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A Comparative Study of Anticipatory Breach and Unsicherheitseinrede from the Perspective of Chinese Law

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Abstract

Unlike most common law and civil law countries, the Civil Code of the People's Republic of China (abbreviated as the Chinese Civil Code) has legislated both anticipatory breach and unsicherheitseinrede (which can be expressed as unsafe right of defence in English) simultaneously. This article, against the background of China's legal system, discusses the relationship between the two legal systems of anticipatory breach and unsafe right of defence. First, the article employs comparative legal research methods to elaborate on the historical development and conceptual characteristics of anticipatory breach and unsafe right of defence. After comparative study, it was found that there are three main different understandings regarding the relationship between the legal systems of Anticipatory Breach and unsafe right of defence: The first is that Anticipatory Breach can completely replace the function of unsafe right of defence, as seen in common law countries such as the UK and the US, where only Anticipatory Breach is stipulated in the law; The second is that unsafe right of defence can completely replace the function of Anticipatory Breach, as seen in civil law countries such as Germany and France, where only unsafe right of defence is stipulated in the law; The third is that both Anticipatory Breach and unsafe right of defence are stipulated in the law simultaneously, as seen in CISG, PICC, DCFR, and China. Secondly, the article further discusses the three aforementioned understandings of the relationship between Anticipatory Breach and unsafe right of defence in a more systematic manner within the perspective of Chinese law, using the research method of normative jurisprudence. After research, it was found that Chinese scholars have different understandings of the relationship between anticipatory breach and unsafe right of defence in theoretical studies. Compared to legislating either anticipatory breach or unsafe right of defence individually, it is more in line with China's actual judicial practice to stipulate both systems simultaneously. Finally, through the method of historical analysis, the article demonstrates the particularly inevitable reasons for China's simultaneous stipulation of anticipatory breach and unsafe right of defence during the evolution of Chinese law. From the perspective of Chinese law, through the analysis of anticipatory breach and unsafe right of defence by Chinese legal scholars, it provides a new line of thinking for legal scholars and practitioners in other countries to gain a deeper understanding of Chinese law.

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Anticipatory Breach; Unsafe Right of Defence; Suspension of Performance; Contract Termination; Chinese Civil Code; Comparative Law.

Introduction

In common law jurisdictions, anticipatory breach has been established through specific case law. The landmark 1853 British case *Hochster v De La Tour* demonstrated how anticipatory breach serves to mitigate breach damages. [LawTeacher, 2013] By allowing creditors to assert claims against debtors before performance deadlines, this mechanism not only reduces creditors' losses from contractual breaches but also decreases debtors' liability for damages. Subsequent developments in British jurisprudence primarily categorised anticipatory breach into two types: express breach and implied breach. In American judicial practice, while maintaining these two established categories, a third type emerged: anticipatory breach due to lack of adequate performance assurance within a reasonable period, as defined by the Uniform Commercial Code (UCC) §2-609 (Right to Adequate performance assurance). [§2-609, n.d.]

The concept of "unsafe right of defence" originates from the German legal tradition. Specifically, this legal mechanism is codified in Article 321[§321 BGB, n.d.] of the German Civil Code (*Bürgerliches Gesetzbuch*, BGB). The applicable conditions for this defence mechanism are: 1. The existence of a bilateral contract with sequential performance obligations; 2. The party with subsequent performance obligations faces a significant risk of complete performance failure (e.g. imminent bankruptcy or severe financial deterioration) between contract formation and termination; 3. The party with prior performance obligations may request the refusal of performance from the party with subsequent obligations when no security is provided. Upon invoking the unsafe right of defence, the prior party to performance may require the subsequent party to furnish a guarantee of full performance within a specified period. Failure to provide such a guarantee within the deadline entitles the prior performance party to terminate the contract. Notably, this contractual termination right did not exist prior to Germany's New Debt Law reforms. For cases requiring contract termination due to performance obstacles, Article 323 of the BGB provides an applicable reference.

