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ANTICIPATORY BREACH REVISITED: FROM PREMATURE BREACH TO CERTAIN FUTURE NON-PERFORMANCE

Hassen TOUAIBIA[1], Mohammed Lakhdar KIRAM[2]

[1]Kasdi Merbah University, OUARGLA, ALGERIA
[2]University of EL-OUED, ALGERIA

touaibia.hassen@univ-ouargla.dz[1]
kiram-mohammedlakhdar@univ-eloued.dz[2]

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Abstract:
The existence of the obligation and its temporal effect, as breach, from a logical standpoint, can only materialize upon the maturity of the time for performance, not merely upon the formation of the obligation. Accordingly, what is termed "anticipatory breach" does not constitute an accurate characterization, as it presupposes the occurrence of a breach prior to its due time. The more precise description of the situation is that of a certain future breach, evidenced by serious indications emanating from the debtor that render non-performance highly probable.
On this basis, granting the creditor the right of termination, or other protective remedies, prior to the maturity of the obligation may be justified on the ground of the existence of a serious cause establishing the likelihood of non-performance, without the need to assume the existence of a present breach. This approach renders the theoretical framework more consistent with the logic of obligations in civil law.
KEYWORDS: Anticipatory Breach. Right of Retention. Right of Termination**.** Certain Future Non-Performance.

Introduction:

Since its inception, the doctrine of anticipatory repudiation has generated sustained controversy in both legal scholarship and judicial practice. Anglo-American jurisprudence tends to treat it as a departure from the general principles of contract law, elevating it to the status of an autonomous doctrine that entitles the creditor to terminate the contract or seek judicial relief prior to the due date of performance, at which the debtor's actual breach would otherwise materialize.

By contrast, civil law scholarship within the Latin tradition remains divided. One school maintains that anticipatory repudiation does not constitute an exception to the general rules, but rather operates in implicit harmony with them, discernible through certain provisions of the civil code without the need for explicit recognition. Another school, however, regards it as an alien construct, incompatible with both the general principles and the specific applications of civil law—a position which, in its outcome, converges with the Anglo-American view in emphasizing the doctrine's non-traditional character.

This divergence gives rise to both theoretical and practical concerns. From a theoretical standpoint, if anticipatory repudiation is merely a manifestation of ordinary contractual breach, it loses any claim to conceptual autonomy and cannot properly be sustained as a distinct doctrine but rather collapses into a mere application of conventional breach. Conversely, if it is acknowledged as an exception to the general rules, it represents a significant innovation within the civil law system, yet it encounters the difficulty of lacking explicit legislative foundation, given that courts are bound to apply statutory provisions rather than to extend them beyond their terms.

While such debate may be justified within Latin legal systems, the position differs in Anglo-American law, where the doctrine originated and developed, before being incorporated into American law and, subsequently, into international legal instruments through its codification in the United Nations Convention on Contracts for the International Sale of Goods (CISG). In these systems, the creditor's right to judicial relief no longer requires theoretical justification, as it derives directly from the texts that

recognize the doctrine. Accordingly, the central issue addressed in this article may be formulated as follows: Is anticipatory repudiation merely a form of traditional contractual breach, thereby explaining its absence from most Latin civil codes, or does it constitute a doctrine that conflicts with the foundational principles of civil law? And is the so-called "anticipatory breach" in Anglo-American law and the CISG a genuine characterization consistent with the logic of contract law, or a formal construct that conceals an underlying tension with

I. Creditor Protection under the Doctrine of Anticipatory Breach:

If the general rules dictate that the creditor is not entitled to invoke non-performance, termination, or damages unless a breach by the debtor is established at the time performance becomes due, the evolution of commercial transactions and the need to ensure stability in legal relations have necessitated the recognition of a form of anticipatory protection for the creditor against the risk of non-performance. This protection has taken shape in the doctrine of anticipatory repudiation, which raises the question of whether it forms part of the general principles of law or is merely a creation of judicial precedent.

