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Analysis of Anticipatory Breach and Unsafe Right of Defense

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Abstract: *The unsafe right of defense is the system of the civil law system, and the anticipatory breach system is a unique system developed by the British and American law departments according to the jurisprudence. Both institutions are stipulated in the Civil Code, issued in 2020. The establishment of the unsafe right of defense system originated from the European law system. However, the establishment of the anticipatory breach system originated from the standard law system. The two are to reduce the losses caused by one party's default to the other party. At present, countries have introduced both systems, such as the introduction of France and Germany and the anticipatory breach system in the United States. Both institutions are of great practical significance in civil Law.*

Keywords: *Anticipatory breach, Unsafe right of defense, Right to rescind the contract*

1. INTRODUCTION

The anticipatory breach is pre-term default in civil law, also known as early default. The breach of contract has already existed before the contract's performance period. It mainly occurs after the agreement was established and come into effect, had not performed the subject matter before the contract. The form of default that the parties express or imply indicates the inability to perform the relevant obligations as agreed in the previous agreement is mainly to solve the risks and problems occurring from the entry of the contract to the performance of the contract. To sum up, the expected breach of contract refers to the form of the contract after the establishment or expiration of the agreement, or after implied omission, or through sufficient evidence that the performance period has not expired..

2. CHARACTERISTICS OF THE ANTICIPATORY BREACH

The anticipatory breach occurs before the expiration of the performance period after the contract comes into effect, which is different from the actual default. The primary time of the anticipatory breach is after establishing the agreement.

2.1. The anticipatory breach is a breach of a future contractual obligation and is belongs to the future tense. The actual default of the contract refers to the performance of the contract that has begun. Only near the expiration of the specified period, the primary obligation cannot be fulfilled.

2.2. In the case of the anticipatory breach, the contract breaching party mainly damages the expected creditor's rights of the defaulting party, which will bring adverse damage consequences to it. Therefore, the anticipatory breach especially faces the danger that may occur in the future, which is generally determined according to the actual development trend, which is relatively complex and achievable.

2.3. In the anticipatory breach, A party to a contract generally chooses to express or implied refuse before its performance due to its performance, which cannot achieve the effect of the expected performance of the contract. Therefore, the anticipated breach of default exists on one party and could not exist between the parties.

3. THE ORIGIN OF THE SYSTEM OF UNSAFE RIGHT OF DEFENSE

The unsafe right of defense originated in medieval Roman Law, and the first country to establish the right of security in the modern sense was Germany. Then, the unsafe right of defense system was based and constantly improved in European, American, and French countries. In the German Civil Code provisions, the dangerous right of defense exists in all the "bilateral contracts," not only the sales contract but also more conducive to protecting the interests of the creditors. It can be seen from the legal provisions of various countries and regions that they belong to the European and American laws, and the system of the unsafe right of defense is not the same in different countries and regions. France focuses on protecting the interests of sellers, stipulating that it only applies to sellers of sales contracts, and adopting the doctrine of no payment. At the same time, the German Civil Code is not limited to the sales contract and no longer restricts the buyer's insolvency. If the buyer's property is significantly reduced after the agreement, the seller can refuse to pay. It can be seen that the German law on the unsafe right of defense is not only more comprehensive than that of the French law but also more beneficial to the protection of the legitimate rights and interests of the obligor paying first in the case that the property condition deteriorates the obligor contracts the realization of the creditor's rights of the obligor is endangered.

4. THE CONSTITUENT CONDITION OF THE UNSAFE RIGHT OF DEFENSE

First, both parties are obligations to each other for the two-service contract. A double-service contract is a contract under which both parties are obliged. A sales contract is a typical double-service contract, in addition, there are lease contracts, contract contracts. Secondly, the performance of the obligations of both parties is in sequential order, and the date of the version of one party has been reached. Finally, after the formal signing of the contract, the party has lost or may lose the ability to perform the obligation before the performance date, and the party has precisely sufficient evidence to prove it.

5. THE SAME OF UNSAFE RIGHT OF DEFENSE AND ANTICIPATORY BREACH

To begin with, both occur at the same time point, after the establishment of the contract, the performance date until before, which is a prerequisite. Secondly, both focus on protecting creditors' rights and safeguarding their predictable interests. Thirdly, the implied anticipatory breach system and the unsafe right of defense in the desired default system are based on the speculation of one party to a certain extent and have a particular subjectivity. Of course, this speculation must also be supported by unmistakable evidence. Otherwise, it isn't easy to establish

6. THE CHOICE OF UNSAFE RIGHT OF DEFENSE AND ANTICIPATORY BREACH

The most apparent problem in the judicial practice of anticipatory breach is the confusion between the unsafe right of defense. Of the 100 cases scheduled of default on the judgment instrument online, 34 were not identified as an anticipatory breach, except for the lack of various elements constituting the anticipatory breach. Only six of these cases are due to the judge's determination of the plaintiff's unsafe right of defense. When the plaintiff assented to the court that the defendant had an anticipatory breach, most of the court chose to make a final determination according to the unsafe right of defense under the expected conflict. Even in a finding that the plaintiff exercised an uneasy right of defense, most of the court was indifferent to plaintiffs asserting the defendant's anticipated breach of default.

