

# Anticipatory Breach of Contract in the United Nations Convention on Contracts for the International Sale of Goods

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**Abstract**—The *United Nations Convention on Contracts for the International Sale of Goods* adopted in 1980 is a substantial law convention drafted by the United Nations Commission on Trade Law specifically for the sale of international goods. Articles 71-73 of the *Convention* stipulate the remedy measures of the observing party when one party is in anticipatory breach of contract, but there are still problems with ambiguous terms, unclear boundaries of the rights provisions, and lack of necessary links between the clauses. It is necessary to further clarify the wording of the *Convention*, refine the link between the suspension of the right of execution and the establishment of Articles 71 and 72 to promote the sustainable development of international trade and economic cooperation.

**Index Terms**—the *United Nations Convention on Contracts for the International Sale of Goods*; anticipatory breach of contract; remedy relief

## I. INTRODUCTION

The contract is an important document that runs through commercial transactions, which embodies the free will of the buyer and the seller, and the legal norms of the contract play an important role in resolving disputes. The *United Nations Convention on Contracts for the International Sale of Goods* (hereinafter referred to as the *Convention*) is one of the international conventions with the largest number of contracting parties because of its far-reaching influence on international trade, which provides great help to the parties involved in international commercial exchanges. Articles 71 to 73 of the *Convention* respectively provide more specific and perfect provisions on the system of anticipatory breach of contract and issues related to partial delivery contracts. In addition, a detailed explanation of the anticipatory breach of contract was also made by the International Trade Law Commission's *Summary of the Case Law of the United Nations Convention on the Contract for the International Sale of Goods* in 2016 (hereinafter referred to as the *Summary*).

## II. THEORETICAL SOURCE OF ANTICIPATORY BREACH OF CONTRACT

Anticipatory breach of contract, that is, anticipatory repudiation, originated from the Anglo-American legal

system, is more frequently used in the field of contract law. Specifically, it refers to the situation where one party explicitly indicates to the other party that he will not be able to perform the contract after the contract is effectively established within a certain period of time and before the expiration of the performance period<sup>[1]</sup>. Before the performance of the contract after the conclusion of the contract, if one party is unable to perform the contract due to various reasons and the other party is not anticipatory to accept the consideration promised by the other party, he will suffer adverse consequences. At this time, the anticipatory breach of contract system will take effect to protect the observant party's reasonable right to expect performance and prevent the observant party's performance expectations from falling through.

Through a series of institutional relief to the observant party, the good effects of resolving disputes quickly, reducing losses caused by actual breach of contract and avoiding waste of resources can be achieved, thus ensuring the performance of international contracts for the sale of goods and improving the efficiency of transactions. In Anglo-American law system, there are two forms of anticipatory breach of contract, express breach and implied breach of contract<sup>[2]</sup>. These two types were established by the cases of *Hochester v. Delatour* in 1853 and *Mrs. Singer v. Mr. Dinger* in 1894 respectively. Express breach of contract means that one party to a contract directly indicates in a clear way that he refuses to perform his contractual obligations. On the contrary, implied breach of contract replaces the verbal and written methods in express breach of contract through some actual act that makes the performance of contract impossible.

On the basis of British and American regulations, the *Convention* integrates the requirements of developing countries to stipulate "the system of anticipatory breach of contract" in Articles 71 and 72, and at the same time to deal with the problem of anticipatory breach of partial delivery contracts in Article 73. However, the *Convention* does not adopt the concept of express or implied breach, but discusses the issues of anticipatory non-fundamental breach and anticipatory fundamental breach respectively according to the different nature of "anticipatory breach of contract".

### III. COMPILATION SUMMARY OF ARTICLES 71 - 73 OF THE CONVENTION

#### (I) Scope of anticipatory non-fundamental breach in Article 71 of the *Convention*

From the provisions of Article 71 of the *Convention* and the interpretation of the *Summary*, it can be seen that the following conditions need to be met in order to determine the establishment of an anticipatory non-fundamental breach of contract:

First, the anticipatory non-fundamental breach of contract needs to meet the time requirement, that is, the breach of contract occurs after the signing of the contract and before one party's obligation is fulfilled. At the same time, the breach of contract that has existed before the conclusion of the contract and appears after the conclusion of the contract is also consistent with this time condition. The *Summary* further explains that the observant party's right to suspend performance exists before the performance deadline. Once the performance date is passed, the aggrieved party can only take other remedies according to the *Convention*.

