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Anticipatory Repudiation of Contract Under the Uniform Commercial Code (UCC) and the Saudi Commercial Law

Naif bin Ibrahim Almazyad¹

Abstract

The concept of anticipatory repudiation differs from traditional legal principles that do not place the breaching party in a position of default since the time for performance of his obligation has not yet arrived. This concept grants the aggrieved party in binding contracts between the parties the right to suspend the performance of his obligations, terminate the contract, and claim damages before the agreed time for performance has elapsed, whenever it becomes clear that the breaching party will not perform his obligation at the agreed time. This is based on explicit or implicit statements by the breaching party indicating his inability or unwillingness to perform the specific obligation. This concept was adopted by the United States Uniform Commercial Code of 2002. It is worth noting that this matter is unfamiliar in Saudi commercial law, which is derived from Islamic jurisprudence.

Keywords: *Anticipatory repudiation, Contract termination, Non-Performance.*

Introduction

It is common in commercial transactions for circumstances or events to arise that hinder one of the contracting parties from fulfilling their obligations or raise doubts about their ability to perform. It is recognized that these circumstances or doubts cannot lead to contract termination before the agreed deadline for execution; because it is possible for the contracting party to confront and overcome these difficulties before the specified time for execution. (Alphonse m. Squillante 1973, P. 373).

On the other hand, given the evolution of contemporary commercial requirements and to minimize negative legal and economic effects, it is undesirable to keep the contract in force even though it may appear that there will be a repudiation of the obligation will occur later.

As legal mechanisms and means are subject to evolution and renewal to meet people's needs and desires, the American judiciary has developed the concept of anticipatory repudiation of contract because established legal rules have not provided suitable solutions. This is because they decide that the breaching party is not considered to have violated its obligation before the deadline for performance and an actual breach occurs on its part. This new concept is based on the premise that a contract involving deferred performance implicitly implies trust and creditworthiness between the parties to fully execute their mutual obligations upon the agreed-upon deadline. These two fundamental pillars, trust, and creditworthiness, diminish when

¹ Department of Law, College of Sharia, Qassim University, Kingdom of Saudi Arabia, Al-Qassim, Buraida, Al-Malida 52571

certain circumstances and events arise that lead one party to believe that the other party will not fulfill its contractual obligation on time. This can happen in various ways, such as a statement from that party indicating inability to perform or expressing unwillingness to fulfill the obligation.

This in turn constitutes an anticipatory repudiation by the breaching party before the agreed-upon deadline, granting the aggrieved party the legal right to suspend the performance of its obligations or request release from the contractual relationship before the stipulated deadline for execution (Al-Hafiz, pp. 2-3).

Although commercial law in the Kingdom of Saudi Arabia, which derives its provisions and regulations from Islamic Sharia, does not have an exact equivalent concept to anticipatory breach of contract, its provisions and general principles do not contradict this concept.

The Importance of Study

The importance of comparing this subject between American and Saudi law lies in the existence of a certain degree of theoretical and practical problematic issues and advantages legally. Theoretically, the concept of anticipatory repudiation conflicts with established legal rules that require the fulfillment of the deadline for execution and the non-performance of either party's obligation in practice. The application of this concept raises certain legal and executive difficulties by benefiting from practical experience between the parties to the contract. Conversely, the proper application of this concept avoids delays in execution for the parties to the contract, especially the aggrieved party, by resorting to prior research for alternatives, thereby mitigating legal and economic damages both immediately and in the long term.

Methodology

The research methodology will be an analytical comparative literature review between the relevant laws and judicial applications. This approach is followed to extract scholarly material to reach the judgments and detailed rules of this innovative concept.

1. Anticipatory Repudiation of Contract under the American Uniform Commercial Code

A. The Concept of Anticipatory Repudiation of Contract

The general principle in contracts is that they are based on the principle of the sovereignty of will. According to the law of the contractors, this entails full compliance with the actual execution of all obligations guaranteed by the contract, whether present or future. Neither party has the right to breach the obligation, whether by executing it differently or defectively, or by offering an alternative to execution or termination in a unilateral manner. The right to dissolve contractual obligations is an exception (based on contract provisions in English law, the contractual relationship between the parties is generally terminated for four reasons: 1. Expiry due to fulfillment 2. Expiry by agreement 3. Expiry due to impossibility 4. Expiry due to breach, and anticipatory breach of contract falls under the fourth reason. (Al-Hafiz, pp. 5-8). In the concept of anticipatory repudiation, there is an exception and a neutralization of the principle. Therefore, the aggrieved party is entitled to resort to the legal penalties prescribed to confront this anticipated breach.

This concept refers to the explicit confirmation or indications issued by one of the contracting parties that he has decided not to fulfill their contractual obligation upon its due date (Alphonse M. Squillante, p. 373). This may occur when one of the parties clearly declares, before the specified date for the execution of the obligation, his intention not to fulfill his obligations when the agreed-upon deadline arrives. In such a situation, the aggrieved party can consider the contract terminated, thus having the right to suspend the execution of his obligations and file a lawsuit immediately without having to wait for the specified execution date, because the other party has committed an anticipatory repudiation. "Anticipatory" means acting or doing something before its proper time. This concept is different from traditional rules, which state that a party is not considered to have committed an actual breach of the contract unless he fails to fulfill his contractual obligations by the specified deadline. However, if something confirms - whether explicitly or implicitly - that one of the parties will breach their obligation before its actual execution date, this action is considered an anticipatory repudiation of the contract.

