ANTICIPATORY BREACH OF CONTRACT

BY

MS. NIPAPORN MONPENGPINIJ

AN INDEPENDENT RESEARCH PAPER SUBMITTED IN
PARTIAL FULFILLMENT OF THE REQUIREMENTS
FOR THE DEGREE OF MASTER OF LAWS
(BUSINESS LAW)

GRADUATE SCHOOL OF LAW
ASSUMPTION UNIVERSITY

NOVEMBER 2007

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Independent Study Title	:	Anticipatory Breach of the Contract
Author	:	Ms. Nipaporn Monpengpinij
Major	:	Business Law (English Program)
Advisor	:	Assoc. Prof. Nattapong Posakabutra

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Degree	:	Master of Laws (Business Law)
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Advisor	:	Assoc. Prof. Nattapong Posakabutra

ABSTRACT

Nowadays, more business transactions have been arising, not only from domestic businesses but also through foreign investors who want to bring their money into Thailand.

For contract making both parties are entitled to an order for performance of its obligations due to the contract which they have made. In some cases, one of the parties will not perform his/her obligation(s) when performance is due. The problems can also be foreseen with certainty from the behavior of the other party that breaching of the contract will definitely occur. This circumstance is commonly known as "Anticipatory Breach" or "Anticipatory Repudiation".

"Anticipatory Breach" or "Anticipatory Repudiation" is not specified in the Civil and Commercial Code of Thailand. The law also does not give the authority to the innocent party to treat such repudiation as an immediate breach and claim for the damage.

Meanwhile, other legal systems have the concepts of Anticipatory Breach of the Contract, for example, the United Kingdom, the Uniform Commercial Code of the United States of America, the German Civil Law and the United Nations Convention on Contract for International Sale of Goods (CISG).

Hence, the Civil and Commercial Code of Thailand should consider providing Anticipatory Breach of Contract in the Thai Legal System to make the reliance for both

domestic and foreign investors. Therefore, if a dispute over a contract arises, the Law should give the innocent party the rights for immediately repudiating and the rights for the claim of such damage because if there is no such law for Anticipatory Breach or Anticipatory Repudiation, the innocent party's damage will become unlimited.

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TABLE OF CONTENT

Pages

Abstract iii

Acknowledgement iv

Table of Content v

Chapter 1 Introduction

1.1 Background and General Statement of the Problem 1
1.2 Hypothesis of the Research 2
1.3 Objectives of the Research 2
1.4 Research Methodology 2
1.5 Scope of the Research 3
1.6 Expectation of the Research 3

Chapter 2 Breach and Remedies for Breach under Thai Law

2.1 Definition of a Breach 4
2.2 Right of Rescission 5
2.3 Effect of Rescission of the Contract 5
2.4 Remedy for the Breach 6
2.5 Anticipatory Breach Based on Specific Provision Laws under Thai Law 7
2.5.1 Impossiblility of Performance 8
2.5.2 Law of Bill of Exchange 12

Pages

Chapter 3 Anticipatory Breach under Foreign Laws

3.1 Anticipatory Breach under United Kingdom Laws 18
3.2 Anticipatory Repudiation under Uniform Commercial Code of the United States of America 23
3.3 The Anticipatory Breach under German Civil Law 29
3.4 Anticipatory Non-Performance under United Nations Convention on Contracts for the International Sale of Goods (CISG) 31

Chapter 4 Analysis of the Problems

4.1 Economic Problems 35
4.2 Legal Problems 36

Chapter 5 Conclusion and Recommendations

5.1 Conclusion 38
5.2 Recommendations 39

Bibliography 41

Appendices

Appendix A The Civil and Commercial Law Code of Thai B.E. 2549 44
Appendix B Uniform Commercial Code of United States of America 49
Appendix C United Nations Convention on Contracts for the International Sale of Goods (CISG) 51
Appendix D German Civil law 53

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Chapter 1
Introduction

1.1 Background and General Statement of the Problems

The increasing Thai population inevitably results in an increasing number of businesses and business transactions. Each business is also involved with many types of contracts such as Sales contract, Lease, etc. In a contract, there are always at least two parties, each of which is required to perform his or her obligation(s). If one party has breached the contract, the other party may seek compensation from the breaching party.

However, when one party clearly intends not to or could not perform their contractual obligation(s) within the contractual period although that contractual period has not been completed, questions arise whether this party has in fact breached the contract or not. This circumstance may be found in any type of contract and is commonly termed "Anticipatory Breach" (or "breach by anticipatory repudiation" or "constructive breach"), which may be defined as "A breach of contract caused by a party's anticipatory repudiation, i.e. unequivocally indicating that the party will not perform when performance is due." Under these circumstances, the innocent party may elect to treat the repudiation as an immediate breach and sue for damages.[1]

Currently, there are no laws in Thailand that address Anticipatory Breach and allow the innocent party (i.e. damaged party) to repudiate the contract. If the contract cannot be repudiated at the time the anticipatory breach occurs and the innocent party is obligated to continue to perform the obligation as written in the contract, further damage may be faced by the innocent party. This is something the Thai Law should consider, as giving the permission to the innocent party to breach the contract may help in the future claim for damages. Because of the actions or behaviors of other party, the innocent party should have the right to ask for compensation even when the contract has not yet been breached.

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[1] Bryan A. Garner, Black's law Dictionary, 8th ed. (United States of America: West Publishing Co., 2004), p. 200.

1.2 Hypothesis of the Research

There is currently no law in Thailand to allow the innocent party to repudiate before the breach occurs (i.e. anticipatory repudiate[2]), this individual research aims to come up with recommendations for laws or regulations to account for such problems in Thailand. Such laws may be useful for many types of businesses in terms of repudiation of contract under the Civil and Commercial Code of Thailand. They can also help the innocent party in minimizing the damage or loss which may occur in the future.

1.3 Objectives of the Research

1. To study the concepts and theories of Anticipatory Breach of Contract.
2. To study the laws of foreign countries relating to Anticipatory Breach of Contract.
3. To analyze the problems of the Anticipatory Breach of the Contract.
4. To recommend the solutions to control the problems and protect the right for such parties.

1.4 Research Methodology

This research paper uses documentary research methodology. The researcher will study relevant text books, journals, articles and internet resources concerned with Breach and Remedies for Breach under Thai Law, Anticipatory Breach under the United Kingdom Law, Anticipatory Breach under the Uniform Commercial Code of the United States of America, Anticipatory Breach under German Civil Law, and Anticipatory Non-Performance under the United Nations Convention on Contracts For the International Sale of Goods.

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[2] Ibid., p.1330.

1.5 Scope of the Research

This independent research paper studies the problems of Anticipatory Breach of Contract by searching the research under related laws and making comparisons with the Thai Law and the laws of foreign country.

1.6 Expectation of the Research

1. To know the concepts and theories of Anticipatory Breach of Contract.
2. To understand the problem of Anticipatory Breach of Contract in Thailand.
3. To understand the law of foreign country.
4. To identify the solutions on controlling the problems of Anticipatory Breach of Contract in Thailand.

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Chapter 2

Breach and Remedies for Breach under Thai Law

2.1 Definition of a Breach

In the case of a contract, it cannot be extinguished unless that contract is already in existence and is a valid contract thus legal relations and obligations having been formed. When the obligation exists and the debtor has fully performed his obligation in accordance with the subject matter and the prescribed time, the obligation will automatically be extinguished without further need for consideration of what the obligation may affect. On the other hand, if the debtor has not performed his obligation or has performed it defectively, it is necessary to consider how the creditor may compel him to perform his obligation, or how the creditor can be compensated for the non-performance or the defective performance of the debtor, or how the creditor may have the right to property or claims of the debtor.

Due to the non-performance of the debtor, the creditor may automatically claim for compensation only in the case of maturity of the obligation. This also needs to consider the actual timing when the obligation is due or whether it is necessary for the creditor to remind the debtor before demanding performance of the obligations. The non-payment may be default on the part of the debtor or non-reminder on the part of the creditor. In addition, it should be considered the method by which the debtor is compelled to perform his obligation. In case that the creditor is not able to compel the debtor to perform the obligation directly, what options are available to the creditor? One must also consider the damage caused by the non-performance or the defective performance. Points of considerations above are all included in the effects of the obligations which are prescribed under section 203-225[3] of The Civil and Commercial Code of the Thailand[4].

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[3] The Thai Civil and Commercial Code B.E. 2549, section 203-225.

[4] Sopol Rattanagorn, The explanation of civil and commercial Code concerned with Obligation B.E. 2532 (Bangkok: Nittibannagarn Publishing Co., 2547), p. 87.

2.2 Right of Rescission

Rights of Rescission in accordance with the contractual agreements, as prescribed under section 386 paragraph 1[5] of The Civil and Commercial Code of Thailand, are straight-forward and very much depends on the intention of the contractual parties as to how to rescind the contract and when the contract is rescinded.