The 'unsafe right of defence' is primarily established under Article 1613[Article 1613 Code civil, n.d.] of the Code civil, where a seller's failure to deliver constitutes a suspension of debt performance. Article 71(1)(a) of the United Nations Convention on Contracts for the International Sale of Goods (CISG) corresponds to the 'unsafe right of defense' in the civil law system, while Articles 71(1)(b) and 72 align with the 'Anticipatory Breach' doctrine in the common law system. The provisions of Principles of International Commercial Contracts (PICC) 7.3.3[Article 7.3.3 PICC, n.d.] (Anticipatory Non-Performance) correspond to Anticipatory Breach under common law systems, while 7.3.4[Article 7.3.4 PICC, n.d.] (Adequate Assurance of Due Performance) aligns with the unsafe right of defense in civil law systems and the U.S. Uniform Commercial Code (UCC)'s deficiency of performance Anticipatory Breach. Finally, focusing on the Draft Common Frame of Reference (DCFR), its III.3:504 [III.–3:504 DCFR, n.d.] (anticipated non-performance) corresponds to the two traditional types of Anticipatory Breach in common law, whereas III.3:505[III.–3:505 DCFR, n.d.] (inadequate assurance of performance) corresponds to the unsafe right of defense in civil law systems and the U.S. UCC's deficiency of performance Anticipatory Breach.

From the above analysis, it is not difficult to see that China's remedies for obstacles to the

performance of anticipatory obligations are basically consistent with CISG, PICC, and DCFR, adopting a hybrid model of two systems. Anticipatory Breach and the unsafe right of defense coexist, due to historical reasons and practical considerations. In fact, the formulation of the Chinese Civil Code has also failed to escape the historical limitations of legislation, remaining superficial in the adoption of Western law. Even Article 528 of the Chinese Civil Code attempts to connect the two systems to resolve the contractual deadlock that arises when the defendant fails to provide security on time after exercising the unsafe right of defense. [Li Jianxing, 2021] Some Chinese scholars believe that the legislative purpose of Article 528 of the Chinese Civil Code is to balance the interests of all parties in the contract, avoiding unresolved contractual debts. It seems to effectively embed Anticipatory Breach within the unsafe right of defense, but the relationship between the two systems still leaves room for further discussion.

Overall, the current debates regarding the relationship between the two mainly fall into the following three categories: First, there is an issue of institutional overlap between the unsafe right of defense and anticipatory breach, and the unsafe right of defense should be integrated into anticipatory breach; Second, similarly, there is an overlap between the unsafe right of defense and anticipatory breach, but anticipatory breach should be integrated into the unsafe right of defense; Third, both the unsafe right of defense and anticipatory breach have irreplaceable functions, and the issue of institutional overlap should be resolved through institutional coordination in a coexisting manner. Although the Chinese Civil Code adopts the third perspective, it is still necessary to conduct a comparative legal analysis of the above three perspectives from the perspective of Chinese law. This is because comparative law will provide a more accurate understanding of the concepts, characteristics, and functions of both anticipatory breach and the unsafe right of defense.

Anticipatory Breach Completely Replacing Unsafe Right of Defense

In bilateral contracts with a sequential performance order, if the party obligated to perform later engages in acts of asset transfer or capital withdrawal under Article 527 of the Chinese Civil Code to evade debt obligations after the contract takes effect, the party with the primary performance obligation may lawfully suspend performance upon presenting sufficient evidence. This legitimate defense mechanism corresponds to the "unsafe right of defense" in civil law systems. Typically, the fulfillment of contractual purposes requires all parties to perform their obligations as stipulated. While parties generally assume mutual compliance with contractual terms, actual performance may deviate from such expectations.

For example, Party A and Party B entered into a sales contract, which stipulated that Party A would deliver the goods to Party B first, and Party B would pay the price to Party A after receiving the goods. If Party A delivered the goods and Party B subsequently paid the price to Party A, the contract would be fully performed, and its purpose would be achieved. However, if Party A delivered the goods to Party B but Party B did not pay the price to Party A, it would clearly constitute a breach of contract by Party B. Another possible scenario is that Party A discovered during the preparation of delivering the goods to Party B that Party B had engaged in asset transfer and capital withdrawal, which might render Party B unable to pay the price to Party A. In such a case, according to the provisions of China law, Party A may suspend the performance of the contract. The point worth discussing here is under what circumstances the actions of the party performing the debt later would be deemed as evading debt through asset transfer and capital withdrawal. In other words, what are the standards for the amount of assets transferred and capital withdrawn? Existing legal provisions do not explicitly address this issue.