This concept originated under the shadow of English jurisprudence in the case of *Hochster v. De La Tour*, where the plaintiff Hochster entered an employment contract with the defendant De La Tour dated April 12, 1852, to work as a tour guide from June 1, 1852. However, on May 11 of that year, the defendant employer sent the plaintiff employee a notice stating that he had changed his mind and no longer required his services. On the following day, May 12, the plaintiff filed a lawsuit seeking to terminate the contract and claim damages for the breach of contract. In response, the defendant argued that the time for execution had not yet arrived and therefore there could be no breach of contract before the actual execution time. The court ruled in favor of the plaintiff, allowing him to bring the lawsuit and stating that he was not required to wait until the specified execution date. The defendant was ordered to pay damages and the contract was terminated (Jill Poole, 2008, p. 334).

Since the issuance of this famous judgment, the rule has been established that the aggrieved party in binding contracts for both parties have the right to immediately suspend the execution of its obligations, terminate the contract, and claim compensation for the anticipatory breach of the contract, and is not obligated to wait until the specified deadline for the execution of the obligation. Subsequently, American legislations adopted the concept of anticipatory breach of contract through codified law. According to the Restatement of the Law of Contracts 1992, under Article 214, in a bilateral contract, the debtor (promisor) is considered to have committed an anticipatory repudiation of the contract justifying the discharge of the creditor from performing his obligations and granting him the right to file a lawsuit directly and before the contractual obligations take effect under certain conditions if the debtor (promisor) without legal justification engages in certain actions, including declaring his unwillingness to perform (Keith A. Rowley, 2001, p. 609 & 610).

The anticipatory repudiation of contract by the breaching party before the actual deadline for execution of the obligation does not, in itself, constitute termination of the contract, but it gives the other party, who is aggrieved by this repudiation, the legal right to consider that act by the breaching party as an anticipatory repudiation of the contract, thereby granting the aggrieved party the right to immediately suspend the execution of its obligations or to terminate the contract (Poole, p. 334).

The explicit or implicit action by one of the parties creates a legal effect, so when he declares his inability or unwillingness to perform a future obligation, this declaration becomes a legal basis for the repudiation, which results in the right to suspend the execution of obligations or

resort to dissolution by the aggrieved party in advance, and the aggrieved party is not required to wait until the actual execution date. This explicit or implicit prior action by the breaching party deprives him of his right to execution upon reaching the specified deadline (Al-Hafiz, pp. 4-6).

B. Scope of Application of the Concept of Anticipatory Repudiation of Contract

The application of this concept is limited to contracts binding on both parties. This type of contract is characterized by the mutual obligations between its parties, which entails important legal consequences such as the obligation to execute contractual obligations in accordance with the agreed terms. Breach of contract may result in legal penalties, including suspension of obligations, enforcement, compensation, or even contract termination. On the other hand, the concept of anticipatory breach cannot be applied to contracts binding only on one party. The execution of the obligation must be deferred and not immediate, meaning that this concept applies to contracts with future execution or contracts where execution occurs in installments, as it is only in these cases that the breaching party's failure to perform its future obligation is conceivable. This is unlike contracts that are executed immediately and instantaneously. (Alphonse m. Squillante 378-379) and (Khaled Ahmed Abdul Hamid, 2001, pp. 101-102).

C. Legal Elements of Anticipatory Repudiation of Contract

The American law requires the presence of several legal factors to fulfill the requirements of the concept of anticipatory repudiation of contract, which are: Firstly, an action taken by the breaching party before the actual execution deadline that diminishes or eliminates the confidence of the aggrieved party. Secondly, acceptance by the aggrieved party and the breaching party's failure to retract its repudiation.

First: An action taken by the breaching party before the actual execution deadline that diminishes or eliminates the confidence of the aggrieved party

This concept is based on the assumption that the breaching party's failure to fulfill its future obligation is due to either its incapacity or unwillingness. Incapacity or unwillingness manifests through specific behavior or actions by the breaching party, leading to a disruption in the aggrieved party's confidence in the seriousness and ability of the breaching party to fulfill its future obligation. This anticipatory repudiation issued by the breaching party can be evident to the aggrieved party through a negative act, such as its refusal to perform what is required (omission), or through a positive act, such as its explicit declaration of unwillingness or incapacity to fulfill its obligation.

1- Explicit anticipatory repudiation of contract

The breaching party may explicitly and clearly express his intention not to fulfill his future obligation through words, actions, or surrounding circumstances. In the case of *Hochster v. De La Tour*, the expression of the unwillingness to fulfill the obligation and to terminate the contract was explicit and left no room for doubt regarding the breaching party's intention to create a specific legal effect, which is the termination of the contract. Due to the severe consequences of such repudiation, courts are reluctant to apply it unless there is clear and unambiguous evidence of the breaching party's intent to repudiate the contract. (Strub, p. 588)

Therefore, a repudiation of contract is considered whenever a party explicitly states his intention not to fulfill his future obligation within the specified deadline. This statement must

be unequivocal, expressing a definitive intention not to execute. Additionally, it must be clear and unambiguous, indicating conclusively the intent not to fulfill the obligation. If it allows for more than one interpretation, it does not constitute a repudiation. Moreover, it must be absolute and unconditional, not contingent upon the occurrence of an uncertain future event. (Abdul-Hameed, p. 102) and (Mohammed Labib Shanab, 1960, p. 4).

