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# Juridical Consequences of Anticipatory Breach as a Form of Breach of o Contract

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## Abstract

Default is a condition in which one of the parties does not carry out or fulfill obligations to the other party as specified in an agreement. In addition, there are several forms of default: not doing something at all, doing something but it is too late, doing something only partially, and doing something prohibited. The concept, the forms, and the consequences of default are often encountered in various literature and legal experts' opinions, unlike the concept of Anticipatory Breach, which is a form of breach of contract/default that exists universally in contract law. In Indonesia, no positive legal provisions accommodate the Anticipatory Breach concept in the form of default. Its nonexistence becomes interesting from the point of view of contract law, where sometimes the parties to the agreement directly or indirectly commit a form of anticipatory breach in implementing the agreement. So that this will raise a question how the impact of an anticipatory breach on the sustainability and implementation of the agreement that the parties have made.

**KEYWORDS** *Anticipatory Breach, Breach of Contract, Contract*

# Introduction

The economic development and growth of society in the current era of globalization have experienced many significant changes. This development also influences the amount of interdependence in business relationships. Economic activity is no longer dominated by the local sector but also by the global sector. The business world is increasingly forced to shift from multinational to transnational in the global economy. This change will increase and expand economic activities.

The function of the global economy can be explained through one word *transaction*. International transactions between developed countries help the continuity of the global economy. These transactions mainly consist of trade between countries. International trade includes the exchange of various products between countries. The increase in business transactions has led many people/business entities to enter into cooperation contracts or agreements with other parties for nothing other than the continuity of their business, especially considering the goal of a company to get maximum profits. However, along the way, the collaboration process between companies or between people sometimes does not run smoothly according to the initial plan due to many factors. It is not uncommon for some people/parties to be at the point where they can no longer fulfill their contractual obligations or, in other words, are in default. This condition will be detrimental to the agreement.

Contracts are an inherent part of business transactions, both on a large and small scale, domestic and international. The contract is crucial in ensuring that all expectations on the parties' agreement can be implemented and fulfilled[1]. In civil law, contract law is one of the things that is very important and needed in daily legal relations relating to assets[2].

In practice, problems are often encountered when making and implementing an agreement that gives rise to a contract (engagement). Problems in a contract can arise when one of the parties does not carry out an achievement or obligation as agreed, or there is a dispute regarding the meaning of the editorial in the contract. Problems rooted in these two things often result in losses for one or both parties. At this point, a dispute occurs between the parties who have bound themselves to the contract[3]. In typical situations,

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1 I Kadek Adi Surya and Putu Eka Fitriyantini, "Akibat Hukum Yang Ditimbulkan Apabila Terjadi Pelanggaran Terhadap Memorandum of Understanding Dalam Kontrak Bisnis," *Majalah Ilmiah Untab* 18, no. 1 (2021): 92–97.

2 Ahmadi Miru & Sakka Pati, *Hukum Perjanjian (Penjelasan Makna Pasal-Pasal Perjanjian Bernama Dalam KUH Perdata (BW)* (Jakarta: Sinar Grafika, 2020).

3 Muhammad Natsir Asnawi, "Perlindungan Hukum Kontrak Dalam Perspektif Hukum Kontrak Kontemporer," *Masalah-Masalah Hukum* 46, no. 1 (2018): 55, https://doi.org/10.14710/mmh.46.1.2017.55-68.

achievements and counter-performance will be exchanged, but in certain conditions, the exchange of achievements does not work as it should, resulting in a default.

In simpler language, default is the failure of a party or one of the parties to carry out their obligations (performance) as stated in the agreement. The default results in the contract no longer being able to be carried out following what was agreed upon. There are three types of circumstances where a contract cannot be executed due to the following errors: (a) one party makes a unilateral mistake about a fact, and the other party knows or at least should know that a mistake has occurred; (b) a unilateral error occurs due to an administrative or mathematical error that is not the result of a gross error; (c) the error is so fatal that the implementation of the contract will deviate from the sense of justice because there are parties who are disadvantaged[4]. Such a situation will result in a breach of contract either from one party or from both parties entering into the contract.

Breach of contract is an essential aspect of the law that must be known by the parties entering into the contract and the parties related to the contract. In American contract law, it is also called a breach of contract. It is constructed as the failure of one of the parties to carry out obligations. This failure was caused by one party not carrying out its obligations appropriately and correctly following the contents of the contract[5]. Breach of contract means a violation of the obligations imposed by a contract.

When one of the parties who must carry out a contract fails to do so or performs an impossible action following the agreement, there is a breach of contract on his part. If one party commits a default, the other party is released from his obligation to carry out his part of the obligation. In addition, he also has the right to sue the party who committed the default for damages for the losses he suffered.

Breach of contract is a risk faced by the parties entering a contract. The parties agreeing (regardless of the type of agreement) will most likely experience a contract that does not meet the requirements agreed upon by the parties. It is more evident that the contract that the parties have signed is legally binding on both parties. When one party fails to fulfill the obligations or achievements stated in the contract, it is a breach of contract.

The definition of "*default*" contains a broader meaning than just "*default*" or "*breach of contract*." In general, it refers to things or conditions that

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[4] F.X. Suhardana, *Contract Drafting* (Yogyakarta: Universitas Atma Jaya Yogyakarta, 2008).

[5] Salim HS & Erlies Septiana Nurbaini, *Perbandingan Hukum Perdata (Comparative Civil Law)* (Jakarta: Rajawali Press, 2014).

parties agree are equivalent to "*non-performance*" or "*violation of promises or statements*" (non-performance)[6].

