

**A COMPARATIVE ANALYSIS OF CANCELLATION, DISCHARGE AND AVOIDANCE AS A  
REMEDY FOR BREACH OF CONTRACT IN SOUTH AFRICAN LAW, ENGLISH LAW AND THE  
CONVENTION FOR INTERNATIONAL SALE OF GOODS (CISG).**

By

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submitted in accordance with the requirements  
for the degree of

MASTER OF LAWS

at the

UNIVERSITY OF SOUTH AFRICA

SUPERVISOR: PROFESSOR SIEG EISELEN

FEBRUARY 2016

## DECLARATION

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Exact wording of the title of the dissertation or thesis as appearing on the copies submitted for examination:

**A COMPARATIVE ANALYSIS OF CANCELLATION, DISCHARGE AND AVOIDANCE AS A REMEDY FOR BREACH OF CONTRACT IN SOUTH AFRICAN LAW, ENGLISH LAW AND THE CONVENTION FOR INTERNATIONAL SALE OF GOODS (CISG)**

I declare that the above dissertation/thesis is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.



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## **ABSTRACT**

The aim of the thesis was to critically compare termination of contracts in South Africa, England and the CISG. It was found out that South Africa prefers to use the term cancellation because it is a remedy of last resort. The problem with cancellation is that it is a drastic step of bringing the transaction to an abrupt and premature end, which is only used when a material breach occurs. English law uses the term discharge as it refers to the ending of the obligations under the contract when a breach occurred and represents the point at which one party is no longer bound by its' contractual obligations and claims damages. Chapter 3 argued that though discharge goes beyond cancellation it does not cater for diverse domestic rules which need uniform international laws. Chapter 4 discussed and argued that avoidance is a term that was chosen by the CISG to end a contract when a fundamental breach occurs. There were problems on interpretation of terms and use of diverse domestic rules. The advantage of the term avoidance is that it is a technical term adopted and given a uniform meaning in the CISG where interpretation of terms and diverse domestic rules did not apply. Avoidance furthermore comprised concepts of rescission and termination. From the above it was argued that South Africa needs to develop new terms for termination of a contract and create new laws along the lines of the CISG.

## **DEDICATION**

**To My Parents**

## ACKNOWLEDGEMENTS

I am greatly honored and privileged in expressing my sincere gratitude to UNISA, which gave me the opportunity to study at the institution. I am also grateful for the bursary from UNISA which enabled me to complete my studies.

My supervisor, Professor Sieg Eiselen, whose academic competence, guidance and patience enabled me to stay focused and complete my studies. He is a leading publisher and scholar who gave me a platform to nature and sharpen my critical analysis, language and presentation of work. I am truly humbled and honored with the guidance Professor Eiselen gave me.

I want to express my heartfelt gratitude to the UNISA library, a first class leading library which enabled me to use its books and internet facilities to carry out and complete my studies. I wish to express my gratitude to Mr Tsepo Constable, the most advanced librarian in the world for his patience and unwavering support in advanced research skills, much needed at the LLM level. I thank you.

To my husband, Professor Maurice Taonezvi Vambe, I am grateful for he has been a great pillar of strength and great motivator in my scholarly life. He inspired and stood by me through the tough times. My sons, Takunda, Tanatswa and Tafadzwa, who gave me courage and hope for a better tomorrow, I am indebted to you.

My acknowledgements also go to my parents, Mr and Mrs Chawatama, for giving me a sound primary and high school education. To my sisters: Jessica (late), Queen, Precious, Patience (late) and brother, Farai for their uncompromising support and prayers. I am sincerely grateful for they encouraged me to persevere until the end.

Last but not least, I want to express my sincere gratitude to all friends, relatives and colleagues who contributed to the completion of my studies.

## **KEY WORDS**

Termination

Cancellation

South Africa

Discharge

English law

Avoidance

CISG

Breach

Remedy

Notice

Rescission

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## Chapter 1

### 1.0 Background to the Study

This study analyses the concepts of cancellation, discharge and avoidance as remedies for breach of contract in South Africa, England and the CISG respectively<sup>1</sup>. The main emphasis of the study is to reveal and analyze the grounds and principles that are followed for cancellation, discharge and avoidance as remedy of breach in South Africa, England and the CISG. The principles and provisions forming decisions to cancel, discharge and avoid contracts need to be discussed and debated using selected landmark cases in order to establish which systems have robust mechanism to deal with breach of contract. The rules and regulations that protect contracts also need to be analyzed in order to benchmark them to the best internationally harmonized<sup>2</sup> standards to benefit contract law for South Africa, England and the CISG.

Landmark cases need to be critically analyzed in order to explain and critically compare the different workings of contract law for South Africa, England and the CISG<sup>3</sup>. Analysis of different landmark cases under one study can provide a critical context to compare findings on how South Africa, England and the CISG determine what is a landmark case and how its meanings can bring out new insights to understand why cancellation, discharge and avoidance can be the most appropriate terms to describe remedy of breach. The choice of landmark cases that this study uses should be justified because not all cases can assist in explaining why termination<sup>4</sup> of contract in South Africa, England and the CISG is best understood in the terms such as cancellation, discharge and avoidance respectively.

Legal scholars encourage new researchers on contract law to make use of cases for analysis from “...several jurisdictions from around the world, both domestic and international”.<sup>5</sup> This is because new cases emerge, and expand the complexity of interpreting contract law. And, ‘old’ cases are sometimes re-interpreted anew in light of precedents set in the past. However, it is not possible to use all known legal cases to explain cancellation, discharge and avoidance as

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<sup>1</sup> In my LLB, Hons, I compared South African law of Contract and the CISG. In this study I add a new dimension and compare the South Africa contract law, the English contract Law and the CISG.

<sup>2</sup> Schwenger, Fountoulakis and Dimsey *Sales* 2.

<sup>3</sup> Schwenger, Fountoulakis and Dimsey *Sales* 2.

<sup>4</sup> Schwenger, Fountoulakis and Dimsey *Sales* V.

<sup>5</sup> Schwenger, Fountoulakis and Dimsey *Sales* V, 2.

remedies of breach. In South Africa, England and the CISG, ‘old’ and ‘new’ landmark cases are very much still open to further and diverse legal interpretations.

Moreover, principle authorities on legal opinion on contract law in South Africa, England and the CISG do not always agree on matters of detail in their interpretation of why cancellation, discharge and avoidance should be viewed as apt descriptions of what should be considered remedies to breach, whether fundamental or not. These disagreements in legal opinion must not be viewed as distracting but as Bergsten<sup>6</sup> correctly states“... judges trained in the law of their own domestic legal system, will have a home-State bias when faced with the need to interpret and apply the Convention.”

The CISG neither applies directly to South Africa nor the United Kingdom but my study follows the wise and correct advice offered by scholars on the CISG<sup>7</sup> which is that “a casebook serves as a selection process whereby those cases of particular interest and significance are emphasized and their legal reasoning discussed.”<sup>8</sup> This view is relevant to my study and also realistic because “it is not only impractical, but also inefficient and laborious to discuss every case ever decided...”<sup>9</sup>

The study seeks to illustrate the argument that the ambiguities of cancellation, discharge and avoidance are revealed in a comparative study. Such a study may show that the interpretation of any landmark case whether from South Africa, England and the CISG can protect the rights of the debtor or creditor depending on what aspects of the facts of the case have been highlighted.

## **1.1 Statement of the Problem**

Although, South Africa, England and the CISG use cancellation, discharge and avoidance as remedy of breach of contract, these terms do not mean the same thing. And yet there has not been an in-depth study from a comparative perspective to reveal why the terms continue to be viewed as remedy of breach of contract. The grounds, requirements and principles for

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<sup>6</sup> Bergsten *CISG IX*.

<sup>7</sup> Schwenger, Fountoulakis and Dimsey *Sales V*.

<sup>8</sup> Schwenger, Fountoulakis and Dimsey *Sales V*.

<sup>9</sup> Schwenger, Fountoulakis and Dimsey *Sales V*.

cancellation, discharge and avoidance are not similar and yet there are few comparative studies<sup>10</sup> that critically explore the effects of those differences to the concepts of remedy of breach of contract in South Africa, England and the CISG. Extant studies have either limited their focus on South Africa<sup>11</sup>, England<sup>12</sup> and the CISG<sup>13</sup> or offered limited comparisons between England and the CISG<sup>14</sup> and South Africa and the CISG.<sup>15</sup> There is, therefore, need to work with well-defined and elaborate terms<sup>16</sup> when stating the grounds for cancellation, discharge and avoidance. Considering the inadequacy of the resource of language to capture with precision the content of concepts, in contract law there appears to be a “wrestle”<sup>17</sup> with words and meanings when attempting to define the term ‘fundamental breach’ or ‘material breach’.

Additionally, in contract law, the difficulties posed by literal interpretation<sup>18</sup> as opposed to metaphorical interpretation of contract law can be a challenge to legal experts when applying the rule-book<sup>19</sup>. Thus, it is hoped that while the use and interpretation of precedent cases can encourage uniformity in contract laws based on the authority of previous case rulings, there still is need to use cases from different regional blocs. This need cannot be overemphasized because over reliance on municipal laws can be too generalized<sup>20</sup> while lack of finely detailed provisions<sup>21</sup> and ignorance on well recognized international texts and comparative law<sup>22</sup> may lead to narrowing of legal opinions on breach and their remedies.

In comparative legal studies, uncritically applying the doctrine of *stare decisis* can impose narrow interpretive frameworks on new cases of breach of contract and its remedies. This can slow or even impede contract law reform.<sup>23</sup> The result could be unfair legal judgments due to the discrepancies in the interpretation of the theory and the application of rules on the actual ground.

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<sup>10</sup> Yovel *CISG* 398,402,440-2; Eiselen 1996 *SALJ* 334; Clive and Hutchinson *Breaches* 176; Eiselen 2001 *SAMLJ* 15.

<sup>11</sup> Hutchinson and Pretorius *Contracts* 67.

<sup>12</sup> Beatson *et al Contracts* 78.

<sup>13</sup> Schwenger, Fountoulakis and Dimsey *Sales V*.

<sup>14</sup> Eiselen 1996 *SALJ* 334.

<sup>15</sup> Eiselen *Remedies* 15

<sup>16</sup> Eiselen *Interpretation* 63-64.

<sup>17</sup> Hoffman *Intolerable* 124

<sup>18</sup> Eiselen *Interpretation* 61-62.

<sup>19</sup> Barnard *Thesis* 55.

<sup>20</sup> Since South Africa is not a member of the CISG, it does not benefit directly from CISG’s forms of standardized contract laws that are well harmonized and uniform.

<sup>21</sup> Zeller *Sales* 627-639.

<sup>22</sup> Schwenger, Fountoulakis and Dimsey *Sales V*.

<sup>23</sup> Aziz *Decisis* 66-73.

My current study agrees with Eiselen<sup>24</sup> when he suggests that there is need to up-dated the definitions, tools, terms, and vocabulary of contract law.

This present study uses a comparative approach to explain cancellation, discharge and avoidance as remedy to breach of contract. However, there is a need to provide a brief context that should justify why it is important to compare English sale law, South Africa sale law and the CISG. Changes in socio-political and economic levels of advancement in the context of globalization affect legislative intention, legislative history, and influence or engineer the laws that States construct, use, amend or adopt in dealing with dispute resolution in contracts law. England and South Africa are not members of the CISG. Despite this fact English and South African sales law recognize the differences between primary contractual remedy regimes of common law versus civil law systems. Damages constitute the primary remedy for English law. Civil law systems have a strong adherence to the doctrine of *pacta sunt servanda*.<sup>25</sup> The differences between the primary remedies for breach of contract under South African and English law are most relevant for interpreting and understanding the differences between cancellation and discharge under South African law and English law respectively.

It is, therefore, imperative to compare the two systems with the CISG that accommodates common law and civil law systems. Furthermore the CISG is most relevant for England which is a European Union member in light of the fact that all EU member states with the exception of Portugal are CISG contracting states.<sup>26</sup> The CISG upon adoption becomes the domestic law of the country, but that there is an imperative in relation to Art 7 of the CISG, to interpret it in view of its international nature. It, therefore, creates a parallel sales regime, one for domestic sales and another for international sales.<sup>27</sup>

The study hopes to manifest potential ambiguities in the “uniformity and diversity [within] the law of international sale’.<sup>28</sup> The comparative and interpretive methods<sup>29</sup> used in my current study can contribute to the growing scholarship aimed at explaining how best to harmonize the rules

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<sup>24</sup> Eiselen *Interpretation* 61-90.

<sup>25</sup> South Africa has a mixed legal system evidencing both common law and civil law influences.

<sup>26</sup> My study does not address the new development that saw England successfully vote to move out of the EU after a referendum on the 23<sup>rd</sup> of June 2016. This study was carried out before BREXIT.

<sup>27</sup> Schwenger, Fountoulakis and Dimsey. *Sales*, V, 2.

<sup>28</sup> Bridge *Uniformity PILR* 55.

<sup>29</sup> The value of these two methods are well elaborated in the section on methodology of this study in this chapter.

and regulations in contract law. This may assist in strengthening and tightening the requirements and principles followed for cancelling, discharging and avoiding as remedies of breach in South Africa, England and the CISG.

## **1.2 Aim of the Study**

Therefore, the main aim of this study is to offer a critical and comparative analysis of cancellation, discharge and avoidance as remedies of breach of contract in South Africa, England and the CISG, respectively.

## **1.3 Objectives of the Study**

Thus, by the end of study it is hoped that:

- The terms cancellation, discharge and avoidance are analysed in their context of South Africa, England and the CISG respectively;
- Landmark cases, both old and new drawn from different regional blocs are analysed to demonstrate how and why cancellation, discharge and avoidance are considered as remedies of breach of contract in South Africa, England and the CISG;
- Comparative and interpretive theories are applied to the analysis of the actual landmark cases to demonstrate how cancellation, discharge and avoidance reveal the different ways they are understood as remedy of breach in South Africa, England and the CISG and that;
- The grounds and principles that are followed for cancellation, discharge and avoidance are evaluated in order to determine to what extent they promote a rigorous and harmonized system of rules and regulations that should be considered as the best practice and emulated to strengthen contract law in South Africa, England and the CISG.

## **1.4 Research Questions of the study**

The four research questions of the study are:

- What are the terms used to define termination under South Africa, England and the CISG?
- What are the requirements for cancellation, discharge and avoidance and how are they similar or different for South Africa, England and the CISG?

- To what extent does a critical comparison and evaluation of the similarities or difference in the concepts of cancellation, discharge and avoidance assist in strengthening contract law for South Africa, England and the CISG?<sup>30</sup>
- To what extent does a critical comparison and evaluation of the similarities or difference in the concepts of cancellation, discharge and avoidance construct and manifest their explanatory potential as remedy of breach in South Africa, England and the CISG?

These questions are relevant to this study because they assist in streamlining or narrowing the area of research enquiry. The questions also usefully structure the argument of the study to remain focused on the critical analysis of cancellation, discharge and avoidance as remedy of breach of contract in South Africa, England and the CISG.

### **1.5 Chapter organization**

Chapter one is the introduction of the study. The chapter defines the area of study, provides justification, outlines methods used in the research and identifies a suitable theoretical framework of the study.

Chapter two explores in detail why cancellation is a remedy of breach, explains the grounds for cancellation and the principles followed for cancellation in South Africa. The chapter argues that the presence of some weaknesses in South African contract law calls for the need to think of ways to upgrade the system so that it should be at par with best practices in international contract law.<sup>31</sup>

Chapter three analyses in detail the principles that the English law follows when discharge is used as a remedy for breach of contract. The assumption of the chapter is that English law's longer history of efforts to harmonize contract law is an advantage. This assumption is tested against the best practices in international contract law of sale.<sup>32</sup>

Chapter four focuses on the CISG and argues that continued scholarly debate on avoidance as remedy of breach can be taken as evidence of the advanced nature of the CISG. This argument

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<sup>30</sup> These four questions are recalled and used in the same ways in chapters two, three, four and five, first to structure in a consistent way the whole study, and second, to assist in explaining different concepts that are described as remedies of breach in three contexts of South Africa, England and the CISG

<sup>31</sup> Eiselen *Adoption SLJ* 330

<sup>32</sup> Beatson *et al Contracts* 1.



is modified by the observation made in the chapter which is that the fact alone that CISG continues to be studied is an admission that more needs to be done to harmonize the CISG laws.<sup>33</sup>

Chapter five is the conclusion. The chapter recalls the four research questions of the study that are then used to structure the critical discussion that compares and evaluate the similarities and differences in cancellation, discharge and avoidance as remedies of breach in South African law, English law and the CISG. The chapter offers recommendations and suggests possible and future research areas in international contract law.

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<sup>33</sup> Bridge *Uniformity PILR* 55; Bridge *Sales* 5.

## **2.0 Chapter 2: Cancellation under South African law**

### **2.1 Introduction**

In South Africa when a contract comes to an end, it is described as having been terminated, repudiated, rescinded or avoided.<sup>34</sup> Although South Africa is not a member of the CISG, South Africa recognizes the differences between primary contractual remedy regimes of common law versus civil law systems. South Africa's sales law has a strong adherence to the doctrine of *pacta sunt servanda*.<sup>35</sup> In South Africa, cancellation is the term most popularly being used to describe the termination of a contract due to breach. Therefore, the main aim of this chapter is to critically explore why and with what implications cancellation is considered a remedy to breach of contract<sup>36</sup>. This chapter argues that cancellation is complex; its interpretation depends on context, which is whether or not it is the debtor or creditor who has defaulted.