Second, the degree of breach of contract. Anticipatory non-fundamental breach, i.e. failure to reach fundamental breach. It is expressed in Paragraph 1, Article 71 of the *Convention* that one of the parties to the contract "fails to perform most of the important obligations". However, the problem lies in the fact that the *Convention* does not specify in the following provisions what "most important obligations" really include. In addition, according to Paragraph 1, Article 72 of the *Convention*, it can be inferred that the extent of non-performance by the defaulting party cannot constitute a fundamental breach of contract under the condition of non-performance of "most important obligations", once a fundamental breach is reached, the specific provisions of Article 72 should be automatically applied. At the same time, the *Summary* also lists the fact that both parties have the right to suspend their obligations according to relevant jurisprudence.

Third, the factual conditions. The behavior of the party who is anticipatory to breach the contract must meet the following two points before it can be considered as an anticipatory non-fundamental breach of contract. The anticipatory breach of contract includes two points: 1. The defaulting party does not have the ability to support him to fulfill his obligations or even though he has the ability, he does not have sufficient credit due to various factors. 2. Some behaviors of the defaulting party during the preparatory performance stage or actual performance stage of the contract have indicated that he does not intend to continue to perform his major obligations in the future. Similarly, the *Summary* also makes a detailed and clear exposition of the prerequisites for both parties' right to suspend their obligations according to relevant jurisprudence. However, this fact requires the other party to make subjective judgment according to the actual situation. There is no doubt that the determination of anticipatory breach of contract completely revises the theory of "anticipatory breach" in Anglo-American law system to a great extent. The decision on whether the defaulting party's performance can be determined as

"anticipatory breach" is not made through the express or implied statement of the defaulting party. On the contrary, the decision will be firmly held by the observant party<sup>[3]</sup>.

Fourthly, non-performance of obligations should reach the level of "obvious". Because whether one party fails to perform his contractual obligations is determined by the other party through subjective judgment, which easily leads to the problem that professor Mohsem Chafik is worried about, "the other party's subjective assumption goes to extremes". Therefore, the *Convention* uses "obvious" to limit the subjective elements of the parties to protect the interests of the parties to the contract as much as possible.

#### (II) Relief after anticipatory non-fundamental breach of contract

1. Right of suspension of performance is a temporary remedy for the observant party to suspend the performance of his contractual obligations (e.g. suspension of delivery, transfer of ownership, delivery of goods, etc.) when one party has an anticipatory non-fundamental breach of contract. The *Summary* points out that the contractual relationship between the two parties still exists and both parties are encouraged to fulfill their contractual obligations, which shows that suspension of performance does not affect the existence of the contractual relationship. The observant party's right to suspend performance is not unchangeable. When the following two situations occur, the right to suspend performance disappears immediately: first, the conditions for suspension disappear, and second, the anticipatory defaulting party provides sufficient performance guarantee for this purpose. It is worth noting that the conditions for suspension of performance require the other party's anticipatory breach of contract to meet the objective criterion of "obvious", if one party suspends performance of contractual obligations due to erroneous subjective judgment, he will be liable for breach of contract. This right applies to both the buyer and the seller.

2. Stoppage in transitu, the applicable subject of the stoppage in transitu is the seller. Specifically, when the buyer's behavior does not constitute an anticipatory breach of contract, if the seller has delivered the goods for transportation, as long as the seller discovers that the buyer has an anticipatory non-fundamental breach of contract in the process, he has the right to choose whether to stop delivery of the goods that have already been shipped or not to the buyer. Once this situation is met, the seller's stoppage in transitu will not be restricted by the buyer's possession of the documents for obtaining the goods. The seller's exercise of stoppage in transitu is also limited by two objective conditions: (1) the buyer's non-performance of the contract is only discovered after the shipment of the goods; (2) the goods have actually been controlled by the carrier, that is, the seller has lost control of the goods. Moreover, the seller's stoppage in transitu will also be restricted by a third party who has accepted it in good faith - Paragraph 2, Article 71, of the *Convention* stipulates that the scope of the seller's stoppage in transitu is limited to the two parties to the sales contract that are related to the right of goods<sup>[4]</sup>. If the buyer has already

resold the goods in transit to a third party before the seller exercises his stoppage in transitu, and the procedural matters such as the transfer of documents have been completed, according to the principle of good faith, the third party convention sacrifices the seller's relief right to order the carrier not to deliver in order to protect the bona fide third party. In addition, the seller's stoppage in transitu may also hinder the seller's actual exercise of it for other reasons. The seller cannot be assured of the exercise of stoppage in transitu because under the influence of the trade terms adopted by both parties, certain restrictions will be imposed on it.

