

# Suspension of Performance due to Anticipatory Breach in Comparative Law and CISG

Nan Kham Mai

## 要 旨

本研究の目的は、コモンロー、民法および国連国際物品売買契約条約（CISG）における違反予知による履行遅延の権利を分析することである。履行遅延の権利により「契約を中断することなく他方当事者の履行遅延のためにパフォーマンスを中断するため不履行が正当化される」。国内法では、履行遅延の権利は、明確な原則に支配される。しかし、国際売買契約においては、CISG の曖昧な文言により、解釈は弾力的である。本稿は履行遅延と三つの法制の比較を研究するものである。

**Keywords: anticipatory breach, suspension of performance, lien, retention of title, stoppage in transit**

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- IV. Suspension of Performance in Civil Law
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## I. Introduction

In business transactions, the duties to pay the price and to accept the delivered goods are the principal duties of buyer under a contract of sale and the seller has obligation to deliver conformed goods at agreed

time.<sup>1</sup> Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions.<sup>2</sup> Hence, the seller must be ready and willing to give possession and the buyer must be ready and willing to pay the price in return for possession of the goods. If one of the parties fails to perform the fundamental contractual obligations, it amounts to breach of contract. A breach of contract may take place either during performance or before the time of performance. The first one is called actual breach of contract and the second is called anticipatory breach of contract. Anticipatory breach occurs before the agreed time of performance, where one party indicates by words or deed that he will not perform his undertaking, including making it impossible for himself to perform. The concept of anticipatory breach is originated in common law and provides both a defense and an immediate cause of action against the repudiating party. English common law has not codified the anticipatory breach doctrine but it is regulated in the United States.<sup>3</sup> In contrast, the concept of anticipatory breach is not recognized in some civil law countries.

Generally, the remedies for breach of contract cannot be exercised until the time of performance of the contract has arrived and breach has occurred. However, the doctrine of anticipatory creates the well-known exception. One party may suspend his own performance and wait the performance of the other party until the time due or terminate the contract and seek for any remedy conferred by law. The idea behind the remedy of suspension of performance is quite simple. If one party has not performed his obligation, the other party can withhold any performance. "I am not going to fulfill my part until you fulfill yours". The law recognized the aggrieved party to adopt the attitude, subject to certain condition, not being breach of contract.

The remedy for suspension of performance conferred by common law vary from civil law depending on the doctrine of the respective legal system. In international sales contract, the United Nations Convention on Contracts for International Sale of Goods (hereinafter referred to as the CISG) adopted the common law concept and set up the remedy for suspension of performance for anticipatory breach at Article 71. The remedy of suspension performance is a self-help remedy and it is not necessary the help of Court decision. The justification of suspension is the core issue for every case, whether the party is justified to suspend his own performance. Concerning this question, the ground for suspension, the scope of this remedy and the methods how to follow to exercise such right are very important factors to discuss because the aggrieved party can be faced the risk of unlawful suspension. This paper aims at comparative study of the right of suspension of performance for anticipatory breach of contract granted under common law, civil law and the CISG. The central question is: *when will one party's suspension of performance be justified without ending the contractual relationship or otherwise discharging either party's obligations?* Section II reveals the

concept of anticipatory breach of contract. Section III and IV discuss the remedy of suspension of performance in comparative perspective. In these sections, I would like to analyze the right of suspension under common law in comparison with civil law. In section V, the aggrieved party's right of suspension of performance under CISG will be widely discussed with cases. This paper will end with the concluding discussion in section VI.

## II. Anticipatory Breach

Anticipatory breach is established where one of the parties to a contract repudiates his obligation in advance of the date agreed for performance of the contract by means of expressly or impliedly informed by the repudiation party.<sup>4</sup> Actual breach of contract, which is established where one of the parties fails to perform the obligations in accordance with the terms of contract within the time stipulated in it.<sup>5</sup>

Anticipatory breach itself does not bring the contract to an end and it still has the duty to perform, while in the actual breach, when one of the party breaks the fundamental obligations of contract, it brings the contract to an end.<sup>6</sup> The remedies of anticipatory breach are different from those of actual breach of contract. It provides both a defense and as immediate cause of action against the repudiating party whereas there is no remedy for a defense in the actual breach of contract because the contract is void and both parties have no obligation to continue to perform the contract.<sup>7</sup>

Basically, there are two remedies for anticipatory breach: “the innocent party may accept the repudiation to end the contract and sue immediately for damages or it can refuse to accept the repudiation and to continue to carry out the performance of contract. After having done that the party can demand full payment or performance from other side.”<sup>8</sup> On the other hand, in the actual breach of contract, the primary remedy in common law is damages.<sup>9</sup> Damages may be inadequate remedy depending on the circumstances of particular case and if goods are unique, in such a case, a court will decree specific performance.<sup>10</sup>

The doctrine of anticipatory breach has not been codified in English common law in contrast to the US Law. Under English Law, there is no provision for anticipatory breach in statute law but the doctrine of anticipatory breach is developed by the case law. It originated in the case *Hochster v De La Tour*<sup>11</sup> and it is a landmark of English contract law case on anticipatory breach of contract. In that case, the claimant agreed to be a courier for the defendant for 3 months starting on 1st June 1852. The defendant wrote to the claimant on the 11<sup>th</sup> May, stating that he no longer wanted his services and refused to pay compensation. The claimant

obtained a service contract elsewhere but this was not to start until 4<sup>th</sup> July. The claimant brought an action on 22<sup>nd</sup> May for breach of contract. The defendant argued that there was no breach of contract on 22<sup>nd</sup> May as the contract was not due to start until 1<sup>st</sup> of June. The Court held that-

“Where one party communicates their intention not to perform the contract, the innocent party need not wait until the breach has occurred before bringing their claim. They may sue immediately or they can choose to continue with the contract and wait for the breach to occur.”<sup>12</sup>

The recent English courts have recognized a new kind of anticipatory breach of contract which concerns with the circumstance when the party to the contract disables himself from performing the obligations on the future due date.<sup>13</sup> The approach to establish the occurrence of that kind of breach is to analyze the seriousness of the resulting failure in performance.<sup>14</sup>

The doctrine of anticipatory breach is codified in the Uniform Commercial Code (hereinafter referred to the UCC) but the determination is based on the fact. According to Article 2-610, anticipatory breach is a situation “when either party repudiates the contract with respect to a performance not yet due the loss of which will substantially impair the value of the contract to the other.” Where the non-breaching party finds out the anticipatory breach by the other, he may suspend his own performance and wait for a commercially reasonable time performance by the repudiating party or he may resort to any remedy for breach.

Generally, the concept of anticipatory breach is not recognized in civil law countries, but they provide for similar remedy for the protection of the right of aggrieved party. As France and Germany are CISG members, the aggrieved party can rely on the remedies for anticipatory breach in international sales contract, albeit there is no provision regarding such remedies in French Civil Code and German Civil Code as well.<sup>15</sup>

As in common law, the anticipatory breach, in the sense of CISG, is based on the breach of substantial part of obligation before the due date of performance; which states in Article 71 “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.

Therefore, an express repudiation by the defaulting party is not necessary. It is sufficient that it is “apparent” that he will default. The rights of aggrieved party due to anticipatory breach by the other party are provided in Article 71.

### III. Suspension of Performance in Common Law

#### (i) English Law

##### (a) Ground for Suspension

Suspension of performance may happen where the buyer anticipates breach of contract; the seller may suspend his performance until the buyer performs his obligation- for instance, the seller may not deliver goods until the payment is secured. There is no requirement for seller to ask for assurance of due performance as in US Law.<sup>16</sup>

In *English Law*, the rights of aggrieved party for anticipatory breach of sale contract can be exercised as lien or withholding delivery or stoppage in transit. However, the right to suspend is given only to the seller and arises only in one narrowly-defined circumstance. Section 41(1) of the Sale of Goods Act, 1979 (hereinafter referred to the SGA), provides that even though a seller has agreed to deliver the goods before the buyer pays, the seller may "retain possession until payment .....(c) Where the buyer becomes insolvent. To be entitled suspension right, the seller must be unpaid seller and the buyer must be insolvent.

