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Potential Breach in the United Nations Convention on Contracts for the International Sale of Goods (CISG - 1980) and Iranian Law

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Before the due date for performance, the promisee may, based on the actions, statements, or circumstances of the promisor, and under reasonable and rational assumptions, conclude that the promisor will not fulfill their contractual obligations when the performance is due. This situation introduces the concept of "hypothetical breach" or "potential breach" of the contract, where the promisee, under such circumstances, may exercise the right to suspend or terminate the contract and seek damages. The theory of potential breach has been accepted in the common law system after undergoing a process of development, particularly in international regulations, such as the CISG. However, it has not been acknowledged in Iranian law, nor is there any specific legal provision for it. This study, with a comparative approach, aims to clarify the position of Iranian law regarding this theory through a theoretical examination of the subject.

Keywords: *Anticipatory breach, hypothetical breach, contract breach, potential breach, CISG, contract due date.*

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1. Introduction

The possibility of a breach of contract by the parties always exists in both international and domestic legal systems. Sometimes, before the due date for performance, signs of a breach of obligation can be inferred from the actions and behavior of the obligor or from the surrounding circumstances, based on reasonable and conventional assumptions. At other times, the obligor explicitly announces in advance that they will not or cannot perform their obligations at the due time. The sound reasoning is that preventing the problem before it occurs is the best remedy, allowing the promisee to take appropriate legal measures to prevent a real breach of the contract, which has more severe consequences. One of the important issues in contract law is the application of the theory of anticipatory breach of contract, aimed at increasing certainty and facilitating and accelerating commercial transactions. Generally, the primary concern of the promisee in contracts is the performance of the obligations of the contracting party. It often happens that from the time the contract is concluded until the full performance of the obligations, due to unforeseen events or other reasons, the obligor lacks the desire or ability to fulfill the contract, and the continuity of the contract comes into question. An important question that arises in such cases is what the logical solution is within various legal systems.

In some legal systems, such as Iranian law, the traditional solution is applied, based on the principle of pacta sunt servanda (the obligation to fulfill contracts), according to which, until the due date for performance, no claim by the promisee against the obligor is admissible. Another solution, which has been articulated in common law, is based on a novel interpretation of the principle of contract enforceability. It allows the contracting party who, based on certain knowledge (not mere probability), knows that the obligor will commit a fundamental breach of the contract at the due time, to suspend the contract and seek damages (Audi, 1990).

One of the important issues addressed in the 1980 United Nations Convention on Contracts for the International Sale of Goods (CISG) is anticipatory breach of contract. According to this theory, if, before the time for performance, the obligor explicitly announces or their behavior indicates that they do not intend or are not able to fulfill their obligations at the appointed time, anticipatory breach is considered to have occurred. Therefore, the application of this theory and the consequent remedies for breach of contract by the promisee are introduced. The anticipatory breach theory, initially developed in common law, has become one of the important rules in international commercial law and is accepted and applied in many legal systems around the world, bringing many benefits and effects.

In this article, by examining the foundations of this theory in common law (its origin) and the CISG, as well as analyzing and critiquing the objections raised against it, the aim is to clarify its legal foundations in Iranian law and answer the question of whether the theory of anticipatory breach is applicable in Iranian law. Another goal of the article is to prove that anticipatory breach, or hypothetical breach, has the same legal consequences as an actual breach.

2. Definition and Meaning of Anticipatory Breach

The literal meaning of breach is to break, destroy, or violate a covenant or agreement (Amid, 1983, p. 1042). In legal terminology, it has not strayed far from its literal meaning. A breach of contract occurs when one or both parties fail to adhere to their obligations under the contract. In other words, if one of the parties to a contract fails to perform their contractual obligations, or announces to the other party that they will not fulfill them, or their behavior indicates their inability to perform the contractual obligations, a breach of the contract and refusal to perform is considered to have occurred (CISG, law.cisg, www). However, in legal terminology, breach refers to the "failure of a party to abide by the terms of the contract" (Jafari Langaroudi, 2003, 2007).

The meaning of anticipatory breach (hypothetical breach) is that before the due date for performance, the promisee predicts that the obligor will not fulfill their obligations (Rahimi, 2005).

There are two types of contract breaches: 1) actual breach and 2) anticipatory breach (hypothetical or preemptive breach). The subject of this article is the anticipatory breach of contract, which is a relatively unknown concept in Iranian law, although people encounter it in practice, it has rarely been discussed from a legal perspective.

Actual breach: The concept of actual breach is clear. It occurs when the contractual obligation is not fulfilled, performed late, or inadequately or incompletely performed on the due date (Katouzian, 2008). The meaning of actual breach depends on the type, nature, and quality of the obligation and its fulfillment.

Anticipatory breach: The English term "Anticipatory Breach" refers to "predictable breach," "preemptive breach," "hypothetical breach," or "potential breach." Some legal scholars, due to the fact that the possibility of such a breach is no longer merely speculative, do not consider it merely hypothetical and instead refer to it as "expected breach" (Darabpour, 1998). In legal terms, when, before the due date for performance, the obligor announces that they will not fulfill their contractual obligations on the due date, or there are signs of unwillingness, unpreparedness, or inability to perform, and if these signs are sufficiently serious, it can be predicted that a breach will occur at the appointed time (Treitel, 1984, 1995). Therefore, anticipatory breach means that before the due date, the promisee predicts that the obligor will not perform the contract. In other words, after the contract is formed and before the time of performance arrives, it becomes clear that one of the parties will not fulfill their contractual obligations in the future (Squillante, 1973). In this case, if the theory is accepted, the promisee, who is expected to perform their obligation before the obligor, is given the right to either terminate the contract or suspend their performance.

Anticipatory breach can be of two types: explicit and implicit. When the obligor announces that they will not perform their obligation on the due date, an explicit breach occurs. For example, if a person undertakes to sell a specific item in the future, but sells it to someone else before the due date, an implicit breach occurs (Cheshire & Furmston, 1991).

Thus, breach of contract can be seen as a general concept, which can occur simultaneously, before, or after the due date. While actual breach refers to the non-fulfillment of an obligation on the due date, anticipatory breach concerns the recognition that the obligor will not fulfill their obligation before the due date.