3. Giving notice and requesting full performance guarantee is also considered to be the duty of the observant party to notify, that is, whether the goods are shipped or not, the observant party shall immediately give notice to the defaulting party so that the defaulting party can provide full performance guarantee. The *Summary* further explains that Paragraph 3 does not explicitly provide for sanctions against the party that suspends performance of its obligations without immediate notice. Relevant jurisprudences agree that without proper notice, the aggrieved party may not exercise its right to suspend his performance, otherwise he will be liable for compensation if it constitutes a breach of contract. However, the *Convention* does not stipulate the form of notification. The *Summary* lists specific forms of notification through case studies, for example, a letter from the buyer refusing to accept unqualified products and proposing to return them. The observant party's immediate resumption of performance of his obligations shall be carried out at the same time as the observant party provides the guarantee, that is, as long as the observant party provides sufficient performance guarantee for this transaction, the observant party shall resume performance immediately. The reason is that the guarantee can provide a reassurance to the observant party to a great extent, and at the same time it also provides the possibility for the continued performance of the contract<sup>[5]</sup>. The *Convention* requires that the guarantee must meet the "sufficient" standard and that it should meet the standard sufficient to dispel the doubts of the observant party about non-performance.

### (III) Scope of anticipatory fundamental breach in Article 72 of the *Convention*

According to Article 72 of the *Convention* and the relevant explanations provided by the *Summary*, the following conditions shall be met in determining whether it constitutes an anticipatory fundamental breach of contract:

First, the time conditions, the deadlines provided in the *Convention* for the anticipatory fundamental breach of contract and the anticipatory non-fundamental breach of contract are roughly the same, that is, the breach of contract starts from the signing of the contract and ends before the performance of the contract.

Secondly, the factual condition, the fact that the defaulting party violates the contract must meet one of the following two kinds of behaviors: the defaulting party explicitly declares in advance that he will not perform his

obligations, or some behaviors made by the defaulting party indicate that he will refuse to perform his obligations. For example, the seller claims to "no longer feel obligated" to perform and "sells elsewhere" as well as the buyer fails to issue a qualified letter of credit [6].

Thirdly, it constitutes a fundamental breach of contract. As to whether the breach of contract by the defaulting party is a fundamental breach of contract, reference can be made to Article 25 of the *Convention*, which elaborates in detail the situation of fundamental breach of contract, that is, as long as the breach of contract by the defaulting party meets the following conditions: 1. One party's breach of contract causes actual damage to the other party; 2. The actual damage caused to the observant party has hindered the realization of the rights that the observant party should have obtained according to the agreement in the contract. Of course, if the defaulting party's breach of contract has not reached the fundamental breach standard, it can be determined that it does not constitute an anticipatory fundamental breach, and the observant party has no right to terminate the contract.

Fourthly, the anticipatory breach of contract must be "clearly visible". However, the wording in Article 71 of the *Convention* for breach of contract is "clearly visible". In comparison, in this article, the breach of contract by the anticipatory fundamental defaulting party must be serious enough to be "clearly visible", while the anticipatory non-fundamental defaulting party just needs to be "obvious". This is due to the fact that the consequences of the breach as stipulated in Article 72 are much more serious than that in Article 71. Article 72 gives the observant party the right to terminate the contract, which is the most serious relief right, while the existence of the contract in Article 71 is not affected. Therefore, the judgment of non-fundamental breach of contract adopts objective criteria, if the observant party terminates the contract hastily, it may cause himself to be liable for breach of contract.

### (IV) Relief measures for anticipatory fundamental breach of contract

#### 1. Declare the contract invalid and claim damages

The right of the observant party to declare contract invalid and the right to claim compensation are respectively stipulated in Paragraph 1, Article 72, Article 75 and Article 76 of the *Convention*. The observant party's right to claim damages is limited by a certain period of time -- it must be exercised before the performance period of the contract, because after the expiration of the contract, other relief measures are applicable.

#### 2. Some restrictions on the observant party in exercising the right to declare the contract invalid

The observant party still needs to fulfill certain obligations before exercising the right to terminate the contract according to law, that is, to notify the defaulting party in advance "reasonably". However, this notice is only made when "time permits". In case of emergency, the right of dissolution can be directly exercised, the notice here is different from the declaration of dissolution stipulated in Article 26. However, the observant party's notification obligation does not apply to all situations, for

example, the case where the defaulting party has declared in advance that he will not perform his contractual obligation is an exception. From this point of view, under the same conditions, the requirement for the anticipatory fundamental breach notification obligation is obviously slighter than the requirement for the anticipatory non-fundamental breach notification obligation.