Moreover, identifying the legal foundation of this doctrine presents a delicate theoretical challenge, given its apparent tension with a fundamental tenet of civil law, namely the requirement that breach be linked to the due date of performance. Constructing creditor protection on the basis of a breach that has not yet occurred in time risks undermining this principle. It therefore becomes necessary to reassess the foundations upon which the doctrine of anticipatory breach rests, and to seek a conceptual framework for creditor protection that is both consistent with the general principles of law and capable of ensuring effective protection for the creditor**.**

I.A. The Existence of the Theory between Judicial Practice and Legal Principles:

The key question is to what extent the doctrine of anticipatory repudiation exists within the general rules of law, and whether it represents an extension of established principles of general jurisprudence or merely a product of judicial development driven by practical necessity. To address this issue, it is essential to distinguish between its roots in general legal principles and the role of the judiciary in shaping and consolidating it.

I.A.1. The Theory of Anticipatory Breach as Judicial Precedent

The genesis of this doctrine was judicial, (adwan,. and Otoum, (2023), p377) arising from a case brought before the English courts between. Edgar De La Tour and Mr. Albert Hochster. The facts of the case are as follows: Mr. De La Tour, a nobleman, decided to undertake a tour of Europe and contracted Mr. Hochster to serve as his guide. However, one month before the scheduled departure, Mr. De La Tour sent a letter to Hochster informing him of the cancellation of the tour, refusing both to compensate him and to employ him in any alternative work. Consequently, Hochster entered into a contract with another employer.

On May 22, 1852, Hochster filed a lawsuit against De La Tour, claiming damages for breach of contract. De La Tour argued that the time for performance had not yet arrived and that breach could not be conceived before its due date. The jury ruled in favor of Hochster, and De La Tour appealed to the Queen's Bench seeking annulment of the judgment (Manhal, 2011, p. 20). The court, however, rejected this plea and awarded damages, with Chief Justice Lord Campbell declaring:

"It cannot be said, as a general rule, that where a person undertakes to perform an act at a future date, an action for breach of that undertaking is not maintainable until the time for performance has arrived. A contractual relationship arises between the parties from the moment of conclusion and continues until the time performance is due. If one party repudiates his obligation, he is in breach of an implied contract. To leave the plaintiff without remedy until June 1 would mean that until that date he could not enter into

any other engagement inconsistent with his obligation to the defendant, whereas justice and the interests of both parties require that he be free to contract with another while retaining his right to damages. Thus, instead of remaining unemployed and incurring expenses in preparation for a journey that will not take place, the plaintiff may seek other employment, thereby mitigating the damages caused by the defendant's repudiation of the first contract." (Shanab, , (1960), pp. 258–259).

I.A.2. Anticipatory Breach within the General Principles of Contract Law

The prevailing body of legal doctrine—across its various traditions, whether Anglo-American, Germanic, or Latin—has generally been reluctant to accept the possibility of taking measures against a debtor who declares, or adopts a position indicating, non-performance of an obligation whose due date has not yet arrived. This reluctance stems from the firmly established principles of the law of obligations in all these schools, which posit that breach arises only upon the maturity of the obligation. The prominence of this doctrine is largely attributable to its sharp departure from these foundational principles; indeed, it is commonly characterized as "anticipatory breach" precisely because of this tension.

In French law, which has historically influenced the various Latin legal systems, there is neither an explicit nor an implicit statutory provision adopting this doctrine. Nor is it recognized in classical French legal scholarship or doctrinal writings. The relatively recent emergence of the doctrine in modern French jurisprudence is attributable to two principal factors: France's accession to the Vienna Convention and the proliferation of comparative legal studies with Anglo-American systems (Habib Jabara, 2015, p. 11).In an effort to mitigate this doctrinal tension, some scholars have sought to reinterpret the concept by aligning it with the traditional principles of the law of obligations. They argue that what is described as an "anticipatory breach" is, in substance, an actual and present breach, grounded in various legal bases:

