مجلة جامعة الشارقة للعلوم القانونية

اسم المقال: إعمال مبدأ الإخلال المبتسر في القانون الإماراتي، دراسة مقارنة بالقانون الإنجليزي
اسم الكاتب: محمود إبراهيم فياض
رابط ثابت: https://political-encyclopedia.org/index.php/library/8507
تاريخ الاسترداد: 2026/11/02 04:09 +03

الموسوعة السياسيّة هي مبادرة أكاديمية غير هادفة للربح، تساعد الباحثين والطلاب على الوصول واستخدام وبناء مجموعات أوسع من المحتوى العلمي العربي في مجال علم السياسة واستخدامها في الأرشيف الرقمي الموثوق به لإغناء المحتوى العربي على الإنترنت.
لمزيد من المعلومات حول الموسوعة السياسيّة – Encyclopedia Political، يرجى التواصل على info@political-encyclopedia.org

استخدامكم لأرشيف مكتبة الموسوعة السياسيّة – Encyclopedia Political يعني موافقتك على شروط وأحكام الاستخدام المتاحة على الموقع https://political-encyclopedia.org/terms-of-use

تم الحصول على هذا المقال من موقع مجلة جامعة الشارقة للعلوم القانونية ورفده في مكتبة الموسوعة السياسيّة مستوفياً شروط حقوق الملكية الفكريّة ومتطلبات رخصة المشاع الإبداعي التي ينضوي المقال تحتها.

جامعة الشارقة
UNIVERSITY OF SHARJAH

University of Sharjah Journal

A Refereed Scientific journal

of

Law Sciences



Vol. 19, No. 2
Jumada 1 1443 A.H. / June 2022 A.D

ISSN : 2616-6526

University of Sharjah Journal for Law Sciences, Volume 19, No. 2 June 2022

https//:doi.org/10.36394/jls.v19.i2.10

Rationalizing anticipatory breach in Emirati law: A comparative legal study with English law

Mahmoud Ibrahim Fayyad

College of Law - University of Sharjah

Sharjah - United Arab Emirates

Received on: 09-04-2020 **Accepted on: 10-05-2020**

Abstract:

The Dubai Court of Cassation ruled a new trend in 2013 by creating the principle of anticipatory breach in a real estate appeal in Emirati law despite the fact that no similar doctrine is known to exist under this law. This doctrine is found in common law legal systems; it authorizes the innocent party to terminate the contract and sue for damages if there are serious grounds to believe that the other party will not perform his future obligations, even though the time of this performance is not yet due. UAE law, and likewise French law, recognizes the principle of an "actual" breach of contract; it must be a "present" to invoke the remedies of the agreement. This paper is meant to detect which bases the Dubai Court of Cassation relied on in the assessment of its decision in comparison with the nature of this doctrine (English law). It finally recommends the insertion of this doctrine in the general principles of contract law provided in the law of civil transactions with specific conditions and procedures.

Keywords: Anticipatory breach, Anticipatory nonperformance, Breach in Emirati law, Anticipatory breach in Common law

1. Introduction

The doctrine of anticipatory breach or the anticipatory non-performance (hereafter the doctrine) has been developed to deal with situations where the contracting party has grounds to suspect that the other party's performance will not be forthcoming at the due time.(1) It was legitimately first established in a famous 1853 case,(2) enabling the innocent party to terminate the contract and sue for damages immediately in the case that the other party declared his will not to fulfill his part, despite the fact that the time stipulated for the latter's performance was not due.(3) The doctrine has since been employed by counsels to justify a premature termination of contract in numerous legal battles. This doctrine has a long history; it therefore has been extensively discussed in legal literature and cases in different legal systems. It has made its way into American law and all common law countries.(4)

Despite the fact that this doctrine is not recognized in Emeriti law, the Dubai Court of Cassation (DCC) ruled this principle in the Case 200/1013. In this case, the contract provided that the agreed date of completion was the first quarter of 2010, but the developer had accomplished only 75% of the work at this time. The buyer paid 60% of the unit's price in accordance with the payment schedule but suspended other payments when it appeared that the project would not be completed on time before its due date. The DCC concluded that the developer did not have any sensible reason to justify the delayed construction

(1) D. Saidov, 'Anticipatory Non-Performance and Underlying Values of the UNIDROIT Principles', Uniform law review Journal, (2006): 795. A. Dawwas, 'Anticipatory Avoidance of Contract: CISG and Egyptian Law Compared', Nordic Journal of Commercial Law 1 (2002): 2.

(2) Hochster v. De la Tour (1853) 2 El. & Bl. 678, 118 E.R. 922. For the history of evolution of the doctrine in common law; K. Rowley, 'A Brief History of Anticipatory Repudiation in American Contract Law', 69 University of Cincinnati Law Review, (2001): 565.

(3) See: B. Nicholas, 'The French Law of Contract' (2nd London: Sweet & Maxwell, 1992), 158. A. Mercedeh. 'Anticipatory Breach Under the United Nations Convention On Contracts For the International Sale of Goods', Nordic Journal of Commercial Law, (2005), Available at http://cisg.law.pace.edu. (Accessed: 25/10/2018).

(4) M. V. Alexandre, 'Clauses which put an end to the contract and clauses which survive the contract', International Business Law Journal, 3/4 (2002): 407.

of the property, and since the purchaser had been making payments according to the scheduled payment plan provided in the agreement, so the developer was in breach of his main obligation by completing the construction in a delayed manner. The DCC ruled that the delay, which amounted to negligence, entitled the purchaser to terminate the agreement even though the date of the obligation of the other party was not yet due.(1)

This decision represents a dramatic change in the recognition of the general principles of contract law in the UAE. Whilst the terms of the Civil Code are clear that one party can suspend performing his obligations if the other party has stopped (Article 247), the new approach allows the innocent party to withhold his obligations even when the other party is still performing if there are "serious reasons" causing him to believe that the other party will not perform his future obligations. This is similar to the English common law doctrine of "Anticipatory Breach" which is not obviously provided in Emirati law. While the theory of contract in the UAE is governed by its Civil Code, which is influenced by Islamic Article 338 of the Emirati Civil Code expressly stipulates that the performance of an obligation cannot be claimed before its due time or event.(2) Article 272/1 of the UAE Civil Code provides that: "In contracts binding upon both parties, if one of the parties does not do what he is obliged to do under the contract, the other party may, after giving notice to the obligor, require that the contract be performed or cancelled". This Article does not explain whether such a termination can be invoked before the performance of the obligation is due. In fact, the decision of the DCC raises two main questions. First, is it possible to say that there is a legal basis for the doctrine of anticipatory breach of contract in UAE civil law? Secondly, if the general principles of contract law in the UAE did not recognize the clear rules of this doctrine, on which grounds did the DCC rely in the assessment of its decision? The answer to these questions will be discussed in detail in this article.

(1) For more details about this case, see: https://www.linkedin.com/pulse/dubai-court-decision-delayed-projects-offers-investor-tormey-ll-m-: (Accessed: 12/5/2018).

(2) This article provides that: a right must be settled whenever its legal maturity conditions are satisfied. If the debtor is in default, the right shall be compulsory enforced, either in kind or through payment of an indemnity, in conformity with the law provisions.

2. The Recognition of Anticipatory Breach in English law

In English law, there are key factors that must be taken into consideration in determining whether there has been a repudiation of a contract amounting to an anticipatory breach. Whether there is a clear case of a refusal to perform contractual obligations that deal with the main obligations of the contract, the refusal to perform those obligations must be absolute; the renunciation of the contract cannot be conditional on certain circumstances occurring.(1) In addition, the decision of the sufficient refusal to perform contractual obligations is to be subjective, so it is judged according to whether a reasonable person in the same position of the innocent party would regard the refusal as being clear and absolute, and finally, the history of the relation in breach must be evaluated in general.(2)

This is to say that anticipatory avoidance in English law requires that: (a) a breach of a contract by the contracting party becomes clear before the obligation is due; (b) such a breach is fundamental in nature; and (c) the innocent party must reasonably infer the occurrence of the breach. These three conditions are going to be discussed in this part of the study.

2.1 The Need for Clarity

The approach of English courts lays down the principal prerequisite to invoke the doctrine of anticipatory breach: it must be clear prior to the time of performance that the debtor will not perform his fundamental obligation.(3) It has to be noted that any circumstance, which results in the expectation that a fundamental non-performance will occur, has to be considered. A fundamental non-performance will take place as a result of the other party's expressions or

(1) A. Burrows, 'Remedies for Torts and Breach of Contract' (3rd Oxford: Oxford University Press, 2004), 435.