Rights of Rescission in accordance with the provisions of Law are as follows:

1. To rescind the contract when the breaching party failed to perform his obligation despite having the capability to do so, the innocent party must give notice to the breaching party to perform the obligation within a reasonable time. If the breaching party still fails to perform his obligation within the prescribed time, the innocent party may automatically terminate the contract under section 387[6] of The Civil and Commercial Code of Thailand
2. For a contract in which period of time in which the obligation must be performed is the essence of the contract and the breaching party failed to perform the obligation within the contractual period of time, the innocent party may automatically rescind the contract under section 388[7] of The Civil and Commercial Code of Thailand without giving any prior notice as stated under section 387 of The Civil and Commercial Code of Thailand.

2.3 Effect of Rescission of the Contract

When one party has completed exercising his legal rights to rescind the contract, the contract would be rescinded. Each party is bound to restore the other to his former condition. Of course, the restoration only applies to the contractual parties only. The Rights of Rescission do not prejudice the rights of the injured party to claim for

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[5] The Thai Civil and Commercial Code B.E. 2549, section 386 para 1.

[6] Ibid., section 387.

[7] Ibid., section 388.

damages, in accordance with section 391[8] of The Civil and Commercial Code of Thailand.

The duty of both parties after the rescission of the contract is to perform the obligation in order to restore the other party to the former condition (similar to a reciprocal contract). According to section 369[9] of The Civil and Commercial Code of Thailand, a party may refuse to perform his obligation until the other party performs or tenders performance of his obligation.

2.4 Remedy for the Breach

There are 2 types of Damages which are caused by the non-performance;

1. Nominal Damages means an important sum awarded when a legal injury is suffered but when there is no substantial loss or injury to be compensated. Nominal Damages are the damages which are provided in section 222 the first paragraph. It can usually occur and it is a common damage or the direct result from the non-performance. They are well-known damages because it normally occurs.

   On the other hand, any person may be concerned with the non-performance. For example, in the case of a seller who didn't hand over the goods which were due under the sale contract, the damages that a buyer can claim for is the higher price that the buyer has to pay for the goods from somewhere else including the expenses.

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[8] Ibid., section 391.

[9] Ibid., section 369.

2. Exemplary Damages means Damages awarded in addition to actual damages. When the defendant acted with recklessness, malice or deceit. Exemplary Damages are the damages which are provided in section 222 the second paragraph and are the damages for an unusual result for the non-performance The damages are unforeseen and don't normally happen, therefore, the debtor is not liable for this kind of damage because the damage cannot be foreseen even when the non-performance occurs.

However, if the debtor is concerned about the exceptional circumstance or ought to have known it, the debtor should be concerned with certainty that this exceptional damage can occur. When the debtor has failed to fulfill his obligation and the damages occurred, the creditor can claim for the compensation including the exemplary damages.[10]

According to the above law in general, there is no law which involves the Anticipatory Breach or the Anticipatory Repudiation. However, there are some matters, which are almost the same as the Anticipatory Breach or the Anticipatory Repudiation, which are provided in the specific provisions of the Civil and Commercial Code of Thailand. Therefore, it will be too complicated to apply with the general contracts.

2.5 Anticipatory Breach Based on Specific Provision Laws under Thai Law

The following provisions of the Civil and Commercial Code are the Law which approximates to the Anticipatory Breach but it is in the part of the specific Law. Therefore, when the dispute of Anticipatory Breach occurs, both parties cannot apply such law to solve their problems.

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[10] Jitti Tingspat, The Civil and Commercial Code Book 2 (Bangkok: Tammasat University Publishing Co., 2523), p. 427.

2.5.1 Impossibility of Performance

Impossibility of performance means the impossibility of carrying out a contract. For example, impossibilities of performance will occur when it relates to subject matter that does not exist. The event making fulfillment impossible may arise either before or after the contract is made. Impossibilities of performance have to be permanent and impossible in reality or maybe become entirely impossibilities.

Entirely impossibility means the whole performance is impossible to perform or impossible in some parts of the performance or impossible in the essential elements. These also include parts of performance, which the debtor can perform, become useless to the creditor or the debtor cannot perform in some parts that are not the essential elements. These also have the difference in legal results.

1. The Circumstance which causes the Impossibility of Performance

   Events or circumstances can cause the impossible performance and the Civil and Commercial Code of Thailand states, "the circumstances which make the performance become impossible." It may become impossible because things that are the subject of obligations lost or damaged in wholly or in the essential elements.

   In the instance the obligation is the ownership transfer or the real right establishment and such things had been legally transferred to someone else, therefore, it is the substance impossibility. In case of the employment contract which seems to be the privacy that the debtor has to perform the obligation.

   Impossibility arises when performance is impossible due to the destruction of the subject matter of the contract or the handicapped or the death of the person necessary for the performance of it;

performance is then excused and the contract duty terminated. Impossibility is an excuse for nonperformance of a contract where the promised performance has become illegal. These circumstances can cause the nonperformance and the performance becomes impossibile.

2. The Circumstance which causes the Impossibility of Performance and Act of God

Act of God means an event due to natural causes such as storms, earthquakes, floods, and a sudden illness or death of a person, act so exceptionally severe that no-one could reasonably be expected to anticipate or guard against it.

Act of God also means the appearance of the forces of nature which are unpredictable and difficult to anticipate; the result of the direct, immediate and exclusive operation of the forces of nature, uncontrolled or uninfluenced by the power of man and without human intervention, which is of such character that it could not have been prevented or avoided by foresight or discretion.

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"Act of God" comes from the French Law; "Force Majeure" which means the obstacles which cause the impossibility of performance such as unforeseeable, irresistible, unavoidable and insurmountable obstacles. Force Majeure is used particularly in commercial contracts to describe events possibly affecting the contract and that are completely outside the parties' control. Such events are normally listed in full to ensure their enforceability; they may include Acts of God, fires, and failure of suppliers or subcontractors to supply the supplier under the agreement, and strikes and other labor disputes that interfere with the supplier's performance of an agreement. This would normally excuse both delay and a total failure to perform the agreement.

2.5.1.1 The Effects of the Impossibility of Performance

For the subjective impossibility, if it is the initially impossibility, it assumes that the debtor is liable without having in mind about the debtor's fault because the debtor has confirmed to fulfill such impossible performance. If it is the subsequent impossibility, the debtor is liable when such impossibility is caused by the debtor himself. If it is not the debtor's fault, so the debtor is not liable.

On the other hand, for the initially impossibility, if it is the conditional impossibility which normally the contract is void, no one is liable. But if it is the subjective impossibility, the debtor is always liable. For the subsequent impossibility, it is not necessary to consider about the subjective or objective because the debtor will be liable only when such impossibility is caused by the debtor. If the debtor is liable, the debtor has to pay for the damages. Besides, if the debtor is not liable, he will relieve from such performance and does not have to pay for anything.

According to The Civil and Commercial Code, the impossibility of performance refers to the conditional impossibility. If it is the initial impossibility, the objective of the juristic act will become impossible. The contract is void in accordance with section 113[11]; therefore, there is non-existence of such obligation.

[11] The Thai Civil and Commercial Code of Thailand B.E. 2549, section.113.

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If it is the subsequent impossibility, which is called "The impossibility of performance", the debtor is discharged from the obligation but there are some damages that occurred, and then it has to take into consideration that who will be liable for such impossibility of performance. The consideration is divided into 2 cases; the general case and the mutuality of obligation case.

1. In general case

   The general principles say that when the performance becomes impossible, the creditor cannot demand performance of the obligation from the debtor according to the principle of the Impossibilium nulia obligation. However, the impossibility of performance does not always make the obligation extinguished and does not mean the debtor is completely discharged from the liability. Whether, the debtor is liable or not, it depends on the circumstances which how the performance becomes impossible. If it is caused by the debtor's fault, the debtor is liable in accordance with the above principle of the debtor liability.

   Circumstances which the debtor is not liable.

   If the performance becomes impossible because of the circumstance which the debtor is not liable, the debtor is discharged from such performance (section 219)[12]. Besides, the creditor does not receive the performance and also cannot claim for any damages from the debtor,

[12] Ibid., section 219.

unless, there is the mutual agreement that says that the debtor will be liable.

2.5.1.2 Circumstances which the debtor is liable

If the performance becomes impossible because of the circumstance which the debtor is liable, even the creditor cannot force the debtor to perform the obligation, the creditor still has the rights to claim for such damages from the debtor (section 217[13], 218[14] the first paragraph). If some parts of performance become impossible, the creditor can still receive the performance which is possible and also can claim for the damages.

And if the possible performance is useless for the creditor, the creditor can also refuse the acceptance of such performance and claim for the damages as same as in the impossibility of performance case (section 218 the second paragraph) or the creditor can also terminate such contract (section 389[15]).[16]

2.5.2 Law of Bill of Exchange

According to the provision of section 959[17] of this code, there is a law of bill of bill of exchange which give right to creditor to terminate contract and claim remedy before the bill of exchange is due.

