

Anticipatory Breach: From CISG's Perspective to Vietnamese Contract Law*

Bao Ha Cong Anh, Yen Nguyen Thi Quynh
(Faculty of Law, Foreign Trade University, Vietnam)

Abstract: The doctrine of Anticipatory Breach has been adopted in many legal systems in the world and found its way into various international instruments, in particular, the United Nations Convention on Contracts for the International Sale of Goods 1980 (CISG). However, this doctrine has not been recognized in Vietnam up to date. As a result, in situations where a breach of contract is evidently anticipated prior to the date of performance, the aggrieved party will not be able to avoid the contract but have to wait until the due date of performance to exercise certain remedies. This article provides an analysis of CISG's provisions on Anticipatory avoidance and discusses Vietnamese contract law's treatment in cases of anticipatory breach, including practices of resolving cases and the views of 633 Vietnamese enterprises participating in a survey on these issues. In the light of the fact that Vietnam has become a member state of CISG, this article will point out the necessity of codifying Vietnamese law on Anticipatory breach, and propose some suggestions for Vietnamese contract law following the approach of CISG.

Key words: anticipatory avoidance; anticipatory breach; fundamental breach; Vietnamese Law; CISG

JEL codes: K12

1. Introduction

When parties enter into a contract, their initial expectation is to have the contractual obligations properly performed by both parties. However, a breach of contract can take place at any time and unavoidably occur in some certain circumstances due to the complexity and inherent risk of business practices. The occurrence of a contractual breach may not only depend on the will of parties but also external factors.

The doctrine of breach of contract is mentioned and defined analogously in the laws of many countries. The French Civil Code considers a contractual breach as a failure to perform contractual obligations and improper performance of contractual obligations¹. The UK Sale of Goods Act stipulates that "failure to perform any significant part of the sale contract is a breach of the contract"². According to Chinese Contract Law, breach of

* This work was supported by the Vietnam National Foundation for Science and Technology Development (NAFOSTED) under grant number 505.99-2019.01.

Bao Ha Cong Anh, Doctor, Faculty of Law, Foreign Trade University; research areas: contract law, dispute resolution. E-mail: Baohca@ftu.edu.vn.

Yen Nguyen Thi Quynh, Ph.D. Candidate, Faculty of Law, Foreign Trade University; research areas: contract law, international business law. E-mail: yenntq@ftu.edu.vn.

¹ French Civil Code 2016, Article 1217

² UK Sale of Goods Act 1979, Article 11.

contract is the non-performance or improper performance of contractual obligations³.

However, due to the constant development of business practices, the form and nature of contractual breach become increasingly diversified, complex and go beyond the limit of the traditional theory of a contractual breach. Another form of breach of contract arises, known as Anticipatory Breach, which derives from England and has been recognized and regulated by the laws of many countries and by international regulations, such as the 1980 Vienna Convention on international sale of goods (CISG) or the Principles of International Commercial Contracts (PICC). Accordingly, when there are clear grounds prior to the date for performance of the contract that one party will not perform or cannot perform their obligations, the other party is entitled to avoid the contract and claim damages without having to wait until the due date of contractual performance.

The CISG was signed in Vienna in 1980 and has been adopted by 94 member states, including Vietnam⁴. This convention deals with Anticipatory Breach by a number of provisions encompassed in Articles 71, 72 and 73 of Chapter V. Technically, these articles shall be applied in situations where it becomes apparent or clear that a party to a contract will not or may not perform his obligations. In such situations, Article 71 provides a wider scope for anticipatory breach allowing the injured party to suspend the performance of his obligations. Article 72 aims to deal directly with anticipatory breach of contract which is fundamental, entitling the aggrieved party to declare a contract avoided if it is clear that the other party will commit a fundamental breach of contract. In the circumstance as provided in Article 72(2), the aggrieved party is required to give a reasonable notice of avoidance so as to permit the suspected breaching party to provide adequate assurance of his performance. Finally, Article 73 provides a special mechanism for anticipatory avoidance with regard to international sales contracts in which the delivery of goods is conducted by installments.

In Vietnam, contractual issues are generally governed by two main statutes, which are Civil Code and Commercial Law. Besides, there are specific regulations for specific type of contracts scattered in specialized laws. Over the past years, the laws on contracts in Vietnam has developed and adapted to international trend in contract law since the revision of the Civil Code in 2015, which is the original law regulating civil legal relations. This has introduced new rules on compensation agreements or hardship, nevertheless, remain silent on the issue of anticipatory avoidance. However, taking into account the fact that Vietnam became a member state of the CISG in 2017 as well as actual practice of signing and implementing contracts in this nation, Anticipatory Breach will be a burning issue for Vietnamese legislators in the economic integration context.

This paper will summarize the history of Anticipatory breach doctrine, examine the position of this doctrine under CISG as well as the recognition of this doctrine under Vietnamese contract law, then assess the way by which Vietnam's current legal system tackles Anticipatory breach situations. This study explores Vietnamese enterprises' views and reactions towards anticipatory breach by surveying 663 businesses as well as the opinions of Vietnamese legal scholars on this issue. Finally, the paper will provide some recommendations for Vietnamese law to harmonize its domestic law with international law on anticipatory breach.

