VI.5 - Anticipatory breach

When a party to a contract absolutely and unequivocally expresses an intention – expressly or tacitly – not to perform, or when it becomes otherwise clear, after the conclusion of the contract, that there will be a fundamental non-performance, the other party may terminate the contract. Principle VI.1 applies.

Commentary:
1 This Principle equates a fundamental non-performance that can be expected with actual non-performance. In order to be equated with actual non-performance, however, the future non-performance must meet one of the two tests provided for in the Principle.

2 The first test relates to a declaration of the party that it will not perform. This declaration, whether express or tacit, however, must be more than a mere general statement or indication of intent. Rather, the party must express this intention “absolutely and unequivocally”. This means 1) that the declaration has left no alternative to non-performance and 2) that there must be no doubt left as to the party’s intention not to perform.

3 Absent such an express or tacit declaration of the party, future non-performance is equated with actual non-performance only if the circumstances make it reasonably clear that there will be a fundamental non-performance. Contrary to the first test, this is an objective, rather than a subjective test.

4 If a future non-performance can be equated with actual non-performance under one of the two tests, the other party has the right to terminate the contract pursuant to Principle VI.1.