### **2.2.0 Terms for termination in South Africa**

#### **2.2.1 Introduction**

The name of the remedy and the process are paramount in deciding a term for ending a contractual relationship. Terms used in South Africa include repudiation, rescission and cancellation. The non-fulfillment of the contractual obligations may lead to termination of a contract<sup>37</sup>. Obligations are terminated either by performance, by agreement, and by operation of law after a breach of contract that is sufficiently serious to allow the aggrieved party<sup>38</sup> to terminate. If either party, by an act or omission and without lawful excuse, fails in any way to honor its contractual obligations, it commits a breach of contract.<sup>39</sup> The manner in which a party commits a breach that leads to ending of a contractual obligation is what is important when considering the name of the remedy being considered. If a breach is sufficiently serious to merit termination, the innocent party can uphold the contract or insist on its fulfillment, or rescind the contract, tender the return of the other party's performance and claim restitution.<sup>40</sup> Cancellation

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<sup>34</sup> Van der Merwe *et al Contracts* 308; Hutchinson and Pretorius *Contracts*; Hutchinson *Breaches*, 279,297-300, 304, 306; Kerr *Contracts* 88; Eiselen *Remedies* 324, 348.

<sup>35</sup> South Africa has a mixed legal system evidencing both common law and civil law influences.

<sup>36</sup> Eiselen *Remedies* 348.

<sup>37</sup> Hawthorn and Lotz *Contracts* 195.

<sup>38</sup> Naude *Termination* 373, 2010

<sup>39</sup> Eiselen *Remedies* 346. Hutchinson *Breaches*, 278, 308.

<sup>40</sup> Hutchinson *Breaches* 278.

is an extra ordinary remedy as it is aimed at undoing the whole transaction and only available in limited circumstances.<sup>41</sup>

### 2.2.2 Repudiation

Repudiation is a term sometimes used for termination in South Africa under the influence of English law. Repudiation is a form of breach and not a method of terminating a contract. This is supported by Van der Merwe *et al*<sup>42</sup> who say that repudiation is an unlawful conduct,<sup>43</sup> which shows that one does not intend to comply with one's duties of the contract.<sup>44</sup> The conduct may take the form of a positive act or omission, or by mere failure to perform. There must be at least words or other conduct that can reasonably be interpreted as anticipating mal-performance.<sup>45</sup> Repudiation entitles the innocent party to cancel the contract due to material breach. For example, in *Sonia (Pty) Ltd v Wheeler*,<sup>46</sup> claims for cancellation were considered normal and desirable since the status of the contract was not in doubt and was well recognised. Repudiation is technically a breach of contract and not the exercise of a remedy.

### 2.2.3 Rescission

Rescission<sup>47</sup> is an exceptional step or remedy that can be taken by a party to a contract in exceptional circumstances. If a party has the right to rescind, then the party can exercise this right by bringing the normal working of a contract to an end.<sup>48</sup> Following upon rescission the party may have certain remedies that it can enforce. The remedy should be described as cancellation than rescission and reserve the word rescission for cases where, typically because of a misrepresentation inducing the contract, it is desired to set it aside *ab initio*. The object of cancellation is to terminate primary obligations of a contract there and then.<sup>49</sup> Therefore, rescission is not the appropriate word to be best used.

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<sup>41</sup> Eiselen *Remedies* 308.

<sup>42</sup> Van der Merwe *et al Contracts* 308; Christie and Brad field *Contracts* 527, 538-540.

<sup>43</sup> *Datacolor International (Pty) Ltd v Intermarket (Pty) Ltd* 2001 (2) SA 239.

<sup>44</sup> *South African Forestry Co Ltd v York Timbers Ltd* 2005 (3) SA 323 SCA 342E.

<sup>45</sup> *Ankon CC v Tadcov Properties (Pty) Ltd* (1991) (3) SA 119 ( C ) 121I- 122C.

<sup>46</sup> *Sonia (Pty) Ltd v wheeler* 1958 1 SA 555 ( A ) 560-1.

<sup>47</sup> Joubert *Principles* 236; Christie and Brad field *Contracts* 561.

<sup>48</sup> *Federal Tobacco Works v Barron & Co* 1904 TS 483.

<sup>49</sup> Christie *Contracts* 596.

## 2.2.4 Cancellation

Cancellation<sup>50</sup> is a term that is used to depict ending or termination of contractual relationships. Cancellation is a drastic remedy which allows a party to terminate a contract when the other party has committed a serious breach that deserves ending a contract. Cancellation of a contract is a unilateral act which terminates certain consequences of a valid contract.<sup>51</sup> Cancellation entails a drastic step of bringing the transaction to an abrupt and premature end, contrary to the original intentions of the parties. A party is awarded cancellation for a sufficiently serious, or material breach.<sup>52</sup> This extra-ordinary remedy depends on the nature and seriousness of breach.<sup>53</sup> In case of a major breach, the aggrieved party is entitled to terminate the contract by cancelling it. However, in the case of a minor breach, a party may not cancel since it is normally only entitled to a specific performance and/or damages. The onus of proving that the breach is major lies on the party asserting it.<sup>54</sup>

## 2.2.5 Conclusion

There are a number of terms used in South Africa to show the act of termination, breaches and remedies which include repudiation, rescission and cancellation. Repudiation is technically a breach of contract and not the exercise of a remedy. Rescission is an exceptional step or remedy that can be used to terminate primary obligations of a contract there and then<sup>55</sup>The remedy should be described as cancellation than rescission and reserve the word rescission for cases where, typically because of a misrepresentation inducing the contract, it is desired to set it aside *ab initio*. Cancellation<sup>56</sup> is a term that is used to depict ending or termination of contractual relationships. Cancellation is a drastic remedy which allows a party to terminate a contract when the other party has committed a serious breach that deserves ending a contract. Therefore, this study chooses to use the term cancellation because it is a unilateral act of a valid contract<sup>57</sup> which entails a drastic step of bringing the transaction to an abrupt and premature end, contrary

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<sup>50</sup> Sharrock *Business* 724-734.

<sup>51</sup> Christie *Contracts* 539 (para 11.44)

<sup>52</sup> Eiselen *Remedies* 113.

<sup>53</sup> Eiselen *Remedies* 347-8; Van der Merwe *et al Contracts* 327, 343 and Hawthorn and Pretorius *Contracts* 341.

<sup>54</sup> Kerr *Contracts* 525.

<sup>55</sup> Christie *Contracts* 596.

<sup>56</sup> Sharrock *Business* 724.

<sup>57</sup> Christie *Contract* 539 .

to the original intentions of the parties.<sup>58</sup> The next section below critically analyses the requirements of cancellation in South African contract law.

## **2.3 Requirements for Cancellation**

### **2.3.1 Introduction**

There are three major requirements for cancellation under South African law.<sup>59</sup> These factors or grounds for cancellation are the materiality of breach, notice of cancellation and mutual restitution. In terms of South African law, a breach of contract in itself does not bring the contract to an end. It provides to the innocent party choice of remedies, which will vary according to the nature and seriousness of the breach. In the case of a major breach of contract, the aggrieved party is entitled to terminate the contract by cancelling it. Additionally, the innocent party has an election between cancellation and keeping the contract intact. The innocent party must also exercise this election within a reasonable period of time. A failure to make the election within a reasonable period of time, will lead to the inevitable conclusion that the innocent party has elected to keep the contract intact. However, in the case of a minor breach, a party may not cancel since it is normally only entitled to specific performance and/or damages. In short, materiality of breach is a requirement for cancellation whereby a breach has to be serious enough to justify giving notice and electing to cancel.

### **2.3.2 Materiality of Breach**

#### **2.3.2.1 Introduction**

Van der Merwe *et al*<sup>60</sup> argue that traditionally there are five forms of breaches. These forms of material breaches in South Africa are positive mal-performance, *mora debitoris*, *mora creditoris*, prevention of performance and repudiation.<sup>61</sup> Time is an element common to all contracts and to decide the consequences of failure to perform a contractual obligation within the appropriate time the law employs the concept of *mora*.<sup>62</sup> Christie and Bradfield<sup>63</sup> classify these forms into

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<sup>58</sup> Hawthorn and Pretorius *Contracts* 341.

<sup>59</sup> Eiselen *Remedies* 325.

<sup>60</sup> Van der Merwe *et al* 290; Hutchinson *Breaches* 306.

<sup>61</sup> Kerr *Contracts* 575; Hutchinson and Pretorius *Breaches* 278; Van der Merwe *et al* 290; Eiselen *Remedies* 308; Joubert *Principles* 242.

<sup>62</sup> Christie and Bradfield *Contracts* 515.

<sup>63</sup> Christie and Bradfield *Contracts* 515.

negative mal-performance<sup>64</sup>(*mora*),positive mal-performance (defective performance), prevention of performance and repudiation.<sup>65</sup>

*Mora debitoris* is a breach that occurs, when the debtor culpably fails to make timeous performance of his or her obligations<sup>66</sup> that are due and enforceable and still possible of performance in spite of such failure.<sup>67</sup> In contrast, *mora creditoris* occurs when the creditor culpably fails to cooperate timeously with the debtor so that the latter may perform his or her obligations.<sup>68</sup> Prevention of performance occurs either when indivisible performance is always available or divisible performance is available *pro tanto*. Repudiation occurs where one party, without lawful grounds, indicates to the other party, by word or conduct, a deliberate and unequivocal intention that all or some of the obligations arising from the contract will not be performed in accordance with its true tenor.<sup>69</sup>

Parties can determine in the contract itself what will constitute a material breach for purposes of cancellation.<sup>70</sup> This is usually done in conjunction with a cancellation clause in a written contract.<sup>71</sup> De Villiers J in *Kangisser v Rieton (Pty) Ltd*<sup>72</sup> stated that cancellation for *mora* in contracts of sale may occur where time is of the essence of the contract either on account of the surrounding circumstances affecting the business of the parties or the nature of the *merx*, or on account of an express term making time of the essence of the contract. An example can be seen in cases of *mora debitoris* when a when time is of the essence. In *Greenfield Manufacturers (Temba) (Pty) Ltd v Royton Electrical Engineering (Pty) Ltd*,<sup>73</sup> Wessels JA sharpened the focus of the traditional inquiry by stressing that what is being looked for is a tacit term that failure to

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<sup>64</sup> Van der Merwe *et al Contracts* 290-291.

<sup>65</sup> *Ally v Courtesy Wholesalers (Pty) Ltd* 1996 3 SA 134 (N) 149F-150H.

<sup>66</sup> *Hutchinson Breaches* 306.

<sup>67</sup> *LAWSA Contract*, @ 217. I van Zyl *Seyn Mora Debitoris volgens die Romein-Hollandse reg (1929)*

<sup>68</sup> *Hutchinson Breaches* 306.

<sup>69</sup> *Datacolor International (Pty) Ltd v Intermarket (Pty) Ltd* 2001 (2) SA 284 (SCA) at 294H-I; *Metalmil (Pty) Ltd v AECI Explosives and Chemicals Ltd*, at 684-685B.

<sup>70</sup> *Louw v TrustAdministrateurs Bpk* 1971 1 SA 896 (W) 903D.

<sup>71</sup> *Alfred Mcalpine & son (Pty) Ltd v Transvaal Provincial Administration* 1977 (4) SA 310 (T) at 311; *Mahabeer v Sharma* 1985 (3) SA 729 (A), *South African Forestry Company v York Timbers Ltd* 2005 (3) SA 12937 (SCA) at 30 para. 38.

<sup>72</sup> 1952 4 SA 424 (T) 428.

<sup>73</sup> *Greenfield Manufacturers (Temba) (Pty) Ltd v Royton Electrical Engineering (Pty) Ltd* 1952 4 SA 424 (T) 428

perform by the specified time entitles the other party to cancel.<sup>74</sup> In *Goldstein and Wolff v Maison Blanc (Pty) Ltd*<sup>75</sup> it was stated that if a party who relies on the fact that ‘time is of the essence’ were simply to aver in the pleadings (1) that a definite time for performance was agreed upon and (2) that, in the event of a failure to perform timeously, the party would be entitled to repudiate the contract.”<sup>76</sup>

### **2.3.2.2 Mora debitoris as a breach**

#### **2.3.2.2.1 Introduction**

A debtor is *in mora* in respect of a particular obligation when three elements are present. First, the obligation must be enforceable against him.<sup>77</sup> Second, performance must be due.<sup>78</sup> Third, the debtor must be or be deemed to be aware of the nature of the performance required of him and the fact that it is due.<sup>79</sup> *Mora debitoris* is a breach that occurs when the debtor culpably fails to make timeous performance of his or her obligations<sup>80</sup> that are due and enforceable and still possible of performance in spite of such failure.<sup>81</sup> The time for performance must have been fixed, either in the contract (*mora ex re*) or by a subsequent demand for the performance (*mora ex persona*) and the debtor must have failed to perform timeously.<sup>82</sup> The concept of *mora* is used to decide the consequences of failure to perform a contractual obligation by a party within the appropriate time.<sup>83</sup>

#### **2.3.2.2.2 Requirements for *mora debitoris***

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<sup>74</sup> *Greenfield Manufacturers (Temba) (Pty) Ltd v Royton Electrical Engineering (Pty) Ltd* 1952 4 SA 424 (T) 428. “In effect, the trial Court held that it had been proved by a preponderance of probability that the parties had agreed (1) expressly, that delivery was to be effected within 8 weeks from 19 June 1973 (ie by not later than 14 August 1973) and (2) tacitly, that respondent would be entitled, at its election, to repudiate the contract in the event of a failure by appellant to effect delivery within the stipulated time.

<sup>75</sup> 1948 (4) SA 446 (C) at 453.

<sup>76</sup> See also *Rautenbach v Venner* 1928 TPD 26; *Racec (Mooifontein) (Pty) Ltd v Devonport Investment Holding Co (Pty) Ltd* 1976 1 SA 299 (W) 301–302; *Kabinet van die Oorgangsregering vir die Gebied van SuidwesAfrika v Supervision Food Services (Pty) Ltd* 1989 1 SA 967 (SWA).

<sup>77</sup> Christie and Bradfield *Contracts* 515.

<sup>78</sup> whether by operation of law (*mora ex lege*), by the terms of the contract (*mora ex re*) or by demand duly made by the creditor (*mora ex persona*).

<sup>79</sup> *Legogote Development Co (Pty) Ltd v Delta Trust and Finance Co* 1970 1 SA 584 (T) 587; cf *Victoria Falls and Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1 .

<sup>80</sup> Van der Merwe *et al* 291. Hutchinson and Pretorius *Breaches* 276; Christie and Brad field *Contracts* 515, 513.

<sup>81</sup> LAWSA Contract, @ 217. I Van Zyl Seyn *Mora Debitoris volgens die Romein-Hollandse reg (1929)*

<sup>82</sup> Hutchinson *Breaches* 306.

<sup>83</sup> Christie and Brad field *Contracts* 515, 513.

(c) *Where time is of the essence*

*Mora debitoris* is terminology borrowed from English law and accepted in South African law, when “time is of the essence”. The following requirements must be met before the debtor can be said to be in *mora*. The obligation to pay the debt must be enforceable against the debtor. The debt or performance must be due.<sup>84</sup> When one says time is of the essence of a contract one means that failure to perform by the time specified must be regarded as a justifying cancellation of the contract.<sup>85</sup> The circumstances in which a ‘mercantile transaction proper’ is concluded and the terms thereof might afford cogent evidence that the parties had in fact agreed that ‘time is of the essence’.<sup>86</sup> This is a matter of fact not law proved by a tacit cancellation clause.<sup>87</sup>

When time is not of the essence an express or tacit forfeiture clause, the creditor would be confined, on the debtor’s failure to perform even a vital term, or important term or a term going to the root of the contract for cancellation.<sup>88</sup> The concept of *mora* is used to decide the consequences of failure to perform a contractual obligation by a party within the appropriate time<sup>89</sup>. The time for performance must have been fixed, either in the contract or by a subsequent demand for performance, and the debtor must have failed to perform timeously. Such failure to perform must be due to the fault of the debtor and the debtor must be aware of the nature of the performance required<sup>90</sup>:

- (a) the creditor stipulates for itself the right to resile;
- (b) the contract does not contain an express or tacit *lex commissoria* but the creditor notifies the debtor of his intention to cancel should performance not take place within a period stated in the notice, which period must be reasonable. Such a notice is known as a notice of rescission<sup>91</sup>;

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<sup>84</sup> Performance must be due. Performance can be due by operation of law (*mora ex lege*), by the terms of a contract or by demand made by the creditor (*mora ex persona*) p551, Christie

<sup>85</sup> Christie and Bradfield 2011 *Contracts*, 529.

<sup>86</sup> *Goldstein and Wolff v Maison Blanc (Pty) Ltd* 1948 (4) SA 446 (C) at p 453.

<sup>87</sup> Christie and Bradfield *Contracts* 523-24.

<sup>88</sup> *Sweet v Ragerguhara* 1978 1 SA 131 (D) 136–137.

<sup>89</sup> Christie and Brad field *Contracts*, 515, 513.

<sup>90</sup> Christie and Bradfield *Contracts* 529

<sup>91</sup> Hawthorn and Lotz *Cases* 206.



(c) if there is an express or implied *lex commissoria* (cancellation clause) to the effect that failure to perform timeously entitles the creditor to cancel, or if creditor has made time of the essence by sending the debtor a notice of rescission.

*Nel v Cloete*<sup>92</sup> illustrates the context in which *mora debitoris* can be ascertained. Cloete sold a house to Nel and paid a deposit. Parties agreed that the balance was to be paid against transfer but Cloete delayed transfer. This case provides authoritative answers to the questions when the debtor is in culpable delay (*mora debitoris*) when the parties did not expressly or tacitly agree on a time for performance and when a creditor may rescind a contract because of delay.<sup>93</sup> The general rule is that where no date for performance is stipulated, a debtor is obliged to perform within a reasonable time. However, should the debtor fail to do so, it is not yet in *mora*. The debtor must be placed in *mora* by a means of a demand plus notice of rescission<sup>94</sup> as this notice does not terminate the agreement but creates the right for the innocent party to do so at a later date. If it then fails to perform within a reasonable time, it will be in *mora ex persona*.<sup>95</sup> A demand will, however, only then have the effect of placing the debtor in *mora* if the period allowed in the demand was reasonable. It is argued that if the period allowed is unreasonable the demand is invalid and without legal effect. The debtor will have to be served with a fresh demand.<sup>96</sup> In other words, when the breach of *mora debitoris* occurs, time is an element of essence common to all contracts, and enables the court to determine the materiality of the breach and finally allows the courts to decide the consequences of failure to perform a contractual obligation within the appropriate time.