2. Methodology

The objective of this paper is to point out the necessity of codifying Vietnamese law on anticipatory breach

³ Article 107 of the Chinese Contract Law 1999 stipulates that "if a party fails to perform its contractual obligations or performs improperly, it shall be held liable for the breach of the contract".

⁴ See the United Nations Commission on International Trade Law (UNCITRAL), at: https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg/status.

and propose suggestions to tackle anticipatory breach-related issues under Vietnamese law from CISG's approach. In order to satisfy the aim of this paper, the authors have adopted the following methodologies:

- The data collection and analysis method: This methodology is used throughout the content of the paper. Specifically, it is used to research and present different perspectives on anticipatory avoidance. Therefrom, the authors summarize and analyze these theories to gain an understanding of nature as well as actual application of anticipatory avoidance to give assessments, conclusions and proposals for the application of anticipatory avoidance in Vietnam.
- The method of merging theory and practice: The authors combine theories and practices of anticipatory avoidance in order to provide proposals for applying anticipatory avoidance in Vietnam.
- The systematic method: This methodology is applied in all sections of the paper to present issues and contents in a logical and appropriate order. There is connection, inheritance and development of issues contents to achieve the aims and objectives of this paper.
- The comparative method: This methodology is mainly used to analyze requirements for the application of CISG's provisions on anticipatory avoidance in practice in comparison with Vietnamese contract law.
- The case study method: This paper analyzes some typical disputes settled by courts and arbitral tribunals by applying CISG's provisions governing anticipatory avoidance, as well as some disputes relating to anticipatory breach settled by Vietnamese courts.
- The method of social investigation: The authors conduct a survey on 633 enterprises based in Hanoi and Ho Chi Minh city, the two most vibrant cities of Vietnam in terms of commercial practice, who engage in international commercial activities. This methodology enables the authors to assess solutions applied by Vietnamese enterprises to deal with the anticipatory breach, thereby propose suitable solutions based on the investigation results.

3. The History and Development of Anticipatory Breach Doctrine From Common Law Jurisdictions to CISG

The doctrine of Anticipatory Breach has its root in common law. It was first established in the United Kingdom (UK) in the leading case *Hochster v. De La Tour*.⁵ De La Tour concluded an agreement to employ Hochster to act as a courier and accompany him on a trip for a three-month period, commencing on 1 June 1852. However, on 11 May 1852, De la Tour repudiated the contract and informed Hochster that they would no longer need his service. Hochster then brought an action ten days prior to the commencement date of the contract, arguing that De la Tour's repudiation of promise was a breach of contract. The court held for Hochster, giving him a power to discharge the contract⁶ and claim for damages.⁷ Following Lord Campbell's viewpoint, the principle

⁵ *Hochster v De la Tour* (1853) 2 E & B 678, *Hochster* was not the first case holding that the injured party has an immediate right of action upon an Anticipatory Repudiation of contract. There were numerous early English cases before *Hochster* taking into consideration the straightway right of action against the promisor due to anticipatory breach. However, it is generally considered to be the foundation from which the doctrine originated, See: Keith A. Rowley, *A Brief History of Anticipatory Repudiation in American Contract Law*, 69 U. Cin. L. Rev. 565 (2001)

⁶ *Hochster v De la Tour* (1853) 2 E & B 678, Lord Campbell stated that "Instead of remaining idle and laying out money in preparations which must be useless, [the claimant] is at liberty to seek service under another employer, which would go in mitigation of the damages to which he would otherwise be entitled for a breach of the contract."

⁷ *Hochster v De la Tour* (1853) 2 E & B 678, as per Lord Campbell, "[t]he man who wrongfully renounces a contract into which he has deliberately entered cannot justly complain if he is immediately sued... by the man whom he has injured: and it seems reasonable to allow an option to the injured party, either to sue immediately, or to wait till the time when the act was to be done, still holding it

that the aggrieved party may bring an immediate action for damages upon an anticipatory breach of contract before the date for performance is due (Herbert R. Limburg, 1925). The decision in *Hochster* set a rule that confers the injured party the right to an immediate cause of action, prior to the time for performance of the contract, when he learns that the other party refused to fulfil its obligations (Liu Qiao, 2007, pp. 574-604). The doctrine announced in *Hochster* has eventually become the settled law in the UK regarding various types of contract, including contracts for services, for marriage⁸, for the manufacture and for sales of goods (Keith A. Rowley, 2001, p. 565).

However, the doctrine of Anticipatory Breach as well as the Court's ruling in *Hochster* has provoked considerable controversy, mostly related to the legal consequence of this doctrine. Some believe that this theory is illogical because a breach of contract is impossible to happen before the time of contractual performance and an anticipatory breach is not an actual breach (David W. Robertson, 1959, p. 121). Many scholars oppose this doctrine on the grounds that its application would be unfair to the party who is presumed to be in breach of an obligation, holding him liable for a breach of obligations which he has not been obliged to perform (David W. Robertson, 1959, p. 121). Another opinion also asserts that allowing the non-defaulting party to cancel the contract and claim damages before the date of contractual performance will make the calculation of damages become onerous as it requires the Courts to estimate the amount of damages for losses, which the plaintiff is about to suffer (David W. Robertson, 1959, p. 121). Despite conflicting views on the decision of *Hochster* case, this ruling has become a landmark case law for subsequent contractual disputes in the UK, and has been widely applied and developed in many common law jurisdictions as well as achieved the international recognition.