Criticisms of the theory of anticipatory breach of contract have been raised. Before outlining the legal foundations of this theory, the objections to the theory are analyzed and critiqued.

3. Definition of Contract in Iranian Law and the Implications of Accepting the Theory of Anticipatory Breach

Whenever one or more individuals commit to an obligation towards one or more others, and their agreement is accepted, a contract is formed (Article 183 of the Civil Code). Failure to perform any of the obligations specified in the contract, unless justified, is considered a breach of the contract. However, the question arises: if one party to the contract declares that they will not perform the contract at its due date (knowledge of breach) or if their behavior creates the possibility that the contract will not be fulfilled (reasonable possibility), can the breach be accepted before the due date? Accepting this situation has significant consequences. Upon such acceptance, the obligee is exempted from performing their corresponding obligations, which will remain unfulfilled (Corbin, 1952). Both parties exclude the contract from their financial and operational calculations. The psychological pressure of a contract that should be performed in the future is alleviated, and the obligee's damages are compensated much sooner than the typical period needed to obtain a court ruling for compensation. Moreover, if the breach is voluntary and explicitly declared by the other party, there may be no need for a legal process (Hemat Kar, 2003, 2005).

4. Criticisms of the Theory of Anticipatory Breach and Their Refutation

Given the apparent opposition of the theory of anticipatory breach with certain principles governing contracts, such as the principle of the enforceability of contracts and adherence to their terms, some have criticized the theory. A detailed analysis of the reasons for their objections is presented below:

4.1. Ignoring the Principle of the Enforceability of Contracts and Failure to Adhere to Their Terms

In the CISG (Convention on the International Sale of Goods), the right to terminate the contract by the obligee is one of the remedies for anticipatory breach. This right is in conflict with the principle of the enforceability of contracts, and this is cited as a reason for rejecting the theory. According to this theory, the obligee, as a potential victim, would have the right to terminate the contract if they predict a breach before the due date of performance, under certain specific conditions. However, termination due to actual breach is considered an exception in civil law systems and is subject to specific conditions. Therefore, granting the right to terminate on the basis of anticipatory breach would undermine the principle of the enforceability of contracts. This objection is often raised by legal scholars following the Roman-Germanic legal tradition.

However, interpreting this principle requires determining the limits of enforceability and discovering the underlying spirit of adherence to contractual terms. Preventing instability in commitments and contracts is the foundation of this principle. In addition to being supported by legal texts, human reason dictates that individuals must honor their agreements and cannot easily avoid their obligations for any reason.

Thus, the principle of enforceability is based on rational foundations, meaning that rational members of society accept the supremacy of this principle in contractual relations. Preventing the disruption of societal transactional order and ensuring the stability of agreements is a logical reason for the enforceability of contracts, which Islamic law also recognizes and approves as a fundamental rule (Shahidi, 2000).

However, if signs of a potential breach arise from the words or actions of the obligor or from the circumstances and conditions, and if the obligor

explicitly declares that they will not fulfill the contract at the due date, no reasonable mind, under the principle of enforceability and adherence to contractual terms, would insist on waiting for the actual breach to occur. Instead, to prevent further harm and loss, it would encourage taking preemptive action.

Therefore, adherence to the principle of enforceability should also consider other factors, such as preventing harm, so that no irreparable damage is done to innocent parties. Adherence to contractual terms and their binding nature in all circumstances is not always fair. In fact, the parties have entered into the contract with the expectation of certain conditions, and these conditions should reasonably be considered part of the contract. As one Western scholar states, contracts remain in force only as long as the reasons for their creation persist (Sadeghi-Moqaddam, 2000).

When parties are bound by the terms of a contract, it is only when the terms remain valid and in force at the time of execution. However, in situations where there is a strong likelihood that the obligor will not fulfill the contract at the designated time, the least that can be done to prevent further harm is to allow the obligee to suspend the contract (Pinna, 2003).

It is also possible to consider a situation in which the obligor does not have the ability to perform their obligations but, in an attempt to delay performance and hide their inability, suggests that there will be a breach of contract. In this case, all circumstances and aspects should be considered when applying the theory to prevent an unjust and unilateral change in the balance and stability of the relationship the parties had originally foreseen through the contract (Kazemi & Rabiei, 2012).

4.2. Priority of Performance over Termination

According to the theory of anticipatory breach, the obligee acquires the right to terminate the contract upon the mere possibility of a future breach, subject to specific conditions. However, in Iranian law, when actual breach occurs, the obligee must first demand performance from the obligor. Only if performance cannot be enforced can the contract be terminated (Rafi'i, 1999). In reality, the priority is given to the enforcement of the contract over its termination. However, it is more difficult to accept such a right for the obligee in situations where an actual breach has not yet occurred and only the possibility of future breach exists.

In Islamic jurisprudence, there are four opinions regarding the remedy for a breach of condition:

1. Termination without enforcement (Shahid Awal, 1995; Tusi, 1990).
2. Option for termination or enforcement (Bojnoudi, 1999; Khoei, 1992; Muhaqqiq Damad, 2010).
3. Termination if enforcement does not yield results (Naraqi, 1998).
4. Enforcement without the right to terminate (Katouzian, 1997).

Article 237 of the Civil Code states: "...the person who is obligated to perform a condition must fulfill it, and if they fail, the other party may refer to the court to request enforcement." Similarly, Article 496 provides: "...in case of failure to meet the conditions stipulated between the landlord and tenant, the right to terminate is established from the time of failure." Thus, the law's writers believe that, under this article, the obligee can either terminate the contract or demand specific performance. If the obligee must first compel the defaulting party to perform, and only afterward can they exercise the right to terminate, this would be unfair and detrimental to the obligee.

In any case, the acceptance of the right to terminate the contract in the case of a breach by the obligor has many supporters in our legal system. In the opinion of legal scholars, this theory is widely supported in Islamic jurisprudence and is consistent with the Islamic law and legal theory (Nayini, 2006).