In South African law, the general principle is that, in the case of a contract in which no time for performance has been fixed the defaulting party should be placed in *mora* by an interpellatio coupled with a notice of rescission<sup>97</sup> "within a reasonable time" after obligation to do so had arisen. In *Alfred Mcalpine & son (Pty) Ltd v Transvaal Provincial Administration*,<sup>98</sup> the onus was on the contractor to establish that the employer had failed to issue drawings and instructions

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<sup>92</sup> 1972 (2) SA 150 (A).

<sup>93</sup> *Nel v Cloete* 1972 (2) SA 150 (A.)

<sup>94</sup> *Eiselen Remedies* 323.

<sup>95</sup> *Hawthorn and Lotz Cases* 207-8.

<sup>96</sup> *Hawthorn and Lotz Cases* 207-8.

<sup>97</sup> *Alfred Mcalpine & son (Pty) Ltd v Transvaal Provincial Administration* 1977 (4) SA 310 (T) 311.

<sup>98</sup> *Alfred Mcalpine & son (Pty) Ltd v Transvaal Provincial Administration* 1977 (4) SA 310 (T) 311.

timeously. Moreover in the above case, the significance of the notion "time is of the essence of the contract" is that it pertains to the question of cancellation and not to breach. Time would have to relate to the consequences of the breach and not to the breach itself. And the question whether a failure to perform timeously constitutes a breach of contract or not, does not depend upon whether time is of the essence of the contract.

Exceptions are that, a mere failure to perform or mere non-performance in the absence of a fixed time for performance, although it may constitute a ground for a defense of *exceptio non adimpleti contractus*, cannot give rise to a claim for damages because it can never be a breach. It affords no answer to contend that *interpellatio* is unnecessary where a debtor happens to know or ought to have known when a reasonable time (within which to perform) has elapsed. The basic requirement of a proper demand (*interpellatio*) is that it must state a certain date on or before which the debtor is required to perform, and it must make it clear to the debtor that the creditor insists upon performance by that date.

The *Alfred Mcalpine & son (Pty) Ltd v Transvaal Provincial Administration*<sup>99</sup> clearly addresses the issue of whether or not time is of essence to a written contract when no time for performance was fixed and the guilty party fails to perform timeously. The facts of the case are that the plaintiff and defendant entered into an engineering contract. Defendant appointed an engineer. In terms of clause 15 (1) of the general conditions of contract, in the above case, the plaintiff was to execute, complete and maintain the works in strict accordance with the contract to the satisfaction of the engineer.

But clause 60 (A) (iv)<sup>100</sup> clearly states that

...if the contractor be dissatisfied with a decision of the employer on any matter, question or dispute of any kind... the contractor may within 28 days after receiving notice of the decision of the employer give notice to the director in writing of his intention to take the matter in dispute to a court of law... Such disputes... shall not be taken to a court of law until after the completion or alleged completion of the works unless with the written consent of the employer and contractor ..."

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<sup>99</sup> 1977 (4) SA 310 (T), 312.

<sup>100</sup> *Alfred Mcalpine & son (Pty) Ltd v Transvaal Provincial Administration* 1977 (4) SA 310 (T), 312.

The doctrine of freedom of contract allows contracting parties to insert clauses in the agreement that stipulates clearly when a breach such as *mora debitoris* will entitle a party to cancel. In *Goldstein and Wolff v Maison Blanc (Pty) Ltd*<sup>101</sup> the trial court argued that

if a party who relies on the fact that ‘time is of the essence’ were simply to aver in the pleadings (1) that a definite time for performance was agreed upon and (2) that, in the event of a failure to perform timeously, the party would be entitled to repudiate the contract.

The stated position taken by the court in the above primary case is also followed up in *Greenfield Manufacturers (Temba) (Pty) Ltd v Royton Electrical Engineering (Pty) Ltd*.<sup>102</sup> In this case ‘definite time for performance’ was to be effected within 8 weeks from 19 June 1973 but not later than 14 August 1973. The parties also agreed that the innocent party would be entitled, at its election, to repudiate the contract in the event of a failure by appellant to effect delivery within the stipulated time. The two cases above demonstrate the significance of time and choice to elect to cancel. However, what makes time of the essence is in fact a tacit forfeiture clause.<sup>103</sup>

But there appears to be conflict of authority in that when no time for performance is fixed but time is of the essence the debtor is not *in mora* and the creditor cannot cancel for non-performance unless a proper demand for performance has been made.<sup>104</sup> Trengove J pointed out that<sup>105</sup> the concept of time is of the essence relates to the consequences of a breach and not to the breach itself. Trengove J in the above case<sup>106</sup> can be viewed as authority to measure the validity of the argument about the essence of time to a written contract when no time for performance was fixed and the guilty party fails to perform timeously in respect of the implied obligation to furnish drawings and instructions. The nature of the contract and the surrounding circumstances and the inquiry in the cases has been directed to whether it ought to be concluded that time was

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<sup>101</sup> 1948 (4) SA 446 (C) at p 453.

<sup>102</sup> prompt delivery or payment is necessary to keep the wheels of commerce or industry turning.

In *Greenfield Manufacturers (Temba) (Pty) Ltd v Royton Electrical Engineering (Pty) Ltd* 1976 2 SA 565 (A) 569 as per Wessels JA.

<sup>103</sup> *Birkenruth Estates (Pty) Ltd v Unitrans Motors (Pty) Ltd* 2005 3 SA 54 (W) [25] stated that If the debtor is in *mora ex re* and there is no tacit forfeiture clause, the creditor cannot cancel the contract but may claim specific performance.

<sup>104</sup> Christie and Bradfield *Contracts* 530.

<sup>105</sup> in *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1977 4 SA 310 (T) 347.

<sup>106</sup> *Alfred McAlpine & son (Pty) Ltd v Transvaal Provincial Administration* 1977 (4) SA 310 (T) 347.

of the essence.<sup>107</sup> However, in the case described above,<sup>108</sup> time was not of the essence to the contract unless it was specifically made of the essence by means of an *interpellatio* coupled with a notice of rescission. Furthermore, a proper demand was a pre-requisite of the plaintiff's claim for damages based, as it was, on alleged *mora debitoris*.

### **2.3.2.2.3 Conclusion to *mora debitoris***

The above section debated the concept of *mora debitoris*. The discussion revealed that a debtor commits a breach if obligations are not performed at all, performed late, or performed in the wrong manner. *Mora debitoris* entitles or warrants cancellation of a contract. But certain requirements must be considered. These are the presence of a cancellation clause, when "time is of the essence", when time is not of essence and a material breach is present. The debtor stipulates for itself the right to resile, when contract does not contain an express or tacit *lex commissoria* and notifies the creditor using a notice of rescission. It was also noted in the discussion that other critics emphasize that the significance of the notion "time is of the essence of the contract" relates to the consequences of the breach and not to the breach itself. Therefore, the question whether or not a failure to perform timeously constitutes a breach of contract does not entirely depend upon whether time is of the essence of the contract. There appears to be conflict of authority in that when no time for performance is fixed but time is of the essence the debtor is not *in mora* and the creditor cannot cancel for nonperformance unless a proper demand for performance has been made. Having explained the nature and grounds for *mora debitoris*, it is crucial to understand the nature and grounds for *mora creditoris*.

## **2.3.3 *Mora creditoris* as a breach**

### **2.3.3.1 Introduction**

Whereas, *mora debitoris* occurs when the creditor culpably fails to make timeous performance of its obligations,<sup>109</sup> *mora creditoris* occurs when the creditor culpably fails to cooperate timeously with the debtor so that the latter may perform his or her obligations<sup>110</sup>. Delay in performance or

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<sup>107</sup> *Swartz & Son (Pty) Ltd v Wolmaransstad Town Council* 1960 2 SA 1 (T); *Stapleford Estates (Pty) Ltd v Wright* 1968 1 SA 1 (E); *Louw v TrustAdministrateurs Bpk* 1971 1 SA 896 (W) 903D.

<sup>108</sup> *Alfred Mcalpine & son (Pty) Ltd v Transvaal Provincial Administration* 1977 (4) SA 310 (T) 347.

<sup>109</sup> Van der Merwe *et al Contracts* 290. Hutchinson and Pretorius *Breaches* 306.

<sup>110</sup> Hutchinson and Pretorius *Breaches* 306 ; Van der Merwe *et al Contracts* 290-291.

the non-performance is traceable to the creditor *mora*.<sup>111</sup> In *Martin Harris & Seuns OVS (Edms) Bpk v Qwa Qwa Regeringsdiens*, the creditor's failure to cooperate with the debtor to the extent necessary to enable the debtor to perform made him liable for *mora creditoris*.<sup>112</sup> The duty to cooperate may arise from a demand by the debtor<sup>113</sup> or by lapse of the time fixed by the contract or the debtor.<sup>114</sup>

### 2.3.3.2 Requirements for *mora creditoris*

The essence of *mora creditoris* is the creditor's failure to cooperate with the debtor to the extent necessary to enable the debtor to perform.<sup>115</sup> The duty to cooperate may arise from a demand by the debtor or by lapse of the time fixed by the contract or the debtor<sup>116</sup>. When the delay in performance or the nonperformance is traceable to the creditor *mora creditoris* arises.<sup>117</sup>

In *Greenfield Manufacturers (Temba) (Pty) Ltd v Royton Electrical Engineering (Pty) Ltd*<sup>118</sup> Wessels JA stressed that what is being looked for is a tacit term that failure to perform by the specified time entitles the other party to cancel.<sup>119</sup> The creditor is *in mora* when he has refused a valid tender of performance by the debtor. The debtor's obligation is not thereby discharged unless the creditor's refusal is such as to amount to a repudiation of the whole contract.<sup>120</sup>

Cancellation for *mora* in contracts of sale may occur where time is of the essence of the contract or when time is not of essence.<sup>121</sup> De Villiers J in *Kangisser v Rieton (Pty) Ltd*<sup>122</sup> stated that

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<sup>111</sup> Christie and Brad field *Contracts* 533; Van der Merwe *et al Contracts* 290; Hutchinson and Pretorius *Breaches* 306.

<sup>112</sup> *Martin Harris & Seuns OVS (Edms) Bpk v Qwa Qwa Regeringsdiens* 2000 3 SA 339 (A) [17]–[19].

<sup>113</sup> *Government of the Republic of South Africa v York Timbers Ltd (1)* [2001] 2 All SA 51 (SCA) [60].

<sup>114</sup> *Martin Harris & Seuns OVS (Edms) Bpk v Qwa Qwa Regeringsdiens* 2000 3 SA 339 (A) [17]–[19].

<sup>115</sup> *Martin Harris & Seuns OVS (Edms) Bpk v Qwa Qwa Regeringsdiens* 2000 3 SA 339 (A) [17]–[19].

<sup>116</sup> *Government of the Republic of South Africa v York Timbers Ltd (1)* 2001 2 All SA 51 (SCA) [60]; *Martin Harris & Seuns OVS (Edms) Bpk v Qwa Qwa Regeringsdiens* 2000 3 SA 339 (A) [17]–[19].

<sup>117</sup> Christie and Brad field *Contracts* 533; Van der Merwe *et al Contracts* 290; Hutchinson and Pretorius *Breaches* 306.

<sup>118</sup> 1976 2 SA 565 (A) 569.

<sup>119</sup> "In effect, the trial Court held that it had been proved by a preponderance of probability that the parties had agreed (1) expressly, that delivery was to be effected within 8 weeks from 19 June 1973 (ie by not later than 14 August 1973) and (2) tacitly, that respondent would be entitled, at its election, to repudiate the contract in the event of a failure by appellant to effect delivery within the stipulated time.

<sup>120</sup> See Christie and Brad field, (2011), *Contracts*, at 538–540.

<sup>121</sup> Van der Merwe *et al Contracts* 290 ; Hutchinson and Pretorius *Breaches* 306.

<sup>122</sup> 1952 4 SA 424 (T) 428.

cancellation for *mora* in contracts of sale may occur where time is of the essence of the contract either on account of the surrounding circumstances affecting the business of the parties or the nature of the *merx*, or on account of an express term making time of the essence of the contract. Also where time is not of the essence (1) where the time for the performance is stipulated. (2) where the time for performance is not stipulated.<sup>123</sup> In *Goldstein and Wolff v Maison Blanc (Pty) Ltd*<sup>124</sup> states that if a party who relies on the fact that ‘time is of the essence’ were simply to aver in the pleadings (1) that a definite time for performance was agreed upon and (2) that, in the event of a failure to perform timeously, the party would be entitled to cancel the contract.”

*Ranch International Pipe Lines (Transvaal) (Pty) Ltd v LMG Construction (Qty) (Pty) Ltd*<sup>125</sup> illustrates the context in which *mora creditoris* can occur. Ranch International Pipelines was awarded a contract by Flour Engineers (SA) (Pty) Ltd for the construction of a pipeline but subcontracted with LMG Construction. Ranch unlawfully dismissed LMG. LMG made a counter application requesting Ranch to be interdicted from interfering with its (LMG's) right to complete the work. Ranch argued that it was the right of an employer to terminate and evict a building contractor any time before or during the performance. Ranch in addition relied on an alleged reluctance on the courts to order specific performance of a building contract. The court dismissed Ranch's application and granted LMG's counter application.

Coetzee J<sup>126</sup> adopted the wide interpretation of the concept *mora creditoris* as failure to cooperate, applied it in deciding that an employer has no unilateral right of stoppage of a building or civil engineering contract. Coetzee J<sup>127</sup> concluded that the duty of cooperating was enforceable by an order of specific performance or an interdict restraining interference. The creditor is in *mora* when he has refused a valid tender of performance by the debtor. The judgment contains an emphatic recognition of a creditor's duty to co-operate to make it possible

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<sup>123</sup> Christie and Bradfield *Contracts* 530.

<sup>124</sup> 1948 (4) SA 446 (C) it was stated at 453)

<sup>125</sup> 1984 (3) SA 861 (W).

<sup>126</sup> *Ranch International Pipelines (Transvaal) (Pty) Ltd v LMG Construction (Qty) (Pty) Ltd* 1984 3 SA 861 (W), para. 877B–879F.

<sup>127</sup> *Ranch International Pipelines (Transvaal) (Pty) Ltd v LMG Construction (Qty) (Pty) Ltd* 1984 3 SA 861 (W), para. 877B–879F.

for the debtor to render performance.<sup>128</sup> The debtor's obligation is not discharged unless the creditor's refusal amounts to a repudiation of the whole contract.<sup>129</sup>

In *Qwa Qwa Regeeringsdiens v Martins Harris & Seuns OVS (Edms)*<sup>130</sup> a contractor had completed work, applied for the issuing of a progress certificate and payment. The contractor was not given his balance of payment and not issued with a progress report. The contractor approached the courts and claimed for the balance of the payment. In the above case<sup>131</sup>, *mora creditoris* occurred when contractor could not perform due to the lack of co-operation of the creditor. *Mora creditoris* arose when contractor demanded for the progress certificate from the creditor. The creditor did not immediately commit a breach of contract by not delivering a progress certificate timeously. The obligation only meant that the creditor could be called upon to produce a progress certificate and pay the money. Breach of contract by *mora creditoris* occurred only when the progress report was called for and money needed. Secondly, *mora creditoris* also meant that there could only be talk of breach of contract by *mora creditoris* were such a demand had in fact been made.<sup>132</sup> The main effect of *mora creditoris* is to shift responsibility for further delay or nonperformance onto the creditor, whether or not the debtor was previously *in mora debitoris*.<sup>133</sup> The risk of destruction, damage or loss lies with the creditor<sup>134</sup> and if any property which the creditor ought to have accepted remains in the hands of the debtor, the debtor is only liable for *dolus* and *culpa lata* in caring for it.

The effect of *mora creditoris* in making it impossible for the debtor to perform on time is evident when a contract contains a *lex commisoriam* as explained by De Villiers JP when he argued that the creditor cannot<sup>135</sup> “alter the contract dates, nor can he put the defaulting buyer in a worse legal position by tendering, after the expiration of the contract period, a delivery which is not, in fact, in accordance with the contract, as it is not made within the contract time.” The creditor is

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<sup>128</sup> Hawthorn and Lotz *Contracts* 219.

<sup>129</sup> Christie and Bradfield *Contracts* 538–540.

<sup>130</sup> *BPK 2000* (3) SA 339 (SCA) Paragraphs [37] and [38] at 355H - 356B

<sup>131</sup> *Qwa Qwa Regeeringsdiens v Martins Harris & Seuns OVS (Edms BPK 2000* (3) SA 339 (SCA) Paragraphs [37] and [38] at 355H - 356B

<sup>132</sup> Paragraphs [18] and [19] at 349C - D and 349H/I - 350A.)

<sup>133</sup> Christie and Bradfield *Contracts* 538–540, 534.

<sup>134</sup> *D* 19 2 36; *D* 24 3 26; *D* 46 3 72 pr.

<sup>135</sup> *Leviseur & Co v Highveld Supply Stores* 1922 OPD 233 239; *Leviseur v Frankfort Boere Ko Operatiewe Vereniging* 1921 OPD 80.

therefore not entitled to use the delay or non-performance for which he is responsible as a foundation for a claim for damages or cancellation against the debtor,<sup>136</sup> but the debtor is entitled to claim against the creditor.<sup>137</sup>

*Mora creditoris* shifts responsibility for further delay or nonperformance onto the creditor, whether or not the debtor was previously *in mora debitoris*. The creditor is, therefore, not entitled to use the delay or nonperformance for which he is responsible as a foundation for a claim for damages or cancellation against the debtor,<sup>138</sup> but the debtor is entitled to claim against the creditor.<sup>139</sup> The risk of destruction, damage or loss lies with the creditor<sup>140</sup> and if any property which the creditor ought to have accepted remains in the hands of the debtor, the debtor is only liable for *dolus* and *culpa lata* in caring for it.<sup>141</sup> Sureties for the debtor's performance are discharged.<sup>142</sup>

### 2.3.3.3 Conclusion to *mora creditoris*

Hutchinson and Pretorius<sup>143</sup> stated that *mora creditoris* is a material breach that occurs when the creditor culpably fails to cooperate timeously with the debtor so that the latter may perform his or her obligations.<sup>144</sup> Van der Merwe *et al*<sup>145</sup> added that delay in performance or non-performance is traceable to the creditor when it shifts responsibility for further delay or non-performance on to the creditor. However, Christie and Bradfield are of the view that the main effect of *mora creditoris* is to shift responsibility for further delay or non-performance onto the creditor<sup>146</sup>. The effect of *mora creditoris* making it impossible for the debtor to perform on time is explained by De Villiers JP.<sup>147</sup> Debtor has to demand required cooperation from creditor. Van

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<sup>136</sup> *Group Five Building Ltd v Minister of Community Development* 1993 3 SA 629 (A) 651 C–D.

