

Rules Governing Anticipatory Breach of Contract Under the Vienna Convention on International Sales

Nasir Albalawee¹

Abstract

Following the descriptive analytical approach, this research addresses the rules governing the anticipatory breach of the contract under the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (CISG). The first section of this paper presents the definition of anticipatory breach. The second section introduced the most important options granted to the parties to contract if the principle of anticipatory breach is performed. The problem of the study lies in showing the adequacy of the legal texts governing anticipatory breach under the CISG and an indication of the extent to which the agreement achieves a balance of interests between the contracting parties. The results showed that anticipatory breach is a principle that applies if one party is expected to fail to fulfil his contractual obligations to another party within the due date due to experiencing an economic crisis.

Keywords: Vienna International Sales Agreement (CISG), anticipatory breach, Fundamental breach, contract termination, a claim for compensation.

Introduction

The principle of the binding force of contract requires the parties to perform their obligations since it was established on their free will, represented by offer and acceptance. Most of the laws, including The Vienna Convention, imposed a penalty for the non-performance of contractual obligations. These penalties may include specific performance, termination, or compensation.

The CISG granted the creditor the right to avoid the contract when non-performance is expected due to the debtor's inability to fulfil his obligation. This is known as the anticipatory breach of the contract. Anticipatory breach, hence, is an action that demonstrates one party's intention to fail to fulfil its contractual obligations to another party.

¹ Assistant Professor, Faculty of Law, Jadara University, nbalawi@jadara.edu.jo

Nonetheless, vocal or written confirmation is not required, and failure to perform any obligation promptly can result in a breach. The counterparty may bring legal action before a contract's provisions are broken by claiming an anticipatory breach.

In this paper, the researcher will discuss the definition of an anticipatory breach in the first section and the most important options granted to the parties to contract if the principle of anticipatory breach is performed in the second section. The problem of the study lies in showing the adequacy of the legal texts governing anticipatory breach under the CISG and an indication of the extent to which the agreement achieves a balance of interests between the contracting parties. The importance of the research lies in the statement of the consequences of the anticipatory breach through the statement of the options granted to the parties if there are cases of breach according to what was stated in the agreement.

Section One

Anticipatory Breach

The CISG issued procedures for anticipatory breaches, although it did not define the term. Some jurists described it as a "principle that is applied if circumstances arise between the conclusion of the contract and prior to the due date, and these circumstances indicate that one of the parties to the contract is unable to enforce the contract; for example, one of the parties is experiencing an economic crisis or the seller's factory is burned." Others define it as "the right of one of the contract's parties to seek an early termination of the contract to avoid any damage that might result from the debtor's intention to breach his obligation in the future." ()

Resorting to an anticipatory breach of contract raises different scenarios. First, it is illogical to ask one of the parties to perform his obligation despite the indications that the other party will not do so, inevitably leading to significant losses and damages for the other party (). Second, several general and specific conditions must be available before applying the anticipatory breach principle. For example, some jurists require a legally binding contract for both parties without exception. Others require clear intent and indications that one party can not perform his future obligations, and in this case, a contract that is legally enforceable in the future is required. However, CISG confirmed that one of the parties could declare the contract avoided if he is sure the other party has apparently committed a fundamental breach, such as a deficiency in goods.

We argue that there should be two requirements for exercising the right to terminate the contract under the anticipatory breach principle: the presence of a fundamental violation and the certainty that the violation would be committed. Regarding the degree of certainty, CISG did not regulate this issue; nonetheless, it is generally agreed that the degree of certainty is determined based on the other party's apparent condition, in accordance with what is mandated by international trade standards. As Article (71/1) of the CISG (1980) stated that: 'A party may suspend the performance of his obligations if, after the conclusion of the contract, it becomes apparent that the other party will not perform a substantial part of his obligations 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.'

Some legal experts emphasised that what is meant by " a serious deficiency in his ability to perform or in his creditworthiness " here refers to the seller, who is the contractor, and that his circumstances may bring on the serious deficiency. For instance, a dispute between him and the main supplier could cause the workflow in his factories to be disrupted. Another example would be the occurrence of something without justification for discussion, such as a fire in his facility.

The serious deficiency in his ability to perform his obligation may sometimes result from another reason. For example, it could have been a general problem over which the contractor had no control, such as in cases of force majeure, such as natural disasters. Regarding " his conduct in preparing to perform or in performing the contract," it can be explained by the existence of a stroke deal between the contractors and the buyer is used to the presence of a flaw in the goods, making it likely that the goods would be defective like its previous goods.

The CISG also stated a condition where the contractor may not fulfil his obligation clearly, : "... if the other party declares that he will not perform his obligations." In this regard, one of the courts resorted to this condition in its decisions when the seller declared that "he no longer feels that he is obligated to perform his obligation and that he will sell the goods". The court clarified that the text of Article (73) of the CISG authorises the buyer to terminate the contract. It considered the seller's declaration as a statement of non-performance and a clear anticipation of committing a fundamental violation in the future because of his inability to pay the price of previous shipments, which constitutes a great indication that he will not be able to fulfil the future in the price or his inability to open a bank credit in the interest of the seller.