According to Section 38, *the seller is unpaid when the whole of the price has not been paid or tendered; or when a bill of exchange or other negotiable instrument has been received as a conditional payment and the condition on which it was received has not been fulfilled by reason of the dishonor of the instrument or otherwise.*

Definition of insolvency is provided in Section 61(4) of the SGA as follows:

*A person shall be deemed to be insolvent within the meaning of this Act if he has either ceased to pay his debts in the ordinary course of business or he cannot pay his debts as they become due.*

Insolvency will not alone amount to an anticipatory breach which entitled the seller to exercise his lien, but the circumstances must show an intention or an inability to perform.<sup>17</sup> This, in effect, authorizes suspension of performance because of prospective non-performance by the other party.

##### (b) Types of Suspension

The rights of unpaid seller are provided for under Section 39 of the SGA. Depending on the conditions, the unpaid seller's right of suspension performance differs in three kinds. Where the buyer default in payment or insolvent and the property in goods has already transferred to the buyer, the unpaid seller can seek for the right of lien.<sup>18</sup> Or, he may retain the right of disposal and withhold delivery if the property in goods is still in his own.<sup>19</sup> In case of both property and goods has been transferred to buyer but still in the middle person

such as carrier or agent, the seller can exercise the right of stoppage.<sup>20</sup> Such rights are the defense of the unpaid seller to secure the payment.<sup>21</sup>

### **(1) Lien**

A lien is defined as a right to hold goods, the property of another, in security for some debt, duty or other obligation.<sup>22</sup> Unpaid seller lien is not creature of contract but it is conferred by law.<sup>23</sup> Lien does not effect on the contract of sale and the seller must remain ready and willing to perform his obligations until the buyer's action becomes repudiatory. The seller's lien is lost in the following cases:

- (i) when the goods are delivered to the carrier or other bailee for the purpose of transmission to the buyer and the right of disposal has not been reserved;
- (ii) when the buyer or an agent lawfully obtained possession of the goods ; and
- (iii) when the seller waives his lien.<sup>24</sup>

The seller's lien is also defeated when a document of title, which is lawfully transferred to the buyer, is turned transferred to a sub buyer for valuable consideration or pledgee acting in good faith.<sup>25</sup>

Lien can be unlawfully exercised by the unpaid seller, when the seller's defense fall and he becomes to an action on the contract for damages for non-delivery.<sup>26</sup> As a general rule, lien does not give the seller the right to resell the goods. If he does so, he may be turned to be the breaching party except in case reselling the goods under section 48.<sup>27</sup>

### **(2) Right of Retention**

The right of retention is provided for in Section 19 of the SGA. In the absence of any contrary agreement, for instance, where there is a stipulation for sale on credit, the unpaid seller has a right to retain possession of the goods until the price is paid or tendered. In order to secure the payment, the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled, notwithstanding the delivery of the goods to the buyer, or to a carrier or other bailee for the purpose of transmission to the buyer. In such case, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled.<sup>28</sup>

A seller can avoid the problem of having to sue a buyer in event of the buyer's default under the agreement by inserting retention of title clause into the contract which is sometimes referred to as *Romalpa* clause.<sup>29</sup> *Aluminium Industrie Vaasen BV v Romalpa Aluminium Ltd*<sup>30</sup> is the first leading case for inserting retention of title clause and it aims to give the supplier of goods priority over secures creditors of the buyer if the buyer fails to pay for the goods because it is insolvent, or for some other reason which may be specified in

the clause.

### **(3) Stoppage in Transit**

Where the buyer defaults in payment in case of insolvency after the property of the goods and the goods has already been delivered, the seller still has the protection by exercising the right of stoppage in transit. Such right is to grant an unpaid seller to exercise some control over goods in which he had no property and of which he had no possession, but only in case of buyer's insolvency<sup>31</sup> and where the property in the goods has passed to the buyer.<sup>32</sup> The unpaid seller may exercise his right of stoppage in transit either *by taking actual possession of the goods or by giving notice of his claim to the common carrier or other bailee* in whose possession the goods are.<sup>33</sup> The effect of the notice is to give the seller the right to possession of the goods.<sup>34</sup> The right of stopping the good in transit is ended when the goods are in possession of the buyer or of his agent.<sup>35</sup> Just as the right of lien, the right of stoppage is defeated in the event of title being lawfully transferred to a good faith purchaser for value.<sup>36</sup>

## **(ii) US Law**

### **(a) Ground for Suspension**

There are two factors which the aggrieved party can suspend his own performance; (1) when reasonable grounds for insecurity arise with respect to the performance of the other party; (2) when the other party repudiates the contract with respect to a performance not yet due.<sup>37</sup>

The UCC takes a lenient approach as to the requirements for assertion of the suspension right, the party who wants to suspend only needs to show there have arisen "reasonable grounds for insecurity" or "anticipatory breach of contract."<sup>38</sup> The coverage of "reasonable grounds for insecurity" is wide. According to Article 2-609(2), the reasonableness of grounds for insecurity shall be determined according to commercial standards. Further, the comments of Article 2-609 state that "repeated delinquencies must be viewed as cumulative." A fact situation such as arose in *Corn Products Refining Co. v. Fasola*<sup>39</sup> offers illustration both of reasonable grounds for insecurity and adequate assurance. In this case a contract for the sale of oils on 30 days' credit, 2% off for payment within 10 days, provided that credit was to be extended to the buyer only if his financial responsibility was satisfactory to the seller. The buyer had been in the habit of taking advantage of the discount but at the same time that he failed to make his customary 10 day payment, the seller heard rumors, in fact false, that the buyer's financial condition was shaky. Thereupon, the seller demanded cash before shipment or security satisfactory to him. The buyer sent a good credit report from his banker,

expressed willingness to make payments when due on the 30 day terms and insisted on further deliveries under the contract. Under this Article [Chapter] the rumors, although false, were enough to make the buyer's financial condition "unsatisfactory" to the seller under the contract clause. Moreover, the buyer's practice of taking the cash discounts is enough, apart from the contract clause, to lay a commercial foundation for suspicion when the practice is suddenly stopped. These matters, however, go only to the justification of the seller's demand for security, or his "reasonable grounds for insecurity."

Regarding the anticipatory breach, the breach of contract shall extend to substantially impair to the value of the contract.<sup>40</sup> A party's failure to provide adequate assurances within a reasonable time (not to exceed 30 days) after receiving a justified demand is a repudiation of the contract.<sup>41</sup> In the case of *Starchem Lab., LLC v. Kabco Pharm., Inc.*,<sup>42</sup> it was held that a failure to respond constitutes a repudiation of the parties' agreement which entitled the party who demanded the assurance to suspend performance and to terminate the contract. Here, the plaintiff (buyer) failed to offer any assurance and responded merely for making a request for more credit. Accordingly, the Court found the seller's properly suspend performance.

#### **(b) Right to Adequate Assurance of Performance**

In case of anticipatory breach, whether suspension of performance is justified is always being the risk of aggrieved party. The problem of the insecurity and uncertainty of the party is solved by Article 2-609 of UCC. It permits one party upon "reasonable grounds for insecurity"<sup>43</sup> to "demand adequate assurance of due performance" and permits that party to suspend any performance until such assurances are received.

According to Article 2-609(1) of UCC, when a party to a sales contract has reasonable grounds to be insecure about the other party's ability to perform under the contract, the insecure party may send a written demand for the other party to provide adequate assurance of that party's ability to perform its obligations under the contract. The other party must then respond with adequate assurance of its ability to perform in a reasonable time not to exceed thirty (30) days. In the meantime, the insecure party can suspend its own performance under the contract until it receives such assurance as long as its suspension of performance is "commercially reasonable." In the event the other party fails to respond or does not provide adequate assurance of its ability to perform under the contract in a timely manner, the insecure party can treat the contract as repudiated and sue for breach of contract. By this means, the aggrieved party's suspension cannot be breach of contract.

#### **(c) Types of Suspension**

**In US Law**, the aggrieved party's right of suspension of performance is provided for in Article 2-610 of

the UCC. The aggrieved party may either suspend his own performance and wait for repudiating party's performance or resort to any remedy for breach (Article 2-703 or 2-711), even though he has notified the repudiating party that he would await the latter's performance and has urged retraction. The US law gives the right of suspension to both sides of parties to the contract.