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[13] Ibid., section 217.

[14] Ibid., section 218.

[15] Ibid., section 389.

[16] Sopol Rattanagorn, op.cit., p. 99,100,103,105, 106.

[17] The Thai Civil and Commercial Code of Thailand B.E. 2549, section 959.

According to section 959, which is applicable holder of any type of bill may exercise a right of recourse against the secondary debtors or the other persons who put a signature upon a bill, except the acceptor of a bill of exchange, a maker of a promissory note and a bank acceptor of a cheque, the holder may have a right of recourse in 2 cases.

1. At maturity, if payment has not been made;
2. Before maturity.

1) At maturity, if payment has not been made

A holder may have a right to take recourse when a drawer or an acceptor does not pay for the payment when it is at maturity and the holder has presented it correctly.

For such case, the holder needs to make a protest when it is required. The reason that the holder has to present the bill and make the protest is because in section 914[18] has provided that the holder may have the right to demand for the liability of a drawer or an indorser when the bill is rightfully presented and there is no acceptor or a non-payment.

At maturity refers to;

(1) For bill of exchange and promissory note, the day of maturity is in accordance with section 913[19], in corroboration of section 909 (4)[20] and section 983 (3)[21]

(2) For cheque, it is a written instrument which a drawer orders a bank to pay on demand a sum of money to a

[18] Ibid., section, 914.

[19] Ibid., section. 913.

[20] Ibid., section 909 para 4.

[21] Ibid., section 983 para 3.

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payee and according to section 987[22] which provided that the cheque must contain the date that it is issued due to section 988(6)[23] Therefore, if the day of maturity of bills is liquidated according to the calendar and the debtor does not perform his obligation when such time arrives, he will be immediately in default of payment without any notice and the holder may have the right to take immediate action for recourse against the person who is liable for such circumstance.

In case of a drawee of a bill, if he has accepted a bill, he may become primary debtor in accordance with section 937[24]. Then, at maturity, the payment has not been made so an acceptor is immediately liable and therefore, a holder may directly sue the drawee as the acceptor of such bill. This is not the right to recourse as the above provisions. (Judgment of Deega No. 1222/2517)

A maker of a promissory note is deemed to perform such payment without any conditions according to section 983(2)[25] and section 986[26] which enforce the maker to be in the same status as the acceptor of the bill. Therefore, the maker of the promissory note is also the primary debtor.

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[22] Ibid., section 987.

[23] Ibid., section 988 para 6.

[24] Ibid., section 937.

[25] Ibid., section 983 para 2.

[26] Ibid., section 986.

For a cheque, if a banker has already accepted a cheque, the banker will be bound to such cheque as the primary debtor in accordance with section 993[27], which is not in the same case as the right to recourse.

The right of recourse may occur when a bill becomes due and it is denied to perform the payment. Even the bill does not become due; there is still the right to recourse. For example, in case of the drawer's account has been closed, the cheque holder might not bring the cheque to demand a sum of money from the bank, the cheque holder may have a right to sue the drawer immediately without any notice. (Judgment of Deega No. 1856/2517, No. 1416/2521 and No. 169/2528)

In case the cheque holder has demanded a sum of money from the bank one day earlier of maturity, then, the bank has refused to pay for the payment. Therefore, the drawer is liable for such performance according to such cheque. (Judgment of Deega No. 2847/2522) But in this case it can not apply with the Act of offence relating to a payment of cheque, which is the criminal case. This means the cheque holder cannot demand the sum of money before maturity. If the holder acts in such manner and the bank has refused to perform such payment due to the drawer's closed account, it is not deemed to be the non-payment at maturity. Therefore, the drawer is not liable for the criminal offence. (Judgment of Deega No. 1261/2526)

[27] Ibid., section 993.

2) Before maturity

Bills with maturity are bills of exchange and promissory notes. For the cheque, a banker is bound to pay on demand a sum of money to the holder. Therefore, since the date of issuing the cheque, the holder has a right to demand for the payment but the holder cannot demand for such payment before maturity. It is deemed that the cheque does not become due until the date of maturity

The holder may have a right to recourse when;

(1) The drawee has refused to accept such bill.

(2) The drawee has become bankrupt which causes the holder to be unable to receive such payment. "Become bankrupt" means the state of a person who has been adjudged by a court to be bankrupt. The court orders the compulsory administration of a bankrupt's affairs so that his assets can be fairly distributed among his creditors. His property will be peremptory or temporary taken care of by the court.

(3) The drawer of a bill which need not be accepted has become bankrupt.

According to (2), a holder needs to make a protest under section 960[28] the fifth paragraph before exercising the right of recourse.

According to (3), a holder has the court judgment which commands the drawer to become bankrupt in

[28] Ibid., section 960.

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exercising the right of recourse under section 960 (6)[29] without making any protest.

For example, the first defendant's bank account has been closed before maturity of the disputed cheque, the plaintiff takes it to the bank and demand for the payment before maturity but the banker has refused such performance. Therefore, the plaintiff can exercise the right of recourse against the giver of aval (the second defendant) without giving notice under section 959[30] and 989[31]. (Judgment of Deega No. 3971/2526)[32]

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[29] Ibid., section 960 para 6.

[30] Ibid., section 959.

[31] Ibid., section 989.

[32] Wichai Tuntikulanant, The explanation of the Civil and Commercial Code B.E. 2545 concerned with Bills (Bangkok: Pimauksorn, 2545), pp.181-183.

Chapter 3

Anticipatory Breach under Foreign Laws

3.1 Anticipatory Breach under the Law of the United Kingdom

It sometimes happens that, before the time fixed for performance under the contract, one party informs the other that he will not or cannot perform his obligations consistent with the terms of the contract. This is known as an anticipatory breach of the contract. What is the effect in law of an anticipatory breach of contract? One response would be to say that it has no effect at all. The time for performance has not yet arisen and one cannot be in breach of contract prior to the time for performance. But such a view presents difficulties for both parties. As far as the innocent party is concerned it leaves him in a state of some uncertainty. Will he receive the promised performance? Should he seek alternative performance elsewhere? The party who has committed the anticipatory breach also has an interest in effect being given to his renunciation. One reason why a party who is unable to perform may inform the other party prior to the time for performance is that he wishes to give the other party the opportunity to find alternative performance elsewhere. The effect of advance notice may well be to reduce the losses of the innocent party and the non-performing party has an obvious interest in reducing his potential exposure to a damages claim. The alternative response is to regard the intimation of the refusal to perform in accordance with the terms of the contract as a breach of contract which immediately gives the innocent party access to the usual array of remedies for breach.[33]

This rule was established in *Hochester v De la Tour*

Hochster v. De La Tour
Queen's Bench 1853

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[33] Ewan Mcken Drick , Contract Law Text, cases and materials (London: Oxford University Press, 2003), p. 975.

Parties:

Plaintiff = courier hired by defendant

Defendant = hired plaintiff to accompany him on a trip

Facts:

The Plaintiff was hired in April 1852 to accompany the D on a tour beginning June 1st.

May 11th—Defendant wrote to the Plaintiff stating that he had changed his mind and no longer wanted P's services; there was no compensation for the cancellation.

May 22nd— Plaintiff brought suit

Sometimes between May 22nd and June 1st, Lord Ashburton hired the plaintiff under equally good terms (as the contract with the defendant), with the trip beginning on July 4.th

Procedural History:

Judge reserved leave to enter a non-suit (no decision on the merits) on issue whether the breach can occur on June 1.st

The jury found for the Plaintiff on the other questions

Terms:

Repudiation of a contract = unequivocal declaration before performance is due that performance will not be made.

Anticipatory = after contract formation, but before performance is due.

Issue:

If A (employee) and B (employer) enter into an agreement & B breaks the agreement before the start of performance, whether A can immediately sue for damages for breach if ready & willing to perform?

Holding:

YES— Plaintiff does not have to wait until performance is due if the Defendant has unequivocally renounced the contract; Plaintiff can sue anytime after the renouncement.

Discussion:

This case:

Defendant claims that the Plaintiff must stay ready & willing to perform even after the May 11th letter; Defendant claims that there can be no breach until June 1.st

Defendant claims are based on an implied condition to keep the contract open Plaintiff detrimentally relied on the renunciation by the Defendant (detrimental reliance/ estoppel).

Generally:

Universal rule: A party can usually bring suit before the performance is due in cases of unilateral renunciation with reliance.

Examples: breaches before performance is due that hold instant liability:

a. a. Promises to marry (engagements)
b. b. Leases of same land to 2 different parties
c. c. Sale of same items to 2 different parties

Reasoning for rule:

a. a. EITHER: Defendant rendered it impossible for him to perform the contract on the performance date (words or actions); OR
b. b. The relationship established between formation and performance of the contract has been prejudiced by Defendant actions

Plaintiff must prove either that Defendant renounced the contract OR Defendant did some act to render the contract impossible

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Court's Decision:
Rational to assume that after renunciation, Plaintiff is at liberty to consider himself free from performance.

