provisions regulate an analogous procedure, whereas the mechanisms regulated in these provisions are in fact substantially different. Article 72(2) CISG leaves no gap. It simply serves different purposes to Article 7.3.4 PICC. Consequently, there is no room for supplementary interpretation of Article 72(2) CISG by way of applying the solution adopted in Article 7.3.4 PICC.

#### IV. THE DOCTRINE OF ADEQUATE ASSURANCE AS A *FAUX AMI*

It has been pointed out in the literature that the interpretation of a uniform law convention may present the risk of *faux amis*, i.e. ‘false friends’. The concept of *faux amis* has been used to describe terms which seem familiar to an interpreter but which, in fact, are defined differently in the uniform law instrument to in the domestic legal system the interpreter is used to.<sup>101</sup>

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<sup>99</sup> Official Comment, at 255.

<sup>100</sup> *ibid.*

<sup>101</sup> See, for example, C Baasch Andersen, *Uniformity in the CISG in the first decade of its application* in IF Fletcher, LA Mistelis and M Cremona (eds), *Foundations and Perspectives of International Trade Law* (Sweet &

Several instances of *faux amis* may be identified on the basis of the CISG. One major example is the mechanism regulated in Article 47 CISG, which was referred to as a ‘*Nachfrist*’ rule in the Secretariat’s Commentary to the 1978 draft of the Convention.<sup>102</sup> This mechanism has been equated by some German courts to the German doctrine of *Nachfrist*. As a result, the doctrine has been wrongly understood by these courts as giving a right for the seller and imposing a duty on the buyer, rather than providing an optional right for the buyer.<sup>103</sup>

Another example of a *faux ami* can be found in the US case of *Delchi Carrier SpA v Rotorex Corp.*,<sup>104</sup> which required an interpretation of Article 74 CISG. This provision states that ‘damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract’. The US court understood this rule as a reference to the ‘familiar principle of foreseeability established in *Hadley v Baxendale*’.<sup>105</sup> *Hadley v Baxendale* is the leading English case on remoteness of damage and has also gained recognition in the US.<sup>106</sup> Rather than referring to the preparatory works and other materials examining the specific meaning of the foreseeability rule under the CISG, the court thus reached for an analogy from its own jurisdiction.

The concept of ‘fundamental breach’ as defined in Article 25 CISG is another instance where the problem of *faux amis* may arise.<sup>107</sup> The term ‘fundamental breach’ has also been used in common law jurisdictions – which are more receptive to avoidance than the CISG.<sup>108</sup> It has been strongly emphasized in the literature that solutions adopted in common law systems ‘should not be looked at ... to determine the meaning of fundamental breach in Article 25’ CISG.<sup>109</sup>

It has been shown in this article that the mechanism of adequate assurance constitutes another instance where the problem of *faux amis* may occur. Even though the same words are used in both the CISG and the UCC, the doctrine regulated in the Convention has a different meaning and serves a different purpose to that of the UCC. As a result, it also leads to different legal consequences to its UCC counterpart. It has been stated in a number of court decisions that ‘*case law interpreting analogous provisions of Article 2 of the UCC may also inform a court where the language of the relevant CISG provisions tracks that of the UCC.*’<sup>110</sup> It was

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Maxwell 2001) 293–5; Honnold (n 71) 118; EA Farnsworth, ‘The American Provenance of the UNIDROIT Principles’ (1998) 3 Uniform Law Review 397, 402; M Heidemann, *Methodology of Uniform Contract Law. The UNIDROIT Principles in International Legal Doctrine and Practice* (Springer 2007) 70; J Felemegas, *Part One. Introduction* in J Felemegas (ed), *An International Approach to the Interpretation of the United Nations Convention on Contracts for the International Sale of Goods (1980) as Uniform Sales Law* (CUP 2007) 141–2.

<sup>102</sup> It had been emphasized in the Secretariat Commentary to art 43 of the 1978 draft (currently art 47 CISG) that the procedure regulated in this provision differs from the German doctrine of *Nachfrist* – see Secretariat Commentary, art 43, para 8.

<sup>103</sup> C Baasch Andersen, ‘Furthering the Uniform Application of the CISG: Sources of Law on the Internet’ (1998) 10 Pace International Law Review 403, 404; see, for example, Germany 10 February 1994 Appellate Court Düsseldorf [6 U 119/93] (*Fabrics case*), available at: <<http://www.unilex.info/cisg/case/53>>.

<sup>104</sup> US Court of Appeals for the Second Circuit 71 F 3d 1024 (2d Cir 1995).

<sup>105</sup> 156 Eng Rep 145 (1854).

<sup>106</sup> See, eg MA Eisenberg, ‘The Principle of Hadley v Baxendale’ (1992) 80 California Law Review 563.

<sup>107</sup> See the decision of the Supreme Court of Spain from 17 January 2008, available at: <<http://www.unilex.info/cisg/case/1249>>, in which it was stated that the concept derives from common law.