1. Breach of the Principle of Good Faith:
   Anticipatory non-performance is viewed not merely as a breach of a future obligation, but as a violation of an existing and present duty incumbent upon the debtor—namely, the obligation to act in good faith and to refrain from undermining the contractual relationship. A debtor's refusal to provide adequate assurances of performance, or an explicit declaration of non-performance, constitutes conduct contrary to good faith and fair dealing, thereby justifying the creditor's refusal to remain bound by a contract whose purpose can no longer be achieved (Al-'Adwan & Al-'Atoum, 2023, p. 382; Dudin, 2015, p. 7).
2. Impossibility or Futility of Performance Attributable to the Debtor:
   A breach is deemed certain and actual where the debtor engages in conduct that renders performance at the agreed time impossible or devoid of utility. In such circumstances, the debtor's conduct is treated as an effective and present breach of contract, justifying termination. The requirement of prior notice (mise en demeure) becomes redundant, as performance is no longer practically feasible (Al-'Adwan & Al-'Atoum, 2023, p. 406; Dudin, 2015, p. 7).
3. Unequivocal Written Declaration of Non-Performance:
   Where the debtor expressly and unequivocally declares in writing an intention not to perform the obligation, such declaration reveals a manifest lack of intent to perform and constitutes, in itself, a definitive and actual breach of contract. This explicit repudiation obviates the purpose of formal notice and renders the breach immediate and effective (Dudin, 2015, p. 7; Al-'Adwan & Al-'Atoum, 2023, p. 406).
4. Serious Delay Equivalent to Total Non-Performance:
   In certain applications—such as contracts for work—if the contractor delays the commencement or completion of the work to such an extent that timely performance becomes manifestly

impossible, this conduct is regarded as tantamount to total non-performance. In this context, legal doctrine, as noted by Professor Al-Sanhuri, characterizes such conduct as a breach that has occurred in advance and with certainty (Al-'Adwan & Al-'Atoum, 2023, p. 394; Dudin, 2015, p. 8).

I.B. **Reassessing the Foundations of the Doctrine of Anticipatory Breach:**

It may appear to some that discussing the foundation of the doctrine of anticipatory repudiation is devoid of both theoretical and practical value. As previously observed, legal scholarship has been divided into two camps, both of which accept the doctrine and recognize the creditor's entitlement to anticipatory protection, yet differ as to the basis upon which it rests. The first camp considers that the breach in anticipatory repudiation is a "premature breach," the anteriority of which is inferred from the debtor's conduct indicating an intention not to perform upon the maturity of the obligation. The second camp, by contrast, maintains that the doctrine is grounded in an actual breach, thereby reconstructing it in a manner consistent with the general principles of the law of obligations.In our view, however, both approaches overlook a fundamental point: the breach that is sought to be characterized as either anticipatory or actual is, in reality, nothing other than a certain future breach. This raises the question whether such a re-foundation of the doctrine carries any genuine theoretical or practical value.

I.B.1. The Traditional Basis of the Theory as Presented in Legal Doctrine:

The principle of the binding force of contracts, in itself, does not give rise to controversy insofar as it mandates the respect of contractual obligations and their performance in accordance with what has been agreed upon. The difficulty, however, emerges when determining the precise moment at which a breach of such obligations may be said to occur. The traditional conception, firmly established in civil law doctrine, closely links breach to the time of performance, such that a breach is deemed to arise only upon the maturity of the obligation and the debtor's failure to perform what he has undertaken.

This linkage is not merely procedural or organizational in nature; rather, it reflects a structural understanding of the nature of the obligation itself, grounded in the distinction between its existence on the one hand and its enforceable effect on the other. While an obligation comes into existence from the moment of its formation, the debtor's duty to perform it remains contingent upon the arrival of the due date, such that the debtor cannot be held liable for non-performance prior to that time. Accordingly, breach, as a legal fact, necessarily presupposes the fulfillment of this temporal condition and cannot be conceived independently of it. On this basis, any attempt to attribute breach to the debtor before the due date of performance appears, from a logical standpoint, to be inconsistent with the very nature of the obligation, as it presupposes the occurrence of a consequence prior to the realization of its cause. However, this conception, notwithstanding its theoretical rigor, encounters evident practical difficulties in light of the evolution of transactions, particularly in the commercial sphere. Situations frequently arise in which it is certain, or at least highly probable, that the debtor will not perform the obligation upon its maturity, even though the due date has not yet arrived. Such certainty may derive from an express declaration by the debtor announcing an intention not to perform, or from conduct that renders performance impossible or devoid of purpose, as in the case where the debtor contracts with a third party over the same subject matter of the obligation.