Plaintiff keeps his rights to sue for damages for breach.

Plaintiff can seek other employment which acts to mitigate the damages.

Defendant has no right to change his mind after he unilaterally renounces when Plaintiff relied on the renunciation.

To make Plaintiff wait until the date of performance to seek other employment is unfair since Plaintiff knows the contract has been renounced.

Plaintiff Options:
Can either sue immediately; OR
Wait until June 1.st

Rule:
When there has been anticipatory repudiation of a contract, it is not necessary to wait for the date of performance to sue. The renunciation is binding when the other party detrimentally relies on the renunciation.[34]

Where the defendant had agreed to employ the plaintiff they were able to claim damages at once; he did not have to wait until June 1 before beginning his action. The main reason for the decision was that "if the plaintiff has no remedy for breach of contract unless he treats the contract as in force and acts upon it down to the 1st of June 1852, it follows that, till then, he must enter into no employment". This reasoning has been justly criticized, for the court could have held that the defendant's repudiation gave the plaintiff *the option*

[34] Hochester V., De la tour, in http://www.law.unlv.edu/faculty/bam/k2001/briefs/hochster.html, access date September 28, 2007.

to rescind at once but did not *entitle him to damages* until June 1: there is no necessary connection between these two consequences of the repudiation.

Where the interval between repudiation and the time fixed for performance is a long one, there are also practical objections to the rule in *Hochster v De la Tour,* and these are particularly strong where the trial takes place well before the time fixed for performance. One such objection is that the rule may lead to a wrong quantification of damages. If a seller of goods to be delivered in three years' time repudiates and the buyer claims damage at one, the quantification of those damages may depend on the market price at the time fixed for delivery, but if the case is tried before that time the court can only guess what that price will be. Another objection to the rule is that it results in an acceleration of the defendant's obligation; he will have to pay damages now, even though under the contract he was not to perform until some future time. Thus if a debtor repudiates liability to repay future installments of a debt, the creditor can claim damages at once, even though the installments, or some of them, are not payable until a future day.[35] Of course in assessing those damages the court will allow the debtor "a discount for accelerated payment".[36] Even more strikingly, the defendant will have to pay damages at once although at the time of the action his liability is still contingent and might never mature at all. Thus damages have been recovered for anticipatory breach of a husband's promise to make a will leaving a life interest in property to his wife, although it was uncertain at the time of the action whether the wife would survive the husband.[37]

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[35] In the US, the doctrine of anticipatory breach does not apply in this situation; see Williston Contracts (3rd ed.), §1326; Restatement 2d, Contracts, §962; and it seems that it would not be followed in England; see next note. There is some support for the American rule in Canada nad Australia: see Melanson v Dominion of Canada General Ins Co [1934] 2 D.L.R. 459; MacKenzie v Rees (1941) 65 C.L.R. 1 at 16-18; Progressive Mailing House Pty Ltd v Tabali Pty Ltd (1985) A.L.J.R. 373 at 385.

[36] Lep Air Sevices Ltd v Rolloswin Investments Ltd [1973] A.C. 331 at 356; Re Park Air Services [1991] 1 All E.R. 673 at 676.

[37] Synge v Synge [1894] 1 Q.B. 466; cf. Frost v Knight (1872) L.R. 7 Ex. 111. The actual decision in the later case has been made obsolete by Law Reform (Miscellaneous Provisions) Act 1970, s.l; but quaere whether it could still govern the time at which an order under s. 2 could be made: cf. above, p. 440

In spite of these objections, the rule in *Hochster v De la Tour* is well established and at least two points can be made in its favour. First, the rule may help to minimize loss. In a case like *Hochster v De la Tour,* the injured party might in fact be more likely (whether or not he was *bound*) to keep himself ready to perform if he had no right to sue at once. The rule giving him that right provides at any rate some incentive for him to abandon the contract, and so to avoid this extra loss. Secondly, the rule may sometimes be necessary to protect the injured party: for example, if he has paid in advance for a promise of future performance which is then repudiated. In such a case the injured party could be seriously prejudiced if he had no claim against the other party until the time fixed for performance had arrived; for, having made the advance payment, he might lack the means to procure a substitute contract.

Acceptance of the breach affects not only the claimant's entitlement to damages, but also the way in which those damages are assessed.[38]

3.2 Anticipatory Repudiation under the Uniform Commercial Code of the United States of America

The Uniform Commercial Code (UCC), a body of law governing commercial transactions by the United States, provides in Section 2-609 and 610.

According to the below case you can see an application of Section 609-610 because the Uniform Commercial Code is in the term of Common Law.

Fact: Transit Authority (TA) was building a rail system but stopped work before the project was finished, resulting in the city of FairFax suing for breach of contract. City brought action against transit authority created by interstate compact and other government entities participating in construction of rail transit system for breach of contract governing construction of transit system. The United States District Court for the Eastern District of Virginia found that defendants had breached the contract

[38] Guenter Treitel, The Law of Contract, 11th ed. (London: Thomson, 1995), pp. 859-860.

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and assessed monetary damages in favor of plaintiff, and defendants appealed. The Court of Appeals, held that: (1) evidence did not support finding that defendants, by enacting interim agreement permitting change in schedule forconstruction of transit system, had unequivocally repudiated or abandoned that which was real object of plaintiff city in joining in execution of original capital contributions agreement, or had made it impossible for themselves to perform their obligations under original agreement, and thus finding that defendants had committed anticipatory breach for which plaintiff city could recover monetary damages was error, and (2) partial breach of original capital contribution agreement represented by failure of defendants to conform to two subsidiary provisions of agreement was not so substantial and material as to warrant recovery of monetary damages by plaintiff city under doctrine of anticipatory repudiation.

Reason: The District Court ruled that the Transit Authority was not in breach. However the Appeal Courts reversed the district court and said their stoppage of work constituted an anticipatory breach of contract.[39]

Essential element of doctrine of anticipatory breach is that breach in questionmust be a repudiation of the very essence of contract; it cannot consist of a mere partial breach, nor can it be based on mere delay unless contract itselfmakes time of the very essence In order to give rise to anticipatory breach which will support action for breach of contract, breach must be so material and substantial in nature that it affectsthe very essence of the contract and serves to defeat object of the parties; it must be a refusal to perform of the whole contract or of a covenant going to the whole consideration; and it must be of such substantial character as to defeat object of parties in making contracts.Repudiation, to engage doctrine of anticipatory breach, Though it must be unconditional and total, need not be express or dependent on spoken works alone; it may rest on defendant's conduct evidencing a clear intention

[39] City of Fairfax , Virginia, Plaintiff, Washington Metropolitan Area Transit Authority et al., Defendant (nine case), (Cite as: 582 F.2d1321).

to refuse performance in the future, such as placing himself in position in which performance would be impossible.

Therefore, anticipatory repudiation entails the right of one party to a contract to sue for breach before the performance date when the other party communicates the intention not to perform. In accordance with UCC 2-611, the repudiation can, however, be retracted before the performance date if the non-repudiating party has not acted on the basis of the repudiation. Some jurisdictions direct the injured party to await the performance date before instituting an action.

UCC 2-609(1) provides that a contract for sale "imposes an obligation on each party that the other's expectation of receiving due performance will not be impaired." This obligation is breached when one party gives the other "reasonable grounds for insecurity" with regard to the promised performance. At this point, the aggrieved party "may in writing demand adequate assurance of due performance and until he receives such assurance may if commercially reasonable suspend any performance for which he has not already received the agreed return." Comment 2 to UCC 2-609 stresses that the right to suspend performance includes "any preparation therefore." If the other party, upon receipt of a "justified" demand, fails "to provide within a reasonable time not exceeding thirty days such assurance of due performance as is adequate under the circumstances of the particular case," it has repudiated the contract and the aggrieved party may take appropriate remedial action, including cancellation. Between merchants, the reasonableness of grounds for insecurity and adequacy of any assurance offered "shall be determined according to commercial standards." UCC 2-609(2). Thus, an aggrieved party may suspend his performance even thought the other party's conduct is short of breach or repudiation but the aggrieved party cannot cancel the contract until the mandatory communication procedure fails to produce "adequate assurance." In this process, a high incidence of consensual adjustment and continued performance is likely, particularly when the generality of the standards in UCC 2-609 is taken into account. On the other hand, if adjustment does not occur and one party has suspended his performance or cancelled the contract, the other may claim that such action was not justified. Within this framework, courts and lawyers

will have to give some content to the phrases "reasonable grounds for insecurity" and "adequate assurance of due performance."