Thus, if the condition is not fulfilled within the agreed-upon time, and termination without the enforcement of the obligation is accepted, it becomes easier to accept the theory of anticipatory breach in cases where there is a strong likelihood that performance will not be possible within the specified time. However, if this interpretation is not accepted, a broader interpretation of Article 240 of the Civil Code regarding conditions whose fulfillment becomes impossible after the contract can provide the injured party with the right to terminate. The legislator has recognized the futility of enforcing the condition in such cases and has allowed the obligee to terminate the contract from the outset (Ghafari Farsani, 2009). Therefore, the acceptance of the theory of anticipatory breach does not conflict with Article 237 of the Civil Code.

4.3. *Probability and Uncertainty of Breach*

The probability and uncertainty of a breach is the most fundamental objection that may arise against the theory of potential breach. It questions whether a person should be allowed to avoid adhering to the terms of a contract and terminate it based solely on speculation or probability. According to this theory, before the due date for performance and before an actual breach of the contract occurs, the obligor is preemptively held accountable based only on the likelihood of a future breach. Generally, the remedies for breach of contract are based on actual violations. Applying such remedies to a party who has not yet breached the contract is considered unjust and lacking in legal logic. In response to this objection, it can be stated that while a breach does not occur based solely on probability, probability itself exists in varying degrees. When there is strong suspicion of a breach, and the likelihood of non-performance is high, the matter should be reconsidered and analyzed from a different perspective.

Section 1 of Article 71 of the International Sale of Goods Convention outlines circumstances under which the obligee has the right to invoke remedies for potential breaches, including the obligor's behavior in preparing for the execution of the contract. Moreover, Section 3 of Article 72 of the same Convention justifies the application of this theory when the obligor declares that they will not fulfill the contract at the agreed time. In such cases, should the obligee not consider this declaration? Even if the obligor's statement or actions do not conclusively indicate a breach but merely suggest a strong likelihood of non-performance, this suspicion is generally considered credible. In both legal and jurisprudential contexts, such a suspicion is taken seriously, as certainty is rare, and most legal rulings are based on this type of strong, reasonable suspicion.

In common law systems, a breach of contract may occur either at the time of performance (actual breach) or before the due date (potential breach). This "potential breach" is recognized as a legal theory in both common law systems and international legal frameworks such as the International Sale of Goods Convention, the Principles of International Commercial Contracts, and the Principles of European Contract Law (Rowley, 2001). The foundation of this theory is justified by the argument that when it is evident that the obligor cannot or will not fulfill their contractual obligations before the due date, the law supports the obligee's reasonable expectations, prevents resource waste, reduces damages, and facilitates practical matters. Consequently, the obligee is granted the right to terminate the contract and sue the obligor before the due date (Honnold, 1999). Therefore, the right to termination granted by the legislator is composed of two layers: first, the acceptance of the removal of the time condition, and second, the ability to sue for breach based on the potential violation. From this perspective, potential breach is essentially the same as actual breach, with the only difference being that, in the case of a potential breach, the performance date is in the future, so it is necessary to first remove the time condition and then declare the contract breached.

4.4. *Injustice in Claiming Damages*

One consequence of accepting the theory of potential breach is the action of the obligee in claiming damages after the termination of the contract, but before the due date for performance (Gilbey Strub, 1989; Treitel, 1984, 1995). It can be argued that forcing the defendant to pay damages for a breach that has not yet occurred could constitute an injustice (Corbin, 1952, p. 945). Professor Williston holds the view that termination of a contract before the due date does not necessarily require a claim for damages at the same time. He argues that the right granted to the obligee is legally flawed because it imposes an undue burden on the obligor, a situation that neither party intended in the contract (Gilbey Strub, 1989).

The injured party may terminate the contract, but claim damages only after the scheduled performance date (Corbin, 1952). However, this objection has been criticized by some legal scholars, who analyze the rule of claiming damages before an actual breach occurs in the context of social order (Corbin, 1952; Gilbey Strub, 1989). They argue that, based on social order, the obligee is entitled to immediately claim damages for the following reasons:

1. The damages claimed in the case of potential breach do not arise from non-performance of the primary contractual obligation but from the unjust and harmful refusal of the obligor to fulfill their secondary obligations, which generally have no moral or ethical justification (Corbin, 1952).

2. Applying this rule may be necessary to protect the obligee, as they may have incurred costs or made advance payments in preparation for the future performance of the contract. In such cases, they could suffer significant losses, as they may not be able to recover the advance payment or conclude a replacement contract. A claim for damages before the performance date would help mitigate this situation (Treitel, 1984).
3. The obligor should compensate for their failure to perform by paying damages promptly. When the obligor clearly or explicitly declares their non-compliance with the contract, insisting on holding the obligee to the contract date seems unreasonable (Treitel, 1984, 1995).
4. Applying this rule helps resolve disputes quickly (Corbin, 1952; Gilbey Strub, 1989), which is one of the primary objectives of the judicial system.

Therefore, the principle of the obligee's right to immediately file a claim for damages is recognized, and it is also stipulated in the International Sale of Goods Convention (Schlechtriem & Translated by Geoffrey, 1998). Unless the obligee requests specific performance, which is usually inconsistent with a claim for damages before the performance date (Corbin, 1952).

4.5. The Difficulty of Assessing Damages

Another objection raised to this theory pertains to the difficulty of determining the amount of damages in a claim resulting from a potential breach, especially before the due date for performance. Some argue that it is difficult to prove the actual damages incurred, which may result in the injured party receiving much less compensation than they deserve or, in some cases, receiving more than they would have been entitled to if the breach had occurred on the due date (Corbin, 1952). This inaccuracy is due to the fact that the contract has not yet reached its performance date, making it difficult to assess actual damages accurately.

However, assuming the acceptance of potential breach, determining the amount of damages is not a significant problem. The International Sale of Goods Convention offers a solution through the resale of the goods and calculation of the difference between the market price and the contract price at the time of delivery (Safai, 2005).