In such circumstances, the question arises as to whether it is acceptable to require the creditor to await the arrival of the due date despite the manifest prospect of non-performance, or whether the creditor should instead be entitled to adopt a legal position in advance. Anglo-American jurisprudence has addressed this issue through the development of what is known as the doctrine of anticipatory repudiation, which allows the creditor to terminate the contract and claim damages prior to the due date where it becomes evident that the debtor will not perform the obligation.

the incorporation of this doctrine into the conceptual framework of civil law has not been without difficulty. It has been designated as "anticipatory breach," a term that suggests the possibility of breach occurring prior to its proper time. This raises a subtle conceptual issue, namely the extent to which such a characterization can be reconciled with the traditional understanding of breach as the result of the non-performance of an obligation that has already fallen due.This difficulty becomes even more pronounced upon examining the doctrinal applications invoked to justify the theory, as it appears that they do not rest upon a unified foundation. Rather, they encompass a range of situations that differ fundamentally in their legal nature.

I.B.2. From Anticipatory Breach to Certain Future Non-Performance: A Conceptual Reassessment:

What has led English courts to adopt a doctrine that departs from the traditional principles and rules of the law of obligations is the strong emphasis on protecting the creditor. Despite earlier hesitation in accepting this doctrine, such reluctance no longer has any real place today, as the doctrine has evolved from a judicial creation of English courts into codified provisions—most notably within the U.S. commercial law framework and the Vienna Convention, which has been ratified by numerous states, thereby rendering it applicable as substantive law governing international sales contracts.

Nevertheless, the principal criticism that may be directed at the doctrine from a scientific standpoint is its conceptual inconsistency. It offers an artificial characterization of breach by labeling it as "anticipatory," whereas, in reality, it concerns a breach that lies in the future and whose time for performance has not yet arrived. Rather than securing creditor protection through such fictional constructs, it would be preferable to ground this protection on objective considerations that align with logic and reality rather than depart from them.

The most coherent explanation for protecting the creditor in the absence of an actual breach is to characterize the situation as one of certain future non-performance. Adopting this concept as an independent analytical framework does not presuppose that a breach has occurred in the present; rather, it is based on acknowledging the inevitability of such breach in the future, as established by strong objective indicators.Such a characterization achieves a balance between the practical need for protection—which justifies allowing the creditor to act prior to the maturity of the obligation—and the requirements of conceptual precision, which preclude attributing breach to an obligation that has not yet fallen due. It also enables a more accurate understanding of the legal consequences arising in such situations—such as termination and suspension of performance—by framing them as preventive measures rather than sanctions for an already realized breach.

Accordingly, re-establishing contractual protection on the basis of certain future non-performance does not merely constitute a terminological adjustment; rather, it reflects a methodological shift in the understanding of the function of law—from stretching traditional concepts to their limits, to recognizing the existence of new legal situations that require distinct analytical tools.

This proposed re-foundation may appear, at first glance, to be radical, as it does not merely seek to identify a new basis for the existing doctrine, but rather advances an entirely new theory—one that allows for the extension of contractual protection to situations of certain future non-performance.

In our view, although this approach may seem unfamiliar, it is in fact explicitly embodied in the provisions of the Vienna Convention, a point that will be demonstrated through an analysis of its relevant texts.

II.Application of the Doctrine of Certain Future Non-Performance under the Vienna Convention

The United Nations Convention on Contracts for the International Sale of Goods (CISG 1980) represents one of the most significant milestones in the unification of international trade rules. It does not confine

itself to regulating the performance of contractual obligations but extends to addressing risks that may threaten such performance prior to its due date. In this context, the Convention establishes a comprehensive legal framework commonly referred to as "anticipatory breach", enabling the creditor to adopt preventive measures against the risk of non-performance.