### **(1) Suspension of Performance**

“Suspend performance” under Article 2-609(1) means to hold up performance pending the outcome of the demand, and includes also the holding up of any preparatory action. This is the same principle which governs the ancient law of stoppage and seller's lien, and also of excuse of a buyer from prepayment if the seller's actions manifest that he cannot or will not perform. Article 2-610 (1) of the UCC provides:

“when either party repudiates the contract with respect to a performance not yet due the loss of which will substantially impair the value of the contract to the other, the aggrieved party may

- (a) for a commercially reasonable time await performance by the repudiating party; or
- (b) resort to any remedy for breach (Article 2-703 or 2-711), even though he has notified the repudiating party that he would await the latter's performance and has urged retraction;”

In the absence of any contrary agreement, payments become due when the seller delivers or is ready to deliver goods, the nonperformance of buyer entitles the seller not to perform or to suspend the performance.<sup>44</sup> While the seller is unpaid and the goods are in possession of seller, two requirements which must be satisfied to exercise the right of suspension of performance are: (i) there must be a reasonable ground that the buyer will not perform his obligation; or (ii) the buyer must be insolvent.

With respect to the first requirement, while the seller is unpaid and before the goods are delivered to a buyer, where there are reasonable grounds to believe that the buyer will not be able or willing to perform; the seller may make a demand for assurances from the buyer that performance will be forthcoming.<sup>45</sup> The determination of ‘reasonableness’ tends to depend on the facts of each case, taking into account the nature of the contract, credit history of the parties, course of dealing between the parties and trade usage.<sup>46</sup> Significant financial difficulties will give the other party reasonable ground for insecurity.<sup>47</sup> Similar to grounds for insecurity, whether assurances are adequate will be determined by the circumstances. Upon making a demand for assurances, a seller may suspend any performance for which he has not already received the agreed exchange until he receives such assurance.<sup>48</sup>

Regarding the second requirement, while the seller is unpaid and where the goods has not been delivered to the buyer, if the seller discovers the buyer is insolvent, he may refuse delivery except for cash including

payment for all previously delivered goods.<sup>49</sup> According to Article 1-201(23) of UCC, a party shall be deemed to be insolvent in one of the three following situations: (a) failing to pay debts in the ordinary course of business, (b) failing to pay bill when they become due and (c) filing for bankruptcy. Here, the last condition, filing for bankruptcy makes clear evidence that he is unable to pay the price so that the wrongful suspension by seller will not occur.

According to Article 2-610 of UCC, where the seller fails to make delivery or repudiates by delivery of nonconformity of goods, the buyer may wait for late delivery of seller or he may resort to any remedies provided for in Article 2-711. In *Scott v. Crown*,<sup>50</sup> the seller refused to deliver goods and demanded performance beyond that required by the contracts. Under these facts, the court conclude that seller did not have the right to suspend performance because he failed to act in a manner that would bring him within the scope of Article 2-609. Instead, seller's action constituted an anticipatory repudiation which gave buyer the right to cancel the contracts and resort to the buyer's remedies.

## **(2) Stoppage in Transit**

Under the UCC, a seller may stop goods in transit in two instances, where the debtor is insolvent or where the buyer repudiates or fails to pay prior to delivery: (1) The Buyer's Insolvency and (2) Anticipatory Breach.<sup>51</sup> Three requirements must be fulfilled for the rights that the seller can exercise under the category of stoppage in transit: (i) the buyer has failed to pay for the price or the buyer must be insolvent, (ii) the goods must be out of seller's possession and (iii) the goods must be in transit.<sup>52</sup> In order to stop the goods in transit, the seller must give notice to the carrier or bailee.

Under the UCC, the seller's right to stoppage is lost upon the buyer's receipt of goods. Receipt is defined under the UCC as physical possession. Stoppage of goods is not considered when title passes. Where an order bill or negotiable bill of lading has been issued for goods the right of stoppage in transit shall not defeat the rights of any purchaser for value in good faith to whom such bill has been negotiated.<sup>53</sup>

The seller loses its rights to stop goods in transit upon an acknowledgment by a warehouseman that it is holding the goods in favor of the buyer. The seller also loses its right to stop goods when a carrier acknowledges that the carrier holds the goods for the buyer by reshipping the goods pursuant to the buyer's directions. The seller's stoppage of goods in transit does not bar the seller from recovering damages for costs of stoppage and redelivery.<sup>54</sup>

### (iii) Effect of Suspension of Performance in Common Law

Suspension of performance does not bring contract to an end. The parties still need to be ready to perform their obligation. The party suspending performance need not immediately decide whether to terminate the contract; instead, suspension forces the breaching party to choose whether to cure his breach or face termination. In English Common Law, the risk of suspension always appears if the suspension of the party is justifiable, because this remedy is self-help remedy and the party need not to seek for the Court decision and it can be done by giving notice to the other party that he will not perform his obligation.<sup>55</sup> The question of justification has to be decided by the Court. If the suspension is not justified, then the aggrieved party turns to be breach of contract. Therefore, although the right of suspension is self help remedy, it ends up with the Court decision. In modern time, unpaid seller have developed a keen appreciation of the wisdom of inserting retention of title clauses in their contract terms. Consequently, the exercise of the seller's lien and stoppage will be a significantly rarer than the exercise of a contractual right of retention.<sup>56</sup>

Compared with the SGA, the approach of right to adequate assurance under Section 2-609 of the UCC is an innovation to solve the issue of insecurity and risk of aggrieved party. There is no such rule in the SGA.

## IV. Suspension of Performance in Civil Law

Civil law does not recognize the doctrine of anticipatory breach. However, various civil law countries provide for a limited remedy for anticipatory breach. For the most part, the civil law remedy is procedural in nature rather than substantive. It gives parties to a bilateral contract a right to suspend performance where the other party fails to perform and the rights of aggrieved party granted under civil law countries is withholding performance or right of retention.

### (i) Ground for Suspension of Performance

The remedy for aggrieved party under civil law is known as '*defense of unperformed contract*', the term '*exceptio non adimpleti contractus*'<sup>57</sup> which derived from Roman law. The doctrine has presumably been received throughout the civil law world. In some civil law jurisdictions, the code sets forth a general principle, such as Article 1612, 1613 and 1653 of French Civil Code, Section 320 and 321 of the German Civil Code.<sup>58</sup>

The remedy, available only when a contract requires concurrent performance, permits one party to refuse to perform until the other party performs. It is an exception in a contract action which involved mutual

duties or obligations to the effect that the plaintiff may not sue if the plaintiff's own obligations have not been performed.<sup>59</sup>

According to Article 1612 and 1613 of French Civil Code, the seller is exempted to deliver the goods if the buyer does not pay the price or if the buyer is insolvent. However, the seller is obliged to deliver goods if he grants the buyer extended time for the payment or although the buyer insolvent, he gives the seller security to pay at the time-limit.<sup>60</sup>

For the buyer remedy, he may withhold payment if he is in doubt on the seller's performance, Article 1653 states "*Where the buyer is disturbed or rightly fears that he will be disturbed by an action, either for a mortgage or for recovery of property, he may suspend the payment of the price until the seller has caused the disturbance to cease, unless the latter prefers to give security, or unless it was stipulated that the buyer will pay notwithstanding a disturbance.*"<sup>61</sup>

German Civil Code authorizes a party to suspend performance under certain conditions which is called "**defense of uncertainty**". According to Article 321 of the German Civil Code, a person who is bound to perform first under a two-sided contract may insist that the other party perform first, or give security if after the conclusion of the contract a serious change for the worse in the financial circumstances of the other party come about, which endangers the claim for the counter-performance. If the other party gives the security, such right cannot be applied. The person required to perform first may fix a reasonable period within which the other party must effect counter-performance or provide security concurrently with performance. If the other party cannot perform within reasonable time, he may terminate the contract.<sup>62</sup>

## **(ii) Retention of title clause**

According to Article 1583 of French Civil Code, the property to the goods is automatically transferred at the time of conclusion of contract, the seller loses the right of control over the goods. To make sure for buyer's payment, the seller can incorporate the *retention of title* clause in the sale contract. In this way, he can prevent passing title to the goods until payment and it is effective only as long as the purchase price concerned remains unpaid. It is necessary to subject to strict rules, for instance, such clause is valid only for the contract of sale and it must have been agreed by the parties in writing.<sup>63</sup>