The 1980 CISG, since its inception, has quickly received worldwide recognition and attract participation from various states. Yet, it also drew heated debate on a number of contractual issues among its member states, one of which is the issue of anticipatory breach. The 1978 draft of CISG regarding anticipatory breach faced considerable opposition from representatives of Civil law countries owing to their unfamiliarity and criticism on this doctrine (M. Gilbey Strub, 1989, pp. 475-501). First, the doctrine was generally not recognized by civil law jurisdictions. Second, the doctrine of anticipatory breach tends to confer excessive power to the aggrieved party and lead to harsh results for the defaulting party. However, despite the objections, the delegates at the 1980 Vienna conference reached a compromise to lessen the possibility for abuse of anticipatory breach doctrine. The compromise draft submitted by an ad hoc Working Group⁹ eventually became the final draft of Articles 71 and 72 of the 1980 Convention.

4. The Recognition of Anticipatory Breach Under Vietnamese Law From CISG's Perspective

The concept of anticipatory breach:

Under Vietnam's contract law, there are 04 types of breach, including the breach of obligation, breach of contract, serious breach and fundamental breach. Among these four terms, both "serious breach" and

as prospectively binding for the exercise of this option, which may be advantageous to the innocent party, and cannot be prejudicial to the wrongdoer."

⁸ As from the effective date of the Law Reform (Miscellaneous Provisions) Act 1970, actions for breaching a promise of marriage have been abolished (see *Section 1(1) of the Act on Engagements to marry not enforceable at law.*)

⁹ The Working Group consisted of delegates from Argentina, Egypt, Finland, France, East and West Germany, Iraq, Mexico, Republic of Korea and the US.

“fundamental breach” refer to the degree or extent of the breach. The term “breach of obligation” is found in the Civil Code 2015, while Commercial Law 2015 adopts the term “breach of contract”. Despite the view that these two terms need to be distinguished, according to the practical application, they seem to have similar legal meaning and consequences. Both terms refer to situations in which a party fails to perform, or incompletely or improperly performs its obligations when the due date for contractual performance arrives. Contrastingly, the concept of anticipatory breach provided in Article 72 of the CISG mentions circumstances in which, prior to the specified date for performance of contract, it becomes evident that a party will not perform its obligations. Thus, the concept of anticipatory breach does not exist under Vietnam’s contract law.

Requirements to apply anticipatory avoidance:

Article 72 of the CISG entitles the non-defaulting party to avoid the contract, regardless of whether it is contract for delivery of goods by instalments or not, as long as two following conditions are met: (i) a breach by party becomes clear prior to the date for performance, and (ii) such breach shall be fundamental in nature. Therefore, the first condition concerns the degree of certainty that a breach of contract will occur and the second condition involves with the nature of the breach.

- i) *Degree of Certainty that a breach of contract will occur*: Although the wordings of Article 72 CISG does not specifically point out the degree of certainty required for the application of this provision, the probability of a future breach must be very high¹⁰. According to Chengwei, “a mere suspicion, even a well-founded one, is not sufficient”¹¹. One of the obvious instances to avoid contracts for anticipatory breach is when a party expressly declares that it will not perform its obligations. In the Sunflower seed case¹², it becomes clear that the seller would commit a fundamental breach of contract when it faxed the buyer its refusal to transport the goods prior to the date of delivery stipulated in the contract. As a result, it is undeniable that the aggrieved party (the buyer) was entitled to avoid the contract under Article 72(1) as the above statement of the seller clearly showed his intention not to perform his contractual obligations. Similarly, when the seller stated that he would “no longer feel obligated” to perform his obligations and would “sell the material elsewhere”, the buyer is entitled to avoid the contract¹³. However, in cases where the defaulting party does not make any announcement of his non-performance of obligations, the likelihood of a breach being committed must be objectively determined. Indeed, Mercedeh asserted in his study that the contract may not be avoided on the basis of subjective fear¹⁴. The innocent party must take into account all of the facts and circumstances of the case to make certain that a breach is going to occur. Case law on Article 72 indicates that the first condition will be met in the

¹⁰ As stated in the German case, the Landgericht, under art. 72 CISG, a very high degree of probability is required (“eine an Sicherheit grenzende Wahrscheinlichkeit”). See GERMANY LG Berlin, 52 S 247/94, *supra* note 23; see also GERMANY OLG Düsseldorf, 18 November 1993, 6 U228/92, available online at: <http://cisgw3.law.pace.edu/cases/931118g1.html>.

¹¹ Chengwei, *supra* note 11, §9.6.2; see also Commission on European Contract Law, Comment and Notes on PECL 9:304, in *Principles of European Contract Law: Parts I and II* 416, 417 (Ole Lando and Hugh Beale eds., Kluwer Law International 2000), available online at: <http://www.cisg.law.pace.edu/cisg/text/peclcomp72.html>.

¹² Court of Appeals of Lamia, Greece, 2006 (docket No. 63/2006), English translation available online at: <https://iicl.law.pace.edu/cisg/case/greece-2006-efetio-court-appeals>.

¹³ CLOUT case No. 417 [U.S. District Court, Northern District of Illinois, United States, 7 December 1999], English translation available online at: <https://iicl.law.pace.edu/cisg/case/united-states-state-minnesota-county-hennepin-district-court-fourth-judicial-district-39>.