Second, the *Summary* points out that Article 72 gives the aggrieved party the right to terminate the contract before the date of performance of the contract, but if it is an installment contract, the special termination rule of Article 73 can be applied.

### 3. Sufficient guarantee of performance

The *Summary* points out that the purpose of the notification under Paragraph 2, Article 72, is to give the recipient an opportunity to provide full performance guarantees. However, the *Convention* does not impose strict and specific restrictions on the form and standard of such guarantee, the author believes that the anticipatory non-fundamental defaulting party should not only provide sufficient performance guarantee, but also further increase the guarantee obligation of the anticipatory fundamental defaulting party on this basis.

#### (V) Anticipatory breach of contract in partial delivery

##### 1. Conditions to be met for declaring a contract invalid in Paragraph 1, Article 73 of the *Convention*

The secretariat of the United Nations Commission on International Trade Law explained the concept of a partial delivery contract in its comments on the *Convention* draft as follows: as long as the contract requires or permits the seller to deliver the goods in separate batches, the contract can be called a partial delivery contract. It is pointed out in the *Summary* that the goods must be replaceable, therefore, the partial delivery contract can include the delivery of different types of goods in each batch of goods. At the same time, it is not necessary to specify the exact batch and quantity for delivery.

It is stipulated in Paragraph 1, Article 73 that in a partial delivery contract, the observant party shall have the right to declare the contract invalid as long as the performance of one party to a certain batch of goods is one of the forms of fundamental breach of contract. This "split" method of regulation regularly divides a whole batch delivery contract into a series of independent and continuous contracts. The advantage of this provision is that although one party declares one delivery invalid, it does not hinder the delivery of other batches of goods and ensures the validity of the contract. Of course, the observant party still has to fulfill the obligation of prior notice before it is declared invalid. At the same time, the aggrieved party has the right to give the defaulting party extra time according to Article 47 or Article 64. If the defaulting party fails to perform within the extra time, the observant party has the right to declare it invalid.

##### 2. Conditions to be met for declaring a contract invalid in Paragraph 2, Article 73 of the *Convention*

According to Paragraph 2, Article 73 of the *Convention*, on the premise that the observant party has sufficient grounds to affirm that the defaulting party will also constitute a breach of contract with respect to subsequent

goods, once the non-performance of any batch of goods by one of the parties constitutes a breach of contract, the observant party shall have the right to declare the future contract null and void before the delivery of the next batch of goods is performed. From the point of view of the prescribed time limit, the provisions of Paragraph 2 are similar to the anticipatory breach of contract. Two problems should be paid attention to, first, the observant party is required to have "sufficient reasons" to believe that the performance of the contract will fundamentally breach the contract in the future. The *Summary* lists the circumstances that give the observant party "sufficient reasons" including the seller's failure to deliver the goods after accepting the payment and the buyer's failure to issue a letter of credit. Compared with Paragraph 1, Article 72, the threshold of proof in Paragraph 2 of Article 73 is lower. There is no need to show "obvious" that there will also be a breach of contract in the future, and it is only necessary to have "sufficient reasons" to believe it. Second, according to Paragraph 2, Article 73, the aggrieved party must give notice within a reasonable time and make a declaration in accordance with Article 26 of the *Convention* when the delivery of the goods in dispute in the future is declared invalid.

##### 3. Conditions to be met for declaring a contract invalid in Paragraph 3, Article 73 of the *Convention*

The provisions of Paragraph 3 also have the characteristics of anticipatory breach of contract. It should be noted that the first two paragraphs of Article 73 are the common rights of the buyer and the seller, and the rights under Paragraph 3 are unique to the buyer. In a partial delivery contract, the parties need to ensure that although each batch of goods is independent of each other, the relationship of "interdependence" does not allow any batch of goods to be used solely to satisfy the purpose envisaged by the parties at the beginning of the contract. In other words, no batch of goods can be used directly. Under this premise, one of the parties to the contract may, while declaring a batch of goods invalid in accordance with Paragraph 1, Article 73 of the *Convention*, declare the same invalid in respect of each batch of goods delivered and delivered in the future. For example, splitting a large machine into several parts and delivering them in batches, the relationship of "interdependence" in each batch is applicable to the provisions of Paragraph 3 of Article 73. The *Summary* points out in particular that the partial delivery contracts for oil and other commodities cannot be considered as "interdependent".