Default is related to achievement because a discussion of default must begin with a discussion of achievement first. The term achievement comes from the Dutch word *prestatie,* which lexically means deed, reaping, and handing over results[7]. Another term for this achievement is debt[8]. Debt is an obligation that the debtor must fulfill. Therefore, performance is an obligation that a debtor must carry out, which arises from an agreement. M. Yahya Harahap believes that achievements must be fulfilled well and perfectly. To assess that the debtor has carried out its contractual obligations/performance must be based on appropriateness[9].

In fulfilling these achievements, there are times when a debtor cannot carry out his achievements or obligations. Sri Soedewi Maschoen Softwan explained that there are two reasons for non-fulfillment of obligations: a) due to the debtor's error, whether intentional or due to negligence (negligence), and b) due to compelling circumstances (*force majeure, overmacht*)[10]. In certain circumstances, achievements and counter-achievements will be exchanged, but the exchange of achievements does not work as it should, resulting in a default[11].

An obligation should perform its obligation at the time and in the manner agreed. If a party fails to do what he has promised – either by not doing it at all, by delaying, or by doing it in a way contrary to the terms of the agreement – or if a party does something that is prohibited by the contract, he may be in default and become liable for damages or some other remedies available to the obligee. As a general rule, however, mere failure to perform does not constitute default. The creditor must affirmatively "*place*" the delinquent debtor in default by observing certain formalities; i.e., he must serve the debtor with a summons in the form of a warrant issued by the clerk of the District

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6 Bayu Seto Hardjowahono & Denny Lesmana, *Perancangan Kontrak Bisnis* (Bandung: PT. Citra Aditya Bakti, 2019).

7 S. Wodjowasito, *Kamus Umum Bahasa Belanda* (Jakarta: PT Ichtiar Baru Van Hoove, 2001).

8 Ridwan Khairandy, *Hukum Kontrak Indonesia Dalam Prespektif Perbandingan, Bagian Pertama* (Yogyakarta: FH UII Press, 2013).

9 M. Yahya Harahap, *Segi-Segi Hukum Perjanjian* (Bandung: Alumni, 1986).

10 Sri Soedewi Maschoen Sofwan, *Hukum Perutangan Bagian A* (Yogyakarta: FH UGM, n.d.). *See also* Mia Maulia Fajriana, "How Are Business Actors Responsible for Consumer Losses in Default Cases? An Analysis of Indonesian Consumer Protection Law." *Journal of Law and Legal Reform* 2, no. 2 (2021): 187-196.

11 Agus Yudha Hernoko, *Hukum Perjanjian, Asas Proporsionaltias Dalam Kontrak Komersial* (Jakarta: Kencana Prenada Media Group, 2010).

Court, or a registered letter himself prepared to demand that the obligation due be performed[12].

Default in positive law in Indonesia is a condition where the debtor does not carry out obligations or achievements that can be claimed. According to Subekti, default is divided into 4 (four) types: (1) not doing what is agreed to; (2) doing what is agreed, but not as promised; (3) doing what is agreed but late; (4) doing what is prohibited in the agreement. In practice, a breach of contract implies that one of the aggrieved parties can demand fulfillment of the contract, accompanied by compensation, just compensation, or termination of the contract and accompanied by compensation[13].

In contract law, it is known as Breach or default, which is known in the law legal system. G.H. Treitel explained that a breach is an action by one of the parties without legal reasons by failing or refusing to fulfill the achievements specified in an agreement. The common law legal system has several forms of breach or default, including an anticipatory breach. According to D.G. Cracknell, the anticipatory breach is a breach (default) before the time specified in the agreement/contract[14]. In an anticipatory breach, one of the parties to the contract intends not to fulfill or carry out contractual obligations that have previously been agreed upon. To summarize, an anticipatory breach is a breach that occurs before the due date specified in the agreement. This is interesting because how can someone judge that the other party has committed a default when this is possible in the future?

Based on the previous explanation, a significant difference exists between a breach of contract in the Indonesian legal system (civil law) and the law legal system. The existence of these differences is why the author needs to study it, which aims to determine the implications for an agreement if one of the parties commits an anticipatory breach. Apart from that, how can the doctrine regarding anticipatory breach be applied and accepted in Indonesia as a legal reason for one party to demand compensation or even cancellation of the agreement even though the term for fulfilling the other party's performance is still not due?

# Breach of Contract: The Contemporary Developments

Understanding the scope of contract law is essential when identifying an act of breach of contract. Regarding contracts, in Indonesia, there are two

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[12] S udargo Gautama, *Indonesian Business Law* (Bandung: Penerbit PT. Citra Aditya Bakti, 2006).

[13] Subekti, *Hukum Perjanjian* (Jakarta: Intermasa, 2014).

[14] D.G. Cracknell, *Obligations: Contract Law* (London: Old Bailey Press, 2002).

known terms: contract and agreement. These two terms are equivalent forms of the terms contract and *overeenkomst*. It can be understood that the term agreement is a translation of the words *overeenkomst* (Dutch) or contract (English)[15]. A contract is an action by two or more parties, and each party must carry out one or more achievements[16]. The legal basis for a contract itself is taken from the definition of agreement as stated in the provisions of Article 1313 of the Civil Code, which essentially explains: "An agreement is an act by which one or more people bind themselves to one or more other people." Therefore, contracts and agreements are the same.