¹⁴ Azeredo da Silveira Mercedeh, 2005, *Anticipatory Breach under UN Convention on Contracts for the International Sale of Goods*, available online at: <https://journals.aau.dk/index.php/NJCL/article/view/3046/2573>.

following circumstances: the buyer failed to pay for prior shipments¹⁵; the buyer failed to open a letter of credit¹⁶; the seller failed to reduce the price and to commit to deliver fashion goods on time¹⁷; the seller deliberately stopped delivering the goods¹⁸. Moreover, it is arguable that the failure to provide adequate assurance of performance on part of the obligor in accordance with Article 72(2) can be considered as a clear evidence that a breach will occur¹⁹.

ii) The nature of the suspected breach:

The second condition for the application of anticipatory avoidance in compliance with Art 72(2) is that the suspected breach must be fundamental. According to art. 25 CISG, *"a breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result."* Case law on this article shows that in international sale, a fundamental breach is committed in cases of non-delivery²⁰ of goods or non-payment²¹. Insolvency cases are also frequently held to constitute a fundamental breach²². However, the non-performance would not be fundamental if "only a minor part of the contract is finally not performed"²³. Therefore, Article 72 of the CISG would not apply in following cases: the buyer refused to pay one installment²⁴; the seller held back the goods²⁵.

The authors researched Vietnamese contract law to find if there is any provision similar to the principle of Anticipatory avoidance under Article 72 of the CISG, which can deal with cases of suspected non-performance. According to the Civil Code 2015,²⁶ a party who is required to perform its obligation first has the right to postpone the performance of his duty if he can prove that the other party's assets has substantially decreased in value in such a way that, the first obligation cannot be performed as promised. Given this provision, it can be understood that before the time for performance, if either party expresses an act of non-performance or clearly shows the evidence of its inability to perform the contract, the other party has the right to postpone performance of its obligations. However, the duration of such postponement must be limited and the innocent party must continue the contract until the suspected defaulting party (i) is able to perform its obligation or (ii) provides assurance of performance.²⁷

It can be considered that the postponement of performance of obligations is one of the measures to prevent damage and mitigate losses. It only allows the injured party to contemporarily suspend the contract in a certain

¹⁵ GERMANY OLG Düsseldorf, 17 U 146/93, supra note 135; GERMANY LG Berlin, 52 S 247/94, supra note 23.

¹⁶ AUSTRALIA Supreme Court of Queensland, supra note 136.

¹⁷ ICC award No. 8786, supra note 49.

¹⁸ SWITZERLAND ZHK Arbitral award No. 273/95, supra note 22.

¹⁹ Ibid. Also see Secretariat Commentary on article 63 of the 1978 Draft [draft counterpart of art. 72 CISG] § 2, available online at: <http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-72.html>.

²⁰ CLOUT case No.90 [Pretura circondariale di Parma, Italy, 24 November 1989]; CLOUT case no.136 [Oberlandesgericht Celle, Germany, 24 May 1995].

²¹ CLOUT case No.130 [Oberlandesgericht Düsseldorf, Germany, 14 January 1994]; CLOUT case no.468 [Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Russian Federation, 5 October 1998]; CLOUT case No.983 [China International Economic and Trade Arbitration Commission, People's Republic of China, 10 May 2005].

²² Australia Federal Court, Adelaide. 28 April 1995. CLOUT case No. 308, available online at: <http://cisgw3.law.pace.edu/cases/950428a2.html>.

²³ UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods 2016, p. 114.

²⁴ SWITZERLAND ZHK Arbitral award No. 273/95, supra note 22.

²⁵ SWITZERLAND Zivilgericht Saane, T 171/95, supra note 126.

²⁶ Article 411.1 Civil Code 2015.

²⁷ Article 411.2 Civil Code 2015.

period of time. Thus, when facing the risk of non-performance from the other side, the aggrieved party is authorized to postpone the contract performance. He, however, cannot avoid the contract and claim for damages. The question is whether the provision on postponement under the Civil Code 2015 can effectively solve the nature of the problem in such cases? The answer is more likely to be no. The problem was raised in a practical case settled at the People's Court of Hanoi²⁸, in which Ha Thanh Import-Export Company (the buyer) entered into a contract with a packaging and export company (the seller) for the supply of Kraft paper to produce cement bags on August 28, 2003. On April 15, 2004, the parties signed an Appendix to agree that the delivery would take place within 2 months from April 25, 2004. In preparation for the contract performance, the seller imported 310,712 tons of Kraft paper and then requested the buyer to take all the imported shipments. However, the buyer replied that it was impossible to consume that amount of papers within two months as specified in the contract appendix. On May 19, 2004, the seller signed another contract to sell the remaining amount of paper to another company. The buyer brought an action against the seller requesting the refund of the remaining deposit. The Court held that the seller's act of selling the remaining paper to another company was a breach of contract and the buyer was entitled to the deposit refunded.

