



Review Paper

An investigation of the Iranian approach to take Advantages of the Right to Suspend Performance of the contract under United Nations Convention on Contracts for the International Sale of Goods (1980)

Masoud Shirani¹, Gholam Nabi Feyzi Chekab², Ebrahim Taghizade¹, Alireza Yazdaniyan³, Jalal Sultan Ahmadi¹

¹Payame Noor University, IRAN

²Allameh Tabatabai University, IRAN

³Esfahan University, IRAN

Available online at: www.isca.in

Received 12th March 2013, revised 8th April 2013, accepted 26th April 2013

Abstract

The suspension of a contract is one the rights of the contract parties that was anticipated by the Convention on contracts for the international sales of goods (1980). Based on the convention, A party may suspend the performance of his obligations if, after the conclusion of the contract, it becomes apparent that other party will not perform his obligations as a result limitations imposed by customary rules. Despite the fact the right to suspend contractual obligations in performance stage could be referred as legal assurance for the aggrieved party, in some legal systems including Iranian legal system the right is neglected in legislative and other legal procedures. Although one could argue that there are some rules for the object under other legal issues that indirectly assure the rights of the aggrieved party in anticipatory breach of contract, making coherent and transparent rules under common law should be considered by law makers. After a brief review of the right to suspend performance of the contract in the light of the United Nations Convention on Contracts for the International Sale of Goods, the author has tried to justify its necessity in Iranian legal system. As a result of logical, sensible and successful performance of the convention as well as satisfactory and acceptable outcomes, it seems that the acceptance of the convention does not affect our legal structures and norms. On the contrary, it would decrease the suspension of the contracts by parties.

Keyword: Anticipatory breach of contract, United Nations convention on contracts for the international sale of goods, suspension of contractual obligations, common law.

Introduction

Each substantive law, as a social product, is directly related to its environment. Thus, the differences in national laws are natural and unavoidable. Sometimes, because of the nature of relationships and social life requirements in the international arena, the national laws have been extended beyond the countries' borders. In fact, ever-increasing international relations and differences in national laws treat the security and ease of relations – as two preconditions of business relations. Differently stated, lack of stable, dynamic and international regime to address the issue is being felt. New technologies demand new approaches and ever-increasing transnational business dealings necessitate transnational arbitration processes. The Iranian sovereignty has not serious and limiting obligations regarding private law issues despite the fact there is high sensitivity towards common law. Thus, some modifications could be applied in the area as the initial steps towards harmonious unity¹.

United Nations Convention on Contracts for international sales of goods that was passed in 1980 is a review of different legal systems' experiences on contracts for the International Sale of

Goods. In the same vein, it is an example of the efforts of the international community to provide the harmonious unity in this domain. The developers of the convention tried to use the experiences of different legal systems as well as they made efforts to provide a frame without structural contradictions. Generally speaking, they have been more or less successful in achieving this goal. The convention actually evolved from previous efforts in this field, including both of The Hague conventions passed in 1964. The anticipatory break of contract and contract performance assurance (Suspension and breach of contract) are two most interesting legal entities of 1980 convention that are referred as the common law achievements.

Anticipatory breach of the contract: One of the new topics in the United Nations Convention on Contracts for the International Sale of Goods is the "anticipatory break of contract" rooted in common law legal system. A breach of contract occurs when one party fails to perform terms of the contract in specified time. If the performance of the contract is failed by one or both of the parties in the specified time, the contract would be void. The right of "anticipatory breach of contract" in common law means that one party predicts that the other party will not perform its obligations prior to the date of

contract performance. The grounds for the articles are non-fulfillment of Contractual Obligations and intention to breach the contract. The non-breaching party is authorized to choose on the two solutions: i. To avoid the contract and claim damages on the basis that the other party did not perform its obligations. ii. To stay for date of performance and do nothing contingent upon losses of damages².

