**ANTICIPATORY BREACH OF CONTRACT:**

**CAN PARTIES HAVE RIGHT TO LEGALLY TERMINATE THE CONTRACT?**

***Scenario 1***: Company A and Company B sign a sale and purchase agreement (SPA) to buy 40 tons of coffee powder, for 40 million VND/ton, the goods will be delivered on 30 July 30, 2021. However, on 20 July 2021, Company A received information that Company B's coffee powder factory was on fire. Besides, Company A is also offered the coffee powder by Company C for 30 million VND/ton.

***Scenario 2***: Similar to the data on the SPA of the coffee powder as in the scenario 1. However, on 20 July 2021, Company A received information that Company B had difficulty in purchasing raw materials for coffee powder production, therefore, Company B will not be able to deliver on time on 30 July 2021 as agreed. Also, there is Company C selling coffee powder at the price of 30 million VND/ton.

A question for the above two scenarios is whether Company A has the right to legally terminate the SPA of the coffee powder signed with Company B?

1. **Nature of anticipatory breach of contract**

Most of us are only familiar with the traditional concept of “breach of contract” as one of the parties breaching their obligations of the contract. Such breach comes from the feature of the SPA, which is a bilateral contract, where the parties have reciprocal obligations. Such a traditional breach occurs and is determined when obligations are due to be performed under a date agreed in the contract, but the obligor does not perform, or incompletely perform, or incorrectly perform such obligation when the above date has expired.

However, since the sale and purchase of goods went beyond the territory of Vietnam and Vietnam became a member of the Vienna Convention 1980 on Contracts for the International Sale of Goods (CISG), a new theory of the anticipatory breach of contract has appeared and accessed. The breach of contract before the date of performance comes from the legal case between Hochster (plaintiff) and De La Tours (defendant) in 1853 and became a landmark England contract law case on anticipatory breach of contract. Accordingly, in April 1852, De La Tour agreed to employ Hochster as his courier for three months from 01 June 1852, to go on a trip around the European continent. On 11 May 1852, De La Tour wrote to say that Hochster was no longer needed. On 22 May 1852, Hochster sued because De La Tours breached the contract before the date of performance. De La Tour argued that Hochster was still under an obligation to stay available and willing to perform until the day when performance was due, and therefore could commence no action before. The court’s judgment held that because De La Tour came out from the contract performed in the future, immediately, Hochster also came out from his obligation and did not need to wait until the date performance was due to commence the action and as well as the right to claim damages. Therefore, the breach of the contract due to coming out of the obligation in the future led to compensation from De La Tour to Hochster. Thus, the court declared rejection of the defendant's argument and a win for Hochster.

It can be seen that not only the above-mentioned case law but also the regulations related to the breach of contract before the due date in UNIDRROIT Principles on international commercial contracts, and the CISG have also become legal references for disputes related to foreseeable breaches. In particular, Article 7.3.3 UNIDROIT Principles stipulates non-performance before the due date that: one party has legal basis to cancel a contract if, before the due date, it can be obviously seen the non-performance, almost coming out from the other party. Similarly, Articles 71 and 72 of the CISG show that to apply the breach of contract before the due date, two factors must be satisfied: *(i) time of the breach is before the date of performance*; and *(ii) there must be a clear or gradually clear sign of breach in the future*. However, the sign for prediction of a breach happening between these articles is different. In which, Article 71 allows that a party only needs to recognize the sign clearly becoming the breach in the future, without the requirement of fundamental breach element, to have the right to suspend the contract. Besides, the sign for a breach before the due date in Article 72 must be clear and requires the fundamental breach element so that the party who has the right, is allowed to cancel the contract.

Thus, if before the date of performance of the obligations in the bilateral agreement of the contract, one party realizes that the other party has the sign of non-performance of its obligations as committed, this party can do the rights to suspend the contract, cancel the contract, claim for damages, etc. similar to the measures applied in cases there has been the breach of contract actually happening.

1. **Practical application of the Law of Vietnam on anticipatory breach of contract**

Regulation of the breach of contract before the due date only exists in the Common Law system of US-UK and does not exist in the jurisdiction of Vietnam. Civil Code and Commercial Law of Vietnam only indirectly regulate the anticipatory breach of contract in a dramatically limited scope. In particular, Article 411.1 Civil Code 2015 stipulates that the party who has to perform obligation at first shall have the right to postpone that obligation performance when the other party’s obligation performing ability significantly falls to a condition that such party even cannot perform their obligation in the contract. Such postponement has been applied until the other party can perform the obligation or there is a third party’s warranty of that obligation performance. In addition, Article 313.2 Commercial Law 2005 also mentions the right to cancel the contract of one party when such party has the legal basis to prove that there is a fundamental breach in the future. However, such breach is only applied to the contracts which have the delivery of goods or provider of services is agreed to be delivered in many times. Accordingly, the legal basis for a party to believe that there will be a breach before the due date is the other party’s failure of obligations performance in one time of delivery; and such breach is the other party’s non-performance in the next times of delivery. Such provision means that the regulation of breaching before the due date cannot be applied in the SPA in case there is only one time of delivery. Therefore, if one party wants to apply any commercial sanctions, he or she must wait for a "breach of contract" from the other party in the traditional method.

Turning back to the question of two situations at the beginning of the article, as the result of the current contract regulations of the Law of Vietnam, it can be answered that: Company A shall not have the right to legally terminate the contract with Company B. Company A can only legally do that in case the terminating reason has belonged to the legal basis regulated in the Civil Code 2015 and the Commercial Law 2005. For instance, if the basis of the contract termination is claimed to be under the agreement, the parties in such contract have no regulation and thus, cannot apply such legal basis; or if Company B has the fundamental breach of the good delivery in incorrect date and this is claimed to be the terminating reason, Company B, in fact, still have no breach of the contract, therefore also, it cannot be applied such legal basis to legally terminate the contract. The Company B’s factory was on fire or the Company B’s purchase faces the difficulty which can lead to the delivery on the incorrect date, which is just the signs, the basis for Company A’s prediction that there shall be a breach of the contract of good delivery in the future but fact, the Company B’s date of obligations performance has not come yet. Therefore, in such a case, when the date of obligations performance has not come, Company B still has not breached in fact, which can lead to a fundamental breach. Company A can only postpone the performance of the obligation and wait until the due date has come (after July 30, 2021) but without Company B’s delivery, to legally apply the sanction of cancellation of the contract and requires the compensation.

**In conclusion:** With international trade contracts signed between the parties belonged to member states of the CISG, it is easy to apply the regulation of breach of contract before the due date. However, with domestic contracts, it shall be limited the scope in cases requiring applying one of the reasonable solutions for damage prevention. Therefore, until our law system can resolve the lack of such issue, the best way to protect the parties’ rights and interest is to put the term of breach of contract before the date of obligation performance into the contract.

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