Though the judgment in the above case is consistent with Vietnamese law, it seems to be unconvincing. In this case, the buyer has demonstrated in writing their failure to perform their obligation to receive the goods and sell out the goods within two months as promised. To some extent, the present case is relatively similar to what happened in CLOUT case No.417 mentioned above, in which the seller requested the buyer to issue a letter of credit, otherwise he would not perform his obligation and sell the goods to others. The application of Article 72 in the present case will enable the buyer to avoid the contract. However, the court in Ha Thanh case held an opposite judgment that the seller was in breach as he resolved this problem by way of selling the remaining amount of goods to another party in order to mitigate potential losses. Arguably, it is unfair and unreasonable not to allow a party to cancel or terminate the contract if it becomes certain that the other party will not perform its obligations. The seller should be authorized to avoid the contract with the buyer and by signing a contract with another one for selling out the remaining paper, the seller would minimize losses for both parties.

In another case brought to the People's Court of Tien Giang province (Phuoc Loc case),²⁹ two parties signed a contract for raising and distributing catfish within the period from January 1, 2017 to December 30, 2017 with a targeted quantity of 700 tons/year at the price of 28,000 VND/kg. On August 18, 2017, the buyer came to check the seller's preparation for delivery of catfish and discovered that the seller delivered the catfish to many other buyers and would cease to deliver the fish to the buyer since August 24, 2017. The seller also verbally declared the contract terminated due to the reduced market price at the agreed time of delivery. The buyer afterward had to buy catfish from another supplier to fulfill its obligations under a previous contract of sale of those fish with his business partner, therefore suffered a loss of VND 2.9 billion. The buyer filed a lawsuit against the seller claiming damages and reimbursement of the advanced amount of payment. In the first instance, the Court found in favor of the buyer, however, the Court of Appeals later held that the buyer's act was considered a breach of contract as the

²⁸ The case is popularly referred to in "*Vi Phạm Hợp Đồng Khi Chưa Đến Thời Hạn Thực Hiện Nghĩa Vụ (Anticipatory Breach) Và Sự Cần Thiết Điều Chính Bằng Pháp Luật*", available online at: <https://danluat.thuvienphapluat.vn/vi-pham-hop-dong-truoc-thoi-han-anticipatory-breach-80847.aspx>, accessed on 20 November 2019 (so as called "Ha Thanh case").

²⁹ Judgment No. 08/2019 / KDTM-PT dated 11/07/2019 regarding: "Contract of sale and purchase of goods and compensation for contractual damages" (so as called "Phuoc Loc case"), Bản án số 08/2019/KDTM-PT ngày 11/07/2019 v/v tranh chấp: "Hợp đồng mua bán hàng hóa và bồi thường thiệt hại hợp đồng".

buyer did not continue to perform the contract but signed a contract to buy fish from another buyer in the meantime. In addition, the original contract did not specify the exact amount of catfish delivered in each month or each quarter, but only stated 700 tons/year in total, thus there was no reasonable ground to impose responsibility on the seller to deliver the fish in August 2017. Therefore, the Appeal Court rejected the buyer's claim for damages in this case.

It can be seen that the decision of the Court of Appeals in Phuoc Loc case is not contrary to the stipulation of current Vietnamese contract law. In this case, the seller obviously sold out the available amount of fish to other parties while there was still his future obligation to deliver the same to the buyer. The relevant facts of Phuoc Loc case can satisfy two conditions imposed by Article 72 of the CISG. Indeed, in Phuoc Loc case, there are clear evidence that a future breach is committed and the suspected non-delivery is obviously an anticipatory fundamental breach. Therefore, should Article 72 be applied in Phuoc Loc case, the buyer would have been able to avoid the contract before the date of performance. However, the Court in Vietnam did not consider the case as a breach the contract because of the reason that the time for the seller's future performance had not been due. This is another indication of unfair treatment on part of the buyer in case of anticipatory breach as the buyer was not entitled to damages for the loss caused by the renunciation of the contract by the seller.

It is apparent that there is an inadequacy in the legal basis of the Vietnamese contract law to deal with Anticipatory Breach, compared to the laws of some other countries and the modern international instruments. If Vietnamese contract law contains provisions regulating the facts equivalent to anticipatory breach in the CISG, the above cases would be approached and resolved in another way and the injured parties could seek a more appropriate remedy. The buyer in Ha Thanh case would be held commit a breach when he expressed in writing their avoidance and the seller could have right to declare the contract avoided and take a prompt action to mitigate the losses. Likewise, the buyer in Phuoc Loc case could avoid the contract and claim for damages incurred upon the seller's anticipated non-performance.

Given the application of the current Vietnamese contract law when dealing with anticipatory breach situations, the law tends to prefer the occurrence of an actual breach while limiting the rights of avoidance of the injured party. In most cases (except the right to suspend the performance of the obligation as stipulated in the Civil Code 2015), the injured party must wait for the breach of the obligations to actually happen before declaring the contract avoided. Meanwhile, the Commercial Law 2005 sets out the obligations to mitigate losses.³⁰ The party claiming damages must apply the appropriate measures to mitigate losses caused by the breach. If he fails to do so, the breaching party may request a refund of damages to the extent of the loss that would have been mitigated. In the absence of express stipulations on anticipatory breach of contract, the injured party is unable to take a prompt action to mitigate the potential losses due to a breach which can be anticipated. In such situation, the losses may be more serious and this can be a waste of time for the injured party. The injured party therefore may be held by the court that he has not applied necessary measures to prevent or mitigate losses.