(2) G. Charles & S. Robert, 'Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforceable Model and a Theory of Efficient Breach', Columbia Law Review, 77 (1977): 554.

(3) See for instance: Alfred C Toepfer v Peter Cremer GmbH & Co [1975] 2 Lloyd's Rep. 118 at 125 left-hand column (Lord Denning M.R.), and at 129 left hand column (Scarman L.J.) CA; summarised by Aikens J. in Gulf Agri Trade FZCO v Aston Agro Industrial AG [2008] EWHC 1252 (Comm); [2009] 1 All E.R. (Comm) 991 at [41].

actions evidencing its unwillingness or inability to perform. It is conditional that the breaching party has denied the performance of their contractual obligations in a serious, express and unambiguous manner. In addition, some external factors such as the destruction of the seller's factory, imposition of an embargo or monetary restrictions, or strikes may result in the same conclusion.(1) The probability of a future breach has to be very high and understandable to everyone, but does not require almost complete certainty. This is to keep balance between the parties and minimize the risk of abusing the right to terminate the contract by one contracting party. This means that the standard of "clear" needs to be interpreted from the viewpoint of a reasonable person and not from the viewpoint of the innocent party. The question of what makes it "clear" that a fundamental breach will occur rests on the circumstances of a particular case.

In addition, if there is an expression of intention to suspend the performance of an obligation upon the condition of amending the terms of the contract, it should be "clear" to the other party that a fundamental breach will occur.(2) If a party expressly and unambiguously states that it will perform only on new terms, it is a clear indication of an anticipated breach. Once this intention was communicated to the other contracting party, he would have the right to end the agreement and seek damages. To invoke this right, the innocent party was not authorized to bring the contract to an end, and therefore his right to damages in respect of the same anticipatory breach, if he declared his intention to affirm the contract regardless of the validity of how he used to affirm it or its method (action or conduct). The first scenario occurs when the contracting party declares his intention obviously not to perform his obligation, while the second takes place if serious indications are provided that he is not able to perform, i.e. he is insolvent.(3) Such clarity appearing in the second case might result from:

(1) See E.W. Hornung in P. Schlechtriem & I. Schwenzer (eds.), 'Commentary on the UN Convention on the International Sale of Goods (CISG), (2nd: Oxford University Press: England, 2005), 721.

(2) E. Peel, Treitel, The Law of Contract (14th London: Sweet & Maxwell, 2015) Para. 21; H. McGregor, McGregor on Damages (19th London: Sweet & Maxwell, 2014) para. 9-024.

(3) Y. Goh & M. Yop, 'Rationalizing anticipatory breach in executed contracts', Cambridge Law Journal, 75/1 (2016): 18-21.

(1) a serious deficiency in the debtor's ability to perform his obligations, or (2) his conduct in preparing to perform his obligations, which indicates negative consequences.[1]

In contrast, in *Stocznia v. Latvian Shipping Co.*,[2] the court held that if the breached party was charged with another breach in the same relation, a call for performance in the face of an anticipatory breach would not prevent the injured party "from later accepting an actual repudiatory breach", but it insisted that he could not so change course while the same breach in respect of that which he had originally affirmed remained anticipatory. This is because English law distinguishes clearly between a continuing actual breach, an actual breach that is no longer continuing, and an anticipatory breach[3]

2.2 Fundamental Non-Performance

An overview of decisions of anticipatory breach seems to suggest that the non-performance breach is fundamental in some cases. The action of "renunciation" represents a clear indication to the fundamental notion of contract.[4] The question into the consequences of one party's conduct may not be commonly made in refusal cases and is mainly employed to invalidate a termination of contract based on a refusal to render an insubstantial part of the agreement.[5] Simon Brown Q.C. used the term "anticipatory repudiatory

(1) A Dawwas, Ibid, P. 8.

(2) Case: Stocznia Gdanska SA v Latvian Shipping Co (Leave to Amend Pleadings) [1997] 2 Lloyd's Rep. 228 (QBD (Comm).

(3) Langley J. in the Commercial Court ([2005] EWHC 161 (Comm); [2005] 1 All E.R. (Comm) 467); Auld and Tuckey L.JJ. and Lord Mance in the Court of Appeal ([2005] EWCA Civ 1190; [2006] 1 W.L.R. 533.

(4) Davidson v. Gwynne (1810) 12 East 381, 389, 104 E.R. 149, 152 (Lord Ellenborough C.J.); Withers v. Reynolds (1831) 2 B. & Ad. 882, 109 E.R. 1370; Mersey Steel v. Milling (1884) 9 App. Cas. 434, 443-444 (Lord Blackburn); Re Rubel Bronze Co. [1918] 1 K.B. 322.

(5) E.g. Johnstone v. Milling (1885-86) L.R. 16 Q.B.D. 460.

breach" to stress the fundamentality required for the non-performance or breach.[1] The non-performance must also concern a substantial part of the obligations. The important question that arises here is what constitutes "a substantial part of the obligations"? The answer to this question must be determined from the viewpoint of an innocent party's state of mind and subjective intentions or on the basis of the standard of a "reasonable man" (often believed to be more objective).[2]

It is well known that a non-performance is fundamental if it has the effect of depriving the innocent party of substantially the whole benefit that the parties intended that he should obtain from the contract. The concept of fundamentality, in order to be judged, has to be redressed in terms of the innocent party's expectations under the contract that are relevant. The adoption of this interpretation will probably involve, to a certain extent, an inquiry into the party's subjective expectations, unless the other party did not foresee and could not reasonably have foreseen such a result.[3] This approach focuses on the *consequences* of the owners' prospective conduct.[4] As per Buckley L.J. in *Decro-Wall International S.A.* v. *Practitioners in Marketing Ltd.*,[5] the breach was held to be "extremely serious" because it would have resulted in the charterers being blacklisted by grain shippers and incurring substantial liability to third parties.[6] The court dismissed the owners' arguments that they honestly believed that they had the right under the charter party to make the instruction,

(1) H.S.S. Hire Services Group Plc. v. B.M.B. Builders Merchants Ltd. and another [2005] EWHC 2013 (QBD), at paras. [4], [58].

(2) L. Graffi, 'Case Law on the Concept of 'Fundamental Breach' in the Vienna Sales Convention', International Business Law Journal, 3 (2003): 338, available at: <http://www.cisg.law.pace.edu/cisg/biblio/graffi.html, (Accessed: 12/7/2018).

(3) D. Saidov, , Ibid, P 804.

(4) Photo Production Ltd. v. Securicor Transport Ltd. [1980] A.C. 827, 849 (HL); Hongkong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha Ltd. [1962] 2 Q.B. 26, 66 (CA).

(5) [1971] 1 W.L.R. 361, 380 (CA).

(6) [1979] A.C. 757, 780 (Lord Wilberforce); 783-784 (Lord Fraser); 785-786 (Lord Russell).

that they intended to perform the charter party, and that their conduct was only a tactical move that was conditioned on the arbitrators' verdict over the issue of deduction.(1) In cases where the innocent party has performed part of his contractual obligations, this description takes place when the innocent party would be deprived of substantially the whole benefit of the agreement that can be concluded from the intention of the parties that it should obtain as consideration for its outstanding performance.(2)

In conclusion, the non-performance is said to be fundamental in many cases, namely: (a) when it is grave enough so as to go to the root of the contract,(3) whether it goes to the whole root or its consequences go through this root;(4) (b) when there is a significant delay in performing the obligation to a degree that is so prolonged that it renders the contract radically different from that originally undertaken; (c) when the defaulting party's performance is said to be "substantially inconsistent" with his contractual obligations; (d) if the conduct of the contracting party indicates an intention to refuse the performance;(5) (e) if the breach deprives, or partly deprives, the innocent party of what he substantially expected to benefit from the agreement; and (f) if it would be "unfair" on the innocent party to confine them to damages, without the further

(1) Q. Liu, 'Inferring future breach: towards a unifying test of anticipatory breach of contract', Cambridge Law Journal, 66 (3) (2007): 16.

(2) G. H. Treitel, The Law of Contract (9th London: Sweet & Maxwell, 1995),769; J. Poole, Textbook on Contract Law (6th Blackstone Press, London, 2001), 248; J.W. Carter, G.J. Tolhurst & E. Peden, 'Developing the Intermediate Term Concept', Journal of Criminal law, 22 (2006) 273.

(3) A commonplace expression, see e.g., Federal Commerce & Navigation Co Ltd v Molena Alpha Inc (The Nanfri) [1979] A.C. 757 at 778–779, 783, 784, 785 and 786; Davidson v Gwynne (1810) 12 East 381 at 389; 104 E.R. 149 at 152 (Lord Ellenborough C.J.).