In the law system, there is a difference between a contract and an agreement. All contracts are agreements, but not all agreements are contracts[17]. A contract is an obligation relationship that binds the parties by agreeing with a specific purpose. As a country that adheres to a law system, Malaysia has its terms regarding contract law. In Malaysia, it is called contract law. Contract law in Malaysia is classified as private law. The concept of private law in Malaysia itself, according to Azimon Abdul Aziz: "The concept of private law in Malaysia is broad. It encompasses private relationships between governments and private individuals or other entities if it is based on the law of contract and not considered within the scope of public law"[18]. In other words, the concept of private law adopted in Malaysia as a common law country is slightly broader because it also includes relationships between the government and individuals or other bodies if the relationship is based on a contract.

A contract is an agreement between two or more parties that the law will enforce. Generally speaking, damages (compensation) are payable for loss suffered by one party due to the non-performance (or poor performance) by the other party to the contract. Moreover, a party may (in appropriate circumstances) request a civil court to order performance by the other party in default. In  law (judge-made law), the same legal principles generally apply to all types of contracts. Over time, the strict application of the common law has become somewhat subdued by the principles of equity, designed by the courts to restrain unconscionable contractual outcomes and promote justice[19].

There are differences between common law and civil law when forming contracts. The consequences of these differences greatly influence the preparation of international contract provisions. In connection with the

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15 Salim HS, *Pengantar Hukum Perdata* (Jakarta: Sinar Grafika, 2008).

16 Suharnoko, "Contract Law In Comparative Perspective," *Indonesia Law Review* 2, no. August (2012).

17 Walter Woon, *Basic Business Law in Singapore* (New York: Prentice Hall, 1995).

18 Sunarjo, "Perbandingan Hukum Indonesia Dan Malaysia,"*Jurnal Cakrawala Hukum* 6, no. 1 (2015): 109–17.

19 Geoff Monahan, *Essential Contract Law* (London: Cavendish Publishing (Australia) Pty Limited, 2001).

differences in legal systems, designing a contract or creating an agreement concept refers to the legal system adopted. However, times continue to move, and the time has come for the era of globalization, which may not affect the legal system if there is a collision between different legal systems[20].

The Civil Law system's thinking method is based on laws that contain logical rules and concepts, starting from general principles and leading to specific regulations. Lawyers in civil law usually start from legal norms regulated in law and, by deduction, make conclusions about actual cases. The thinking method is deductive. The way lawyers think in common law starts from actual cases and compares them with the same or similar legal issues decided by the courts and related precedents through induction. The consequence of the fundamental difference between these two systems is that civil law lawyers tend to be more conceptual, while common law lawyers are considered more pragmatic[21].

In countries that adhere to a common law system, parties have the freedom to agree on the terms they wish to enter into a contract as long as they do not violate public policy or the law. If specific requirements are not covered, reasonable rights and obligations will apply based on existing legal provisions or the usual business practices of the parties or the industry. Usually, losses are measured by the lost benefit of the bargain (benefits or profits that should be obtained are lost)[22].

For a contract to be executed in a country that adheres to the common law system, it must fulfill the requirements of a contract as the basic elements of a contract:[23]

a. Bargain, one of the elements of a contract in the common law system, is coercive. The idea of bargaining, the concept of an offer, is considered the spearhead of an agreement and is the source of rights arising from a contract[24].
b. Agreement, according to Black's Law Dictionary, is a mutual understanding between two or more persons about their relative rights and duties regarding past or future performance or which means an understanding between two or more persons regarding their relative rights and obligations regarding past or future performance which will come.
c. Consideration relates to the term cause in the agreement. Restatement Second, section 71 (1) explains that a cause or consideration exists if there is an approved counter-performance.

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[20] Sophar Maru Hutagalung, *Kontrak Bisnis di ASEAN* (Jakarta: Sinar Grafika, 2013).
[21] Nurbaini, *Perbandingan Hukum Perdata (Comparative Civil Law)*.
[22] Hutagalung, *Kontrak Bisnis di ASEAN*.
[23] Hutagalung.
[24] Victor Purba, "Kontrak Jual Beli Barang Internasional (Konvensi Vienna 1980)" (Universitas Indonesia, 2002).

d. Capacity, or the capacity to enter into a contract, can be stated by anyone who can enter a contract (any legal person may be a party to a contract).
e. Legality (validity) means that the agreement must not contain anything contrary to applicable legal provisions.

In its implementation, even though the agreement has been designed and prepared in such a way by the binding parties to provide benefits and minimize losses for the parties concerned, it cannot guarantee that the drafted agreement will be implemented well as expected by the parties. The situation experienced by the debtor is known as default, which can occur either intentionally or unintentionally[25]. At common law, an operational error renders a contract *void abinitio*, not avoidable. Consequently, a mistaken party can take action to recover any money paid to the other party under the void contract. Where the contract cannot be declared void at common law, equity may assist the mistaken party in three ways by (a) refusal and order for specific performance; (b) declaring a contract voidable (that is, equity can set the agreement aside); (c) ordering rectification of a written agreement[26].

There are three types of operative mistakes: (a) common mistakes, where each party makes the same mistake; (b) mutual mistakes, where the parties misunderstand each other and are therefore at cross-purposes; (c) unilateral mistakes, where one party knows, or ought to be aware of the mistake made. This category also includes mistakes regarding the nature of a document or non *est factum* (this is not my deed)[27].

There are two ways in which a breach of contract can occur: (1) one of the parties will not carry out the substance of the contract, or (2) one of the parties does not implement its achievements. As a result of not carrying out these obligations appropriately and correctly, other parties, especially creditors, have the right to ask the debtor to pay compensation and other solutions[28].

In Malaysia, default or breach of contract is known as breach of contract. A breach of contract is when one party fails to fulfill its achievements so that the other party feels disadvantaged and considers this situation a breach of contract. A breach of contract can usually occur if one of the parties does not carry out its contractual obligations, either due to negligence or on purpose.