<sup>108</sup> For a comparison of the meaning of the concept ‘fundamental breach’ under the CISG and in English law, see M Bridge, ‘Avoidance for Fundamental Breach of Contract under the UN Convention on the International Sale of Goods’ (2010) 59 International and Comparative Law Quarterly 911, 916–17.

<sup>109</sup> *ibid* 917.

<sup>110</sup> See eg *Macromex SRL v Globex Inteno, Inc*, US District Court, Southern District of New York, 16 April 2008, available at: <<http://www.unilex.info/cisg/case/1303>>; *Genpharm Inc v Pliva-Lachema AS*, US District Court, Eastern District of New York, 19 March 2005, available at: <<http://www.unilex.info/cisg/case/1310>>; *Travelers Property Casualty Company of America et al v Saint-Gobain Technical Fabrics Canada Limited*, US District Court, Minnesota, 31 January 2007, available at <<http://www.unilex.info/cisg/case/1166>>.

shown in this article that this approach is not justified, particularly in the context of the doctrine of adequate assurance. The need for an autonomous interpretation of the Convention stressed in its Article 7(1) requires a clear line to be drawn between the rules governing the adequate assurance procedure under the CISG, on one hand, and under the UCC and other legal acts inspired by the latter, on the other.

## V. CONCLUSIONS

The conclusions arrived at in this article on the role of adequate assurance of performance in the CISG can be summarized as follows:

- I. A failure to provide adequate assurance requested under Article 71(3) CISG does not justify per se an avoidance of a contract; it can only be seen as one of the circumstances taken into account in the assessment of the probability that a fundamental breach will occur.
- II. The adequate assurance mechanism regulated in Article 71(3) CISG protects the interests of the promisor by allowing them to prevent suspension of performance by the promisee. The provision also protects the interests of the promisee, however, this protection is much weaker than that offered under section 2-609 UCC.
- III. The different ways in which the doctrine of adequate assurance operates under Article 71(3) CISG and under section 2-609 UCC result from the general differences between the systems of remedies adopted in the two legal acts. While the UCC adopts the perfect tender rule and allows the buyer to immediately reject the goods regardless of the seriousness of the non-conformity, the CISG is based on the principle of *favor contractus* and allows for avoidance only in cases of fundamental breach. As a result, the adequate assurance procedure regulated in Article 71(3) CISG cannot offer the same benefits as its UCC counterpart. As such, it can be seen as a failed legal transplant.
- IV. The purpose of the adequate assurance mechanism regulated in Article 72(2) CISG is solely to protect the interests of the promisor. The right to provide adequate assurance gives the promisor a chance to re-establish themselves and prevent the avoidance of a contract by the promisee. The adequate assurance procedure regulated in Article 72(2) CISG is not meant to remove an uncertainty experienced by the promisee – it only applies where the occurrence of a future fundamental breach is clear. The mechanism regulated in Article 72 CISG thus plays a very different role to the procedure regulated in section 2-609 UCC.

The differences between the adequate assurance mechanism regulated in the CISG and the one regulated in section 2-609 UCC may become very visible in the context of the current COVID-19 crisis. The outbreak of the pandemic arguably provides reasonable grounds for insecurity with respect to the performance of a significant number of sales contracts. At the same time, however, the occurrence of a future breach can only rarely be ‘clear’ given the unpredictable development of the pandemic and the fact that national governments are constantly updating the relevant restrictions. The probability standard required for avoidance of a contract under Article 72 CISG will thus not often be satisfied. The adequate assurance procedure regulated in section 2-609 UCC may prove to be a helpful tool in the current climate by allowing the promisee to remove the uncertainty involved and escape the contract where adequate assurance is not provided within a reasonable time. By contrast, the usefulness of the adequate assurance mechanism regulated in Article 71(3) CISG is limited in this context. If

adequate assurance is not provided, the promisee can merely continue with suspension of their performance, which may generate further uncertainty.

A more general conclusion regarding the interpretation of international conventions can be drawn from this analysis. An interpretation of an international uniform law convention, such as the CISG, must be based on the assumption that the expressions used by the drafters are intended to be independent and neutral. Recourse to the understanding of a given concept in a domestic legal system is only justified where it is clear from the legislative history that this is what the drafters intended.<sup>111</sup> The choice of expressions employed in an international convention is always a result of a compromise. At the same time, the range of interests that need to be balanced in the process of drafting an international convention are different to those implicated in drafting national legal rules. The adequate assurance procedure regulated in Article 72(2) CISG offers a very good example of this. As explained in this article, the provision was included in the Convention at the request of delegates from developing countries who feared that, in the case of international sales, the promisor may often be in a weaker position than the promisee – a consideration which is unlikely to be relevant in a national context. Concepts employed in an international convention should therefore not be associated with those employed in a domestic legal system – even if they are textually the same.

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<sup>111</sup> F Ferrari, ‘Autonomous Interpretation versus Homeward Trend versus Outward Trend in CISG Case Law’ (2017) 22 Uniform Law Review 244, 246–7.