<sup>137</sup> *Acton v Lazarus* 1927 EDL 367; *Van Wyk v Botha* (2005) 2 All SA 320 (C).

<sup>138</sup> *National Bank of SA Ltd v Leon Levson Studios Ltd* 1913 AD 213; *Van Loggenberg v Sachs* 1940 WLD 253; *Bardopoulos and Macrides v Miltiadous* 1 9 4 7 4 S A 8 6 0 ( W ) ; *Group Five Building Ltd v Minister of Community Development* 1993 3 SA 629 (A) 651C–D.

<sup>139</sup> *Acton v Lazarus* 1927 EDL 367; *Van Wyk v Botha* (2005) 2 All SA 320 (C).

<sup>140</sup> *D* 19 2 36; *D* 24 3 26; *D* 46 3 72 pr.

<sup>141</sup> *D* 18 6 17; *D* 24 3 9; Voet 18 6 2.

<sup>142</sup> *St Patrick's Mansions (Pty) Ltd v Grange Restaurant (Pty) Ltd* 1949 4 SA 57 (W) 63.

<sup>143</sup> Hutchinson and Pretorius *Breaches* 306.

<sup>144</sup> Hutchinson and Pretorius *Breaches* 306; Van der Merwe *et al Contracts* 290-291.

<sup>145</sup> Van der Merwe *et al Contracts* 290-291.

<sup>146</sup> Christie and Bradfield *Contracts* 534, 538–540.

<sup>147</sup> *Leviseur & Co v Highveld Supply Stores* 1922 OPD 233 239; *Leviseur v Frankfort Boere Ko Operatiewe Vereniging* 1921 OPD 80.



der Merwe<sup>148</sup> adds that apart from breaches of contract by the debtor in the form of *mora debitoris* and *mora creditoris* two more forms of breaches which he calls defective performance and conduct contrary to a contractual obligation “relate to the manner in which an obligation is executed”.<sup>149</sup> However, where performance on either side becomes impossible after the conclusion of the contract owing to the fault of either the creditor or the debtor, the contract is not terminated, but the party who renders performance impossible is guilty of prevention of performance.

### **2.3.4 Positive mal-performance**

#### **2.3.4.1 Introduction**

Positive mal-performance as an act of breach of contract occurs when obligations in a contract are performed in the wrong manner.<sup>150</sup> Defective performance is viewed as a form of novation which replaces contractual obligations by new obligations arising out of breach<sup>151</sup>, replaces of a contract depends on the terms of a contract which can be consensual, *ex lege or naturalia*.<sup>152</sup> There are two requirements for positive mal-performance and these are firstly, performance by a debtor is done in a defective way or incomplete manner.<sup>153</sup> Secondly, that performance rendered must be in conflict with a contractual prohibition by debtor conflicts with the particular obligation *non faciendi*.

#### **2.3.4.2 Requirements for positive mal-performance**

In positive mal-performance an act of breach of contract is complete as soon as performance that is defective or incomplete has been made. The debtor does perform, but in a defective way or in an incomplete manner.<sup>154</sup> The creditor bears no general duty to return performance to the debtor for rectifying the defects. In *BK Tooling*<sup>155</sup> Jansen JA remarked that a debtor who had not cancelled the contract was obliged to return the defective performance in order to enable the

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<sup>148</sup> Van der Merwe *et al Contracts* 290-291

<sup>149</sup> Van der Merwe *et al Contracts* 290-291

<sup>150</sup> Christie and Bradfield *Contracts* 515.

<sup>151</sup> *Ally v Courtesy Wholesalers (Pty) Ltd* 1996 3 SA 134 (N) 149F-150H.

<sup>152</sup> Van der Merwe *et al Contracts* 301.

<sup>153</sup> Hutchinson *Breaches* 306.

<sup>154</sup> Hutchinson *Breaches* 306.

<sup>155</sup> *Bk Tooling v Scope Engineering* 1979 (1) SA 391 (A).

debtor to rectify any defects. The contractant relied on the defense of reciprocity and thus claimed counter performance. The contractant was obliged to allow the other party to perform or to rectify its defective performance where performance by the other party was still possible. The defendant could hold back its performance until the plaintiff had performed.

#### **2.3.4.3 Defective conduct in conflict with a contractual obligation**

The second interpretation of what is positive mal-performance is that performance rendered must be defective conduct in conflict with a contractual. Fault is only a requirement for positive mal-performance if parties so agree but the position has been taken that fault is indeed required in principle, but that it is usually assumed to be present, unless the contractant who is alleged to have committed a breach of contract proves the absence of fault. In view of the nature of breach of a contract, fault should not be a requirement or a defense in respect of positive mal-performance.

#### **2.3.4.4 Conclusion**

Positive mal -performance may take two forms. The first form occurs where debtor has a positive obligation, which means a debtor duly performs, but in an incomplete or defective manner. The second form occurs where the debtor has a negative obligation, which means that the debtor does the act that it is bound to refrain from doing.<sup>156</sup> However, *mora debitoris* moves further from the principle the debtor duly performs but in an incomplete or defective manner and adds that debtor culpably fails to make timeous performance of its obligations<sup>157</sup> that are due and enforceable and is still possible of performance in spite of such failure.<sup>158</sup>

### **2.3.5 Prevention of Performance as a breach**

#### **2.3.5.1 Introduction**

Nature of performance is important when one looks at *mora* and fault is attributed to a particular party. The essence of prevention is manifested where performance on either side becomes impossible after the conclusion of the contract owing to the fault of either the creditor or the

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<sup>156</sup> Hutchinson *Breaches* 306.

<sup>157</sup> Hutchinson *Breaches* 306.

<sup>158</sup> LAWSA *Contracts* 217; I Van Zyl *Seyn Mora Debitoris volgens die Romein-Hollandse reg (1929.)*

debtor. The contract is not terminated, but the party who renders performance impossible is guilty of prevention of performance.<sup>159</sup>

### **2.3.5.2 Requirements of Prevention of Performance**

Fault is an essential element of prevention of performance, unless the debtor has guaranteed performance (and the creditor is not at fault). Usual remedies are available to the creditor except for specific performance. In the case of material prevention of performance of a divisible obligation, the creditor may only cancel *pro tanto* and counter performance will be reduced proportionately.<sup>160</sup>

Whether performance is defective, depends primarily on whether the performance made complies with the terms of a contract. Thus, a builder renders defective performance if he renders a house that was not erected in compliance with the agreed building plan. Terms of the contract refer not only to the consensual terms which are express or tacit but also to the *ex-lege* terms or naturalia of the contract. Performance can be defective whether made before, on or after the time fixed for performance as in the case of *Sweet v Rageerghara NO and others*<sup>161</sup>

In the above case, an applicant had applied for an order declaring an agreement of sale of immovable property to have been lawfully cancelled. The purported cancellation was on the ground that the respondents had failed to give applicant vacant possession on the date stipulated in the agreement. The notice of cancellation which had been given by way of a letter called upon the respondents to ensure that the applicant would be given vacant possession within 30 days from the date of the letter.<sup>162</sup>

Where cancellation of an agreement is claimed in motion proceedings the applicant should unequivocally state in its founding affidavit that the cancellation is based on a material breach of the agreement and it should thereafter set out fully the facts on which it relies for its assertion. If a contractant commits an act contrary to an express or tacit prohibition in the contract then it should relate to the manner in which the obligation was executed. An example is the situation where the seller of a business undertakes not to compete with the purchaser for a specific time

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<sup>159</sup>Hutchinson *Breaches* 306.

<sup>160</sup>Hutchinson *Breaches* 306.

<sup>161</sup> 1978 (1) all SA 277 (D) 285.

<sup>162</sup> *Sweet v Rageerghara NO and others* 1978 (1) SA 277 (D) 278-9 per Kumleben, J.

within a certain area and does compete with him. Or parties to a contract expressly agree that failure to give purchaser vacant possession on 1 January 1977 is a material breach of the agreement.<sup>163</sup>

The *South African Forestry Company v York Timbers Ltd*<sup>164</sup> provides another clear example of prevention of performance. In this case a contract conferred a right on one party to approach the minister and also to refer the matter for arbitration. After considering the dictates of good faith in interpreting the clause, the court found that the corollary of this right was a duty on the other party not to frustrate the exercise of this right. The party prevented or delayed arbitration and this amounted to mal-performance.<sup>165</sup>

The case above is clear illustration of the requirements of prevention of performance.<sup>166</sup> Firstly, the debtor must have performed. Secondly, the performance made must be defective. It is the element of conduct in respect of minimum performance in the form of positive mal-performance that can be described as conduct of the debtor that eventually results in delivery of defective performance. The breach must be serious. A *lex commissoria* must be present. The question is when the debtor can be said to have performed. As a rule, performance can only be made with the co-operation of the creditor. The debtor will have to tender performance and will only have performed when the tender of the performance has been accepted. Thus, if the debtor wants to deliver the motor vehicle that is due, the creditor will have to accept delivery before there can be performance and the debtor can be discharged. If the debtor tenders defective performance and it

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<sup>163</sup> *Sweet v Rageerghara NO and others* 1978 (1) SA 277 (D) 282.

<sup>164</sup> 2005 (3) SA 12937 (SCA) 28-29 para 35. The South African government had a long term agreement to sell softwood to York but Safcol cancelled the contract due to breach. The facts of the case are that In 1982, ('York') took over all the rights and obligations of the other party in terms of both contracts. With effect from 1 April 1993, the SA government transferred all its rights and obligations under the contracts to ('Safcol' (the purchaser) pursuant to the provisions of s4 of the Management of State Forests Act 128 of 1992. In 1999, Safcol applied for cancellation of the contracts due to certain material provisions of the contract had become unworkable and that a breach of contract by York occurred either through repudiation of or through non-compliance with its obligations in terms of clauses 3.2 and 4.4. The two contracts were entered into at a time when the South African Government decided to encourage investment by the private sector in the sawmilling industry by entering into long-term agreements with sawmills. In clause 4.1 York provided Safcol with security of tenure. Clause 4.2 went on to provide that the contract operated for an indefinite period. Safcol's complained that certain material provisions of the contract had become unworkable. In the alternative, Safcol contended that the contracts had been validly cancelled by it on 10 November 1998 as a result of York's breach, either through repudiation of or through non-compliance with its obligations in terms of clauses 3.2 and 4.4.

<sup>165</sup> *South African Forestry Company v York Timbers Ltd* 2005 (3) SA 12937 (SCA) 28-29 para 35.

<sup>166</sup> *South African Forestry Company v York Timbers Ltd* 2005 (3) SA 12937 (SCA) 28-29 para 35.

is refused by the creditor, there is no question of completed performance but an attempt to commit mal-performance.<sup>167</sup>

In the above case, prevention of performance occurred through supervening impossibility when contractual provisions became unworkable through statutory amendment while government was still a party to contracts. The appellant as successor to government's rights and obligations could not rely on supervening impossibility created by the same government while still party to contract. It was a self-created impossibility as it was created by legislative amendments made by the government in power. It was argued that as a matter of law, sanction against reliance on self-created impossibility was not limited to situations where an act causing impossibility could somehow be described as wrongful or reprehensible. In other words, implied and tacit terms are to be applied when obligations to act in accordance with principles of reasonableness, fairness and good faith cannot be implied into contract.

The above case also illustrates the fact that when interpreting contracts, obligations to act in accordance with principles of reasonableness, fairness and good faith are applied. Use of such principles in interpreting terms of contract should be on the basis of intention of parties. While the court is not entitled to superimpose on clearly expressed intention of parties, its notion of fairness, is different when the contract is ambiguous. In such a case, the principle that all contracts governed by good faith are applied, and the intention of parties are determined on basis of what they have negotiated with one another in good faith. From the above comments one can argue that prevention of performance can come from either the creditor or debtor resulting in both parties being prevented from completing performance of an obligation. The South African law makes provision calling for cancellation.<sup>168</sup>

### **2.3.5.3 Conclusion to Prevention of Performance**

In conclusion, prevention of performance will warrant cancellation where performance on either side becomes impossible owing to the fault of either the creditor or the debtor. The contract is not terminated but the party who renders performance impossible is guilty of prevention of performance. The fault of either the creditor or the debtor a serious breach occurs and a *Lex*

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<sup>167</sup> *South African Forestry Company v York Timbers Ltd* 2005 (3) SA 12937 (SCA) 28-29 para 35.

<sup>168</sup> *Trustee, Estate Cresswell & Durbach v Coetzee* 1916 AD 14 at 19; *Dharumpal Transport (Pty) Ltd v Dharumpal* [1956 \(1\) SA 700](#) (A) at 706–707; *Mittermeier v Skema Engineering (Pty) Ltd* [1984 \(1\) SA 121](#) (A) at 128A–C; *Joosub Investments (Pty) Ltd v Maritime & General Insurance Co Ltd* [1990 \(3\) SA 373](#) (C) at 383E–F.

*commissoria* must be present. The debtor can only perform with the co-operation of the creditor. However, it is also important to understand how the demonstration by a party, through words or conduct that reveals an unequivocal intention no longer to be bound by the contract can lead to cancellation.

## 2.4 Repudiation as breach

### 2.4.1 Introduction

In contrast to the grounds defining prevention of performance, repudiation is a form of anticipatory breach of contract which can take place even before performance becomes enforceable. Repudiation may occur where either party renders the performance impossible or indicate that they will not perform the contract or a substantial part of the contract or will commit a serious breach.<sup>169</sup> Kerr<sup>170</sup> uses the term repudiation in the context of both anticipatory and ordinary breach. Legal and non-legal usages of the word “repudiation” refer to rejection of the contract as a whole or an obligation of major importance.<sup>171</sup>

The breach may lead to cancellation if the consequences are serious. The doctrine of anticipatory breach was received into South African law from the English law.<sup>172</sup> The question that arose in the case of repudiation was how a breach of contract could be committed before the date of performance had arrived, especially when performance remained possible. The explanation originally advanced in English law was that repudiation constituted an offer from the guilty party to cancel the contract which offer could then be accepted or rejected by the innocent party.<sup>173</sup> Although the offer and acceptance theory was for a long time accepted in South African Law, the Appellate Division did not accept it in *Stewart Wrightson (Pty) Ltd v Thorpe*.<sup>174</sup>

Repudiation occurs due to words or conduct<sup>175</sup> by the party in breach whose actions goes to the root of the contract that affects a vital part of the obligations or conduct that results in there being no substantial performance.<sup>176</sup> Thus, repudiation contains a mental element which discloses an

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<sup>169</sup> Hutchinson, (2012), *Breaches*, 306.

<sup>170</sup> Kerr *Contracts* 205.

<sup>171</sup> Luanda and Hawthorn *Contracts* 205.

<sup>172</sup> Hawthorne and Lotze *Cases* .

<sup>173</sup> *Stewart Wrightson v Thorpe* (1977) (2) SA 943 (A) at 77 D.

<sup>174</sup> (1977) 3 All SA 267 (A) at 274 -276 as per Miller, J.

<sup>175</sup> Hutchinson *Breaches* 306.

<sup>176</sup> Hutchinson *Breaches* 306.

intention of no longer wanting to be bound by a party in a contract.<sup>177</sup> The term is commonly used in South African law when a refusal to perform a contract acknowledged to be binding, or of a declaration of inability to perform, or of other declarations of a similar nature<sup>178</sup>. The test for repudiation is wholly objective, the only question is whether it can be reasonably inferred from the repudiator's conduct that mal-performance will take place in the future.<sup>179</sup> The innocent party has a choice to rescind or affirm the contract.

#### **2.4.2 Requirements for Repudiation**

Repudiation is an act by the guilty party evincing a deliberate and unequivocal intention no longer to be bound by the agreement. The election by the innocent party to choose cancellation completes and confirms the breach. In *Data Colour International (Pty) Ltd v Intermarket (Pty) Ltd*<sup>180</sup> it was argued that repudiation is a breach in itself. The requirements were that an innocent party shows by words or conduct that it has elected to cancel the contract. Once the innocent party decides to cancel, communication of the cancellation may be conveyed to the guilty party by someone other than the innocent party. The Court, therefore, concluded that the Appellant's initial letters to the Respondent constituted a repudiation, and that the Respondent replied by treating the agreement as having been terminated.<sup>181</sup>

Repudiation occurs where either party renders performance of the contract impossible (prevention of performance)<sup>182</sup> Repudiation of a contract is a serious breach and provides grounds for cancellation. The above case is a good illustration of repudiation in the form of anticipatory breach which can take place even before performance becomes enforceable. It can take place in the form of repudiation or prevention of performance. Repudiation occurs due to words or conduct<sup>183</sup> by the party in breach whose actions goes to the root of the contract that

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<sup>177</sup> Kerr *Contracts* 205.

<sup>178</sup> Kerr *Contracts* 205.

<sup>179</sup> Hawthorn and Lotz *Contracts* 205.

<sup>180</sup> (2001) 1 All SA 581 (A) 582.

<sup>181</sup> *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd* 2001 (2) SA 284 (SCA) at 294H-I; *Metalmil (Pty) Ltd v AECL Explosives and Chemicals Ltd*, at 684-685B.

<sup>181</sup> *South African Forestry Company v York Timbers Ltd* 2005 (3) SA 12937 (SCA) para 38,30.

<sup>182</sup> Hutchinson *Breaches* 306.