(4) Federal Commerce & Navigation Co Ltd v Molena Alpha Inc (The Nanfri) [1978] Q.B. 927 at 945 (Kerr J.).

(5) Tullett Prebon Plc v BGC Brokers LP [2011] EWCA Civ 131; [2011] I.R.L.R. 420 at [22]–[29] (Maurice Kay L.J.); Eminence Property Developments Ltd v Heaney [2010] EWCA Civ 1168 at [61]–[63] (Etherton L.J.).

option of termination.(1) It has to be noted that English courts do not deal with cases similarly when testing the right to invoke anticipatory avoidance. In the last three cases, this right is not recognized if the degree of seriousness is not such that the innocent party has a clear justification for ending the contract, and while the level of default must be great, it need not be almost total.(2) In contrast, the first three cases are serious enough to invoke this right.

Finally, English law requires, in order to invoke this doctrine, that the non-performance results in the fault of the debiting party; there will be no repudiation if a party in breach points out that the breach has not occurred because of his fault, but because of someone or something else acting beyond this party's control.(3)

2.3 Reasonable Inference of Non-Performance

The principle of reasonable inference applies regardless of whether it is a party's willingness or ability to perform the obligation.(4) For instance, in *Universal Cargo Carriers Corporation* v. *Citati*,(5) the ship owners under a voyage charter party terminated the contract and re-chartered the vessel to a third party three days before the expiry of the stipulated lay-days because the charterers failed to load any cargo. The ship owners justified the termination on the grounds that the contract would have been frustrated by the charterers' long delay in loading the cargo.(6) The court agreed with this justification on the grounds of the existence of a reasonable inference of that belief at the time of

(1) Decro-Wall International S.A. v Practitioners in Marketing Ltd [1971] 1 W.L.R. 361 at 380; [1971] 2 All E.R. 216 at 232 CA (Buckley L.J.).

(2) As preferred by M. Bridge, 'The international Sale of Goods' (Oxford university press: Oxford, 2017), 120.

(3) G.H. Treitel, 'Frustration and Force Majeure', (3rd London: Sweet & Maxwell 2014) Paras 12-026 to 12-051.

(4) G.H. Treitel, 'The Law of Contract', (14th: London: Sweet & Maxwell, 2015), 862.

(5) [1957] 2 Q.B. 401.

(6) HongKong Fir v. Kawasaki [1962] 2 Q.B. 26, 66-69 (Diplock L.J.).

thetermination.[1]

A reasonable inference of a potential of breach must be assessed objectively according to the guilty party's words or conduct prior to the due time. This is a core test in assessing the legitimacy of termination, e.g. in *The Hermosa*,[2] Donaldson L.J. held that the termination was not justified on the grounds of either the renunciation approach or the fundamental breach approach, "not because the breach … anticipated was insubstantial, but because the conduct … did not justify a firm inference that there would be a further breach".[3] To rule a "reasonable inference", a mere suspicion was unsatisfactory and a firm conclusion was required.[4] The distinction between both cases is similar to the difference between a possibility of a breach and a reasonable probability. However, current circumstances at the time of exercising the right of termination may deny a reasonable inference, for instance, if the exercise of the right fails only on a technical reason and the other party is aware of this. For this reason, the effect of the reasonable inference must be conclusive and insusceptible to attacks grounded in real and logical facts. It must be based on real indications and proofs provided that the obligation in question will not be performed at the due time. It is irrelevant whether the inference is correct or not. This conclusion was held in the Court of Appeal's decision in *The Hermosa,* when the court concluded that an anticipatory breach is ruled and completed at the moment a "reasonable inference" is drawn, even if information that appeared after the time of termination indicated the wrongfulness of that termination, simply because this termination was assessed upon a reasonable inference at that

(1) Universal Cargo v. Citati [1957] 2 Q.B. 401, 439. See also The Hermosa [1982] 1 Lloyd's Rep. 570, 581.

(2) [1982] 1 Lloyd's Rep. 570. Mentioned in: P. Richrds, Law of Contract (2nd Pitman Publishing: London 1995) P 261.

(3) [1982] 1 Lloyd's Rep. 580. Mentioned in: M.G. Bridge, The Sale of Goods (3rd Oxford: Oxford University Press, 2014) para.10.34.

(4) [1982] 1 Lloyd's Rep. 580. Mentioned in: M. Chen-Wishart, 'Contract Law' (5th Oxford: Oxford University Press, 2015), 93–94.

time.[1] For the same reason, a reasonable inference would also be satisfactory to support the order of specific performance prior to the time of performance, even though such an order will not be executed until that time arrives.[2]

For the burden of proof, the innocent party must therefore justify his decision to terminate the contract by invoking the other party's "self-induced impossibility", and there would no way to keep the validity of the agreement. This is because the courts will examine whether the future default had truly become unavoidable, and the terminating party bears this onus of proof. In this case, the Court of Appeal in the MSC Mediterranean Shipping case ruled the termination of the contract automatically, without an "election" by the innocent party as an exception to the "elective" process of termination for breach. This exception concerns the impossibility to contend that agreement (breach by frustrating delay).

3. No Specific Rules in Emirati Contract Law for "Anticipatory Breaches"

According to the terms of the Emirati Civil Code, it is clear that there is not, in general, a doctrine of an anticipatory breach in Emirati contract law. Emirati contract law distinguishes clearly between the existence of the contractual obligation and its actionability, which is discussed in detail under the heading of the nature and effect of the obligations with a term, or *ajal*. A term does not suspend the undertaking; it only delays its fulfilment to a specific date or a certain specific event.[3] The general rule is that, where a party agrees to undertake an obligation, the performance of that obligation is due immediately

(1) Embiricos v. Sydney Reid & Co. [1914] 3 K.B. 45, 54 (Scrutton J.); Bank Line, Limited v. Arthur Capel and Company [1919] A.C. 435, 454-455 (Lord Sumner). See also J.W. Carter, "The Embiricos Principle and the Law of Anticipatory Breach", The Modern Law Review, 47/4 (1984): 422.

(2) Khatijabai Jiwa Hasham v. Zenab (As Legal Representative of H.G. Harji) [1960] A.C. 316 (PC).

(3) Y. Obidat, 'Anticipatory breach of contracts, a comparative legal study between English and Jordanian Law (in Arabic: mabda al'iikhlal almsbq- almbtsr- almueadu liltanfidh fi almstqbl: dirasat mqarnt bayn alqanun al'iinjlizii walqanun almadanii al'urduniyi), Journal of legal and political studies, Al Yarmouk University, 25 (2) (2009): 406.

on contract, even though this strict approach is tempered where a reasonable period is allowed for performance. If the parties have fixed a time to perform a party's obligation, this time creates *ajaj yaqef,* which is defined as a contract preferable to securing athe performance of the obligation but not suspend it.(1) Imposing performance on the debtor before his obligation is due is not allowed. Unlike common law legal systems, it seems as though anticipated non-performance of an obligation (not yet due and payable) was never considered either in formal law or in doctrine in Emirati law.(2) Some articles only mention it parenthetically. The Emirati Civil Code provides three exceptions to this rule, where the term *ajal* is to be forfeited, and therefore the obligation will be sued before the date on which it is due according to the *ajal*.(3) These cases do not include cases in which the party is unable or declares himself unwilling to perform the obligation before the due date. This is to say, situations which English law would see as possibly invoking the doctrine of anticipatory breach are not in existence according to the general principles of contract law in the UAE.(4)

This Emirati position is provided as the result of three factors. Firstly, historically, the distinction between obligation and performance is ultimately an Islamic perspective; the performance of any obligation is conditional with its due (Article 247, Civil Code). Secondly, logically, if there is no non-

(1) Dubai Cassation Court decision No. (364/2004). Article 359/1 of the Civil Code itself expressly provides that where an obligation is due only on a certain event (typically a date or specific action), its performance cannot be claimed before the occurrence of that event.

(2) S.Issawi, 'Anticipatory contract breach and its impact in international trade contracts (in Arabic; al'iikhlal almubtasir bialeaqd wa'atharih , dirasat fi euqud altijarat alduwalia)', Babel University Journal, 14(2) (2007).

(3) Union Supreme Court decisions No. (91/2006), (67/2003), (121/1996), (94/2002), (442/2000); Abu Dhabi Cassation Court decisions No. (509/2013), (403/2008); Dubai Cassation Court decision No. (60/2009); Union Supreme Court decisions No. (171/2000), (501/2000), (136/2002), (98/1996); see also Abu Dhabi Cassation Court cases no. (310/2008), (138/2008), (1090/2010), (387/2008); Dubai Cassation Court decision No. (43/2009).