In Iranian law, determining damages that are contingent on future events, such as lost profits, is a common issue. For instance, civil law considers the loss of future profits (i.e., loss of expected income). Despite the differences in legal perspectives regarding the compensation of lost profits (following the approval of Clause 2 of Article 515 of the Civil Procedure Code and Clause 2 of Article 9 of the Criminal Procedure Code), there is no disagreement on how to assess the damages if they are considered compensable. In cases where a party has permanently lost their ability to work, the damage is considered a future loss, and the judge, in accordance with the circumstances, determines the appropriate method of compensation (Safai, 2007).

These examples confirm that even when the potential breach involves future losses, a judge can evaluate the damages based on the situation and expert opinion, supporting the claim that the amount of damages resulting from a potential breach can be determined.

5. Theoretical Foundations of Potential Breach

The institution of potential breach, which has been established in the common law system and recognized in various countries, has found a place in international legal instruments and conventions. This phenomenon is undoubtedly not without legal and logical foundations, and it is essential to examine to what extent this rule is justifiable and acceptable under Iranian law. To this end, the institutions in Islamic jurisprudence and Iranian law that may provide a basis for justifying the theory of potential breach will be discussed and analyzed below.

5.1. Rational Judgment and the Custom of the Wise

The "custom of the wise" refers to the practical approach of reasonable individuals in performing or refraining from actions without the influence of temporal, spatial, ethnic, or religious factors. This concept, also referred to as the "custom of the rational" or "rational tradition," plays a significant role in the process of deriving legal principles and jurisprudential rules, such as the principle of no harm (La Darrar) and the rational preliminary premises (Feyz, 2012). Some jurists have even considered it a legal basis for many rulings, such as the validity of contract-based actions and the necessity of balance in exchange considerations (Bojnoudi, 1999; Najafi, 2014).

Considering that the purpose of every exchange contract, such as a sale, is for each party to gain the object of the other's commitment, when there is strong knowledge or suspicion that one of the parties will not be able to fulfill their obligations at the time of performance, it is unreasonable for the other party to perform their obligations, especially in commercial and international contracts, without appropriate guarantees. The enforcement of obligations by a party who has already fulfilled their own obligations, while waiting for the other party to perform their commitments at a later date, even though this non-performance was reasonably predictable, makes the return of what has been delivered a futile act, and alongside its costs and time consumption (Chengwei, 2003, 2005), it is not recommended by rational individuals. In contrast, the rational judgment would be that once strong knowledge or suspicion of the other party's breach becomes evident, the obligations of the other party should be lifted, and they should have the option to either perform their duties or release themselves from such a contract. Rational thinking always favors prevention over cure, and thus, putting the contract at risk of dissolution is preferable to carrying out a one-sided performance, followed by a return to the status quo ante. One of the measures endorsed by the wise and the rational tradition is granting the potential injured party the right to terminate the contract.

Denying the right given in the theory of potential breach and its associated remedies would contradict the customary practice of the wise, moral conscience, fairness, and legal intuition (Taghizadeh et al., 2017).

5.2. *Implied Conditions in Contracts*

Among the types of conditions within contracts, an implied condition is one that is not explicitly stated but is inferred from the nature of the contract (Ansari, 2012). In other words, implied conditions are not agreed upon in the same manner as explicit conditions, nor are they formulated before the contract, but are instead assumed by custom and tradition, and rational persons take their existence for granted (Muhaqqiq Damad, 2010).

Every contract implicitly includes a condition prohibiting the parties from engaging in any conduct that would result in the repudiation of the contract, whether before or after the deadline for performance. The remedy for such an act is the right to suspend or terminate the contract (Kazemi, 1384, p. 111).

The theory of potential breach and its associated remedies can be justified based on the implied conditions of the contract. Specifically, the early breach of a contract by the obligor can be seen as a breach of a current and actual obligation, or more precisely, a breach of an implied condition (Corbin, 1993, p. 203; Smith, 1991). This implied condition exists in every contract, where the parties agree not to take actions that would obstruct the fulfillment of the contract. The obligation of the parties, justified by the principle of good faith, is to do whatever is reasonably necessary to perform the contract (Winthrop, 1924, p. 333). Once it is evident, through the obligor's declaration or other means, that they will not perform their obligations by the agreed-upon date, the contract is breached, and further waiting for performance becomes irrelevant. According to this view, every contract implicitly carries a condition where the parties commit not to harm their contractual relationship, meaning they are obliged to uphold it. This implied condition follows from the linguistic implication of the contract's terms and, based on reason, law, or custom, is essential to the agreement. Since the implied meaning of the contract is derived from these auxiliary ways, there is no need to express it explicitly, and the parties, if they do not provide a contrary declaration, are bound by the implied meaning of their words (Katouzian, 2008).

It may be criticized that the breach of an implied condition is, in fact, a real breach of the contract, not a potential breach. In response, it can be argued that while the application of this theory in such a case is based on actual breach, the foundation of this actual breach, in fact, lies in the acceptance of potential breach of the contract in the future. Therefore, accepting the effects of the potential breach theory is not only reasonable but facilitates its acceptance under Iranian law.

5.3. *The Rule of La Darrar (No Harm)*

Another legal basis for the theory of potential breach of contract is the rule of "no harm" (La Darrar), which mandates the prevention of potential harm. According to the majority of Shi'a jurists, any ruling that entails harm (whether material or immaterial) is not legislated, and such rulings are inherently negated (Isfahani, 1988; Mousavi Khamari, 1995; Nayini, 2006). This rule is a universal legal principle and is not exclusive to Islamic law (Moqaddam Damad, 1389, p. 134). It is an

independent rational principle that is accepted by human nature (Naraqi, 1417 AH, p. 51).

A party's continued commitment to a contract, which will inevitably be breached by the other party in the near future, causes harm to both parties or at least to the obligee. However, a pertinent question arises: does the rule of La Darrar also cover potential harms? And is there a method to compensate for future damages? The answer is that rational judgment dictates that any reasonable person, when faced with the possibility of imminent harm, will not wait for the harm to occur and then seek remedies, but will instead take all necessary precautions to prevent the damage before it materializes (Ansari, 2012). Moreover, harm is a concept that is understood in ordinary life, so for each specific case, the issue should be evaluated based on custom (Mohammadi, 2003).