5. Actual Practice of Applying Anticipatory Breach by Vietnamese Enterprises

There have been only a few studies evaluating the practice of applying Anticipatory Breach doctrine of Vietnamese enterprises in reality, and there is no specific data related to this issue. Therefore, the authors have conducted the sociological survey method with a purpose of exploring the viewpoint of Vietnamese enterprises on

³⁰ Article 305 Commercial Law 2005.

Anticipatory Breach.

The authors have created a questionnaire based on the study of secondary data, via court judgments, experts' opinions and practical situations that already occurred. Subsequently, the authors questioned two businesses to evaluate the questionnaire and revised the questionnaire based on those review before sending to 1000 businesses from many industries and business fields in Vietnam. However, 633 businesses responded to the survey and gave the following results.

Despite not being stipulated under Vietnamese law, the issue of Anticipatory Breach has been faced by numerous enterprises. 153 businesses, accounting for 23.7% of enterprises participating in the survey, stated that they had encountered this problem.

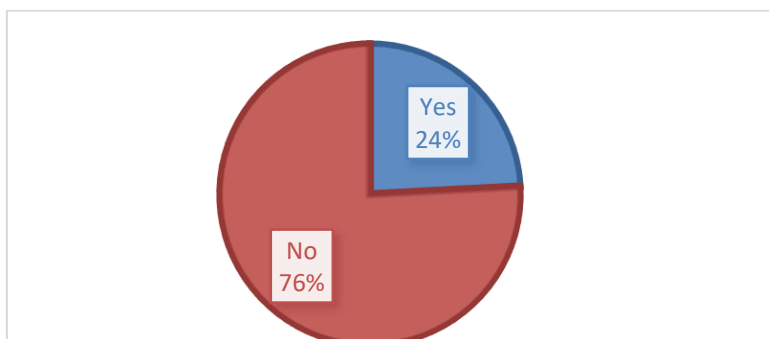


Figure 1 Number of Vietnamese Enterprises That Has Faced Anticipatory Breach

Sources: Survey results

In assessing Vietnamese businesses' reaction in the event of Anticipatory Breach, the survey showed that 237 enterprises would take no action but wait until the due time of performance of contracts, which means that these businesses comply with the regulations of Vietnamese law. Meanwhile, 81 enterprises chose to cancel contracts and claim damages; 195 businesses would do likewise and also find new partners to reduce the risks. There were 90 other choices of actions, in which some enterprises decided to negotiate with their business partners to seek a solution.

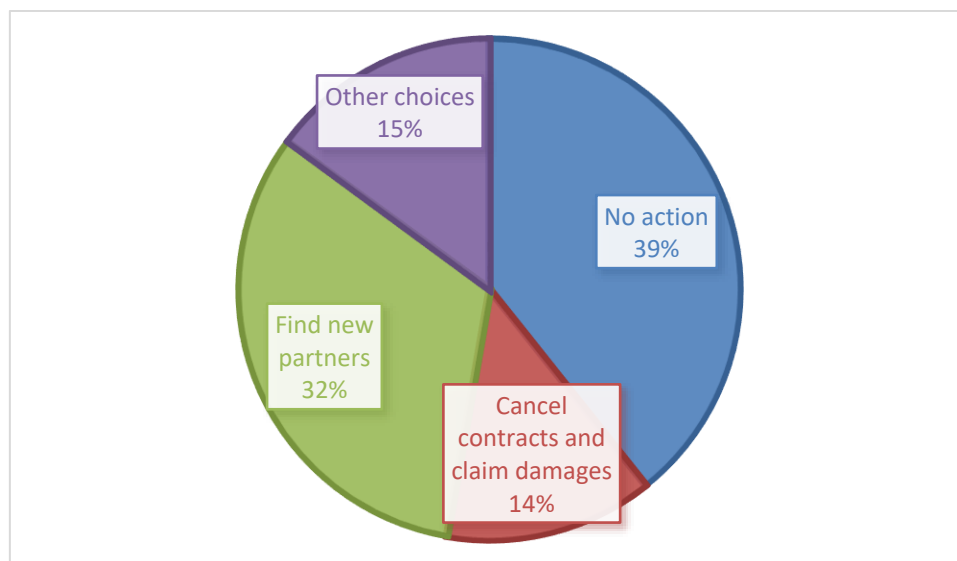


Figure 2 Vietnamese Enterprises' Reaction in the Event of Anticipatory Breach

Sources: Survey results

Among 153 enterprises who have already encountered Anticipatory Breach, 66 of them chose to wait until the time for performance of the other party's obligations was due. 24 enterprises cancelled the contract and claimed damages. 36 of them tried to solve the problem by negotiating with their partners apart from choosing to cancel contracts or claim damages. The result has suggested that many Vietnamese enterprises would decide to comply with CISG regulations rather than Vietnamese regulations on this matter, which shows that there exists the need for recognition and application of Anticipatory Breach in Vietnam.

With regard to factors affecting the certainty of partners' inability to fulfil their contractual obligations, 306 enterprises, which account for nearly half of survey respondents, claimed that if the obligor declares that he would not performance his obligations, the contract would be undoubtedly breached; while 276 enterprises indicated that the contract would be impossible to be carried out if their partners went bankrupt. 115 enterprises asserted that a breach of contract would become obvious if distinctive products which were subjects of contracts had been sold to third parties. 87 enterprises believed that sellers would be unable to supply and deliver the goods as undertaken due to crops failure. Enterprises participating in the survey also proposed a number of potential practical cases, the most common of which was the failure to contact obligors when the time for performance of their obligations approached, being considered as a signal of anticipatory breach.