It can be imagined that the determination of such standards will likely lead to disputes in judicial practice.

Correspondingly, the behavior of a party obligated to perform a debt subsequently in a contract constitutes a subjective tendency to fail to perform the debt as agreed, as well as an objective risk of non-performance. Although the party performing the debt subsequently does not explicitly express its refusal to perform, such behavior still constitutes an implied anticipatory breach. In such cases, it remains unclear whether to apply the unsafe right of defense or anticipatory breach as a remedy. Some scholars in China have proposed that anticipatory breach is more flexible than the unsafe right of defense, as it is not limited to bilateral contracts with a sequential performance order and has a broader scope of application. [Cui Jianyuan, 2023] Therefore, it is suggested that anticipatory breach could replace the unsafe right of defense in Chinese legislation. The rationale for proposing that anticipatory breach can fully replace the unsafe right of defense can be summarized into three key points: First, the coexistence of both systems would lead to institutional confusion, making it essential to adopt only one. Second, while the unsafe right of defense can fulfill the functions of the implied anticipatory breach, its scope of application and applicable parties are limited. Third, the implied anticipatory breach has broader applicability than the unsafe right of defense and provides more comprehensive remedies for contractual parties. Scholars who argue that anticipatory breach can fully replace the unsafe right of defense primarily rely on the aforementioned three points in their arguments.

The rationale for Anticipatory Breach to fully replace the unsafe right of defense requires further analysis. Scholars argue that Anticipatory Breach better protects contractual parties' interests and stabilizes market transactions compared to the unsafe right of defense. [Wang Liming, 2016] The three primary types of Anticipatory Breach established through Anglo-American judicial precedents primarily focus on the specific actions of the party obligated to perform the contract. Firstly, Express Anticipatory Breach refers to a party's explicit declaration of refusal to fulfill contractual obligations. For instance, after a contract is formed and becomes legally binding, its rights and obligations are legally established. This means all parties involved are bound by the contract's terms. Typically, contracts are based on mutual trust between parties, which implies that any party's declaration—especially when unfavorable to the other—would naturally be trusted. In such cases, when a debtor explicitly states their refusal to perform contractual obligations, creditors naturally assume this declaration is valid. In such circumstances, even before the debt becomes due, the creditor's contractual rights are already rendered unenforceable. Thus, for this explicit anticipatory breach, it constitutes a fundamental breach. As for the legal consequences of this explicit anticipatory breach on the contract—whether to adopt a legal approach of first suspending the contract followed by a termination of contract, or to directly terminate the contract—there is essentially no significant difference in substance.

Regarding implied anticipatory breach, it is generally considered a contractual practice where a party expresses refusal to perform contractual obligations through their actions (or inaction). Typically, the debtor indirectly signals to the creditor through their conduct before or during obligation fulfillment. Unlike explicit anticipatory breach, implied anticipatory breach involves a presumption of intent. Therefore, both legal theory and judicial practice explicitly require sufficient evidence to prove the debtor's deliberate or conscious intent to indirectly indicate non-performance. This raises a critical question: Since implied anticipatory breach involves such presumptions, specific judicial standards must be established. For instance, what specific actions by the debtor can be conclusively deemed as indirect refusal to fulfill contractual obligations? What constitutes an objective approach to understanding the debtor's conduct? In practice, whether based on the general public's common sense or the more precise standard of rational economic agents, the criteria for judgment often remain

ambiguous. Article 563 [Article 563 Chinese Civil Code, n.d.] of the Chinese Civil Code defines both explicit and implied anticipatory breach, while Article 578 [Article 578 Chinese Civil Code, n.d.] specifies their legal consequences.

