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**„ Comparative Study on Remedies of Anticipatory breach:
The Possible Development of Chinese Contract Law“**

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I. Introduction

Breach responsibility system is the core of contract law, among which rules of anticipatory breach is the most confusing one. Usually, “anticipatory breach” refers to a unique doctrine well settled in common law, aiming to solve legal problems under a situation where prior to the due time of performance, one party of the contract either declares that he will not carry out his obligations expressly or shows his intent of non-performance by his conduct. But in civil law system, there are also instruments regulating similar issues, such as unsafe right of defense system. And this article focuses on different remedies offered by several jurisdictions in this particular circumstance in which the breach of a contract by one party is expectant due to many reasons.

In real life, there is often a gap between the conclusion of a contract and the performance of it. During this period, either party is likely to repudiate contractual obligations or have difficulty carrying out obligations, considering the changing market environment and other objective factors. The protection traditional theory of civil law confers on contract mainly embodies in actual breach, namely, one party should assume corresponding liability due to its non-performance after the expiry of the time of performance. Nevertheless, in practice, one party demonstrates expressly or by its conduct that it will not behave as stipulated in the contract from the time of conclusion to due time of performance, which will also pose a threat to the other party’s expected benefit. At this time, if the aggrieved party is unable to gain relief and cut loss timely, the only way to survive is waiting for the deadline of performance, adverse to protecting contracting parties’ legal advantages. In order to alleviate such adverse consequences, English common law gradually develops a rule called “anticipatory breach”.

In common law system, it is recognized that the case of *Hochster v De La Tour*¹ in Britain leads the beginning of rule of anticipatory breach in 1853. Subsequently, it

¹ *Hochster v. De la Tour* (1853) EWHC QB J72

was spread widely to other countries and districts of Anglo-American law system, developing a lot constantly. In contrast, there is even no legal concept of anticipatory breach in continental law system, regardless of a unified system ruling it. But many civil law countries provide similar legal remedies by means of rules like impossibility of performance and refusing of performance. Anticipatory breach also plays an important role in the international contract law unification movement: There are also relevant provisions in Principles of International Commercial Contracts (“PICC”) and United Nations Convention on Contracts for International Sale of Goods (“CISG”). When these devices first began to appear, “the main theoretical objections to them are well known: How is one to explain how a promise can be broken before the time for its performance has arrived?”² Different legal systems provide different answers to this question, justifying the creditor’s expectant rights. What is more important, this criticism draws a clear distinction between anticipatory breach and actual breach. Because anticipatory breach only shows the possibility of breach of contract, the occurrence of which eventually depends on the promising party’s final act. If he executes obligations strictly in accordance with the contract before the appointed time, then the assentation of his anticipatory breach will lose its ground automatically, as a result of which he will not assume any liabilities. As for actual breach of contract, since default has become an established fact already, generally speaking, it will lead the breaching party to assume corresponding responsibility without any doubt. Compared to those of actual breach, stipulations relating to anticipatory breach bring forward post-default legal issues, leaving more options to parties to deal with the contractual relationship at risk. Just because it does not completely eliminate the possibility of bringing the contractual relationship to normal state, the damage caused by anticipatory breach is relatively minor. Considering striking differences between anticipatory breach and actual breach, different national laws demonstrate the same

² Francis Dawson, ‘Metaphors and Anticipatory Breach of Contract’ (1981) 40 Cambridge Law Journal 83, citing " There can be no fine-spun reasoning which will successfully make that a breach of promise which, in fact, is not a breach of promise. It should be sufficiently clear that a promise cannot possibly be broken before the time for its performance arrives ": C. T. Terry, " Book Review " (1921) 34 Harv.L.Rev. 891, 894.

trend to provide specific remedies for anticipatory breach, distinguished from actual breach. This feature presents an important question in front of us: whether the remedies for anticipatory breach are compatible with the overall remedy system of the country to be introduced in.

Doctrine of anticipatory breach is introduced into China relatively late, but it has become a hot issue in Chinese academic circle of civil law since the 1990s. And academic researches concerning this issue exert an important influence on 1999 Chinese Contract Law, some of which turned into legal provisions in the end. Following the example of CISG, Chinese Contract Law introduces anticipatory breach rules and provides unsafe right of defense system at the same time, which is definitely an adventurous innovation. But unfortunately, it did not make good integration of the two instruments from different systems, reflecting either on provisions literally or real judicial practice. For example, some scholars argue that Chinese Contract Law does not stipulate retraction right for the default party when he is already under the circumstance of anticipatory breach. There are also judges indicating that the scope of article 108 and article 68 overlaps somehow, causing much difficulty in application of remedies. In order to address such deficiencies in Chinese Contract Law, this article investigates relevant legal instruments in various jurisdictions, analyzing solutions they put forward towards every single practical problem with their application effects and pros and cons, the purpose of which is to focus on whether we can adopt the same interpretation when applying Chinese Contract Law and reasons to adopt such interpretation. Except for comparative study methods, this thesis is going to use logic analytical methods, methods of interests balancing, methods of economic analysis and methods of historical analysis, to comprehensively clarify the meaning of related stipulations in *lex lata*, the loopholes they leave and the way to fill the gap. In other words, this thesis aims to afford a suit of systematic interpretation to relevant legal questions, hoping to offer direct guide for judicial practice and suggestions for improvement of Chinese Contract Law.

It is settled that adequate and reasonable protection should be rendered to creditors by contract law before the deadline of performance, the issue in dispute is in what way to

protect and the extent of the protection. James J. White and Robert S. Summers describe in their coauthored textbook of UCC the difficulty to answer aforesaid questions like this: It is pure happiness for contract law teachers that UCC made so difficult stipulations about anticipatory breach and compensation for damages caused by it, but it is absolutely hell for most students. These complicated stipulations also scared judges, some of whom chose to turn a blind eye to those problems.³ Chinese Contract Law gives its own answer to these questions although it is not quite convictive. So I choose contract law in several representative jurisdictions as comparison objects: Germany and America. Germany is representative for civil law countries, which has a precise system of law of obligations including remedies of default. Since Chinese civil law system was established referring to German law, remedies for anticipatory breach in German law can be an appropriate option for China to learn from due to its compatibility with the whole system of liability for breach of contract. Doctrine of anticipatory breach originated from Anglo-American law system, and related provisions in America's Uniform Commercial Code are considerably mature and comprehensive. So America contract law is also a good comparable object in this regard. Through comparison with these two jurisdictions, this thesis will come up with differences between them and China towards similar questions, analyze the merits and demerits and try to provide a relatively proper system of remedies for anticipatory breach, which perfectly suits to the entire default relief system of Chinese Contract Law. Since unsafe right of defense system is closely connected with rules of anticipatory breach, this article will also give some details about this instrument additionally.

II. Remedies of anticipatory breach in America

2.1 Socio-economic circumstances

Generally speaking, Uniform Commercial Code ("UCC") is developed on the basis of

³ James J. White, Robert S. Summers, *Uniform Commercial Code* (4th edn, West Group 1995)

English law. “Although the degree of this influence varies from field to field, American contract law is affected dramatically by rules relating to contracts formed in English common law and equity law.”⁴ There are cases dealing with anticipatory breach prior to *Hochster v De La Tour*⁵, but it did not seem to draw much attention.⁶, because the court’s ground for its judgment is not strong enough. The *Hochster v De La Tour*⁷ case along with several early important cases in UK soon exerted widespread effect in America. Of course American law develops its own characteristics upon this instrument at the very beginning. According to English law, if the creditor chooses to maintain the contract and insist to fulfill their contractual obligations, thus making themselves even further lose, he can get full compensation when the other party actually breaches the contract. However, in accordance with American law, the creditor has no right to ask for compensation for the additional loss under the same circumstance.⁸

In the latter half of 19th century, 15 states including California admitted anticipatory breach rules, while courts in several states refused to adopt it. “Two significant early United States Supreme Court decisions—*Dingley v Oler*⁹ and *Roehm v Horst*¹⁰, especially the latter one—seem to have insured that the doctrine would be widely adopted in this country.”¹¹ In *Roehm v Horst*¹², the plaintiff signed a series of sales contracts with the defendant in his own name and on behalf of their company (Horst Brothers), for a period of over five years. During this period, after being informed by the plaintiff that Horst Brothers was dismissed, the defendant wrote back indicating that he regarded the contracts as terminated due to the dissolution of the plaintiff’s

⁴ Wang Jun, *American Contract Law* (2nd edn, University of International Business and Economics Press 2004) 255

⁵ *Hochster v. De la Tour* (1853) EWHC QB J72

⁶ Keith A. Bowley, ‘A brief History of Anticipatory Repudiation in American Contract Law’ (2000) 69 U. Cin. L. Rev. 565, 575, citing *Masterton & Smith v. Mayoer of Brooklyn*, 7 Hill 61 (N. Y. Sup. Ct. 1845)

⁷ *Hochster v. De la Tour* (1853) EWHC QB J72

⁸ Samuel Williston, ‘Repudiation of contract’ (1901) 14 Harvard L. Rev. 317 and 421; Henry W, Ballantine, ‘Anticipatory Breach and the Enforcement of Contractual duties’ (1924) 22 Mich. L. Rev. 329

⁹ 117 U.S. 490 (1886)

¹⁰ 178 U.S. 1 (1900)

¹¹ Keith A. Bowley, ‘A brief History of Anticipatory Repudiation in American Contract Law’, 69 U. Cin. L. Rev. 565, 594

¹² *Roehm v Horst* 178 U.S. 1(1900)

company. Afterwards, the defendant refused to take delivery of goods and refused payment. The Supreme Court cited and analyzed English early cases *Hochster v. De la Tour*, *Frost v. Knight*, *Danube & Black Sea Ry. & Kustendjie Harbour Co. v. Xenos*, *Johnstone v. Milling* and plenty of American cases, concluding that “the rule laid down in *Hochster v. De la Tour*¹³ is a reasonable and proper rule to be applied in this case and in many others arising out of the transactions of commerce of the present day”¹⁴.

From the beginning of the 20th century to the 1930s, some scholars started to severely criticize the doctrine of anticipatory breach, among which the most important representative figure is Samuel Williston¹⁵. He pointed out that the concept of anticipatory breach is illogical, because the issue about breach of contract does not exist before the arrival of performance period, let alone anticipatory breach. The doctrine of anticipatory breach “requires the repudiating party to assume his duty to obey his promise, thus enlarging his obligations and responsibilities.”¹⁶, especially when courts have difficulty in ascertaining market price at the due time of performance, because in a suit brought before the due time, measuring damages will be “pure inference and speculation”. His criticism towards anticipatory breach has attracted much attention and has made effect up to now.¹⁷ And the most well-known case object to anticipatory breach is *Daniels v. Newton*¹⁸ in Massachusetts, which is still valid today. On the other hand, many academics defend for anticipatory breach¹⁹, and it seemed difficult to reverse the trend of establishment of this rule in many states. The supporters of this rule argued that parties of a contract are entitled to expect the opposite party not only to perform when the performance is due, but also not to

¹³ *Hochster v. De la Tour* (1853) EWHC QB J72

¹⁴ *Roehm v Horst* 178 U.S. 1 (1900)[19]-[20]

¹⁵ Samuel Williston, ‘Repudiation of contract’ (1901) 14 Harvard L. Rev. 317 and 421; His main opinions are reflected in the article “Repudiation of contract” and his classic work *Williston on Contracts*, S1341 et al.

¹⁶ Samuel Williston, ‘Repudiation of Contracts’ (1901) 14 Harv. L. Rev. 421,428,438

¹⁷ Keith A. Bowley, ‘A brief History of Anticipatory Repudiation in American Contract Law’ (2000) 69 U. Cin. I. Rev. 565, 605

¹⁸ *Daniels v. Newton* 114 Mass. 530 (1874)

¹⁹ Henry W. Balianine, ‘Anticipatory Breach and the Enforcement of Contractual Duties’ (1924) 22 Mich. L. Rev. 329; Lauriz Vold, ‘Anticipatory Repudiation of Contracts and Necessity of Election’ (1928) 26 Mich. I. Rev. 502; Lauriz Vold, ‘Anticipatory Repudiation of Contracts and Necessity of Election’ (1928) 26 Mich. I. Rev. 502.

substantially run counter to such expectation. G.H.Treitel said: The creditor has an imperfect right to claim the debtor to perform the contract, which will turn into a perfect right when the performance is due. Before the deadline, he also has the right to make sure that the contract exists and is valid persistently. During the period when the creditor waits for the performance, he is entitled to ensure that the debtor is willing and able to perform his contractual obligations. The debtor's any conducts inconsistent with such expectation is actual breach of binding commitment instead of anticipatory breach of future promise.²⁰ American scholar A.L.Cobin thinks the defendant's repudiation of performance is often unforgivable, because it reduces the creditor's sense of security and causes his instant economic losses. And allowing the aggrieved creditor to bring a suit immediately helps to solve the dispute as soon as possible and compensate for loss in time.²¹ Above all, a contract is persistently valid before the deadline of the performance since it was concluded by two parties. So it can be justified that either party expects the other party to performance in the future, on which legal protection should be conferred. Thus some remedies for actual breach of contract can also apply to anticipatory breach. Rules of anticipatory breach entitle the aggrieved party to suspend his own remained performance and claim for compensation for all damages. As for the way of evaluating damages, there is no substantial difference with that under actual breach of contract. In addition, in many circumstances, it takes some time to begin trial of the first instance, the problem of which can be solved by rules of anticipatory breach. As American judge Learn Hand said, one of effects of rules of anticipatory breach is that the court should try its best to estimate damages if estimating it before the performance is due, however, this does not mean the court will neglect facts that have already occurred if the performance period has expired when the court is hearing the case.²² It is said that the difficulty to estimate future damages will not increase because of the application of the doctrine of anticipatory breach; Even in few cases where the danger of major unfairness exists,

²⁰ G·H·Treitel, *The Law of Contract* (Stevens&sons 1983) 644

²¹ A.L. Cobin, *Cobin on Contracts* (Wang Weiguo, Xu Guodong, Li Hao, Su Min, Xia Dengjun tr, 1st edn, Encyclopedia of China Publishing House 1998) 452

²² *NewYork Trust Co. v. Island Oil & Transp. Corp.* 4F. 2d 653,654(2d Cir.1929)

the court also has sufficient preventive measures within the range of its power, namely, it can delay trial until this uncertainty can be eliminated to some degree.²³ Finally, the side supporting rules of anticipatory breach accounted for the mainstream, so this instrument was able to exist and keep on developing. In a case in 1916, the United States Supreme Court said that anticipatory breach rule is “no longer open to question”²⁴. Nowadays, all states in US except Massachusetts admit the doctrine of anticipatory breach.²⁵

In 1932, the American Law Institute published *Restatement of the Law, Contracts*, and articles 318-324 stipulate anticipatory breach,²⁶ which is “the first serious attempt to “standardize” American law on anticipatory repudiation.”²⁷ Then in 1949, the American Law Institute and National Conference of Commissioners on Uniform State Laws officially released UCC, which is then gradually passed by the legislatures of vast majority states, becoming the most important statute law in American commercial law field. This code is the greatest achievement of American Uniform State Laws Campaign, and the provisions regarding anticipatory breach are mainly stipulated in article 2.²⁸ Except from Louisiana (retaining the civil law tradition of French colonial period), other states adopted this code by passing state legislations. Provisions in UCC manifest many commercial principles and business usage, because the chief reporter “Llewellyn had a strong sense of the relationship between law and commerce, and he imported this into the drafting of the UCC.”²⁹ And in order to assure its permanence, UCC affords open-ended standards to courts based on reality

²³ A.L. Cobin, *Cobin on Contracts* (Wang Weiguo, Xu Guodong, Li Hao, Su Min, Xia Dengjun tr, 1st edn, Encyclopedia of China Publishing House 1998) 451

²⁴ *Central Trust Co. of Illinois v. Chicago Auditorium Association* 240 U.S. 581 (1916)

²⁵ The current legal situation in Massachusetts, see Norman R. Prance, ‘Anticipatory Repudiation of Contracts: a Massachusetts Anomaly’ (1982) *Massachusetts Law Review* 30. But this State has enacted legislation to pass Section 2 of UCC, which means it has adopted anticipatory breach rule through legislation at least in the field of sales of movable property.