A breach of contract is considered whenever a party performs an act indicating his intention not to fulfill his future obligation by the specified deadline. This can include actions that render the fulfillment of his obligation impossible by the deadline. For example, if a seller destroys the goods that he sold before the delivery deadline, or if the seller enters into another contract regarding the sold goods, such as deciding to pledge rights over them or selling them again to another person, thereby breaching their obligation to transfer ownership to the original buyer free from any third-party rights. ((Alphonse M. Squillante, p. 373) and (Khaled Abdul-Hameed, p. 103). (Mohammed Labib Shanab, p. 10-11).

If a party imposes new conditions for continuing to fulfill his obligation beyond what was agreed upon, this constitutes a repudiation of contract. (Strub, p. 588) and (Abdul-Hameed, p. 102-103).

It may not be necessary for a party to issue any statement or take any action, but the surrounding circumstances clearly indicate that the performance of his obligation has become highly unlikely or nearly impossible, indicating that a repudiation of contract is imminent. For example, if a person contracts with another to purchase a piece of land from him, it is not considered a breach of contract if this land is in the possession of a third party. In such a case, the seller must be able to recover this possession to fulfill the sales contract, and this will only become clear when the future execution date arrives. However, if the land is in the possession of a government entity that is not allowed by law to relinquish its possession, then the seller's inability to fulfill their obligation becomes evident. (Abdul-Hameed, p. 103).

2- Implied anticipatory repudiation of contract

This type of implicit anticipatory repudiation may occur in specific and limited circumstances when it can be inferred from the conduct or actions of a contracting party that they implicitly indicate a lack of willingness to fulfill their obligations.

If a statement is made by one of the contracting parties indicating that he is facing difficulties in preparation for execution, or that he is dissatisfied with the deal, this statement alone is not considered sufficient to assert the existence of an anticipatory repudiation (Abdul Hameed, p. 102). Expressing fear and uncertainty about whether execution will be carried out on the specified date, or even threatening non-performance, is not considered an anticipatory repudiation because it does not constitute an unequivocal statement in such cases (Shanab, p. 5). Similarly, if the buyer informs the seller that he is winding up his affairs, this does not amount to an anticipatory repudiation because it does not clearly indicate an intention not to fulfill his obligation or an inability to pay. Instead, the buyer may be urging the seller to fulfill his obligation with such a statement (Shanab, p. 5). Likewise, if one of the contracting parties requests a modification of a contract term, this does not constitute an anticipatory repudiation because it does not imply that he will refuse to perform his obligation if the other party does not comply with his request (Shanab, p. 6).

Similarly, anticipatory repudiation may also be implicit when one of the parties refrains from

performing an action that would enable the obligation to be fulfilled on time. For example, if there is a contract for the sale of goods with a deferred delivery date for manufacturing by the seller or a third party, and the seller is unable or reluctant to take any steps to manufacture the goods or procure them from a third party (Al-Hafiz, p. 12).

This type of breach raises some legal complexities and challenges regarding its consideration as anticipatory repudiation, which grants the aggrieved party the right to suspend the performance of his obligation, terminate the contract, and claim compensation. However, such actions by one of the contracting parties may raise suspicion and doubt in the other party, potentially granting him the right to file a claim for anticipatory repudiation. Implicit anticipatory repudiation may be evident in the cases of one of the contracting parties declaring bankruptcy or insolvency, questioning their ability to fulfill their obligation by the agreed-upon deadline. Some judicial rulings have considered bankruptcy as a breach of contract, while others argue that it is not a repudiation because even if there is a possibility or fear of non-performance, it is possible (Dudin, pp. 3-4).

The Uniform Commercial Code in the United States addresses the situation of buyer insolvency by granting the seller the right, if the goods are still in his possession, to refrain from delivering them if the buyer becomes insolvent, except in exchange for full payment (Paragraph 1 of Section 2-702 of the Uniform Commercial Code). If the goods have been delivered to the buyer in exchange for his commitment to pay the price in installments, the seller can demand their return if he discovers the buyer's insolvency, provided that this request is made within ten days of receiving the goods (Paragraph 2 of Section 2-702 of the Uniform Commercial Code). Moreover, it also allows if the goods have been delivered to a carrier for delivery to the buyer, the seller to stop their delivery to the buyer if he discovers the buyer's insolvency (Paragraph 1 of Section 2-705 of the Uniform Commercial Code).

The Uniform Commercial Code in the United States has adopted the "usual creditor" standard in accordance with commercial standards, including the commitment to the principle of good faith (Rowley, p. 620).

Second: the acceptance of the aggrieved party and the non-retraction of the breaching party from his repudiation

To complete the legal elements of the concept of anticipatory repudiation of contract, two factors must be present: Firstly, the acceptance by the aggrieved party of the declaration issued by the breaching party, and secondly, the breaching party's failure to retract their anticipatory repudiation.

1. The aggrieved party acceptance of the breach issued by the breaching party by not implementing its obligation:

After the breaching party has been proven to commit an anticipatory repudiation of contract, the aggrieved party has the right to accept this breach before the deadline for performance. Additionally, the aggrieved party has the right to adhere to their legal entitlement to keep the contract valid and await the agreed-upon deadline for fulfilling the obligation. In this case, the contract remains valid, and the non-breaching party should fulfill his obligations according to the contract. The option to keep the contract valid should be clear, leaving no doubt that the aggrieved party wishes to continue with the contract (Sir Guenter Treitel, 2003, P 864).