<sup>183</sup> Hutchinson *Breaches* 306.

affects a vital part of the obligations or conduct that results in there being no substantial performance.

Hutchinson<sup>184</sup>, argues that if “words or conduct” by a party are lawful but are misunderstood to be unlawful evidence by the creditor unconsciously leads the creditor into repudiation even when the question of who would have repudiated is posed.<sup>185</sup> Hutchinson further adds that repudiation occurs where either party renders performance of the contract impossible (prevention of performance).<sup>186</sup> However, Eiselen<sup>187</sup> brings a new perspective when he argues that repudiation can be used in the context of both anticipatory and ordinary breach.<sup>188</sup> In particular circumstances conduct of a contracting party can constitute both a breach of contract in the form of mal-performance and repudiation. A fair example of this is to be found in the above case. York's conduct amounted to breach in the form of failure to comply with his obligations in terms of clause 3.2 and 4.4. However, at the same time York's conduct also amounted to repudiation in that York conveyed the clear indication to Safcol of its intention not to comply with those obligations in the future. In these circumstances, the contracts were, in my view, duly terminated when Safcol accepted York's repudiation in its letter of 10 November 1998.<sup>189</sup> Legal and non-legal usages of the word “repudiation” refer to rejection of the contract as a whole or an obligation of major importance.<sup>190</sup>

*Tuckers Land and Development Corporation (Pty) Ltd v Hovis*, is a landmark case which clearly illustrates the remedy of repudiation in South Africa for the first time.<sup>191</sup> According to Jansen, J. the doctrine of anticipatory breach originated in England and has been received by South Africa as a violation of “not a future, but an existing obligation”.<sup>192</sup> The violation flows from the requirement of *bona fides* which underlies our law of contract. Jansen, J. uses the terminology of offer and acceptance in this regard, and to denote a creditor's decision to act

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<sup>184</sup> Hutchinson *Breaches* 306.

<sup>185</sup> *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd* 2001 (2) SA 284 (SCA) at 294H-I; *Metalmil (Pty) Ltd v AEI Explosives and Chemicals Ltd*, 1994 (3) SA 673 (A) at 684–685B.

<sup>186</sup> Hutchinson *Breaches* 306.

<sup>187</sup> Eiselen *Remedies* 348.

<sup>188</sup> *South African Forestry Company v York Timbers Ltd* 2005 JOL 12937 (SCA) para 38, 30.

<sup>189</sup> *South African Forestry Company v York Timbers Ltd* 2005 JOL 12937 (SCA) para 31 p 38.

<sup>190</sup> Luanda and Hawthorn *Contracts* 205.

<sup>191</sup> (1980) 1 All SA 358 (A).

<sup>192</sup> *Tuckers Land And Development Corporation (Pty) Ltd v Hovis* (1980) 1 All SA 358 (A), 360.



upon an anticipatory breach not as an “acceptance” but as an election. It can take place in the form of repudiation or prevention of performance. When the respondent instituted action in *Tuckers Land v Hovis*,<sup>193</sup> the appellant’s duty to give transfer of the stands was not yet enforceable because the suspensive condition had not yet been fulfilled. One, therefore, has a case here in which the alleged breach of contract had occurred before the time for the performance had arrived. *Tuckers Land v Hovis* illustrates further that the offer and acceptance terminology should be derived from the requirement of good faith which prohibits anticipatory breach.<sup>194</sup>

*Data Colour International (Pty) Ltd v Intermarket (Pty) Ltd*<sup>195</sup> illustrates further the point of repudiation of contract as breach where an innocent party could be said to have cancelled the contract on being informed of impending repudiation. The case suggests that cancellation should be clear from the innocent party’s conduct. The questions in *Data Colour International (Pty) Ltd v Intermarket (Pty) Ltd*<sup>196</sup> case were whether or not the appellant improperly repudiated a distribution agreement between the parties, and if so whether the respondent properly cancelled. In the above cases, the doctrine of repudiation was set out as follows: where one party to a contract, without lawful grounds, indicates to the other party a deliberate and unequivocal intention no longer to be bound by the contract, the party is said to repudiate the contract.<sup>197</sup>

The innocent party has a right to accept the repudiation and rescind the contract. The contract will come to an end upon communication of its acceptance to the guilty party. The test for repudiation is objective rather than subjective in that the emphasis is not on the repudiating party’s state of mind, but on what someone in the position of the innocent party would think he intended to do. Repudiation is accordingly not a matter of intention; it is a matter of perception.<sup>198</sup> *Culverwell and another v Brown*<sup>199</sup> showed that a repudiatory breach of contract justified the injured party’s action of cancelling the contract. The test whether or not conduct amounts to repudiation of a contract is, ‘fairly interpreted’, exhibits a deliberate and unequivocal

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<sup>193</sup> *Tuckers Land And Development Corporation (Pty) Ltd v Hovis* (1980) 1 All SA 358 (A), 360.

<sup>194</sup> *Tuckers Land and Development Corporation (Pty) Ltd v Hovis*, 1980 (1) SA 645(A), 647.

<sup>195</sup> 2001 (2) SA 284 (SCA) at 294H–I.

<sup>196</sup> 2001 1 All SA 581 (A), 582.

<sup>197</sup> *Data Colour International (Pty) Ltd v Intermarket (Pty) Ltd* 2001 1 All SA 581 (A), 582.

<sup>198</sup> *Data Colour International (Pty) Ltd v Intermarket (Pty) Ltd* [2001] 1 All SA 581 (A), 582.

<sup>199</sup> 1990 (1) SA 7 (A) 14B-E.

intention no longer to be bound' by the contract. Where the time for performance is not specified in the agreement, repudiation does not per se bring agreement to an end but it is only upon exhibition of conduct of no longer wanting to be bound by the guilty party is when the injured party has a right to elect whether or not to accept repudiation or specific performance.<sup>200</sup> From the above case, it can be argued that until an injured party accepts repudiation, the obligations in the contract have to be carried out. The injured party should be given reasonable time to make an election to cancel or uphold the contract. The contract is cancelled only when the injured party elects to cancel and then does the claim for damages arise.<sup>201</sup>

### 2.4.3 Conclusion to Repudiation

This section discussed repudiation. Van der Merwe *et al*<sup>202</sup> argued that repudiation is an unlawful conduct which occurs when one does not intend to comply with its duties of the contract.<sup>203</sup> In support of Van der Merwe's observation, the trial courts of *Datacolor International (Pty) Ltd v Intermarket (Pty) Ltd*,<sup>204</sup> and *South African Forestry Co Ltd v York Timbers Ltd*.<sup>205</sup> reiterated that conduct may take the form of a positive act or omission, or by mere failure to perform. There must be at least words or other conduct that can reasonably be interpreted as anticipating mal-performance.<sup>206</sup> Kerr argued that repudiation involves the act by the guilty party, evincing a deliberate and unequivocal intention no longer to be bound by the agreement, and the act of the adversary in accepting and thus completing the breach. In support of Kerr's observation *Tuckers Land and Development Corporation (Pty) Ltd v Hovis*,<sup>207</sup> revealed that repudiation is manifested in the form of anticipatory breach which can take place even before performance becomes enforceable. Also in *Data Colour International (Pty) Ltd v Intermarket (Pty) Ltd*<sup>208</sup> the emphasis is not on the repudiating party's state of mind, on what he subjectively intended, but on what someone in the position of the innocent party would think he

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<sup>200</sup> 1990 (1) SA 7 (A) 14B-E.

<sup>201</sup> *Bowditch v Peel & Magill* 1921 AD 561 at 572-573; *Armstrong v Magid & Another* 1937 AD 260 at 273; *Schuurman v Davey* 1908 TS 664 at 67; Hefer JA in *Mahabeer v Sharma NO & Another*, 1985 (3) SA 729 (A) at 736D; D-I.

<sup>202</sup> Van der Merwe *et al Contracts* 290-293

<sup>203</sup> *South African Forestry Co Ltd v York Timbers Ltd* 2005 (3) SA 323 SCA 342E.

<sup>204</sup> 2001 (2) SA 239

<sup>205</sup> 2005 (3) SA 323 SCA, 342E.

<sup>206</sup> *Ankon CC v Tadcor Properties (Pty) Ltd* 1991 (3) SA 119 ( C ) 121I- 122C.

<sup>207</sup> 1988 (1)SA 645(A) at 652G per Jansen JA.

<sup>208</sup> 2001 (2)SA 284 (SCA) at 294H-I

intended to do. But repudiation is not merely a matter of intention as Kerr and Van der Merwe *et al* seem to argue; it is also a matter of perception.<sup>209</sup>

This above view is elaborated by Christie and Bradfield,<sup>210</sup> for whom, the test whether conduct amounts to repudiation of a contract is whether or not 'fairly interpreted', such conduct 'exhibits a deliberate and unequivocal intention no longer to be bound' by the contract.<sup>211</sup> An example was illustrated in the case of *Culverwell and another v Brown*.<sup>212</sup> From the above analysis, it can be argued that until an injured party accepts repudiation the agreement or contract is still alive.<sup>213</sup> The injured party should be given reasonable time to make an election to cancel or uphold the contract. The contract is cancelled only when the injured party accepts repudiation and then does the claim for damages arise.

## **2.5 Notice of cancellation**

### **2.5.1 Introduction**

*Mora*, material breach of an essential term and repudiation entitle the innocent party to cancel the contract.<sup>214</sup> Notice of cancellation is a requirement for cancellation independent of the nature of the breach.<sup>215</sup> Procedure for cancellation has to be followed.<sup>216</sup> The breaching party has to be notified of the intention to cancel by the innocent party within a reasonable time.<sup>217</sup> Notice of cancellation is a written statement that is inserted when drawing up a written contract by the parties. Inserting a cancellation clause is seen as standard practice when deciding whether the gravity of the breach justifies cancellation in a given case that may not be clear.

### **2.5.2 Requirements for Notice of cancellation**

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<sup>209</sup> Van der Merwe *et al Contracts* 293.

<sup>210</sup> Christie and Bradfield *Contracts* 538-540.

<sup>211</sup> 1990 (1) SA 7 (A) 14 B-E .

<sup>212</sup> 1988 (2) SA 468 (C) at 475C ; 1990 (1) SA 7 (A) 14 B-E .

<sup>213</sup> Hutchinson *Breaches* 306. *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd* 2001 (2) SA 284 (SCA) at 294H-I; *Metalmil (Pty) Ltd v AECI Explosives and Chemicals Ltd*, 1994 (3) SA 673 (A) at 684-685B), (1977) 3 All SA 267 (A) at p274 -276 as per Miller, J. *Culverwell and Another v Brown* , 1988 (2) SA 468 confirmed.

<sup>214</sup> Christie and Bradfield *Contracts* 561-562.

<sup>215</sup> Eiselen *Remedies* 325.

<sup>216</sup> *Attridgeville Town Council v Livinos* 1992 1 SA 296 (A) 303 I – 306 C; *Bekker v Schmidt Bou Ontwinelings CC* (2007) 4 ALL SA 1231 para11, (13-17).

<sup>217</sup> Eiselen *Remedies* 325.

Notice of cancellation must be clear and unequivocal, but need not identify the cause of cancellation. Neinaber JA in *Data Colour International Pty Ltd*<sup>218</sup> concluded that “ it is settled law that the innocent party, having purported to cancel on inadequate grounds may afterwards rely on any adequate ground which existed at, but was discovered after, the time’.<sup>219</sup> A principal case that shows requirements of notice of cancellation is *Mahabeer v Sharma*.<sup>220</sup> It was argued that an innocent party may cancel the contract under the following circumstances:

- Where the contract contains a *lex commissoria*, that is, a clause entitling the buyer to cancel the contract immediately upon non-performance on a specified date; or
- Where the buyer has informed the seller, that if a seller should not perform by a specific date in the future, the buyer intends cancelling the contract. The period of time stipulated in this contract must be a reasonable period of time under the contract.
- If time is of essence in the particular circumstances, the particular circumstances attendant upon the contract in question will determine whether time will be regarded as of the essence. This however, will be done in exceptional circumstances and the buyer will have difficult onus to acquit.

*Mahabeer v Sharma*<sup>221</sup> also shows how late performance can result in a material breach warranting cancellation. The court held that notice of cancellation could terminate a right only where the right becomes prescribed. This case described above can be an authority as to requirements of a notice of cancellation. If a major breach occurs, the innocent party has an election between keeping the contract intact and cancellation.<sup>222</sup> It must exercise this discretion within a reasonable time. Failure to make the election within a reasonable time, will lead to the inevitable conclusion that the innocent party has elected to keep the contract intact.

*Bowditch v Peel & Magil*<sup>223</sup> and *Culverwell and Another v Brown*<sup>224</sup> illustrate further that once a breach justifies cancellation, the innocent party is faced with an election either to affirm or

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<sup>218</sup> 2001 2 SA 284 (SCA) 299F.

<sup>219</sup> *Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd* 1985 4 809 (A) 830E; *Kragga Kamma Estates CC v Flanagan* 1992 2 SA 367 (A) 375E-F; *Telcordia Technologies Inc v Telkom SA Ltd* 2007 3 SA 266 (SCA) @166.

<sup>220</sup> *Mahabeer v Sharma* 1985 (3) SA 729 (A).

<sup>221</sup> *Mahabeer v Sharma* 1985 (3) SA 729 (A),

<sup>222</sup> *Microutsicous v Swart* 1949 3 SA 715 (A) 728 and *Myers v Abramson* 1952 3 SA 121 (C)

<sup>223</sup> 1921 AD 561 at 572-3;

cancel the contract. Once an election is made, it is final and irrevocable, unless the other party consents to its reversal. Another requirement for cancellation is that if the party elects to cancel the contract, it must notify the other party of the decision, and the notice of cancellation must be clear and unequivocal.

*Swart v Volsoo*<sup>225</sup> can be taken as a primary source that captures further, the essence of the requirements for the notice of cancellation. In the above case, the requirements for cancelling a contract seem consequently stricter than for concluding one. Whereas a contract can, for instance, be entered into by posting a letter of acceptance, cancellation is only effective when the notice of cancellation is brought to the attention of the other party, unless, of course, the contract provides otherwise.

*Swart v Vosloo* also sets an extremely strict requirement for the valid cancellation of a contract, viz, the guilty party must first acquire actual knowledge of the cancellation.<sup>226</sup> In the above case, delivery of the letter of cancellation to the respondent's office was not proper notification. Only after the respondent had read the letter could it be said that the respondent had received notice. In relationship to the above view, Christie and Bradfield<sup>227</sup> emphasize that a notice of cancellation takes effect from the time it is communicated to the other party. The case of *Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd* illustrates the critic's view which is that cancellation only takes effect if it has only been communicated to the party in breach.<sup>228</sup> But in *Middleburgse Stadstraat v Trans-Natal Steenkoolkorporasie Bpk and Win Twice Properties (Pty) Ltd v Binos* the courts pointed out that if the letter of cancellation has not been previously communicated the notice of cancellation takes effect from the service of summons or the notice of motion<sup>229</sup>. This is the general rule. However, Sharrock argues that the position will be different where the contract provides expressly or tacitly that termination may occur in another way than by notice to the guilty party.<sup>230</sup> The decision to cancel once made may be communicated to the party in breach,

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<sup>224</sup> *Culverwell and Another v Brown* 1990 (1) SA 7 (A) at 17; *Mahabeer v Sharma* 1985 (3) SA 729 (A) at 736E-H and *Bwditch v Peel & Magil* 1921 AD 561 at 572-3;

<sup>225</sup> 1965 (1) SA 100 (A) at 105.

<sup>226</sup> *Swart v Vosloo* 1965 (1) SA 100 (A) at 105G.

<sup>227</sup> Christie and Bradfield *Contracts* 562.

<sup>228</sup> *Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd* 1985 (4) SA 809(A) at 830,842

<sup>229</sup> *Middleburgse Stadstraat v Trans-Natal Steenkoolkorporasie Bpk* 1987 2 SA 244 (T) 249A-G; *Win Twice Properties (Pty) Ltd v Binos* 2004 4 SA 436 (W).

<sup>230</sup> Sharrock, (2011), *Business*, p725; Hawthon and Kushchke in Hutchinson and Pretorius. (2012,) 403.

by a third party.<sup>231</sup> In accordance with the principle of party autonomy, the agreement between the parties takes precedence over the common law rules, except where such an agreement or clause is unlawful. In many contracts, parties will stipulate the circumstances under which the contract may be cancelled after a breach of contract and also the requirements that need to be met.<sup>232</sup>

But, the decision to cancel cannot be worded as to take effect only from a future date.<sup>233</sup> For example, in *Sonia (Pty) Ltd v Wheler*<sup>234</sup> it was argued that there are no formalities required for the act of cancellation; a simple oral or written notice will suffice. Nor is there a need for a court order, since the act of cancellation is decided by the innocent party instead of the court.<sup>235</sup> But, if the other party disputes the validity of the cancellation, a court order can be obtained to confirm cancellation. Furthermore, and as demonstrable in the cases *Thomas v Henry*<sup>236</sup>; and *Chamber of Mines of South Africa v National Union of Mineworkers*<sup>237</sup> once an election is made, it is final and irrevocable, unless the other party consents to its reversal. Thus, if the innocent party elects to uphold the contract, it cannot thereafter change its mind and cancel the contract, unless the other party commits a fresh breach justifying cancellation.

The *lex commissoria* gives the innocent party a right to cancel for any breach, irrespective of its materiality in terms of the common law rules.<sup>238</sup> The agreement between the parties takes precedence over the common law rules, except where such an agreement or clause is unlawful. In *Outorian Properties (Pty) Ltd v Maroun* it was argued that a minor breach that would not

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<sup>231</sup> *Datacolour International (Pty) Ltd* 2001 (2) SA 284 (SCA) at 300.

<sup>232</sup> Hawthorn and Kushchke *Contracts* 403, *If any party breaches the Agreement, the other party shall give the former written notice of the breach and afford the breaching party 14(fourteen ) days to remedy the breach. Where the breach is not remedied, the part prejudiced by the breach may cancel the Agreement immediately*; Eiselen *Remedies* 324-325.