²⁶ Keith A. Bowley, ‘A brief History of Anticipatory Repudiation in American Contract Law’ (2000) 69 *U. Cin. I. Rev.* 565, footnote 257 and the accompanying text.

²⁷ Keith A. Bowley, ‘A brief History of Anticipatory Repudiation in American Contract Law’ (2000) 69 *U. Cin. I. Rev.* 565, 609

²⁸ Legislative history about major provisions about anticipatory breach in UCC, see: Dena DeNooyer, ‘Remedying anticipatory repudiation ---- Past, present, and future?’ (1999) 52 *SMU L. Rev.* 1787

²⁹ William A. Schnader, ‘Short History of the Preparation and Enactment of the Uniform Commercial Code’, 22 *U. Miami L. Rev.* 1 (1967) 1,4 (“He insisted that the provisions of the Code should be drafted from the standpoint of what actually takes place from day to day in the commercial world rather than from the standpoint of what appeared in statutes and decisions.”).

of commercial transactions, for example, reasonableness, courses of dealing and usage of trade.³⁰ “While such standards produce uncertainty, that uncertainty merely mirrors reality.”³¹ As section 1-106 stipulates, “the remedies provided by this act shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed”³², the main value orientation of UCC illustrated by many provisions is to compensate the aggrieved party.

2.2 Specific stipulations of remedies

2.2.1 Anticipatory Repudiation

The title of section 2-610 of UCC is “anticipatory breach”. “Repudiation” means that one party refuses to fulfill his contractual obligation, “which includes refusal to perform before and after his performance is due.”³³ The distinction between “anticipatory repudiation” and “anticipatory breach” is that the former one refers to *de facto status* while the latter one more emphasizes on the nature of the result cause by that fact. Put another way, the result of “anticipatory repudiation” is “anticipatory breach”, and this is why American famous legist Farnsworth named anticipatory breach as “anticipatory repudiation as a breach”³⁴. In his opinion, “The term “anticipatory breach” is elliptical, for what is meant is “breach by anticipatory repudiation”³⁵.

Section 2-610 of UCC does not only confirm 2 optional remedies established by English cases, but also add a remedy for the non-repudiating party when he admits the

³⁰ Dena DeNooyer, ‘Remedying Anticipatory Repudiation ---- Past, Present and Future?’ (1999) 52 S.M.U. L. Rev. 1787, 1795, citing John A. Sebert, Jr., ‘Remedies Under Article Two of the Uniform Commercial Code: An Agenda for Review’ (1981) 130 U. PA. L. REV. 360, 362; Imad D. Abyad, Note, ‘Commercial Reasonableness in Karl Llewellyn's Uniform Commercial Code Jurisprudence’ (1997) 83 VA.L.REV.429. Llewellyn recognized the feasibility of a commercial code: "The body of material is of itself both central, large, highly important, and a working unit." Karl Llewellyn's notes, Memorandum to Executive Committee, Committee on Scope and Program, Section on Uniform Commercial Acts; U.C.C. § 1- 102 cmt. 1.

³¹ John A. Sebert, Jr., ‘Remedies Under Article Two of the Uniform Commercial Code: An Agenda for Review’ (1981) 130 U. PA. L. REV. 360, 362

³² Uniform Commercial Code, S 1-106

³³ Carter, *Breach of Contract* (West Pub. Co.1956): Section701.

³⁴ E. Allan. Farnsworth, *American Contract Law* (Ge Yunsong, Ding Chunyan tr (1st edn. China University of Political Science and Law Press 2004) 600

³⁵ E. Allan. Farnsworth, *Farnsworth on Contract* (2nd edn, Aspen Publisher, Inc. 2000)

other party has breached the contract anticipatorily, which entitles him to suspend performance, urge and wait for the other party to retract anticipatory breach. It is obvious that this section provides the aggrieved party with three choices when one explicitly displays his unwillingness to carry out substantial contractual obligations either by words or conduct: (a) wait for the repudiating party to carry out his performance; (b) take remedial measures for breach of contract; (c) suspend his performance or exercise the seller's right to identify goods to the contract.³⁶

2.2.1.1 Directly bring a lawsuit to the court to claim damages;

The first remedy for anticipatory repudiation is to suspend the aggrieved party's performance, bring a suit to courts and claim damages. It seems self-evident that one party is entitled to suspend his performance if the other party appears as if he repudiates the contract. For example, the buyer who buys the land is unable to pay the price immediately after the landowner expressly refused to honor his promise before the performance is due. However, things are always more difficult in practice. As Cobin says, in lawsuit of breach caused by unconditional repudiation of performance, the plaintiff's performance ability is still the precondition that he can gain compensation. If he is unable or unwilling to pay the actual equivalents, then he cannot obtain compensation for damages due to non-performance or repudiation of the defendant.³⁷ That is to say, the buyer in a land sale has to prove his willingness and ability to pay the money, otherwise, he is not entitled to bring a suit against anticipatory breach and even worse, he might be sued for anticipatory breach of the sales contract, because the landowner can explain his conduct as a defense or self-remedy when buyer's proof is unavailable.

³⁶ Uniform Commercial Code, S 2-610: "When either party repudiates the contract with respect to a performance not yet due the loss of which will substantially impair the value of the contract to the other, the aggrieved party may: (a) for a commercially reasonable time await performance by the repudiating party; or (b) resort to any remedy for breach (Section 2-703 or Section 2-711), even though he has notified the repudiating party that he would await the latter's performance and has urged retraction; and (c) in either case suspend his own performance or proceed in accordance with the provisions of this Article on the seller's right to identify goods to the contract notwithstanding breach or to salvage unfinished goods (Section 2-704)."

³⁷ A.L. Cobin, *Cobin on Contracts* (Wang Weiguo, Xu Guodong, Li Hao, Su Min, Xia Dengjun tr, 1st edn, Encyclopedia of China Publishing House 1998) 472

Another thing we should notice about this remedy is that the non-defaulting party should take necessary measures to reduce his losses. That is because when calculating compensations, the court will consider that the aggrieved party can reduce his cost because he does not need to fulfill his own obligation, and avoid damages by using redeemed resources; In fact, the aggrieved party is asked to take appropriate measures to avoid this kind of damage.³⁸ This can be verified by *Pillsbury Co. v. Ward*³⁹ case.⁴⁰ When the original buyer repudiated the contract, the soybean seller was supposed to actively sign contracts with the third party if he received an offer to purchase soybeans from a third party. If not, he is not conferred the right to claim loss of expectant interest cause by the increasing price of soybean afterwards.

2.2.1.2 Notify the defaulting party that he will wait for the performance or urge the defaulting party to retract his anticipatory breach.

As the *Truman L. Flatt & Sons Co. v. Schupf*⁴¹ case demonstrates, the party who anticipatorily breaches the contract is able to retract his non-performance under certain conditions. If the breach is expressed by words, the breaching party can notify the aggrieved party either orally or in writing to retract his repudiation; if the breach is demonstrated by active voluntary conduct, the non-breaching party has to correct his own conduct and let the other party know it. Retraction can be carried out either on his own initiative or urged by the other party. The breaching party's retraction right is explicitly stipulated both in UCC and *Restatement of the Law, Contracts (the 2nd edition)*. UCC stipulates that the breaching party is entitled to retract his repudiation before the deadline of his next performance as long as the non-breaching party has not changed his positions towards this contract due to the repudiation. And the retraction is supposed to be explicit showing that the repudiating party changes his mind and plans to fulfill his contractual duties.⁴² *Restatement of Law, Contracts (Second)*

³⁸ E. Allan. Farnsworth, *American Contract Law* (Ge Yunsong, Ding Chunyan tr (1st edn. China University of Political Science and Law Press 2004) 606

³⁹ *Pillsbury Co. v. Ward* [1977] 250N.W. 2d35, Supreme Court of Iowa

⁴⁰ *Pillsbury Co. v. Ward*, 250N.W. 2d35, Supreme Court of Iowa (1977)

⁴¹ *Truman L. Flatt & Sons Co. v. Schupf* [1995] App.3d983,649 N.E.2d 990

⁴² Uniform Commercial Code, S 2-611: "(1) Until the repudiating party's next performance is due he can retract his repudiation unless the aggrieved party has since the repudiation cancelled or materially

provides in section 256: If one party can be regarded as expressing intention of repudiating performance based on section 250 or his words can be deemed as the factual foundation of refusing performance, he can retract his words or conducts to eliminate the legal consequence, as long as the non-breaching party does not make the repudiation settled yet.⁴³

Firstly, the validity of the retraction of the defaulting party partly depends on measures taken by the aggrieved party. This has two requirements: One is that the retraction should be conducted before the non-repudiating party shows that he will terminate the contract. If the non-repudiating party gives the notice indicating his acceptance of anticipatory repudiation or brings a default compensation suit to the court, then it is certain that the breach has led to the result of termination of the contract, which cannot be reversed. The other is that one should retract his breach before the non-repudiating party's contractual status has substantially changed. Although the innocent party does not terminate the contract when knowing the other party repudiates the contract, if his display of repudiation largely affects the non-repudiating party, leading him to take some action that substantially changed his status in this contract, this anticipatory repudiation cannot be retracted in this specific situation. Just like in *Pillsbury Co. v. Ward* case, the soybean seller chose to make transactions with a third party after the buyer anticipatorily repudiates his performance. Secondly, the retracting party is required to afford sufficient assurance. As for the adequacy of the assurance, the standard to judge shall be given in detail hereinafter. Thirdly, after successful retraction, the status of contractual rights and obligations of both parties will return to normal state. But during the period from the anticipatory breach happens to retraction, the aggrieved party's suspending performance may constitute delay in performance, the responsibility caused by which

changed his position or otherwise indicated that he considers the repudiation final. (2) Retraction may be by any method which clearly indicates to the aggrieved party that the repudiating party intends to perform, but must include any assurance justifiably demanded under the provisions of this Article (Section 2-609). (3) Retraction reinstates the repudiating party's rights under the contract with due excuse and allowance to the aggrieved party for any delay occasioned by the repudiation.”

⁴³ Li Xiang, *The Essence of American Contract Law* (1st edn, China University of Political Science and Law Press 2008) 436

he can be exempted from. And this may also lead the due time of performance to postpone.

2.2.1.3 Ignore the other party's declaration of anticipatory breach and continue keeping the validity of the contract until he actually breaches the contract, and then get remedies under actual breach;

This remedy is the least efficient one, because the innocent party is subject to damage if he disregards or refuses to accept the other party's anticipatory repudiation and awaits performance. First of all, this election is often criticized by economic analysis of law due to its inefficiency.⁴⁴ The non-breaching party is surely entitled to terminate the contract and bring compensation litigation, and thus get rid of the old contract and look for new opportunities to trade. Efficiency is not the leading factor affecting the party's decision, especially in China where *Renqing*⁴⁵ and *Mianzi*⁴⁶ values more. Second, the contract may be terminated on account of *force majeure*⁴⁷ during the period from the non-breaching party chooses to maintain the contract to performance is due, under this circumstance, the non-breaching party shall lose right to compensation induced by anticipatory repudiation.⁴⁸ Take the case *Avery v. Bowden*⁴⁹ as an example, plaintiff Avery insisted that the contract was valid and continued performing his obligation though Bowden repudiated the contract in advance. But then a war between Britain and Russia occurred which led the contract to be cancelled. And Avery couldn't get any compensation for damages on the basis of defendant's anticipatory repudiation. Third, the non-breaching party can ignore the other party's non-performance and wait for its performance, but only for a

⁴⁴ R.A. Posner, *Economic Analysis of Law* (Jiang Zhao Kang tr, 1st edn, Encyclopedia of China Publishing House 1997) 150-168.

⁴⁵ *Renqing*, meaning closed connection or relationships between people, which will be taken into consideration when one makes decisions.

⁴⁶ *Mianzi* is like a person or a company's reputation, affecting others' valuation towards it a lot.

⁴⁷ *Force majeure*, meaning 'superior force', is a common clause in contracts that essentially frees both parties from liability or obligation when an extraordinary event or circumstance beyond the control of the parties, such as a war, strike, riot, crime, or an event described by the legal term act of God (such as hurricane, flooding, earthquake, volcanic eruption, etc.), prevents one or both parties from fulfilling their obligations under the contract.

⁴⁸ Li Xianbo, *Study on Anglo-American System of Termination of Contracts* (1st edn. Peking University Press 2008) 290.

⁴⁹ 3 *Avery v. Bowden*. 5E.& B.714(1855).

commercially reasonable period.⁵⁰ In this case, rules about compensation for damage may place the damaged party in a very unfavorable position. In the period waiting for the breaching party's performance, if the damaged party continues performing, then the cost of his performance should be excluded for the compensation he can get according to the principle of "avoidability as a limitation"⁵¹. Besides, if the injured party could arrange substitutional transactions immediately after anticipatory repudiation, then he will lose the right to request compensation for damages in terms of the loss that could be avoided by that arrangement. The *Oloffson v. Coomer*⁵² case can contribute to our understanding of this issue. On April 16th of 1970, Oloffson and Coomer made a transaction of 40000 bushels of corn, which is formed by two sales contracts: The first contract stipulated that the seller Coomer should deliver 20000 bushels of corn to Oloffson before October 30th, with the price 1.12 and 3 quarters of a dollar per bushel. And in the second contract, the delivery of 20000 bushels of corn should be before December 15th, with the price 1.12 and 1 quarter of a dollar per bushel. On June 3rd of 1970, Coomer explicitly notified Oloffson that he would not plant any corns this year due to the humid climate. So if Oloffson had already concluded resale contracts of the corns with others, he had better look for other source of goods because the price of corn at that time is only 1.16 dollars per bushel. However, Oloffson insisted that Coomer should carry out his performance, but Coomer indicated many times that he would not perform his obligation. It turned out that Oloffson had no corn to resale to others when the appointed delivery time was due. In order to fulfill the contracts with others, Oloffson had to buy 20000 bushels of corn with high price. So Oloffson brought a suit against Coomer, and finally the compensation Oloffson got was only the price difference between the contract price and the market price on June 3rd of 1970 (1.16 dollars). Since UCC entitles the

⁵⁰ J. Ferrier, M. Navin, *Understanding Contracts* (Chen Yanming tr, 1st edn, Peking University Press 2009) 429.

⁵¹ E.A. Farnsworth, *American Contract Law* (Ge Yunsong, Ding Chunyan tr, 1st edn. China University of Political Science and Law Press 2004) 600. Namely, if the aggrieved party could have taken some reasonable measures to avoid losses to some extent, the court won't award compensation for such loss.

⁵² *Oloffson v. Coomer*. 11 Ill.App.3d918, 296N.E.2d871.

aggrieved party to await performance by the other party for a commercially reasonable time,⁵³ in the current case, 3rd June 1970 is so-called “a commercially reasonable time”. As a result, Oloffson’s other loss should be assumed by himself based on “avoidability as a limitation”.