Laws of Malaysia, Act 136, Contracts Act 1950, states the consequences of a breach of contract: (1) Compensation for loss or damage caused by a breach of contract; (2) Compensation for failure to discharge obligations resembling those created by contract.

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[25] Ahmadi Miru, *Hukum Kontrak Dan Perancangan Kontrak* (Jakarta: Rajawali Press, 2007).
[26] Monahan, *Essential Contract Law*.
[27] Monahan.
[28] Nurbaini, *Perbandingan Hukum Perdata (Comparative Civil Law)*.

## Anticipatory Breach as a Form of Default

People who consent to a contract mean that they are aware of and want the contract to exist and also want the legal consequences that will arise from the existence of the contract. Generally, all agreements in a contract have binding force on the parties to the contract. Thus, the agreement's contents should consistently be implemented because that is what the parties want. If what is promised is carried out, it will be seen that an orderly and just life will be realized. What is felt by members of society and social institutions in various aspects of society? If we observe the reality of life in society, various contracts are made by members of society. In these contracts, various interests and goals are to be achieved. The contract is embodied as a perfect contract; even though exceptions often occur here and there, there are deviations from the contract. Strictly speaking, quite a few problematic contracts have been found. Not a few cases handled by courts in various countries originate from contracts. It is not uncommon, even though it initially appears to be a civil case, that it is related to or even becomes a criminal case[29].

By definition, default can be interpreted as a non-fulfillment of an achievement due to the debtor's fault, intentional or negligent. In Indonesia, it is regulated by the provisions of Article 1238 of the Civil Code, "The debtor is declared negligent using a warrant, or by a similar deed, or based on the strength of the agreement itself, namely if this agreement results in the debtor being deemed to be in default after the specified time has passed." Therefore, default is closely related to achievement issues.

Juridically, especially in the scope of contract law known in the civil law legal system, achievement is an obligation that a debtor must fulfill[30]. Thus, the meaning of achievement includes fulfilling contractual or legal obligations in the context of engagement law. The term equivalent to the achievements known in the common law system is performance. Nevertheless, the two are not compatible. A distinction between achievement and performance is known in common law. Performance only refers to contractual obligations. In other words, performance means fulfilling or implementing the achievements specified in the contract[31]. However, achievements in the civil law system cover a broader scope. It is not only related to contractual obligations but also obligations arising from legal agreements.

Apart from that, in a narrower meaning, the achievement is more focused on fulfilling obligations arising from contracts, where contractual obligations

[29] Suhardana, *Contract Drafting*.
[30] Khairandy, *Hukum Kontrak Indonesia Dalam Prespektif Perbandingan, Bagian Pertama*.
[31] Khairandy.

can originate from a) obligations determined by law, b) obligations agreed upon by the parties in the agreement/contract, c) obligations required by propriety and custom. The source of contractual obligations is also known in the common law system. In the common law system, a contract's contents include not only what is stated expressly (express terms) but originate from statements made implicitly (implied terms). In implied terms, these are not stated explicitly but are inferred from what is implied in the contract, which is divided into three forms:[32] a) Terms Implied by statute (the contents of the contract are determined by law), b) Terms implied by custom (the contents of the contract are determined by custom), c) Terms implied by the Court (the contents of the contract are determined by the Court).

In carrying out these achievements, sometimes debtors cannot carry out their achievements or obligations. There are obstacles when the debtor carries out the obligations/achievements determined. The occurrence of default needs to be thoroughly understood, as not all circumstances can cause a qualified party to commit default. As stated by Sri Soedewi Maschoen Sofwan, non-fulfillment of obligations is caused by several things[33]: (1) Due to the debtor's fault, whether intentional or negligent and (2) Due to *force majeure*, something that happens is beyond the debtor's ability. In every contract law system, both in common law and civil law countries, including in Indonesia, there are situations where a performance or obligation cannot be carried out due to circumstances beyond one's expectations or capabilities. This situation is called *overmacht* or *force majeure*.

*Force majeure* conditions mean that debtors are not responsible for losses creditors suffer. Debtors are released from responsibility for performance. This forced situation is related to the risk in fulfilling the agreement, in the sense that when a forced situation occurs, the risk cannot be passed on to the party experiencing it. In these circumstances, the judge will reject the creditor's demand that the debtor fulfill the agreement. The purpose of including a *force majeure* clause is to protect the parties if they cannot carry out the contents of the agreement for reasons beyond their capabilities, which cannot be avoided by taking reasonable action[34]. A natural disaster can generally be considered a *force majeure* situation. The parties should agree upon the provisions regarding force majeure before they agree to sign the contract they make. This is important so that when a dispute occurs, it is clear whether this situation is a

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[32] Ridwan Khairandy, *Hukum Kontrak. Op.cit,*hlm 291

[33] Sofwan, *Hukum Perutangan Bagian A*.

[34] Soeroso, *Perjaniian di Bawah Tangan* (Jakarta: Sinar Grafika, 2010). *See also* Zsazsa Dordia Arinanda, "Perspectives of Business Personnel on Force Majeure as A Reason For Cutting Work Relationship in The Pandemic Time Covid-19." *Journal of Private and Commercial Law* 4, no. 2 (2020): 90-107.

*force majeure*. If the parties cannot resolve it, they need assistance from another party, such as a court, an arbitrator, or a mediator, to resolve the dispute.