<sup>233</sup> *Longhorn Group (Pty) Ltd v The Fedics Group (Pty) Ltd* 1995 3 SA 836 (W) 841G; *Phone-a-copy Worldwide (Pty) Ltd v Orkin* 1986 1 SA 729 9a0 751A-C. *Ganief v Hoosen* 1977 (4) SA 458(C).

<sup>234</sup> 1958 (1)SA 555 (A) at 561.

<sup>235</sup> *Culverwell v Brown* 1990 (1) SA 7 (A) at 17; *Mahabeer v Sharma* 1985 (3) SA 729 (A) at 736E-H.

<sup>236</sup> 1985 (3) SA at 896.

<sup>237</sup> 1987 (1) SA 668 (A) at 660.

<sup>238</sup> Eiselen *Remedies* 324-325.

justify cancellation at common law may afford a right to cancel, provided it falls within the scope of the cancellation clause.<sup>239</sup>

### 2.5.3 Conclusion on notice of cancellation

The above section discussed cancellation. Eiselen argued that a notice of cancellation usually states the grounds upon which the contract is being cancelled. This was supported by the case of *Telcordia Technologies Inc v Telkom SA Ltd* which stated that a good reason for cancellation should exist. The cancellation will be effective despite the fact that the innocent party has relied upon a wrong reason.<sup>240</sup> Van der merwe *et al*<sup>241</sup> further argues by stating that breaching party has to be notified of the intention to cancel by the innocent party within a reasonable time. This is supported by *Mahabeer v Sharma* who state that where the contract should contain a *lex commissoria*, the buyer should informed the seller and time should be is of essence. Eiselen argues that once a breach justifies cancellation, the innocent party is faced with an election either to affirm or cancel the contract. This is supported by the case *Consol Ltd v Twee Jonge Gezellen Pty Ltd*<sup>242</sup> in which is it argued that the innocent party cannot blow both hot and cold, decision must be made to approbate or reprobate. This view is supported by Watermeyer AJ when he states that the innocent party can elect to take advantage of the event or elect no to do so.<sup>243</sup> Cancellation not only extinguishes obligations but it creates new obligations to restore or give back whatever performance that was received in the contract before it was cancelled. The next section shows how restitution places a party in the position it occupied before conclusion of the contract.

## 2.6 Restitution

### 2.6.1 Introduction

This section discusses the concept of restitution in South Africa law. Mutual restitution requires both parties to restore or give back whatever performance that was received in the contract before it was cancelled.<sup>244</sup> This argument is supported by Eiselen who states that cancellation not

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<sup>239</sup> *Outorian Properties (Pty) Ltd v Maroun* 1973 (3) SA 779 (A) at 785.

<sup>240</sup> *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA) para. 166.

<sup>241</sup> Van der Merwe *et al* *Contracts* 290-291

<sup>242</sup> 2005) 4 ALL SA (C ) 533-537

<sup>243</sup> Watermeyer AJ in *Segal* 1920 CPD 634 644-645.

<sup>244</sup> Christie and Bradfield *Contracts* 566.

only extinguishes obligations but it creates new obligations.<sup>245</sup> In other words, a litigant sues to have its bargain or equivalent in money for contract<sup>246</sup>. Restitution aims to place the other party in the position it occupied before conclusion of the contract.<sup>247</sup> The party claiming termination and restitution must tender restitution of the performance it received in its pleadings.<sup>248</sup>

## 2.6.2 Requirements for restitution

Under South African law, restitution must be made upon the cancellation of a contract.<sup>249</sup> The parties may expressly provide in the contract for the type of restitution that is to occur in given circumstances. *Sackstein v Proudfood SA (Pty) Ltd*<sup>250</sup> illustrates that for restitution to be possible, both parties need to restore or give back whatever performance that was received in the contract before it was cancelled. In the case, on 14 April 2000 Sackstein instituted an action claiming restitution to recover payments made by the company to the respondent under a contract for the provision of consultancy services during 1 December 1997 until 29 April 1998 when the company was placed under provisional liquidation in Namibia. Liquidation not only extinguished obligations but it created new or secondary obligations. It is the duty of parties to restore benefits received under contract. Failure to tender restitution is fatal to claim.<sup>251</sup>

The court goes on to say that an innocent party may claim the return of any money or performance made in terms of the contract.<sup>252</sup> The aim is to return the parties to the position they were in before the contract.<sup>253</sup> When parties reach an agreement to discharge the contract, there are two general principles that apply to the restitution, irrespective of whether the topic of restitution was included in the contract. Firstly, an agreement to discharge the contract is presumed to include a tacit agreement to restore what has been delivered in part performance.<sup>254</sup> The buyer is hereby entitled to claim any purchase price that it has already paid,<sup>255</sup> while the

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<sup>245</sup> Eiselen *Remedies* 327-328.

<sup>246</sup> *Trotman v Edwick* 1951 1 SA 443 (A) 449B-C as per Van den Heever JA.

<sup>247</sup> *Victoria Falls and Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1 22 as per Innes CJ.

<sup>248</sup> Eiselen *Remedies* 327-329.

<sup>249</sup> Voet 18.3.2; *Radioelectronics (Pty) Ltd v Scott, Lindberg and Co Ltd* 1951 (1) SA 312 (C) 329A-330B.

<sup>250</sup> 2006 (6) SA 358 (SCA), para. 10.

<sup>251</sup> *Sackstein v Proudfood SA (Pty) Ltd* 2006 (6) SA 358 (SCA), para 10.

<sup>252</sup> *Christie Contracts* 447.

<sup>253</sup> *Feinstein v Niggli* 1981 (2) SA 684 (A) 700F.

<sup>254</sup> *Geldenhuis v Maree* 1962 (2) SA 511 (O) 513E.

<sup>255</sup> *Combrink v Maritz* 1952 (3) SA 98 (T), *Ace Motors v Barnard* 1958 (2) SA 534 (T)



seller is entitled to the return of any goods delivered in terms of the contract.<sup>256</sup> According to Christie, where ownership has passed to the buyer, and the goods are in its possession, the seller cannot recover ownership by virtue of the cancellation alone without actual delivery.<sup>257</sup>

Where ownership has passed to the buyer, the buyer may validly sell<sup>258</sup> or pledge<sup>259</sup> the property to an innocent third party, despite the agreement to cancel. It is, therefore, necessary that actual delivery of the property be made back to the seller to prevent the alienation of the goods to a third party by the buyer.

The court goes on to say that the second principle is that both parties are permitted to recover the parts of the contract already performed.<sup>260</sup> In the instance of a lease contract having been terminated, the tenant is liable to pay rent for the period that it occupied the premises<sup>261</sup> even if this continues after the lease is terminated.<sup>262</sup> The rule requiring parties to make restitution may be modified when justice requires it.<sup>263</sup>

Restitution aims to place the other party in the position it occupied before conclusion of the contract.<sup>264</sup> As pointed by Christie, an innocent party may claim the return of any money or performance made in terms of the contract.<sup>265</sup> However, Eiselen argues that exceptions to mutual restitution are available due to impossibility when it is not the fault of the party, or due to breach, as well as when it is due to an inherent defect.<sup>266</sup> This point is illustrated in the Sackstein case in which the appellant would have had to restore the benefits that the company received by way of a pecuniary substitution. In the above case the appellant's counsel argued that the consultancy services were no longer necessary, but Mr Neethling wanted the services of the consultancy firm

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<sup>256</sup> *Harper v Webster* 1956 (2) SA 495 (FC) 499-500.

<sup>257</sup> *Christie Contracts* 518.

<sup>258</sup> *Clarke v Bradfield* 1892 (6) EDC 238.

<sup>259</sup> *Clarke v Bradfield* 1892 (6) EDC 238.

<sup>260</sup> *Van Gelderen v Schaff* 1912 CPD 76.

<sup>261</sup> *Maw v Grant* 1966 (4) SA 83 (C) 87C; *Parry Leon and Hayhoe Ltd v Yorkshire Insurance Co Ltd* 1940 CPD 397

<sup>262</sup> *Tooth v Maingard and Mayer (Pty) Ltd* 1960 (3) SA 127 (N).

<sup>263</sup> *Harper v Webster* 1956 (2) SA 495 (FC) 499-500.

<sup>264</sup> *Feinstein v Niggli* 1981 2 SA 684 (A) 700F-H; *Cash Converters Southern Africa (Pty) Ltd v Rosebud Western Province Franchise (Pty) Ltd* 2002 5SA 494 (SCA) 500.

<sup>265</sup> *Christie Contracts* 447.

<sup>266</sup> *Eiselen Remedies* 328.

as it was beneficial to the company. The above case further reveals that at times restitution may not occur where the goods perished due to the defect;<sup>267</sup> or where the goods were disposed of as contemplated but the proceeds are offered;<sup>268</sup> or where the goods were partly destroyed in testing their quality;<sup>269</sup> and the goods lost value while being used as contemplated.<sup>270</sup>

### 2.6.3 Conclusion for Restitution

The section above discussed restitution. It was stated that restitution aims to place the other party in the position it occupied before conclusion of the contract.<sup>271</sup> This view was supported by Christie who advocates that restitution aims to return the parties to the position they were in before the contract<sup>272</sup>. The argument was illustrated in *Feinstein v Niggli and Cash Converters Southern Africa (Pty) Ltd v Rosebud Western Province Franchise (Pty) Ltd*.<sup>273</sup> Where restitution occurs upon the cancellation of a contract<sup>274</sup>, a litigant sues to have its bargain or equivalent in money for contract.<sup>275</sup> Christie observes further that actual delivery is an important principle needed to prevent the alienation of the goods to a third.<sup>276</sup> *Geldenhuis v Maree* reveals that parties restore what has been delivered in part performance.<sup>277</sup>

The second principle of restitution is the recovery of goods or duties already performed.<sup>278</sup> This view is supported by Eiselen who argues that although restitution ends obligations, restitution also creates new duties. In other words, cancellation not only extinguishes obligations but it creates new ones. In *Sackstein v Proudfood SA (Pty) Ltd*.<sup>279</sup>, liquidation not only extinguished obligations but it created new or secondary obligations. These new obligations are a consequence

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<sup>267</sup> *Marks Ltd v Laughton* 1920 AD 12.

<sup>268</sup> *Rau v Venter's Executors* 1918 AD 482.

<sup>269</sup> *Theron v Africa* (1893) 10 SC 246.

<sup>270</sup> *African Organic Fertilizers and Associated Industries Ltd v Sieling* 1949 (2) SA 131 (W).

<sup>271</sup> *Victoria Falls and Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1 22 as per Innes CJ.

<sup>272</sup> *Christie Contracts* 447.

<sup>273</sup> *Feinstein v Niggli* 1981 2 SA 684 (A) 700F-H; 2002 5SA 494 (SCA) 500.

<sup>274</sup> Voet 18.3.2; *Radiotronics (Pty) Ltd v Scott, Lindberg and Co Ltd* 1951 (1) SA 312 (C) 329A-330B.

<sup>275</sup> *Trotman v Edwick* 1951 1 SA 443 (A) 449B-C as per Van den Heever JA.

<sup>276</sup> *Christie Contracts* 518.

<sup>277</sup> *Geldenhuis v Maree* 1962 (2) SA 511 (O) 513E.

<sup>278</sup> *Van Gelderen v Schaff* 1912 CPD 76.

<sup>279</sup> 2006 (6) SA 358 (SCA), para. 10.

of cancellation due to breach.<sup>280</sup> *Harper v Webster* further pointed out that restitution can be modified where and when justice requires it.<sup>281</sup>

The discussion on restitution also indicated the situations that can lead to exceptions to mutual restitution. These conditions are (1) where the goods perished due to the defect;<sup>282</sup> or (2) where the goods were disposed of as contemplated but the proceeds are offered;<sup>283</sup> or (3) where the goods were partly destroyed;<sup>284</sup> and (4) lost.<sup>285</sup> In the Sackstein case, liquidation made it impossible to return what was in possession before the contract ended. The appellant would have had to restore the benefits that the company received by way of a pecuniary substitution. But, in the Sackstein case, cancellation went ahead. Trial courts cases support the view that the party claiming termination and restitution must highlight performance it received in its pleadings.<sup>286</sup>

## 2.7 Conclusion to the chapter

The aim of chapter two was to critically analyze cancellation in South African law. The chapter debated repudiation, rescission and and cancellation. It was found that repudiation is not an appropriate term because it is technically a breach of contract and not the exercise of a remedy.<sup>287</sup> Some critics argued that rescission is an exceptional step or remedy that can be used to terminate primary obligations of a contract there and then.<sup>288</sup> Others argued that rescission should be reserved for cases where, typically because of a misrepresentation inducing the contract, it is desired to set it aside *ab initio*. This study chose the term cancellation because it is a unilateral act of a valid contract<sup>289</sup> which entails a drastic step of bringing the transaction to an abrupt and premature end, contrary to the original intentions of the parties.<sup>290</sup> However, the problem is that South Africa is rather reluctant to grant this remedy. The chapter debated *mora debitoris*, *mora creditoris*, positive mal-performance, prevention of performance, repudiation, notice of cancellation and restitution.

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<sup>280</sup> Eiselen *Remedies* 327-328.

<sup>281</sup> *Harper v Webster* 1956 (2) SA 495 (FC) 499-500.

<sup>282</sup> *Marks Ltd v Laughton* 1920 AD 12.

<sup>283</sup> *Rau v Venter's Executors* 1918 AD 482.

<sup>284</sup> *Theron v Africa* (1893) 10 SC 246.

<sup>285</sup> *African Organic Fertilizers and Associated Industries Ltd v Sieling* 1949 (2) SA 131 (W).

<sup>286</sup> Eiselen *Remedies* 327-329.

<sup>287</sup> Christie and Bradfield *Contracts* 527, 538-540

<sup>288</sup> Christie *Contracts* 596.

<sup>289</sup> Christie *Contracts* 539.

<sup>290</sup> Hawthorn and Pretorius *Contracts* 341.

The chapter debated the concept of *mora debitoris*. The discussion revealed that a debtor commits a breach if obligations are not performed at all, performed late, or performed in the wrong manner. *Mora debitoris* as a breach does not in itself cause cancellation. It is the substantial detriment that entitles the innocent party to choose to cancel. But certain requirements must be considered. These are the presence of a cancellation clause, when “time is of the essence”, when time is not of essence and a material breach is present. It was also noted in the discussion that some critics who emphasize the significance of the notion “time is of the essence of the contract” relate failure to perform timeously while other critics relate to the consequences of the breach and not to the breach itself. There appears to be conflict of authority in that when no time for performance is fixed but time is of the essence the debtor is not in *mora* and the creditor cannot cancel for nonperformance unless a proper demand for performance has been made.

Critics such as Hutchinson and Pretorius<sup>291</sup> discussed in this chapter stated that *mora creditoris* is a material breach that occurs when the creditor culpably fails to cooperate timeously with the debtor so that the latter may perform his or her obligations.<sup>292</sup> Van der Merwe *et al*<sup>293</sup> added that delay in performance or non-performance is traceable to the creditor when it shifts responsibility for further delay or non-performance on to the creditor. However, Christie and Bradfield were of the view that the main effect of *mora creditoris* is to shift responsibility for further delay or non-performance onto the creditor.<sup>294</sup> The effect of *mora creditoris* making it impossible for the debtor to perform on time is explained by De Villiers JP.<sup>295</sup> There seem to be agreement by mainstream critics on how *mora creditoris* leads to cancellation.

It was observed in this chapter that positive mal -performance may take two forms. The first form occurs where debtor has a positive obligation, which means a debtor duly performs, but in an incomplete or defective manner. The second form occurs where the debtor has a negative

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<sup>291</sup> Hutchinson and Pretorius *Breaches* 306.

<sup>292</sup> Hutchinson and Pretorius *Breaches* 306; Van der Merwe *et al Contracts* 290-291.

<sup>293</sup> Van der Merwe *et al Contracts* 290-291.

<sup>294</sup> Christie and Bradfield *Contracts* 534, 538–540.

<sup>295</sup> *Levisieur & Co v Highveld Supply Stores* 1922 OPD 233 239; *Levisieur v Frankfort Boere Ko Operatiewe Vereeniging* 1921 OPD 80.

obligation, which means that the debtor does the act that it is bound to refrain from doing.<sup>296</sup> However, *mora debitoris* moves further from the principle that the debtor duly performs in an incomplete or defective manner and adds that debtor culpably fails to make timeous performance of its obligations<sup>297</sup> that are due and enforceable and is still possible of performance in spite of such failure.<sup>298</sup>

Prevention of performance as a breach will by itself not cause cancellation. It was debated and revealed that prevention of performance occurs when performance on either side becomes impossible due to the fault of either the debtor or the creditor. Several cases were used to illustrate and show the application of the factors or grounds that result in cancellation as remedy for breach of contract in South African law.

The chapter agreed with Van der Merwe *et al*<sup>299</sup> who argued that repudiation is an unlawful conduct which occurs when one does not intend to comply with its duties of the contract.<sup>300</sup> It was stated that there must be at least words or other conduct that can reasonably be interpreted as anticipating mal-performance.<sup>301</sup> Kerr avers that repudiation involves the act by the guilty party, evincing a deliberate and unequivocal intention no longer to be bound by the agreement, and the act of the adversary in accepting and thus completing the breach. Christie and Bradfield,<sup>302</sup> say that the test whether conduct amounts to repudiation of a contract is whether or not 'fairly interpreted', such conduct 'exhibits a deliberate and unequivocal intention no longer to be bound' by the contract.<sup>303</sup> From the above analysis, it can be argued that the critics agree that until an injured party accepts repudiation the agreement or contract is still alive.<sup>304</sup> But, it is the innocent party that makes an election to cancel or uphold the contract.

The chapter observed that giving notice is the second requirement for cancellation. A notice of cancellation usually states the grounds upon which the contract is being cancelled. This was

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<sup>296</sup> Hutchinson *Breaches* 306.

<sup>297</sup> Hutchinson *Breaches* 306.

<sup>298</sup> LAWSA *Contracts* 217; I Van Zyl *Seyn Mora Debitoris volgens die Romein-Hollandse reg (1929.)*

<sup>299</sup> Van der Merwe *Contracts* 290-291.

