

In the Name of Allah, the Most Merciful One

١٤٢١

Anticipatory Breach

Under the United Nation Convention on Contracts of International Sale of Goods,

United Kingdom and Iranian Legal Systems

139518



دانشکده حقوق

پایان نامه جهت اخذ درجه کارشناسی ارشد رشته حقوق تجارت بین الملل

موضوع:

نقض قابل پیش بینی قرارداد

تحت کنوانسیون بیع بین المللی کالا، حقوق انگلیس و ایران

استاد راهنما:

جناب آقای دکتر داراب پور

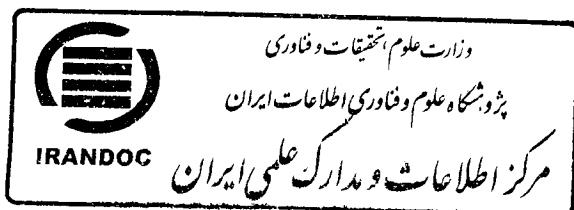
استاد مشاور:

جناب آقای دکتر عابدیان

دانشجو:

عطیه نظری دفتری

سال تحصیلی ۸۹-۱۳۸۸



۱۴۹۵۱۵

۱۳۸۸/۱۰/۱۹

To My Beloved Father and Mother

Aknowledgment

Firstly I offer my sincere gratitude to Dr. Darabpour as my supervisor who taught me the first basic step, how important it is to have a correct research plan. Also, without his encouragement to have my own idea, this thesis would not have any thing new to propose.

I am highly thankful to Dr. Abedian as my advisor for his valuable contribution and comments, answering my questions and correcting my opinions throughout this research.

I also like to express my special honour and appreciation to Dr. Firoozmand as my very nice teacher, devoted his valuable time to answer my questions regarding this research and inspiring me and always all the students to be dare proposing new ideas.

I am as ever, especially indebted to my parents, Mr. Nazari & Mrs. Akhavan, who always inspire me by their profound support and pure love, preparing the situation in a way that I can focus on my work.

Finally I wish to thank all of those who supported me in any respect during the completion of this project, including my friend, classmates and faculty staff.

Last name: Nazari Daftari

First name: Atyeh

University: Shahid Beheshty

Faculty: Law

Group: International Commercial Law

Professor: Dr. Darabpour

Subject: Anticipatory Breach under the United Nation Convention on Contracts for International Sale of Goods (1980), United Kingdom, Iranian legal systems.

Abstract

‘Anticipatory Breach’ is a contractual concept that describes a situation in which one of the parties anticipates a non-performance by the other party in future due performance time. This research is done in an effort to examine available remedies regarding anticipatory breach under the defined scope of United Nation Convention on Contracts for the International Sale of Goods (1980), United Kingdom and Iranian legal systems. Through this study, suspension and avoidance, as entitled remedies by CISG, are interpreted in a new way from the aspect of needed preconditions trying to remove the ambiguities. Also, the proposed remedies by English law, including avoidance and suspension, are investigated regarding the necessary prerequisites. The research discusses the possibility of existence of anticipatory breach in Iranian law that by invoking to different articles under Civil and Commercial codes, together with Islamic Jurisprudence, an implied limited anticipatory breach might be extracted.

It might be useful to suggest acknowledging the concept and consequences of the anticipatory breach in Iranian legal system. It is in order to eliminate one obstacle through adhesion to the CISG, getting closer to international level of trade rules and help our businessmen to protect their commercial benefits. They can be able to suspend or avoid the contract which might be breached before performance in domestic or international trade world. Hence, there is no need to stick to a contract which is obvious it won't be fulfilled in due performance time.