There are several circumstances in which the debtor cannot be required to perform: *force majeure*, *rechtsveerweking, non adimpleti contractus*[35]. *Force majeure* can be interpreted more broadly as a situation that forces one or several parties to be unable to fulfill their obligations as agreed in the agreement that has been made. This situation is beyond their prediction, control, physical, psychological, or technical ability. *Rechtsverweking* is the release of one or several parties from certain obligations because the other party, either silently, verbally, or in writing, releases or is concluded to release the person concerned from the obligations in question. *Non adimpleti contractus* is fulfilling a promise or obligation by one or several parties because the other party bound by the agreement in question also does not carry out its obligations or promises. This *non adimpleti contractus* in examining civil cases is often used to file objections or exceptions to the proposed breach of contract lawsuit. In the Indonesian legal system, the conditions in this exception are sometimes referred to as *exeptio non adimpleti contractus*[36].

In Malaysia, substances such as *overmacht* are included in the "doctrine of disappointment," which is associated with contracts to perform impossible acts. The doctrine of disappointment is a term used in contract law that refers to enacting a condition or event that results in a contract that has been perfectly formed but then becomes impossible to continue[37].

In the legal system in Indonesia or other countries that adhere to the civil law system, default is understood as a situation where the debtor cannot carry out his obligations or achievements[38]. Therefore, this breach of contract has a comprehensive meaning because it includes a condition where the debtor does not carry out contractual obligations or does not carry out (civil) obligations arising from an agreement from the law. The meaning of default in the civil law system is equivalent to the term default in the common law system. Default in common law does not explicitly refer only to breach of contract but rather a default or non-fulfillment of legal obligations, which means it gives the meaning of an action against the law.

Contextual default in contract law in Indonesia means that the debtor does not carry out his achievements or as he should. Because of that, creditors do not get what they should, as previously agreed[39]. In the common law system, default is almost equivalent to breach of contract. Robert Upex explains that a

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[35] Riduan Syahrani, *Seluk Beluk Dan Asas-Asas Hukum Perdata* (Bandung: Alumni, 2006).

[36] Syahrani.

[37] Hernoko, *Hukum Perjanjian, Asas Proporsionaltias Dalam Kontrak Komersial*.

[38] Suhendro, *Tumpang Tindih Pemahaman Wanprestasi & Perbuatan Melawan Hukum* (Yogyakarta: FH UII, 2014).

[39] Suhendro.

breach of contract occurs if one of the parties to the contract fails to carry out one or more of its obligations or it is proven that there is a purpose not to carry out the obligations specified in the contract[40]. The form of breach as a whole can be described as a form of repudiation of the parties' contractual obligations to the contract.

After the contract is signed, certain obligations are imposed on both parties. If one party is negligent or refuses unconditionally to carry out the obligations imposed on him, a breach of contract will occur. The party causing the default is usually called the guilty party, while the other party can be called the injured party. Breach of Contract can also be called repudiation of the Contract. Breach allows the aggrieved party to enforce its right of action against the guilty or defaulting party. Breach of Contract can consist of two categories: (1) Actual Breach of Contract and (2) Anticipatory Breach of Contract. In contrast to anticipatory violations, actual violations occur when a party ignores, refuses, or fails to carry out its duties at the time in question, which does not occur prematurely.

This repudiation has several forms, as explained by Jeniffer Corrin: breach of essential contractual obligations, then breach of intermediate terms, where the breach and its consequences are important or substantial, which results in the aggrieved party not benefiting from the contract, and finally, an indication of the words or actions of one of the parties which shows that he does not want to fulfill the obligations in the contract or an indication of the inability of one of the parties to carry out his contractual obligations[41]. In the common law legal system, there is a form of breach or default: anticipatory breach.

A contract may be breached for non-performance or defective performance of the contract. In both cases, the breach occurred on or after the performance date. Another kind of breach of contract exists, which occurs before the performance date. The breach is called an anticipatory breach. An anticipatory breach is committed in anticipation that any party to the contract will not perform his or her obligations[42]. A breach does not have to occur for the party responsible to be liable. In the case of an Anticipatory breach, the actual breach has not occurred, but one party has indicated that it will not fulfill its obligations under the contract. This can occur if the party who breaches it intentionally informs the other party that he will not fulfill his obligations, but the claim can also be based on actions that show one party does not intend or will not be able to fulfill them.

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[40] Robert Upex, *Davis on Contract* (London: Sweet & Maxwell, 1991).

[41] Jennifer Corrin Care, *Contract Law in The South Pacific* (London: Cavendish Publishing Limited, 2000).

[42] Liton Chandra Biswas, "A Comparative Account on the 'Practical and Fair' Aspects of the Vienna Convention Rules and of the English Common Law Rules on Anticipatory Breach of Contract," *SSRN* 2012, https://doi.org/https://dx.doi.org/10.2139/ssrn.2192995.

No branch of commercial law presents more significant difficulties to the practitioner than determining the rights and obligations of the parties where a contract has been repudiated before its time for performance has arrived[43]. Therefore, the fundamental purpose of a contract is destroyed when one of the parties to the contract informs the promisee that he will not perform[44]. There are two possible theories: (1) that repudiation is a present injury, or (2) a threatened injury may provide a ground of action at law and in equity[45].

In general, it can be seen if one of the parties to the agreement knows that the debtor cannot carry out his obligations, and this statement is known before the time of execution of the contract. If the debtor does not intend to fulfill his obligations according to what is written in the contract, the creditor can sue the debtor for breach of contract.

To be exact, a breach of contract involves a failure to perform a contractual duty rather than a broken promise. A mere threat to commit a breach should furnish a cause of action to enforce the contractual duty. The literal terms of the promise do not entirely measure the legal duties arising from a contractual engagement[46]. In an anticipatory breach, one of the parties to the contract intends not to fulfill the obligations in the contract. The intention not to fulfill obligations is equated with a refusal to fulfill achievements, known as a repudiation breach. The word repudiation in the legal context of an agreement/contract describes an action by one of the parties, either with words or actions, indicating that he or she does not want to perform based on the contract.