(4) A. Dawwas & Y. Shandi, 'The Applicability of the CISG to the Arab World', Uniform Law Review Journal (2011): 813.

performance, there can be no actions based on the non-performance, in terms of Article 273 of the Civil Code. Thirdly, avoidance of the contract is a remedy of last resort. This approach has a religious base: "the aggrieved party has the right to cancel the contract in case of lack of the object of the contract or the total lack of its benefit", according to El-Sanhuri Said.(1) The aggrieved party is not allowed to use this right to the detriment of the other contracting party in terms of the general principle of contract law, which provides that: repelling an evil is preferable to securing a benefit (Article 44, Civil Code). Given this, it is well known that Emirati scholars disagree that the contracting party can terminate the agreement before its performance is due.(2)

3.1 The Theory of "Actual Breach" in Emirati Law

Emirati law takes as its starting point that contractual obligations should be performed, and this is reflected by a more substantial approach to the availability of actions for specific performance. In general, obligations to do or not to do something may be subject to an order for performance unless they are impossible.(3) The deliberate nature of a party's non-performance is not a direct reason in the judges' decision whether or not to make such an order. However, even in cases where performance is possible, the judges have a choice of whether or not to order it, and the faith of the party could influence how they exercise their discretion. Moreover, in impairment cases, it is clear that a party would not be ordered to perform, as his obligation's performance would be

(1) A. El- Sanhory, Resources of Rights in Islamic Fiqh, (in Arabic: Msadr Alhq Fy Alfqh Alaslamy) (Lebanon: El-Halby Publisher, 1998) 231.

(2) N. Mahsna, 'The Obligation of the Seller to Deliver in English Law and the United Nation Convention of International Sales of Goods (in Arabic; ailtizam albayie bialtaslim walmutabaqati, dirasat fi alqanun al'iinjlizii waitifaqiat al'umam almutahidat lilbaye alduwalii lilbadayie)' (Amman, Al thaqafa Publisher, 2011), 206.

(3) Dubai Cassation Court decisions No. (207/1991), (204/1991), (252/1993), (313/1993), (238/1999); Union Supreme Court decision No. (387/2005), (224/1995), (118/2000), (68/2000), (621/2004), (384/2006), 730/2015), (64/2014); Abu Dhabi Cassation Court decisions No. (259/2012), (361/2010), (407/2013), (7/2010), (446/2010), (967/2010), (2016/2012), (273/2008), (1457/2009), (43/2010), (1478/2009), (134/2010), (1070/2011), (421/2013).

impossible, even if this impossibility arises due to his own fault.(1) A breach of contract is normally viewed as a non-performance of a contractual obligation that has already fallen that was due to be performed. This is called an "actual" breach of contract; it must be a "present" rather than a "future" breach.(2)

The actual breach theory is initially put forward either by law and court decisions. Emirati courts adopt three steps to decide this breach.(3) Firstly, they must find out whether the obligation in question that is due arrives. Secondly, if the answer is yes, it is required to decide whether such an obligation has been breached. Thirdly, if the obligation has been breached, it is important to assess whether that breach justifies a wholesale termination of the contract. Accordingly, the real and actual breach of the obligation is considered to be the basis of the failure and whether to terminate or not.(4)

Even though the breach takes place, the innocent party is not authorized to terminate the contract individually; he has the right to either invoke his right of non-performance due to the breach of the other contracting party according to Article 247 of the Civil Code, or to ask the court to terminate the contract according to Article 272 of the Civil Code. In the first case, Emirati law has recognized that the non-performance of a party's obligation to a bilateral

(1) A. Sultan, The Resources of Obligations in Civil Code, A Comparative Legal Study with Islamic Fiqh (in Arabic: Msadr Alaltzam Fy Alqanwn Almdny, Drasah Mqarnah Bahkam Alfqh Alaslamy) (Amman: Dar El-Thaqafa, 2012) 87.

(2) M. Fayyad, 'The Transportation of the European Directive 85/374/EEC of Product Liability into Palestine and Jordan: Is it Adaptable to Islamic Law?', Global Journal of Comparative Law 1 (2) (2012): 194; M. Fayyad, 'Misleading Advertising Practices in Consumer Transactions: Can Arab Lawmakers Gain an Advantage from European Insight?,', Arab Law Quarterly 26 (3) (2012): 287.

(3) For more details see: M. Fayyad, 'Fundamental Breach of Contract in Terms of the UN Sales Convention and Emirates Law: A Comparative Legal Study', Arab law Quarterly Journal 33 (2) (2019): 109- 151; M. Fayyad, 'Classification of Contractual Agreements in Comparative and Islamic Jurisdictions: Does it Make Any Sense?', Arab Law Quarterly 27 (3) (2013): 203-229.

(4) Dubai Cassation Court decision No. (298/2001), Union Supreme Court decision No. (252/2003), Union Supreme Court decision No. (387/2005), Dubai Cassation Court decision No. (214/2006).

contract may give a defense to the other party if sued by the party in breach of performance. Yet, the fact that the first party's non-performance was deliberate does not have any proper impact on the availability of that defense; it could go to the issue of the importance of the non-performance necessary to attract its application. For example, if a contractual party informed the other party that he would not perform his obligations at all, this would – after the date when performance was due – clearly constitute a sufficiently serious non-performance to invite that defense. With regard to the second case, Emirati law recognizes the fact that in the absence of express stipulation, in principle an innocent party cannot terminate the contract by his own act or by notice if the other party breached his obligation. Instead, he must apply to the court for judicial termination under Article 272 of the Civil Code. In this case, and if satisfied of the seriousness of the non-performance, the court may terminate the contract, or it may protect its existence and allow the debtor further time for performance. This decision would take into account whether or not the non-performance was deliberate, and therefore whether or not it was in bad faith. In contrast, it is unlikely that any further time for performance would be given if the party in breach had previously declared himself unwilling to perform his obligation even though he was able to do so.(1)

3.2 Conditions of Breach Reward Termination

Even in the event of an actual breach, the Emirati Civil Code does not specifically specify the criteria for the breach of a contractual obligation that gives the creditor the right of annulment. This is because Islamic law looks at a breach as not just a "cause of action", but also as an unlawful event,(2) which can be defined as inexcusable default. Similar to the approach of English courts, Emirati high courts recognize that default is justifiable if any of the following conditions applies: the contract has been frustrated; an exculpatory clause applies, such as a force majeure clause, provided that a party will be released

(1) M. Fayyad, 'A glance at unfair terms in consumer transactions in Arab legal systems and Islamic law: what Arab lawyers can learn from the European experience?', International Journal of Private Law 5 (2) (2012): 209.

(2) R. Bigwood, "Economic Duress by (threatened) Breach of Contract", Law Quarterly Review (2001): 379.

from his obligation by reason of freak and excusable supervening events;[1] or the innocent party has excused the breaching party from performing.[2] In other words, a breach will also be non-actionable where there is a complete defense against liability: although nominally in breach, the party in breach is rendered wholly exempt from liability to pay considerable damages. Finally, a breach will also be non-actionable if the innocent party waives default.

Furthermore, UAE law does not provide clear criteria for determining the fundamentality of a breach, as is provided in English law, which invokes the right of termination, so the national judge can make this assessment in terms of Article 272 of the Civil Code, which adopts the objective criterion ,through the approach between what was implemented correctly and what was not, making this evaluation, according to the average person's expectations, measured in terms of the obligor's condition, circumstances and level at the time of the contract, which, if he knew of the magnitude of the breach, he would not have contracted, in order to assess the extent to which the degree of seriousness of the contractual breach justified by the termination has been achieved. In contrast, the investigation of the national high court's approach may serve the conclusion of some specific criteria that correspond with English law. In several cases, the fact that the buyer had failed to pay for previous deliveries was deemed to have made it "clear" that the buyer would commit a fundamental breach by not paying the price.[3] In one case, the buyer's refusal to establish a letter of credit was regarded as sufficient to meet the standard of being "clear".[4] Other cases also provide examples where the buyer has been found to have had the right to terminate.[5] These cases include situations where, for instance, before taking delivery of the goods, the buyer concluded that a fundamental breach would occur on the basis of testing the samples provided by the seller or because of

(1) See: K. Lewison, 'Interpretation of Contracts' (6th London: Sweet & Maxwell, 2015), Ch.13; G.H. Treitel, , Ibid, para.12-026 to 12-051.

(2) Sumpter v Hedges [1898] 1 Q.B. 673 CA and Bolton v Mahadeva [1972] 1 W.L.R. 1009; [1972] 2 All E.R. 1322 CA.