Keywords: Contract; Breach; Anticipatory Breach; Fundamental Breach; Avoidance; Suspension; Reasonable Notice; Adequate Assurance; Lien Right

Table of Contents

Page

Introduction	1
I. Anticipatory Breach under United Nation Convention on Contracts for the International Sale of Goods	3
1.1 Suspension.....	4
1.1.1 History and Definition.....	5
A: History.....	5
B: Definition	8
1.1.2 General Conditions.....	10
1.1.2.1 Time of Suspension.....	11
1.1.2.2 ‘Appearance’ of Breach in Future	12
A: Meaning of Appearance	12
B: Time of Appearance	14
C: Appearance Examples	16
1.1.2.3 Anticipating the Breach of ‘Substantial’ Part of Obligations	18
A: Meaning Of Substantial Obligations	18
B: Substantial Obligation Examples	20
1.1.2.4 Anticipation Resulting from	21
A: Serious Deficiency	22
B: the Breaching Party’s Conduct.....	24
1.1.3 Suspension after Dispatching the Goods.....	26
1.1.3.1 Suspension in the Case of Dispatched Goods.....	27
1.1.3.2 Only the Seller’ Right.....	29

1.1.3.3 Only Between the Contracting Parties	30
1.1.4 Notice	32
1.1.4.1 Immediate Notice of Suspension	34
1.1.4.2 Is It Obligatory?	35
1.1.4.3 Adequate Assurance.....	37
A: the Nature of Adequate Assurance	37
B: the Adequacy of Assurance.....	37
C: Adequate Assurance Examples	38
1.1.4.4 Continuing of Performance.....	41
A: in The Case of Assuring.....	41
B: in The Case of Non-Assurance	42
1.2 Avoidance	44
1.2.1 History and Definition	45
A: History.....	45
B: Definition	47
1.2.2 General Conditions.....	48
1.2.2.1 Time of Avoidance.....	49
1.2.2.2 'Clearance' of Breach in the Future	50
A: Meaning of Clearance	50
B: Time of Clearance	53
C: Clearance Examples	53
1.2.2.3 Anticipating a 'Fundamental' Breach	55
A: Meaning of 'Fundamental' Breach	55
B: Fundamental Breach Examples	56
1.2.2.4 Dilemma between Suspension and Avoidance	58
1.2.3 Notice.....	60
1.2.3.1 Reasonable Notice	61

1.2.3.2. Is It Obligatory?	63
A: Lack of Sufficient Time	64
B: Declaring the Non-Performance by Breaching Party.....	64
1.2.3.3 Adequate Assurance	66
A: the Nature of Adequate Assurance	66
B: the Adequacy of Assurance.....	66
C: Adequate Assurance Examples.....	67
1.2.3.4 Continuing the Performance	68
A: in the Case of Providing Adequate Assurance.....	68
B: in the Case of Non-Assurance.....	68
Conclusion	70
II. Anticipatory Breach under the United Kingdom Legal System.....	72
2.1 Distinct Theories on the Breach in English Law	72
2.2 Distinct Theories on Anticipatory Breach in English Law	73
2.3 What Constitutes an Anticipatory Breach?.....	76
A: General Conditions	76
B: Sub-conditions.....	77
2.4 Results of Anticipatory Breach.....	79
2.4.1 Doctrine of ‘Election’	80
A. Affirmation.....	80
B. Termination	81
2.4.2 Suspension	84
2.4.3 Notification	85

A. Regarding Affirmation/Termination.....	85
B. Regarding Suspension.....	85
Conclusion	86
III. the possibility of Anticipatory Breach under the Iranian Legal System.....	88
3.1 Unsupportive Rules.....	89
3.1.1 Article 219, Civil Code.....	89
3.1.2 Article 226, Civil Code.....	91
3.1.3 Article 370, Civil Code.....	92
3.2 Supportive Rules.....	93
3.2.1 under the Commercial Code	93
3.2.2 under the Civil Code	95
3.2.3 under the Islamic Jurisprudence.....	96
Conclusion	99
Overall Conclusion.....	101

List of statutes

United Kingdom

Sale of Goods Act 1979

Section 5, Art. 41 (1)