Suppose that under a written contract for the sale of goods the seller is to deliver in a single lot on March 1 and the buyer is to pay the full contract price on April 1. The buyer's basic obligation here is to accept and pay for the goods in accordance with the contract, UCC 2-301, and it is in this regard that grounds for insecurity may arise. Except insofar as the seller has rights under UCC 2-702(2), however, once the buyer has accepted the seller's tender of delivery, the seller can reduce any insecurity he feels about subsequent payment of the price only by exercising rights he may have under an Article 9 security interest-rights he may not have. As a practical matter, UCC 2-609 itself affords little protection to a seller who has fully performed his obligation before the alleged ground for insecurity arises.

Before delivery, however, UCC 2-609 is available and in some cases this availability is spelled out with precision for both seller and buyer alike. See UCC 2-210(5) and UCC 2-611(2). From the seller's point of view, two situations are described which justify protective action. When, in an installment contract, the buyer's default in past due payments is not sufficient to justify a cancellation, the seller may withhold delivery of goods then due until payment for past deliveries is received. UCC 2-612(3), Comment 7. When the seller, in a credit transaction, discovers the buyer to be insolvent (as defined in UCC 1-201(23)), he may "refuse delivery except for cash including payment for all goods theretofore delivered under the contract, and stop delivery" under UCC 2-705. This latter remedy finds firm support in §§ 53(1)(a) and 54(1) of the Uniform Sales Act and in prior case law. See, e.g., Leopold v. Rock-Ola Mfg. Corporation, 109 F.2d 611 (5th Cir.1940). However, it has been held that insolvency alone does not justify cancellation of the contract. Keppelon v. W.M. Ritter Flooring Corp., 97 N.J.L. 200, 116 A. 491 (1922)

Short of the situations noted above, exactly what constitutes either reasonable grounds for insecurity or adequate assurance of due performance is less clear.

Suppose Seller and Buyer are in a long-term contract and the market price has plummeted well below the contract price. There are no re-determination clauses in the contract and Seller has refused to negotiate over a price adjustment. The prospects for relief under UCC 2-615(a) or any theory are very slim. Is there any alternative for Buyer other than to perform and take the loss or to breach and take a judgment for damages?

One possibility is to invoke UCC 2-609. But Buyer cannot demand adequate assurance of due performance from Seller unless "reasonable grounds for insecurity" have arisen. UCC 2-609(1). This is unlikely in a falling market, since Seller will probably have both the capacity and incentive to perform. Such a demand is also perverse, since Buyer's true objective is to avoid rather than to secure Seller's performance. Thus, unless Buyer can show objective circumstances generating the insecurity, the use of UCC 2-609(1) is doomed to failure. See, e.g., Universal Resource Corp. v. Panhandle Eastern Pipe Line Co., 813 F.2d 77 (5th Cir. 1987), rehearing denied, 821 F.2d 831 (8th Cir. 1987), where Buyer had no reasonable grounds and, even so, demanded more by way of assurance than Seller was obligated to provide.

Another possibility for Buyer is to find an interpretation question in the contract and state to Seller that there will be no further performance until the interpretation question is resolved by a court. Buyer may also seek a declaratory judgment and should make it clear to Seller that Buyer will perform the contract in full in accordance with the court's interpretation. Will this provide Buyer with a "safe harbor" until the dispute is resolved?

The answer should be no if there is not a good faith dispute. The courts will have little sympathy if Buyer has manufactured the dispute in an effort to avoid the contract. Even if there is a good faith dispute, UCC -610 does not say whether this communication is repudiation. There is some risk that a court will conclude that Buyer's qualified statement that it will not perform until the good faith dispute is resolved but then will perform in full is repudiation. See Record Club of America v.

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United Artists Records, 643 F.Supp. 925 (S.D.N.Y. 1986), holding that the qualified statement was not a repudiation.

One solution is to provide a narrow definition of actionable repudiation in the revised Article 2. This would protect Buyer's qualified repudiation and provide a safe-harbor where there is a good faith dispute. In addition, a narrow definition would reduce uncertainty, tend toward preserving the contract and facilitate communication between the parties. But as one commentator has observed, this revision would simply shift the problem from UCC 2-610 back to UCC 2-609, with its open ended phrases.

The question, then, is whether UCC 2-609 needs a revision for more predictability and certainty and, if so, exactly what should the revision be? For example, if Buyer's qualified statement is not a repudiation under a revised UCC 2-610, does it give "reasonable grounds for insecurity" under 2-609(1)? If so, does Buyer give "adequate assurance" if it states that the contract will be fully performed as interpreted by the court? One would hope so, but if a court, in its discretion, concludes not, then conduct which is not repudiation under UCC 2-610 becomes repudiation under UCC 2-609(4). Obviously, that is a result to be avoided.[40]

3.3 Anticipatory Breach under German Civil Law

German civil law does not have anticipatory breach or anticipatory repudiation but they have a similar law like Anticipatory Breach under the German Civil Code (Bürgerliches Gesetzbuch or BGB), a judge who is faced with a breach of contract must put it in one of two legal categories: either it is a case of *impossibility* of performance—(the Code of Obligations speaks of 'Ausbleigen der Erfullung')—or it is a case of *delay*. It has to be said that this dichotomy is misconceived. A debtor is of

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[40] Richard E. Speidel, Robert S. Summers, James J. Whit , Sale Teaching Materials 5th Edition, 5th ed. (United State of America: West Publishing Co., 1993), pp. 325-330.

the end of the matter. He may in addition have further obligations arising from the contract, failure to perform which cannot be categorized either as 'impossibility of performance' or as 'delay'; in such cases the courts have for long been holding that he is liable on the ground of 'positive breach of contract', unfortunate though the name is. If, contrary to his promise, a vendor supplies a third party with similar goods, or if a site-owner fails to give the necessary details to the building contractor, the innocent party can claim compensation for the harm caused by this breach of duty; furthermore, he can insist on performance, and if the breach of contract imperils the whole purpose of the transaction is such a way that in all the circumstances of the innocent party cannot be expected to continue with the contract and to perform his own obligations under it, then he is entitled, without setting any fixed period for performance, to claim damages for non-performance of the whole contract or to withdraw from the contract, as under §§325, 326 BGB.[41]

Under §325 of the BGB, if the performance due from one party under a mutual contract becomes impossible because of a 'circumstance' for which he is responsible, the other party may demand compensation for non-performance, or withdraw from the contract. In case of partial impossibility, if he does not desire the partial performance of the contract, he is entitled, subject to the conditions specified in §280(2) to demand compensation for no-performance of the entire obligation, or to withdraw from the entire contract. Instead of the claim for compensation and of the right of rescission he may demand the rights specified in the situation provided for by §323.

The same applies in the situation provided for by §283, if the performance is not made before the expiration of the period, or if at that time it is in part not made.

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[41] Introduction to Comparative Law by Konrad Zweigert, Emeritus Professor, University of Hamburg Emeritus Director, Max Planck Institute for Foreign and International Private Law and Hein Kotz M.C.I. (Mich) Professor, University of Hamburg Director, Max Plamek Institute for foreign and International Private Law, 2nd Revised Edition (1987) translate from the German by Tony Weir, Fellow of Trinity College, Cambridge, Clarendon Press Oxford.

the other party may demand compensation for non-performance, or withdraw from the contract. In case of partial impossibility, if he does not desire the partial performance of the contract, he is entitled, subject to the conditions specified in §280(2) to demand compensation for no-performance of the entire obligation, or to withdraw from the entire contract. Instead of the claim for compensation and of the right of rescission he may demand the rights specified in the situation provided for by §323.

The same applies in the situation provided for by §283, if the performance is not made before the expiration of the period, or if at that time it is in part not made.
Under §326 of the BGB, if, in case of a mutual contract, one party is in default in performing, the other party may give him a reasonable period within which to perform his part with a declaration that he will refuse to accept the performance after the expiration of the period. After the expiration of the period he is entitled to demand compensation for non-performance or to withdrawal from the contract, if the performance has not been made in due time; the claim for performance is barred. If the performance is only party made before the expiration of the period, the provision of §325(1), sent. 2, applies mutatis mutandis.

If, in consequence of the default, the performance of the contract is of no use to the other party, such other party has the rights specified above without giving any period.[42]

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[42] The German Civil Code (1975), Translated with an Introduction by Lan S. Forrester, Advocate of Tulane University, New Orleans; Cleveland, Simon L. Goren, Professor of Law, Case Western Reserve University; Cleveland and Hans Michael ilgen, Doctor of Laws, University of Cologne. (Amsterdam Oxford: North-Holland Publishing Company), p. 200.

obstacles to international trade and to ensure an orderly development of economic activities on a fair and equal basis.[43]

Currently, there are 70 contracting states of CISG, making CISG the uniform international sales law of countries that account for two-thirds of all world trade.[44]

Note that neither Thailand nor the United Kingdom are CISG contracting states. However, it may be said that all anticipatory breach laws stemmed from the United Kingdom example, and indeed the law of the United Kingdom concerning anticipatory breach are consistent with CISG. This is not the case for Thai law.