The anticipatory breach doctrine, established in U.S. commercial contracts, addresses situations where a party fails to provide full performance guarantees within a reasonable period. Unlike express or implied anticipatory breach, this legal mechanism does not directly terminate the contract but requires a breach of contract liability process. Specifically, when a debtor cannot ensure full fulfillment of contractual obligations within a reasonable timeframe, the creditor may reasonably doubt the security of their claims due to the lack of performance guarantees. This creates a risk of unfulfilled obligations for the creditor, regardless of the debtor's intent. In commercial transactions, opportunities and risks coexist, yet information asymmetry often leads to legal challenges. This explains why U.S. law innovatively grants both parties the right to expect full performance guarantees from each other. This also means that when one party is unable to fully perform the guarantee, the other party's right to fully perform the guarantee will be impaired. To remedy this right, the termination of the contract is permitted.

Next, it should be particularly noted that the unsafe right of defense has specific applicable scopes, conditions, and legal effects. First, the unsafe right of defense only applies to bilateral contracts with a sequence of performance. Second, according to the provisions [Article 527 Chinese Civil Code, n.d.] of China law, the unsafe right of defense requires the existence of four factual circumstances as stipulated in Article 527 of the Chinese Civil Code. Finally, the unsafe right of defense only occurs when the party [Article 528 Chinese Civil Code, n.d.] with the prior performance obligation has a statutory reason for breach of contract, and does not necessarily result in the termination of the contract. Of course, Article 528 of the Chinese Civil Code stipulates that after the contract liability for breach of contract, if the party with the subsequent performance obligation fails to provide security within the time limit, such omission shall be deemed as non-performance of the obligation, thereby resulting in the termination of the contract. There is no doubt that the types of contracts applicable to anticipatory breach cover the specific types of contracts for which the unsafe right of defense applies.

From the provisions of CISG, PICC, and DCFR, it is clear that the legal effects of anticipatory breach include both contract termination and the liability for breach of contract under the unsafe right of defense. The key question is whether the applicable conditions of anticipatory breach can fully encompass those of the unsafe right of defense. Regarding the express and implied anticipatory breach stipulated in the Chinese Civil Code, neither can fully cover the institutional function of the unsafe right of defense. As for the anticipatory breach created by the UCC, which lacks a guarantee of full performance within a reasonable period, it clearly can encompass the institutional function of the unsafe right of defense. However, the Chinese Civil Code does not explicitly provide legal provisions for this type of anticipatory breach relief. Therefore, for China, anticipatory breach cannot completely replace the unsafe right of defense.

The Complete Substitution of Unsafe Right of Defense for Anticipatory Breach

Article 525 of the Chinese Civil [Article 525 Chinese Civil Code, n.d.] Code stipulates the Defense right of simultaneous performance. For example, C and D entered into a goods sales contract, which stipulates that C shall deliver the goods to D while D shall pay the price to C. Such sales contracts have existed since the Roman law period and still exist in many such contracts today. Under Chinese law, if

C demands that D pay the price to C first, D may refuse. Similarly, if D demands that C deliver the goods to D first, C may also refuse. This is because Chinese law stipulates the Defense right of simultaneous performance. The performance of contractual obligations by C and D is simultaneous, with no sequence of priority. Under this system, the parties to the contract may either perform their respective obligations simultaneously or simultaneously fail to perform their respective obligations. This means that the performance deadlines of C and D are the same and are equally protected by law.

Article 526 of the Chinese Civil [Article 526 Chinese Civil Code, n.d.] Code stipulates the first-performance (or subsequent-performance) defense system. For example, E and F entered into a goods sales contract. The contract stipulated that E would first deliver the goods to F, and E would pay F the purchase price only after receiving and inspecting the goods without any issues. If E failed to deliver the goods to F or if the goods delivered to B had defects, E could refuse to pay F in such a case. The reason lies in the fact that China law provides for the First Performance Defense in contracts. Under this system, only after the party required to perform the contractual obligation first has fully performed the contract in accordance with its terms can the party required to perform the obligation later be demanded to fulfill it. This essentially involves the protection of the time-interest of the party required to perform the contractual obligation later.