<sup>300</sup> *South African Forestry Co Ltd v York Timbers Ltd* 2005 (3) SA 323 SCA 342E.

<sup>301</sup> *Ankon CC v Tadcor Properties (Pty) Ltd* 1991 (3) SA 119 ( C ) 121I- 122C.

<sup>302</sup> Christie and Bradfield *Contracts* 538-540.

<sup>303</sup> 1990 (1) SA 7 (A) 14 B-E .

<sup>304</sup> Hutchinson *Breaches* 306. *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd* 2001 (2) SA 284 (SCA) at 294H-I; *Metalmil (Pty) Ltd v AECI Explosives and Chemicals Ltd*, 1994 (3) SA 673 (A) at 684-685B), (1977) 3 All SA 267 (A) at p274 -276 as per Miller, J. *Culverwell and Another v Brown* , 1988 (2) SA 468 confirmed.

supported by the case of *Telcordia Technologies Inc v Telkom SA Ltd* which illustrated that where a good reason for cancellation should exist, the cancellation will be effective despite the fact that the innocent party has relied upon a wrong reason.<sup>305</sup> Van der Merwe argued that the breaching party has to be notified of the intention to cancel by the innocent party within a reasonable time. According to Eiselen, once a breach justifies cancellation, the innocent party is faced with an election either to affirm or cancel the contract.<sup>306</sup> Christie and Bradfield stated that the innocent party cannot blow both hot and cold, decision must be made to approbate or reprobate<sup>307</sup>. This was supported by Watermeyer AJ when he states that the innocent party can elect to take advantage of the event or elect not to do so.<sup>308</sup>

But the argument of chapter was that cancellation not only extinguishes obligations but it creates new obligations to restore or give back whatever performance that was received in the contract before it was cancelled.<sup>309</sup> This view was supported by Christie who advocated that restitution aims to return the parties to the position they were in before the contract.<sup>310</sup> However, where restitution occurs upon the cancellation of a contract<sup>311</sup>, a litigant sues to have its bargain or equivalent in money for contract.<sup>312</sup>

In short, the chapter argued that *mora debitoris*, *mora creditoris*, positive mal-performance, prevention of performance, repudiation are the main breaches in South African law. But as argued in the chapter, the breaches do not by themselves lead to cancellation. The innocent party must give notice and then chooses to elect to cancel in an unequivocal way. The next chapter debates how discharge terminates contracts under English law.

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<sup>305</sup> *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA) para. 166.

<sup>306</sup> Eiselen *Remedies* 327-329.

<sup>307</sup> Christie and Bradfield *Contracts* 563.

<sup>308</sup> Watermeyer AJ in *Segal* 1920 CPD 634 644-645.

<sup>309</sup> *Victoria Falls and Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1 22 as per Innes CJ.

<sup>310</sup> Christie *Contracts* 447.

<sup>311</sup> Voet 18.3.2; *Radiotronics (Pty) Ltd v Scott, Lindberg and Co Ltd* 1951 (1) SA 312 (C) 329A-330B.

<sup>312</sup> *Trotman v Edwick* 1951 1 SA 443 (A) 449B-C as per Van den Heever JA.

### **3.0 CHAPTER 3: Discharge under English law**

#### **3.1 Introduction**

This chapter critically analyses discharge as a remedy for breach of contract under the English Sales law. It is important to state that England is not a member of the CISG. Despite this fact English sales law recognizes the differences between primary contractual remedy regimes of common law versus civil law systems. In English sales law, damages constitute the primary remedy. English sales law has a strong adherence to the doctrine of *pacta sunt servanda*.<sup>313</sup> Therefore, this chapter will start by briefly explaining the history of English law and critically reviewing the legal theories developed for English law. General principles that govern the above systems will be summarized and the requirements that govern the remedy of discharge will also be outlined. The chapter argues that breaches of condition and anticipatory breach justify discharge and that the right to discharge depends on the seriousness of the breach. The consequences for discharge form primary and secondary obligations, and the basis of restitution. And, the extent of damages awarded when discharge is awarded as a remedy for breach of contract is an important part and parcel of ending a contractual relationship.

#### **3.2 Terms to define termination under English law**

##### **3.2.1 Introduction**

The aim of this section is to critically explain why discharge is viewed as a remedy for breach of contract under the English Law. The section will commence by defining the terms termination, discharge and remedy and give a general overview of what the procedure and requirements are in English law. Because the term breach is a literary term<sup>314</sup>, the section will define the term breach and will argue that the nature of breach is crucial or is of paramount importance when one focuses on termination as a right that leads to a remedy of ending a contractual relationship. In addition, the section will argue that although defective performance is the major cause of breach of contract, not all defective performance will result in termination because other factors such as the type of breach whether be it breach of term, breach of condition and anticipatory breach are crucial in determining factors and requirements that lead to discharge.

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<sup>313</sup> South Africa has a mixed legal system evidencing both common law and civil law influences.

<sup>314</sup> MacQueen *Remedies* 200-226.

Lord Wilberforce has pointed out the lack of any agreed or consistent terminology<sup>315</sup> in the process and concepts of termination. Termination, repudiation, resciling and rescission are terms or words that need to be addressed when one is dealing with English law as there is some conceptual muddle. The injured party may be said to repudiate the contract,<sup>316</sup> or treat the contract as repudiated<sup>317</sup> or discharged.<sup>318</sup> Alternatively, the contract may be discharged,<sup>319</sup> rescinded,<sup>320</sup> cancelled, or terminated.<sup>321</sup>

### 3.2.2 Repudiation

The notion of repudiation is mostly used to indicate a wrongful refusal to perform, or a total inability to perform.<sup>322</sup> Repudiation is a term appropriate for frustrated cases when a party avoids a contract without proving that the breach has produced serious consequences which can be treated as ‘going to the root of the contract’ or as being ‘fundamental’. In *Maredelanto Compania Naviera SA v Bergbau-Handel GmbH*, Megaw LJ argued that the discharge should be done on the exact date according to the expected readiness clause.<sup>323</sup> In *The Helvetia-S*<sup>324</sup> the trial court argued that if parties avoided the contract before the due date, nominal damages would

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<sup>315</sup> Treitel *Breaches* 139.

<sup>316</sup> *Behn v Burness* (1863) 3 B & S 751 (Exchequer Chamber) 755, 122 ER 281, 283 (Williams J); *J & E Kish v Charles Taylor & Sons & Co* (1912) AC 604 (HL) 617 (Lord Atkinson); *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd (The Hongkong Fir)* (1962) 2 QB 26 (QBD: Commercial Ct) 38 (Salmon J).

<sup>317</sup> Sale of Goods Act 1979, s 11(2), (3), and (4); *Hallam v Avery* [2000] 1 WLR 966 (CA) 969 (Judge LJ); *Meikle v Nottinghamshire County Council* (2004) EWCA Civ 859; (2005) ICR 1, para 34 (Keene LJ); *Azimut-Benetti SpA v Healey* (2010) EWHC 2234 (Comm); (2011) 1 Lloyd’s Rep 473, para 32 (Blair J).

<sup>318</sup> *Kingscroft Insurance Co Ltd v Nissan Fire & Marine Insurance Co Ltd (No 2)* (1999) CLC 1875 (QBD: Commercial Ct) 1915 (Moore-Bick J); *TTM v Hackney LBC* (2011) EWCA Civ 4; [2011] HRLR 14 para 87 (Toulson LJ); *Masri v Consolidated Contractors International Co SAL* (2007) EWCA Civ 688; (2007) 2 CLC 49 (CA) para 33 (Lloyd LJ).

<sup>319</sup> *Humphreys v Chancellor, Master and Scholars of the University of Oxford and anor* (2000) ICR 405 (CA) 423 (Moore-Bick J); *ST Microelectronics NV v Condor Insurance Ltd* [2006] EWHC 977 (Comm); (2006) 2 Lloyd’s Rep 525, para 61 (Christopher Clarke J); *ENE 1 Kos Ltd v Petroleo Brasileiro SA (The Kos)* (2010) EWCA Civ 772; (2010) 2 CLC 19, para 18 (Longmore LJ).

<sup>320</sup> *Stocznia Gdanska SA v Latvian Shipping Co* [1998] 1 WLR 574 (HL) 598; (Lord Lloyd of Berwick); *Hanson v South West Electricity Board* (2001) EWCA Civ 1377; ([2002] 1 P & CR 35).

<sup>321</sup> *ERG Raffi nerie Mediterranee SpA v Chevron USA Inc (t/a Chevron Texaco Global Trading)* (2007) EWCA Civ 494; (2007) 1 CLC 807, 810 (Longmore LJ); *Dadourian Group International v Simms* (2009) EWCA Civ 169; (2009) 1 Lloyd’s Rep 601, para 9 (Arden LJ); *Parkwood Leisure Ltd v Alemo-Herron* (2011) UKSC 26; (2011) IRLR 696, para 12 (Lord Hope).

<sup>322</sup> *Azimut-Benetti SpA v Healey* (2011) 1 Lloyd’s Rep 473, para 32 (Blair J); *Universal Cargo Carriers Corp v Citati* (1957) 2 QB 401 (QBD: Commercial Ct) 426 as per Devlin J.

<sup>323</sup> As per Megaw LJ, p 129 *c* and *g*, p 134 *e* and *c* and p 138 *d* to *f*, *post*. See also *Finnish Government (Ministry of Food) v H Ford & Co Ltd* (1921) 6 Lloyd LR 188 and *Samuel Sanday & Co v Keighley, Maxted & Co* (1922) 91 LJKB 624.

<sup>324</sup> (1960) 1 Lloyd’s Rep 540 at 540.



be awarded. Though repudiation is a breach, it is not the appropriate term to describe a situation where the refusal or inability to perform is justified. Rescission is a term where a contract is avoided *ab initio*,<sup>325</sup> as for instance when one party is guilty of fraudulent misrepresentation.<sup>326</sup>

### 3.2.3 Rescission

Rescission is claimed by a party who claims to be innocent and is valid when there is a material breach. Treitel<sup>327</sup> states that though a party can undo the contract by terminating or rescinding, ending a contract by withholding performance is better known as ‘default termination’.<sup>328</sup> The right to rescind in the sense of refusing to perform depends on the provisions or stipulations of the contract with regards to the order in which the parties are to perform.<sup>329</sup> However, it would be better to talk of termination or discharge rather than rescission when the innocent party chooses to treat the contract as having ended.<sup>330</sup> This is in contrast to the situation where the defaulting party still remains under what is termed a ‘secondary obligation’ to pay damages for the breach.<sup>331</sup>

### 3.2.4 Discharge

In English law, to avoid a contract is to make or render it void, that is, to cancel and withdraw from it.<sup>332</sup> Much of the difficulty regarding the ‘termination’ of a contract and its effect on the plaintiff’s claim for damages arise from uncertain or inconsistent terminology; in particular (per Lord Wilberforce) the use of rescission’ as an equivalent for discharge, though justifiable in some contexts, may lead to confusion in others.<sup>333</sup> Discharge is a useful term as it refers to the ending of the obligations under the contract.<sup>334</sup> Discharge is a term better used as it represents the point at which one party is no longer bound by its’ obligations under the contract.<sup>335</sup> It is not the contract itself that is terminated, but rather the obligations of the injured party to perform his

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<sup>325</sup> *Eminence Property Developments Ltd v Heaney* [2010] EWCA Civ 1168; [2010] 3 EGLR 165, para 23 (Etherton LJ); *Johnson v Agnew* [1980] AC 367 (HL) 392–3 (Lord Wilberforce); *Photo Production Ltd v Securicor Transport Ltd* (1980) AC 827 (HL) 844 (Lord Wilberforce);

<sup>326</sup> *Poole Contracts*, 601.

<sup>327</sup> *Treitel Breaches* 319.

<sup>328</sup> *Beale Cases* 547

<sup>329</sup> *Treitel Breaches* 320. There is the condition precedent, concurrent conditions and independent covenants.

<sup>330</sup> *Johnson v Agnew* (1980) AC 367, (1979) 1 ALL ER 883

<sup>331</sup> *Moschi v Lep Air Services* [1973] AC 332 (HL) 350 (Lord Diplock).

<sup>332</sup> *Atiyah Contracts* 48.

<sup>333</sup> *Photo Production Ltd v Securicor Transport Ltd* [1980] 1 All ER 556

<sup>334</sup> *TTM v Hackney LBC* (2011) EWCA Civ 4; (2011) HRLR 14 para 87 (Toulson LJ); *Masri v Consolidated Contractors International Co SAL* (2007) EWCA Civ 688; [2007] 2 CLC 49 (CA) para 33 (Lloyd LJ).

<sup>335</sup> *Furmston et al Contracts* 18 ; *Beatson Contracts* 13–16.

or her obligations under that contract.<sup>336</sup> Discharge is treated as a remedy when a breach occurs. The injured party exercises this right to bring an end to contractual obligations and then claim damages aimed at putting the party in the position it would have had been had the contract not been performed. The aim of discharging is to terminate, undo, and cancel the contract by the innocent party.

### 3.2.5 Conclusion

The discussion above underlined the fact that discharge of a contract refers to the ending of the obligations under the contract<sup>337</sup> and represents the point at which one party is no longer bound by its obligations under the contract. Discharge is a term better used when a contract ends due to breach as it represents the point at which one party is no longer bound by its' obligations under the contract.<sup>338</sup> It is not the contract itself that is terminated, but rather the obligations of the injured party to perform his or her obligations under that contract. Rescission means the retrospective cancellation of a contract *ab initio*, as for instance, when one party is guilty of fraudulent misrepresentation. In the case of the innocent party treating the contract as having ended, it would be better to talk of termination or discharge rather than rescission.<sup>339</sup> The right to rescind in the sense of refusing to perform depends on the provisions or stipulations of the contract with regards to the order in which the parties are to perform.<sup>340</sup> There is the condition precedent<sup>341</sup>, concurrent conditions<sup>342</sup> and independent covenants<sup>343</sup>. As a remedy, discharge is a useful term and better term as it refers to the ending of the primary obligations and creation of secondary obligations under the contract.<sup>344</sup> Discharge as a process requires the injured party to give notice, elect to discharge contractual obligations, and claim restitution.

## 3.3 Requirements for Discharge

### 3.3.1 Introduction

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<sup>336</sup> *Johnson v Agnew* (1980) (HL) 350 (Lord Diplock) 350; *Heyman v Darwins* (1942) AC 356 (HL) 373 (Lord Macmillan); *Moschi v Lep Air Services* (1973) AC 332. (HL) 350 (Lord Diplock), 350.

<sup>337</sup> Martin and Turner *Contracts* 400.

<sup>338</sup> *Furmstone et al Contracts* 18–20; *Beatson Contracts* 13–16.

<sup>339</sup> *Poole Contracts* 601.

<sup>340</sup> *Treitel Contracts* 320.

<sup>341</sup> *Miles v Wakefield Metropolitan District Council* (1987 AC 539 AT 561, and 574

<sup>342</sup> *Sale of Goods Act 1979*, s28.

<sup>343</sup> *Taylor v Webb* (1937) 2KB 283.

<sup>344</sup> Martin and Turner *Contracts* 400.

The section above argued that discharge is a remedy for ending primary contractual obligations due to breach.<sup>345</sup> Performance of primary obligations would not have been met in a satisfactory manner or when one party has failed to complete some oral agreement of their primary obligations. It was also explained that secondary obligations occur if a party fails to complete its primary obligations.<sup>346</sup> But there has to be a fundamental breach by the guilty party. English law classifies terms breached to establish if a breach justifies discharge.

### 3.3.2 Forms of breach and discharge

#### 3.3.2.1 Introduction

Commercial and consumer contracts often contain express rights of termination, and the question then arises as to how these relate to the right to terminate for breach at common law.<sup>347</sup> The right to discharge for breach under English law depends on whether the term broken is a ‘condition’; ‘warranty’ or ‘intermediate term.’<sup>348</sup> Not all breaches lead to discharge as discharge calls for restitution.

#### 3.3.2.2 Breach of Condition

Breach of condition is where a breach *always* gives rise to a right to terminate.<sup>349</sup> According to s11(1)(b) of the Sale of Goods Act 1893, a condition is described as a term ‘the breach of which may give rise to a right to treat the contract as repudiated’ but not breach of warranty.<sup>350</sup> This is supported by Fletcher Moulton LJ who advocates that a breach of condition gives rise to the right to terminate,<sup>351</sup> The word ‘condition’ is used in many different ways in the law of contract,<sup>352</sup> and in the present context it can be used to mean not only an important term of the contract but also some agreed contingency that must occur before a particular obligation becomes due for

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<sup>345</sup> Redmond and Stevens *Contracts* 157.

<sup>346</sup> Martin and Turner *Contracts* 400.

<sup>347</sup> Carter and Goh *Concurrent* 33.

<sup>348</sup> Treitel *Conditions* 185; Carter *Condition* 90.

<sup>349</sup> Per Megaw LJ *Maredelanto Compania Naviera SA v Bergbau-Handel GmbH* The Mihalis Angelos [1970] 3 All ER 125. 138 f, p 540 j, p 541 f to j, p 542 a b d to j, p 543 j to p 544 c and j to p 545 b and g to p 546 e, p 549 h to p 550 e, p 551 d to g and p 554 d, post); dictum of Diplock LJ in *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* (1962) 1 All ER at 485–489.

<sup>350</sup> Sale of Goods Act 1893, s 11(1)(b) and the Sale of Goods Act 1979, s 11(3).

<sup>351</sup> *Wallis, Son and Wells v Pratt and Haynes* (1910) 2 KB 1003 (CA) 1012 (Fletcher Moulton LJ (dissenting)). The appeal was allowed, and the sentiments of Fletcher Moulton LJ were approved, by the House of Lords at (1911) AC 394 (HL).