CISG applies to contracts of sale of moveable goods between parties which have their place of business in different states when these states are contracting states or when the rules of private international law lead to the application of the law of a contracting state. Certain types of contracts are excluded from its scope of application by virtue of Art. 2 CISG. For instance most consumer sales will not fall under the CISG.

With regard to the substantive issues, the CISG basically governs three areas: the conclusion of the contract, the obligations of the seller including the respective remedies of the buyer and the obligations of the buyer including the respective remedies of the seller. The CISG therefore provides both a substantial "law of sales" and a regulation of certain issues of the general law of contract, albeit limited to those international sales transactions which fall under its scope of application.

The Convention is divided into four parts, with the third part's *Chapter V* Section I (Art. 71-73 CISG) dealing with anticipatory breach and installment contracts.

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[43] CISG Thailand, in http://www.egat.co.th/legal_CISG/understandin_cisg.html, access date August 30, 2007.

[44] Electronic Library on International Commercial Law and the CISG, in http://www.cisg.law.pace.edu/cisg/guide.html, access date August 30, 2007.

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Article 71, 72 and 73 of the CISG deal with the situation where it becomes apparent or clear that one of the parties to an agreement will or may not perform a substantial part of its obligations in terms of the agreement.[45] The object of Article 72 is to provide the innocent party with a remedy in cases where it is clear that the other party will not perform at all or will commit another fundamental breach.[46] This remedy based on the Anglo-American doctrine of anticipatory breach allows the innocent party to avoid the contract when the breach occurs without having to wait until performance becomes due. Whereas Article 72 is aimed at the phenomenon of anticipatory breach of contract, i.e. a breach of contract that takes place before the performance is due by the party in breach, Article 71 has a wider scope in that it deals with anticipatory breach as well as incomplete performance. The remedies in Article 71 are aimed at keeping the contract in tact, whereas the remedies in Article 72 are aimed at avoiding the contract. Article 73 provides for anticipatory breach in

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[45] Leser HG & Hornung R in Schlechtriem PH & Bacher K *Kommentar zum Einheitlichen UN Kaufrecht* 3rd ed (2000 München) Art 71 Rn 1; Art 72 Rn 1, Art 73 Rn 1; Magnus U in Martinek M (ed) *J von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetze: Wiener UN-Kaufrecht* (1999 Berlin) Art 71 Rn 1, Art 72 Rn 1, Art 73 Rn 1; Burkhart F *Interpretatives Zusammenwirken von CISG und UNIDROIT Principles* (2000 Baden-Baden) 194; Schnyder AK and Straub RM in Honsell H *Kommentar zum UN Kaufrecht* (1997 Berlin) Art 71 Rn 1, Art 72 Rn 1, Art 73 Rn 1; Witz W, Salger HC & Lorenz M *Internationales Einheitliches Kaufrecht* (2000 Heidelberg) Art 71 Rn 1, Art 72 Rn 1 & 2, Art 73 Rn 1; Kritzer AH *Guide to the Practical Applications of the United Nations Convention on Contracts for the International Sale of Goods* (1989 Deventer) 465-467; Honnold JO *Uniform Law for International Sales* 3rd ed (1999 The Hague) para 395 at p. 437.

[46] Enderlein F & Maskow D., *International Sales Law - United Nations Convention on Contracts for the International Sale of Goods* (1992 New York), para 1 at p. 291., in http://cisgw3.law.pace.edu/cisg/biblio/enderlein.html, access date August 30, 2007.

installment contracts. It is for that reason that these articles contain different requirements for the exercising of the respective remedies.[47]

There are a number of interpretational issues in respect of Article 72 on which there is a divergence of opinion. Commentators differ on the exact interpretation and meaning of the meaning of the words "it is clear" (Article 72(1)) and "it becomes apparent" (Article 71(1))[48]

And whether there is any difference in the meaning or the standards to be applied. They also differ on whether the giving of notice of termination is an essential requirement to become entitled to the remedy or whether it is only necessary in circumstances where objectively speaking the other party would have been able to give an adequate assurance. Lastly there is also a difference of opinion on whether a failure to give an adequate assurance on demand under Article 71(1) automatically entitles a party to avoid the contract under Article 72. The construction and provisions of Articles 9:304 and 8:105 of the PECL may be helpful in solving these issues.

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[47] See Schlechtriem Uniform Sales Law - The UN-Convention on Contracts for the International Sale of Goods (Vienna 1986) 389 et seq., in http://cisgw3.law.pace.edu/cisg/biblio/schlechtriem-72.html; Staudinger/Magnus Art 72 Rn 8 & 9; Flechtner HM 8 Journal of Law and Commerce (1988) 53-108 in http://cisgw3.law.pace.edu/cisg/text/flecht71,72.html. Initial efforts to combine the articles during the drafting process were intentionally rejected. See Enderlein/Maskow p 284 Note 1 & 2, p 291 N 1; Honsell/Schnyder/Straub Art 72 Rn 10.

[48] Enderlein/Maskow p 286 Note 2; Honsell/Schnyder/Straub Art 71 Rn 24-26, Art 72 Rn 25; Staudinger/Magnus Art 71 Rn 18. Honnold p 429 para 388 remarks that these provisions were consciously so drafted and that this difference in terminology is also found in the French and Spanish versions of the CISG. See also Kee C Comparative Editoria lRemarks to Articles 51 & 73, in http://cisgw3.law.pace.edu/cisg/text/peclcomp51.html., access date August 27, 2007.

entitles a party to avoid the contract under Article 72. The construction and provisions of Articles 9:304 and 8:105 of the PECL may be helpful in solving these issues.

In certain circumstances, a party may be entitled to rely on either Article 71 or 72. If an anticipatory breach occurs, the innocent party may want to enforce specific performance in which case it would make use of its right to suspend performance under Article 71 rather than to avoid the contract under Article 72 even if it is entitled to do so. However where the contract consists of a series of performances (installments, for instance, delivery of a certain number of goods on a monthly basis), a serious deficiency in quality of the first consignment, entitles the innocent party to exercise its rights under Article 73[49] and avoid the contract.[50]

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[49] This is to be distinguished from the situation where only 1,000 pairs of shoes have been delivered instead of 2,000 on the date of performance. In this instance the correct remedies are either Article 51 and Article 45 or Article 71 and not Article 72. See Witz/Salger/Lorenz Art 71 Rn 1; Art 73 Rn 1; Honsell/Schnyder/Straub Art 72 Rn 15; Austria 10 December 1997 Vienna Arbitration proceeding S 2/97 in http://cisgw3.law.pace.edu/cases/971210a3.html; Germany 18 November 1993 *Oberlandesgericht* [Appellate Court] Düsseldorf. In http://cisgw3.law.pace.edu/cases/931118g1.html; Germany 15 February 1995 *Bundesgerichtshof* [Federal Supreme Court] in http://cisgw3.law.pace.edu/cases/950215g1.html]. access date August 28, 2007.

[50] Pace Law School Institute of International Commercial Law, in http://cisgw3.law.pace.edu/cisg/text/peclcomp71,72.html, access date August 10, 2007.

Chapter 4

Analysis

4.1 The Consequence of Lack of General Provision (Anticipatory Breach) under Thai Law

Should Thailand not have general provisions in her law to account for anticipatory breach of contract, she is very much at risk of being left behind in this rapidly borderless world dominated by international trade and associated transactions, which inevitably heavily rely on contractual obligations. Such contractual obligations must ensure maximum protection for all parties concerned, be that foreign parties or Thai parties, and reduce risks such as those that anticipatory breach regulations attempt to address. If the Anticipatory Breach is being prescribed in the Civil and Commercial Code of Thai law, therefore, when the breach of contract occurs, both creditor and debtor will get the benefit. There might cause no serious damage or even no damage at all for the creditor and the debtor. Due to the making contract, if the creditor ought to have foreseen that the debtor will certainly breach the contract or the debtor may not fulfill his obligation according to the contract, therefore, the creditor shall have the right to immediately terminate such contract without the maturity. Besides, if the contract has not been terminated yet and the creditor already knows that the debtor will breach such contract, the creditor can also find the alternative performance elsewhere. For the debtor, he may gain the benefit if there are provisions of the Anticipatory Breach prescribed in the Civil and Commercial Code of Thai law means that if the debtor knows he cannot perform the obligation according to the contract, he can inform to the creditor and give him a reasonable period within which to perform his part and if the performance has not been made in due time, the claim for performance is barred. According to this case, if the damage occurs, both creditor and debtor may not receive such serious damage because the creditor might find the alternative performance elsewhere to handle such circumstances. The debtor also does not have to pay for the damages which can be unlimited.