Article 527 of the Chinese Civil Code stipulates the system of unsafe right of defense. [Article 527 Chinese Civil Code, n.d.] For example, G and H entered into a goods sales contract. The contract stipulated that G would first deliver the goods to H, and H would pay G the purchase price after inspecting and confirming the goods were in good condition. Normally, according to the contract, G would fulfill its contractual obligations first, and H could fulfill its obligations later. However, if G, while preparing to fulfill or already fulfilling its contractual obligations, discovered that although H could wait until G delivered the goods to pay, H was already unable to pay, this situation could lead to G fulfilling its obligations while H defaulted due to lack of payment capacity. In such cases, China law provides for the system of unsafe right of defense. By establishing this system, it protects the party that first fulfills its contractual obligations while also preventing contract breaches. Under this system, G can refuse to deliver the goods to H on the grounds that H lacks the ability to pay, unless H can provide a guarantee to demonstrate its payment capacity.

Whether a contractual party explicitly states non-performance or demonstrates it through specific actions, anticipatory breach can be addressed within the existing framework of civil law defenses. In contrast, the anticipatory breach doctrine in common law systems is unnecessary, as the "unsafe right of defense" can fully replace its institutional function [Li Yongjun, 2005]. All three defenses temporarily suspend contractual obligations, and the refusal to perform becomes a legal justification through these defenses. Originally, any party's failure to fully fulfill contractual obligations would constitute a breach. However, the exercise of defenses transforms such non-performance into a legally permissible act, temporarily relieving the original performance from liability for breach. The legal consequences of this defense primarily aim to protect the performance interests of contractual parties during contract execution.

Unlike the legal purpose of the "unsafe right of defense" system, anticipatory breach—whether occurring during suspension or termination of a contract—primarily aims to protect the contractual parties' temporal interests during contract performance. If the unsafe right of defense could fully replace anticipatory breach, then logically, it might simultaneously safeguard both performance interests and temporal interests of contract parties. Alternatively, the temporal interests involved in contract performance might not require protection through the unsafe right of defense. But if such protection isn't necessary, what legal mechanism should be established? Given the current lack of clear legal

frameworks specifically protecting temporal interests during contract performance, should we consider designing a new legislative system to achieve this protection?

Under Articles 525 and 526 of the Chinese Civil Code, defenses are limited to the legal effect of Liability for Breach of Contract. Regarding the Defense Right of Simultaneous Performance, if both parties assert this defense against each other's contractual obligations, while the performance interests of both sides may be protected, the contract could become deadlocked. Prolonged non-performance inevitably leads to loss of contractual term benefits, which contradicts the original purpose of contract formation. As for the First Fulfill the Defense Right, if the party with delayed performance exercises this right due to the defaulting party's failure to perform, although the delayed party's performance interests may be secured, the contract could still become deadlocked due to defenses, resulting in inevitable loss of term benefits. Concerning the Unsafe Defense Right, Article 528 of the Chinese Civil Code stipulates that from a legal system perspective, the issue of contract deadlock does not arise. From the above discussion, it is not difficult to see that defenses can effectively protect the performance interests of the parties to a contract, but the time interests of the parties involved in the performance of the contract cannot be protected simultaneously. For example, in the sales contracts between C and D, E and F, and G and H mentioned in the previous article, although Chinese law provides different defense systems for the issues faced by these three types of contracts, when the conditions for a defense are met and the parties raise a defense, the legal effect of suspension or termination of the contractual obligations will occur as stipulated by law. However, it must be clarified that a defense is usually a temporary and provisional choice. The defense itself merely provides a legitimate reason for the party who should perform the contractual obligations to temporarily refrain from doing so under the law.

Some scholars might argue that neither party in a contract has substantially harmed the debtor's performance period interests through defense mechanisms. However, this interpretation is problematic. Contracts are typically established with clear objectives, often arising from urgent needs in private or commercial transactions. If defense causes the rights and obligations structure between parties to remain suspended while existing, the performance period interests inevitably suffer losses for both sides. Therefore, based on the above analysis, it is difficult for the "unsafe right of defense" to fully replace anticipatory breach. This would only be possible if the performance period interests of the contracting parties during contract execution do not require protection through the unsafe right of defense.