(3) Abu Dhabi Cassation Court decision No. (259/2012).

(4) Dubai Cassation Court decision No. (298/2001).

(5) Dubai Cassation Court decisions No (207/1991), (204/1991), (252/1993).

defective drawings provided by the seller, on the basis of which the goods were to be manufactured.

4. Emirati Treatment of Facts That in English Law Attract "Anticipatory Breach"

In contrast to the above general rules, the circumstances in which English law appeal to the doctrine of anticipatory breach do affect the remedies available in Emirati law after the due date comes into effect. The general rules of annulment in the Civil Code correspond to a certain extent with the terms of contract termination in English law in terms of the need for a formal summons to the debtor and the absence of breach of the other party requesting the annulment, and of the need to remain prepared and able to implement it. The requirements of the theory of premature termination are available in UAE civil law as general provisions in terms of origin, so research in the legalization of this theory in this law remains to be done. Emirati law recognizes specific cases justifying the right to invoke this principle as well as some general rules on which the Dubai Court of Cassation relied on in its decision.

4.1 Specific rules for exception

1. Partially anticipated non-performance. This means that an obligation, which is not yet due, will be breached if the contracting party notices that an obligation which is already due has not been performed. Even in the common law legal system, it is not always essential to rely on anticipatory non-performance in order to enable the creditor with an immediate means of action. The sanctions available for an actual breach of the contract lead to similar outcomes. Predicting the non-performance of upcoming obligations is to be considered an essential breach of contract, which allows the innocent party to free himself from the relation immediately. This occurs in contracts that require continuing obligations to be performed, in which a debtor has already proved unable to perform one or more obligations, so it is reasonably predicted either that he will not be able to perform the rest of his upcoming obligations or that he does not have the intention to perform them. Another scenario of this sort is in continuous contracts when a debtor has stopped performing,

thus making it reasonably foreseeable that the performance of obligations will never be done. This also takes place where a debtor had already made quite a few deficient deliveries in a manner that makes it clear that the following deliveries will be as deficient. This case of non-performance exists in the Emirati legal system as well as common law. Articles 106 and 116 of the Commercial Code allow the creditor to invoke a number of actions without them being considered untimely, and his non-performance will be considered when it comes to determining whether or not the sanction, such as rescission, is well-founded. When assessing the compensation due upon rescission, the court will look at the damages caused by actual as well as future non-performance in cases where the latter has become certain as a result of the termination of the contract.

2. The event of default. In application of Article 431 of the Civil Code, the debt is due immediately if the debtor goes bankrupt. This is to make it easier when it comes to settling his estate. It is also justified on the grounds that the creditor will not be able to trust his debtor once he becomes insolvent. This explanation is even more clear if we consider the fact that the article provides for a defaulting event if the debtor, by his own means, reduces the securities given to his creditor.

Although this provision is very positive for the creditor, it applies in very narrow circumstances. National jurisprudences have recognized insolvency to bankruptcy, and a lack of securities to their reduction. However, the provision is still very limited in application and defaulting has a very strict interpretation. The fact that it is justified on the loss of trust suffered by the creditor will not be sufficient for it to be claimed every time trust disappears before term.

3. Protective acts and measures meant to ensure in-kind performance. Although the creditor cannot require an obligation to be performed before term, he has the right to invoke any protective acts in order to ensure his right in the future. Article 392 of the Civil Code provides that every creditor, even if his right is not yet due, may exercise in the name of his debtor all his debtor's rights save only those that are purely personal or cannot be attached. The exercise by

a creditor of the rights of his debtor is not admissible unless the creditor proves that the debtor himself has not exercised such rights and that the debtor's failure to do so is such as to result in or increase his bankruptcy. The debtor's forced intervention in the court action is a must. The question which arises here is whether it would be possible for this measure to ensure the effective performance of the contract, such as prohibiting the debtor transaction from being included in the protective way available to the creditor. It is clear from Article 392 that the notion of protective measures is strictly interpreted. Acts for the preservation of the debtor's real property given as security and acts to the creditor for the protection of the creditor's right and evidence of it are included. Because they are a mix between performance acts and protective acts, these measures will most certainly be refused if they are required on the basis of Article 392 mentioned above. In addition, the required sanctions include asking the court to sentence the debtor to accomplish, or not accomplish, a specific act; they may be subject to a penalty if necessary. However, they will never sentence him to perform an obligation not yet due and payable.

4.2 Rationalizing the Approach of the Dubai Court of Cassation

The decision of the DCC No. 200/2013 in a real estate appeal represents a unique and unparalleled approach to the UAE judiciary in recognizing the principle of anticipatory breach; no similar doctrine exists in UAE law, but it appears to confirm a recent trend by the courts to create a similar doctrine for off-plan real estate disputes. In this case, a property had been completed, evidenced by certificates of accomplishment from the relevant authorities, but the developer had failed to deliver the project's supporting infrastructure and services. In this case, the DCC held that frustration with this had prevented the purchaser from being able to benefit from the property for its intended purposes, so the purchaser had the right to terminate the contract before the time of obligation was due, if there were serious indications

showing the failure of the other contracting party to implement his obligation.(1) According to Articles 247, 414 and 415 of the UAE Civil Code, either party may withhold the performance of his obligation if the other party fails to perform his obligation on time. Therefore, the buyer may suspend scheduled payments if there are good reasons to predict that the seller will not perform his obligation as agreed. Furthermore, if either party of the contract fails to perform any of his obligations, the other party may, according to Article 272 of the Civil Code, request the termination of the contract. Upon termination, the contracting parties are restored to their positions before entering into the agreement and the seller must refund any amounts paid by the buyer.

In addition, and according to Article 246 of the Civil Code, contracts must be performed in accordance with their content and in a manner consistent with the requirements of good faith.(2) Performing the agreement in good faith demands that the developer refrains from selling units before securing the land used for the project in addition to all necessary approvals for the project and its execution. The delay to get the necessary approvals is therefore not to be considered force majeure, as the court of appeal judged, since force majeure is caused by an unforeseeable event at the time of the contract that is impossible to avoid. Under the terms of the agreement, the expected time of completion was the first quarter of 2010, which could be extended for up to a further 12 months in the event of force majeure. Yet the percentage of work at the time of the expert's inspection was 75%; this delay amounted to negligence that entitled the buyer to seek the termination of the contract.

In this regard, it is well known that the principle of good faith in contracting is the place of the soul in the body and its existence is expected at all junctures of contracting, including the time of its negotiation, formation, implementation and termination. As long as the common will of the contracting parties is to conclude the agreement under certain conditions, each of them should take as much care as possible to implement it in accordance with what has been agreed

(1) For more details about this case visit the following link: https://www.linkedin.com/pulse/dubai-court-decision-delayed-projects-offers-investor-tormey-ll-m- (Accessed: 12/5/2018).

(2) https://www.tamimi.com/law-update-articles/does-anticipatory-breach-exist-under-uae-law/ (Accessed: 12/5/2018).

upon, and refrain from any conduct or behavior of a manner inconsistent with the requirements of this principle that would prejudice the integrity and honesty required for the obligations. Among other examples is the debtor's declaration or confirmation of the obligation to do so having already been declared or not implemented at the end of the term despite their ability to do so.

Is the creditor forced to hold a contract that cannot be implemented? What if the bankruptcy of the debtor has been declared or they have been proven insolvent, and the circumstances of the case indicate that it is impossible to implement the obligation by the agreed date, forcing the creditor to wait for the term? What if the result of the failure to meet this date will be a terrible loss to the creditor? What if the creditor asked the debtor to provide guarantees to ensure its fulfillment within the specified timeframe, and the debtor refused to do so? Is this position not in itself confirming a breach of the contract?

As mentioned above, Article 247 of the Civil Code provides that the contract must be executed in accordance with what has been agreed upon and in accordance with the principle of good faith. The creditor, even if his right has not fallen due, may exercise in the name of his debtor all his debtor's rights save only those that are purely personal or cannot be attached. The exercise by a creditor of the rights of his debtor is not admissible unless the creditor proves that the debtor himself has not exercised such rights and that the debtor's failure to do so is such as to result in or increase his bankruptcy. The debtor's forced intervention in the court action is a must.(1) Therefore, if the obligation of the debtor is to do something, there is no way to invoke the specific performance and the right of the creditor is to be exclusive to request termination, because the refusal of the debtor to implement his obligation contradicts with the requirements of the principle of good faith. This can also be explained in terms of Article 388 of the Civil Code which exempts the aggravated party from his obligation to summon the party in breach in some cases: if the execution of the obligation becomes impossible or useless due to some act of the debtor; if the object of the obligation is the payment of damages in respect of an illicit act; or if the object of the obligation is the restitution of a thing that the debtor knew to have been stolen or of a thing that he received knowing that it was not due to him, the debtor declares, in writing, that he does not want to perform his

(1) See article (392) Civil Code.

obligation. In this case, Professor al-Senhouri says that the breach has occurred in advance, and in a real way.