If the deadline passes and the breaching party fails to fulfill his obligation, the aggrieved party

is entitled to demand specific performance or contract termination with compensation to remedy the damage incurred (Al-Hafiz, pp. 15-16). This element clarifies that the declaration of the breaching party expressing his desire to terminate the contract or not fulfill his future obligation alone is not sufficient to terminate the contract; rather, the consent of the aggrieved party is necessary.

2. Failure of the breaching party to retract from his anticipatory repudiation:

The breaching party may retract from his anticipatory repudiation by fulfilling his contractual obligation. Legally, for this retraction to be valid, it must occur before acceptance by the aggrieved party of the repudiation issued by the breaching party (Al-Hafiz, p. 16). If this action is taken as previously mentioned, the breaching party reinstates a degree of trust and creditworthiness with the aggrieved party (Al-Hafiz, p. 16).

In this regard, the Uniform Commercial Code stipulates, for the effectiveness of the breaching party retraction from the anticipatory repudiation, that the aggrieved party has not made a material alteration to his contractual position. This alteration implies a significant change in the party's position regarding the contract that makes it impossible to return to the previous state. For example, if the buyer purchases alternative goods instead of those promised by the breaching party, or if the seller resells the contracted goods (Paragraph 1 of Article 2-611 of the Uniform Commercial Code).

D. Legal Effects of Anticipatory Repudiation of Contract

If one party commits an anticipatory repudiation of contract, the aggrieved party has the right to overlook this breach and continue fulfilling its obligations, awaiting the deadline for the breaching party obligations to be due, to confirm whether an actual breach of the contract will be issued by the breaching party or not. Also, the aggrieved party, before the deadline for performance, can take several measures to address the anticipatory repudiation by the breaching party. Firstly, by suspending the performance of its obligations and requesting sufficient guarantees. Secondly, by terminating the contract with compensation.

1. Suspending performance and requesting sufficient guarantees:

Upon the issuance of a declaration by the breaching party expressing unwillingness to perform, the aggrieved party is entitled to a temporary suspension of his obligations, whereby it cannot be compelled to fulfill its obligations towards the other party. This represents a form of justified non-performance (Al-Hafiz, p. 17). The Uniform Commercial Code (UCC) has regulated this matter, granting the aggrieved party the right to suspend the execution of its obligations whenever reasonable grounds exist that lead to its lack of confidence in the other party's compliance with its obligations under the contract. Here, the U.S. law imposes on the aggrieved party the obligation to issue a written notice requesting from the breaching party adequate assurances for performance by the deadline. Until such assurances are provided, the aggrieved party retains the right to suspend the execution of any obligation for which it has not received the agreed consideration, if commercially acceptable (Section 2-610 of the Uniform Commercial Code).

This ruling is justified by the notion that a contracting party's right is not only to receive the agreed consideration but also to have confidence throughout the period preceding the performance deadline that performance will occur without breach. If a breach is anticipated,

the party has the right to be informed as soon as possible to mitigate the resulting damages, thus serving the interests of both parties (Al-Hafiz, p. 17).

The request for adequate assurances must be in writing as stipulated by the article. In the case of [Continental Grain Co. v. McFarland], the appellate court considered the appellant's claim for adequate assurances from the debtor as if it had not been made because the request was not in writing and no evidence was presented that he had directed a written request to the company for the provision of adequate assurances, and then his breach would be unjustified (Abdel Hameed, p. 106).

If the aggrieved party submits a written request to the breaching party to provide adequate assurances, the aggrieved party has the right to suspend the execution of its obligations until it receives such assurances (Al-Hafiz, p. 17). The breaching party must, upon receiving such a request, provide these assurances within a reasonable period not exceeding thirty days from the date of receipt of the request. If the breaching party fails to do so, it is considered to have breached the contract (Al-Hafiz, p. 17). It should be noted that the law has not specified what can be considered adequate assurances, nor has it defined the reasonable grounds for dissatisfaction. Therefore, the assessment of this is left to the circumstances of each case and the prevailing commercial practices in this regard (Paragraph 2 of Article 609-2 of the Uniform Commercial Code).

2. Termination of the contract with compensation:

The breaching party failure to fulfill its obligations and its declaration of repudiation of the contract before its deadline allows the aggrieved party to always maintain the contract and continue its implementation until the deadline. If it becomes apparent at that time that the breaching party is unable to perform, the aggrieved party has the right to demand specific performance or termination with compensation (Article 610-2 of the Uniform Commercial Code). However, if the aggrieved party accepts the breaching party's declaration of repudiation of the contract and is unable to provide adequate assurances, the aggrieved party has the right to demand termination of the contract with compensation for the damage suffered, and here it must comply with the duty to mitigate damages (Catherine Elliott and Frances Quinn, 2003, P. 254 & P. 272).

Granting the aggrieved party the right to bring an action for termination, compensation, or both upon proving anticipatory repudiation without waiting for the deadline is considered a sufficient cause for the lawsuit. Regarding the timing for the aggrieved party to exercise his right to termination, under the rules of English law and judicial precedents, this right arises as soon as the repudiation is declared (Treitel, P. 860).