In fact, both the unsafe right of defense and the other two defense systems face a common problem: after the defense realizes the legal effect of contract Liability for Breach of Contract, how can the contract avoid forming a deadlock? Judging from the many China legislative provisions mentioned earlier, there are two models to avoid the formation of such a deadlock: "direct termination" and "indirect grafting"[Ye Jinqiang, 2020]. The term "direct termination" refers to the legal effect where, after a creditor party initiates an "unsafe right of defense" to claim liability for breach of contract, the non-performing party fails to provide required performance guarantees [Article 69 Contract Law of China, n.d.], entitling the performing party to terminate the contract. This is specifically stipulated in Article 69 of the original Contract Law of the People's Republic of China. "Indirect grafting" occurs when, following the emergence of liability for breach of contract due to an unsafe right of defense, the non-performing party's failure to provide performance guarantees is deemed an implied anticipatory breach, thereby invoking Article 563 of the Chinese Civil Code, which grants the performing party the right to terminate the contract. However, both models apply exclusively to cases involving unsafe right of defense. When it comes to the two defense mechanisms—simultaneous performance defense and first fulfillment defense—can contractual deadlock truly be resolved within the existing framework of

defenses? This raises serious doubts. If the issue were to be addressed through the principle of good faith, as Germany did before amending its new debt law, it would still give rise to numerous new challenges in judicial practice.

Functional Connection between Unsafe Right of Defense and Anticipatory Breach

From the two perspectives mentioned above—the complete replacement of anticipatory breach by unsafe right of defense and the complete replacement of unsafe right of defense by anticipatory breach—combined with the specific civil legislation of China, neither can fully meet the specific legislative needs of China's judicial practice. Some scholars argue that integrating unsafe right of defense and anticipatory breach into legislative provisions could provide more comprehensive legal remedies for contract termination, [Zhang Pinghua, 2023] contractual defenses, and liability for breach of contract. Anticipatory breach originated in common law countries, while unsafe right of defense originated in civil law countries [Han Xinlei, 2022]. The simultaneous appearance of these two systems in the Chinese Civil Code is related to China's adoption of both functionalism and normativism in its legislative process. Those familiar with the legal development of China will understand that since the early 20th century, China's legal system has undergone multiple transformations, including initial transplants of legal systems from Japan, France, Switzerland, and Germany. At the same time, there was a transplantation of many legal systems from the Soviet legal system later on. Then in the 1980s, the legal systems of the civil law system represented by Germany were transplanted. Meanwhile, the legal systems of the common law system represented by the United States were also transplanted. It is precisely for this historical reason that China's civil legislation, especially the contract law, has blended many similar systems from both the civil law and common law systems.

Before the formulation and implementation of the Chinese Civil Code, China's civil legislation was mainly composed of standalone laws such as the Contract Law of the People's Republic of China, the Property Law of the People's Republic of China, the General Principles of the Civil Law of the People's Republic of China, and the Tort Liability Law of the People's Republic of China. However, compared to a code, these individual laws lacked a systematic structure, and their coordination function was insufficient. Therefore, China also formulated and promulgated the Chinese Civil Code. The original purpose of this code was to resolve conflicts between legal provisions and to maximize the social regulatory role of legal provisions through its systematic approach. It must be noted, however, that compared to the German Civil Code and the French Civil Code, the compilation of China's code was more urgent. During the compilation process, it was simultaneously influenced by the transplantation of legal systems from both the civil law tradition and the common law tradition, resulting in some legal provisions being more formal than substantive. The so-called emphasis on formal content at the expense of substantive content refers to the effective integration of legal provisions from different legal systems that appear on the surface of the code. However, in specific judicial practice, it is found that such integration fails to fulfill the intended legislative function and may even lead to conflicts in the application of legal provisions. Returning to the topic discussed in this article, the issues faced by anticipatory breach and unsafe right of defense in China law are also problems that many provisions of the Chinese Civil Code have already faced or will face.