In this context, it has to be noted that the right of the innocent party to invoke this doctrine is restricted with the existence of "serious reasons" causing him to believe that the other party will not perform their future obligations. The test of the "serious reasons" that led to the cover-up of the performance are subject to the discretionary power of the court, and will not be invoked unless the withholding party can prove that they are sufficiently serious. Emirati law does not clarify what are considered to be "serious reasons", though in its decision 179/2012, the Dubai Court of Cassation held that a failure by a developer to start construction within six months of receiving approval to sell the units off-plan might be sufficient. This is to say that if a purchaser decides to withhold payment due to fears about the developer's ability to deliver the unit on time, he must demonstrate the existence of those fears at the time the decision to withhold payment is made. Withholding performance is a serious action, resulting in the right of the developer to terminate the agreement and resell the unit. In contrast, if by the time the dispute reaches the court the unit has indeed been constructed, even if delayed, it will be difficult for the purchaser to maintain the case that there were serious reasons to believe the developer would not perform.

Finally, it is important to detect the reasons that may justify the approach of the Court of Cassation in this case and finally recommend the existence of this doctrine in Emirati law, and analyze numerous criticisms that have been put forward with respect to the doctrine. This evaluation will be discussed in the next part of the study.

4.2.1 Rationalizing the Recognition of the Doctrine in Emirati Law

Despite the fact that the doctrine generally originated for practical reasons, many scholars have still long sought to provide a theoretical foundation for its existence. For this reason, it is important to detect the possible reasons that justify the transposition of this doctrine into Emirati law; the investigation is important not only to highlight questions about the values pursued by the doctrine, but also to perceive the legal and economic importance of the application of this

doctrine.[1] So, why does the court allow a party to have recourse to remedies before the due date for the performance of the other party's obligations? Is it logical to have a remedy in response to a breach that has not yet occurred? Is it fair in relation to the party under suspicion?

It has to be noted that the term "anticipatory non-performance" is misleading because an innocent party is given a remedy not in response to a future non-performance, but in response to a present non-performance. For this reason, the application of this doctrine operates to prevent future waste and to reduce losses.[2] It is incorrect to believe that the innocent party in the agreement has not suffered if he is required to wait for an actual breach to take place before suing. The concept of the anticipatory breach is grounded by economic efficiency; if the defendant's refusal to perform the obligation is clear, the plaintiff could suffer present losses, including costs to obtain alternative cash inflow and a loss of public confidence in the market.[3] If the other party's performance has been useless or seriously harmful to the other party, termination by the innocent party is a basic act of self-protection and a matter of fundamental entitlement.[4]

In addition, the existence of remedies for anticipatory non-performance may deter parties from committing anticipatory non-performance. The party in breach will know in advance that a breach might give rise to termination, and this will make him think many times before introducing any breach.

Moreover, allowing the contracting parties to settle their dispute early would enable them to move on and plan their future economic activities to

(1) M. Bridge, 'Benjamin's Sale of Goods' (9th London: Sweet & Maxwell, 2014) Para.10-037; N. Andrews, 'Contract Rules: Decoding English Law', (Cambridge: Intersentia Publishing, 2016) 135.

(2) S. Gopalan, 'New Trends in the Making of International Commercial Law', Journal of Law and Commerce 23 (2014): 117.

(3) Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd [2013] EWCA Civ 200; [2013] B.L.R. 265 at [126]; CASE: Golden Strait Corp v Nippon Yusen Kubishika Kaisha (The Golden Victory) [2007] UKHL 12; [2007] 2 A.C. 353 (HL).

(4) Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd (The Hongkong Fir) [1962] 2 Q.B. 26 at 39 (Salmon J.); Cehave NV v Bremer Handelsgesellschaft mbH (The Hansa Nord) [1976] Q.B. 44 at 71; [1975] 3 All E.R. 739 at 755 CA (Roskill L.J.).

break down, as much as possible, their related losses. The innocent party is allowed to take positive proactive steps in order to ensure his right of damage. Where the innocent party has this authority, he should be free to walk away without inquiry into his motives or the extent, if any, of the prejudgment of the facts. A serious breach can operate as a useful method for exiting a contract and taking advantage of better terms available elsewhere. For instance, in *Bunge SA v Nidera BV*,(1) the defendant was a one-ship company with no other substantial assets, and the decision of the court of appeal affirming the application of the doctrine of anticipatory breach enabled the plaintiff to foreclose the ship before it departed from the port as the best way of obtaining substantial relief. If the doctrine of anticipatory breach could not be invoked, the appellant would have had no basis to foreclose the vessel while it was docked, and there would be a real risk that the defendant could evade full liability while having gained the full advantage of the contract. Thus, the doctrine would enable the creditor to "leap over" other creditors to enforce his "debt" in the event of the debtor's financial distress. This is to say that contracting parties should consider their options before committing any conduct that would invoke the doctrine of anticipatory breach in this relation. Finally, the right of termination would not need to go to court or arbitration and this will ensure time and money for both contracting parties.

The real estate sector in the UAE is the most attractive and competitive compared to those of the rest of its neighboring countries.(2) In 2002, non-nationals were allowed to own real estate in Dubai, a move that was considered as the beginning of the transformation of the real estate market and the direction of the global market.(3) This has helped the UAE to become a haven for those who do not want to pay taxes, in addition to the ease of procedures and laws governing property ownership. In 2008, however, the real estate market in Dubai collapsed completely and property values fell by 50%; real estate speculation was one of the reasons for this crisis, which led to the collapse of

(1) Bunge SA v Nidera BV [2015] UKSC 43; [2015] 3 All E.R. 1082.

(2) Al- Foujerah Newspaper, https://alfujairahdaily.com/404 (Accessed: 12/4/2016).

(3) BBC Reports, http://www.bbc.com/arabic/business/2015/04/150412_dubai_fears_bubble_trouble (Accessed: 16/2/2017).

this important economic sector and a loss of confidence among buyers.

The economic crisis has reduced the rate of lending and financing resources in Dubai. Both citizens and investors have left the city and their confidence in the real estate market has been missed. The UAE market, which has been hit by price inflation to a large extent, has been hit by a recession. It has been a difficult period for real estate investors and the city itself. Property prices fell sharply and house prices fell by a third or more in half in a few months. Equity markets also lost 70% of their value, causing thousands of Asian workers to leave for their home countries, and major housing projects also lost considerable value.(1) The financial crisis had an additional negative impact along with the collapse of the real estate market, which was that Dubai's indebtedness rose at the time due to the real estate slump, coupled with Dubai's borrowing of large sums of money to build that giant, surreal industrial island, Palm Jumeirah.

In this context, a report issued by the National Bank of Abu Dhabi revealed that the decline in the share prices of most real estate companies listed on the domestic markets during 2010 led to a decline in indicators. The performance of most real estate companies during the first nine months of 2010 was negative, which was a big surprise, and some of these companies suffered operational losses, for example Aldar Properties, which amounted to losses in the first nine months of the year of about one and a half billion dirhams. The decline in the sales of real estate companies, together with the high operating costs, led to a significant decline in the operating profits of these companies, added to the fact that the shares of most of these companies recorded a significant decline during the year, which had a negative impact on the movement of the indicators of the UAEfinancialmarkets.(2)

In order to get over this crisis, economists indicated the importance of supplying buyers in the real estate sector with confidence through the enactment of an integrated legal system aimed at protecting consumers in both purchase and mortgage contracts, which led to the issuance of several legislations in

(1) See the following link in Arabic: https://www.alittihad.ae/ (Accessed: 14/8/2018).

(2) http://www.bbc.com/arabic/business/2015/04/150412_dubai_fears_bubble_trouble (Accessed: 17/9/2018).

2013 and beyond.[1] In line with this approach, the Dubai Court of Cassation can be justified in their decision, which aims to restore confidence in buyers and give them the right to invoke the doctrine of anticipatory breach if there are serious grounds to indicate a real breach by developers in the future.