2.2.2 Right to Adequate Assurance

From the above, it is not easy for the contracting party to adopt remedies for anticipatory repudiation whose standard is high because it is not easy to adopt remedies for anticipatory breach⁵⁴. The remedies would be available only when the repudiating party indicates nonperformance expressly and definitely. If the expression of breaching of the contract is ambiguous or uncertain, or the contracting party is just susceptible of the opposite side’s contractual ability, a dilemma will come out: Assume that the innocent party suspends his performance on the basis of his doubt on whether the opposite side could carry out performance, and initiates a proceeding against anticipatory repudiation. If the court denies his claim, he will be accused of default. But if he continues performing without regard to doubt, the loss that originates from his inaction to avoid cannot fall within the scope of compensation once the court decides the other party’s conduct fulfill anticipatory breach. In order to avoid such dilemma, UCC affirms the right to adequate assurance of performance, setting an innovation to anticipatory breach.

Section 2-609 stipulates: “ (a) A contract for sale imposes an obligation on each party that the other's expectation of receiving due performance will not be impaired. When reasonable grounds for insecurity arise with respect to the performance of either party the other may in writing demand adequate assurance of due performance and until he receives such assurance may if commercially reasonable suspend any performance for which he has not already received the agreed return; (b) Between merchants the

⁵³ Uniform Commercial Code, S 2-610: “When either party repudiates the contract with respect to a performance not yet due the loss of which will substantially impair the value of the contract to the other, the aggrieved party may: (a) for a commercially reasonable time await performance by the repudiating party...”

⁵⁴ *Oloffson v. Coomer*. 11 Ill.App.3d918, 296N.E.2d871.

reasonableness of grounds for insecurity and the adequacy of any assurance offered shall be determined according to commercial standards; (c) Acceptance of any improper delivery or payment does not prejudice the aggrieved party's right to demand adequate assurance of future performance; (d) After receipt of a justified demand failure to provide within a reasonable time not exceeding thirty days such assurance of due performance as is adequate under the circumstances of the particular case is a repudiation of the contract.”

According to this article, when a party has reasonable grounds to say that the other party may be not or fail to perform his obligations, he can require the other party to offer some assurance. If the other party cannot provide, then he can adopt remedies for anticipatory breach. American field of law speaks high of this rule, and “It is impossible to find a writer who has a bad word to say about the application of the adequate assurances doctrine in the U.C.C. Article 2 context”⁵⁵. Prof. R.J. Robertson, Jr. says, “demanding assurance is frequently the first step to an eventual agreement between the promisee and promisor to work out difficulties of performance. If that is the case, then the assurance device is one of the most innovative and commercially sensible developments in contract law in this century.”⁵⁶ Though its wide acceptance, the application of this rule is not very easy, because it faced with the following two questions:

2.2.2.1 Whether the ground to judge insecurity is reasonable?

According to UCC, the rationality of the basis causing insecurity should be determined by business principles instead of legal principles, which means it is a matter of fact rather than law to ensure whether one party has good reasons to feel insecure. In the *AMF, INC. v. McDonald's corp*⁵⁷ case, McDonald’s corp built its insecurity on the basis of the serious problem with a kind of machine and AMF’s inability of punctual delivery. At the same time, we should notice that the reason

⁵⁵ Gregory S. Crespi, ‘Adequate Assurances Doctrine after U.C.C.§2-609: a Test of the Efficiency of the Common Law’ (1993) 38 *vill.L.Rev.* .179, 185-186

⁵⁶ R.J.Robertson,Jr., ‘Right to Demand Adequate Assurance of Due Performance:U.C.C.2-609 and Restatement(second) of Contracts Section 251’ (1988) 38 *Drake L.Rev.*305,353

⁵⁷ *AMF, INC. v. McDonald's Corp.*, 536F.2d1167 (7th Cir.1976)

causing insecurity is not always rooted from or related to this contract in the light of business usage and principles. For instance, assume that the buyer needs some precision parts to put into use immediately after delivery, if he finds the seller deliver this kind of parts with defects to other buyers, then he has reasonable grounds for insecurity.

In specific, it depends on various factors, including words and conducts by parties, the process of transaction between parties and the nature of sales contracts and the industry.⁵⁸ In accordance with concepts in common law, the standard is an objective standard of reasonable person, namely, to check whether a reasonable person would fall into insecurity if he is in the same situations as the party feeling insecure.⁵⁹ McDonald's corp affirmed AMF could not deliver goods on time because it seems to a reasonable person that AMF was impossible to produce 23 machines by July of 1969 under the production condition of the time since it had not produce any until May of 1969. However, there have not been many judgments based on article 2-609 in America so far. That is because the restriction of it has not been defined yet. Courts seem not inclined to support claim for assurance to performance without sufficient reasons, because wide acceptance of the reasons might lead both parties to harass each other.

2.2.2.2 Whether the assurance is sufficient?

Similarly, as the judge in the *AMF, INC. v. McDonald's Corp.*⁶⁰ case described, what constitutes sufficient assurance to performance is also a matter of fact. Sufficient assurance can be either explanation by the party himself or report or opinions provided by a third party. The mere fact that the buyer can make use of defective goods and the seller with good reputation promises no more defects can amount to sufficient assurance. But similar promise made by one with bad reputation may be regarded as insufficient assurance unless he affords security or a third party provides

⁵⁸ *Restatement of Law, Contracts* (2nd edition), Official comment 3 of Section 251

⁵⁹ Ge Yunsong, *Study on Rules of Anticipatory Breach — Concurrently Discussion on Unsafe Right of Defense System* (1st edn, China University of Political Science and Law Press 2003): 74.

⁶⁰ *AMF, INC. v. McDonald's Corp.*, 536F.2d1167 (7th Cir.1976)

guarantee. And if the defective goods are easy to repair but already affect the normal use of the buyer, oral declaration cannot be deemed as sufficient assurance, unless the seller substitutes goods, reduces price, takes remedial measures or adopts other commercially reasonable methods. To sum up, guarantee is necessary in some cases, the extent of which is even higher sometimes. As UCC official comment says, evaluating the sufficiency of assurance offered by the breaching party is not in a so-called “satisfying” state, so, the non-breaching party has to perform his fiduciary duty and obey commercial principles.⁶¹ As for the legal consequence of this rule, it is quite similar with that of anticipatory repudiation. Firstly, the non-breaching party can put aside the other party’s anticipatory repudiation, await the contract deadline and then demand the court for relief based on actual breach. Secondly, he can seek relief according to Section 2-609 of UCC that provides 3 remedies: (1) the non-breaching party has right to ask for “sufficient assurance”; (2) When he has strong evidence to feel insecure, the non-breaching party is entitled to suspend his performance and any preparations until the assurance is enough to eliminate his insecurity. And if the ground he relies on is reasonable, he can be exempted from the responsibility of delayed performance due to his suspending; (3) Provided that the defaulting party fails to offer “sufficient assurance” within the prescribed time, the non-breaching party can take it as anticipatory breach and claim for damages.

III. Remedies of anticipatory breach in Germany

3.1 Socio-economic Circumstances

It should be noted that Germany revised its civil code in 2002, the main part of which is the part II about the debt relations. I will introduce and compare different stipulations about *Leistungsstoerungen*⁶² in old and new civil codes.

Performance failure act in 1900 German Civil Code is centered on impossibility of

⁶¹ American Law Institute (ALI), The National Conference of Commissioners on Uniform State Laws (NCCUSL) (eds), Sun Xinqiang (tr), *American Uniform Commercial Code and Its Official Comments* (1st edn, China Renmin University Press 2004) 190

⁶² *Leistungsstoerungen* means payment barrier.

performance.⁶³ German civil law rooted in Roman law and was established on *Pandektenwissenschaften*⁶⁴ that was developed on the basis of intensive study of Roman law. Savigny is the ancestor of modern theories of impossibility of performance, but who affects performance failure act in German civil code most is Roman jurist Mommsen, who is also called “Father of the theory of impossibility of performance”. In 1853, he raised, literatures of Roman law manifested that all performance failure can be summarized as two forms: impossibility of performance and delay of performance. This viewpoint is agreed by most jurists, including Windscheid, who played an important leading role in the draft process of German Civil Code. As a result, 1896 German Civil Code only stipulated two forms of non-performance—impossibility and delay of performance—and made specific provisions about them, instead of providing a united concept of “debt violation”, general rules about responsibilities of non-performance and admitting other forms of non-performance.⁶⁵ Of course, in specific provisions about contract, German Civil Code stipulates other forms of breach, but it has no universality at all.

As mentioned above, 1900 German Civil Code only stipulates two forms of non-performance: impossibility of performance and delay of performance. This bifurcated approach was soon challenged by legal practice and doctrines.⁶⁶ In 1902, Staub published his famous thesis *On the Positive Contract Infringement and Their Legal Effect*. Two years later, he revised and published, changing the name into *Positive Contract Infringement*. His thesis laid the theoretical foundation of positive infringement as the third form of non-performance. He listed 15 cases, in the last of which the seller indicates before the appointed delivery time that he will not perform

⁶³ Shiomi Kao, Yu Min tr, ‘The Recent Development of Contractual Liability and Impossibility of Performance in Europe’, See: Liang Huixing, *Civil and Commercial Forum VIII* (1st edn, Law Press 1999)

⁶⁴ *Pandektenwissenschaften* is a legal school, developing from *Digesta* (part of ancient Roman law), whose studying object is the compilation of civil code

⁶⁵ Ye Saiying, ‘Research on Basic Theory and Practice on Impossibility of Performance’ (Master Thesis, National Taiwan University 1981); R. Hoorn, H. Kötz, H.G. Laser, *The Introduction of German Civil Law* (Chu Jian tr, Encyclopedia of China Publishing House 1996) 103.

⁶⁶ Markesinis, Lorenz, Dannemann, *The German Law of Obligations, Volume 1, The Law of Contracts and Restitution: A Comparative Introduction* (1st edn, Clarendon Press 1997) 418; R. Hoorn, H. Kötz, H.G. Laser, *The Introduction of German Civil Law* (Chu Jian tr, Encyclopedia of China Publishing House 1996) 114.

his duty when the performance is due.⁶⁷ Enneccerus-Lehmann said: "... the fixed declaration of the debtor that he will not bring about the performance (for instance he says that he repudiates the contract, annuls it, withdraws from the contract), would be deemed an infringement of the claim even if no delay as yet occurs, indeed, even if the claim is not yet matured, because through this declaration the fulfillment of the duty is endangered."⁶⁸

3.2 Specific Stipulations of Remedies

Strictly speaking, Germany does not have any express instrument of "anticipatory breach"; instead, it solves this problem through rules of impossibility of performance and refusing of performance.

3.2.1 Impossibility of performance

3.2.1.1 Stipulations in 1900 Germany Civil Code

Impossibility of performance means that the debtor cannot achieve the main purpose of the debt by carrying out his performance or it is impossible for him to accomplish the performance. Impossibility of performance can be divided into subjective incapability (*unvermogen*) and objective one, the distinction standard of which is really divergent. One mainstream is as this: Objective incapability means that anyone is unable to perform this obligation; Subjective incapability means that only the debtor cannot fulfill the obligation, while it is possible for the third party to accomplish it.⁶⁹ In addition, impossibility of performance can also be classified as initial impossibility and subsequent impossibility. According to article 306 of 1900 German Civil Code, if the debtor's impossibility occurs in the beginning, the contract shall be invalid. Impossibility of performance, as one form of the non-performance,

⁶⁷ Chen Yanxi, 'Research on Incomplete Fulfillment on Contract in Favor of a Third Party' (National Taiwan University 1983) 161; Wang Zejian, 'Basic Theory on Incomplete Fulfillment', *Civil Law Theories and Case Study III* (1st edn, China University of Political Science and Law Press 1998)

⁶⁸ Mitchell Franklin, 'Equity as Form: a Study of *Frost v. Knight*' (1956) 30 Tul. L. Rev. 175, 192.

⁶⁹ Shi Shangkuan, *Law of Obligation* (1st edn, China University of Political Science and Law Press 2000) 378; Wang Zejian, 'Impossibility of Performance', *Civil Law Theories and Case Study I* (1st edn, China University of Political Science and Law Press 1998)

specifically refers to subsequent impossibility of performance, including both subjective incapability and objective incapability.⁷⁰

In Germany, the responsibility principle of non-performance is fault responsibility principle.⁷¹ Under impossibility of performance, one is required to assume the responsibility only when he is in fault. When impossibility of performance caused by matters to which the debtor is attributed occurs, 1900 German Civil Code provides that, the debtor's initial payment duty is surely extinguished, and the legal consequence afterwards is as follows:

(1) The creditor is entitled to ask the debtor to compensate for damages (section 280⁷²). If it refers to contractual obligations, it should be noted that the contract is still regarded as valid, so the scope of compensation of the debtor is benefit of performance.⁷³ If the contract is bilateral (first sentence of paragraph 1 of section 325⁷⁴), then according to a calculation method as the mainstream in Germany, the creditor is not bound to the unfulfilled debt anymore; instead, he can ask the other party to pay the margin that exceeds his own payment ("Theory of Balance"⁷⁵). The timing when he can claim for compensations is exactly the time when non-performance occurs.

The reason why Theory of Balance exists is mainly because that the creditor cannot ask for compensations after terminating the contract according to 1900 German Civil Code. If "Theory of Balance" is not adopted, then the creditor has to perform his scheduled obligations in order to keep his claim right for

⁷⁰ id.

⁷¹ 1900 German Civil Code (Bürgerliches Gesetzbuch), S 276: "Responsibility of the obligor: (1) The obligor is responsible for intention and negligence, if a higher or lower degree of liability is neither laid down nor to be inferred from the other subject matter of the obligation, including but not limited to the giving of a guarantee or the assumption of a procurement risk. The provisions of sections 827 and 828 apply with the necessary modifications. (2) A person acts negligently if he fails to exercise reasonable care. (3) The obligor may not be released in advance from liability for intention."

⁷² 1900 German Civil Code (*Bürgerliches Gesetzbuch*)

⁷³ Markesinis, Lorenz, Dannemano, *The German Law of Obligations: A Comparative Introduction, Volume I, the Law of Contracts and Restitution*, (1st edn, Clarendon Press; Oxford University Press 1997) 412.

⁷⁴ 1900 German Civil Code (*Bürgerliches Gesetzbuch*)

⁷⁵ R. Hoorn, H. Kötz, H.G. Laser, *The Introduction of German Civil Law* (Chu Jian tr, Encyclopedia of China Publishing House 1996) 119-120; Shi Shangkuan, *Law of Obligation* (1st edn, China University of Political Science and Law Press 2000) 606-607.

compensations, often leading to improper consequence.⁷⁶ And the effect of Theory of Balance is actually that both parties' scheduled performance automatically extinguishes backwards (no retroactive effect).

- (2) In a bilateral contract, the creditor gains the right to terminate the contract. The effect of termination, based on stipulations of section 327, 346-356⁷⁷, will be restitution, but the creditor is not entitled to claim for compensations.

But in German law, if the creditor's exercising of termination right leads to restitution, then he is not allowed to claim for compensations. In contrast, Chinese law confers the right to claim for compensation for damages on the creditor even after he terminates the contract.