Article 528 of the Chinese Civil Code clearly reflects the legislative positioning of the relationship between the two systems: unsafe right of defense and anticipatory breach. The two are not substitutable but complementary. Some scholars argue that in the Chinese Civil Code, anticipatory breach is centered

on the debtor's termination of the contract, while unsafe right of defense is [Chen Yunxi, 2023] centered on the creditor's termination of the contract. Of course, it is noteworthy that although Article 528 of the Chinese Civil Code has legislatively created a new type of anticipatory breach distinct from those in common law countries, the existing problems remain evident. The legislative expression of "deemed to indicate by one's own conduct that the principal obligation is not to be performed" may pose difficulties in the specific judicial practice of China. Anticipatory breach is generally considered to involve the intentional act of the contractual debtor, and its legal nature is typically recognized as fundamental breach. However, unsafe right of defense is quite different from this. The doctrine of 'unrestored performance capacity' as a prerequisite for implied anticipatory breach differs fundamentally from conventional interpretations of such breaches. Consequently, this legislative framework fails to achieve equitable balance between contracting parties. Regarding the legal articulation between anticipatory breach and the doctrine of unsafe defense, the current model under China's Civil Code remains imperfect and requires further refinement.

There are clear differences in the scope of application and legal effects between the unsafe right of defense and anticipatory breach, and such differences cannot be completely eliminated. Following this logic, the coexistence of the two systems—unsafe right of defense and anticipatory breach—seems to be a better choice. Some scholars argue that both anticipatory breach and unsafe right of defense target potential future breaches of contract. The choice between applying anticipatory breach or unsafe right of defense should be based on a judgment of the likelihood of future breach. [Li Jianxing, 2017] Different possibilities should be addressed with different systems according to actual circumstances. However, after their coexistence, effectively and reasonably arranging these two systems within a common civil law framework is not an easy task. Therefore, the "indirect grafting" institutional arrangement proposed in China has already emerged as a problem. Some scholars contend that because the certainty of a party's expectation of non-performance varies [Chen Yunxi, 2017], it cannot be simply attributed to either unsafe right of defense or anticipatory breach. The scope of application for "unsafe right of defense" and "Anticipatory Breach" should be further clarified based on their respective legal contexts. When there is clear evidence or sufficient grounds to reasonably infer that a party would refuse performance prior to the contract's expiration, the "Anticipatory Breach" doctrine applies. Conversely, if the refusal is highly probable but not conclusively established, the "unsafe right of defense" doctrine should prevail. Furthermore, it is crucial to harmonize the legal consequences of applying these two doctrines. While uniformity is not required, the legal effects must be consistent under both scenarios: the "unsafe right of defense" should yield identical outcomes when applied, and the "Anticipatory Breach" should produce equivalent results when invoked. In practice, the difficulty in applying these doctrines stems largely from their differing legal effects, which often prevent a single system from achieving complete uniformity across different cases.

In fact, the eclectic legislative model appears to simply transplant the advantages and benefits of different legislative backgrounds and systems. However, it should not be overlooked that compatibility issues arising during the process of legal transplantation will also follow. From the above analysis, the coexistence of these two systems in China's legislation is undoubtedly beneficial in terms of legislative purpose. Yet, in terms of specific legislative design, there are problems. This is because the differences between the two systems are evident, whether for the unsafe right of defense or for anticipatory breach. In the practice of China's legislation, although there is an attempt to organically integrate the two systems through legislative unification, hoping to leverage the functions of both systems while avoiding their shortcomings, reality shows that this is difficult to achieve completely [Bi Kejun, 2017]. Therefore, there are still many issues in the current China's legislation regarding the integration of these

two systems, and these problems have already emerged in China's specific judicial practice. Some scholars believe that urgent legal application issues can be addressed through supporting judicial interpretations. In fact, there are not many problems in judicial practice when applying the unsafe right of defense in civil law countries and anticipatory breach in common law countries. On the contrary, China, which simultaneously stipulates the unsafe right of defense and anticipatory breach in its legislation, has encountered numerous problems in specific judicial practice. For contracts, especially commercial transaction contracts, the purpose of establishing them is consistent. This can be demonstrated by the legislative practices of CISG, PICC, and DCFR, which are cross-border. Therefore, the main issue facing Chinese law now lies in the insufficient recognition of the essential characteristics of these two systems during the legislative process. It is precisely due to the inadequate understanding of the historical development and structural functions of anticipatory breach and unsafe right of defense that these two systems fail to effectively connect when applied concurrently, and even conflict with each other. This should be avoided in future legislation and amendments.