For such refusal to constitute a breach, the promisor must continue to refuse after the time for performance arrives, or the promisee must accept the refusal, terminating the performance of the contract. At the time of termination, both parties are released from the obligation to carry out their respective contractual duties, and the promisee can claim damages based on the doctrine of anticipatory breach of contract[47]. So, Anticipatory Breach occurs when a partner refuses to complete his duties or fulfill his promises (as specified in the

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[43] Herbert R Limburg, "Anticipatory Repudiation of Contracts," *Cornell Law Review* 10, no. 2 (1925).

[44] Wendell Holmes, "A Suggested Revision of the Contract Doctrine of Anticipatory Repudiation," *The Yale Law Journal* 64, no. 1 (1954): 85, https://doi.org/10.2307/794200.

[45] Henry Winthrop Ballantine, "Anticipatory Breach and the Enforcement of Contractual Duties," *Michigan Law Review* 22, no. 4 (1924): 329–52.

[46] Ballantine.

[47] J. W. Carter, "The Embiricos Principle and the Law of Anticipatory Breach," *The Modern Law Review* 47, no. 4 (1984): 422–36. *See also* Pujiyono Pujiyono, et al. "Small Claim Court as the Alternative of Bad Credit Settlement for Legal Certainty of the Economic Actors." *Indonesian Journal of Advocacy and Legal Services* 3, no. 2 (2021): 137-154.

Contract) before the Actual time arrives. An individual or entity is unwilling to fulfill contractual obligations before the performance date.

Anticipatory Breach occurs before the maturity date stipulated in the contract[48]. Apart from that, a more precise definition of anticipatory breach is a breach of contract committed before the maximum time for fulfilling obligations arrives. The violation is seen based on words or actions that show an intention to refuse to fulfill contractual obligations[49]. In other words, the doctrine of anticipatory breach of contract includes two basic principles: (1) that the party receiving an anticipatory repudiation of a contractual obligation may bring an immediate suit, and (2) that the repudiated in this situation need not continue with his part of the performance, but may discontinue the performance immediately without fear of prejudicing his right against the repudiator[50].

An anticipatory breach of contract occurs before the time specified for implementation arrives. If the party who promises ultimately refuses to carry out his promise and shows his reluctance even before the time for implementation arrives, this is called Anticipatory Breach. Anticipatory breach of contract can be done wrongly in one of two ways: (a) Expressly through spoken or written words and (b) Implicitly through the actions of one of the parties.

In its development, there are 2 (two) forms of anticipatory breach known within the scope of contract law:

1) *Explicit Repudiation*
   Explicit Repudiation is a written or oral statement from one of the contracting parties that he does not intend to carry out his obligations or achievements as specified in the contract. For example, this form of explicit repudiation occurred in the case of Hochster v. De La Tour (1853), in which Defendant agreed in April to work for Plaintiff as a courier during his overseas tour in June. Then, on May 11th, the defendant wrote a letter and sent it to Plaintiff, stating that he had changed his mind, so he was unable and willing to act as a courier as previously agreed. The Plaintiff then sued the Defendant for damages before June 1st[51].
2) *Implicit Repudiation*
   Implicit Repudiation is a suspicion or rejection that is carried out implicitly. It can be rationally concluded that the actions of one of the parties to the

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[48] Cracknell, *Obligations: Contract Law*.

[49] Alphonse M Squillante, "Valparaiso University Law Review Symposium on Commercial Law Anticipatory Repudiation and Retraction," in *Symposium on Commercial Law*, 1973.

[50] David W Robertson, "The Doctrine of Anticipatory Breach of Contract Repository Citation," *Louisiana Law Review* 20, no. 1 (1959).

[51] Michael Philip Furmston, *Cheshire, Fifoot, and Furmstom's Law of Contract* (England: Butterworths, 2001).

contract no longer intend to fulfill their achievements or obligations as regulated in the contract.

The definition of anticipatory breach varies from country to country and from legal system to legal system based on their respective practices. For example, in civil law countries, an innocent party cannot avoid their performance as easily as under English Common law rules. Therefore, under the civil law, the definition would be different. Likewise, the rules governing anticipatory breach vary from country to country, legal system to legal system[52]. The anticipatory breach doctrine originates from an older and stricter legal theory. If within the scope of contract law in general, one of the parties can be said to have breached the contract when he or she has failed to carry out and fulfill the obligations/achievements as agreed, and this failure occurs at the time specified in the contract. However, the existence of a revolutionary form of contract law in England and the United States gave birth to the view that one of the parties to an agreement can be said to have violated the contract before the due date arrives, so not only when the time specified in the contract has arrived (anticipatory doctrine breach)[53].

## Legal Consequences of an Anticipatory Breach in Contract Implementation

Breach of contract may be actual or anticipatory. If a breach of contract occurs, the affected party can claim damages from the Court by forcing the other party to do as promised. If one party fails to fulfill this obligation, there is a contract breach. Legal remedies for breach contracts include claims for damages, demands for specific performance, cancellation of the contract, stopping the other party from doing something, and claims for *quantum meruit* (compensation for work done before the breach).

The injured party may have several options based on the anticipatory breach of contract conditions. For example, the injured party may wait for the performance date, suspend the performance of obligations, or demand the termination of the contract. The creditor has two options: demand that the contract be carried indirectly or refuse to accept a breach and wait until the performance date. In other words, the creditor may decide to wait until the performance date, ignoring the debtor's inability to perform his obligations in

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[52] Biswas, "A Comparative Account on the 'Practical and Fair' Aspects of the Vienna Convention Rules and of the English Common Law Rules on Anticipatory Breach of Contract."