By interpreting the rule of La Darrar, it is evident that no harm should remain unremedied. When sound reasoning deems the future harm inevitable, it would be more rational to prevent this harm rather than to wait for it to occur. According to common understanding, any loss, whether in the form of property damage, lost profits, reputation damage, or missed opportunities, constitutes harm that is compensable. This is why, under prior regulations, potential losses and future harms were considered compensable, even though under the new Civil Procedure Code, they are not explicitly acknowledged as compensable due to conflicting jurisprudential opinions.

In fact, predicting a breach in the theory of potential breach is akin to predicting imminent harm. Therefore, this harm, which is commonly recognized, should not remain unaddressed, and preventing it is the most rational method of remedy. Professor Winthrop stated, "Not granting the right to enforce the remedies for potential breach of contract and waiting for the actual breach is as peaceful as saying that a country has no right to take any defensive action and must wait to be attacked and occupied by the enemy" (Winthrop Ballantine, 1924).

5.4. *Rule of Mitigation of Damages*

The rule of mitigation of damages is a principle established in tort law and has been recognized in many legal systems and international conventions, such as the United Nations Convention on Contracts for the International Sale of Goods (Article 77 of the Convention). According to this rule, the injured party, as a result of the actions of others, is obliged to mitigate the damage incurred to a reasonable and customary extent. Damages that the injured party suffers, despite the ability to prevent them, are not compensable under this rule. In other words, each individual is required to take reasonable preventive actions to avoid or reduce damages that may result from the fault of another person; otherwise, they will be deprived of compensation for damages that could have been prevented. The origin of this rule lies in contractual liability, which can also form the basis of the theory of probable breach. In other words, if the other party announces that they will not fulfill their obligations on the due date, or if circumstances indicate this, the rule of damage prevention obliges the other party to take steps to avoid or mitigate the damage. Therefore, the cancellation of the contract and the procurement of the subject matter from another source are effective actions in preventing or reducing damage. This is because rescinding the contract after the failure or refusal of the obligor to perform their future obligations causes less harm than waiting for the contractual deadline. Therefore, the duty to mitigate damage is another foundational aspect of the theory of probable breach and the right to rescind the contract based on it.

5.5. *Custom and Usage*

Article 9 of the United Nations Convention on Contracts for the International Sale of Goods explicitly recognizes custom and usage as a source of rights and obligations for the parties to the contract. The importance of custom and usage lies in their role as a reliable source for explaining the terms of contracts and the obligations of the contracting parties, which may be explicitly or implicitly referred to by the parties and imposed upon them (Article 356 of the Civil Code). They eliminate contractual gaps and complement the parties' intentions (Safai, 2005).

Commercial custom and usage indicate the existence of a right to rescind for the potential injured party when there is doubt about the performance of the other party's contractual obligations. The existence of such a right is confirmed by the principle of security in commercial law. The right to suspend or rescind the contract when the obligee has clear evidence that the obligor will not fulfill their obligations, or when the obligor explicitly

announces their refusal to perform, is a reasonable and customary practice and is supported by the principle of rationality. Therefore, at least the minimum provisions of the Convention can be accepted as established customs in Iranian law, and the right can be granted under Articles 220 and 225 of the Civil Code.

5.6. *Justice and Fairness*

Requiring a party to adhere to a reciprocal contract when it is already evident that the other party cannot or will not fulfill their obligations by the agreed deadline is unjust. Justice and fairness dictate that such a party should be free to release themselves from the contract or, if possible, compel the other party to fulfill their obligations. In reciprocal contracts, one party's performance is completely dependent on the performance of the other party; in other words, the obligation of each party is the cause of the other's obligation (Imami, 2008).

Obliging a party to perform their obligations when it is clear that the other party cannot or does not want to perform by the deadline is unfair and contrary to the principle of balance of exchange. The motivation for entering into a contract is the assurance of performance. If either party knew that, even immediately after concluding the contract, it would be hindered, they would certainly not have entered into the agreement.

On the other hand, if the obligor, in good faith, announces that they will not be able to perform their obligations in the future, justice and fairness dictate that the other party should not insist on adhering to the contract, and that the other party should not exploit their rights to the detriment of the first party.

5.7. *Rescission*

According to Article 72, Paragraph 3, of the United Nations Convention on Contracts for the International Sale of Goods, the obligor's announcement of non-performance by the due date is one of the instances that triggers the application of remedies for probable breach (including rescission) by the obligee. Thus, it can be inferred that one of the legal foundations of the theory of probable breach is that a rejection of the contract by the obligor is a trigger for rescission and dissolution of the contract. In other words, breach of contract is not the sole cause of rescinding the contract; it is a proposal to terminate the previous agreement and, in fact, a step toward rescission (Corbin, 1952). The other party to the contract, upon accepting this proposal, can rescind the contract, and if they do not accept it, the contract remains in force. However, the intention and consent of both parties are required for rescission to take place. In the case of probable breach, if we do not claim that the breaching party has the intention to propose rescission in all cases, in most cases, they do not have the intention to propose rescission, and this is one of the criticisms of the theory of probable breach. On the other hand, the right to claim damages is an effect of exercising the right to rescind the contract, whereas in rescission, the mutual agreement of the parties is for the dissolution of the previous legal relationship and the elimination of its future effects (Shahidi, 2000, 2006, 2007a, 2007b). Therefore, there is no place for claiming damages in this mutual agreement, unless the parties agree that the proposing party is responsible for paying damages resulting from the rescission to the injured party. Additionally, the proposal for rescission is only an offer, and there is no obligation for the other party to accept it. However, in the theory of probable breach, in cases where the contract cannot be executed or where continuing the contract offers no legitimate benefit to one of the parties (such as when a customized product has been ordered, but the production of the product is permanently halted for any reason), the other party is obligated to accept the probable breach (Carter, 1984). It seems that rescission cannot serve as a legal foundation for the theory of probable breach, because rescission based on the prediction of breach results from the exercise of rights established by the rules of probable breach, not from the mutual agreement of the parties. However, since there are cases where, before the obligation is performed, the obligor indicates that they will not perform their duty in the future, and the obligee accepts this offer, rescission takes place. This is an issue that is also accepted in Iranian law, and thus the basis for accepting the theory of probable breach in Iranian law can be established.