In addressing the issue of “breach of contract” and especially in Iranian common law, the first thing that comes to mind is parties’ failure to perform contract obligations in specified time. On the contrary, in common law “anticipatory breach of contract” means breach of contract by one party prior to the date for performance of the contract. Thus, in this legal system, if one party gave notice that he will not perform his obligations or it is clear that one of the parties will not be able to perform his obligations, the other party may declare the contract avoided. When, the inability of one party is not clear, the other party may declare the contract avoided only if the behavior of the other party predicts the likelihood of a fundamental breach based on the assumption of a hypothetical reasonable person³.

In British legal system the assurances of “anticipatory break of contract” is to avoid the contract and claim for damages. This raised two questions: if proved, that a buyer or a seller will not perform their obligations in future what is the right of the other party in an international contract? Anticipatory break of contract was accepted by Convention on Contracts for the International Sale of Goods (article 72 and 73) and there are assurances for it including suspension and breach of the contract. The current study covered the first guarantee of the contract; namely, suspension of the contract. There are differences between these two articles. The right to suspend obligations under article 71 is different from the right of an aggrieved party to avoid contract under article 72. Both contracts are established based on the idea of potential breach of contract by the two parties in the future. The preconditions for damages as a result of avoidance are more serious than those for suspension. Moreover, there are different requirements for notice of intent to avoid and notice of suspension that would be discussed in detail subsequently. Based on article 72, considering time limitations, there must be a reasonable prior notice that excuses the notice if the other party has declared that it will not perform its obligations. On the contrary, immediate notice of suspension with no exception is required by article 71.

Historical baseline of the contract suspension in 1980 convention: The right of the contractual obligation suspension for parties of the contract prior to the date of performance has been recognized by private international law. The draft convention of 1978 only recognized the right to suspend when the grounds for suspension were not known at the time of contract conclusion. Based on the article 62 of the draft convention, the current article 71, the breaching party must offer good grounds. Thus, the other party may conclude that the breaching party will not perform a substantial part of its

obligation under the contract. Finally and after long discussion, the article was written. Germany, Canada, and Australia were the countries who proposed amendments to the draft of the convention before the 27th meeting. The First Committee of the convention only approved the Germany’s proposed amendment to paragraph one by 18 out of 50 votes. After negotiations about the provisions of draft Article 62, the Committee focused on amendment that was proposed submitted by Egypt. The amendments intended to reduce the perceived subjectivity of article 62. Italy was another country who submitted an amendment. Both amendments were rejected by 19 votes in favor of the amendments and 19 votes against them. A working group composed of eleven-nation was established to work on the wording of draft articles 62 and 63 (current articles 71 and 72). In the 37th meeting, the working group submitted the following draft version of the paragraph 1 of Article 62.

A party may, if it is reasonable to do so, suspend the performance of his obligations when, after the conclusion of the contract, it appears that the other party will not perform a substantial part of his obligations as a result of i. A serious deficiency in his ability to perform or in his creditworthiness or ii. His conduct in preparing to perform or in performing the contract.

The main purpose of working group was to offer contract parties a more objective criterion for investigation the right to suspend contract performance under the Article. At the 38th meeting, an oral amendment was proposed and the draft was corrected again. Finally, the final version of draft Articles 62 and 63 (current Articles 71 and 72) were passed by unanimous voting and all the 35 members vote in favor of it.

Under article 71 of the convention: i. 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 i. A serious deficiency in his ability to perform or in his creditworthiness or ii. His conduct in preparing to perform or in performing the contract. ii. 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. iii. 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.

One of the most important issues of the history of this article is the concern of under developing countries about abuse of the article by developed countries. The under developing countries were concerned that dominant and powerful countries could benefit the right to suspend the contract and may insist to obtain

contract performance assurances in date of contract, despite the fact they have not demanded such requests when concluding the contract. Thus, there was always a concern about the assurances of the right to suspend the contract. Most of the experts believed that the right should be guaranteed based on practical, applicable and objective criteria. Consequently, different amendments were applied in the convention. Generally, laws on anticipatory breach of contract lead to contradictory issues. When, a party suspects that the other party is likely to breach the contract, it may suspend the contract. The stated position is not optimal and the law should set preconditions for such circumstances. In such cases, when the preconditions were satisfied the other party entitled to suspend its contractual obligations in order to prevent damages. In order to address the problem many efforts have been made and several amendments have been applied in article 71 of the convention (The same source p.59).