To preserve the contract, the Uniform Commercial Code (UCC) allows the breaching party to retract from the repudiation at any time before the deadline for fulfilling their obligation. In this case, both parties revert to the state they were in before the repudiation occurred (Abdul-Hameed, p. 108). This retraction can be done in any way that clearly indicates the breaching party's intention to fulfill their contractual obligation, and it must include providing any adequate assurances requested by the aggrieved party for accepting the retraction (Paragraph 2 of Section 611-2). However, retraction does not have any effect if the aggrieved party has already terminated the contract or fundamentally changed his position in a manner that prevents him from returning to the contract, such as by contracting with another party to provide the goods or services that were originally agreed upon with the breaching party, or if he has explicitly declared his intent to consider

the repudiation final (Paragraph 1 of Section 611-2).

One of the obligations imposed on the aggrieved party is the duty to mitigate damages, and one aspect of this obligation is to set a reasonable time frame for exercising the right of termination and not leaving it open. This is to prevent the deliberate harming of the breaching party by the aggrieved party through leaving the option open to him, either terminating the contract or waiting until the deadline, which would exacerbate the damage and consequently the compensation. Therefore, the aggrieved party is bound by what is known as the "duty to mitigate damages," which applies in cases where the contractual relationship is terminated (Elliott and Quinn, pp. 254&272).

The application of the idea of mitigating damages is not limited to contracts involving the supply of specific goods that can be bought or sold in the market. It extends to contracts involving the performance of work as well. For example, in employment contracts that are terminated anticipatorily before the agreed deadline, the employee is required to seek similar employment opportunities with another employer. If such an opportunity is found, he is entitled only to nominal compensation for the termination. If he finds employment with lower pay than his previous job, he is entitled to compensation equal to the difference in wages, considering the time difference between the two jobs. This was decided by one of the English courts in the case (Elliott, Quinn, P. 254 & P. 272).

As for the assessment of compensation, it is subject to the rules established in contractual liability in general. However, due to the nature of the theory of anticipatory repudiation of contract, the court takes into consideration what has been previously stated regarding mitigating damages, which is a duty placed on the aggrieved party. Therefore, if the aggrieved party takes necessary steps to mitigate damages, thereby reducing the scope of damages, the compensation awarded may be nominal or symbolic, as the aggrieved party has not suffered damages warranting compensation, but if the aggrieved party does not avoid damage that could have been avoided, he is not entitled to compensation for that damage (Al-Hafiz, p. 19-20). Regarding the burden of proof, the established rules in liability dictate that the claimant must prove the anticipatory repudiation of contract by the other party. In the event of the breaching party declaration of unwillingness to execute the contract, he has effectively proven the repudiation himself, relieving the aggrieved party from this burden. Compensation, as in general rules, covers both losses incurred and profits missed by the aggrieved party. The court assesses compensation as if the contract had been fulfilled, if it does not exceed the actual value of the expected damages at the time of contracting (Elliott and Quinn, P. 273).

The Uniform Commercial Code (UCC) adopts what is known as the "Market Price Principle," which it borrowed from the English Sale of Goods Act 1979 to base compensation assessment. In cases where the aggrieved party takes action to mitigate damages resulting from the anticipatory repudiation of contract by the breaching party, the assessment of compensation is based on the difference between the contract price and the market price. The latter may be the purchase price if the buyer decides to buy alternative goods from the market after the seller repudiates the contract, or it may be the selling price if the seller decides to sell the goods in the market (articles 708 and 713 of the Uniform Commercial Code).

Summary

The foregoing elucidates the principle of anticipatory repudiation of contract, which entails

"the statement or conduct of the contracting party that renders the performance of his obligation impossible at its due date or indicates his intention not to continue with the performance (Strub, p. 588)." This principle finds its roots in the American legal system and has been recognized by the English judiciary since ancient times, with the first judgment applying the principle issued in 1852. An anticipatory repudiation of contract entitles the aggrieved party to suspend the performance of his obligations and request sufficient assurances until the other party's position regarding the performance of its obligations becomes clear. Additionally, the aggrieved party has the right to initiate legal action immediately and before the due date for performance, whether seeking contract termination or compensation. Despite the various rights granted to the aggrieved party, American law incentivizes contract preservation by permitting the breaching party to retract this repudiation provided that it occurs before the due date for performance and that no action has been taken to prevent a return to the contract.

2. Anticipatory Repudiation of Contract Under Saudi Commercial Law

A- a General Introduction to the Concept of Anticipatory Repudiation of Contract in Saudi Commercial Law

The main purpose of this study is to analyze whether Saudi commercial law, as derived from Sharia, has developed provisions addressing the concept of anticipatory repudiation of contract. The study also seeks to determine whether Saudi law, compared to the Uniform Commercial Code, is sufficiently flexible to address the diverse situations arising in contemporary commerce. Understanding the general approach of Saudi commercial law in this regard is a crucial introduction to examining the potential compatibility between Saudi law and the Uniform Commercial Code.

In general, Saudi commercial law, the new civil law, and the Saudi judiciary do not recognize the concept of anticipatory repudiation of contract as an independent legal theory, as is the case in the Uniform Commercial Code. Similarly, the legal provisions derived from Islamic Sharia, which are considered the next reference for commercial and civil laws when seeking the applicable law, do not have a meaning equivalent to this legal concept. However, this innovative legal idea does not contradict the fundamental principles of Sharia and can be accepted and adopted in general or modified and supplemented as needed.