[53] Michael D. Bewers, "The Doctrine of Anticipatory Breach Revisited—Does Unnecessary Confusion Still Exist ?" *Louisiana Law Review* 38, no. 1 (1977).

the future, and then urge the debtor to fulfill his obligations voluntarily, or he may resort to specific performance[54].

Anticipatory breach is indeed based on convenience. It allows the victim to shake off the obligations of the old contract and find a secure substitute buyer or seller. It also benefits the repudiator in that the victim who chooses to sue at once must mitigate his loss and the damages for which the repudiator is responsible[55]. The Anticipatory breach principle is a principle that is applied if circumstances arise between the end of the contract and before the maturity date, and these circumstances indicate that one of the parties to the contract is unable to carry out the contract; for example, one party is experiencing a loss.

The doctrine of anticipatory breach became known in the case of Hochster v. De la Tour (1853). This doctrine began to be agreed upon in Frost v. Knight. Campbell C.[56]. Regarding anticipatory breach, this doctrine focuses on the possibility of failure that will occur in the future and shows uncertainty in fulfilling achievements. If one party to the agreement shows their inability or unwillingness to fulfill their contractual obligations, the other party will consider this a form of anticipatory breach[57].

In the end, the Hochster case shows that the anticipatory breach doctrine says that when one party to a contract states that they do not intend to carry out the obligations stipulated in the contract in the future, then this automatically eliminates the obligation of one of the parties to continue to carry it out the contract[58]. There is no reason for the other party to wait until the contract period is over to file legal action through a lawsuit in Court by sufficiently proving that it is true that the breach of contract that occurred will cause actual harm in the future[59].

Based on the previous explanation, the juridical consequence of an anticipatory breach in an agreement/contract is that one of the parties can

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[54] Nasir Albalawee, "Rules Governing Anticipatory Breach of Contract Under the Vienna Convention on International Sales," *Journal of Namibian Studies : History Politics Culture* 33 (2023): 2023–32, https://doi.org/10.59670/jns.v33i.604. *See also* Faizal Kurniawan, et al. "The Principle of Balance Formulation as the Basis for Cancellation of Agreement: An Effort to Create Equitable Law in Indonesia." *Lex Scientia Law Review* 6, no. 1 (2020): 121-156; Yossica Ariatami Edwina, and Reni Anggriani. "Cancellation of Deed of Sale and Purchase of Land Rights Due to Unlawful Actions." *Journal of Private and Commercial Law* 7, no. 2 (2023): 128-160.

[55] Andrew Nicol and Rick Rawlings, "Changing Attitudes to Anticipatory Breach and Third Party Beneficiaries," *The Modern Law Review* 43, no. 6 (1980): 696–703.

[56] Samuel Stoljar, "Some Problems of Anticipatory Breach," *Melbourne University Law Review* 9, no. 355 (1974).

[57] Squillante, "Valparaiso University Law Review Symposium on Commercial Law Anticipatory Repudiation and Retraction."

[58] Anton Trichardt, "Breach by Anticipatory Repudiation," *Commercial Law Quarterly: The Journal of the Commercial Law Association of Australia* 29, no. 4 (2015): 3–16.

[59] Trichardt.

immediately cancel the agreement/contract by demanding compensation from the other party even though the due date specified in the agreement has not arrived. This is interesting because the existence of the anticipatory breach doctrine applies in the common law system, which incidentally is different from the Indonesian legal system, which adheres to the civil law system. In Indonesia, requests for compensation or cancellation of an agreement can be made based on an anticipatory breach. When discussing anticipatory breach, these dates must be carefully differentiated since there is often a wide divergence in time and, hence, a likely change in value between the date of breach and the date of performance[60].

In Indonesia, default includes positive and negative actions. Positive and negative actions in breach of contract consist of carrying out or not carrying out achievements in the form of obligations as intended in Article 1234 of the Civil Code: doing something, giving something, and not doing or carrying out something. According to the definition, default can be interpreted as failure to achieve performance due to the debtor's fault, intentional or negligent. Default is regulated in Article 1238 of the Civil Code, "The debtor is declared negligent using a warrant, or by a similar deed, or based on the strength of the agreement itself, that is if this agreement results in the debtor being deemed to be in default after the specified time has passed." The implications if there is a default on the debtor are: 1) The debtor must compensate the losses suffered by the creditor; 2) Cancellation of the agreement is accompanied by payment of compensation; 3) Transfer of risk to the debtor since the default occurs; 4) Payment of court costs if the case is brought before a judge.

The legal consequences of an anticipatory breach in the common law system and the breach of contract in Indonesia, which adheres to the civil law system, have several similarities. If one of them commits one of these acts, the other party can demand compensation for damages and file a lawsuit before the Court. However, there are differences between the two regarding when one party can be declared to have committed a breach of contract. If in an anticipatory breach, a party is declared to have committed a breach of contract if it implicitly or explicitly shows its inability to fulfill its obligations/achievements, or there is a refusal to fulfill its achievements (repudiation) even though it has not yet reached the specified due date. In default, referring to the provisions of Article 1238 of the Civil Code, it is necessary to pay attention to the grace period specified in an agreement. Apart from that, to determine that one party has defaulted, a statement of default by

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[60] William F. Snyder, "Contracts: Duty to Mitigate Damages upon Anticipatory Breach of Forward Contract of Sale," *Michigan Law Review* 47, no. 4 (1949): 538, https://doi.org/10.2307/1284813. *See also* Yossica Ariatami Edwina, and Reni Anggriani. "Cancellation of Deed of Sale and Purchase of Land Rights Due to Unlawful Actions." *Journal of Private and Commercial Law* 7, no. 2 (2023): 128-160.

the other party is needed after a warning letter is issued so that one of the parties fulfills the performance within the specified time.