#### IV. DEFECTS AND RELATED SUGGESTIONS OF THE CONVENTION REGARDING THE SYSTEM OF ANTICIPATORY BREACH OF CONTRACT

First, the provisions of the *Convention* regarding the anticipatory breach of contract are too vague and lack of relevant standards. Terms such as "most important obligations", "have good reason to think", "obviously" and "obviously visible" further amplify the subjective judgment of one party and may damage the tools of developing countries in western developed countries. At the same time, there are still many differences in the

understanding of the *Convention* that need to be further improved in terms of relevant regulations and interpretations. Under the current circumstances, it is still necessary to resolve them with the help of commercial practices and jurisprudence.

Secondly, although the second and third paragraphs of Article 73 have made a series of regulations regarding the anticipatory fundamental breach of contract, they have not mentioned any anticipatory non-fundamental breach of contract, which has something to do with the fact that Paragraphs 2, 3 of Article 73 takes Paragraph 1, Article 73 as the premise. Even if one party's performance of only a certain batch of goods constitutes a non-fundamental breach of contract during the performance of the contract, but the act gives the other party sufficient reason to believe that the non-fundamental breach will inevitably occur in the future installment payment. Then, in order to protect the interests of the observant party, the observant party may exercise the right to suspend performance at this time.

Thirdly, regarding the right to suspend performance, the *Convention* only gives the observant party the right to suspend performance, but it does not stipulate which part of the obligations the observant party can suspend performance. Suppose there is a situation where the buyer has paid part of the payment in advance in a certain transaction, but in subsequent transactions the buyer constitutes an anticipatory non-fundamental breach of contract, at this time, the goods that the seller should stop include all the goods? There are different opinions on whether to include only some goods corresponding to the buyer's unpaid payment. After consulting relevant papers and systematically sorting out the academic viewpoints, the author's viewpoints are as follows: once a party constitutes an anticipatory non-fundamental breach of contract, it may exercise the right to suspend performance under the premise of following the "principle of proportionality". When considering which part of the obligation to suspend, the observant party should first examine the impact of the non-performing obligation of the defaulting party on the contract value [7]. The seller has already received the payment for the corresponding goods, and he is obligated to issue the corresponding goods to the buyer according to the "principle of proportionality". The seller totally denies the buyer's right to obtain the corresponding goods according to the contract, which violates the "principle of good faith" and is inconsistent with the purpose of the *Convention* to protect transactions.

Fourthly, there is a lack of provisions applicable to the conversion between Articles 71 to 72. The two provisions stipulate the anticipatory non-fundamental breach and the anticipatory fundamental breach respectively, but the lack of excessive provisions makes it controversial whether the former can be transformed into the latter. The *Convention* does not give a positive answer to the failure of the defaulting party to provide sufficient assurance after notification in the event of an anticipatory non-fundamental breach of contract that the other party has the right to declare the contract null and void if the conditions

for a fundamental breach of contract can be met. The secretariat of the United Nations Commission on International Trade Law only vaguely points out that this kind of situation may make the possibility of anticipatory fundamental breach even more obvious. However, this view has met with opposition from academic circles, because Article 71 is that the defaulting party cannot fulfill "most important obligations" and even if he cannot make sufficient guarantee within a certain period of time, it will not substantially impair the right of the observant party to expect benefits. At present, the two more mature suggestions are: first, to absorb the provisions of Paragraph 4, Article 2-609 of the *Uniform Commercial Code* of the United States, requiring the defaulting party to provide sufficient performance guarantee within a certain period of time, and exceeding the time limit will constitute the destruction of the contract; Second, according to the principle of good faith and the principle of "independent contracting" in Article 6 of the *Convention*, the two parties to the contract have increased the agreement on the consequences of providing guarantee and not providing guarantee, so as to reduce the disputes between the two parties regarding the performance of the contract [8].

## V. CONCLUSIONS

The United Nations Convention on Contracts for the International Sale of Goods has played an irreplaceable role in the field of international commercial exchanges since its adoption, mainly manifested in that the parties to most of the contracts are willing to make it an integral part of the terms of the contract. The provisions of the *Convention* on anticipatory breach of contract are of great significance for the parties to successfully perform the contract and reduce the risk. Moreover, with the improvement of international legislation in related fields and the increasing number of cases, this system will play a greater role. At the same time, "the belt and road initiative" strategy promotes Chinese enterprises to "go out" and the scale of international trade continues to expand. It is of great practical significance to study the system of anticipatory breach of contract in order to enhance China's right to speak in international treaty policy formulation. It also provides intellectual support for Chinese enterprises to help and prevent and control trade risks.

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