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Therefore, having the provisions of Anticipatory Breach by the Civil and Commercial Code of Thai Law will be very useful for the injured parties. Having no such provisions, the damage could have occurred to the parties in the future because both parties cannot agree with each other or even cannot solve the problems due to the Civil and Commercial Code of Thai law which does not prescribe for such circumstances. There are no provisions which give the power to the injured party to terminate the contract before the maturity or the injured party cannot even seek for other performance because he/she has to wait until the maturity which has been clearly specified in the contract. To wait for such period of time may cause the unlimited serious damage to the injured party in the future.

4.2. Recommend the Solutions to Control the Problems and Protect the Right for such Parties

According to Chapter 2, there are some provisions of Anticipatory Breach by the Civil and Commercial Code of Thai Law but they are prescribed in the term of the specific law which related to the Impossibility of Performance and also in the term of bill of exchange which related to the Promissory Note and Cheque. When the dispute between parties occurs, we cannot apply the provisions of Anticipatory Breach under the specific law to such circumstances because in the term of the specific law means to the specific expression which has only been prescribed under the provisions of law. Therefore, the provisions of Anticipatory Breach shall be added in the Civil and Commercial Code of Thai Law to give the most useful benefits to both parties and it is also easy to apply to when the Anticipatory Breach occurs.

To prescribe the provisions of Anticipatory Breach by the Civil and Commercial Code of Thai Law in the term of general provision law, we shall also prescribe such provisions in the Law of Obligations because if it is the dispute which caused by the non-performance of one of the parties, the injured party might immediately apply the Law of Obligations to enter the action against the non-performance party

Therefore, the provisions of Anticipatory Breach shall be suitably prescribed by the Civil and Commercial Code relating to the Law of Obligations and the most suitable international Law which shall also be applied to prescribe for such provisions is the Law of Convention on contracts for International Sale of Goods (CISG) Article 71-73, which also has the law Code as the Civil and Commercial Code of Thai Law. It is different from the Common Law because Common Law does not have the Law Code and most of all, many countries also properly accept the provisions of the Anticipatory Breach under the CISG. Thus, we shall apply the CISG to the law of Obligations under the Civil and Commercial Code of Thai Law. For the Law of UK, UCC, German Civil Code, we can also use them as the guideline for the Judicial Decisions.

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Chapter 5
Conclusion and Recommendations

5.1 Conclusion

As can be seen from this research paper, the Civil and Commercial Code of Thailand does not have general provisions to allow the innocent party to directly repudiate a contract before actual breaching occurs. In the Civil and Commercial Code, there are also some provisions which are similar to Anticipatory Breach such as when the creditor can immediately claim for damages. For this case, it is in accordance with the Impossibility of Performance and bill of exchange. Therefore, when Anticipatory breach occurs to both parties, applying the specific law might be very complicated for both parties or sometimes it cannot even apply with such dispute. In other words, anticipatory breach is not stated in Thai law.

Anticipatory breach is a breach of contract caused by a party's anticipatory repudiation, i.e., unequivocally indicating that the party will not perform when performance is due. Under these circumstances, the non-breaching party may elect to treat the repudiation as an immediate breach and sue for damages.[51]

Since the Civil and Commercial Code of Thailand does not allow the innocent party to repudiate before breaching, this may result in greater damage for the innocent party or other party (or both). This is not consistent with internationally-accepted United Nation's Convention on Contracts for the International Sale of Goods (CISG) and contract laws of the majority of the world, which is not good for Thailand's international trade and investment in today's globalization trend. Thailand cannot ignore that nations that conform to CISG account for over two third of all trade in the world.

More specifically, foreign investors or entities in Thailand will receive benefits if Thailand has Anticipatory Breach or Anticipatory Repudiation, in the Thai Civil and

[51] Bryan A. Garner, Black's law Dictionary, op. cit., p.200.

Commercial Code. The benefit that Thai's will get is minimizing damage or loss which can occur in the future. The investors or entities who wish to do business with Thailand may feel not well protected because of lack of anticipatory repudiation or anticipatory breach under Thai law. Foreign investors have a desire to do business in Thailand but may be hesitate to enter into a contractual relationship controlled by Thai law because they feel their rights will not be protected. Thailand should make effort to attract foreign investment. Allowing for Anticipatory Breach in the country is one good way to do this. When entering into contract that has a fixed time period stated but time not yet concluded when problems can be foreseen with certainty from behavior of other party that a breach will occur for sure, the innocent party cannot terminate the contract yet since according to the Civil and Commercial Code of Thailand article 203 paragraph 2 states "If a time is fixed, it is to be presumed, in case of doubt, that the creditor may not demand the performance before that time; the debtor, however, may perform earlier". Without anticipatory repudiation, damage to the innocent party cannot be limited to just the time that breach is anticipated. The same can be said for the other (breaching) party who will have liability even more increase over time since the liability cannot be limited to just the time breach is anticipated and contract repudiated.

5.2 Recommendations

For the reason stated in the conclusion, it is the recommendation of the researcher that the Civil and Commercial Code of Thailand be amended to allow anticipatory breach, anticipatory repudiation including being able to immediately claim for damages. If the non performaning party will definitely breach the contract and such non performance could obviously be seen by the innocent party, therefore, the innocent party should have the rights to terminate such contract (repudiation) before the fixed date which the other party has to perform the obligation; according to the contract or the given period in the contract.

Improving the law for the innocent party to claim for damages in such Anticipatory Breach of the other party should be a priority. The innocent party should have the

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rights to immediately claim for the damages because if he/she has to wait for such given time that was agreed in the contract or according to the time which provided by the law, the innocent party might suffer further damages.

Such an amendment to allow for anticipatory breach may make use of the common law examples of the United Kingdom as guidelines to judicial decisions. The UCC provisions of the United States and the relevant articles of the German Civil Codes may be used as a basis for suitable adaptation for use with Thailand's own Civil and Commercial Code. Due to the Amendment of the Civil and Commercial Code of Thailand with the addition of Anticipatory Breach or Anticipatory Repudiation, this can make foreign investors in Thailand feel more secure about entering into contracts while doing business in Thailand.. The Thai Law has also given the rights to terminate the contract before the time for performance or the time that agreed in the contract. Therefore, if such damage occurs, giving them the right to immediately claim for damages will help them avoid such serious damage

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Appendix A

The Thai Civil and Commercial Law Code B.E. 2549

Section 113: The foundation must have a word "foundation" incorporated with its name.

Section 217: A debtor is responsible for all negligence during his default. He is also responsible for impossibility of performance arising accidentally during the default, unless the injury would have arisen even if he had performed in due time.

Section 218 When the performance becomes impossible in consequence of a circumstance for which the debtor is responsible, the debtor shall compensate the creditor for any damage arising from the non-performance.

In case of partial impossibility the creditor may, by declining the still possible part of the performance, demand compensation for non-performance of the entire obligation, if the still possible part of performance is useless to him.

Section 222 The claim of damages is for compensation for all such damage as usually arises from non-performance.

The creditor may demand compensation even for such damage as has arisen from special circumstance, if the party concerned foresaw or ought to have foreseen such circumstances.

Section 369 A party to a reciprocal contract may refuse to perform his obligation until the other party performs or tenders performance of his obligation. But this does not apply, if the other party's obligation is not yet due.

Section 386 If by contract or by the provisions of law one party has the right of rescission, such rescission is made by a declaration of intention to the other party.

The declaration of intention mentioned in the forgoing paragraph cannot be revoked.

Section 387 If one party does not perform the obligation, the other party may fix a reasonable period and notify him to perform within that period. If he does not perform within that period, the other party may rescind the contract.

Section 389 If performance becomes wholly or partly impossible by a cause attributable to the debtor, the creditor may rescind the contract.

Section 391 If one party has exercised his right of rescission, each party is bound to restore the other to his former condition; but the rights of third persons cannot be impaired.

To money which is to be repaid in the case of the forgoing paragraph interest is to be added from the time when it was received.

Section 909. A bill of exchange must contain the following particulars:

(1) The designation of it as a bill of exchange.

(2) An unconditional order to pay a sum certain in money.

(3) The name or trade name of the drawee.

(4) A day of maturity.

(5) The place of payment.

(6) The name or trade name of the payee, or a mention that it is payable to bearer.

(7) The date and place where the bill is issued.

(8) The signature of the drawer.

Section 913 The maturity of the bill of exchange is:

(1) On a fixed day, or

(2) At the end of a fixed period after the date of the bill, or

(3) On demand, or at sight, or

(4) At the end of a fixed period after sight.

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Section 914 Any person who draws or indorses a bill of exchange engages that on due presentment it shall be accepted and paid according to its tenor and that, if it be dishonoured by non-acceptance or non-payment, he will pay it to the holder or to a subsequent indorser who has been compelled to pay it, provided that the requisite proceeding on non-acceptance or non-payment have been duly taken.

Section 937 By acceptance of the bill of exchange the drawee becomes bound to pay the amount accepted according to the tenor of his acceptance.