From the above, we can see that the legal consequence caused by impossibility of performance has nothing to do with performance period of the debt. The deadline of performance is regarded as the timing to judge whether the performance is possible. That is to say, if one cannot perform his duty at present, but the impossibility turns to possibility when the performance is due, this situation does not belong to impossibility of performance. For example, the seller promised to deliver a particular thing on July 1st, but he negotiated with the third party to transfer the particular thing with a much higher price on June 25th. It seems to the buyer that he cannot expect to obtain the thing from the seller, which means that the purpose of the contract seems impossible to be achieved. However, the seller cancelled his appointment with the third party on June 30th, as a result, the performance turns to be possible at this time. On the other hand, if the performance is certain to be impossible before it is due, then it is unnecessary to take the performance period into account. For instance, the seller negotiated with the third party on June 25th, promising to make registration and transfer the ownership of the particular thing on June 26th. Then on 1st of July, it is impossible for the seller to deliver the appointed thing to the buyer, so the performance period is without any regard to and the aforesaid relevant legal

⁷⁶ Shi Shangkuan, *Law of Obligation* (1st edn, China University of Political Science and Law Press 2000) 606-607

⁷⁷ 1900 German Civil Code (*Bürgerliches Gesetzbuch*)

consequence happens immediately. That is, the creditor is entitled to claim for compensation for damages at once. In conclusion, Germany law does not make a distinction between anticipatory breach and actual breach, and rules about impossibility of performance apply to all the situations before and after the performance period expires.

3.2.1.2 Stipulations in 2002 German Civil Code

1900 German Civil Code distinguishes payment barrier very precisely as impossibility, delay and repudiation, but the legal consequence does not depend on this. It is hard for layman outside legal field to understand the difference. In fact, buyers are usually unable to know the reason why the sellers do not fulfill performance.⁷⁸ As a result, it is necessary to adjust the whole system to find a quicker and easier way. The starting point of 2002 German Civil Code is that the reason why the debtor disobeys his duty does not matter. In other words, it changes its focus from the reason of violating obligations to whether the debtor indeed breaches his duty.

Although 2002 German Civil Code establishes a united concept called “debt violation”⁷⁹, it is unitary in the sense when all types of debt violation cause consequence of compensations for damages. As for questions like whether the creditor can claim for compensations that replace the scheduled payments and whether a bilateral contract can be terminated, it is still of great significance to distinguish forms of breach.

Section 275⁸⁰ uniformly stipulates the elimination of scheduled payment obligations without distinguishing whether this elimination is owed to the debtor. Questions

⁷⁸ Mi Jian (ed), *Chinese and German Academic Papers Corpus* (1st edn, Law Press 2003) 123

⁷⁹ 2002 German Civil Code (*Bürgerliches Gesetzbuch*), S 280

⁸⁰ 2002 German Civil Code (*Bürgerliches Gesetzbuch*), S 275: “Exclusion of the duty of performance: (1) A claim for performance is excluded to the extent that performance is impossible for the obligor or for any other person. (2) The obligor may refuse performance to the extent that performance requires expense and effort which, taking into account the subject matter of the obligation and the requirements of good faith, is grossly disproportionate to the interest in performance of the obligee. When it is determined what efforts may reasonably be required of the obligor, it must also be taken into account whether he is responsible for the obstacle to performance. (3) In addition, the obligor may refuse performance if he is to render the performance in person and, when the obstacle to the performance of the obligor is weighed against the interest of the obligee in performance, performance cannot be reasonably required of the obligor. (4) The rights of the obligee are governed by sections 280, 283 to 285, 311a and 326.”

concerning the creditor's remedies are provided by other articles. Paragraph 1 of the article obviously stipulates impossibility of performance in 1900 German Civil Code, in which 'impossibility for creditors' means subjective impossibility while "impossibility for anyone" means objective impossibility. The same as 1900 German Civil Code, they all directly lead to the elimination of scheduled payment obligations. Under situations in paragraph 2 and 3, performance is possible, but claiming for scheduled one would cause too much or unreasonable burden to the debtor, which results in the same consequence of impossibility of performance.⁸¹

Even though the scheduled duties asked for by the creditor extinguish, if impossibility occurs due to the debtor, then the creditor is entitled to claim for compensations according to paragraph 1 of section 280⁸². And in accordance with the first sentence of section 283⁸³, what the creditor claims for is the compensation replacing all scheduled performance. This shows that the legal consequence of impossibility of performance (and non-expectation of performance) is still the same as stipulations in section 280⁸⁴ of 1900 German Civil Code. The law does not indicate any relationships between the trigger of this claim right of compensation for damage and the deadline of scheduled performance, so this right can be exercised immediately.

In a bilateral contract, when the debtor's scheduled obligations extinguish according to paragraph 1-3 of section 275⁸⁵, then based on section 326⁸⁶ paragraph 2, if the cause is attributed to the creditor or occurs in delay of acceptance, then the creditor is still supposed to perform his duties; According to paragraph 1, if the cause is attributed to the debtor or is not attributable to both parties, then the debtor's right to ask for reciprocal performance extinguishes. As a result, through comprehensive analysis of section 280⁸⁷ paragraph 1 and the first sentence of section 283⁸⁸, what

⁸¹ Huang Li, *Pandect on Debt Part of Civil Law* (1st edn, China University of Political Science and Law Press 2002) 441-442

⁸² 2002 German Civil Code (*Bürgerliches Gesetzbuch*)

⁸³ According to paragraph 1-3 of section 275, if the debtor has no payment obligation, then the creditor is entitled to claim for compensation for damages that replaces payment.

⁸⁴ 2002 German Civil Code (*Bürgerliches Gesetzbuch*)

⁸⁵ id.

⁸⁶ id.

⁸⁷ id.

⁸⁸ id.

remains in the bilateral contract now is only the creditor's claim right of compensations for damages. This legal consequence is consistent with "*differenztheorie*" which was dominant before German Civil Code was revised. In other words, if the debtor can be blamed, then both parties' debt in this bilateral contract will finally be extinguished at the same time in the future, and the creditor is entitled to ask for compensations.

In addition, paragraph 5 of section 326⁸⁹ provides, the creditor can quote section 323⁹⁰ (termination right under a bilateral contract) to cancel the contract without regular interpellation, and the exercising of this termination right does not exclude the application of his claim right of compensations. Because impossibility of performance attributable to the debtor falls within the scope of debt violation, the scope of his claim right should amount to benefits of performance.⁹¹ This is a significant revision of German debt law. Compared by legal consequence of a situation where the contract is not terminated, the difference is that both parties have liability in restitution of payment that is already carried out.

3.2.2 Refusing of Performance

3.2.2.1 Stipulations in 1900 German Civil Code

German courts began to provide legal remedies for creditors under anticipatory repudiation in practice a long time ago. In the case of June 11th 1902, the seller repudiated his performance before the deadline, so the buyer bought goods from the third party and claimed for compensations before the appointed delivery time, and the court was in support of his request.⁹² After this case, the mainstream theory in Germany believes that creditors are entitled to sue debtors who refuse performance anticipatorily before the period expires. In another case on February 23rd of 1904, the

⁸⁹ 2002 German Civil Code (*Bürgerliches Gesetzbuch*)

⁹⁰ *id.*

⁹¹ Article 325 of Debt Law Draft of German Federal Ministry of Justice stipulates that the creditor is entitled to claim compensation for damages due to non-performance of contract or belief that the contract was to perform, namely, to make choice between performance benefits and trust benefits. But it was changed when German Civil Code was revised.

⁹² Samuel Williston, *A Treatise on the Law of Contracts* (4th edn, Lawyers Co-operative Press 1990) Section 1337A

debtor anticipatorily breached collateral duties based on the principle of good faith originated from article 157 and 242 of German Civil Code.⁹³ According to the theory about collateral duties in Germany, in principle, breach of collateral duties will trigger claim right for compensations; But if the breach is so serious that forcing the creditor to be subject to the contract obviously runs counter to the principle of good faith, then the creditor is entitled to terminate the contract.⁹⁴

Mainstream doctrines and legal precedents in Germany take anticipatory repudiation as one type of positive infringement of creditors' right.⁹⁵ Obligations breached by anticipatory repudiation are generally regarded as collateral obligations based on the principle of good faith, specifically, the obligation to abide by burden of the duty.⁹⁶ If the debtor has done something that is contrary to trust which is within the binding effect of the contract, this breach would be deemed as a breach of obligations which are mature and should be performed continually rather than a anticipatory breach of obligations which are due in the future.⁹⁷

Anticipatory repudiation demands the debtor's expression of intention to be final, definite, unequivocal and interpreted strictly. In accordance with Germany precedents, if the debtor indicates "the contract is invoked", "he withdraws the contract", "the contract never existed" or adds additional condition to perform his duties, his behavior can be regarded as refusing of performance. What's more, the debtor's conduct with clear and unambiguous meaning can also be taken as tacit declaration of refusal, leading to the same legal consequence.

Common theory agrees that creditors are entitled to claim that the debtor fails to perform his duty without interpellation. Like impossibility of performance, the creditor cannot expect the debtor to perform original debt after he refuses the performance, so legal consequence of impossibility of performance should apply to

⁹³ id.

⁹⁴ Samuel Williston, *A Treatise on the Law of Contracts* (4th edn, Lawyers Co-operative Press 1990) Section 1337A

⁹⁵ Chen Yanxi, 'Research on Incomplete Fulfillment on Contract in Favor of a Third Party' (National Taiwan University 1983) 69-72

⁹⁶ Liu Kongzhong, 'Research on Infringing the Creditor's Rights Positively' (1985) 120 *Law Journal*

⁹⁷ G.H. Jones, P. Schlechtnem, 'Breach of Contract (Deficiencies in a Party's Performance)', *International Encyclopedia of Comparative Law, Vol. 7, Contracts in General, Chapter 15* (Tuhingen, Lancaster: J. C. B. Mohr (Paul Siebeck); Martinus Nijhoff 1999) Section 142.

this situation.⁹⁸ Some doctrines oppose to take anticipatory repudiation as positive breach of contract, instead, they claim that the creditor can cancel the contract or ask for compensations immediately based on policy consideration. There are a few scholars arguing to interpret it by using doctrine of anticipatory breach from Anglo-American law system. However, it is only controversial on the non-performance forms of anticipatory repudiation. As for the legal consequence, generally speaking, the creditor is entitled to refuse to take delivery of the other party's payment and ask for compensations for non-performance of all debts, and he has the right to cancel the contract without routine notification, or claim to terminate the contract and ask for compensations if it concerns continual contract obligations.⁹⁹ But if the expression of repudiation does not amount to the extent of absolutely clear, in other words, the debtor does not indicate refusing of performance in any case, then the creditor should apply to section 326 of 1900 German Civil Code which requires him to regularly urge the debtor to perform his duty, and he is entitled to obtain the termination right or claim for compensations only when his urging has no effect.¹⁰⁰ In principle, the debtor can eliminate the default state by withdrawing expression of refusing of performance,¹⁰¹ as long as the creditor did not claim his legal remedies. If the creditor has already carry out substitute transactions, then the debtor cannot retract his refusing.¹⁰²

⁹⁸ 2002 German Civil Code (*Bürgerliches Gesetzbuch*), S 325

⁹⁹ Chen Yanxi, 'Research on Incomplete Fulfillment on Contract in Favor of a Third Party' (National Taiwan University 1983) 69-72; R. Hoorn, H. Kötz, H.G. Laser, *The Introduction of German Civil Law* (Chu Jian tr, Encyclopedia of China Publishing House 1996) 113-114

¹⁰⁰ Markesinis, Lorenz, Dannemano, *The German Law of Obligations: A Comparative Introduction, Volume I, the Law of Contracts and Restitution*, (1st edn, Clarendon Press; Oxford University Press 1997) 499-501. In a case (NJW 1977. 35), the plaintiff ordered 4 million flowerpots. But before the performance is due, the defendant noticed the plaintiff that he could not provide all 4 million flowerpots as appointed. The court thought if the debtor claimed not to fulfill his obligation before the deadline of performance, his behavior indeed amounted to active breach of contract. However, the creditor was supposed to urge the debtor to perform his duty termly by applying to section 326 of analogy. Of course if the defendant unambiguously and expressly indicates that, he wouldn't deliver the appointed 4 million flowerpots within the appointed period in any circumstance, then the reminder in section 326 is not necessary at all.

¹⁰¹ Mitchell Franklin, 'Equity as Form: a Study of *Frost v. Knight*' (1956) 30 Tul. L. Rev. 175.

¹⁰² Jones, Schlechtriem, 'Breach of Contract', chapter 15, vol. VII of the *International Encyclopedia of Comparative Law* (ed. von Mehren, Mohr (Siebeck) Tübingen 1999) sec.146. In a German case in 1918, a seller and a buyer concluded a sales contract of cloth cover of canteen, appointing to deliver goods by installment from April. At the beginning of April, the seller noticed the buyer that he couldn't make the delivery on time. But on 1st May, he claimed that he could carry out his performance now.

Except for the above legal consequences, the creditor can also ask for the court to made a judgment of confirmation based on article 256 of German Code of Civil Procedure, ensuring the existence of the debt, or request the court to make a judgment to force the debtor to perform his duty according to article 259, but the deadline is still as scheduled. In accordance with this judgment, if the debtor does not automatically carry out his performance by the deadline, the creditor can directly apply to execute the sentence instead of bringing a suit again (article 751 of German Code of Civil Procedure).

3.2.2.2 Stipulations in 2002 German Civil Code: Repudiation of Performance and Anticipatory Breach

In the new civil code, stipulations about anticipatory repudiation of performance seem to introduce views in doctrines and precedents into legal provisions. Firstly, section 280¹⁰³ generally stipulates that the creditor is endowed with the right to claim for compensations for damages when the debtor breaches his obligations. Repudiation of performance breaches duties to abide by performance, which is collateral and cannot be sued independently. But for damages caused by this, it is reasonable to seek compensations. Thus it seems to infer that in 2002 German Civil Code, the basis of the creditor's claim right for compensations should be section 280¹⁰⁴. Of course, if the creditor does not terminate the contract, and does not take any alternative measures as substitutional transactions, thus no realistic damages occur, then there is no space for him to ask for compensations before the performance period expires.

Section 281¹⁰⁵ provides a right for the creditor to claim for compensations to replace the scheduled performance when the debtor does not perform or perform his duties improperly. In this provision, paragraph 2 stipulates: If the debtor refuses to perform his obligations seriously and expressly, then it is unnecessary to ascertain the above deadline. If there are special circumstances, and immediate claim for compensations

The Reichsgericht thought, the buyer was entitled to refuse the latter suggestion of performance, because the seller was subject to expression of repudiation of performance in April.

¹⁰³ 2002 German Civil Code (*Bürgerliches Gesetzbuch*)

¹⁰⁴ id.

¹⁰⁵ id.

can be regarded as reasonable after balancing both parties' interests, the deadline is unnecessary either.¹⁰⁶ This section does not expressly confine situations in which it applies to repudiation of performance after it is due, but from the contextual analysis, it refers to refusing of performance after the debt is due.¹⁰⁷

Since paragraph 4 of section 323¹⁰⁸ confers the termination right on the creditor before the performance is due, stipulations in the new civil code are much broader than refusing of performance in *stricto sensu*, which belongs to rules of anticipatory breach that is widely applicable. In paragraph 4, whether the termination right trigger depends on whether the constitutive requirements provided in the first three paragraphs will surely be met. For example, if the debtor expresses his repudiation of performance corresponding with a requirement in article 2 paragraph 1 and indicates that his intention will not change, then he fulfills requirements of paragraph 4. However, this article seems to be closely related to stipulations about anticipatory breach in Convention on Contracts for the International Sale of Goods ("CISG"). If it is true, then paragraph 4 of section 323 of 2002 German Civil Code will apply to a large range of situations, inferring from the latter one. Furthermore, this provision does not stipulate whether it is necessary for the creditor to urge the debtor to perform his duty before cancelling the contract. But since 1900 German Civil Code distinguished whether interpellation is necessary by distinguishing whether the repudiation of performance amounts to the extent of absolutely certain, this article seems to be explained as this: when the debtor's non-performance in the future does not amount to the severity provided in paragraph 2, interpellation is also necessary. If

¹⁰⁶ 2002 German Civil Code (*Bürgerliches Gesetzbuch*), S 281: "Damages in lieu of performance for nonperformance for failure to render performance as owed: ... (2) Setting a period for performance may be dispensed with if the obligor seriously and definitively refuses performance or if there are special circumstances which, after the interests of both parties are weighed, justify the immediate assertion of a claim for damages ..."