Preconditions for suspension: What are the preconditions for suspension based on the Convention terms? The first paragraph of the articles 71 implies that: “A party may suspend the performance of his obligations if, after the conclusion of the contract, it becomes apparent that the other party will not perform a substantial part of his obligations as a result of”:

The article 71 is exercised when the breach of contract is anticipated by the parties of the contract but it is not occurred and compensation is awarded for damages due to non-performing substantial part of the contract obligations. The article mainly concentrates on future possibilities that could be anticipated based on current situations. Due to the inherent uncertainty of the future events, one cannot say that whether the party will breach the contract or not. If the other party has declared that it will not perform its obligations, there is still a possibility that it will perform its obligations because there may be variety of reasons for non- performing the obligations.

The first ground for exercise of the right to suspend and the contract is the “after the conclusion of the contract, it becomes apparent that the other party (The same source .p .56)”. The quality of being apparent as the first precondition for suspension is to determine the likelihood of a fundamental breach based on the assumption of a hypothetical reasonable person.

Prior to the adoption of the last version of the article 62 (article 71), the committee of convention discussed the transparency and the factors that may influence the anticipatory breach of contract in future. Before passing the last version, the objective criterion was used in order to interpret the contracts in draft of the convention. It is evident that uncertainty cannot be avoided in future events and there are no objective methods for future prediction. By adding the “it became apparent ...” the committee took an objective criterion in prediction of the anticipatory breach of contract. Determining the likelihood of a fundamental breach is based on the assumption of a hypothetical reasonable person and it is similar to objective approach that is

used in materiality determination. The anticipatory breach of contract is not necessary based on previous considerations; the breach will show itself in the future. Another important point is that after the conclusion of the contract, it becomes apparent that the other party will not perform a substantial part of his obligations. Thus, if inability and ability of parties to perform their obligations does not cover substantial part of the contract; the right to suspend the contract is not valid.

According to the convention, when one party does not perform a substantial part of its obligations the contract will govern by article 71. If the fundamental breach of contract is occurred, the contract will govern by article 72 and there are strong assurances for the contract performance (The same source, p.56). The contract's parties that is governed by the convention are authorized by Paragraph one of Article 71 to suspend the contract if the other party does not perform its obligation or avoid the contract. Unlike many national legal systems such as the Swiss, the convention does not differentiate between primary and secondary obligations and does not require the breaching party to be guilty. Consequently, all the cases of breach of contract do not led to right to suspend the contract.

Anticipatory breach of contract must influence the substantial part of contract obligation. Breach of a secondary obligation or non-fundamental breach of contract does not led to the exercise of paragraph one of article 71. On the other hand, article 71 and 72 do not specify that the breach should be fundamental as it was stated in article 25. If the non-fundamental breach changes to a fundamental one during the time, the party who did not breach the contract may suspend the entire contract.

Grounds for suspension: In the draft of convention, the grounds for suspension were not considered. Moving towards the objective criterion and considering inherent characteristics of the phenomena as well as the insistence of developing countries, the paragraph 1 and 2 were added to the article. Article 71(1) provides two main grounds for suspension: i. A serious deficiency in the ability to perform or in the credit-worthiness of the other party; or ii. The conduct in preparing to perform or in performing the contract.

Paragraph (a) considers two main issues: firstly, a serious deficiency in the ability of the party to perform its obligations that is interpreted as the quality of performance and providing the requirement for performance and secondly, serious deficiency in the credit-worthiness of the other party that refers to financial situation of the parties.