The second condition for enforcing the principle of anticipatory breach is to send immediate notice of the suspension to the other party to give him a chance to provide an adequate guarantee of his performance. According to CISG, "A party suspending performance, whether before or after dispatch of the goods, must immediately give notice of the suspension to the other party and must continue with performance if the other party provides adequate assurance of his performance".

This text indicates that in the case of the anticipatory breach, the damaged party has the right to annul the contract or suspend the performance of its contractual obligations. However, both cases necessitated notifying the party who is expected to violate the contract. Moreover, article (71) requires the party who intends to suspend the contract to notify the other party immediately. Nevertheless, CISG did not regulate the contents of the notice, but it required it to include reasonable conditions.

In this regard, some jurists contend that the reasonable reason here may be determined based on the reason for the notice, its time, and the conditions it includes. For example, suppose the notice aims to allow the other contractor to perform his obligation. In that case, it must include the nature of the violation that will certainly occur in the future and the indications that made the person who sent the notice ensure that a breach will occur.

However, the CISG did not regulate a penalty for not giving a suspension notice. In this regard, the judicial decision settled that if the notice was not given to the violated party, the injured party could not rely on his right to suspend the performance. The notice of suspension stipulated in Article (72) aims to allow the other party to provide sufficient guarantees that he will perform his obligation in the future. According to the previous text, the termination must be declared before the execution due date. However, the text did not define the nature of the guarantee (Vinchristo, 2022).

So, to apply the principle of anticipatory breach, several requirements must be satisfied, the most crucial of which is that the contract be loose, there be an indication for non-performance, and the breach must be fundamental. In addition, the party claiming the right to use anticipatory breach must also notify the other party of the suspension.

Section Two

Options granted to the parties in light of the anticipatory breach of the contract

The injured party may have several options based on the anticipatory breach of contract conditions. For example, he may wait for the performance date, suspend the performance of his obligations, or demand the termination of the contract.

CSIG stipulates that "If prior to the date for performance of the contract, it is clear that one of the parties will commit a fundamental breach of contract, the other party may declare the contract avoided." And that " A party may suspend the performance of his obligations if, after the conclusion of the contract, it becomes apparent that the other party will not perform a substantial part of his obligations."

First: Continuing with the contract

The creditor has two options: demand that the contract be carried out immediately or refuse to accept a breach and wait until the performance date. In other words, the creditor may decide to wait until the performance date ignoring the debtor's inability to perform his obligation in the future and then urge the debtor to fulfil his obligation voluntarily, or he may resort to specific performance().

Second: Suspension of obligation

Suspension of performance of obligations is one of the most important consequences of the anticipatory breach of the contract under the Vienna Convention. The majority of national legislation confirmed this right. It is also consistent with the national legislation known as the defence of non-performance. A defence of non-performance is defined as a legal option resorted to by any of the contracting parties in contracts binding upon both parties, whereby either of them has the right to refuse or suspend the obligations and the performance of the contract until the other party fulfils his obligation or at least showing his intent to perform his obligation.

The defence to non-performance of the contract has several goals, including emphasising equality between the contracting parties and ensuring the performance of their obligations. Noting that it is a legitimate right stipulated by the majority of legislation, considering that it is based on one party's failure or repudiation to perform his required obligation.

This fact is confirmed by the Jordanian legislation, which stipulated that: " In contracts binding upon both parties if the mutual obligations are due for performance, each of the parties may refuse to perform his obligation if the other contracting party does not perform that

which he is obliged to do." It is noted that the difference between the Jordanian legislation and the Vienna Convention lies in the fact that the Jordanian legislator did not adopt the principle of anticipatory breach, whereby the obligation must be due for performance until the other party refrains from performing his obligation.

In the Vienna Convention, the seller or the buyer may suspend performing any of his obligations under the international sales contract if the mutual obligations are due for performance and he is unlikely to obtain the performance promised by the other party. The party that suspends performing his obligation shall not be considered in breach of the contract if he has the right to do so. The Convention did not specify a period for suspending the performance of the contract. Still, most judicial precedents held that the right to suspend the performance is valid until the performance date is due, after which the other party must act according to what was stated in the Convention.

However, the Convention requires the party who suspends the performance, whether before or after dispatch of the goods, to immediately give notice of the suspension to the other party informing him about his intention to suspend the performance, and he must continue with performance if the other party provides –adequate assurance of his performance. This text did not regulate the issue of guarantees that must be provided, nor did it indicate the form of these guarantees and the period for their submission. However, as mentioned previously, some judicial precedents ruled that bail or mortgage is one of the guarantees that can be provided.

Undoubtedly, exercising the right to suspend performance requires the existence of a link between the obligation whose breach is certain and the obligation whose performance has been suspended. () If the seller has already dispatched the goods and it becomes evident that there are acceptable reasons, 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 .