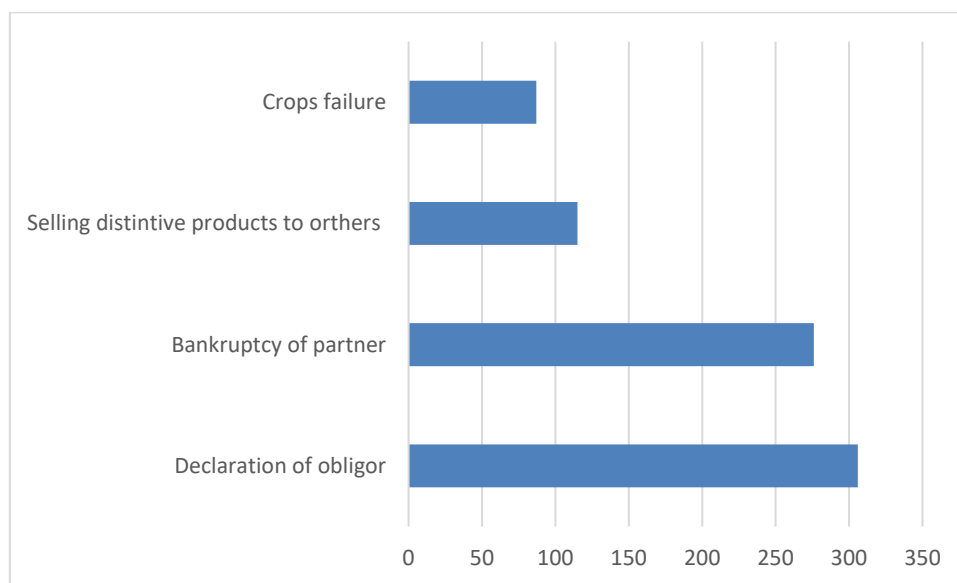


Figure 3 Cases of Anticipatory Breach in Practice

Sources: Survey results

Though the issue of Anticipatory Breach has not been mentioned under Vietnamese law, but according to the above conducted survey, 138 enterprises have incorporated this issue in their contracts, but only 85 of them have faced this in reality. This shows that some Vietnamese enterprises have taken action to prevent this kind of breach without confronting it before. In some contracts, businesses often include a penalty clause to limit risks of Anticipatory Breach cases, however the maximum level of penalty under Vietnamese Commercial Law 2005 is only 8% of the value of the breached contractual obligation portion; therefore, in many cases, injured parties' rights could not be fully protected because losses that they suffered were much greater than the penalty amount and also, their claims were not easily approved.

The result of the survey also shows a rise in awareness of Anticipatory Breach among various Vietnamese

enterprises. However, their attempts in addressing this problem seemed inconsistent, some of them knew to protect themselves by mentioning this issue in drafting contracts. This will be a vital basis for proposals on introducing and adopting the doctrine of Anticipatory Breach in Vietnam.

6. The Necessity of Codifying Vietnamese Law on Anticipatory Breach

The participation of Vietnam into CISG: Vietnam has been a member of CISG in 2015, from a legal perspective, this enables Vietnamese lawmakers to be more familiar with definition of anticipatory breach when The Law on Treaties clarifies that in cases where a treaty to which Vietnam is a party, contains different provisions on the same matter, the provisions of the treaty shall prevail, except the Constitution.³¹ Moreover, if the concept of anticipatory breach is not codified under Vietnamese law, it is likely to lead to controversies among courts and arbitral tribunals over the direct application of the CISG into international sale disputes. Even if the CISG is applied directly, the CISG's provisions on Anticipatory Breach are only applicable to international contracts of sale while there is a practical and urgent demand to apply the doctrine of Anticipatory Breach for Vietnamese domestic contracts.

The harmonization of international law is a basis for Vietnam to fill the loopholes in its domestic law. There have been significant improvements of Vietnamese law with regard to various contractual issues such as hardship,³² compensation agreement,³³. However, Vietnamese contract law still remain silent on the issue of anticipatory breach. In comparison with countries having commercial activities with Vietnam, either common law countries such as the UK, the United States or other civil law jurisdictions such as France (S. Whittaker, 1996), China, they all recognize and regulate provisions on Anticipatory Breach in their domestic laws. This can be considered as strong indication of the popularity and significance of this provision.

Practical needs of Vietnamese enterprises for applying Anticipatory Avoidance.

The findings of the enterprise survey revealed the fact that many enterprises had faced with the situation of Anticipatory Breach by their counterparts. This seems consistent with the reality in Vietnam; for instance, in disputes over contracts for the sale of goods or contracts for the sale of real estate. After entering into a contract to sell a house and before handing over the house, realizing that real estate market prices were rising rapidly, the house owner declared not to sell the house. Similarly, after signing a contract for the sale of goods and before the time of payment, the seller had sufficient grounds to believe that the buyer did not have financial capacity to perform his payment obligation under the contract ... In such cases, it is obvious that innocent parties would not desire to maintain the performance of the contracts, as it would lead to a waste of time, incurrence of opportunity costs as well as damage which arise from waiting until performance of obligations were due to cancel the contracts, therefore many businesses would decide to immediately terminate the contract and claim damages.