Section 5, Art. 39 (b)

Section 5, Art. 46

Iran

Commercial Code

Section 11, chapter 10, Art. 530

Section 11, chapter 2, Art. 421

Section 4, chapter 1, Art. 238

Civil Code

Section 2, Art. 377

Section 2, Art. 219

Section 2, Art. 226

Section 2, Art. 370

Section 2, Art. 380

List of Cases

International Cases:

BV BA. J.P. v. S. Ltd, (26 April 2000), Appellate Court Gent, Belgium	p.14
Case No. 9448 (July 1999), ICC award 9448	p.11
Cheese case, (29 December 1998), Hamburg Arbitration award, Germany	p.54
Chemical products case, (27 December 1999), Appellate Court Dresden, Germany	p.12
Clothes case, (13 November 1992), Belgium District Court, Brussels	p.23
Clothing case, (January 1997), ICC Award 8786	p.57
Cobalt sulphate case, (3 April 1996) Federal Supreme Court, Germany	p.49
Downs Investments v. Perwaja Steel, (17 November 2000), Supreme Court Queensland, Australia	p.54
Fashion goods / clothing case, (1 March 1995) District Court Hasselt, Belgium	p.16
Frozen bacon case, (22 September 1992), Appellate Court Hamm, Germany	p.16
Furniture case, (23 June 1998) Appellate Court Hamm, Germany	p.32
Granite rock case, (12 October 2000), District Court Stendal, Germany	p.8
Industrial equipment case, (23 January 1997), ICC Award 8611	p.24
Key press machine stamping case, (15 February 1995), Supreme Court, Germany	p.49
Magellan International v. Salzgitter Handel, (7 December 1999), Federal District Court, United States	p.55
Malaysia Dairy Industries v. Dairex Holland, (2 October 1998), District Court's-Hertogenbosch, Netherlands	p.10
Metal concentrate case, (September 1996), ICC Award 8574	p.56
Minibus case, (29 July 2009) District Court Arnhem, Netherlands	p.20
Mushrooms case, (17 November 1995), Budapest Arbitration, Hungary	p.16

Propane case, (6 February 1996), Supreme Court, Austria	p.24
Russia Arbitration proceeding 302/1996, (27 July 1999)	p.17
Shoes case, (14 January 1994), Appellate Court Düsseldorf, Germany	p.39
Shoes case, (15 September 1994) District Court Berlin, Germany	p.24
Shoes case, (28 April 1993), District Court Krefeld, Germany	p.57
Shoes case, (30 September 1992), District Court Berlin, Germany	p.50
Shoes case, (31 January 1991), Lower Court Frankfurt, Germany	p.36
Soinco v. NKA, P (31 May 1996) Zürich Arbitration proceeding, Switzerland	p.23
Spirits case, (20 February 1997), District Court Saane, Switzerland	p.56
Umbrella case, (12 February 1998), Supreme Court, Austria	p.23
Waste container case, (5 December 1995) Budapest Arbitration, Hungary	p.24
<u>National Cases</u>	
<i>Afovos Shipping Co. SA v. R. Pagnan & Fgli.</i> (1983) 1 WLR 195, 203	p.74
<i>Amann Aviation Pty Ltd v Commonwealth of Australia</i> (1990) 92 ALR 601	p.77
<i>Avery v BOWDEN</i> (1856) 5 E & B 714	p.81
<i>Clea Shipping v Bulk Oil International</i> (1984) 1 All ER 129 at 132ff, 137	p.83
<i>Federal Commerce v. Molena Alpha Inc</i> (1979) AC 757	p.73
<i>Hochster v. De la Tour</i> (1853) 2 El. & Bl. 678, 118 E.R. 922	p.73
<i>Sanko Steamship Co. Ltd. v. Eacom Timber Sales Ltd.</i> (1985) 32 D.L.R. 4th 269 (B.C. Sup. Ct.)	p.77
<i>Sargent v. ASL Developments Ltd</i> , (1974) 131 CLR 634	p.80
<i>Shindler v Northern Raincoat Co Ltd</i> (1960) 2 All ER 239	p.83
<i>Vitol SA v. Norelf Ltd</i> , (1996) A.C. 800; 3 W.L.R. 105; 3 All E.R. 193	p.82