It is important to note here that Islamic Sharia delineates the broad lines of general principles relating to transactions; it does not provide detailed provisions like those found in the Uniform Commercial Code. It leaves the intricate details of contract provisions to the discretion of the contracting parties and to the customs and common practices among traders. The general rationale behind this approach is that Islamic Sharia always applies, in all places, and to all transactions among people, which change and evolve over time. Therefore, establishing general principles in this regard is appropriate; details and provisions designed for specific times may later prove to be unsuitable.

The Islamic Sharia has never included a specific and detailed system for contract law. Instead, its commercial transactions and business approach focus on prohibiting certain practices rather than enumerating permissible transactions (Almazayad, 2021, pp. 53-55). In his work "Islamic Commercial Law", (Saleem, 2012, p.1) highlights that Islam, in its inception, agreed with most pre-existing and current transactions. The Sharia accepted all transactions that do not contradict its principles while correcting and amending some types of transactions by eliminating unfair conditions and prohibited elements (Mohammed, Othman Shbeir, 2010, pp.

17-22).

As an introduction to the understanding of financial transactions - money, property, contracts - Sharia applies an Islamic understanding to financial transactions to protect people's wealth from destruction and prevent anything that may cause enmity or hatred among humans. Therefore, most Muslim scholars believe that Islam allows all transactions that are not explicitly prohibited by Sharia (Almazyad, p. 54). This approach has enabled the Kingdom of Saudi Arabia to allow many new commercial transactions that people usually engage in as long as they do not violate the general principles of Sharia. Sharia imposes certain restrictions and conditions on specific types of transactions that may cause hatred and enmity among people. For example, it prohibits (Reba) usury, Contractual ambiguity (Confusion), and gambling (Maysir) (Almazyad, p. 54).

In summary, Sharia only addresses the general aspects of contract law and does not contain comprehensive and detailed provisions regarding contracts (Almazyad, 54-55). Therefore, Islamic transaction laws enjoy flexibility and room for development within the legitimate purposes and constraints imposed by Islamic law.

Islamic Sharia establishes the general rules governing contracts in commercial transactions, but it does not delve into the details of these transactions. Furthermore, it does not establish specific rules for transactions within the Muslim community, but rather leaves room for people to deal with preceding or subsequent contracts, provided that they abide by the general rules it sets. (Ismaeel Aljeriwi, 2010, P. 51-52). Among the most important principles of contracts in Islamic jurisprudence are the principle of contract freedom, consideration of purposes and objectives, consideration of custom and practice, the principle of consent, equality and fairness, fulfillment of contracts and promises, and consideration of good faith (Almazyad, pp. 57-63). These general principles play important roles in aligning Saudi laws with best international practices as stipulated in the detailed provisions of contract law, including the detailed provisions of anticipatory repudiation in the Uniform Commercial Code.

B- Anticipatory Repudiation of Contract in Saudi Commercial Law

The general principle in Saudi commercial law is that for one of the contracting parties to be able to resort to contract termination, it is required that the other party commits an actual breach in fulfilling its obligations. Article 107 of the Civil Transactions Law 2023 states: "In contracts binding on both parties, if one of the contracting parties fails to fulfill his obligation, the other contracting party, after his warning to the breaching party, may request the execution of the contract or its termination, with compensation in both cases if required, and the court may reject the termination request if the non-compliance by the breacher is of minor significance to the obligation." It cannot be said that there is a breach in the execution of a specific obligation unless it is due for performance, as the legal concept of breach does not occur otherwise. (Abdul Hameed, p. 99). When the contracting party fails to fulfill its obligation, the aggrieved party has the right to demand specific performance through litigation or request contract termination and compensation for damages (Article 107: Civil Transactions Law, under the section of contract termination and rescission, thirdly: breach of obligation). Also, in this context, refer to the first chapter: specific performance, Article 164:

1. The debtor is obliged, after being notified, to execute his obligation materially whenever possible.
2. If there is exhaustion in the material execution for the debtor, the court may, upon his request, limit the creditor's right to demand compensation if this does not cause him serious

harm." It should be noted in this context what is mentioned in Article 108: "It is permissible to agree that the creditor has the right to terminate the contract if the debtor breaches his obligations without the need for a judicial ruling, and this agreement does not exempt from notification unless the contracting parties expressly agree to exemption from it".

However, there are certain cases in Saudi commercial law that can be akin to the concept of anticipatory repudiation of contract in the Uniform Commercial Code in the United States. One of these cases is the exemption from issuing a notice of default, as stipulated in Article 177 of the Civil Transactions Law for the year 2023, paragraphs (b) and (h). The reason for resorting to civil law is the absence of a commercial transactions law in the Kingdom of Saudi Arabia to date. Notice of default by the debtor is not required in the following cases:

- A. If the execution of the obligation becomes impossible or impractical due to the debtor's actions.
- B. If the debtor expressly states in writing that he will not fulfill his obligation. (Civil Transactions System, Chapter Two: Effects of Obligations, Second Section: Execution by Compensation).

