
Robert Koch
Contents

Fundamental Breach and Installment Sales: Article 73(1)(2) 1

SiSU Metadata, document information 3

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Article 73 governs the avoidance of installment sales. While paragraph (1) of article 73 basically repeats the contents of articles 49(1)(a) and 64(1)(a) with respect to the parties’ failure to perform a particular installment, paragraph (2) deals with future installments. The latter paragraph entitles the aggrieved party to declare the installment contract avoided for the future if the promisor’s failure to perform any of his obligations in respect of any delivery gives [the aggrieved party] good grounds to conclude that a fundamental breach of contract will occur with respect to future installments.

As under article 72(1), paragraph (2) of article 73 does not itself provide any assistance to determine when a particular act or occurrence justifies the conclusion that a fundamental breach is to be expected. The formulation “good grounds to conclude” seems to require a less strict and more subjective standard for avoidance than under article 72(1). This reading [page 310] is confirmed by the Secretariat Commentary on Article 73(1) provides:

“In the case of a contract for delivery of goods by instalments, if the failure of one party to perform any of his obligations in respect of any instalment constitutes a fundamental breach of contract with respect to that instalment, the other party may declare the contract avoided with respect to that instalment.”

There is a dispute among scholars whether the different formulations under art. 71(1) (“it becomes apparent?”), art. 72(1) (“clear?”) and art. 73(2) (“good grounds to conclude?”) require different degrees of certainty. Some authors hold the view that there is a gradation of remedies, increasing from art. 71(1) via art. 73(2) to art. 72, in the sense that the latter requires the highest degree of certainty. They argue that it is not the different wording itself that enables any distinction to be drawn, but the severity of the remedy’s interference with the contract. Avoidance of the contract in the future under art. 73(2), as a reaction to a breach of contract, although not necessarily fundamental in nature, is at a lesser level than avoidance of the whole contract. See Leser, supra note 451, at Art. 73, n.23; Magnus, supra note 28, at Art. 73, n.22 and Art. 72, n.9.

Other authors conclude from the wording and the fact that in the setting of art. 73(2) (unlike the situations invoking arts. 71 and 72) a breach of contract has already occurred, that a less strict and more subjective standard for avoidance is required. See, e.g., Honnold, supra note 20, at Â§401; and Bennett, supra note 141, at Art. 73, 3.3. Schlechtriem, supra note 45, at 96, takes the view that the different formulations under arts. 71(1),

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the 1978 Draft version of article 73(2), which is identical with the Official Text. It is expressly stated with reference to the 1978 Draft version of article 72(1) that avoidance of the contract in respect of future deliveries is permitted even though it is not ?clear? that there will be a fundamental breach.4

The grounds for the assumption that a fundamental breach will occur are different under article 73 from those under article 72. Neither the promisor's failure to provide adequate assurance on demand due to a deterioration of creditworthiness, nor his declaration that he will not perform, give the promisee the right to avoid the contract. An actual failure to perform must instead be the basis for avoidance of future installments.5

Thus, as far as it concerns future installments, article 73(2) does not support the approach that considers a party's refusal to perform itself as a fundamental breach. It confirms, however, the no-reliance approach based on an actual breach. [page 31]

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