4.2.2 The Criticism of the Doctrine

One of the main criticisms of the doctrine is that it gives significant power to the party intending to rely on the other party's anticipatory non-performance. Such an enablement may lead the innocent party to abuse his position. Thus, the doctrine may provide a party with an opportunity to abuse the other party's unstable position. This fear was definitely recorded during the 1980 Vienna Diplomatic Conference by representatives from some developing countries. Instability in economic conditions in these countries would put their citizens under the guillotine of using this theory to justify the termination of the contract by the other party and seek compensation. Furthermore, it has been noted that the use of this doctrine and, in particular, the exercise of the right to terminate the contract may impose stricter consequences on commercial men from developing countries. For instance, in international trade, effective communication and storing facilities for the preservation of goods are not always guaranteed. In less developed countries where adequate storage facilities do not exist, one may notice industrial products left on the ground, exposed to the weather, and in these cases the contracting party may invoke the application of this doctrine to terminate the contract. Therefore, it is advised that the rules on anticipatory breach should not be used as an instrument for providing parties with a legal method for escaping from a bargain or abusing their position and, thereby, abusing the unstable circumstances of the other contracting party.[2] Such an approach may have a far-reaching influence on the interpretation and

(1) See the following link in Arabic: https://www.alittihad.ae/ (Accessed: 14/8/2018).

(2) Jet2.com Ltd v Blackpool Airport Ltd [2012] EWCA Civ 417; [2012] 2 All E.R. (Comm) 1053 and authorities.

application of the rules on anticipatory non-performance.(1)

In addition to the above, the application of the doctrine may result in unfair consequences, because it extends the obligations assumed by a party under the contract to an acceleration of liability. Although the party is not required to provide adequate assurance when contracting, it is indeed in this party's interests to provide such assurance to minimize the risk of the other party terminating the contract.(2) In other words, the party's own interests require that it provides adequate assurance, which means doing more than what the contract itself requires.(3) In addition, the right of the innocent party to end the contract and seek compensation before the due time will result in the acceleration of the liability of the other contracting party. When an innocent is awarded damages, the other party's liability can be said to have been accelerated.(4)

Finally, in addition to the aforementioned legal explanation which discusses the lack of the legal base of the transposition of this doctrine in national law, it is clear that this approach springs from economic grounds either; it prevails to the need to protect investors and reanimate their confidence in the local market after the aforementioned Real Estate depression. Market statistics, which are mentioned above, indicate the collapse of the Real Estate sector in UAE, so economists pointed out the importance of promoting investment in this important sector by awarding significant guarantees and incentives for investment to regain the sector. The excessive protection for consumers to the detriment of undertakings will have a destructive economic impact either.

---

(1) A. Dyson, "What do the White & Carter 'Limitations' Limit?" in G. Virgo and S. Worthington", Commercial Remedies: Resolving Controversies (Cambridge: Cambridge University Press, 2017).

(2) Bwllfa and Merthyr Dare Steam Collieries (1891) Ltd v Pontypridd Waterworks Co [1903] A.C. 426
Fercometal S.A.R.L. v Mediterranean Shipping Co SA (The Simona) [1989] 1 A.C. 788.

(3) J.W. CARTER, "Suspending Contract Performance for Breach", in J. Beatson / D. Friedman (Eds.), 'Good Faith and Fault in Contract Law', (Oxford University Press: Oxford, 1995) 515.

(4) D. Saidov, Ibid, P. 803.

5. Conclusion

This study shows that the decision of the DCC represents a revolution and a fundamental change in the UAE's jurisprudence in the recognition of the doctrine of "anticipatory breach", since the doctrine of "actual breach" is the general rule. Emirati contract law distinguishes clearly between the existence of the contractual obligation and its actionability, so if the contracting parties have agreed on a time to perform a party's obligation, this time delays the performance of the obligation but does not suspend it. This is to say that the party in obligation is not asked about his performance before the time is due. This is the first case in which Emirati courts recognize this doctrine, enabling the innocent party to invoke the termination of a contract before the national court if there are serious grounds indicating the failure of the other contracting party to perform his obligations in the future. The importance of this judgment cannot be understated; it is to punish non-performance and unquantified delay by developers in delivering according to their obligations. It is a positive indictor that proves to be influential when considering whether a developer has met his obligations or whether the purchaser, regardless of how 'close' their unit is to delivery, can argue for non-performance due to either the unit's non-completion, or the development in a wider sense. This judicial approach has economic grounds, as it has the aim of reconstructing confidence in the real estate sector in the UAE and therefore enriching market transactions in this important field.

The application of this doctrine in national law was an economic need during the period of economic recession that hit the real estate sector in the country. In addition, if the defendant's refusal to perform the obligation is clear, the plaintiff could suffer present losses, including costs to obtain alternative cash inflow and a loss of public confidence in the market. If the other party's performance has been useless or seriously harmful to the other party, termination of the contract by the innocent party is a basic act of self-protection and a matter of fundamental entitlement. The application of this principle will preserve the existence of the agreement, since the contracting party will think many times before committing any breach, because he will know in advance that that breach might give rise to termination.

For the above concluded reasons and many others mentioned in this study,

the DCC succeeded in adapting the implementation of the principle of good faith provided for in Article 246 of the Civil Code to approach the conditions and requirements of the application of this principle to the real estate dispute. Performing the agreement in good faith demands that the developer refrain from selling units of his project before getting the land on which the project is to be developed and all the necessary approvals for the project and its execution. The delay in performing this obligation is not considered force majeure and entitles the innocent party to withhold the performance of an obligation and to invoke the termination of the agreement.

Finally, this study concludes the following:

1. Since the real estate sector in the UAE represents an attractive and competitive sector compared to those of the rest of its neighboring countries, the DCC invoked the application of this principle in order to protect the economic interests of contractors in a sector.

2. Even though the Emirati law does not recognize the doctrine of Anticipatory breach obviously, the approach of the DCC shows a histrionic significant change in dealing with real states contracts.

3. The application of this doctrine in Emirati law is in harmony with the principle of good faith which is provided in the Civil Code.

4. This Judicial principle authorizes the aggrieved party to terminate the contract if there are serious indications show the fundamental breach of the other contracting party even though the performance of the obligation is not due.

5. To invoke that right in English law, the breach in the future must be clear, fundamental, and the aggrieved party must reasonably conclude the occurrence of the breach.

6. The aggrieved party is given that remedy not in response to a future non-performance, but in response to a present non-performance, so the right to invoke that principle operates to prevent future waste and to reduce losses.

7. The application of this principle has important economic considerations for the national economy. When the innocent party exercises his right to terminate the contract in the event that there are serious indications of the other party's breach, this will avoid him future financial damage that may occur to him if he waits for the date of performance, so he will get the opportunity to recover any damage early and therefore to avoid its grow.

Recommendations

1. This study recommends the amendment of the provisions of the law of civil transactions to include the clear and direct application of the principle of Anticipatory breach in the general principles of contract law with the same conditions that are provided in English law.

2. The right of the innocent party to invoke that doctrine should be carried out in accordance with the following controls: (a) there must be clear indications to the breach of the other party before the obligation is due, (b) such a breach must be fundamental in nature, (c) the necessity to notice the breaching party before invoking this right by requiring his evidences that show his intention and ability to perform his obligations at the agreed time, (d) the innocent party cannot invoke this right if it is proven that he does not fulfill his due contractual obligations.

References:

A. El- Sanhory, Resources of Rights in Islamic Fiqh, (in Arabic: Msadr Alhq Fy Alfqh Alaslamy) (Lebanon: El-Halby Publisher, 1998) 231.

As preferred by M. Bridge, 'The international Sale of Goods' (Oxford university press: Oxford, 2017), 120.

Burrows, 'Remedies for Torts and Breach of Contract' (3rd Oxford: Oxford University Press, 2004), 435.

Bwllfa and Merthyr Dare Steam Collieries (1891) Ltd v Pontypridd Waterworks Co [1903] A.C. 426

D. Saidov, 'Anticipatory Non-Performance and Underlying Values of the UNIDROIT Principles', Uniform law review Journal, (2006): 795 https://doi.org/10.1093/ulr/11.4.795

Dawwas & Y. Shandi, 'The Applicability of the CISG to the Arab World', Uniform Law Review Journal (2011): 813. https://doi.org/10.1093/ulr/16.4.813

Dawwas, 'Anticipatory Avoidance of Contract: CISG and Egyptian Law Compared', Nordic Journal of Commercial Law 1 (2002): 2.

Dyson, "What do the White & Carter 'Limitations' Limit?" in G. Virgo and S. Worthington", Commercial Remedies: Resolving Controversies (Cambridge: Cambridge University Press, 2017).