A closer examination of the Convention's provisions—particularly Articles 71, 72, and 73—reveals that the international legislator did not base these measures on the assumption of an existing breach, but rather on varying degrees of likelihood of future non-performance. Article 71 permits suspension of performance where it "appears" that the debtor's ability to perform has suffered a serious deficiency. Article 72 requires that this likelihood reach the level of "clear certainty," approaching practical inevitability. Article 73 adopts an intermediate standard, relying on "good grounds to conclude" that a fundamental breach will occur.

This gradation demonstrates that the true foundation for creditor intervention lies not in the actual occurrence of breach, but in the degree of certainty regarding its future occurrence. What the Convention terms "anticipatory breach" therefore does not amount to a present breach in the strict sense, but rather describes a situation in which breach has not yet occurred, though its likelihood has crystallized to the point where non-performance is virtually assured.

Accordingly, the CISG does not depart from the logic of contract law, nor does it establish the notion of a premature breach. Instead, it provides a practical model of a preventive mechanism grounded in the concept of certain future non-performance, whereby protection is afforded to the creditor on the basis of serious and objective indications, without the need to presume an existing breach. This approach allows for a recharacterization of the doctrine in a manner more consistent with general principles, while preserving its practical effectiveness in safeguarding the creditor.

II.A. Right of Retention as a Preventive Measure:

Article 71 of the Convention entitles the creditor to react to the debtor's conduct when indications of non-performance become apparent, by suspending his own performance without terminating the contract. In this sense, suspension operates as a preventive mechanism (Schlechtriem & Schwenzer, 2020, p. 940). It may be regarded as a mitigated sanction, insofar as the indications of non-performance have not yet reached the level of certainty required for more severe remedies.

II.A.I. Implicit and Explicit Indications for Exercising the Right of Retention:

A creditor may not suspend the performance of his obligation unless such suspension is grounded in concrete and verifiable facts attributable to the debtor. These facts may either be implicitly inferred from the debtor's conduct, or they may be explicit and clearly reveal the debtor's intention.

II.A.I.1. Implicit Indications :

Article 71 requires, for the activation of the right of retention, the existence of a "serious deficiency" in the other party's ability to perform. Scholarly opinion maintains that such deficiency must not be a mere remote possibility but must be grounded in tangible and material facts (Honnold, 2009, p. 428).

1. Financial Insolvency or Inability to Perform: This condition is reflected in the deterioration of the debtor's financial situation, such as a declaration of bankruptcy or severe credit difficulties preventing performance (Ingeborg Schwenzer, 2016, p. 1012). Courts have applied this standard in *Austrian Supreme Court, 1996*, where it was emphasized that mere rumors concerning the debtor's financial position are insufficient unless corroborated by conclusive evidence.

2. Debtor's Conduct in Preparing for Performance: The right of suspension also extends to cases where the debtor's conduct reveals a lack of seriousness in fulfilling obligations—for example, ceasing production of the contracted goods or attempting to sell them to a third party at a higher price (Bridge, 2014, p. 115).

II.A.I.2. Explicit Indications (The "Apparent" Standard)**:** Article 71 employs the expression "if it becomes apparent," which establishes an objective standard measured by what a "reasonable person" would perceive under the same circumstances (Lookofsky, 2022, p. 158). However, requiring complete clarity in the debtor's position weakens the protection afforded to the creditor, since in many instances it is difficult for the creditor to ascertain the debtor's stance in a clear and unequivocal manner. For this reason, Ferrari argues that the standard under Article 71 is one of "preponderant probability," which is less stringent than the "clear certainty" required under Article 72 (Ferrari, 2015, p. 182).

II.A.I.3. Burden of Proof:

The burden of proof regarding the facts invoked to justify suspension of performance rests upon the party who has decided to suspend its own obligations. This follows the general rules of evidence: if it is subsequently established that the reasons were not "serious," that party will be deemed to have breached its obligations and will bear liability for damages (Brunner, 2004, p. 230). This is consistent with the general principles governing the law of evidence.