5.8. *The Will of the Contracting Parties and the Interdependence of Exchanges*

In reciprocal contracts, the intention and will of the parties is to achieve the exchange of something to which they have committed to deliver to the other party. This

means that the reason for each contracting party to be bound by the agreement is the performance of the other party's obligations. If, at any time after the contract is concluded, the performance of an obligation by one party becomes impossible, or if the circumstances or conditions indicate that it will be impossible to perform by the agreed date, the performance of the other party's obligation would contradict the intention and will of the contracting parties. This is because the intent of the parties was for both to fulfill their obligations, and whenever it is clear that, for any reason, one of them is unable to perform their contractual obligations and such non-performance is reasonably foreseeable, the other party should have the right to refrain from performing their obligations and to release themselves from the contract. From this perspective, it does not matter whether the time for performing the obligation of the latter party has arrived or not.

In reciprocal contracts, for each party, the ultimate reason for accepting the obligation is the other party's obligation, meaning that the parties' intention is to bind the exchanges together in such a way that a breach of obligation by one party will excuse the other party from performing their own obligation (Imami, 2008). Therefore, if it is reasonably foreseeable that the other party will not be able to fulfill their obligations, the other party should be entitled to either rescind the contract or, at the very least, suspend the performance of their own obligations. Forcing them to perform their obligations without the fulfillment of the other party's obligations is contrary to the principle of interdependence of exchanges. It also seems that the theory of interdependence of exchanges is not limited to non-performance on the specified date and that a broad interpretation of this theory could extend its scope to include situations before the performance date. Previously, the common understanding of the theory of interdependence of exchanges in complete reciprocal contracts was that the release of each party from their obligations was conceivable only after the due date, if the non-performance of one party was confirmed. However, it appears that a broad interpretation of this theory, which would allow one party to be released from performing their obligations if it is established before the due date that the other party will not perform on time, is acceptable. This is because the theory of interdependence of exchanges is rooted in the shared intent and will of the contracting parties, and the agreement between them is based on the condition that, if it becomes apparent that one of the parties is unwilling or unable to perform their obligations, the other party will be entitled to release themselves from the contract due to the breach. In fact, each party's performance is conditional upon the performance of the other party, and if the performance of one party is due, the other party's performance is dependent on the possibility of that performance being completed by the deadline. Therefore, if this possibility ceases before the time is due, the other party's obligation will also be void. In other words, a reasonably foreseeable potential breach can be treated as an actual breach.

According to Article 8 of the United Nations Convention on Contracts for the International Sale of Goods, contrary to some legal systems, the shared intent of the parties is not the governing criterion. Instead, the will of one party, provided the other party is aware of it or their ignorance is not excusable, is considered valid and serves as the basis for interpretation. Accordingly, it can be argued that the right to dissolve the contract due to the anticipation of a breach stems from the will of the injured party, because the parties' will in the contract is based on the assumption that if it becomes clear that one party is unwilling or unable to fulfill their future obligations, the other party should be free to release themselves from the contract. The other party is aware of this intention or, at least, their ignorance is not excusable, because it is reasonable and foreseeable that they could not have been unaware of this intention.

The acceptance of the theory of interdependence of exchanges in some legal systems and in cases where the subject matter of the obligation is a specific object, and it is destroyed before the delivery date, results in the dissolution of the contract. However, under the United Nations Convention on Contracts for the International Sale of Goods, there is no provision for the dissolution of the contract, and in all instances of anticipating a future breach, the right to dissolve the contract is granted.

5.9. Principle of Good Faith

The principle of good faith is explicitly mentioned in many international instruments and conventions, including Article 7 of the United Nations Convention on Contracts for the International Sale of Goods (Paragraph 1). According to this principle, the contracting parties

must fully perform their contractual obligations in accordance with the contract. However, if one party explicitly announces that they will not perform their obligations, they are acting contrary to this principle, whether the time for the performance of the contract has arrived or not.

Furthermore, a party that has serious doubts about the performance of their obligations by the specified time, and who requests the performance of the other party's obligations before being certain about their execution, is acting in bad faith, even if the time for performance has passed.

According to the principle of good faith, when it is clear that the obligor is unable to perform their obligations when due, because rescinding the contract at that time would result in less harm, it is contrary to good faith to expect the obligee to wait until the deadline for the obligor's performance to claim further damages. Therefore, in order to align with the principles and avoid defeating the purpose of the contract, the right to dissolve the contract is reasonable. Furthermore, by accepting the principle of good faith as the basis for this right of dissolution, the obligee is required to exercise it.

6. Similar Cases of Potential Breach in Iranian Law

Although Iranian law is unfamiliar with terms such as "potential breach," "expected breach," or "hypothetical breach," a review of the laws reveals signs of a theory related to potential breach, based on the prevention of probable harm or the mitigation of potential damage.

6.1. Option of "Taflis" (Bankruptcy Rescission)

One of the similar cases of potential breach in Iranian law is the option of "Taflis," as outlined in Article 380 of the Civil Code. This article states: "If the buyer becomes bankrupt and the subject matter of the sale is still in their possession, the seller has the right to retrieve it, and if the item has not yet been delivered, the seller can refuse to deliver it." The apparent meaning of the above article is absolute and includes cases where the payment is deferred. It seems that, due to the bankrupt party's inability to pay future debts, the legislator has granted the right of rescission to the aggrieved party. It could be argued that bankruptcy causes debts to become due and is unrelated to predicting a breach. However, it can be stated that although deferred debts become due upon the issuance of a bankruptcy ruling (Article 421 of the Commercial Code), one of the reasons for justifying the due date of the bankrupt's debts is that, since the situation is such that the possibility of paying future debts is very low, it is unreasonable for the debtor's assets to be divided solely among creditors with due claims (Eskini, 2002). Therefore, alongside maintaining the equality of creditors, predicting a breach and the strong possibility of non-payment of deferred debts can be considered as another reason for making the bankrupt's debts due, which justifies the creditors' right to rescind the contract under Article 380 of the Civil Code (Kazemi, 2005; Kazemi & Rabiei, 2012).