The original assumption is that if the contracting party fails to fulfill its obligation, the aggrieved party demands the formal issuance of a notice to the debtor, requesting them to fulfill their obligation. According to Article 19/1 of the Commercial Courts Law for the year 2020, it states: "In lawsuits specified by the regulations, the claimant must notify the defendant in writing of the claim at least fifteen days before the lawsuit is filed." Furthermore, Article 69 of the Executive Regulations of the Commercial Courts Law for the year 2020 provides further clarification on this matter, stating: "The claimant must notify the defendant in accordance with the provisions of paragraph (1) of Article 19 of the Law in all cases within the jurisdiction of the court, except for the following: 1- Lawsuits related to penalties stipulated in commercial regulations".

- 1 -Lawsuits in which the administration is a party.
- 2 -Lawsuits subject to procedural requirements under special regulations.
- 3 -Summary lawsuits.
- 4 -Urgent requests.

In some cases, the requirement to issue this notice from the aggrieved party to the debtor is waived, as if the execution becomes impossible or impractical due to an act of the debtor, or if the debtor expressly states in writing that he will not fulfill his obligation. The concept of notice in Saudi law is broad, where merely filing a lawsuit against the defaulting party or any other judicial action is considered a legal form of notice (Civil Transactions Law, Article 177).

These instances partially align with the concept of anticipatory repudiation of contract. If an act or behavior is performed by a contracting party that renders the future execution of his obligation impossible by the agreed-upon deadline, such as intentionally damaging the goods by the seller or selling the specified goods to another person, it can be argued that the breach of the obligation has occurred even though the deadline has not yet arrived. It becomes evident that the seller will not be able to fulfill his obligation by transferring ownership and delivering the goods by the deadline. Similarly, a breach occurs if the debtor expressly states in writing before the deadline for executing the obligation that he will not fulfill his obligation when the execution deadline arrives. In such a case, it may be said that the aggrieved party has the right to file a lawsuit without being required to issue a notice to the debtor to fulfill his obligation

because notices are simply a legal means of demanding the debtor to fulfill his obligation. In such cases, issuing such notice would be futile (Abdul-Hameed, p. 109). The exemption of the aggrieved party from issuing the notice in these cases, despite the debtor's obligation not yet being due, is a type of implicit or indirect acceptance of anticipatory repudiation. However, the judiciary does not accept the filing of a lawsuit before the debtor's obligation to execute his commitment becomes due; therefore, the aggrieved person must wait until the execution deadline to file the lawsuit (Abdul-Hameed, pp. 109-110).

Among the legal cases analogous to the concept of anticipatory repudiation is the expiration of the term upon the declaration of insolvency or bankruptcy of the debtor, whether this debtor is a merchant or a non-merchant. The declaration of insolvency of the merchant debtor occurs when he ceases to pay his due commercial debts due to the disruption of his financial affairs, and his debts exceed all his assets. (Saudi Bankruptcy Law for the year 2018, Article 1.) As for the non-merchant debtor, his insolvency is declared if his funds are insufficient to pay his due debts in full. (Abdul-Hameed, p. 110).

The Civil Transactions Law, in Article 205, stipulates that: "The debtor's right to the term shall be forfeited if he is declared bankrupt, fails to provide the agreed-upon guarantees, or if those guarantees are weakened by his actions or due to reasons beyond his control; unless he promptly completes them." The underlying rationale for this ruling is the creditor's or aggrieved party's lack of confidence in the debtor's fulfillment of his obligation by the deadline. If any of these situations arise, such as if the debtor declares bankruptcy or fails to provide the agreed-upon guarantees, or if the debtor weakens these guarantees either by his actions or due to external factors, the debtor's right to the term granted to him is forfeited. According to Saudi law, the expiration of debt deadlines requires a final judicial ruling declaring bankruptcy or insolvency, and the expiration of debt deadlines includes ordinary debts, as well as those secured by a mortgage, privilege, or lien, and it also encompasses all deadlines, whether they are contractual, legal, or judicial (Abdul-Hameed, p. 111).

One of the cases where the term granted to the debtor expires is the debtor's failure to provide the guarantees he committed to provide. In this case, the term expires as a penalty for the debtor's breach of his obligation, and the creditor or the aggrieved party is entitled to enforce his right immediately because with the expiration of the term, the performance becomes due. The term expires whether the provision of the guarantee is according to a special provision in the contract between the parties or by a specific provision in the law. (Abdul-Hameed, pp. 110-111).

One of the cases where the term granted to the debtor expires is when the debtor undermines the guarantees he provided to the creditor. In this case, the deferred debt has a specific guarantee, such as a mortgage or privilege, by the debtor fully or partially disposing of the guarantee, which diminishes its value. (Abdul-Hameed, p. 111).

Undermining the guarantee means that the guarantee becomes less than the value of the debt secured by it, and minor or slight weakening that leaves the guarantee sufficient to fulfill the debt is not considered. The term expires whether the weakening of the guarantee is due to an act attributed to the debtor or due to reasons unrelated to the debtor's actions. (Abdul-Hameed, p. 111).

These cases explicitly stipulated in Saudi law resemble the concept of anticipatory repudiation in the Uniform Commercial Code, which allows a party, if reasonable grounds arise causing

him to distrust the other party's performance of his obligation, to request adequate and appropriate guarantees in writing. However, they differ in that Saudi law limits this in cases where there is fear of the debtor's bankruptcy, failure to provide agreed-upon guarantees, or weakening the value of those guarantees, whereas the Uniform Commercial Code expands the concept of anticipatory repudiation to include all cases leading to distrust in the other party's performance of any of his obligations, granting the aggrieved party the right to request adequate assurances as well as the right to suspend the performance of his obligations until such assurances are provided.