Section 959 The holder may exercise his right of recourse against the indorsers, the drawer and the other persons liable under the bill.

a) At maturity, if payment has not been made;

b) Even before maturity,

(1) When acceptance has been refused;

(2) When the drawee, whether he has accepted or not, has become bankrupt, or has suspended payment, even if the suspension is not authenticated by a judgment; or where execution has been levied against his goods without result;

(3) When the drawer of a bill which need not be accepted has become bankrupt.

Section 960 Default of acceptance or payment must be evidenced by a formal document, called protest.

Protest for non-payment must be made either on the day when the bill is payable or on one of the three following days.

Protest for non-acceptance must be made within the limit of time fixed for presentment for acceptance or within the three following days.

Protest for non-acceptance dispenses with presentment for payment and protest for non-payment

In the case provided for by Section 959 b) (2), the holder cannot exercise his right of recourse until after presentment of the bill to the drawee for payment, and after the protest has been drawn up.

In the case provided for by Section 959 b) (3), the production of the judgment pronouncing the bankruptcy of the drawer, suffices to enable the holder to exercise his right of recourse.

Section 983 A promissory note must contain the following particulars:

(1) The designation of it as a promissory note.
(2) An unconditional promise to pay a sum certain in money.
(3) A day of maturity.
(4) The place of payment.
(5) The name or trade name of the payee.
(6) The date and place where the promissory note is made.
(7) The signature of the maker.

Section 986 The maker of a promissory note is bound in the same manner as an acceptor of a bill of exchange.

A Promissory note payable at a certain time after sight must be presented for the visa of the maker within the limits of time fixed by Section 928. The limit of time runs from the date of the visa, signed by the maker of the note. The refusal of the maker to give his visa with the date thereon must be authenticated by a protest the date of which gives the point of departure for the limit of time from sight.

Section 987 A cheque is a written instrument by which a person, called the drawer, orders a banker to pay on demand a sum of money to, or to the order of, a person, called the payee.

Section 988 A cheque must contain the following particulars:

(1) The designation of it as a cheque.

(2) An unconditional order to pay a sum certain in money.

(3) The name or trade name and address of the banker.

(4) The name or trade name of the payee or a mention that it is payable to bearer.

(5) The place of payment.

(6) The date and place where the cheque is issued.

(7) The signature of the drawer.

Section 989 The following provisions of Chapter II relating to Bills of Exchange apply to Cheques in so far as they are not inconsistent with the nature of this instrument, namely, Sections 910, 914 to 923, 925, 926, 938 to 940, 945, 946, 959, 967, 971.

In case of foreign cheques the following provisions shall also apply, namely, Sections 924,960 to 964, 973 to 977, 980.

Section 993 If the banker signs on the cheque a statement such as "good" or "good for payment," or words to the same effect, he becomes bound, as principal debtor, to pay the cheque to the holder.

If the holder of a cheque procures it to be so certified, the drawer and indorsers are discharged from liability thereon.

If it is so certified at the drawer's request, the drawer and the indorsers are not discharged[1].

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[1] Kamol Sandhiskshetrin, The Civil and Commercial Code (Bangkok: Nitibannagarn Publishing Co., 2000), p. 1-6.

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Appendix B

Uniform Commercial Code of United States of America

U.C.C. - ARTICLE 2 - SALES

PART 6. BREACH, REPUDIATION AND EXCUSE

§ 2-609. Right to Adequate Assurance of Performance.

(1) A contract for sale imposes an obligation on each party that the other's expectation of receiving due performance will not be impaired. When reasonable grounds for insecurity arise with respect to the performance of either party the other may in writing demand adequate assurance of due performance and until he receives such assurance may if commercially reasonable suspend any performance for which he has not already received the agreed return.

(2) Between merchants the reasonableness of grounds for insecurity and the adequacy of any assurance offered shall be determined according to commercial standards.

(3) Acceptance of any improper delivery or payment does not prejudice the aggrieved party's right to demand adequate assurance of future performance.

(4) After receipt of a justified demand failure to provide within a reasonable time not exceeding thirty days such assurance of due performance as is adequate under the circumstances of the particular case is a repudiation of the contract.

§ 2-610. Anticipatory Repudiation

When either party repudiates the contract with respect to a performance not yet due the loss of which will substantially impair the value of the contract to the other, the aggrieved party may

(a) for a commercially reasonable time await performance by the repudiating party; or

(b) resort to any remedy for breach (Section 2-703 or Section 2-711), even though he has notified the repudiating party that he would await the latter's performance and has urged retraction; and

(c) in either case suspend his own performance or proceed in accordance with the provisions of this Article on the seller's right to identify goods to the contract notwithstanding breach or to salvage unfinished goods (Section 2-704).

§ 2-611. Retraction of Anticipatory Repudiation

(1) Until the repudiating party's next performance is due he can retract his repudiation unless the aggrieved party has since the repudiation cancelled or materially changed his position or otherwise indicated that he considers the repudiation final.

(2) Retraction may be by any method which clearly indicates to the aggrieved party that the repudiating party intends to perform, but must include any assurance justifiably demanded under the provisions of this Article (Section 2-609).

(3) Retraction reinstates the repudiating party's rights under the contract with due excuse and allowance to the aggrieved party for any delay occasioned by the repudiation.

Appendix C

United Nations Convention on Contracts for the International Sale of Goods (CISG)

CISG Articles concerning Anticipatory Breach

CISG Article 71

(1) 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:

(b) a serious deficiency in his ability to perform or in his creditworthiness; or

(c) his conduct in preparing to perform or in performing the contract.

(2) If the seller has already dispatched the goods before the grounds described in the preceding paragraph become evident, 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. The present paragraph relates only to the rights in the goods as between the buyer and the seller.

(3) 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.[2]

CISG Article 72

(1) 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.

(2) If time allows, the party intending to declare the contract avoided must give reasonable notice to the other party in order to permit him to provide adequate assurance of his performance.

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[2] Pace Law School Institute of International Commercial Law in http://www.cisg.law.pace.edu/cisg/text/e-text-71.html, access date August 10, 2007.

(3) The requirements of the preceding paragraph do not apply if the other party has declared that he will not perform his obligations.[3]

CISG Article 73

(1) In the case of a contract for delivery of goods by installments, if the failure of one party to perform any of his obligations in respect of any installment constitutes a fundamental breach of contract with respect to that installment, the other party may declare the contract avoided with respect to that installment.

(2) If one party's failure to perform any of his obligations in respect of any installment gives the other party good grounds to conclude that a fundamental breach of contract will occur with respect to future installments, he may declare the contract avoided for the future, provided that he does so within a reasonable time.

(3) A buyer who declares the contract avoided in respect of any delivery may, at the same time, declare it avoided in respect of deliveries already made or of future deliveries if, by reason of their interdependence, those deliveries could not be used for the purpose contemplated by the parties at the time of the conclusion of the contract.[4]

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[3] Pace Law School Institute of International Commercial Law - Last updated May 2, 2003. in http://www.cisg.law.pace.edu/cisg/text/e-text-72.html, access date August 10, 2007.

[4] Ibid.

Appendix D

German Civil law

§ 280 (Liability in case of impossibility for which one is responsible)

(1) Where the performance becomes impossible because of a circumstance for which the debtor is responsible, the debtor shall compensate the creditor for any damage arising from the non-performance.

(2) In the event of partial impossibility the creditor may, be declining the still possible part of the performance, demand compensation for non-performance of the entire obligation, if he has no desire for the partial performance. The provisions of § 346 to 356 applicable to the contractual right of recession apply *mutatis mutandis.*

§ 325 (Development of impossibility for which debtor is responsible)

(1) If the performance due from one party under a mutual contract becomes impossible because of a circumstance for which he is responsible, the other party may demand compensation for non-performance, or withdraw from contract. In case of partial impossibility, if he does not desire the partial performance of the contract, he is entitled, subject to the conditions specified in § 280(2) to demand compensation for non-performance of the entire obligation, or to withdraw from the entire contract. Instead of the claim for compensation and of the right of rescission he may demand the rights specified in the situation provided for by § 323.

(2) The same applies in the situation provided for by § 283, if the performance s not made before the expiration of the period, or if at that time it is in part not made.

§ 326 (Default; fixing of period with warning of refusal)

(1) If, in case of a mutual contract, one party is in default in performing, the other party may give him a reasonable period within which to perform his part with a declaration that he will refuse to accept the performance after

the expiration of the period. After the expiration of the period he is entitled to demand compensation for non-performance or to withdrawal from the contract, if the performance has not been made in due time; the claim for performance is barred. If the performance is only party made before the expiration of the period, the provision of §325(1), sent. 2, applies mutatis mutandis.

(2) If, in consequence of the default, the performance of the contract is of no use to the other party, such other party has the rights specified in (1) without giving any period.[5]

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[5] S. Forrester, Simon L.Goren and Hans-Michael LLgen, The German Civil Code (London: North-Holland Publishing Company Amterdam, 1975), p.46,53.

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