How one party can conclude that there is serious deficiency in the ability of the other party? Problems such as general strike in the country, Economic sanctions, ban on exports and fire in manufacturing unit the supplies the goods of the contract, are among common grounds for a serious deficiency in the ability to perform. A serious deficiency in the creditworthiness of one of the parties, especially the buyer, could be proved by delayed

payment to seller or third parties as well as bankruptcy and notice of stoppage in payments of debts. Some believe that deficiency in creditworthiness of the sponsor of one the parties of the contract may be considered as the deficiency of the creditworthiness of the party. As it was mentioned before, paragraph (b) is about parties' performance or preparations to perform the contract. Commentators suggested the following two interpretations for the paragraph: Firstly, if the seller agrees to deliver the goods for credit, but before the delivery it becomes apparent that the buyer has become insolvent. Secondly, if the buyer agrees to pay for goods before delivery, but before delivery it becomes apparent that the seller will not deliver the goods (stoppage in manufacturing goods due to fire or natural disasters such as floods and earthquakes). In the two mentioned cases, in order to suspend the contract the date of performance of one party must be prior to the date of performance of the other party. According to some commentators, the following are examples that could be considered as grounds to suspend the contract under paragraph 1 of the article 71.

The seller's deficiency in ability to perform the contract:

There may be deficiency in the quantity of the goods delivered as a result of strike in the factory of the seller. The strike may be continued. In such circumstances, the buyer may suspend the contract to eliminate the need for doing requirements such as opening a letter of credit for the goods that will be delivered in future as well as preparations for the goods transportation and documents submission. The right to suspend the contract is not considered as the right to sell the goods that are kept for buyer by seller or to buy counterfeit goods by buyer.

Deficiency in deficiency in the creditworthiness of the buyer:

There may be more than one contract between seller and buyer. Buyer's late payment of the price in other contracts may be considered as deficiency in the creditworthiness of the buyer. If it becomes apparent that as a result of such deficiency, the buyer will not pay for the goods of the contract, the seller is authorized to stop preparation and production of goods.

The contractual behavior of the parties: Let's suppose that a buyer bought some delicate and subtle spare parts to be used immediately at delivery time. There may be no deficiency in the quality of products, but it become apparent that other buyers received defective goods. If it has been proved that the reason for delivery of defective goods is the quality of raw materials or mines that are used by seller, the buyer is entitled to suspend the contract. The right to suspend the contract was anticipated in paragraph 1 of article 71. Moreover, the same was anticipated only for seller in specific situations. Under this paragraph, when one of the above conditions were met, and the goods were handed over to the first carrier and they are shipping to the buyer, the seller is authorized to avoid delivery of goods by carrier or another trusted person despite the fact the documents were handed over before. The right affects only buyer and seller and does not affect third parties that the goods may be legally

transferred to them before final delivery to the buyer. It worth mentioning that the legal transfer of goods to third parties was not discussed in the convention and domestic laws may be referred to address such cases (The same source, P.61). It should be noted that in Iranian legal system, when the buyer introduces someone to guarantee his payments or if the seller introduces someone to guarantee the delivery of goods, the right to preserve the goods is not valid anymore.

Under paragraph 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." The paragraph 3 does not explicitly require that the notice should include the reason of suspension. It is optimal to state the reason for suspension in such a way that the receiving party would be able to provide adequate assurance to contract performance⁴. Another question is raised here: whether the notice of suspension is a precondition of suspension? What can be inferred from the appearance of article is that the notice of suspension is not considered as the condition of suspension because the notice could be given after suspension and there is no obligation to give notice before suspension. If the appearance of article is referred as the only framework of interpretation, failure to give notice would authorize the aggrieved party to claim damages only if all the conditions of liability litigation have been satisfied⁵.

Thus, the offered interpretation should be in accordance with equity and justice in such way that it mentioned in different articles of different laws of different countries (article 1134 of France law, article 242 of Germany law, and article 1-203 of American Uniform Commercial Code. Similarly, the article 7 of the Vein convention implicitly states the suspending party must give notice to the other party prior to the suspension. This view point is more congruent with performance of contract and non-stoppage in contract performance.