6.2. Transaction to Evade Debt

According to Article 114 of the Civil Procedure Code, if a debt is documented by an official deed and is at risk of being dissipated, the creditor may request a precautionary measure, even if the obligation is deferred and its due date has not yet arrived. Also, according to Article 218 of the Civil Code: "If the creditor submits a petition to the court and provides evidence that the debtor intends to sell their property to evade debt, the court may issue a seizure order for their property up to the amount of the debt...". In the specific case under the Civil Code, it is not required that the right be based on an official deed, and it is unclear whether this ruling applies to due debts or whether the creditor has the right to request a precautionary measure in the case of deferred debts. Dr. Nasser Katouzian's interpretation of this article is that this provision is not restricted to sales alone, and any transaction that jeopardizes the debtor's property and ultimately leads to its transfer falls under this rule. By comparing Articles 114 and 108 of the Civil Procedure Code with the above article, it can be concluded that the precautionary measure prescribed in Article 218 of the Civil Code applies even if the debt is deferred and the debt is based on a private document (Katouzian, 1995, 1997, 2003, 2008). Shams disagrees with this interpretation, and for a view on the opposing perspective (Shams, 2007). Therefore, if the actions, behavior, and statements of the obligor indicate that they will not perform their obligations in the future, the obligee can request a precautionary measure and the seizure of the obligor's property by proving the obligor's malicious intent.

Although the term "potential breach" is not used in the analysis of these provisions, the basis for accepting the right to request a precautionary measure in the case of a deferred obligation where there is a strong likelihood that it will not be performed on time is undeniably grounded in the theory of potential breach, which aims at preventing or mitigating the risk of potential harm. It seems that the precautionary measure prescribed in the above article is essentially a guarantee requested by the obligee in cases of potential breach to ensure that the obligor performs their contractual obligations with confidence (Article 71, paragraph 3 of the Convention).
Now, if the possibility of obtaining a guarantee or precautionary measure is lost, for example, when the obligee becomes aware of the obligor's malicious intent to transfer all their assets to evade debt, would it be logical or reasonable for the other party to perform their obligation and wait until the deadline for the performance of the other party's obligation and then face the difficulties caused by challenging the fraudulent transaction? It does not seem rational or reasonable that the creditor, before the transaction occurs, could prove that the debtor intends to sell their property to evade debt, and prevent them from selling the property. However, once the debtor performs the transaction with this intent and transfers their property to others, the creditor should not be deprived of their rights, and the restriction of the right to suspend or rescind the contract would place an undue burden on the aggrieved party, forcing them to perform their obligations.

6.3. Right of Retention (Haq Habs)

Suspension of contractual obligations due to the anticipation of a breach is one of the remedies for potential breach. This theory is similar to the right of retention in Iranian law, which is explicitly mentioned in Articles 377 and 1085 of the Civil Code and Articles 371 and 390 of the Commercial Code. The important point here is that to exercise the right of retention, certain conditions must be met, such as the need for the simultaneous performance of obligations. However, in the case of the remedy for suspension under the theory of potential breach in deferred contracts, this condition of simultaneity is not applicable, which makes it different from the right of retention. Regardless of this distinction, it seems that there is no fundamental difference between the right of retention and the right to suspend contractual obligations. Based on the views of legal scholars regarding the reasons and justifications for accepting the right of retention (Imami, 2008; Katouzian, 2008; Shahidi, 2007a), which emphasizes the interdependence and relationship of exchanges in reciprocal contracts, this can be used to justify the recognition of the right to suspend in Iranian law as well. In fact, each party to a contract is committed to fulfilling the obligations they have undertaken, to the same extent that they have committed the other party. If, for any reason, one of the contracting parties refuses to perform the obligations they have accepted, or if, based on the circumstances, it becomes reasonably and strongly apparent that they will not perform their obligations in the future, the obligation of the other party to fulfill their contractual obligations is automatically void.

6.4. Article 533 of the Commercial Code

According to Article 533 of the Commercial Code, if a merchant purchases goods and becomes bankrupt before paying the price, and is unable to pay for the transaction, the seller may refuse to deliver the goods to the buyer. The provisions of this article reflect the concept of the right of retention mentioned in Article 377 of the Civil Code, which is a general principle applicable to all contracts of exchange. The only difference between Article 377 of the Civil Code and Article 533 of the Commercial Code is that for the exercise of the right of retention in Article 377, the obligations of both parties must be due, while Article 533 of the Commercial Code is unconditional and appears to apply to any sales contract, regardless of whether the goods or the price are deferred. Dr. Shahidi believes the difference between these two articles lies in Article 421 of the Commercial Code, and he interprets that if a due date for payment of the price is set for the bankrupt buyer, the presence of a due date does not prevent the seller from refusing to deliver the goods to the bankruptcy trustee, as with the occurrence of bankruptcy, there is no longer any due date for the bankrupt debtor's debt for the price (Shahidi, 2006). The connection of this issue with the article is that even though the bankrupt debtor's debts become due due to bankruptcy, one of the foundations of this rule could be the anticipation of non-performance of the obligation in the future due to bankruptcy, and consequently, a significant reduction in the debtor's

ability to perform the contract, based on logical and reasonable justifications.

6.5. *Diminishment of the Debtor's Financial Credit*

According to the theory of potential breach, one of the instances in which the right to suspend a contract is granted to the creditor is a substantial reduction in the debtor's financial credit to perform the contract. In this case, if the other party provides adequate guarantees for the performance of their obligations, the creditor is obliged to continue fulfilling their own obligations. Articles 237 and 238 of the Commercial Code provide clear examples in Iranian law of the importance of the debtor's financial credit and the possibility of non-performance of obligations in the future. According to Article 237 of the Commercial Code, a protest against a bill of exchange by the drawee is a clear indication of a defect in the credit of the issuer and endorsers of the bill. For this reason, the law grants the holder of the bill the right to lose confidence in the credit of the issuer and endorsers and be concerned about the future collection of their amount. Based on this, they may request these parties to provide a guarantee for the payment of the bill at maturity or to pay the bill along with the expenses of the protest and collection costs immediately. In Article 238, the legislator questions the credit of the drawee who has accepted the bills of exchange but failed to pay the first one at maturity, and a protest has been made against him. This gives the holders of trade documents, which the same merchant has issued but whose maturity date has not yet arrived, the right to request a guarantee from the party whose performance of the obligation is in doubt, based on the concern that the debtor will not fulfill the obligation in the future (Kazemi & Rabiei, 2012).