German Law provides the seller with the strongest possibility of recovery of purchase price through the retention of title clause. Such clause is based on Section 449 which states:

*If the seller of the movable thing has retained title until payment of the purchaser price, then in case of*

*doubt it is to be assumed that ownership is transferred subject to the condition precedent that the purchase price is paid in full(Retention of title).*<sup>64</sup>

Generally, the property of the goods is passed to the buyer in these two conditions: the mutual consent of the parties and the delivery of the goods.<sup>65</sup> In sale contract, the parties may agree that the seller remains owner of the sold goods until the buyer has paid for the whole purchased price. If the sale contract is incorporated with the retention of title clause, the seller still has the right of ownership although the goods have delivered to the buyer. In such case, the transfer of property does not subject to the delivery of the goods. Unlike French law, there is neither necessary formal requirement nor to register for retention of title clause.<sup>66</sup>

### **(iii) Effect of Suspension of Performance in Civil Law**

It is temporary for retaining the right of ownership and the party must be ready to perform if and when the other party fulfills conditional obligations. In this manner, the remedy serves as a suspension right, although its invocation is limited to the time of performance rather than in advance.<sup>67</sup> The retention of title clause is effective against the buyer and all other creditors, unless the parties have agreed in writing to modify or disregard it.<sup>68</sup> In case the unpaid seller withhold the goods sold, the code expressly excludes the case that the seller agreed that the buyer may pay later but if the buyer become insolvent he can retain the goods irrelevant of their agreement for the extension of period for payment.<sup>69</sup>

## **V. Suspension of Performance in CISG**

Right of suspension under CISG is granted to both buyer and seller and to any obligation of them. *Honnold* address the problem relating to anticipatory breach of international sale contract as: (1) a seller has agreed to deliver goods on credits but, prior to that time for delivery, the buyer becomes insolvent or otherwise has manifested an inability to pay for the goods; (2) a buyer has agreed to pay before receiving the goods but, prior to the time for payment, the seller's insolvency or some other circumstances make it apparent that the seller will not deliver the goods.<sup>70</sup>

### **(i) Ground for Suspension of Performance**

Right of suspension under CISG is based on the breach of substantial part of obligation before the due

date of performance. An express repudiation by the defaulting party is not necessary. It is sufficient that it is “apparent” that he will default.

Article 71 (1) reads “(1) *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 serious deficiency in his ability to perform or in his creditworthiness or his conduct in preparing to perform or in performing the contract.*” An anticipated minor breach of contract by the other party is insufficient.

Under CISG, nonperformance of one party includes not only acts in *performance of the contract*, but also those in *preparation of performance*. Regarding the latter case, *Chengwei* argues that, “the reason for subjecting such preparatory steps to the application of CISG Article 71, rests on the idea that such a failure makes it apparent that the other party will not perform *a substantial part* of the contract.”<sup>71</sup> An anticipated minor breach of contract by the other party is insufficient.

The appearance of prospective non-performance must result from either a serious deficiency in the ability to perform, or in creditworthiness, or from conduct in preparing or actually performing the contract. The most difficult issue to interpret the two grounds for suspension of performance is the phrase “*apparent that the other party will not perform a substantial part of his obligations.*” Regarding this phrase, there must be a high degree of probability of non-performance known by the party wishing to suspend performance and such non-performance will not have to constitute a fundamental breach as defined by Article 25.<sup>72</sup> It is not necessary to extend to fundamental breach to suspend performance temporary. If the breach of one party actually amount to fundamental breach of contract, the remedy should be termination of the contract and claim for damages rather than suspending his own performance. Although there is no bright-line standard for determining the degree of certainty needed to anticipate fundamental breach, there should be a very high degree of probability that the breach will occur.<sup>73</sup> Some scholars’ comments and decisions of courts relates to this points are as follows:

*Honnold* states that, the word “apparent” have an objective meaning whereas in practice, this will call for a judgment on the part of the party proposing to suspend performance and his judgment will to some extent be subjective although it will need to be based on appropriate facts.<sup>74</sup> An objective measure should be used to judge the reasons which would give rise to a suspension of performance; subjective fear by one party will not be sufficient. There must be a high degree of probability of non-performance. In a case before the Supreme Court of Austria,<sup>75</sup> the court found a serious deficiency in creditworthiness in light of insolvency

proceedings or the seizure of payments or delivery. Late payments alone were not considered sufficient. The withdrawal of a transfer order was likewise insufficient to establish the party's insolvency with a degree of likelihood high enough to satisfy Article 71(1). It was also held that the issue of company's alleged substantial financial deterioration was not decided by national law and it was decided according to CISG.<sup>76</sup>

The question "whether or not the seller knows about the apparent of bad economic situation of the buyer and when" is also important and very difficult to determine in reality and it should be based on the circumstances of the whole case. Regarding this issue, *Bennett* argues that the right to suspend performance cannot be invoked if the bad economic situation of the other party is generally apparent but not in fact known to the party wishing to suspend performance.<sup>77</sup> A party would not have the right to suspend performance unless he was aware of the bad economic situation of the other party at the conclusion of the contract and can prove that the other party's economic situation considerably worsened.<sup>78</sup>

A party must not only be aware of the bad economic situation of the other party at the time of the conclusion of the contract but also he must have to prove that the other party's economic situation considerably worsened. *Chengwei* points that "if the suspending party could hold the information available to him to be true, the risk falls to the other party. If the first party, however, refuses to perform his obligations unfoundedly, he commits a fundamental breach of contract. Risks of this kind cannot be fully avoided in international trade."<sup>79</sup> In *the Umbrella case*,<sup>80</sup> a seller was found not entitled to suspend its obligations. The Austria Supreme Court further held that a seller who acts in conformity with a contract may choose between the remedies available under CISG Articles 71(1) (a) and 73(2). Neither the fact that the buyer had not paid the purchase price for a number of deliveries nor the cancellation of the bank payment order indicated with a sufficient degree of probability establishes a serious deficiency in the buyer's ability to perform the contract or in its creditworthiness in keeping with CISG Article 71(1)(a). The seller's right to suspend performance, therefore, had not been established. In other case,<sup>81</sup> the Dutch Court rejected the seller's defense that it had the right to withheld performance under Article 71(1) (b) CISG because it could not be proved that the buyer would not perform a substantial part of its obligations to take delivery and pay the price. On the contrary, the buyer was ready to take delivery in the free trade zone in case the authorities of Singapore would consider that the radioactivity was too high and to open a letter of credit in order to guarantee payment. The buyer was awarded damages for breach of contract by the seller.

According to *Bennett*, as the purpose of the right of suspension is to keep continuing of contract, the extent of breach of contract should not be fundamental and the seller believe the uncertainty of

non-performance is sufficient to exercise this right. Non-performance of a substantial part of obligations will, however, not always amount to a fundamental breach.<sup>82</sup> In contrast, *Huber* believes differently, an anticipated minor breach of contract by the other party is insufficient.<sup>83</sup> In an arbitral award rendered by the Hungarian Chamber of Commerce and Industry Court of Arbitration, the non-payment of installments when due was deemed sufficient grounds for the suspension of the duty of subsequent performance.<sup>84</sup>

## **(ii) Types of suspension**

Article 71 of CISG expresses the right of suspension in two situations: right of suspension when the anticipatory breach occurs before the goods has been delivered and right of stoppage for unpaid seller after delivery of goods.