Conclusion

The legal practice in China shows that adopting both the unsafe right of defense and anticipatory breach in legislation is merely an ideal model. If, like the Chinese Civil Code, the functions of these two systems cannot be effectively integrated, it will lead to legal application issues in judicial practice. Essentially, although the unsafe right of defense and anticipatory breach have distinct differences, their legal objectives are similar. Therefore, a single legislative model, such as the unsafe right of defense in some civil law countries or the anticipatory breach in some common law countries, may better align with the needs of social life. However, China, due to its unique legal development and historical evolution, has attempted to integrate the functions of the two different systems—anticipatory breach and unsafe right of defense—through the method of "indirect grafting." Despite the numerous issues still arising in China's current judicial practice, many Chinese scholars have also conducted normative analyses from the perspectives of legal doctrine and legal economics, aiming to resolve the problems encountered in China's judicial practice through the reconstruction of legal theories. This attempt not only has practical significance in China, but also serves as a reference for other countries in future legislative design.

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Сравнительное исследование предварительного нарушения и права на защиту от небезопасных обстоятельств с точки зрения китайского права

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Аннотация

В отличие от большинства стран с общим и гражданским правом, Гражданский кодекс Китайской Народной Республики (сокращенно — Гражданский кодекс Китая) одновременно регулирует как предварительное нарушение, так и право на защиту от небезопасных

обстоятельств (которое на английском языке может быть выражено как «право на защиту от небезопасных обстоятельств»). В данной статье, на фоне правовой системы Китая, рассматривается взаимосвязь между двумя правовыми системами — предварительным нарушением и правом на защиту от небезопасных обстоятельств. Во-первых, в статье используются методы сравнительно-правового исследования для подробного изучения исторического развития и концептуальных характеристик предварительного нарушения и права на защиту от небезопасных обстоятельств. В результате сравнительного исследования было установлено, что существуют три основных различных понимания взаимосвязи между правовыми системами, касающимися предварительного нарушения договора и небезопасного права на защиту: первое — предварительное нарушение договора может полностью заменить функцию небезопасного права на защиту, как это наблюдается в странах общего права, таких как Великобритания и США, где законом предусмотрено только нарушение договора; второе — небезопасное право на защиту может полностью заменить функцию предварительного нарушения договора, как это наблюдается в странах гражданского права, таких как Германия и Франция, где законом предусмотрено только небезопасное право на защиту; третье — как предварительное нарушение договора, так и небезопасное право на защиту одновременно предусмотрены законом, как это наблюдается в КМКПТ, PICC, DCFR и в Китае. Во-вторых, в статье более систематически рассматриваются три вышеупомянутых понимания взаимосвязи между предварительным нарушением договора и небезопасным правом на защиту в контексте китайского права с использованием метода нормативной юриспруденции. В результате исследования было установлено, что китайские ученые по-разному понимают взаимосвязь между нарушением договора в ожидании исполнения и правом на небезопасную защиту в теоретических исследованиях. По сравнению с законодательным регулированием либо нарушения договора в ожидании исполнения, либо права на небезопасную защиту по отдельности, одновременное установление обеих систем в большей степени соответствует реальной судебной практике Китая. Наконец, с помощью метода исторического анализа в статье показаны конкретные неизбежные причины одновременного установления в Китае нарушений договора в ожидании исполнения и права на небезопасную защиту в процессе эволюции китайского права. С точки зрения китайского права, анализ нарушений договора в ожидании исполнения и права на небезопасную защиту китайскими правоведомы предлагает новое направление мысли для юристов и практиков в других странах, позволяющее глубже понять китайское право.

Для цитирования в научных исследованиях

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Ключевые слова

Нарушение договора в ожидании исполнения, Право на небезопасную защиту, Приостановление исполнения, Расторжение договора, Гражданский кодекс Китая, сравнительное правоведение, обязательственное право.

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