White and Carter (Councils) v McGregor (1961) UKHL 5	p.83
Winterton Construction Pty Ltd v. Hambros Aust Ltd (1992) 111 ALR 649	p.87
Woodar v. Wimpey (1980) 1 W.L.R.277 (HL)	p.78

List of Abbreviations

CISG	United Nation Convention on Contracts for the International Sale of Goods
SGA	English Sale of Goods Act
ICC	International Chamber of Commerce
UNCITRAL	United Nation Commission on International Trade Law
UK	United Kingdom
FOB	Free on Board
UN	United Nation
Ed.	Edition
Art.	Article

Introduction

The present research is going to analyse a special situation between the contractual parties in an international sale contract. What is the mentioned special situation? Suppose a contract under which the parties have agreed to perform their obligations in next three months later. Meanwhile, one of the parties recognizes that due to some reasons the contract in question is not going to be fulfilled at the fixed performance time. Forcing the innocent party to continue carrying out his part of obligations while the future breach is obvious, does not seem fair, and reasonably there should be available remedies. If the reasons amounting to this doubt are serious enough, a concrete ground is made based on which the party can anticipate the future breach by failing partner. This breach is called '*anticipatory breach*'.

The general aim of this research is to describe and analyze the meaning and the consequences of anticipatory breach, as a significant concept in international trade law. This study will be under the United Convention on Contracts for the International Sale of Goods (1980)¹, United Kingdom² and Iranian legal system. The underlying question of the research is what remedies are available proposing to potential aggrieved party in the case of anticipatory breach and under what general conditions he is permitted to exercise those remedies based on the mentioned three systems. It is regarded as hypothesis that the anticipatory breach is an acknowledged concept in CISG and UK legal system and it might be acceptable under the Iranian law to a limited extent.

As it is mentioned above, the research scope is within the CISG (Art.71 & 72), UK and Iranian legal system. The CISG is selected because it was the initial attractive motivation for commencement of this research. Moreover it is necessary to examine the CISG because this convention is the most successful document in order to unify the different trade laws and usages around the world with the majority of countries' ratification. The UK legal system is studied since anticipatory breach has its roots there and it was necessary to understand the concept more profoundly in order to be able to find out the ambiguities and complicated points. The available court judgments, arbitration awards, England

¹ Hereafter as CISG

² Hereafter as UK

Sale of Goods Act (1979)³ and academic opinions are regarded to answer the research questions under this scope. Iranian legal system is chosen trying to make a new step in order to improve it and make it closer to the updated level of international sale.

The research has been library based and the applied methodology is descriptive analytical. In addition to the related convention articles and domestic regulations, the efforts were made to take the maximum advantage of the academic literature in this area. I tried to make the research richer in practice by studying the related cases wherever they were available. Regarding the background of this research subject, there have been just a few previous legal studies of anticipatory breach in Iran which have not gone through this issue profoundly.⁴

The body of this dissertation is structured in three main sections. In the first section, the anticipatory breach is analysed under the CISG in two subsidiary chapters based on article 71 and 72 including history, general conditions and more details under each chapter. In the second section, the UK system is the source of viewing this concept which will be in four chapters, presenting general and particular theories around the issue, necessary conditions and consequences of anticipatory breach. In the final section which is regarded Iranian law, we engage with the existence of this concept in two chapters, supportive and unsupportive rules explaining in details under subsidiary parts.

³ Hereafter as SGA

⁴ Except an article as 'Anticipatory Breach in Contract' written by Habibollah Rahimi, (1384) 15 *Pazhuhesh Hoghugh Siasat journal*, which has presented useful points about the anticipatory breach under Iranian law.