### **(1) Suspension of Performance**

According to article 71, after conclusion of contract, a party may suspend the performance of his obligations if he has a sufficient ground. It is not compulsory duty to suspend by the innocent party; he has a choice to wait until the actual breach occurs for invoking the other remedy. In the *Granite rock case*, the Court held that “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 assurance of performance.”<sup>85</sup> Such right may be exercised at any time between the conclusion of the contract and the actual time for performance.<sup>86</sup> That is to say, once the date for the threatening party's performance has passed the threatened party must look to other remedies (for actual breach) under the Convention. In a word, the suspended performance relates *the performance of the suspending party's obligations already due*, whereas the anticipatory breach is *the breach of the other party's obligations still to be due*.<sup>87</sup> For example, a buyer may suspend performance of a prepayment which is already due for the buyer, but which is not yet due for the seller. However, the CISG does not give the buyer the right to withhold due payment for deliveries already occurred.<sup>88</sup> The right of suspension intended to give a right to a party that he should be released from his obligations whenever he suspects that the other party might be about to commit some breach. In practice, the insecurity of performance by the other party is difficult to determine because the Convention does not provide for express guidance in this regard. Therefore, the issue of assessing anticipatory breach solely rests on the discretion of the court or arbitral. Many cases' judgments may be different in determination of anticipatory breach in particular case depends on the different circumstances of the respective case.<sup>89</sup>

In any event, if the conditions specified in CISG Article 71 are not satisfied, the suspending party will

breach the contract when it fails to perform its obligations. However, if a party is granted under this article the right to suspend performance, *non-performance* by that party is *not a breach of contract*. In the *Granite rock case*, “given the prerequisites of Article 71(1), the suspension of the threatened party's performance does not constitute a breach of contract, but expresses the right to unilaterally modify the time of performance due to the surrounding circumstances.”<sup>90</sup> Thus, the suspending party must be cautious about impact of invoking the right of suspension.

## **(2) Stoppage in Transit**

According to Article 71(2), the right of stoppage is only granted to seller who has already dispatched the goods to the buyer and when the uncertainty of buyer's position to perform his obligation is apparent. It is irrelevant whether the property to the goods has already passed to the buyer or whether he holds a document of title that enables him to require the delivery of the goods.

Article 71(2) states -

*“If the seller has already dispatched the goods before the grounds described in the preceding paragraph become evident, he may prevent the handing over of the goods to the buyer even though the buyer holds a document which entitles him to obtain them. The present paragraph relates only to the rights in the goods as between the buyer and the seller.”*

The ground for stoppage in transit under CISG and the ground for suspension are the same.<sup>91</sup> Therefore, it is obviously not necessary to reach the actual fundamental breach of contract. It is sufficient to exercise the right of stoppage if it is apparent that the buyer will not fulfill his obligation of payment. The seller, however, must become aware of the buyer's anticipatory breach only after the dispatch of the goods. According to *Alexander von Ziegler*, “if the seller was aware of the likely breach before the shipment, a court of tribunal is likely to deem him to have forfeited his right under article 71 (2), since he continued to perform in light of the buyer's likely nonperformance.”<sup>92</sup> In two cases,<sup>93</sup> reliance on article 71 to justify a stoppage in transit was rejected, because the sellers had either failed to give the requisite notice or failed to prove that there was a well-grounded fear of nonperformance or the failing creditworthiness of the buyer.

This right is directly against the buyer who obtains the document of title and the carrier who must subject to the buyer in case the buyer holding the document of title. However, the last sentence of this article deters to exercise the right of stoppage the third party. The most significant questions regarding stoppage in transit may arise in connection with the last sentence of this Article: “the present paragraph relates only to the rights in the goods as between the buyer and the seller.” *Chengwei* states, “(t)he right to stop the goods in

transit, therefore, does not relate to the relationship between the buyer and his other partners if he has already resold the goods and a third party has obtained title in the goods. The seller loses his right to order the carrier not to hand over the goods if the buyer has transferred the document to a third party who has taken it for value and in good faith.”<sup>94</sup>

The right to stop the goods in transit does not touch upon *the relationship between carrier and buyer*.<sup>95</sup> Since this Convention governs the rights in the goods only between the buyer and the seller, the carrier is not obliged to follow the order or request of the seller. Article 71(2) allows the seller to “reclaim” possession, even if the seller has in some way lost control and possession during the course of the transaction. In a contract of sale, the seller promises to transfer ownership of the purchased goods to the buyer. However, the CISG is silent on the precise means by which ownership may be transferred.<sup>96</sup> Various legal systems worldwide have devised different rules for the transfer of ownership: in some places great weight is put on contractual clauses, while in others the use of documents of title or some other mechanism for the transfer of ownership is required, such as the transfer of possession. In many cases, *ownership over the goods has been transferred to the buyer* well before delivery; hence, stoppage in transit under Article 71(2) would be directed against a party who has become the goods’ rightful owner.

Article 71(2)’s right of stoppage in transit seems to be able in certain circumstances to secure the purchase price after the seller has performed his duty to dispatch the goods. *Alexander von Ziegler* pointed that “the system of Article 71(2) recalls the basic principle of the synallagma of Article 58. Both parties’ performance is subject to simultaneous performance: the goods are to be exchanged against payment. The seller can withhold delivery of the goods by the carrier to the buyer until payment of the purchase price.”<sup>97</sup>

Some criticize that the CISG is only addresses the permissibility of a conveyance, not the possibility thereof. Article 71(2) merely confirms that a seller is not in breach of a sales contract when, under the circumstances listed in Article 71, he prevents the carrier from handing over the purchased goods to the buyer at destination.<sup>98</sup> Whether and under what conditions the seller is able to enforce that right in the context of international trade, transportation or insolvency, is not addressed here; determinations of these issues depend on the principles governing other fields of law (e.g., property law, transportation law, insolvency law) within the framework applicable under the pertinent conflict-of-laws rules.<sup>99</sup>

Therefore, as long as the first sentence and second sentence of the context of Article 71(2) contradicts each other, which lead to the right of stoppage conflict with the third party’s right, as a result, there is lack of binding effect against carrier and subcontractor.

**(iii) Notice requirement**

Article 71(3) states that “*the party which suspends performance ....must promptly notify the other party.*” Failing such notification, the other party may claim damages for the loss which could have been avoided if he had been notified.

As mentioned above, notice is very important to exercise the right of suspension, but it must be comply with the necessary of Article 27.<sup>100</sup> The two questions are involved: (a) determination of the effective notice and (b) the legal effect of failure or ineffective notice.

There are two criterions to determine whether the notice is effective or not. Firstly, the party who is seeking to exercise the right of suspension must notify the buyer *immediately* that he will suspend performance. *Immediately* means that the other party must be informed of the suspension without any avoidable delay. Notice may also be given before suspension takes effect. In practice, it is possible for the suspending party to give notice after the suspension of his own performance if it is sufficient in the sense of Article 27.<sup>101</sup> Secondly, the notice must be given in appropriate means. A communication is appropriate to the circumstances, if it is appropriate to the situation of the parties. However, a means of communication which is appropriate in one set of circumstances may not be appropriate in another set of circumstances.<sup>102</sup> For instance, e-mail is not appropriate means of notifying an addressee in a country with unreliable or nonexistent e-mail service. On the other hand, there may be more than one means of communication which is appropriate in the circumstances. In such a case, the sender may use the one which is the most convenient for him.<sup>103</sup> Since Article 27 does not make clear what means of communication is appropriate means of notice, the form of the means must be primarily determined on the basis of the usage between parties. If there is lacking of contractual specification of communication means, the intention of the party and the overall circumstances and fact must be considered.<sup>104</sup> In short, notice must be given appropriately and punctually.

Regarding the issue of legal effect of failure or ineffective notice, it may cause the wrongful suspension of performance. In every case, the burden of proof is in the suspending party that the notice was sent in timely and appropriate means.<sup>105</sup> If he cannot prove that he must bear for the liability of ineffective notice, i.e. he is obliged to indemnify for loss of profit.<sup>106</sup>

In *the shoes case*,<sup>107</sup> the court held that the seller committed a breach of contract by suspending delivery without giving notice of the suspension to the buyer and set off the claim of the seller for the balance of the purchase price against the claim of the buyer for damages. The court reasoned that if the seller wanted to exercise his right of suspension, he was obligated to inform the buyer about any doubts regarding the buyer's

creditworthiness or ability to perform the duties and liabilities under the sales contract. Inasmuch as the seller did not demonstrate that he gave any such notice and information to the buyer, he was not permitted to suspend performance.

As expressly stated, however, if a party declares that he will not perform his obligations, the suspending party does not have to give notice. In the *Metal concentrate case*,<sup>108</sup> “(w)ith respect to anticipatory breach, CISG invests the potentially prejudiced Party with a right of suspending (Article 71) or terminating, avoiding in the parlance of CISG (Article 72) the contract. However, in order for the Party to suspend or terminate his performance, he must give immediate or reasonable, respectively, notice of the suspension or termination. The only situation where this may be dispensed is (according to Article 72) in the event where the other Party has declared that he will not perform his obligations.”