For this procedure to be valid, the seller shall prove and provide a sufficient justification for fear of future non-performance to invoke non-delivery of the goods, which has been confirmed by many judicial precedents.

Third: Termination of the contract

The termination of the contract is the choice given to the party who anticipates being damaged in the future due to the other party's inability to fulfil his obligation. As indicated, most national laws grant any contracting party the right to cancel the contract between the performance date and the realisation of non-performance. This is why

the anticipatory breach, which does not require waiting until the performance due date described earlier, differs from the conventional termination. The Convention also gave the seller or buyer the right to terminate the contract before the performance date if it was clear that the other party would commit a fundamental breach of the contract. This is stated in Article (71/3): "If, prior to the date for the performance of the contract, it is clear that one of the parties will commit a fundamental breach of contract, the other party may declare the contract avoided."

Article (73) also states the right to anticipatory termination concerning contracts that include delivery in instalments, as it stipulates that: "If one party's failure to perform any of his obligations in respect of any instalment gives the other party good grounds to conclude that a fundamental breach of contract will occur with respect to future instalments, he may declare the contract avoided for the future, provided that he does so within a reasonable time."

In this context, some Jurisprudence supports the fact that in the event of delivery in instalments, the loss of one of the parties of his right to anticipatory breach as a result of a breach in a specific payment does not affect his right to annul future payments if the breach in the payment in which he lost the right to annulment confirms that, the other contracting party will inevitably commit a fundamental violation per what the contract specified for the remainder of the payments. Numerous case law has held that in contracts where goods are delivered in instalments, the buyer may declare the contract avoided in respect of any subsequent -delivery if the seller fails to deliver any previous -delivery despite accepting payment. The seller also has the right to declare the contract avoided for subsequent payments if the buyer fails to open a letter of credit because this gives the seller an indication that the buyer will not be able to pay.

The Convention provided a special provision in this matter. It considered each instalment as an independent obligation. Therefore, if one party fails to perform his obligations regarding any instalment that constitutes a fundamental breach of contract, the other party can declare the contract avoided for that instalment. This denotes that the termination of each instalment must be separate from the other in particular. We argue that the Convention did not consider this matter concerning the delivery of goods by instalments and did not separate each instalment.

Regarding the notice, as was already said, the notice required by the provisions on anticipatory breach is meant to offer the party anticipated to breach the contract in the future a chance to make adequate guarantees rather than to cause termination. As a result, it is necessary to enforce Articles (72) and (73) of the Convention, which

state that recourse to an anticipatory breach must occur before the performance deadline. When the dates for performance pass without the obligations having been fulfilled, the contract can be avoided following the terms of Article 49. However, the legal effect of terminating the contract depends on the provisions of the Convention, as previously discussed.

The Convention entitled the parties to the contract the right to declare the contract avoided or suspend its performance in some circumstances. For example, during the Corona pandemic, if an international sales contract was made before the Corona pandemic and it was necessary to perform it during the pandemic, and one of the contracting parties was evidently unable to fulfil his obligations due to his bankruptcy, insolvency or having economic problems that lead to the termination of employment contracts of the workers in the factory, the other party may under the provision of the Convention declare the contract avoided. This is what is known as the anticipatory breach. Thus the agreement is distinguished from many national legislations that did not explicitly regulate the issue of anticipatory breaches, such as the Jordanian law.

Conclusion and Results

The researcher concluded several results and recommendations, which are as follows:

Results:

- The Vienna Convention on the International Sales of Goods stipulated different penalties regarding the parties' performance of their obligations: specific performance, a claim for compensation or a reduction in the price.
- The anticipatory breach is defined as "a principle applied in the event of circumstances arising between the conclusion of the contract and before the date of performance, and these circumstances indicate the inability of one of the parties to the contract to perform and continue with it; for example, one of the parties is experiencing an economic crisis, or the seller's factory is burned."
- The principle of anticipatory breach must be realised under several circumstances, including that the performance of the contract is loose; and that there is proof that the debtor will categorically be unable to perform his obligation in the future. If it becomes apparent following the conclusion of the contract that the other party will not perform his obligations, either party may declare the contract avoided.

- Most national laws, like the one in Jordan, did not explicitly adopt the concept of anticipatory breach.
- The principle of anticipatory breach grants the debtor several options to recourse to, including continuing the contract's performance while waiting for the performance date, terminating the contract, or suspending the performance of the mutual obligation.

Recommendations:

Given that numerous cases in Jordanian law fall under the umbrella of the principle of anticipatory breach of contract, such as what was in the provisions governing the contract of contracting, the researcher suggests that the Jordanian legislator and national legislation regulate the issue of the anticipatory breach through clear and direct texts in the provisions of the civil law. On the other hand, the application of the principle of anticipatory breach accomplishes the contractual balance and has some merit. When a creditor realises that a debtor won't perform his obligation, waiting until the performance date is unreasonable because it would result in wasted rights and increased damage.

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