7. THE PROPERTY OF THE RIGHT TO TERMINATE THE CONTRACT

The realization of the right to terminate a contract as a kind of the right of formation does not require a request to the court nor a lawsuit for confirmation to the court or arbitration institution. Still, the notice of the termination of the contract must be delivered within the control of the other party. As the breaching party exercises the right, although the right exists in special circumstances, it should also be the right of formation right or belongs to the right of the form and should not be identified as the right of claim in any case. If the right of the breaching party to terminate the contract is identified as the right to claim, it first does not match the case of the right to remove as the right to form. The property of the right to terminate is that the right is the general knowledge of the academic circle, which cannot be questioned. As the breaching party exercises the right, although the right exists in exceptional circumstances, it should also be the right of formation right or belongs to the right of the form. It should not be identified as the right of claim in any case. The realization of the right of the claim depends very strongly on the human, and the legal effect of the right of request only requests the other party to make a particular act, which only produces is the request force. The legal product of exercising the right is relatively weak and may not get the legal effect needed to solve this problem. Nor can the defaulting party's right of contract rescission be a right of defense, which is usually held to be against the request of others to exercise their right against himself and is also understood as a defense of the pleading right.

The right to defend is hostile and defensive, divided into delaying the right of defense and eliminating the right of defense, leading to the generation, change, and elimination of the legal relationship. In the case of elimination, it is the absolute elimination of the right, and the legal effect is far more potent than the right to defend. Suppose the property of the contract termination of the defaulting party is the right of defense, only to delay the defaulting party's request or deprive the continued performance of the contract. In that case, the contractual relationship will not have a material impact on the existing contract. There is no help to resolve the contract deadlock at this time, so the defaulting party's right to terminate the contract should not be the right of defense. Although section 580 of the Civil Code promulgated in 2020 provides that the parties may request rescission on the exclusion of continued performance, I do not feel that it can not, therefore, construe the right of the defaulting party as a right of defense. The right of formation can be divided into the simple right of the formation and the formation right of litigation according to the different modes of exercise. The simple right of formation need not be carried out through the court or the arbitration institution by the right holder in the unilateral intention, and the effect occurs when it reaches the counterpart. The formation right of litigation must bring an action or arbitration with the court or the arbitration agency and is the right of formation that must be determined by the judgment of the court or the award of the arbitration agency. The right of dissolving the contract of the defaulting party shall be distinguished in nature from the latter. Its rights themselves are given in special circumstances and should be subject to special restrictions. The formation right of litigation is the limitation of the exercise of the formation right of litigation. It is a special right to formations. Therefore, the right enjoyed by the defaulting party should be to form the right of action.

In our current legal system, the contract termination system is one of the essential components. Still, it does not have explicit provisions on the contract termination right of the defaulting party. The large number of cases in the practice circle that support the right of the contract make us have to consider the defaulting party shall enjoy the legitimacy of the right. The default behavior of the defaulting party is very complicated in practice, with active default and profit-seeking default and passive default

and harm-avoidance default. Through the analysis of western efficiency default theory, it can be seen that British and American French countries do not distinguish between this. Still, the active default and profit-seeking default are not adapted to the local, national conditions, so they are excluded. According to the discussion of the purpose of the contract termination system, the principle of honesty and trustworthiness, efficiency principle, fairness and justice, and the judicial situation in China, it is clear that the defaulting party chooses to breach the contract due to the obstacle to performance, and enjoying the right to termination of the contract is justified in the performance of the contract.

8. Conclusion

Recommendations for the existing problems, the scope of application of the anticipatory breach system is vague There is a cross with the content of the uneasy defense right. The certainty of non-performance should be taken as the distinction standard, divide the expected default into two categories of express expected default and implied expected default, and provide performance guarantee as a condition for the connection between the uneasy right to defense and the expected default system. The lack of defining criteria for statutory reasons, Some provisions are not highly operable, It should be clear that "clearly shows non-performance", "shows non-performance by behavior", and "objective facts show that non-performance" should be everyday situations. The provision of the mode of relief is too simple, Different relief institutions shall be specified for express and implied anticipated defaults, Using "foreseeability" as the standard of determination of the scope of damages, The non-defaulting party shall have a derogation obligation in admitting the expected breach.

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