Hence, notification is an absolutely necessary prerequisite for exercising the right of suspension for anticipatory breach.

#### **(iv) Adequate Assurance of Performance**

The provision of adequate assurances restates the suspending party's obligations under the contract. In any event, where a party who has suspended performance receives an adequate assurance from the other party, he is required to continue with performance. He should, however, inform the other party that he has accepted the adequacy of the assurance and is continuing with performance, although there is no express requirement to this effect in Article 71. There are many comments regarding Article 71(3) among scholars,<sup>109</sup> but there is no reported case in this regard. Article 71(3) provides that, *a party suspending performance, whether before or after dispatch of the goods.....must continue with performance if the other party provides adequate assurance of his performance.*

To be adequate, the assurances must give reasonable security to the suspending party that the threat of non-performance is removed. The assurances must demonstrate either that the other party will in fact perform or that the suspending party will be compensated for losses resulting from continued performance.<sup>110</sup> For instance, an insolvent buyer may offer adequate assurances consisting of the establishment of an irrevocable letter of credit. According to *Honnold*, this includes the event in which the buyer, who had suspended payment of this obligation, has re-established them.<sup>111</sup> If performance was suspended on the basis of the mere statement by the other party that he did not intend to perform his obligations, a later statement that he would now be performing as required by the contract may be adequate. Such assurance could also be given by way of offering immediate performance of his obligations or performing them without delay. In the event

of a deficiency in creditworthiness, a banker's guarantee would, for instance, offer adequate assurance.

The assurances do not necessarily have to prove perfect performance. Since suspension is justified only when there is a threat of non-performance of “substantial part” of a party’s obligations, assurances may be adequate even if it involves insubstantial non-conformity in performance.<sup>112</sup>

When the other party provides adequate assurance, such assurance may cover two events: (a) *the grounds which led to the suspension of performance have been overcome; and (b) the grounds were not existent at all.*<sup>113</sup> In the latter case, “the suspending party may already have committed a breach of contract including all the consequences ensuing from it. Suspension of performance may, therefore, also entail a certain risk. The other party might, in certain circumstances, claim damages not only because of the delay but also because of the costs incurred in providing additional assurances.”<sup>114</sup> Since there is no statement of the consequences of an adequate assurance in Article 71(3), there is a difference of opinion among commentators on the consequences of a failure or a refusal to produce adequate assurance where it has been demanded is in itself a fundamental breach. According to *Honnold*, failure to give assurance is a good ground to avoid the contract.<sup>115</sup> According to *Bennett*, suspension of performance under Article 71 has been kept separate from avoidance under Article 72 and it follows that the contract continues in existence unless and until it is avoided. Frequently, 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.<sup>116</sup>

**(v)Effect of Suspension**

Unlike the avoidance of a contract, which terminates the obligations of the parties,<sup>117</sup> the suspension of contractual obligations recognizes that the contract continues but encourages mutual reassurance that both parties will perform. As the right of suspension is to secure the performance of other party, where an anticipatory breach occurs the innocent party may want to enforce specific performance, in which situation he can rely on the right of suspension of performance under Article 71(1). Right of suspension is a temporary remedy, which is based on the apparentness of insecurity performance by the other party and ends when the other party gives an adequate assurance of performance. It does neither affect the contract termination nor cause breach of contract for suspending party.<sup>118</sup>

Therefore, various events can put an end to a party’s right, under Article 71 CISG, to suspend his obligation to perform. Indeed, the obligation to perform may remain suspended only until the other party performs his obligations, until this party provides adequate assurance of performance of his obligations, until the first party declares the contract avoided (if the conditions of Article 72, 49 or 64 of CISG are met) or until

the period of limitation applicable to the contract has expired. Rightful suspension of performance under the CISG has no other consequence than that which the term literally entails: a suspension of contractual obligations, nothing more.<sup>119</sup>

#### **(vi) Effectiveness of Stoppage in Transit**

As mentioned above, the right of stoppage may be in conflict with the right of third party. Many scholars criticize the issue of the usefulness of right of stoppage, in practice, based on the aspect of the principles of stoppage in transit as follows.

*Bennett* states “(p)aragraph (2) is expressly limited in its operation to ‘the rights in the goods as between the buyer and the seller.’ ...where the buyer holds a document which entitles him to obtain the goods, the carrier may be precluded from withholding them from him by his obligations under municipal and international law. In such circumstances the effective operation of the paragraph could therefore be quite limited.”<sup>120</sup> Similarly, *Honnold* states: “(t)he fact that article 71(2)’s rules on stoppage relate only to rights ‘as between the buyer and the seller’ does not make this provision as feeble as might be supposed.”<sup>121</sup>

Depending on the domestic law of each country, the right of stoppage may have to subject to the right of good faith purchaser where the buyer has sold the goods to third party acted in good faith. *Lookofsky* states, “(t)he right of good faith purchaser may have under the applicable domestic law remained unaffected by this Convention rule.”<sup>122</sup> This view is held that in such cases the seller cannot claim the goods from a third party on the basis of the Convention, but he might do so under the applicable national law.<sup>123</sup>

The right to stop the goods in transit does not touch upon *the relationship between carrier and buyer*,<sup>124</sup> whether or not a third party (carrier, warehouse keeper, etc.) must comply with a stoppage ordered by the seller must be determined by the contract concluded with him, and so is a matter of domestic law. *Hornung* says, “(w)here the seller has concluded the contract of carriage, it may give him a right to issue directions to the carrier and so to enforce the right of stoppage. A carrier who observes the seller’s right of stoppage may incur liability in damages to the buyer if the latter has the right to claim delivery of the goods by the carrier.”<sup>125</sup>

The question whether the carrier must or is permitted to follow the instructions of the seller where the buyer has a document which entitles him to obtain them is governed by the appropriate law of the form of transport in question.<sup>126</sup>

Transportation law provides for numerous types of transport documents which enable the holder to exercise some control over the goods in transit and, ultimately, entitle the holder to request delivery of the

goods. In the hands of a buyer, these documents confer the power to control the goods and demand delivery of them at the destination, regardless of whether the purchase price has already been paid in accordance with the applicable sales law.<sup>127</sup>

On the carrier's side, if he voluntarily stops the goods in transit he exposes himself to a claim for damages on the part of the buyer.<sup>128</sup> The seller, on his part, could, because of the right to stop performance, request the buyer not to take measures against the carrier. Because of the contractual relationship with the carrier, the seller could give orders to the former thus exercising his right to stoppage. Otherwise, he would have to call in a court.<sup>129</sup> To what extent the latter follows those orders in the first place depends on the contract concluded for carriage. If the buyer's country has acceded to the CISG, or if the domestic rules of that country also provide for a right to stop the goods in transit, the seller may try to enforce this right through the courts, e.g. by court injunction.<sup>130</sup>

In times of rapid transit, the ability of a seller to issue a stop notice is correspondingly abridged.<sup>131</sup> Despite the fact that sales law provides for a default rule of a delivery-against-payment or documents against-payment, trade practices allow transport documents to reside with the buyer well before payment of the purchase price. The consignee is exclusively vested of this right as soon as the legal prerequisites are met, and the seller-shipper has no recourse to prevent the consignee from exercising this right.<sup>132</sup>

## VI. Conclusion

Except English Law, the right to suspend performance is given to both parties. The common ground for suspension under three legal systems is the non-performance of the other party prior to the time of performance or anticipatory repudiation of contract. However, the legal doctrine on which each system based can slightly differ: Common law is based on breach of condition of contract, civil law is based on the *exceptio*. CISG is based on the breach of substantial part of obligation, under which fundamental breach under Article 25 is not necessary for suspension. Despite differences in the legal doctrine, all legal systems seek to balance the interest of the innocent party to the contract.

There are a number of issues which can be caused by the unjustified right of suspension. Although rightful interruption of performance of obligations is not itself a breach of contract, a wrongful suspension can have a severe effect on the suspending party. Suspending without notice asking for the adequate assurance and failing to perform after receiving adequate assurance causes breach of contract of suspending

party. A wrongful suspension of performance is usually a clear sign that the non-suspending party has reason to believe that the suspending party will fail to comply with the contract to an extent that amounts to a fundamental breach which lead to termination of the contract. To answer this issue, the assessment must be made upon three matters: sufficient ground for suspension, the methodology to follow, and the scope and margin of suspension.

