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COMMERCIAL DISPUTES **KNOW-HOW GUIDES**

REPUDIATION OF CONTRACT

If a breach of contract is so serious that it can be said to go to the core of the contract and deprives the innocent party of the benefit of the contract, then it may be a repudiatory breach that gives the innocent party the option of treating the contract as terminated and seeking damages.

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REPUDIATORY BREACHES OF CONTRACT

Repudiation may arise in the following ways.

1. There is a breach of a "condition." A condition is one imposed by statute or where it has been agreed by the parties in the contract that the breach of a particular term would deprive the innocent party of the benefit of the contract. Using the word "condition" to describe a term of the contract is not necessarily sufficient. The term needs to, in fact, be an essential part of the contract and ideally the contract should make it clear that a breach of the term entitles the innocent party to terminate the contract.
2. There is a breach that goes to the root of the contract or "is so serious as to frustrate the commercial purpose of the contract" (*Suisse Atlantique v NV Rotterdamsche* [1967] 1 A.C. 361)
3. The party in breach shows (by writing, orally or by conduct) that it no longer intends to perform its obligations that go to the root of the contract or makes it clear that it can no longer perform them
4. A party may act (or fail to act) in a way that prevents itself from performing its contractual obligations in an essential respect.

ANTICIPATORY REPUDIATORY BREACH

An anticipatory repudiatory breach of contract may arise, for instance, if a party makes it clear that it will not perform its contractual obligations in the future. If this refusal occurs before the time to perform the contractual obligation arises, then this is known as an anticipatory breach.

TREATING A CONTRACT AS REPUDIATED – THE ALTERNATIVES

A party facing a repudiatory breach of contract has two alternatives:

- (a) to terminate the contract by accepting the repudiatory breach and claim damages. The notice of termination should preferably be in writing. Although there is no requirement to give detailed reasons, it is common to identify the grounds for termination and to reserve the right to rely on other grounds not set out in the notice; or
- (b) to "affirm the contract" by treating the contract as continuing and claim damages for the breaches that have occurred and require future performance of the contract.

The election between the alternatives should be made without delay as affirmation can readily be implied if the innocent party knew about the breach and continued to treat the contract as continuing.

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TREATING A CONTRACT AS REPUDIATED- THE RISKS

Ultimately, whether a breach is repudiatory or not will depend on the construction and interpretation of the contract and the factual matrix, and the case law shows that court decisions are heavily fact sensitive (*Eminence Property Developments Ltd v Heaney* [2010] EWCA Civ.1168). If the court decides that there has been no repudiatory act, then the innocent party may be treated as having repudiated the contract and so be liable to pay damages for its own unlawful termination.

The test of whether a breach was repudiatory is at the date of the acceptance of the repudiation by the innocent party and so the court has to take into account what happened after the breach including what steps were taken to remedy it (*Telford Homes v Ampurius* [2013] EWCA Civ 577).

WHICH BREACHES OF CONTRACT ARE REPUDIATORY?

Ideally, the contract will identify which breaches are to be treated as repudiatory. In the absence of that, then the innocent party has to rely on the common law right to terminate for repudiatory breach and has to persuade the court that the breach is serious enough to amount to repudiatory breach.

Non-payment is rarely treated as repudiatory. Even a long delay in payment is unlikely to be treated as sufficiently serious to justify a termination because the innocent party retains the right to payment in full and usually with a right to claim interest. It may well be a different matter if lengthy payment delays are accompanied by evidence that future payment obligations are also unlikely to be met.

Poor contract performance and also the missing of deadlines may well be insufficient but these can be a question of degree. If there is partial non-performance the court would need to decide if it meant that the innocent party was deprived of substantially the whole benefit of the contract.

Where there are repeated breaches, the cumulative effect of these may be sufficient to be treated as repudiatory if the breaches indicate that the party will continue to underperform with the result that the innocent party would be deprived of a substantial part of the totality of what it contracted for.

This is part of a series of practical know-how guides for those involved in commercial disputes whether the dispute has led to litigation or not. They provide basic information on a wide range of disputes topics but are not a substitute for specific legal advice.

FOR MORE INFORMATION PLEASE CONTACT



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