6.6. *Right of Retention*

Suspension of contractual obligations due to the anticipation of breach is one of the remedies for potential breach. This theory is similar to the right of retention in Iranian law, which is explicitly referred to in Articles 377 and 1085 of the Civil Code, and Articles 371 and 390 of the Commercial Code. An important point in this regard is that for the application of the right of retention, conditions such as the necessity of simultaneous performance of the obligations must be met. However, the legal remedy of suspension in the theory of potential breach can be applied in the case of deferred contracts, which distinguishes it from the right of retention. Regardless of this difference, there is not much of a fundamental difference between the right of retention and the right of suspension, and based on the views of legal scholars on the reasons and foundations for the acceptance of the right of retention (Imami, 2008; Kazemi, 2005; Kazemi & Rabiei, 2012; Shahidi, 2000, 2006, 2007b), which emphasize the interdependence of the contractual exchanges in all reciprocal contracts, this reasoning can also be used to support the application of the right of suspension in Iranian law.

In fact, each party to a contract is obligated to perform their duties to the same extent that they have imposed obligations on the other party. If one of the parties refuses to perform the obligations they have accepted due to a reason contradicting the contract's conditions, or if, due to the circumstances, there is a reasonable and strong suspicion that they will not fulfill their obligation in the future, the obligation of the other party to perform their contractual duties becomes automatically nullified.

7. Conclusion

The theory of potential breach, despite its long-standing history in common law systems, the United Nations Convention on Contracts for the International Sale of Goods, and other international regulations and the laws of some foreign countries, remains unfamiliar in certain civil law countries, particularly in Iran. There is no explicit provision regarding potential breach and its enforceable remedies in Iranian law, especially since contract termination is considered an exceptional and contrary remedy for the breach of a contractual obligation.

Nevertheless, signs of this concept can be found in several provisions of the Civil Code and the Commercial Code of Iran, including Article 380 of the Civil Code and Articles 237, 238, 530, and 533 of the Commercial Code. It seems that the basis for all these provisions is the mutual interdependence of the exchanges in the contract. In fact, the primary and real motivation for each party in forming a contract is to obtain the other's commitment, and if one party loses the ability to perform their obligation or it becomes apparent that they will not adhere to their commitment, it is reasonable that the other party's obligation should be annulled as well,

regardless of whether the failure to perform occurs at the time of performance or earlier. It is even more reasonable if the failure occurs earlier, and the creditor is satisfied with terminating the contract, respecting the injured party's decision and protecting them from the waste of time and resources while upholding the principle of efficiency in commercial matters. This reasoning supports the theory of potential breach.

For the theory of potential breach to be accepted, it is necessary to ensure that the creditor's benefit and the economic interests of both parties in performing the contract must not always be considered as the ultimate goal.

Based on this, the theory can be justified through an implicit condition that is recognized in Islamic jurisprudence and Iranian law. Referencing the principle of contract binding cannot prevent the implementation of this theory; the parties intend to remain committed to their contract under normal circumstances, not in every situation. In fact, the obligation of the parties to adhere to the contract and fulfill their commitments has a limit, and this boundary is sometimes defined explicitly or implicitly within the terms of the contract. Sometimes, the parties do not explicitly agree on the possibility of contract termination, but the very nature of the contract's implementation implies that the contract should not be imposed on one of the parties.

Given that, at present, Iranian laws do not explicitly include the theory of potential breach and its enforcement remedies, and assuming that no implicit condition has been made within the contract regarding this matter, it can be justified based on a violation of the implicit condition. This implies that there is an implicit condition that the parties to the contract, even before the performance date, consider themselves obligated to fulfill their commitment and prepare the necessary conditions for it, and neither party should act in a way that harms the other. Therefore, if one party announces before the performance date that they will not fulfill their commitment, or if they fail to prepare the necessary conditions for fulfilling the obligation, effectively removing the possibility of performance, the violation of the implicit condition will occur, and the other party will acquire the right to terminate the contract based on the breach of this condition.

It is important to note that the theory of potential breach is not a special rule but rather one of the specific instances of actual breach that only arises before the performance date. The inclusion of this theory in international conventions and national laws, coupled with strengthening the preventive aspect of this theory, is based on protecting the reasonable expectations of the creditor, preventing resource wastage, accelerating and facilitating practical matters, reducing damages, and emphasizing the principle of interdependence and mutual exchange, the principle of no harm, and the implicit intent of the parties, which is an established norm in contracts. Therefore, if actual breach allows the creditor to use various remedies to enforce their rights, the same remedies should be available for potential breach, as both types of breach have the same nature and thus must have the same effect and function.

Although the necessity and importance of accepting the right to termination based on the principles in Islamic jurisprudence, such as the principle of public interest and the principle of no harm, is evident, and applying the remedies of potential breach, including suspension and termination, due to the anticipation of breach is in line with moral conscience, fairness, and the practice of reasonable people, it is necessary for the legislator to explicitly address this issue in future legislation, drawing on international frameworks such as the Vienna Convention as a basis for future legislation. To resolve any conflicts in this regard, amending existing laws, passing appropriate laws, and joining international conventions, especially the United Nations Convention on Contracts for the International Sale of Goods, are essential for engaging in global trade. This will enhance Iran's international standing and promote the country's economic and commercial growth, aligning domestic laws with commercial necessities.

Authors' Contributions

Authors contributed equally to this article.

Declaration

In order to correct and improve the academic writing of our paper, we have used the language model ChatGPT.

Transparency Statement

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