In order to avoid unjustified suspension and breach of contract, the US method is safe for the party who want to suspend performance. The aggrieved party shall make sure whether the other party will perform the contract obligation. To do so, the methodology of adequate assurance must be followed: during suspension of performance, the aggrieved party must give effective notice to ask for adequate assurance. After receiving adequate assurance, he must ready and continue to perform his obligation. Hence, the right of suspension ceases when the other party gives adequate assurance that he will perform the contractual obligation.

The alternative measure to avoid wrongful suspension is inserting the retention of title clause in the contract, whereby title to the goods remains vested in the seller until certain obligations (usually payment of the purchase price) are fulfilled by the buyer. Retention of title serves as a form of lien to secure payment of a loan given to purchase the secured item.

Nowadays, according to the method of payment and delivery in international sale contract, the buyer usually makes the payment by letter of credit in return for shipping documents; *vice versa*, the seller dispatches the goods on term whereby the goods, or document controlling their disposition, will not be handed over to the buyer only against payment. Therefore, the case of stoppage in transit rarely happens. In other words, the seller would not need the right of stoppage in transit any more.

## Endnotes

1 Section 27 of the Sale Goods Act, 1979.

2 Section 28 of the SGA.

3 Article 2-610 of the UCC.

4 *Hochster v De La Tour* [1853] EWHC QB J72 (25 June 1853).

5 *Bettini v Gye* (1876) 1 QBD 183.

6 *Hochster v De La Tour* [1853] EWHC QB J72 (25 June 1853).

7 *White & Carter (Council) Limited v. McGregor* [1962] A.C.413.

8 *Frost v. Night* (1872) LR 7 Exch 111.

9 Barry Nicolas, *French Law of Contract* at 205-206 (1982).

10 Michael H. Whincup, *Contract Law and Practice: The English System and Continental Comparisons* at 231, 294-295 (3<sup>rd</sup> ed.1999).

11 *Hochster v De La Tour* [1853] EWHC QB J72 (25 June 1853).

12 Judgment of Lord Campbell C.J.[ cited from: <http://www.bailii.org/ew/cases/EWHC/QB/1853/J72.html>]( last accessed

- on 30.9.2014).
- 13 Universal Cargo Carriers Corp v Citati [1957] 2 All ER 70, [1957] 2 QB 401 at 436-38.
- 14 *Ibid.*
- 15 Odile B. Plegat – Kurrault, *France, in* Transfer of Ownership in International Trade at 155,170,192 (Alexander von Ziegler et al. (eds.) 1999); M. Gilbey Strub, *The Convention on the International Sale of Goods: Anticipatory Repudiation Provisions and Developing Countries*, 38 International and Comparative Law Quarterly (1989) at 475-501 [cited from <http://www.cisg.law.pace.edu/cisg/biblio/strub.html>](last accessed on 24.9.2014).
- 16 Compare Section 41 of the SGA and Article 2-609(1) of the UCC.
- 17 M.G. Bridge, *The Sale of Goods Act at 587* (3<sup>rd</sup> ed., 2014).
- 18 Section 41 of the SGA.
- 19 Section 39 (2) of the SGA.
- 20 Section 44 of the SGA.
- 21 Section 39 of the SGA.
- 22 Francis M. Burdick, *The Law of the Sale of Personal Property at 263-264* (3<sup>rd</sup> ed., 1913).
- 23 *Ibid.*
- 24 Section 43(1) of the SGA.
- 25 Section 47(2) of the SGA.
- 26 M.G. Bridge, *supra* note 17 at 588.
- 27 Section (48) of the SGA lists three exceptions for the right to resell the goods: (a) Where the goods are of a perishable nature; (b) Where the unpaid seller gives notice to the buyer of his intention to resell and the buyer does not pay for them within a reasonable time; or (c) Where the seller expressly reserves the right of resale in case the buyer default in payment.
- 28 Section 19(1) of the SGA.
- 29 *Aluminium Industrie Vaasen BV v Romalpa Aluminium Ltd [1976] 1 WLR 676.*
- 30 *Ibid.*
- 31 John Delatre Falconbridge, *Handbook of the law of sale of goods* (1921) [cited from <http://chestofbooks.com/business/law/Handbook-Of-The-Law-Of-Sale-Of-Goods/74-Stoppage-In-Transitu.html>] (last accessed on 8.2.2014).
- 32 M.G. Bridge, *supra* note 17 at 593.
- 33 Section 46 (1) of the SGA.
- 34 Section 46 (2) of the SGA.
- 35 Section 46 (3) of the SGA.
- 36 Section 47(2) of the SGA.
- 37 Article 2-610 of the UCC.
- 38 Yinghao Yang, *Suspension Rules under Chinese Contract Law, the UCC and the CISG: Some Comparative Perspectives*, *China Law & Practice*, September 2004 at 23-27[cited from <http://www.cisg.law.pace.edu/cisg/biblio/yang.html>] (last accessed on 24.9.2014).
- 39 New Jersey Supreme Court, 94 N.J.L. 181, 109 A. 505 (1920).
- 40 Article 2-610 of the UCC.
- 41 Article 2-609 (4) of the UCC.
- 42 New York Supreme Court, 2014 NY Slip Op 30979(U).
- 43 Reasonable ground is a question of fact.
- 44 Michael L. Rustad, *The Concept and Methods of Sales, Leases and Licenses at 321*(1998).
- 45 Section 2-609 (4) of the UCC.
- 46 *Hornell Brewing Co. v. Spry*, Supreme Court of New York County, 174 Misc. 2d 451, 664.N.Y.S.2d 698(1997).
- 47 Charles L Knapp et al., *Problems in Contract Law: Cases and Materials at 776-778* (5<sup>th</sup> ed., 2003).
- 48 *Ibid.*
- 49 Article 2-702(1) of the UCC.
- 50 Court of Appeals of Colorado, 765 P.2d 1043 (1988).
- 51 Article 2-705 of the UCC.
- 52 *Ibid.*
- 53 Caslav Pejovic, *Stoppage in Transit and Right of Control: ‘Conflicts of Rules’?*, *Pace International Law Review*, Spring, 2008, Vol. XX, 134-135.
- 54 Article 2-705(3) and 2 -710 of the UCC.
- 55 M.G Bridge, *supra* note 17 at 588.
- 56 *Ibid.*
- 57 Barry Nicholas, *supra* note 9 at 207-210.
- 58 M. Gilbey Strub, *The Convention on the International Sale of Goods: Anticipatory Repudiation Provisions and Developing Countries*, 38 International and Comparative Law Quarterly (1989) at 475-501 [cited from <http://www.cisg.law.pace.edu/cisg/biblio/strub.html>] (last accessed on 24.9.2014).
- 59 *Ibid.*