II.A. II. Conditions for Exercising the Right of Retention:

The right of retention is determined for the creditor in two situations specified in paragraph 3 of Article 71:

1. **Immediate Notice:** The suspending party must send notice "without delay" to the other party (Clout Case No. 238). The purpose of this notice is to prevent surprise and to enable the other party to defend its contractual position.
2. **Guarantee Excludes Retention:** If the debtor—the party suspected of potential non-performance—provides adequate security (such as a bank guarantee or collateral), this bars the creditor from exercising the right of retention, and the creditor must immediately resume performance (Kritzer, 1989, p. 467). In *German District Court of Darmstadt, 2001*, it was held that refusal of sufficient guarantees constitutes an abuse of rights, rendering the suspension invalid.

II.B. Preventive Termination:

If the creditor's suspension of performance is merely a precautionary measure, the contractual relationship remains intact; it serves only as a safeguard that pressures the debtor to reconsider his position. By contrast, the creditor's demand for termination seeks to extinguish an existing contractual relationship and erase its effects both retrospectively and prospectively. This constitutes a serious step taken by the creditor, not on the basis of an actual breach, but on the basis of a future breach that is practically certain. Thus, while Article 71 represents the "shield" of preventive protection, Article 72 Provides :" (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. (3) The requirements of the preceding paragraph do not apply if the other party has declared that he will not perform his obligations" Thus, Article 72 embodies the 'sword' of legal termination, severing the contractual bond before its maturity. This provision is regarded as one of the strictest in the Convention due to the gravity of its consequences (Honnold, 2009, p. 435).

II.B. I. The Breach Must Be Clear (The Standard of Clarity) :

In this context, the creditor's right to terminate, due to its gravity, must rest upon two elements: first, the breach must be clear; second, it must be of a fundamental nature.

1.Clarity of the Breach: The requirement of clarity in cases of termination differs significantly from that applicable to suspension of performance, as it goes far beyond the "apparent" standard required

under Article 71. Schlechtriem explains that clarity here means *"practical certainty"*, leaving no room for reasonable doubt in the mind of a rational person under the same circumstances (Schlechtriem & Schwenzer, 2020, p. 950).

Judicial practice has considered the most evident example of clarity to be the debtor's express repudiation. In *Helsinki Court of Appeal, 1998*, the court held that the seller's inability to commence production as the delivery date approached constituted "clear" evidence justifying anticipatory termination. It should be noted that what courts describe as "anticipatory termination" is in fact a form of preventive termination, protecting the buyer from waiting in vain and thereby incurring losses.

2.Fundamental Nature of the Breach: Article 72 requires that the occurrence of a future breach be not only "clear" but also fundamental. The fundamental nature of the anticipated breach (Fundamental Breach) (Nassir, 2007, p. 226) is what establishes the right of termination. It is not sufficient for the breach to be clear; it must also be fundamental within the meaning of Article 25 of the Convention which declares:" A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprivehim of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.

The fundamental character is determined by the extent of harm suffered by the creditor in the event of the anticipated breach, namely, whether it deprives the creditor of what he was entitled to expect from the contract (Bridge, 2014, p. 122).

Brunner emphasizes that when applying Article 72, the court must ascertain two points: first, that the future act will occur with certainty; and second, that if it were to occur, it would constitute a fundamental breach (Brunner, 2004, p. 241).

This is precisely the concept of "certain future non-performance": it is future because the due date has not yet arrived, and it is certain because it rests upon clear and conclusive indications of the debtor's intention not to perform. Waiting until the due date would only increase the harm to both creditor and debtor.

II.B. II. Conditions for Exercising the Right of Termination:

1. Obligation to Notify the Debtor: Article 72(2) imposes a fundamental procedural requirement to ensure good faith and transactional stability, namely the creditor's obligation to notify the debtor "if time permits," thereby granting the debtor an opportunity to provide adequate assurances (Kritzer, 1989, p. 472). The requirement of notice prior to termination is a core condition expressly recognized in all civil law systems within the Latin tradition.

2. Exemption from Notice: The necessity of notice is waived under Article 72(3) if the other party expressly declares that it will not perform its obligations. In *ICC Arbitration Case No. 8786*, the arbitrators held that an express refusal eliminates the need for any further clarifying procedures. This exception is likewise enshrined in all Latin civil law systems.