These cases resemble the concept of anticipatory repudiation of contract, as declaring the debtor bankrupt or insolvent leads to an expectation and inference of the debtor's inability to perform his obligation when due, although it is not considered a breach of the contract per se between the parties. Whereas the failure to provide or weaken guarantees constitutes a direct breach in the contract between the parties, which is a breach that occurred before the deadline for performance. Consequently, the creditor is entitled to request contract termination if the debtor fails to fulfill his obligation, and the termination judgment here is similar to the concept of anticipatory contract termination because the deadline for the obligation has not yet arrived.

One of the cases in which the provisions of Saudi commercial law closely resemble the concept of anticipatory repudiation is what is stated in the draft Commercial Transactions Law (which is still in the study phase and has not yet become an effective law). In the supply contract, it is stipulated that if one of the parties fails to fulfill its obligation regarding periodic supplies, the other party is not allowed to terminate the contract unless the failure to perform would cause significant harm to it or undermine the confidence in the ability of the defaulting party to continue supplying subsequent items regularly. The ninety-second article states: "If one of the parties fails to fulfill its obligations regarding periodic supply, the other party is not allowed to terminate the contract unless the failure to perform would cause significant harm to it or undermine the confidence in the ability of the defaulting party to continue supplying subsequent items regularly".

If the concept of anticipatory repudiation in a contract means enabling the aggrieved party in the contract, or the one who anticipates being harmed, to terminate the contract if they have strong doubts that justify his belief that the other contracting party will not fulfill its future obligations, then what is stipulated in the new Commercial Transactions Bill regarding the obligations of the parties to a supply contract falls within this concept. When strong doubts arise and confidence in the ability of the defaulting party to supply subsequent items regularly is undermined, the aggrieved party is allowed to terminate the contract. Examples of such doubts and lack of confidence include the seller's failure to deliver periodic installments or the buyer's failure to pay for one of the installments received. The right to terminate granted by the Saudi law for subsequent supplies is an anticipatory termination because there has not been a breach regarding them yet. Rather, the breach occurred regarding one of the supplies, leading to a loss of confidence in the defaulting party's ability to continue supplying subsequent items regularly.

Summary

It becomes evident from the foregoing that the concept of anticipatory repudiation of contract is not fully defined in Saudi commercial law and jurisprudence. However, Saudi law contains some provisions that somewhat resemble the concept of anticipatory repudiation found in the

Uniform Commercial Code of the United States, such as cases of exemption from sending notices, the expiration of deadlines upon the declaration of insolvency or bankruptcy of the debtor, the debtor's failure to provide the promised guarantees, or the weakening of the guarantees granted to the creditor. Additionally, the failure of one party to fulfill its obligation regarding periodic supplies in supply contracts is also considered.

Conclusion

This study attempted to compare the concept of anticipatory repudiation in the Uniform Commercial Code of the United State with relevant provisions in Saudi law. The study found a significant degree of common ground between the principles and relevant provisions in both legal systems and did not identify any significant differences. Although the concept of anticipatory repudiation is not familiar in Saudi law, it could be adopted by the Saudi legislature due to the level of harmony in the concept of anticipatory repudiation in both legal systems. In conclusion, summarizing the key findings and recommendations of this research on the concept of anticipatory repudiation of contract in American and Saudi law can be presented as follows:

Findings

The concept of anticipatory repudiation of contract has its origins dating back decades in American law and traces its roots to English jurisprudence, with the first ruling applying this principle issued in 1852.

1. This innovative concept grants the aggrieved party the right to suspend the performance of its obligations and request adequate assurances until the other contracting party's position regarding the fulfillment of its obligations becomes clear. It also allows for initiating legal proceedings before the deadline for fulfilling the obligation, whether by seeking contract termination or compensation.
2. American law encourages contract preservation as much as possible by allowing the anticipatory repudiation to be remedied, provided that it is done before the deadline for fulfilling the obligation and without taking any action that precludes returning to the contract.
3. Saudi law and jurisprudence do not have an equivalent and comprehensive concept of anticipatory repudiation of contract. However, there are some partial provisions that resemble this principle.
4. The concept of anticipatory repudiation and its detailed provisions do not contradict the fundamental principles of Islamic Sharia law and can be adopted or modified and supplemented as needed.

Recommendations

1. The importance of a comprehensive examination and regulation of the concept of anticipatory repudiation by the legislative authority in the Kingdom of Saudi Arabia. This will help fill the gaps in Saudi commercial law. The codification of this innovative concept will clarify and regulate the rights of the aggrieved party objectively and in detail, thereby

reducing potential disputes and ensuring justice and equality among the parties.

2. Granting judges, a degree of authority and broad discretion in assessing the facts constituting anticipatory repudiation of contract, including the power to seek expert opinions, will clarify areas of ambiguity.
3. If it is not feasible to fully codify the concept of anticipatory repudiation in the Kingdom of Saudi Arabia, it would be legally appropriate to include some of its substantive provisions partially in certain contracts where the idea of anticipatory repudiation is prevalent, such as supply contracts, installment sales, and construction contracts. Adopting some partial provisions and benefiting from them would be a significant achievement for Saudi law, while adopting the entire provisions of this innovative concept would be an even greater achievement.

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