Assurance of performance: If the conditions listed in paragraph one are met and one of the parties suspends the performance of its obligations, but the other party accepts to provide adequate assurance for its performance, the suspending party must continue with performance. The assurances should be in form of documentary Profs or actions such as the bank guarantee for payment or supplying raw materials in case of lack of raw materials. It worth mentioning that if a reason for contract suspension causes damages the aggrieved party would be responsible to fully compensate the losses of the other party. There is no article in the convention that addresses the time of suspension as well as the extension of time for performance. Considering the right of suspension of performance for both parties under article 71, one can deduct that the time of suspension may be added to the time of contract. The domestic rules of each country should be referred to judge the issue. If the offending party refused to provide adequate assurance after suspension of performance, the suspending party is authorized

to breach the contract as a result of non-performance of obligations by the other party (articles 25, 29, 64, 81) and claim for losses. The losses are evaluated based on articles 85 and 86 of the convention.

The contract suspension and its requirements should be applied in such a way that protects the rights of parties and not to be misinterpreted. As it was stated earlier, under article 71 of the convention, if it becomes apparent that one party will not perform a substantial part of its obligations, the other party is authorized to suspend the performance of its obligations. Thus, the main precondition of the right is not the fundamental breach of contract under article 25 of the convention because “the fundamental breach of contract” is not stated in article 71 of the convention whereas article 72 is about breach of contract⁶. The fundamental breach of contract and non-performance of substantial part of obligations are not well separated from each other in article 25 of the convention, but it can be concluded that the non-performance of substantial part of obligations is due to the seller’s deficiency in ability to perform or his conduct in preparing to perform or in performing the contract. The other requirement is that the deficiency in the ability of one of the parties becomes apparent after the conclusion of the contract. It means the parties are not entitled to suspend the contract during the time of the performance.

Based on the above, the convention has anticipated two assurances of performance; namely, the suspension of performance and the breach of contract. The conditions for breach of contract are more stringent than those for anticipatory breach of contract. Moreover, the anticipatory breach of contract must be fundamental and not on ground of substantial breach of contract. The grounds and preconditions for breach must be stronger than those of suspension. Although the convention does not mention the grounds and preconditions for breach of the contract, the most prominent reason for breach is explicit notice of non-performance of obligations by one party. The notice of suspension must be given after suspension; on the contrary, the notice of breach must be given before the breach of contract with exclusion of explicit notice of non-performance of obligations. In such situation, after giving the notice of breach a note must be sent to the other party too. Giving adequate assurance would terminate suspension as well as breach of contract because there is no concern about non-performance of obligations in future. The quality of adequate assurance is determined through the grounds for breach and suspension. The contract will be extended for a reasonable period of time after providing the adequate assurance although the issue was not included in the convention. The theory of anticipatory breach of contract has long been considered in common law system, but it has widely accepted by the convention. The suspension of the contract performance does not exist in British and American legal systems; thus, the seller is authorized to prevent the handing over of dispatched goods. Likewise, the United States uniform commercial code and the convention share similarities regarding suspension of performance and breach of contract.

The theory of anticipatory breach of contract in British and American legal systems has further noticed the breach of contract with more stringent conditions in comparison with the conditions of the convention. The right to breach contract is effective only if made by behavior and words of the parties and not serious deficiency in their ability to perform or in their creditworthiness.

The suspension of contract performance in Iranian legal system: In Iranian civil code, the anticipatory breach of contract and its assurances – suspension and breach of contract – have not been considered by Iranian lawmakers. There are a number of rules within existing constitutional law frameworks that indirectly supports the rights of aggrieved party in cases of anticipatory breach of contract. Under article 219 of Iranian civil code, the binding characteristics of contracts govern the suspension and breach of contract. The conditions anticipated in article 377 of Iranian civil code regarding the goods preservation are referred in cases of anticipatory breach of contract. “Before the time of performance, the parties of the contract are authorized to preserve goods and payments until the other party perform his obligations. If the for performance is reached, payments and goods must be delivered. Although some experts believe that there are similarities between article 370 on Iranian civil code and anticipatory breach of contract regarding the right to preserve the goods, it should be noted that the debt must be clearly defined and eligible. Thus, the anticipatory breach of contract is not valid. The right to suspend the contract is limited to contracts without time limitations or contracts that their time of performance has been reached. The anticipation does not authorized rights to contract parties (the same source, P. 130). It seems that article 380 of the civil law define the situation more clearly: “If the buyer become bankrupted and the goods have been delivered before , the seller is entitled to give them back and If the goods were not delivered the seller is entitled to preserve them”. One of the foundations of the theory of anticipatory breach of contract is common trading practices. Under common trading practices, anticipating the futures, the seller should watch the financial status of the buyer. Considering reasonable criteria for serious deficiency in the creditworthiness of the buyer, the seller is entitled to suspend the contract and avoid losses⁷. Under article 530, 532 and 533 of Iranian Trade Act, if one party becomes bankrupted before the payment of the price, the seller is entitled to suspend the contract and stop good transition. The seller is authorized to give back the goods that handed over or delivered to carrier before, if they have not been sold to the third party. The goods that have been sold to third parties are not refundable⁶.