E. Peel, Treitel, The Law of Contract (14th London: Sweet & Maxwell, 2015) Para. 21.

E.W. Hornung in P. Schlechtriem & I. Schwenzer (eds.), 'Commentary on the UN Convention on the International Sale of Goods (CISG), (2nd: Oxford University Press: England, 2005), 721.

G. Charles & S. Robert, 'Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforceable Model and a Theory of Efficient Breach', Columbia Law Review, 77 (1977): 554. https://doi.org/10.2307/1121823

G. H. Treitel, The Law of Contract (9th London: Sweet & Maxwell, 1995),769.

G.H. Treitel, 'Frustration and Force Majeure', (3rd London: Sweet & Maxwell 2014) Paras 12-026 to 12-051.

G.H. Treitel, 'The Law of Contract', (14th: London: Sweet & Maxwell, 2015), 862.

H. McGregor, McGregor on Damages (19th London: Sweet & Maxwell, 2014) para. 9-024.

H.S.S. Hire Services Group Plc. v. B.M.B. Builders Merchants Ltd. and another [2005] EWHC 2013 (QBD), at paras. [4], [58].

Hochster v. De la Tour (1853) 2 El. & Bl. 678, 118 E.R. 922. For the history of evolution of the doctrine in common law

K. Rowley, 'A Brief History of Anticipatory Repudiation in American Contract Law', 69 University of Cincinnati Law Review, (2001): 565.

J. Poole, Textbook on Contract Law (6th Blackstone Press, London, 2001), 248.

J.W. CARTER, "Suspending Contract Performance for Breach", in J. Beatson / D. Friedman (Eds.), 'Good Faith and Fault in Contract Law', (Oxford University Press: Oxford, 1995) 515.

J.W. Carter, "The Embiricos Principle and the Law of Anticipatory Breach", The Modern Law Review, 47/4 (1984): 422. https://doi.org/10.1111/j.1468-2230.1984.tb01659.x

J.W. Carter, G.J. Tolhurst & E. Peden, 'Developing the Intermediate Term Concept', Journal of Criminal law, 22 (2006) 273.

K. Lewison, 'Interpretation of Contracts' (6th London: Sweet & Maxwell, 2015), Ch.13;

G.H. Treitel, , Ibid, para.12-026 to 12-051.

L. Graffi, 'Case Law on the Concept of 'Fundamental Breach' in the Vienna Sales Convention', International Business Law Journal, 3 (2003): 338, available at: <http://www.cisg.law.pace.edu/cisg/biblio/graffi.html, (Accessed: 12/7/2018).

M. Bridge, 'Benjamin's Sale of Goods' (9th London: Sweet & Maxwell, 2014) Para.10-037

N. Andrews, 'Contract Rules: Decoding English Law', (Cambridge: Intersentia Publishing, 2016) 135.

M. Chen-Wishart, 'Contract Law' (5th Oxford: Oxford University Press, 2015), 93-94. https://doi.org/10.1093/he/9780199689163.001.0001

M. Fayyad, 'A glance at unfair terms in consumer transactions in Arab legal systems and Islamic law: what Arab lawyers can learn from the European experience?', International Journal of Private Law 5 (2) (2012): 209. https://doi.org/10.1504/IJPL.2012.046061

M. Fayyad, 'Classification of Contractual Agreements in Comparative and Islamic Jurisdictions: Does it Make Any Sense?', Arab Law Quarterly 27 (3) (2013): 203-229. https://doi.org/10.1163/15730255-12341256

M. Fayyad, 'Fundamental Breach of Contract in Terms of the UN Sales Convention and Emirates Law: A Comparative Legal Study', Arab law Quarterly Journal 33 (2) (2019): 109- 151 ز https://doi.org/10.1163/15730255-12332008

M. Fayyad, 'Misleading Advertising Practices in Consumer Transactions: Can Arab Lawmakers Gain an Advantage from European Insight?,', Arab Law Quarterly 26 (3) (2012): 287. https://doi.org/10.1163/15730255-12341234

M. Fayyad, 'The Transportation of the European Directive 85/374/EEC of Product Liability into Palestine and Jordan: Is it Adaptable to Islamic Law?', Global Journal of Comparative Law 1 (2) (2012): 194; https://doi.org/10.1163/2211906X-00102003

M. V. Alexandre, 'Clauses which put an end to the contract and clauses which survive the contract', International Business Law Journal, 3/4 (2002): 407.

M.G. Bridge, The Sale of Goods (3rd Oxford: Oxford University Press, 2014) para.10.34.

Mercedeh. 'Anticipatory Breach Under the United Nations Convention On Contracts For the International Sale of Goods', Nordic Journal of Commercial Law, (2005), Available at http://cisg.law.pace.edu. (Accessed: 25/10/2018).

N. Mahsna, 'The Obligation of the Seller to Deliver in English Law and the United Nation Convention of International Sales of Goods (in Arabic; ailtizam albayie bialtaslim walmutabaqati, dirasat fi alqanun al'iinjlizii waitifaqiat al'umam almutahidat lilbaye alduwalii lilbadayie)' (Amman, Al thaqafa Publisher, 2011), 206.

Nicholas, 'The French Law of Contract' (2nd London: Sweet & Maxwell, 1992), 158.

P. Richrds, Law of Contract (2nd Pitman Publishing: London 1995) P 261.

Photo Production Ltd. v. Securicor Transport Ltd. [1980] A.C. 827, 849 (HL); Hongkong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha Ltd. [1962] 2 Q.B. 26, 66 (CA).

Q. Liu, 'Inferring future breach: towards a unifying test of anticipatory breach of contract', Cambridge Law Journal, 66 (3) (2007): 16. https://doi.org/10.1017/S0008197307000748

R. Bigwood, "Economic Duress by (threatened) Breach of Contract", Law Quarterly Review (2001): 379.

S. Gopalan, 'New Trends in the Making of International Commercial Law', Journal of Law and

Sultan, The Resources of Obligations in Civil Code, A Comparative Legal Study with Islamic Fiqh (in Arabic: Msadr Alaltzam Fy Alqanwn Almdny, Drasah Mqarnah Bahkam Alfqh Alaslamy) (Amman: Dar El-Thaqafa, 2012) 87.

Y. Goh & M. Yop, 'Rationalizing anticipatory breach in executed contracts', Cambridge Law Journal, 75/1 (2016): 18-21. https://doi.org/10.1017/S0008197316000143

Y. Obidat, 'Anticipatory breach of contracts, a comparative legal study between English and Jordanian Law (in Arabic: mabda al'iikhlal almsbq- almbtsr- almueadu liltanfidh fi almstqbl: dirasat mqarnt bayn alqanun al'iinjlizii walqanun almadanii al'urduniyi), Journal of legal and political studies, Al Yarmouk University, 25 (2) (2009): 406.

إعمال مبدأ الإخلال المبتسر في القانون الإماراتي، دراسة مقارنة بالقانون الإنجليزي

محمود إبراهيم فياض

كلية القانون - جامعة الشارقة

الشارقة - الإمارات العربية المتحدة

ملخص البحث:

قضت محكمة تمييز دبي في العام 2013 بإعمال مبدأ الإخلال المبتسر في أحد الطعون التي رفعت إليها في قضية عقارية، على الرغم من عدم اعتراف القانون الإماراتي بهذا المبدأ كما هو الحال في القانون الإنجليزي. يتضمن هذا المبدأ حق الطرف المتعاقد في طلب فسخ العقد قبل حلول أجل تنفيذ الطرف الأخر إن وجدت دلائل كافية تشير إلى عدم تنفيذ الطرف المتعاقد لالتزامه التعاقدي دون أن يحل موعد التنفيذ، ويهدف إلى تجنب الآثار السلبية الناشئة عن هذا الإخلال قبل حدوثه قدر المستطاع. يأخذ القانون الإماراتي بمبدأ الخرق الفعلي للعقد، بالتالي يسجل هذا الحكم سابقة قضائية في دولة الإمارات العربية المتحدة. يناقش هذا البحث ماهية هذا المبدأ وأهميته وتنظيمه في القانون الإنجليزي، ومن ثم بيان الاسس التي استندت عليها محكمة تمييز دبي في حكمها والأسباب القانونية والاقتصادية لهذا التوجه القضائي، لتوصي في النهاية بضرورة النص على مبدأ الإخلال المبتسر في القواعد العامة الناظمة لنظرية العقد، من خلال تعديل نصوص قانون المعاملات المدنية الإماراتي بذات القيود والشروط الواردة في القانون الإنجليزي

الكلمات الدالة: الإخلال المبتسر، الإخلال المتوقع للعقد، الإخلال المبتسر في القانون الإنجليزي، الاخلال العقدي في القانون الإماراتي.