¹⁰⁷ 2002 German Civil Code (*Bürgerliches Gesetzbuch*), S 281: "Damages in lieu of performance for nonperformance for failure to render performance as owed: (1) To the extent that the obligor does not render performance when it is due or does not render performance as owed, the obligee may, subject to the requirements of section 280 (1), demand damages in lieu of performance, if he has without result set a reasonable period for the obligor for performance or cure ... (2) Setting a period for performance may be dispensed with if the obligor seriously and definitively refuses performance ..."

¹⁰⁸ 2002 German Civil Code (*Bürgerliches Gesetzbuch*), S 323: "Withdrawal for nonperformance or for performance not in conformity with the contract: ... (4) The obligee may withdraw from the contract before performance is due if it is obvious that the requirements for withdrawal will be met ..."

the creditor terminates the contract according to paragraph 4 of section 323¹⁰⁹, then his claim right for compensations will not be excluded based on section 325¹¹⁰.

IV. Remedies of anticipatory breach in China

4.1 Socio-economic Circumstances

4.1.1 Academic Debate on Introducing Anticipatory Breach

Anticipatory breach is a unique instrument in common law, the system and framework of Chinese law has followed civil law system for a long time, and has developed an instrument with similar function, namely, unsafe right of defense system. On this occasion, whether it is necessary or whether it will achieve goods results to introduce anticipatory breach is the bond of contention either before or after Contract Law of the People's Republic of China ("1999 Chinese Contract Law") issued.

Some scholars argue that in the process of developing socialist market economy¹¹¹, introducing anticipatory breach is an attempt to be into line with international standards, which is worth approving.¹¹² In their opinion, anticipatory breach rule enables the creditor to take countermeasures as early as possible and cut his losses actively, contributing to the achievement of legal value of fairness, efficiency and safety.¹¹³ Some scholars even use economic analysis method, concluding that anticipatory breach rule helps the creditor get rid of the contractual relationship as soon as possible and avoid meaningless waiting and preparations for performance,

¹⁰⁹ 2002 German Civil Code (*Bürgerliches Gesetzbuch*)

¹¹⁰ *id.*

¹¹¹ Socialist market economy is the official term PRC uses to describe its economic mode. It is a particular form of market economy under socialist system, which is a combination of public-owned economy and non-public economy including individual economy, private economy and foreign-capital economy.

¹¹² Yang Yongqing, 'Study on Anticipatory Breach Rules', *Civil and Commercial Law Studies* (1st ed. Law Press 2001): 499-582

¹¹³ Ge Yunsong, *Study on Rules of Anticipatory Breach—Concurrently Discussion on Unsafe Right of Defense System* (1st ed. China University of Political Science and Law Press 2003): 28; Nan Zhenxing, Guo Dengke, 'A Comparative Study on Anticipatory Breach of Contract' (1993) 3 *Chinese Journal of Law*; Han Shiyuan, Cui Jianyuan, 'Anticipatory Breach and Chinese Contract Law' (1993) 1 *Chinese Journal of Law*

which promotes social benefits.¹¹⁴

Opponents insist that China belongs to the civil law countries, so it is easy to cause conflicts and misunderstanding in concept and system if introducing a common law legal instrument independently into our current legal system.¹¹⁵ And appropriate relief measures for the problem aimed at by anticipatory breach can surely be found in the current system of civil law, therefore it is not necessary to introduce it as an independent instrument.¹¹⁶ The debate is continuing throughout the entire process of enacting Chinese Contract Law. Many academics also worry that anticipatory breach involves too much subjectivity. Considering the imperfection of transaction rules and credit system in Chinese market economy, if contracting parties are entitled to suspend performance and cancel contracts *ad arbitrium*, the instability of contracts will increase. As a result, legislator in China made major changes of anticipatory breach when introducing it, which leads to a lot of conflicts and effects.

4.1.2 Legislative Process to Introduce Anticipatory Breach

Before the issue of 1999 Chinese Contract Law, Chinese contract law system mainly consisted of 1981 Economic Contract Law of PRC, 1985 Law of PRC on Economic Contracts Involving Foreign Interest, 1987 Technical Law of PRC and 1986 General Principles of the Civil Law of PRC. This system is the production of planned economy, the content of it is dispersed and disordered, and many parts overlap, contradict and lack uniformity and normativity. Not only did the legislative technique lag behind, but also scholars did not reach a consensus on many questions at that time. As such, in this stage, anticipatory breach that comes from a different legal system gains little attention in China.

Article 17 of Law of PRC on Economic Contracts Involving Foreign Interests provides: When one party can prove the other party is unable to perform, he is entitled

¹¹⁴ Ye Lin, *Responsibility of Breach of Contract—A Comparative Study* (1st edn, Renmin University of China Press 1997): 196-197

¹¹⁵ Li Yongjun, 'Is it Necessary to Introduce Independent Anticipatory Breach System into Chinese Contract Law' (1998) 6 *Tribune of Political Science and Law*

¹¹⁶ *id.*

to suspend his performance with notice to the other party; But if the other party can afford sufficient assurance, then he cannot be free from performing.¹¹⁷ And this provision used to cause debate. Some scholars think this article is about anticipatory breach, but the rule provided by it is different from that in common law system. Others hold that it cannot be interpreted according to anticipatory breach, but should be understood combined with right of defense to perform the obligations simultaneously and unsafe right of defense.¹¹⁸

1999 Contract Law of PRC terminated the long-term disordered and fragmented situation in the field of contract law, demonstrating the harmonization and the improvement of legislative technique in the field of contract law. This law stipulates both anticipatory breach rule and unsafe right of defense system.

4.2 Specific Stipulations of Remedies

4.2.1 Classification of Anticipatory Breach

In China, the common theory divides anticipatory breach into express anticipatory breach and implied anticipatory breach. Express anticipatory breach generally means that before contract period expires, one contracting party indicates that he is unable or unwilling to carry out his contractual obligations by conduct or words without reasonable justification¹¹⁹; Implied anticipatory breach refers to a situation under which one party's conduct and objective circumstance indicate that he will not perform obligations but is unwilling to provide any assurance although he does not

¹¹⁷ Law of the People's Republic of China on Economic Contracts Involving Foreign Interest, Art.17:“ A party may temporarily suspend its performance of the contract if it has conclusive evidence that the other party is unable to perform the contract. However, it shall immediately inform the other party of such suspension. It shall perform the contract if and when the other party provides a sure guarantee for performance of the contract. If a party suspends performance of the contract without conclusive evidence of the other party's inability to perform the contract, it shall be liable for breach of contract.”

¹¹⁸ Liang Huixing, *Civil Law and Case Study* (1st edn, China University of Political Science and Law 1993): 170

¹¹⁹ Nan Zhenxing, Guo Dengke, ‘Comparative Study on Theories of Anticipatory Breach’ (1993) 1 *Legal Research* 70; Yang Yongqing, ‘Study on Anticipatory Breach Rules’, *Civil and Commercial Law Studies* (1st ed. Law Press 2001) 356; Wang Liming, ‘Research on Some Issues about Anticipatory Breach’, *Civil and Commercial Law Studies II* (1st edn, Law Press 2001) 499-528

explicitly express that.¹²⁰

4.2.1.1 Express Anticipatory Breach

Article 94 (2) and article 108 of Contract Law of PRC deal with express anticipatory breach. Article 94¹²¹ stipulates: “The parties to a contract may terminate the contract under any of the following circumstances: ... (2) prior to the expiration of the period of performance, the other party expressly states, or indicates through its conduct, that it will not perform its main obligation.” And article 108 Where one party expresses explicitly or indicates by its conduct that it will not perform its obligations under a contract, the other party may demand it to bear the liability for the breach of contract before the expiry of the performance period.

The application conditions of these two articles are almost the same: one contracting party expresses explicitly or indicates by its conduct that it will not perform its contractual obligations prior to the due time of performance. The only distinction between them is that the non-performed obligation in article 94¹²² is the main obligation in a contract while article 108¹²³ says obligation without mentioning the significance of it. The reason why these two articles have such difference is that the legal consequences of them are different. If article 94 is fulfilled, then the non-breaching party has the right to terminate the contract that leads to the end of the whole contractual relationship. To maintain the stability of contractual relationship, the situations in which article 94¹²⁴ applies to should be restricted.

4.2.1.2 Implied Anticipatory Breach

Most scholars agree that Chinese law stipulates rule of implied anticipatory breach, which is reflected in the wording “indicates by its conduct that it will not perform its obligations under a contract” in article 94¹²⁵ and article 108¹²⁶. Except for that,

¹²⁰ id.

¹²¹ 1999 Contract Law of PRC

¹²² id.

¹²³ id.

¹²⁴ id.

¹²⁵ id.

¹²⁶ id.

Chinese contract law also provides unsafe right of defense system. These two instruments have a lot of similarities. The interests they protect are both the creditor's interest when apparent evidence shows that the debtor will not perform his obligations without explicit expression before the expiry of performance period, which is consistent with that protected by adequate assurance rule in American contract law. So I will compare them with adequate assurance rule afterwards.

Since the above has already discussed article 94¹²⁷ and 108¹²⁸ in detail, unsafe right of defense system will be emphasized in this section. Unsafe right of defense system originates from Germany, and is adopted by many civil law countries. According to section 321 of German Civil Code, "The party who is supposed to fulfill performance first under a bilateral contract is entitled to refuse his performance before the other party carries out performance or affords appropriate assurance, if the other party's asset decreases dramatically after the conclusion of the contract and may be in the risk of not able to fulfill its obligations."¹²⁹ Based on this system, in a case where the financial status of the party supposed to carry out performance later deteriorates, threatening the achievement of the other party's creditor right, it can protect the other party's legal interest, illustrating substantial justice.¹³⁰ As such, Contract Law of PRC provides unsafe right of defense in article 68: The party who should perform first is entitled to suspend his performance if he can prove that the other party is under 4 situations that will or may lead to his inability to perform.¹³¹

¹²⁷ id.

¹²⁸ id.

¹²⁹ 2002 German Civil Code

¹³⁰ Cui Jianyuan, *Contract Law* (4th ed. Law Press 2007) 138

¹³¹ 1999 Contract Law of PRC, Art. 68: "The party required to perform first may suspend its performance if it has conclusive evidence showing that the other party is under any of the following circumstances:(1) its business has seriously deteriorated;(2) it has engaged in transfer of assets or withdrawal of funds for the purpose of evading debts;(3) it has lost its business creditworthiness;(4) it is in any other circumstance which will or may cause it to lose its ability to perform. Where a party suspends performance without conclusive evidence, it shall be liable for breach of contract."

4.2.2 Legal Consequences of Anticipatory Breach

4.2.2.1 Exercise the right to terminate the contract

According to article 94¹³², when express anticipatory breach occurs, the creditor can gain the right to terminate the contract immediately. Article 95¹³³ and 96¹³⁴ providing the deadline and methods to exercise the termination right surely applies in this situation. And it leaves the creditor to decide whether to exercise his right of termination or not. If he does not, the contractual relationship remains unchanged; if he does, what is the further legal effect?

Some interprets article 97¹³⁵ of 1999 Contract Law of PRC from the wording: only when one party carried out his own performance can he claim for damages “in accordance with the circumstances of performance or the nature of the contract”¹³⁶. Nevertheless, based on the common theory, whether one party is entitled to claim for damages has nothing to do with whether the contract is fulfilled, the circumstances of performance or the nature of the contract, but is relative to the cause of the termination right. If the creditor gains the termination right because of the debtor’s breach of contract, then he still has the right to claim for damages after canceling the contract. And just like article 115 of General Rule of Civil Law provides, “A party’s right to claim compensation for losses shall not be affected by the alteration or termination of a Contract.”¹³⁷

The legal consequences of termination of contract are stipulated in article 97 of Chinese contract law: (1) If the creditor has not perform, then he is entitled to stop his performance; (2) If the creditor has already carried out some performance, he is entitled to claim for restitution and take remedial measures. Article 97 provides: “if

¹³² 1999 Contract Law of PRC

¹³³ id.

¹³⁴ id.

¹³⁵ 1999 Contract Law of PRC, Art.97: “After the termination of a contract, performance shall cease if the contract has not been performed; if the contract has been performed, a party may, in accordance with the circumstances of performance or the nature of the contract, demand the other party to restore such party to its original state or adopt other remedial measures, and such party shall have the right to demand compensation for damages.”

¹³⁶ 1999 Contract Law of PRC, Art. 97

¹³⁷ General Principles of Civil Law of PRC, Art. 115.

the contract has been performed, a party may, in accordance with the circumstances of performance or the nature of the contract, demand the other party to restore such party to its original state or adopt other remedial measures.”¹³⁸ According to this stipulation, termination of contract first leads the originally appointed payment obligations to be extinguished. But as for how to “restore such party to its original state”, the provision does not offer explicit stipulations. But we must notice that the original state should be the current state at which the two parties are supposed to be if the contract was not concluded instead of that before the contract was concluded. And termination of contract does not necessarily lead to restitution, because article 97¹³⁹ provides it should depend on “the circumstances of the performance or the nature of the contract”. This question, in fact, is related to the question whether “termination” in Chinese contract law is retroactive: If the termination is retroactive, the breaching should restore the other party to its original state; Whereas, if the termination does not have any retrospective effect, then the breaching party does not need to bring the opposite party to its original state. Last but not least, what is the meaning of “remedial measures” in article 97¹⁴⁰? This wording is also mentioned in article 107¹⁴¹, and according to that provision, it refers to “repairing, substituting, reworking and so on” in article 111¹⁴². If the termination of contract is retroactive, it is not necessary to take remedial measures. So some scholars think this means the aggrieved party can ask for the other party to compensate for liquidated damages if restitution is not enough to protect the interest of the aggrieved party.

4.2.2.2 Claim for breach of contract

Anticipatory breach is a type of breach of legal liability before the contract period expires, so it invokes responsibility of breach of contract in accordance with article 97¹⁴³. And article 108¹⁴⁴ states that creditors can claim the other party to assume the

¹³⁸ 1999 Contract Law of PRC

¹³⁹ id.

¹⁴⁰ id.

¹⁴¹ id.

¹⁴² id.

¹⁴³ 1999 Contract Law of PRC

responsibility before the performance is due. Here are two major questions: One is the relationship between this liability for breach and the liability for damages after termination stipulated in article 97¹⁴⁵; the other is the concrete content of liabilities in article 108¹⁴⁶.

(1) The legal grounds for claiming compensation for losses after the termination of the contract

There are two explanations for the compensation for losses in article 97¹⁴⁷: the first is that canceling contracts does not necessarily affect the exercise of the right to claim for compensation of damages, which means it needs another legal basis; the second is that after termination of the contract, the right to claim for compensation for damages emerges directly based on article 97¹⁴⁸. As far as I am concerned, the first explanation is more persuasive.