Some believe that under article 421, if one party declared bankruptcy, all its payments become immediately payable; thus, the anticipatory breach of contract would be meaningless⁶. Given that, it could be anticipated that the bankrupted party is not able to pay its debts, so the lawmaker authorized the right to the aggrieved party to breach the contract without delay. Consequently, observing the rule of equal protection of

creditors, the anticipatory breach of contract could be considered as a reason for immediate payments of debts or the right of creditors to breach their contracts². Non-performance of the contract obligations may be due the inability of the parties or general problems such as economic sanctions or wars. Article 71 of the convention does not make a distinction between these two positions. Under Iranian common law, when an external obstacle stops the performance of contract obligations, the obligations are not removed generally. When external barriers are eliminated, the contract would be valid again and may be examined in court. When an external occurrence or event makes the performance under a contract impossible, the contract would be totally terminated, so that the parties are excused from further performance⁸. The situation, while logically true, seems not to be true practically. The Iranian law only governs situations in which the external obstacle occurs when the time for performance has been reached. On the contrary, article 71 of the convention governs cases of anticipatory breach of contract. Generally speaking, there are no clearly defined grounds for acceptance of anticipatory breach of contract by Iranian legal system. The issue could be accepted and interpreted in the light of the concept of mutually co-dependent obligations of the contracting parties and common trading practices.

Conclusion

The acceptance of anticipatory breach of contract by Iranian legal system is only possible through common trading practices and expansion of the concept of mutually co-dependent obligations of the contracting parties. Thus, due to anticipatory breach of contract, one party is authorized to suspend the performance of its obligations. The right to breach contract is authorized to the parties of the contract if the performance of obligation become impossible. Moreover, if one party declared bankruptcy the other party is entitled to breach the contract. Some believe that article 71 and article 72 of the convention may be misconstructed or wrongly interpreted. The party who is not willing to perform its obligation may get rid of its obligations and this is in sharp contrast with ultimate objective of the convention that is making contracts and providing secure international transactions. Thus, it has been suggested that articles should be interpreted using narrow interpretation approach and be applied only in specific cases. In general it can be stated that the articles of convention do not have a detrimental effect on third world countries; thus the acceptance of convention by Iran for international trade practices is allowed although it is violation of domestic law.

However, the need to anticipatory breach of contract is felt in all the legal systems of the world and it has more prominent role in international trade in comparison with domestic transactions. The theory is referred as a fast and efficient mechanism to avoid further damages, suspension and breach of contract. Iranian commercial law needs to be fundamentally reformed in all of its aspects and the acceptance of convention is the first step to reform. These reformations make the domestic rules more

consistent with the requirements of developing world trade. Iranian legal system as well as legal systems of other countries that have not accepted the convention is practically faced with cases of anticipatory breach of contract. Consequently, it seems that the acceptance of the convention do not damage the structure of legal norms; at the same time, it encourages the performance of contract obligations by parties. The existence of legal principles such as compensation of damages arising from contracts, the need for categorization different types of breach of the contract, considering reason and justice in international contracts, paying attention to preventive aspects of law, and respect for aggrieved party rights confirmed the need that is felt in Iranian legal system. As a result of logical, sensible and successful performance of the theory of anticipatory breach of contract as well as acceptable development, the theory is a good example of law adaptability with new trade requirements. To conclude, it should be noted that the acceptance anticipatory breach of contract theory, considering commercial and sociological requirements, is a necessity for Iranian legal system.

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