7. Suggestions for Vietnamese Legislation on Anticipatory Avoidance

The above analysis shows a lack of legal basis for applying the doctrine of anticipatory breach under Vietnamese law, compared to the laws of numerous countries in the world and CISG which adopted provisions covering this type of breach. Meanwhile, there is an increasing demand among Vietnamese enterprises for

³¹ Vietnam Law on Treaties 2016 regarding the relationship between treaties and provisions of domestic laws, Article 6.

³² Article 420, Civil Code 2015.

³³ Article 13, Civil Code 2015.

applying avoidance in cases of Anticipatory breach to immediately protect their rights. Therefore, it is suggested that Vietnamese contract law should recognize the anticipatory avoidance doctrine and govern anticipatory breach.

Firstly, the definition of anticipatory breach should be introduced in the provisions governing breach of civil obligations under Civil code and breach of contract under Commercial law. This is considered as a fundamental foundation for the application of provisions regarding remedies and legal consequences in dealing with anticipatory breach situations in Vietnam. The author proposes to supplement a definition of inability to perform obligations so the definition of breach of contract should be understood that one party is unable to perform, fails to perform or improperly perform its obligations within the time stipulated in the contract. Similarly, breach of contract under Commercial law should be defined as the failure to perform or inability to perform the contract, improper performance of one party according to agreement between parties or stipulations of Commercial law. The addition of the phrase “inability to perform” into the definition of breach of contract would enable a common understanding that there is no need to wait until the due time for performance stipulated in the contract to declare that a breach of contract has been committed.

Secondly, following the suggestion on introducing the definition of anticipatory breach, Vietnamese contract law should also supplement the remedy of anticipatory avoidance. If Vietnamese law recognizes the doctrine of anticipatory breach, it shall be appropriate to apply anticipatory avoidance under Vietnamese Civil code since Article 425 of Civil code 2015 governing Cancellation of the contract due to inability to perform³⁴ will cover avoidance of contract in case of inability to perform obligations. However, with respect to Commercial law, the authors propose to include a provision on anticipatory avoidance following the approach of Article 72 CISG. Not only will this provision facilitate a uniform application of anticipatory avoidance to both domestic and international contracts, it also avoids controversy over the direct or indirect application of the CISG in Vietnam.

Thirdly, there must be preconditions for applying anticipatory avoidance. Following the approach of Art 72 CISG, the first condition to apply avoidance in cases of anticipatory breach is the existence of a very high probability that a breach of contract will be committed. Besides, since avoidance is undoubtedly considered the most severe among remedies for breach of contract, both Vietnamese contract law and CISG have common stipulation that avoidance or cancellation of contract only applies to cases of actual fundamental breach. Therefore, a same strict requirement should be set out for the application of anticipatory avoid, the second condition is proposed that the anticipatory breach must be a fundamental one.

Fourthly, it is needed to establish procedure for applying anticipatory avoidance in order to avoid potential losses incurred by the suspected defaulting party. It should follow the approach of CISG Article 72, in which the party intending to declare the contract avoided must inform the other party of his intention in order to allow him to provide adequate assurance of his performance and prevent anticipatory avoidance of contract. The authors propose a specific provision on anticipatory avoidance as follows:

Article on Anticipatory Avoidance of Contract

1) A party is entitled to declare the contract avoided if prior to the date for performance, there is clear evidence that the other party will commit a fundamental breach of contract.

2) The party having intention to declare the contract avoided must give notice to the other party to permit him to provide adequate assurance of his performance, unless he has expressly stated that he will not perform obligations under the contract.

³⁴ Article 425 Civil Code 2015.

Finally, The Judges' Council of the Supreme People's Court must issue guidance and build up case law to facilitate the application of this remedy. To apply this remedy, the most difficult issue is to determine the probability of occurrence of a fundamental breach. To tackle this problem, there must be specific grounds for application by contractual parties. To explain CISG, it must rely on the Secretariat Commentary as well as system of case law constructed by its Contracting States. Therefore, it is suggested that the Judges' Council of the Supreme People's Court should enact specific guidance and introduce relevant cases to develop a legal basis for the application of this remedy.

References

- David W. Robertson (1959). "The doctrine of anticipatory breach of contract", *La. L. Rev.*, Vol. 20, p. 121.
- Gilbey Strub M. (1989). "The convention on the international sale of goods: Anticipatory repudiation provisions and developing countries", *The International and Comparative Law Quarterly*, Vol. 38, No. 3, pp. 475-501.
- Herbert R. Limburg (1925). "Anticipatory repudiation of contracts", *Cornell L. Rev.*, Vol. 10, p. 135, accessed on 9 November 2019, available online at: <http://scholarship.law.cornell.edu/clr/vol10/iss2/2>.
- Keith A. Rowley (2001). "A brief history of anticipatory repudiation in American Contract Law", *U. Cin. L. Rev.*, Vol. 69, p. 565.
- Liu Qiao (2007). "Inferring future breach: Towards a unifying test of anticipatory breach of contract", *Cambridge Law Journal*, Vol. 66, No. 3, pp. 574-604.
- Whittaker S. (1996). "How does French law deal with anticipatory breaches of contract?", *ICLQ*, Vol. 45, p. 662.