- 60 Article 1612 and 1613 of French Civil Code.
- 61 Article 1653 of the French Civil Code.
- 62 Article 321 of the German Civil Code.
- 63 Peter D V March, *Comparative Contract Law*, England, France, Germany at 255-256 (1994).
- 64 Section 449 of the German Civil Code.
- 65 Karsten Thorn, Germany, in *Transfer of Ownership in International Trade* at 181,185(Alexander von Ziegler et al. (eds.) 1999).
- 66 Peter D V March, *supra* note 63 at 258.
- 67 Odile B. Plegat – Kurrault, *France*, in *Transfer of Ownership in International Trade* at 155,169(Alexander von Ziegler et al. (eds.) 1999).
- 68 *Ibid.*
- 69 Barry Nicolas, *supra* note 9 at 207-210.
- 70 John.O Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention* at 425-426 (3<sup>rd</sup> ed., 1999).
- 71 Liu Chengwei, Remedies for Non-performance - Perspectives from CISG, UNIDROIT Principles and PECL (2003) at 148. [cited from <http://cisgw3.law.pace.edu/cisg/biblio/chengwei-71.html>] (last accessed on 1.10.2014).
- 72 Larry A. DiMatteo et al., *The Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence*, 34 *Northwestern Journal of International Law and Business* (Winter 2004) at 299-440. [cited from <http://cisgw3.law.pace.edu/cisg/biblio/dimatteo3.html>] (last accessed on 24.9.2014).
- 73 *Ibid.*
- 74 John.O Honnold, *supra* note 70 at 429.
- 75 Austria 12 February 1998 Supreme Court (*Umbrella case*) [Cite from: <http://cisgw3.law.pace.edu/cases/980212a3.html>] (last accessed on 24.9.2014).
- 76 *Ibid.*
- 77 Trevor Bennett, in *Bianca-Bonell Commentary on the International Sales Law*, Giuffrè: Milan (1987) at 513-524[cited from: <http://www.cisg.law.pace.edu/cisg/biblio/bennett-bb71.html>] (last accessed on 24.9.2014).
- 78 Alexander von Ziegler, *The Right of Suspension and Stoppage in Transit (and Notification Thereof)* 25 *Journal of Law and Commerce* (2005-06) at 353-374 [cited from: <http://www.cisg.law.pace.edu/cisg/biblio/ziegler.html>] (last accessed on 24.7.09).
- 79 Liu Chengwei, *supra* note 71 at 150.
- 80 *Umbrella case*, *supra* note 75.
- 81 Netherlands 2 October 1998 District Court's-Hertogenbosch (*Malaysia Dairy Industries v. Dairex Holland*) [Cite from: <http://cisgw3.law.pace.edu/cases/981002n1.html>] (last accessed on 24.9.2014).
- 82 Trevor Bennett, *supra* note 77 at 519.
- 83 Peter Huber, *Some introductory remarks on the CISG*, *Internationales Handelsrecht* (6/2006) 228-238[cited from <http://www.cisg.law.pace.edu/cisg/biblio/huber.html>] (last accessed on 24.9.2014).
- 84 Hungary 5 December 1995 Budapest Arbitration proceeding V b 94131 (*Waste container case*) [Cite from: <http://cisgw3.law.pace.edu/cases/951205h1.html>] (last accessed on 25.7.2014).
- 85 Germany 12 October 2000 District Court Stendal (*Granite rock case*) [Cite from: <http://cisgw3.law.pace.edu/cases/001012g1.html>] (last accessed on 1.10.2014).
- 86 Harry M. Flechner et al., (eds.). *Drafting Contracts under the CISG* at 424 (2008).
- 87 ICC July 1999 International Court of Arbitration, Case 9448[cited from: <http://cisgw3.law.pace.edu/cases/999448i1.html>] (last accessed on 3.8.2014).
- 88 ICC International Court of Arbitration, Case CLOUT No. 630 (Roller bearings case), ICC Arbitration Case No. 9448, July 1999, [cited from: <http://cisgw3.law.pace.edu/cases/999448i1.html>] (last accessed on 24.9.2014).
- 89 Joseph Lookofsky, *The 1980 United Nations Convention on Contracts for the International Sale of Goods*, *International Encyclopedia of Laws - Contracts*, Suppl. 29 (J. Herbots &R. Blanpain, eds., December 2000) at 1-192 [cited from: <http://cisgw3.law.pace.edu/cisg/biblio/lookofsky.html#p148>] (last accessed on 24.9.2014)
- 90 *Granite rock case*, *supra* note 85.
- 91 See Article 71 (1) of the CISG.
- 92 Alexander von Ziegler, *supra* note 78 at 364.
- 93 Germany 31 January 1991 Lower Court Frankfurt (*Shoes case*) [Cite from: <http://cisgw3.law.pace.edu/cases/910131g1.html>], Switzerland 17 July 2007 Supreme Court (*Kickboards, scooters case*) [Cite from: <http://cisgw3.law.pace.edu/cases/070717s1.html>] (last accessed on 24.9.2014).
- 94 Liu Chengwei, *supra* note 71 at 151.
- 95 Article 71(2) of the CISG.
- 96 Article 4 of the CISG.
- 97 Alexander von Ziegler, *supra* note 78 at 367-368.
- 98 *Ibid.*
- 99 *Ibid.*
- 100 Article 27- Unless otherwise expressly provided in this Part of the Convention, if any notice, request or other

- communication is given or made by a party in accordance with this Part and by means appropriate in the circumstances, a delay or error in the transmission of the communication or its failure to arrive does not deprive that party of the right to rely on the communication.
- 101 Peter Schlechtriem, *Effectiveness and Binding Nature of Declarations (Notices, Requests or Other Communications) under Part II and Part III of the CISG*, Cornell Review of the Convention on Contracts for the International Sale of Goods (1995) 95-114.
- 102 Notices, requests or other communication to a party can be given in an electronic message. The important factor is that the information be conveyed to the other party, not in what form it is conveyed. CISG - AC Opinion no.1, Electronic Communications under CISG, [<http://www.cisg.law.pace.edu/cisg/CISG-AC-op1.html#art27>] (last accessed on 24.9.2014).
- 103 Peter Schlechtriem, *Article 27*, in Commentary on the UN Convention on the International Sale of Goods (CISG) at 306,310-311 (2<sup>nd</sup> ed., Peter Schlechtriem & Ingeborg Schwenzer (eds.), 2005).
- 104 Alexander von Ziegler, *supra* note 78 at 371-373.
- 105 Austria 30 June 1998 Supreme Court (*Pineapples case*) [Cite from: <http://cisgw3.law.pace.edu/cases/980630a3.html>] (last accessed on 24.9.2014).
- 106 Liu Chengwei, *Suspension or Avoidance due to Anticipatory Breach: Perspectives from Arts. 71/72 CISG, the UNIDROIT Principles, PECL and Case Law*, [2<sup>nd</sup> edition: Case annotated update (May 2005)], [cited from: <http://www.cisg.law.pace.edu/cisg/biblio/liu9.html>] (last accessed on 24.9.2014).
- 107 Germany 31 January 1991 Lower Court Frankfurt (*Shoes case*) [Cite from <http://cisgw3.law.pace.edu/cases/910131g1.html>] (last accessed on 24.9.2014).
- 108 ICC Arbitration Case No. 8574 of September 1996 [Cite from: <http://cisgw3.law.pace.edu/cases/968574i1.html>] (last accessed on 24.9.2014).
- 109 Cited from [<http://www.cisg.law.pace.edu/cisg/text/e-text-71.html#schol>] (last accessed on 24.9.2014).
- 110 M. Gilbey Strub, *supra* note 58 at 494-495.
- 111 John O. Honnold, *supra* note 70 at 434.
- 112 M. Gilbey Strub, *supra* note 58 at 496.
- 113 Liu Chengwei, *supra* note 71 at 153.
- 114 *Ibid.*
- 115 John O. Honnold, *supra* note 70 at 432-433.
- 116 Trevor Bennett, *supra* note 77 at 519.
- 117 Article 81 of CISG.
- 118 Harry M. Flechtner, *Remedies under the New International Sales Convention: The Perspective from Article 2 of the U.C.C.*, 8 Journal of Law and Commerce (1988) at 53-108 [cited from: <http://www.cisg.law.pace.edu/cisg/text/flecht71,72.html>] (last accessed on 24.9.2014).
- 119 Alexander von Ziegler, *supra* note 78 at 370.
- 120 Trevor Bennett, *supra* note 77 at 520.
- 121 John O. Honnold, *supra* note 70 at 433.
- 122 Joseph Lookofsky, *supra* note 89 at 1-192.
- 123 *Ibid.*
- 124 Trevor Bennett, *supra* note 77 at 520.
- 125 Rainer Hornung, Article 71, in Commentary on the UN Convention on the International Sale of Goods (CISG) at 701, 713-724 (2<sup>nd</sup> ed., Peter Schlechtriem & Ingeborg Schwenzer (eds.), 2005).
- 126 Caslav Pejovic, *supra* note 53 at 140-143.
- 127 Ralph H. Folsom et al., *International Business Transactions*, at 58-60 (4th ed., 1992).
- 128 Liu Chengwei, *supra* note 71 at 152.
- 129 Caslav Pejovic, *supra* note 53 at 147-151.
- 130 Alexander von Ziegler, *supra* note 78 at 363-368.
- 131 M.G Bridge, *supra* note 17 at 598.
- 132 Caslav Pejovic, *supra* note 53 at 143-146.

主指導教員（沢田克己教授）、副指導教員（駒宮史博教授・梅津昭彦教授）