Firstly, article 97¹⁴⁹ provides legal consequence for all situations of contract termination including circumstances where *force majeure* is involved or agreed right of cancellation is exercised. So it is impossible to stipulate unified application conditions for exercising the right to claim for compensation for damages. Secondly, during the period from the debtor breached the contract to the creditor cancelled the contract, the debtor already assumed corresponding liability for breach according to chapter VII. Then after terminating contracts, what is the legal consequence of the liability the debtor has assumed? Based on the nature of termination, the liability of actual performance will be eliminated because of the termination. If the right to claim for compensation is regarded as extinguished at the same time, then the right provided in article 97¹⁵⁰ can only be interpreted as a newly born right. However, it is agreed by CISG, 2002 German Civil Code and common law system that it is more reasonable to regard the right to claim for compensation after termination of contract as the

¹⁴⁴ id.
¹⁴⁵ id.
¹⁴⁶ id.
¹⁴⁷ id.
¹⁴⁸ id.
¹⁴⁹ d.
¹⁵⁰ id.

continuation of original creditor's right.

As such, the reasonable explanation is that the right to claim for compensation for damages under article 97¹⁵¹ should not hinder the exertion of the right that the party has already got. And the legal ground for creditors to get the right to claim for compensation for losses is still article 107¹⁵². Since anticipatory breach is a kind of default and article 108¹⁵³ particularly stipulates that the aggrieved party can claim before the expiry of the performance, article 107¹⁵⁴ can surely apply before the deadline of the performance.

(2) Assuming liabilities for breach of contract

The Creditor can claim the debtor to assume liabilities for breach as soon as anticipatory breach occurs irrespective of terminating contracts. Here comes a question: Do the liabilities here include all kinds of liabilities for breach provided in Contract Law of PRC?

The first kind of liability is to continue to perform obligations. Some academics think the creditor is entitled to request the debtor to fulfill contractual obligations before due time of the performance¹⁵⁵, while some think this question cannot be decided as a whole, but should be determined case by case.¹⁵⁶ The first issue we should make clear is that such legal consequence should be invoked only when the creditor does not terminate the contract. Because once the contract is cancelled, there is no available debt for enforcement. From the analysis of the policy, the first opinion would cause such situation where the debtor performs ahead while the creditor still fulfills its performance according to the scheduled time, which may break the original transaction relationship totally. Besides, there is no legal ground for such opinion. Because the precondition to enforce performance should be the occurrence of obligations, and before the deadline of performance, such obligations do not come

¹⁵¹ id.

¹⁵² id.

¹⁵³ id.

¹⁵⁴ id.

¹⁵⁵ Wang Liming, Fang Shaokun, Wang Yi, *Contract Law* (4th edn, China Renmin University Press 2013) 270-271

¹⁵⁶ Zhang Guangxing, Han Shiyuan, *General Principles of Contract Law* (1st edn, Law Press 1999): 130-131

into reality. But American law allows the creditor to bring a suit before the due time, requesting the court to order the debtor to perform at the maturity of the debt. Thus the creditor would ask for execution judgment rather than initiate another proceeding if the debtor does not carry out performance when the due time arrives. This is a good remedy, which affirms the existence and content of contractual debt through judgment without increasing the debtor's burden, contributing to dispute resolution as early as possible. There is no such stipulation in Chinese Civil Procedure Law, but it is better to add this provision according to article 108¹⁵⁷.

The way to assume responsibility for breach in article 111¹⁵⁸ is to adopt supplementary measures. Under anticipatory breach, since obligations have not been performed yet, no object for supplementary measures exists. Of course the aggrieved party cannot claim based on this kind of liability.

Compensation for loss is the most complicated and common method to assume liability for breach. The first thing to make clear is that right to claim compensation for loss can be triggered simply because obligations are breached. It does not depend on whether there is actual damage. The occurrence of actual damage only confirms the content and scope of that right, but is not the requirement of the right. Otherwise, the ground to claim compensation for prospective damages will be undermined. Of course, if there is no actual damage, the right to claim compensation cannot be actually claimed. When anticipatory breach occurs, the creditor can gain right to claim compensation based on article 107 and 108. But whether the creditor exercises the right to terminate contract matters to the determination of actual damages. If the creditor still awaits the debtor's performance, then the creditor's right can be achieved successfully without any loss once the debtor indeed fulfills his obligations in the future. So there is no loss at all at that time. That is to say, under anticipatory breach, the main loss of the creditor is actually the loss incurred by the other party's non-performance in the future. If the creditor gains such compensation totally without cancelling the contract, and keeps its right to await performance at the same time, it

¹⁵⁷ 1999 Contract Law of PRC

¹⁵⁸ *id.*

get double creditor's right, which obviously cannot be supported by any legal policy. In American contract law, one can actually claim compensation for losses only after the contract is terminated. To conclude, in the case of not terminating contract, the creditor has difficulty claiming compensation, although there is still possibility to make such claim.

4.2.2.3 The Elimination of the Right to Terminate

The creditor gains the right to terminate contract where anticipatory breach occurs. This said right shall be extinguished due to various causes, including both general reasons and special reasons for anticipatory breach.

(1) General Reasons for Extinguishment of the Right to Terminate

Article 95 of Contract Law of PRC provides that the right to terminate contract can be extinguished if no party exercises it when the time limit expires. Chinese law does not regulate the scheduled period of carrying out the right to terminate when a contract is anticipatorily breached, but parties can make an agreement about this issue (it can be stated in the contract before or after the anticipatory breach occurs). The right to terminate shall be extinguished if the creditor does not exercise it after being urged by the debtor.

Whether the right to terminate can be extinguished if the creditor waives such right? In principle, any rights could be waived, including the right to terminate contract. One cannot claim to cancel the contract based on the same fact once he gives up. Nevertheless, if a new situation occurs causing anticipatory breach afterwards, a new right to terminate can surely emerge. As for the expression of intent to waive the right to terminate, it requires no express presentation of intention. It is a matter of fact whether one has such intention. But the judiciary should be cautious enough speaking of this issue. Conducts like urging the other party to retrieve the breach or offer assurance should not be regarded as the expression of intention to waive the right to terminate.

(2) Special Reasons for Extinguishment of the Right to Terminate: Removal of Anticipatory Breach

The termination right caused by non-performance of debt can be extinguished due to the elimination of the reason of non-performance.¹⁵⁹ For example, when delay in performance occurs, the debtor then carries out its performance in accordance with the nature of the debt and corrects the defect as well.¹⁶⁰ This is because the right to terminate no longer has a reason to continue to exist since the cause of this right no longer exists. The legal duty that is breached anticipatorily cannot be claimed independently by way of litigation. But it does not mean that the debtor cannot perform this duty again hereafter. For example, if the debtor repudiated performance at the first place and then express willingness to perform before the deadline of the performance, we can say the previous intention of repudiation does not exist any more. Another example occurs when the debtor does not afford adequate assurance of performance. In such situation, the creditor obtains the right of cancellation, but before he exercises his right, the debtor can also offer sufficient assurance to make sure the realization of the creditor's right, performing his statutory duties to offer assurance. Considering that obligations previously breached are carried out actually, the state of anticipatory breach has been removed. The direct basis in current law is only article 69 of Contract Law, which applies to some situations under anticipatory breach, but other kinds of anticipatory breach can also apply it by analogy.

The result to remove the state of anticipatory breach is that the creditor is not supposed to claim any legal consequences based on anticipatory breach. But it is worth noting that anticipatory breach belongs to breach of contract, as a result, the creditor is conferred the right to ask for compensation for damages. If the creditor does not have any actual loss, then the removal will lead to the end of all legal consequences. If one wants to remove anticipatory breach once and for all, he should remove compensations for damages concurrently when there're actual damages. However, even if compensation for damages is not removed and the damages are not serious enough to incur termination right, the right to terminate should be deemed as

¹⁵⁹ Shi Shangkuan, *Law of Obligation* (1st edn, China University of Political Science and Law Press 2000) 566

¹⁶⁰ Liu Chuntang, *General Rules of Obligation Part of Civil Code, Volume I: Pandect of Contract Law* (1st edn, San Min Book Co., Ltd. 2001) 399

extinguished. But the right to ask for compensations does not end because of this, which can be otherwise advocated by the creditor. That is because the damage is the result of violation of obligations of the debtor in the past.¹⁶¹

However, in principle, the legal consequence of anticipatory breach is extinguished because of its removal. If the creditor has already suffered significant damages caused by the violation of duties before the removal, making it impossible to achieve the purpose of the contract, we should take anticipatory breach as not removed exceptionally.

Concretely speaking, conducts to remove anticipatory breach may lead to the following results. Firstly, all results of anticipatory breach will be extinguished if there is no actual loss to the creditor. Secondly, the creditor suffers minor loss. For example, the creditor has started to make arrangements with the third party in order to reduce his loss, and he has also paid some fees for it although the new transaction is not concluded yet. This loss is very minor, compared to the interest he can enjoy according to the contract. Under this situation, if the creditor is still allowed to terminate the contract, it is obvious to disobey the principle of good faith and the theory that the right is not supposed to be abused. Therefore we should deem the termination right as extinguished. But the fees paid by the creditor belong to actual loss due to breach of contract by the other party, so the aggrieved party is entitled to claim for compensations immediately based on article 107 and 108 of Contract Law of PRC¹⁶². Thirdly, the creditor suffers substantial detriment occurs. Assuming that the creditor has already concluded a substitutional contract with the third party and even began performance. If now there are enough reasons to believe that the debtor will perform this contract properly, it makes no sense to the creditor to perform the contract. If the creditor is deprived of the right to terminate and subject to this

¹⁶¹ Shi Shangkuan, *Law of Obligation* (1st edn, China University of Political Science and Law Press 2000) 407. This situation is similar to the elimination of delay of performance. If the debtor makes up for the delay of performance and damages caused by the delay, then the delay ends, but the consequence following the delay will not be eliminated.

¹⁶² Additionally, if the creditor wastes time because of suspending of performance due to the other party's anticipatory breach, leading to situations of breach of contract such as his delay of performance when recovering his ability to perform his duty, then the debtor cannot claim for compensation.

contract, he will definitely breach the contract with the third party, leading him to assume responsibilities for such breach and may also causing his credibility harmed. Though such loss can also be compensated by the debtor, it will cause a lot of trouble to the creditor. Besides, whether the creditor can actually obtain interest contained in the original contract is still unsettled. In addition, it will surely cause additional cost. In fact, the anticipatory breach of the debtor has already caused considerable damage to the creditor. And his subsequent conduct to remove the breach is of no use to the fact that the creditor cannot realize the purpose of the contract. As a result, in this circumstance, the creditor's right to terminate is not going to be extinguished, and the right to ask for compensation exists as well.

4.2.2.4 Legal Consequences when the Debtor's Performance is Due

If the creditor did not cancel the contract that is anticipatorily breached by the other party but waits for the deadline of the debtor's performance, then what legal effect will occur? First of all, the relevant matters will continue to exert their influence if anticipatory breach still exists. Take impossibility of performance as an example, generally speaking, such state will last until the performance is due, and thus turn to actual breach of contract. If the intention of refusing of performance is not withdrawn, the anticipatory breach will also turn into real. Of course, there are some doubts in anticipatory breach due to the debtor's refusal to afford assurance. Because at this point, the other party's main payment obligation should be carried out, which is far more significant than the obligation to offer assurance to ensure performance. But considering that the previous situation constitutes anticipatory breach and incurs the termination right, there is no justification to deprive the creditor of this right; instead, it should be deemed as valid. The legal consequence at the moment varies based on different sequences of performance period of two parties.

(1) If the debtor's performance is due prior to the creditor's, and he did not make payment, then his non-performance obviously fulfills requirements stipulated in

paragraph 4 of article 94¹⁶³ in Chinese contract law, which confers the right to terminate on the creditor as well. How about the termination right derived from anticipatory breach? This question is relatively a theoretical one. According to the previous analysis, the termination right arising from the debtor's inability to offer assurance (anticipatory breach) should continue to be valid, but the existing law does not have any direct stipulations (The termination right provided in paragraph 3 and 4 of article 94¹⁶⁴ is based on facts occurring after the deadline of performance). However, since article 69¹⁶⁵ has no restrictions itself, it can be taken as a basis.

(2) If the creditor is supposed to perform first and he has totally carried out his performance, then the legal consequence after the debtor's performance is due will be the same as the above.

(3) Another situation is like this: the creditor is required to perform first, but he exercises his unsafe right of defense system to refuse his own performance and wait for the deadline of the debtor's performance. What's the legal consequence in this circumstance? Whether the debtor constitutes actual default? In other words, whether counterpleaing right of later execution provided in article 67¹⁶⁶ applies to this situation? The answer is "yes" because under the situation where the contract is not cancelled, the parties' payments are still in consideration relationship, and there is no legal ground to ask the debtor to perform his obligation first. The debtor's anticipatory breach only runs counter to legal duty instead of main payment obligation. Of course the creditor still has the right to terminate the contract, because there is no justification to extinguish this right at this point. But it is still in doubt which article can apply to this circumstance. The debtor does not constitute delay of performance due to his right of defense based on article 67¹⁶⁷, so paragraph 3, 4 of article 94¹⁶⁸ are of no applicability. It seems no choice for the creditor but to obtain

¹⁶³ 1999 Contract Law of PRC

¹⁶⁴ id.

¹⁶⁵ id.

¹⁶⁶ id.

¹⁶⁷ id.

¹⁶⁸ id.

the termination right on the basis of paragraph 2 of article 94¹⁶⁹.

(4) What if the parties' debts mature at the same time? Like the third situation above, the debtor's counterpleaing right of simultaneous execution derived from article 66 still exists, which means that his conduct does not necessarily cause actual breach. But it makes no difference to the termination right.

From the above, compared with rules of anticipatory repudiation, rules of express anticipatory breach in Chinese Contract Law have a lot of shortcomings. Firstly, express anticipatory breach does not clearly point out the object it breaches is "contractual obligations" or "major contractual obligations". Besides, provisions about remedies are not very clear, too. Secondly, it is regarded as implied anticipatory breach that one party indicates non-performance by conduct in Chinese Contract Law without distinguishing whether this conduct is explicit, active or voluntary. In the case *Mrs. Synge v. Mr. Synge*¹⁷⁰, Mr. Synge promised to give Mrs. Synge a house as present after getting married, but then Mr. Synge sold this house to a third party. Although it is still likely that Mr. Synge will buy the house back, Mr. Synge can do nothing to ensure that Mrs. Synge's right to gain the house, because the decision power is in the hand of the owner instead of Mr. Synge. At this time, Mrs. Synge is entitled to claim for compensation immediately. In China, similar problems occur in contracts where the object is sold twice: When the sales contract is signed but the seller does not deliver the object yet, the seller sells the object to a third party and fulfills delivery. According to Property Law of PRC, the third party has gained the ownership of the object, at this moment, the seller can directly bring a lawsuit against breach of contract without requesting performance assurance from the seller, so that he can get rid of this contract and seek new opportunities for transaction. So I think, if one party expressly indicates that he will not perform main obligation, it can be regarded as anticipatory breach of contract. Thirdly, Chinese Contract Law does not explicitly stipulate constitutive requirements for express anticipatory breach. Last but not least, express anticipatory breach in China does not confer retraction rights on the

¹⁶⁹ id.

¹⁷⁰ *Synge v. Synge* [1894] 1.Q.B.466.

repudiating party, which is inconsistent with the important principle of encouraging trade in today's contract law and enhances (expands) the repudiating party's responsibility as well.