II.C. Application of the Concept of Future Breach in Installment Contracts (Article 73 CISG):

Article 73 constitutes a specific and in-depth application of the principles of anticipatory breach, as it addresses supply contracts performed over successive periods of time. The central issue here lies in determining the extent to which the "failure" of a particular installment affects the future of the contractual relationship as a whole (Schlechtriem & Schwenzer, 2020, p. 962).

II.C. I. The Standard of Strong Inference for Certain Future Non-Performance:

Article 73(2) grants the aggrieved party the right to terminate the contract with respect to future installments if it has "good grounds to conclude" that a fundamental breach will occur. Honnold observes

that this standard occupies a middle ground: it is stronger than the "apparent" standard in Article 71, yet less stringent than the "clarity" required under Article 72 (Honnold, 2009, p. 442).

Judicial practice often derives this strong inference from repeated breaches in prior installments. For example, if the buyer fails to pay three consecutive installments, the seller has strong grounds to infer that future payments will also default (Lookofsky, 2022, p. 168). In *Swiss Federal Supreme Court, 1998*, the court held that non-conformity of goods in initial installments justified termination of future deliveries where the defect stemmed from a structural flaw in the seller's production lines.

II.C. II. The Theory of Interdependence and Total Termination:

Article 73(3) permits avoidance of the contract not only with respect to future installments, but also retroactively (total avoidance), in cases of "close interdependence" between installments. This presupposes the indivisibility of the installments, requiring that they be so interrelated that none can serve the contractual purpose intended by the parties without the others (Bridge, 2014, p. 128).

For example, in a contract for the supply of industrial machinery to a textile factory, if the defect concerns the "central control unit," both the earlier installments (metal structures) and the subsequent ones (motors) lose their functional value for the buyer. In such circumstances, Ferrari recognizes the buyer's right to return what has already been delivered and to seek avoidance of the contract as a whole (Ferrari, 2015, p. 195).

A doctrinal question arises as to whether the creditor may rely on Article 72 instead of Article 73 in installment contracts. The prevailing view, as expressed by Brunner, holds that Article 73 constitutes a *lex specialis* that takes precedence over the general rule in Article 72 when dealing with installment contracts (Brunner, 2004, p. 255).

Kritzer further observes that the interaction between these provisions affords the creditor procedural flexibility: where the creditor is unable to establish the "clear certainty" required for total avoidance under Article 72, he may instead rely on Article 73(2) to terminate only future installments, thereby adopting an intermediate solution that shields him from liability (Kritzer, 1989, p. 478).

It is noteworthy that the CISG allows the creditor to avoid the contract in its entirety even where the debtor has partially performed, provided that clear evidence demonstrates the debtor's inability to complete the remaining obligations, which are closely connected to the part already performed. These remaining obligations are future in nature, and their non-performance amounts to a certain future breach. Accordingly, the creditor's right to total avoidance is grounded not in an existing breach, but in a practically certain future non-performance.

Conclusion:

Building on the foregoing, it may be concluded that the regime of "anticipatory breach" under the Vienna Convention (CISG) reflects a delicate balance: it seeks, on the one hand, to preserve contractual stability, and on the other, to prevent the aggravation of damages. Nevertheless, the Convention retains the terminology of "anticipatory breach," a formulation inherited from Anglo-American judicial practice, particularly English and U.S. case law.

This gives rise to a certain linguistic and conceptual tension within the text itself. It suggests that, while the Convention implicitly recognizes the underlying difficulty, it does not fully resolve it, remaining situated between accurately capturing the legal phenomenon and adhering to inherited doctrinal structures.

Further follows that the standard adopted by the Convention for the protection of the creditor operates along a graduated spectrum. It begins with the threshold of "apparent" risk for the exercise of the right to suspend performance (Article 71), and culminates in the requirement of "clear certainty" for contract avoidance (Article 72). In this respect, the Convention implicitly affirms the notion of future breach by

calibrating the degree of its likelihood—ranging from probable in cases of mere appearance, to virtually certain where clarity is fully established.

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