Therefore, an agreement has similar legal consequences if an anticipatory breach or default occurs. However, there are differences related to the momentum of anticipatory breaches and defaults, which result in differences in the timing of the emergence of the right of one of the parties to demand compensation and file a lawsuit before the Court. What is interesting is whether the doctrine of anticipatory breach can be used as a basis for demanding compensation and filing a lawsuit in Court or even canceling agreements/contracts in Indonesia.

Indonesia is a country that adheres to a continental legal system (civil law). In the civil law legal system, some policies have socio-political reasons and objectives, namely limiting the role of law in making laws[61]. Even after the third amendment to the 1945 Republic of Indonesia Constitution, the legal system adopted by Indonesia is the Pancasila Legal System, which uses a "prismatic" concept that takes the best aspects of two conflicting concepts (*Rechtstaat* and The Rule Of Law). However, the Indonesian Legal System cannot be separated from constitutional law, of which there are at least seven types of sources of constitutional law: (a) Unwritten constitutional values; (b) The constitution, both its preamble and its articles; (c) Written laws and regulations; (d) Judicial jurisprudence; (e) Constitutional conventions; (f) The doctrine of legal science which has become ius *commissiononis opino doctorum*; (g) International law that has been ratified or has come into force as customary international law[62]. The application of legal sources in Indonesia must be used hierarchically, as stated by John Henry Merryman, as there are three sources of law in civil law countries: laws (statutes), derivative regulations (regulations), and customs.

Based on the previous explanation, the law as a form of legal codification in Indonesia, a country that adheres to a civil law system, is the main source of law used by judges to decide/resolve a case. If a written rule regulates a legal event or issue, it must be used first, considering aspects of the purpose for which the law was established. If it relates to the application of the anticipatory breach doctrine as a basis for parties to an agreement to declare that the other party is in breach of the agreement/contract, the existing legal situation must first be considered.

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[61] Choky Ramadhan, "Konvergensi Civil Law Dan Common Law Di Indonesia Dalam Penemuan Dan Pembentukan Hukum," *Mimbar Hukum* 30, no. 2 (2018): 213, https://doi.org/10.22146/jmh.31169.

[62] Jimly Asshiddiqie, *Pengantar Ilmu Hukum Tata Negara, Cet. Ke-5* (Jakarta: RajaGrafindo Persada, 2014).

The doctrine of anticipatory breach can and does enhance contract law. Even though the doctrine also enlarges contract obligations, the quick settlement of disputes nullifies the deleterious effect of that enlargement[63].

Implementing the anticipatory breach doctrine in Indonesia's agreement/contract legal system is a form of legal transplantation. Legal transplantation is the taking over legal rules, teachings, structures, or institutions from another legal system or from one legal area to another[64]. Legal transplantation can lead to legal harmonization if conformity includes legal rules, teachings, structures, or institutions. Everything depends on the substance being transplanted.

From the legal substance of contracts in Indonesia, applying the anticipatory breach doctrine as a basis for terminating a contract or filing a lawsuit for compensation in Court will create disharmony in the existing law. Basically, in contract law in Indonesia, especially regarding default itself, it has been strictly regulated in the provisions of Article 1238 of the Civil Code, which essentially explains the parameters by which a party to an agreement can be said to have committed a breach of contract when one of the parties is unable to carry out its performance until within the time specified in the agreement. So, the right to unilaterally apply for compensation or cancellation only arises when one party to the agreement has sent a warning letter to the other party to fulfill its obligations within the specified time, but the other party has still not carried out its achievements.

Based on this, the applicability of the anticipatory breach doctrine cannot yet be applied in civil law in Indonesia. Looking at the legal situation in Indonesia, especially in the scope of Agreement law, there is no harmony or conformity with the doctrine of anticipatory breach, which has been implemented by many countries that adhere to the common law system.

# Conclusion

The doctrine of anticipatory breach, known in the common law system, is a theory or basis for the concept of renewal in the scope of contract law. Anticipatory breach is a formulation of contract law teachings to mitigate the risk of loss in business contracts. However, this doctrine cannot yet be implemented in Indonesia's legal system for several reasons, such as

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[63] Lawrence J Meyer, "Anticipatory Breach of Contract: Effects of Repudiation," *The University of Miami Law Review* 8, no. 1 (1953). *See also* Jafar Sidik, et al. "Choice of Arbitrators Regarding Dispute Settlement (Comparing Indonesia and Russia)." *Journal of Law and Legal Reform* 5, no. 1 (2024): 109-136.

[64] Tri Budiyono, "Menggagas Sintesa Global-Lokal Dalam Membangun Hukum Ekonomi," *Perspektif* XI, no. 2 (2006).

fundamental differences in the legal system and the legal situation of agreements/contracts in Indonesia. This is what makes the anticipatory breach doctrine still unable to be applied in contract law in Indonesia as a basis for filing claims for compensation, lawsuits, and terminating contracts. There needs to be a civil law reform in Indonesia, especially regarding the doctrine of anticipatory breach as a form of default, because this doctrine can be a risk mitigation solution for existing business contracts in Indonesia as a country that adheres to a civil law system that prioritizes codification and written law as the primary source of law. It would be best for Indonesia to implement and codify this doctrine regarding its use in contract law in Indonesia.

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