Unsafe right of defense system in Chinese Contract Law protects the same interest as the rule of sufficient assurance to performance does, that is, the creditor's interest in a situation where there is obvious evidence to show that the debtor would not perform his substantial obligations although he does not express this intention explicitly. However, there are many differences between these two rules. First, the subject matter who is conferred on them is different. Unsafe right of defense system is only given to the party who is to perform first in a bilateral contract, while the right to adequate assurance applies to any sales of goods contracts according to part II of UCC. And *Restatement of Law, Contracts (2nd edition)*, being an important reference to judges, develops the rule rooted from UCC, expanding its application scope to all contracts. Second, the application scope of them is not the same. Chinese Contract law lists 3 situations that can apply unsafe right of defense system with a save clause saying that "it is in any other circumstance which will or may cause it to lose its ability to perform."¹⁷¹ Nevertheless, according to UCC, one can exercise the right to adequate assurance as long as "the other party's words or conducts can give him reasonable grounds to feel insecure". By comparison, the adequate-assurance right in American contract law applies to more situations. Third, the application of unsafe right of defense system requires the claiming party to have "conclusive evidence" and the other party's assurance to be "appropriate". But the law does not give clear definition about the standard of "conclusive evidence" and "appropriate assurance". And this legal loophole cause much inconvenience in judicial practice since Chinese judicial principle is "taking law as criterion". In contrast, rule for adequate assurance to performance stipulates that the grounds to lead to the party's insecurity and the adequacy of the assurance should be judged by business principles rather than legal principles. Considering that America is a highly advanced commercial country and it

¹⁷¹ 1999 Contract Law of PRC, Art. 68

has already established a complete set of business practices and business ethics, it is not difficult to determine whether the non-breaching party's ground is reasonable and whether the assurance provided by the breaching party is appropriate. Fourth, remedies for them are different. Though Chinese Contract Law expands the application of unsafe right of defense system, it only entitles the non-defaulting party to terminate the contract. American contract law allows the non-breaching party to bring a suit for damages compensation if the breaching party cannot afford adequate assurance. Above all, we can easily conclude that the right to adequate assurance in American contract law confers more comprehensive and reasonable protection to parties of a contract.

The reasonableness of anticipatory breach is without any doubt, which can be verified by the long-term undisputed facts in Germany and Britain, and the wide spread of this rule in America though a heated debate. It seems that no scholars deny the necessity of protecting creditors before the performance is due. The controversy among them is whether this protection should be conferred within the system of civil law or by introducing rules of anticipatory breach from common law system.

Legal policy basis of anticipatory breach deducted from the heated debate in American academic circle is highly persuasive. It is hard to imagine any particular reasons to weaken the necessity of protection for creditors before the due time in China, compared with other countries. Rather, business credit in China is now in worrying situation: The rate of contracts not being fulfilled is very high. So it is more urgent in China to afford sufficient protection for creditors. American law has considerable reasons to include the right to ask for assurance to adequate performance, and the same applies to Chinese law.

V. Conclusion

5.1 Comparison of Remedies of Anticipatory Breach in Different Jurisdictions

(1) The creditor's right of termination

When anticipatory breach occurs, the first question is whether it is still necessary for

the creditor to continue to fulfill the obligations. The second is whether he is entitled to require reinstatement of obligations that he has already fulfilled. And is the effect above based on the intention of parties or direct regulations in law?

In German law, when impossibility of performance attributable to the debtor occurs, the scheduled duties of both parties extinguish together, and the only effect remaining in this contract will be the creditor's claim right for compensations for damages. In other words, the validity of the contract is automatically terminated. That is why anticipatory impossibility of performance can be remedied by rules of impossibility of performance in German law. As long as the payment obligation is extinguished, the contract is cancelled at once, and the party can also ask for compensations immediately, no matter the performance is due or not.

In American law, the creditor needs to choose to accept the other party's anticipatory breach when it happens, and only then can the creditor be entitled to terminate the contract and ask for compensations. However, it does not mean that the creditor has to indicate his acceptance by expression of intention, because some behaviors substantially changing his state also have the effect to end the contract. In addition, the extinguishment of the scheduled payment obligations is not retroactive, which means that the performance already carried out continues to be valid, and then the creditor is entitled to claim for compensations. Of course, if the obligations already fulfilled lack consideration, then one can claim for returning unjust enrichment.

German law respectively stipulates different rights of termination by distinguishing temporary debt and continuing debt, and the latter one is not retrospective, while there is no such differentiation in American law. And in American law, performance before the breach is on the basis of valid contract, and so is claim right for compensations for damages. If the termination has retroactivity, then the claim right for compensations for damages will be extinguished together logically. In order to offer more alternatives for both parties, American law also allows the debtor to terminate the contract retroactively and then ask for returning unjust enrichment instead of compensations for damages.

By comparison, stipulation about the termination right in German Civil Code is more

elaborate, which distinguishes termination right into several kinds. In principle, the termination right with retroactivity only aims at legal relation of debt whose subject matter is one-time payment; as for the debt relation that is persistent, the creditor is endowed with non-retroactive termination right by principle, and he can gain retroactive one only in exceptions.

(2) The right to suspend performance and ask the other party to afford the performance assurance

Since the legal consequence of not accepting anticipatory breach provided in English law may lead both parties to be stuck in disadvantaged situations, American law puts forward “the right to ask for affording adequate assurance of performance”, and the creditor is entitle to suspend his performance when exercising this right.

The aim of one party of a contract to suspend his performance is to remind the other party to notice that he has suspected that the other party may not perform his duty when it is due, and it is necessary for the other party to make some expressions to dismiss the suspicion. But it varies in different countries’ legislations and jurisprudence whether the party to suspend his performance can expressly ask the other party to afford assurance.

UCC clearly stipulates that one party can “demand sufficient assurance of due performance in writing”, while many other countries’ laws do not stipulate the right to demand assurance in express provisions. Analyzing from jurisprudence, continental law countries generally think that the party who suspend his performance has no right to ask the other party to provide assurance; instead, he can only suspend performing his own duty. Affording assurance is not one obligation of the other party, but it is an action the other party takes to eliminate his suspending. On this point, CISG adopts the view of civil law system, and so stipulates the obligation to notify his suspending of performance to the other party.

Nevertheless, one party should stop suspending of performance if the other party offers sufficient assurance, no matter the law provides “the right to demand sufficient assurance” or “obligations to notify”. What if the other party does not afford adequate assurance? UCC stipulates the period to offer assurance: If the other party does not

offer assurance within 30 days at most, the party to suspend performance is provided with other remedies, like termination the contract and claim for compensations. CISG provides a “reasonable period” when referring to this question. Legislation of civil law countries does not concern this question. As for Germany, it stipulates the legal consequence of unsafe right of defense system—suspending performance, and when the other party does not offer assurance he is entitled to cancel the contract. Although this stipulation is similar to that of UCC and CISG and able to solve some problems, it cannot replace anticipatory breach system because they are different legal instruments.¹⁷²

(3) The creditor’s claim right for compensations for damages

In Germany, the breaching party is usually forced to actually carry out his performance, and only when performance is impossible or actual performance does no good to the creditor, he can ask for compensations for damages.

In Anglo-American law countries, compensation for damages is the most basic and general remedy. In Anglo-America, the creditor is endowed with claim right for compensations after the contract is terminated. English law stipulates that one is regarded as breaching the contract only when the creditor terminates the contract. Before the termination, breach of contract does not exist, let alone claim right for compensation. American law thinks if the contract is not terminated, the creditor’s own debt will still exist. And the creditor cannot claim compensation for non-performance of the overall contract, instead, he can only gain compensation considering the performance the debtor has already carried out. As a result, in common law system, if the contract is not terminated, then either it is regarded as no breach or no damage even there is breach. This is also why remedies for anticipatory breach in common law have to be related to the termination of contract. Only if the aggrieved party chooses to terminate the contract, he can bring a suit of compensation for damages before the deadline of performance.

¹⁷² Some scholars in China equal termination right after suspending performance under unsafe right of defense system to assurance to adequate performance under rules of anticipatory breach, but I don’t agree with such opinions. Because unsafe right of defense system is only temporary defense that cannot lead the contract to be eliminated, while anticipatory breach can cause the termination of the contract.

In Germany, repudiation of performance is breach of contract itself, and the creditor can ask for compensation under this situation. But when the performance is still possible, then the creditor suffers no actual loss at present if the creditor does not cancel the contract but expects the other party to fulfill his main payment obligations, so he has no ground to actually claim for compensation. Besides, unlike common law, German law does not bind compensation for damages and termination of contract together. Even though the other party retracts repudiation of performance, if the creditor suffers actual loss, he can still ask for compensation.

As for methods of compensation for damages, civil law stipulates restitution and monetary compensation, while compensation for damages in common law refers only to monetary compensation. About the scope of compensation for damages, civil law and common law have different stipulations. But there is no difference substantially, including both actual loss and expectation interest.

5.2 Whether Chinese contract law should introduce remedies of anticipatory breach from common law system?

In the law-making process of Chinese contract law, there are two kinds of viewpoints in dispute: One claims to introduce both unsafe right of defense system in civil law and rules of anticipatory breach in common law, thinking that anticipatory breach and unsafe right of defense system are two kinds of instruments different in aspects as the object, requirements and legal properties. Under express anticipatory breach, they are not contradictory, unrelated, and not simultaneous. Under presumptive anticipatory breach, exercising unsafe right of defense system is one of conditions to identify whether there exists anticipatory breach. For this reason, anticipatory breach and unsafe right of defense system can be stipulated in the same contract law.¹⁷³ The other point of view thinks, China inherited from the civil law system. But within the system framework of civil law, the problem anticipatory breach solves can totally be appropriately remedied, so it is not necessary to introduce anticipatory breach as an

¹⁷³ Ye Lin, *Responsibility of Breach of Contract—A Comparative Study* (1st edn, Renmin University of China Press 1997) 201.

independent instrument.¹⁷⁴

The legal system of civil law system is different from common law system. As the legal rule of common law, if anticipatory breach is introduced, is it contradictory to civil law system or China's civil law system in logic?

“Anticipatory breach” in common law describes different situations under which the creditor can gain the right of termination and claim right for compensation. All these situations are summarized as “anticipatory breach”, and thus become a legal rule. In Germany, from the perspective of legal policies, rules of both impossibility of performance and repudiation of performance can render the creditor protection.¹⁷⁵ And it never considers that the performance is not due will cause a logical obstacle. However in forms, German law does not establish a single rule of anticipatory breach, although it substantially allows the creditor to claim for liability for breach of contract. Since it has already established the concept of impossibility of performance without considering the performance period and the repudiation of performance is regulated as an independent form of non-performance. And in German law, setting substantive unitary rules of anticipatory breach will indeed contradicts with current law.

Nevertheless, in Chinese law, establishment of rules of anticipatory breach is not contradictory to the logic system of Chinese civil law. Specific reasons are as follows: Unlike Germany, China does not make unitary stipulations about the concept of impossibility of performance and corresponding legal consequence.¹⁷⁶ So making separate provisions on breach of obligations before and after the deadline of performance does not have any logical problem. Of course, this is mainly in terms of the terminations right. As for compensation for damages, in theory, anyone breaching obligations is supposed to compensate for the other party's loss whether it is before or after the performance is due.

¹⁷⁴ Li Yongjun, ‘Is it Necessary to Introduce Independent Anticipatory Breach System into Chinese Contract Law’ (1998) 6 Tribune of Political Science and Law

¹⁷⁵ However, German law also thinks there're defects in the protection of the aggrieved party under anticipatory breach in its original legal system, so paragraph 4 of section 323 emphatically stipulates ‘anticipatory repudiation of performance’.

¹⁷⁶ 1900 German Civil Code provides rules of impossibility of performance and repudiation of performance systematically in section 275, 323 and other provisions, while 1999 Contract Law of PRC only gives scattered stipulations in paragraph 1 of article 110 and article 117.

5.3 Defects of rules of anticipatory breach in Chinese contract law

(1) Relevant provisions are scattered, system is non scientific

Rules of anticipatory breach are stipulated respectively in chapter 6 “The termination of the right and duty of the contract” and chapter 7 “liability for breach of contract” in 1999 Contract Law of PRC. In terms of system logic, article 108¹⁷⁷ should be a recapitulative stipulation about anticipatory breach while paragraph 2 of article 94¹⁷⁸ is its legal consequence. Chinese contract law mixes them together, causing rules of anticipatory breach scattered in each chapter, not developing a unitary and complete system of anticipatory breach, which is either not in accordance with logical structure of the whole system or easy to cause difficulty in application of law.

(2) Relevant stipulations are inconsistent

Paragraph 2 of article 94¹⁷⁹ in Chinese contract law regards non-performance of main obligation as requirements of anticipatory breach, almost the same as stipulations in Anglo-American law and CISG. But article 108 expresses as “..... non-performance of obligation”. The two stipulations are obviously inconsistent, because the properties of non-performance of main obligation and obligation are totally different. The scope of “non-performance of obligation” in article 108¹⁸⁰ is clearly broader than “non-performance of main obligation”. The stipulation in article 108¹⁸¹ is inconsistent with the original idea of rules of anticipatory breach and paragraph 2 of article 94¹⁸², and thus is easy to cause disorder in the application of law.

(3) The judgment criterion of anticipatory breach is not objective and perfect enough

Some scholars argue that article 108¹⁸³ only stipulates express anticipatory breach, and thereby infer that Chinese contract law does not provide implied anticipatory breach.¹⁸⁴ However, although article 108¹⁸⁵ does not explicitly state as express

¹⁷⁷ 1999 Contract Law of PRC

¹⁷⁸ id.

¹⁷⁹ id.

¹⁸⁰ id.

¹⁸¹ id.

¹⁸² id.

¹⁸³ 1999 Contract Law of PRC.

¹⁸⁴ Liu Kaixiang, Nie Xiaohong, ‘On the Defects of the Applicable Scope of Anticipatory Breach in Contract Law ’ (2000) 1 Law Science Magazine

¹⁸⁵ id.

anticipatory breach and implied anticipatory breach, it uniformly provides the two kinds of anticipatory breach. This method of law making will easily lead to ambiguity in interpretation and unnecessary controversy. This provision uses two kinds of expression: “one party expressly indicates that he won’t perform his duty” and “one party indicates his non-performance of obligation by his own conducts”, indicating that anticipatory breach is divided into express anticipatory breach and implied one. It is easy to recognize express anticipatory breach because the counterparty can determine it based on explicit and definite intention; as for implied anticipatory breach, how to determine it? This determination is so important that lack of it will cause randomness of application. In a rapidly changing market situation, anticipatory breach may occur because of the deterioration of the economic situation of one party or business reputation decline. The above situation is deemed as implied anticipatory breach in American law and CISG by predicting and judging it based on “reasonable ground”, better protecting the expectation interest of the creditor. In contrast, article 108¹⁸⁶ provides determination of anticipatory breach only by the conduct of parties instead of judgment criterion in terms of objective facts. This deficiency will bring difficulty and confusion to the aggrieved party’s judgment, because objective facts are intuitionistic and easy to grasp and utilize, while taking the other party’s conduct as standard would often lead the aggrieved party to hesitate to come to conclusion so that lose the opportunity to protect its own legal interests.

(4) Deficiency of express and flexible identification criteria of “main obligation”

Paragraph 2 of article 94 of Chinese contract law stipulates:” prior to the expiration of the period of performance, the other party expressly states, or indicates through its conduct, that it will not perform its main obligation.” But as for what “main obligation” is, the contract law does not make specific and detailed stipulations, which makes it lack a standard scale to determine main obligation in judicial practice, causing the deficiency of express and detailed legal ground to determine anticipatory breach. In my opinion, main obligation means the main part of contract obligations,

¹⁸⁶ id.

namely, the obligation of important place and determining the nature of contract provided in the contract.¹⁸⁷ The performance of it will determine whether parties can achieve the ultimate purpose of signing a contract. If one does not perform his main obligation, this non-performance will constitute anticipatory breach. If one only does not carry out part of obligations in contract or collateral term, the fundamental aim of signing the contract would not be hindered, then it will not be regarded as anticipatory breach. As a consequence, law or judicial interpretation should make clear definition of “main obligation”.