I. **Anticipatory Breach under the United Nation Convention on Contracts for the International Sale of Goods (1980)**⁵

Under the UN Convention of International Sale of Goods, When a party of a contract doesn't perform or performs defectively his obligation by the date fixed under the contract, the other one can avoid the contract resorting to Art.49, 64 naming 'Fundamental Breach' but when he faces with a condition in which he can anticipate breach by the other party before the due performance time, naming 'Anticipatory Breach', CISG entitles the former party in two ways, suspension and avoidance. The first choice is softer than the latter which is harsher. In other words, whereas Art.72 CISG is aimed at the termination of the contractual relationship and the release of the parties of their obligations, Art.71 CISG is aimed at keeping the contract intact and on foot.⁶

The first section focuses on assessing the Anticipatory Breach under CISG, in two chapters; one is dedicated for Art.71 and the other one regarding Art.72. In each chapter, firstly we talk a bit about the history of each article. Then the significant and ambiguous points will be discussed to clarify for better understanding.

⁵ Except where otherwise noted, all references herein to Convention articles refer to the current version of the CISG.

⁶ Mercédeh Azeredo da Silveira, 'Anticipatory Breach under the United Nations Convention on Contracts for the International Sale of Goods' [2005] *Nordic Journal of Commercial Law*, <www.cisg.law.pace.edu/cisg/biblio/azeredo.html> (last visit at 26 August 2010)

1.1 Suspension

Art.71 has three parts in which it explains the needed grounds for resorting to suspension. Paragraph (1) sets out the circumstances which give the right to suspend performance. Paragraph (2) indicates the rights of a seller who suspend while the goods are dispatched. Paragraph (3) obliges the suspending party to give notice of the suspension and if the other party provides adequate assurance, the latter one should resume. In order to give you better illustration for how a party can suspend the contract due to the breach anticipating, an example can be useful.

Suppose that a seller has agreed to deliver goods on credit but, prior to the time for delivery, the buyer becomes insolvent and in contrary, a buyer has agreed to pay before receiving the goods but, prior to the time for payment, the seller's insolvency makes it apparent that the seller will not deliver the goods.⁷ Isn't it unfair if we expect the buyer to continue with his performance which could result in his suffering an irrevocable loss? That's why the CISG permits him to suspend the contract and ask for assurance to resume the performance.

⁷ John O. Honnold , *Uniform Law for International Sales under the 1980 United Nations Convention* (3rd edn, Hague, Kluwer Law international, 1999), p. 426.

1.1.1 History and Definition

A: History

With regard to history, disagreements by (mostly) developing countries made unusual long discussions on Art.71 at the diplomatic conference. The representatives believed that this rule can be abused against less strong countries.

Historically at the fifth session of the Working Group in 1974, this provision was re-drafted to take account of a number of criticisms of it which had been expressed, particularly that the words «the economic situation of the other party appears to have become so difficult» needed to be more objective and precise.⁸ The re-drafted provision read as follows:

“ A party may suspend the performance of his obligation when, after the conclusion of the contract, a serious deterioration in the economic situation of the other party or his conduct in preparing to perform or in actually performing the contract, gives reasonable grounds to conclude that the other party will not perform a substantial part of his obligations.”

This provision retained the reference to «the economic situation of the other party» but required that there should be «a serious deterioration in» this situation. It also broadened the circumstances in which suspension was to be possible by permitting regard to be had to the other party's «conduct in preparing to perform or in actually performing the contract». The phrase «good reason to fear» was changed to «reasonable grounds to conclude» and «material part of his obligations» was changed to «substantial part of his obligations».

At the sixth session of the Working Group in 1975 some representatives contended that «a serious deterioration in the economic situation of the other party» was too vague a test to be employed without difficulty. It was

⁸ See Yearbook, vol.V (1974), p.38.