(5) Remedies for anticipatory breach lack operability or are not sufficient enough

Article 108¹⁸⁸ simply provides remedy for anticipatory breach as “the other party may demand it to bear the liability for the breach of contract” without explaining the nature of the responsibility and the way to assume this responsibility. Considering logical system, forms of responsibility assumed by the breaching party should be various forms of responsibility listed in chapter 7. In accordance with stipulations about forms of responsibility for breach of contract, enforced performance, liquated damages, fine of deposit and compensation for damages can be applicable. However, taking enforced performance as one responsibility type of anticipatory breach violates the theoretical basis of efficient breach, and deprives the system of anticipatory breach of its value. And the precondition to apply liquated damages and fine of deposit is that parties of the contract have relevant agreement when signing it. So among all kinds of forms of responsibility for breach of contract, only compensation for damages can apply to anticipatory breach.

Article 94¹⁸⁹ of Chinese contract law stipulates: The parties to a contract may terminate the contract if one party of the contract expressly states, or indicates through its conduct, that it will not perform its main obligation.¹⁹⁰ But it does not clearly distinguish between express anticipatory breach and implied anticipatory

¹⁸⁷ Zhong Shujian, ‘Brief Analysis on Anticipatory Breach and Unsafe Right of Defense System in Contract Law’ (2000) 2 Contemporary Law Rev.

¹⁸⁸ 1999 Contract Law PRC

¹⁸⁹ id.

¹⁹⁰ Yu Yanman, *On Contract Law* (1st edn, Wuhan University Press 2002) 756

breach, which runs counter to internationally accepted practice. The remedy for implied anticipatory breach in Chinese contract law is so simple that it is easy to cause the abuse of termination right, because it does not make necessary limits about the determination of the other party's anticipatory breach and the right to adopt corresponding remedies. And it may prompt the defendant to assume debt and thus leads to the unbalance of interest between parties. When one party breaches the contract, the other party will end the validity of the contract in advance in order to protect his own interest, and this is called termination of contract. From the perspective of the aggrieved party, it is a remedy for breach of contract; from the breaching party's side, termination of contract will make the breaching party totally lose the opportunity to afford self-remedy, often leading the breaching party to be harshly punished. Before the fact of breaching of contract is affirmed, conferring the right to directly terminate the contract on the aggrieved party may prompt the defendant to assume debt quickly, causing interest unbalance between parties and abuse of termination right, and contradictory to article 68 and 69¹⁹¹. Stipulations in UCC are more reasonable: the aggrieved party is entitled to ask the breaching party to afford assurance for performance and suspend his performance at the same time, and he cannot cancel the contract if the breaching party offers assurance within reasonable time, while if the breaching party is unable to provide assurance for performance, then the aggrieved party is allowed to terminate the contract because it is indicated that the inference of the aggrieved party is true. And various specific responsibilities for breach of contract listed in UCC do not include particular remedies for implied anticipatory breach: one party can unilaterally suspend his performance if he predicts that the other party will not or cannot perform his duty, ask the other party to afford assurance for performance, and terminate the contract after reasonable period when the other party cannot offer corresponding guarantee. In conclusion, remedies for anticipatory breach in Chinese contract are not perfect because lack of variety and operability.

(6) No special method to assume responsibility for anticipator breach

¹⁹¹ 1999 Contract Law of PRC

There is much difference between anticipatory breach and actual breach, so the method to assume responsibility should also be different. Anticipatory breach means non-performance in the future, infringing the expectant right of the creditor. From the debtor's point of view, period of performance is the period during which the debtor actually performs his duty. Before this deadline, the debtor has undertaken duty of performance, that is to say, the deadline is the due time when the contractual obligation is supposed to be performed rather than the time when the contractual obligation is appointed. If the debtor breaches the contract unilaterally, it will lead the debtor to breach obligation stipulated in contract even this breach occurs before the performance is due. But after all, this breach happens before the deadline of performance, the harm of which to the creditor is also different. As for anticipatory breach, it generally causes reliance damages¹⁹², such as certain costs for preparing for performance in reliance on the other party. So the scope of compensation for damage of anticipatory breach should be different from that of actual breach, being confined to reasonably foreseeable range, and the creditor's duty to mitigate loss should be taken into account. Chinese law applies identical method to assume responsibility without distinguishing between anticipatory breach and actual breach, which obviously does not take the particularity of anticipatory breach into account, and should be improved.

The superiority of traditional system of anticipatory breach mainly appears in remedies: When one party shows the tendency to anticipatorily breach the contract, the other party can ask him to afford assurance for performance in time. Or he can terminate the contract immediately, claim for compensation and then conclude remedial contract with the third part, eliminating risks in transaction timely, protecting his own interest furthest, reducing the loss to the lowest and thus efficiently avoiding waste of social resources.

¹⁹² Reliance damages is the measure of compensation given to a person who suffered an economic harm for acting in reliance on a party who failed to fulfill their obligation.

5.4 Suggestions for improving Chinese contract law

(1) Centrally prescribe anticipatory breach in the chapter of responsibility for breach of contract in Chinese contract law

It is better to revise article 108¹⁹³ as a provision centrally prescribing express anticipatory breach and its remedies, and clearly providing adoptable remedies for the non-breaching party under express anticipatory breach, such as suspending of performance, claiming for assurance, termination of contract, asking for compensation and so on. Besides, the expressly anticipatorily breaching party should be entitled to retract his expression of refusing performance.

It is necessary to add a provision specially stipulating implied anticipatory breach and remedies for it. Therefore, the situation to which implied anticipatory breach applies is similar to that stipulated in article 68¹⁹⁴ of Chinese contract law, and the remedy for it can refer to article 69. It is worth noting that article 68 stipulates: “The party required to perform first may suspend its performance if it has conclusive evidence showing that the other party is under any of the following circumstances ...”¹⁹⁵ We can change the phrase of “conclusive evidence” to “reasonable ground”, to reduce the burden of proof of the non-breaching party. And we can also use judicial interpretation to restrict situations belonging to “reasonable ground”—for example, stipulating whether this ground is reasonable should be determined based on industry regulations and trade usage—so as to prevent abuse of implied anticipatory breach, the stipulations about which is too subjective.

In order to avoid the disorder of stipulations, paragraph 2 of article 94¹⁹⁶ in the chapter “Termination of contractual rights and obligations” should be removed.

(2) Keep the unsafe right of defense system and eliminate its conflict with anticipatory breach

¹⁹³ 1999 Contract Law of PRC

¹⁹⁴ 1999 Contract Law of PRC, Art. 68: “The party required to perform first may suspend its performance if it has conclusive evidence showing that the other party is under any of the following circumstances: (1) its business has seriously deteriorated; (2) it has engaged in transfer of assets or withdrawal of funds for the purpose of evading debts; (3) it has lost its business creditworthiness; (4) it is in any other circumstance which will or may cause it to lose its ability to perform. Where a party suspends performance without conclusive evidence, it shall be liable for breach of contract.”

¹⁹⁵ 1999 Contract Law of PRC, Art. 68

¹⁹⁶ 1999 Contract Law of PRC

In terms of function, the system of anticipatory breach with complete remedies can almost replace unsafe right of defense system. But considering the protection of integrity and strict logic of the legal system, Chinese contract law still follows the legal framework of continental law system, which cannot be changed by deleting or adding individual provision. And unsafe right of defense system still has its value in terms of the protection of the party who should perform first. So I think relevant stipulations still should be retained in current stage. As for conflicts in terms of legal application, such as the application conflicts between article 68¹⁹⁷ and article 108¹⁹⁸, it can be solved by conferring the non-breaching party option through judicial interpretation. When application conditions are all fulfilled, the party is entitled to choose from the two legal systems to safeguard his right based on specific circumstance. And this choice should be defined as a final one in order to protect the stability and transaction safety of the contract.

To eliminate the conflicts between unsafe right of defense system and anticipatory breach, we had better make simple revision of provisions without changing the structure of current Chinese contract law. The first problem is the conflict between paragraph 2 of article 68¹⁹⁹ and paragraph 2 of article 94²⁰⁰. To solve this problem, there are two trains of thought. The first solution is to revise article 94²⁰¹ as “The parties to a contract may terminate the contract under any of the following circumstances: ... (2) prior to the expiration of the period of performance, the other party expressly states that it will not perform its main obligation”, and add a paragraph “prior to the expiration of the period of performance, the other party indicates through its conduct, that it will not perform its main obligation, one party can suspend its performance, and after suspending, the other party does not regain its ability to perform or afford appropriate assurance within a reasonable period. ” The second is to incorporate the conduct of “transfer of assets or withdrawal of funds” into

¹⁹⁷ id.

¹⁹⁸ id.

¹⁹⁹ id.

²⁰⁰ id.

²⁰¹ id.

application scope of anticipatory breach, on the basis of the subjective state of mind and error. At the same time, paragraph 4 of article 68²⁰² should also be revised as “it is in any other circumstance with exemptions which will or may cause it to lose its ability to perform”.

Anticipatory breach system should be restructured when revising Chinese contract law in the future. Chinese contract law is one of fundamental legislations in China, which is the guarantee of quick and healthy development of market economy, so it cannot be constantly changing. As a result, we should restructure anticipatory breach in the future revision of Chinese contract law. Firstly, we can endow the non-breaching party with three rights, taking CISG for reference: (1) Suspend his own performance and preparations for performance; (2) Ask for the other party to afford sufficient assurance of performance; (3) Gain the right to terminate the contract and claim for compensation if the other party does not afford this assurance within reasonable time. Thus the loss of parties of the contract can be reduced, efficiently avoiding waste of social resources. Anticipatory breach, just as its name implies, is breach of contract in the process of performance before the period expires, so rules about it should be placed in chapter 4 “Performance of Contracts”. Furthermore, anticipatory breach does not necessarily cause terminations of contractual rights and obligations; just as the existence of the fact of breach of contract does not necessarily lead to responsibility for breach of contract. As a result, placing rules of anticipatory breach in “Performance of Contracts” is more suitable for the logical system of Chinese contract law. It is better to take paragraph 2 of article 94²⁰³ alone as a stipulation, and place it in chapter 4 “Performance of Contracts” instead of chapter 6 “Termination of Contractual Rights and Obligations”. Secondly, we should add a retraction right of anticipatory repudiation of performance. The lack of retraction right causes much disadvantage to performance of the contract in practice. So it is necessary to add a retraction right for repudiation of performance, but at the same time conditions to restrict the exercising of this right should be stipulated in legal

²⁰² id.

²⁰³ id.

provisions.

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Zusammenfassung

Bei Verträgen mit einem längeren Leistungszeitraum kann es vorkommen, dass eine Partei basierend auf eigenen Interessen oder aufgrund objektiver Faktoren die vertraglich vereinbarte Leistung verweigert. Traditionellerweise sind im Zivilrecht vor allem die Interessen der Vertragsparteien zum Zeitpunkt des Vertragsabschlusses geschützt. Kann sich die betroffene Vertragspartei nicht rechtzeitig gerichtlich Abhilfe verschaffen, so muss sie den Ablauf des Vertragserfüllungszeitraumes abwarten um Schadenersatz geltend zu machen, was aber ihren legitimen Interessen abträglich ist.

Verschiedene Jurisdiktionen haben unterschiedliche Ansätze zur Lösung des Problems eines “anticipatory breach” (Vertragsaufsage) entwickelt. Die USA haben 1949 den Uniform Commercial Code promulgiert, der spezifische Regeln für den Fall des “anticipatory breach” einführt und entwickelt. Es werden vor allem zwei Mittel zur Abhilfe bereitgestellt: Einerseits die Regel der „anticipatory repudiation“, und das Recht auf „adequate assurance“. Im Gegensatz dazu kennt das deutsche Recht keinen speziellen Behelf für die Vertragsaufsage sondern bietet stattdessen generelle Regelungen für Rechtsmittel im Fall von Vertragsverletzungen wie z.B. Rechtsmittel bei Unmöglichkeit oder Leistungsverweigerung/Nichterfüllung, die auch in diesem Fall anwendbar sind. Das chinesische Vertragsrecht hat, dem Vorbild der United Nations Convention on Contracts for the International Sale of Goods folgend, Rechtsmittel für den Fall des “anticipatory breach” aus dem zivilrechtlichen System und dem System des common law eingeführt. Diese Innovation war ein großer Schritt in der Geschichte des chinesischen Vertragsrechts, hat aber auch zu einigen Problemen in der praktischen Anwendung und im Zusammenspiel mit dem gesamten System zur Regelung von Vertragsbrüchen geführt.

Diese Arbeit beginnt mit einer Einführung in Grundkonzepte und Geschichte der Regelung des “anticipatory breach”. Die folgenden Kapitel beschäftigen sich mit den sozio-ökonomischen Umständen und spezifischen Bestimmungen für “anticipatory breach” in den USA, Deutschland und China. Diese These vergleicht die Rechtsbehelfe in diesen drei Jurisdiktionen und analysiert die Hintergründe der

bestehenden Unterschiede. Basierend auf diesem Vergleich zieht die Arbeit die Schlussfolgerung dass das chinesische Vertragsrecht Rechtsmittel des Common Law einführen soll, obwohl das chinesische System dem Civil Law angehört. Zusätzlich zeigt die Arbeit auch einige Probleme der Regelung des „anticipatory breach“ im Contract Law of PRC auf und gibt Hinweise für mögliche Verbesserungen.

Abstract

In real life, there is a performance period in some contracts which are not necessary to be closed out immediately, in this period, a dangerous situation really exists that one of the parties of the contract may refuse to perform the contract obligations based on his own interests or by considering some objective factors. The traditional civil law mainly protect the interests of parties in the time when the contract had been concluded. By this time if the other party concerned can't get judicial relief in time, he has to wait for the arrival of the time limit for performance to get it according to liability for breach of contract, this is disadvantageous to protect the legitimate interests of the parties to the contract.

In order to solve this problem, different jurisdictions develop different judicial remedies for the situation of 'anticipatory breach'. In 1949, America promulgated Uniform Commercial Code, in which the rule of anticipatory breach was introduced and developed specifically. It mainly provided two remedies: one is rule of 'anticipatory repudiation', and the other is 'the right to adequate assurance'. In contrast, German law doesn't individually stipulate remedies for anticipatory breach. Instead, it generally offers remedies for breach of contract, namely remedies under impossibility and refusing of performance, which apply to anticipatory breach as well. And Chinese contract law learned from United Nations Convention on Contracts for the International Sale of Goods, introducing remedies of anticipatory breach from both civil law and common law system. This innovative introduction was a big breakthrough in the legislative history of Chinese contract law, but it also caused some problems in the practical application and harmonization with the whole breach system.

This study begins with some basic concepts about anticipatory breach and the history of this instrument. Then the following chapters respectively describe socio-economic circumstance and specific stipulations of remedies for anticipatory breach in America, Germany and China. This thesis compares remedies in these three jurisdictions, and analyzes reasons behind those differences. And on the basis of the comparison, it reaches a conclusion that Chinese contract law should introduce remedies from

common law system although Chinese law belongs to civil law system. Besides, it also points out some defects of rules of anticipatory breach in Contract Law of PRC and raises some advice aiming to improve it.