<sup>352</sup> A ‘chameleon-like word that takes on its meaning from its surroundings’: *Skips A/S Nordheim and ors v Syrian Petroleum Co Ltd and anor (The Varenna)* (1984) QB 599 (CA) 618 (Donaldson MR); SJ Stoljar, ‘The Contractual Concept of Condition’ (1953) 69 LQR 485.

performance.<sup>353</sup> In accordance with the general law of contract, which had been expressly preserved by s 61(2)a of the 1893 Act, it was the duty of the court to construe a stipulation to see if it was a condition in the strict sense, in which case any breach of the stipulation by the party would entitle the other to treat himself/herself as discharged.<sup>354</sup> If the stipulation was not a condition, the court was then required to look into the extent of the actual breach; if it went to the root of the contract the other party was entitled to treat himself/herself as discharged.<sup>355</sup>

### 3.3.2.3 Breach of warranty

Breach of warranty is where a breach *never* or at any rate, hardly ever gives rise to a right to terminate. According to s11(1)(b) of the Sale of Goods Act 1893, a warranty is a term ‘the breach of which may give rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated’.<sup>356</sup> A breach of warranty occurred in *Cahave NV v Bemer Handelsgesellschaft mbH*.<sup>357</sup> A German company sold US citrus pulp pellets to a Dutch company but part of the cargo in one hold was found to be severely damaged and resulted in the buyers rejecting the whole cargo. The fact that the pellets could only be resold at a reduced price since they had subsequently been used for the purpose for which they were commonly sold, ie, for cattle food, suggests that the buyers were not entitled to reject the cargo since there had been no breach of that condition but a breach of warranty. In the same way, the word ‘warranty’ has been used to denote not only a minor term of the contract, but also: (1) a term of the contract as opposed to a ‘mere representation’;<sup>358</sup> (2) a guarantee of goods or services;<sup>359</sup> (3) a fundamental term in an insurance contract;<sup>360</sup> and even (4) a fundamental term generally.

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<sup>353</sup> Treitel 1990 *LQR* 185; Carter 1990-91 *JCL* 90.

<sup>354</sup> *Cahave NV v Bemer Handelsgesellschaft mbH* (1975) 3 ALL ER 739. The stipulation in cl 7 that the goods were to be shipped ‘in good condition’ was not a condition in the strict sense and the sellers’ breach of it did not go to the root of the contract. Accordingly the buyers were not entitled to reject the whole cargo because of the breach of that stipulation but were only entitled to claim damages.

<sup>355</sup> *NV v Bemer Handelsgesellschaft mbH* (1975) 3 ALL ER 739 p 746 g to p 747 a c d and f to h, p 748 a to c, p 754 b and c, p 755 a and f, p 756 b g and h, p 757 d to h, p 765 f and g, p 766 d to f and 767 c to e, post); dicta of Upjohn and Diplock LJJ in *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha* [1962] 1 All ER at 487, 487 applied.

<sup>356</sup> *Wallis, Son and Wells v Pratt and Haynes* [1910] 2 KB 1003 (CA) 1012 (Fletcher Moulton LJ (dissenting)). The appeal was allowed, and the sentiments of Fletcher Moulton LJ were approved, by the House of Lords at [1911] AC 394 (HL).

<sup>357</sup> (1975) 3 ALL ER 739; (see p 748 e, p 749 e to p 750 a, p 761 a to d, p 762 j, p 763 g and h and p 764 e, post); dictum of Lord Reid in *Henry Kendall & Sons v William Lillico & Sons Ltd* [1968] 2 All ER at 451 applied.

<sup>358</sup> *Oscar Chess Ltd v Williams* [1957] 1 WLR 370 (CA) 377 (Hodson LJ); *Dick Bentley Productions Ltd and anor v Harold Smith (Motors) Ltd* [1965] 1 WLR 623 (CA) 627 (Lord Denning MR).

<sup>359</sup> *Bernstein v Pamson’s Motors (Golders Green) Ltd* [1987] RTR 384 (QBD) 393 (Rougier J); *Dandara Holdings Ltd v Co-operative Retail Services Ltd* [2004] EWHC 1476 (Ch); [2004] 2 EGLR 163, para 70 (Lloyd J); *National*

Breach of an innominate or intermediate term is where a breach *sometimes* gives rise to a right to terminate. In the *Hongkong Fir* case,<sup>361</sup> Diplock LJ added that not all contractual terms could be classified as ‘conditions’ or ‘warranties’, but there were some terms of which the breach might or might not give rise to a right to terminate, depending on the gravity of the consequences.<sup>362</sup> In *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd*,<sup>363</sup> the Court of Appeal rediscovered and reaffirmed that English law recognizes contractual terms which, on a true construction of the contract of which they are part, are neither conditions nor warranties but are, to quote Lord Wilberforce’s words<sup>364</sup> ‘intermediate’. This type of term has been classed as an ‘innominate’ or ‘intermediate’.<sup>365</sup> However, neither of these terms are free from ambiguity.

### 3.3.3 Conclusion

In summary, conditions are situations where a breach *always* gives rise to a right to terminate, warranties occurs where a breach *never* or at any rate, hardly ever gives rise to a right to terminate, and innominate or intermediate terms is a situation where a breach *sometimes* gives rise to a right to terminate. Given that the right to terminate for serious breaches can arise quite independently of the construction of the contract, it can be argued that this threefold analysis is over-subtle.<sup>366</sup> In short, one would better simply to speak of: (1) conditions (where breach always gives rise to a right to terminate); and (2) warranties (where this can only be done if the consequences of the breach are sufficiently serious). However, courts have accepted the idea of an innominate term.<sup>367</sup>

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*House Building Council v Revenue and Customs Commissioners* (2010) UKFTT 326 (FT); (2010) STI 2655, para 62 (Sir Stephen Oliver QC).

<sup>360</sup> Marine Insurance Act 1906, s 33(3); *De Maurier (Jewels) Ltd v Bastion Insurance Co* (1967) 2 Lloyd’s Rep 550 (QBD: Commercial Ct) 560 (Donaldson J); *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd (The Good Luck)* (1992) 1 AC 233 (HL) 262 (Lord Goff ); *Global Process Systems Inc v Syarikat Takaful Malaysia Bhd (Th e Cendor Mopu)* [2011] UKSC 5; [2011] 1 Lloyd’s Rep 560, para 56 (Lord Mance).

<sup>361</sup> *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd (Th e Hongkong Fir)* (196)] 2 QB 26 (CA).

<sup>362</sup> *The Hongkong Fir* , 70

<sup>363</sup> (1962) 1 All ER 474, (1962) 2 QB 26

<sup>364</sup> in *Bremer Handelsgesellschaft mbH v Vanden Avenne-Izegem* (1978) 2 Lloyd’s Rep 109 at 113,

<sup>365</sup> *Cehave NV v Bremer Handelsgesellschaft MBH (Th e Hansa Nord)* [1976] QB 44 (CA) 82 (Ormrod LJ); *Bunge Corp v Tradax Export SA* (1981) 1 WLR 711(HL) 714 (Lord Wilberforce); *Dominion Corporate Trustees Ltd v Debenhams Properties Ltd* (2010) EWHC 1193 (Ch); [2010] 23 EG 106 (CS) para 22 (Kitchin J).

<sup>366</sup> Carter, JW, (1998), *Classification* (1981) CLJ 219.

<sup>367</sup> Carter, (1998), *Classification* (1981), 219.

## 3.4 Fundamental breach

### 3.4.1 Introduction

Broadly speaking, termination for breach of contract at common law can take place in two cases, the first being where the other party has broken a condition of the contract, and the second where there has been some other breach with very serious consequences. Since deciding whether a particular term is a condition is primarily a matter of construction<sup>368</sup> because the distinction between termination for breach of condition and termination under a contractual right can be a very difficult one to draw. According to *The Hongkong Fir*,<sup>369</sup> the right to discharge may be exercised not only for breaches of condition but for other serious breaches too. Such breaches are described in various ways; for instance ‘fundamental’ breaches,<sup>370</sup> ‘frustrating’ breaches,<sup>371</sup> ‘repudiatory’ breaches,<sup>372</sup> or breaches that go to ‘the root of the contract’.<sup>373</sup> Unfortunately none of these terms are without difficulty.

### 3.4.2 Forms of fundamental breach

#### 3.4.2.1 Definition of terms

Lord Diplock argued that when a fundamental breach occurs, fulfilment of primary contractual obligations is no longer possible and the innocent party chooses to end to all primary obligations

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<sup>368</sup> *Schuler AG v Wickman Machine Tool Sales Ltd* (197) AC 235 (HL); *Tradax Export SA v European Grain & Shipping Co* (1983) 2 Lloyd’s Rep 100 (QBD: Commercial Ct); *George Hunt Cranes Ltd v Scottish Boiler and General Insurance Co Ltd* (2001) EWCA Civ 1964; (2003) 1 CLC 1.

<sup>369</sup> *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd (The Hongkong Fir)* (1962) 2 QB 26 (CA).

<sup>370</sup> *Antaios Compania Naviera SA v Salen Rederierna AB (The Antaios)* (1983) 1 WLR 1362 (CA) 1375 (Fox LJ); *Hurst v Bryk and ors* (1999) Ch 1 (CA) 9 (Peter Gibson LJ); *Great Peace Shipping Ltd v Tsavrilis Salvage International Ltd (The Great Peace)* (2002) EWCA Civ 1407; (2003) QB 679, para 82 (Lord Phillips).

<sup>371</sup> *The Hongkong Fir*, 35 (Salmon J) (n 58); *Suisse Atlantique Société d’Armement Maritime SA v NV Rotterdamsche Kolen Centrale* (1967) 1 AC 361 (HL) 436 (Lord Wilberforce); *Trade and Transport Inc v Iino Kaiun Kaisha (The Angelia)* (1973) 1 WLR 210 (QBD) 221 (Kerr J).

<sup>372</sup> *Miles v Wakefield Metropolitan District Council* [1987] AC 359 (HL) 562 (Lord Templeman); *Esanda Finance Corp Ltd v Plessnig* (1989) 63 ALJR 338 (HCA) 242 (Brennan J); *Esso Petroleum Co Ltd v Milton* (1997) CLC 634 (CA) 637 (Simon Brown LJ); *Associated British Ports v Ferryways NV* (2008) EWHC 1265 (Comm); (2008) 2 Lloyd’s Rep 35, para 55 (Field J).

<sup>373</sup> *London Transport Executive v Clarke* [1981] ICR 355 (CA) 362 (Lord Denning MR); *Millers Wharf Partnership Ltd v Corinthian Column Ltd* (1991) 61 P & CR 461 (Ch D) 478 (Knox J); *ACG Acquisition XX LLC v Olympic Airlines SA* [2010] EWHC 923 (Comm); (2010) 1 CLC 581, para 35 (Hamblen J).

of both parties remaining unperformed.<sup>374</sup> The innocent party will further demand compensation from the guilty party and the guilty party will perform secondary obligations. ‘Breach of condition’ should be confined to the situation where the contracting parties have agreed, whether by express words or by implication of law, that any failure by one party to perform a particular primary obligation irrespective of the gravity of the event that has in fact resulted from the breach shall entitle the other party to elect to put an end to all primary obligations of both parties remaining unperformed.<sup>375</sup>

The concept of ‘fundamental breach’ has been used in the past in a totally different connection, that is to say a breach of such gravity as to bar the party responsible from relying on an exemption clause in the contract.<sup>376</sup> Though this doctrine has long since been discredited,<sup>377</sup> there is still debate as to whether breaches of condition are also necessarily ‘fundamental’ in the present context.<sup>378</sup> To talk of a ‘frustrating’ breach creates the risk of confusion with the modern doctrine of frustration; and it may not be appropriate to describe all breaches of this sort as ‘repudiatory’.<sup>379</sup> The notion of a breach going to the ‘root of the contract’ has a long and respectable pedigree and for this and other reasons has been preferred by some judges,<sup>380</sup> but it has been described as a misleading metaphor.<sup>381</sup> Given that there is now no longer any risk of confusion with the law of exemption clauses, it is probably best to use the term ‘fundamental

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<sup>374</sup> *Maredelanto Compania Naviera SA v Bergbau-Handel GmbH* The Mihalis Angelos (1970) 3 All ER 125 Per Megaw LJ. An expected readiness clause in a charterparty ought to be regarded as being a condition of the contract, in the old sense of the word ‘condition’, ie that when it has been broken, the other party can, if he wishes, by intimation to the party in breach, elect to be released from performance of his further obligations under the contract; and that he can validly do so without having to establish that, on the facts of the particular case, the breach has produced serious consequences which can be treated as ‘going to the root of the contract’ or as being ‘fundamental’, or whatever other metaphor may be thought appropriate for a frustration case (see p 138 *f*, post).

<sup>375</sup> *Maredelanto Compania Naviera SA v Bergbau-Handel GmbH* The Mihalis Angelos (1970) 3 All ER 125 Per Megaw LJ, p 138 *f*, post.

<sup>376</sup> *Karsales (Harrow) Ltd v Wallis* (1956) 1 WLR 936 (CA); *Charterhouse Credit Co v Tolly* (1966) 2 QB 683 (CA); *Harbutt’s Plasticine Ltd v Wayne Tank & Pump Co Ltd* (1970) 1 QB 447 (CA); Montrose, (1964), ‘Some Problems about Fundamental Terms,’ CLJ 60.

<sup>377</sup> *Suisse Atlantique Société d’Armement Maritime SA v NV Rotterdamsche Kolen Centrale* (1967) 1 AC 361 (HL); *Photo Production Ltd v Securicor Transport Ltd* (1980) AC 827 (HL).

<sup>378</sup> Montrose, (1964), *Some Problems about Fundamental Terms*, 60.

<sup>379</sup> Thus repudiation suggests an unwillingness or inability to perform in the future, whereas an injured party may terminate purely on the basis of the consequences of the breach that have already occurred. For this and other reasons it is argued by Carter that the doctrine in *The Hongkong Fir* operates independently from that of repudiation.

<sup>380</sup> *Decro-Wall International SA v Practitioners in Marketing Ltd* (1971) 1 WLR 361; (CA) 374 (Sachs LJ).

<sup>381</sup> *Bank Line Ltd v Arthur Capel & Co* (1919) AC 435 (HL) 459 (Lord Sumner)

breach' for a breach that goes to the root of the contract, whilst leaving open for the present the question whether it necessarily includes a breach of condition.<sup>382</sup>

Two tests are conducted for one to see the nature of breach before it is called fundamental Breaches.<sup>383</sup> Firstly, courts may find the decisive element in the importance which the parties would have attached the term which has been broken to be of serious or minor importance. Secondly, the seriousness of the consequences that would have resulted from the breach also decides whether or not a breach is fundamental. Descriptions such as the degree of breach going to the whole root of the contract and not merely part of it or the breach affecting the whole substance of the contract are taken into consideration.

In *Photo Production Ltd v Securicor Transport Ltd*,<sup>384</sup> a fundamental breach occurred when defendants contracted to guard a factory against fire instead caused fire which destroyed the factory. The plaintiffs sued the defendants for damages on the ground that they were liable for the act of their employee. The defendants pleaded, *inter alia*, an exception clause in the contract, to the effect that 'under no circumstances' were the defendants to be 'responsible for any injurious act or default by any employee. But the Court of Appeal reversed this decision, holding that there had been a fundamental breach of the contract by the defendants which precluded them from relying on the exception clause.<sup>385</sup>

The defendants appealed to the House of Lords and according to Lord Diplock<sup>386</sup> the expression 'fundamental breach' should be confined to an event resulting from the failure by one party to perform a primary obligation which has the effect of depriving the other party of substantially the whole benefit which it was the intention of the parties that he should obtain from the contract, so that the party not in default may elect to put an end to all primary obligations of both parties remaining unperformed.<sup>387</sup> It was held that because the parties were free to agree to whatever exclusion or modification of their obligations they chose and, therefore, the question whether an

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<sup>382</sup> *Photo Production Ltd v Securicor Transport Ltd* (1980) 1 All ER 556, p560 b-d

<sup>383</sup> *Willoughby v CF Capital plc* (2011) EWCA Civ 1115, (2012) ICR 1038, para 21 (Rimmer LJ), *Geldof Metaalconstructie NV v Simon Carves Ltd* (2010) EWCA Civ 667,(2010) 1CLC 782, para 10 (Longmore LJ)

<sup>384</sup> (1980) 1 All ER 556.

<sup>385</sup> (1978) 3 All ER 146.

<sup>386</sup> *Photo Production Ltd v Securicor Transport Ltd* (1980) 1 All ER 556 p 560 b to d, p 561 c to f, p 565 b, p 566 c to e, p 567 f g, p 568 a h and p 570 a to d .

<sup>387</sup> *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* (1966) 2 All ER 61 explained and applied; *Charterhouse Credit Co Ltd v Tolly* (1963) 2 All ER 432.



exception clause applied when there was a fundamental breach, breach of a fundamental term or any other breach, turned on the construction of the whole of the contract, including any exception clauses.<sup>388</sup> Also the parties were free to reject or modify by express words both their primary obligations to do that which they had promised and also any secondary obligations to pay damages arising from breach of a primary obligation.

### 3.4.3 Breach of Condition

According to s 61(2)(a) of the 1893 Act, it was the duty of the court to construe a stipulation to see if it was a condition in the strict sense, in which case any breach of the stipulation by the party would entitle the other to treat himself/herself as discharged.<sup>389</sup> If the stipulation was not a condition, the court was then required to look to the extent of the actual breach; if it went to the root of the contract the other party was entitled to treat himself/herself as discharged.<sup>390</sup> A breach of condition shows the different implications when it comes to deciding what rights and remedies the injured party may have in addition to the basic right to terminate.<sup>391</sup> In particular, a party who terminates for breach of condition may be in a much stronger position when it comes to damages than one who merely exercises a contractual right.<sup>392</sup> There are other problems associated with the distinction. For instance, to what extent can a party that wrongfully refuses to perform to meet a claim for wrongful repudiation by arguing that it had made a *bona fide* mistake in interpreting the scope of a right to terminate that was expressly *given* by the contract, and that therefore his/her refusal to perform should not be construed as a refusal to be *bound* by

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<sup>388</sup> *Photo Production Ltd v Securicor Transport Ltd* (1980) 1 All ER 556 p 560 *b to d*, p 561 *c to f*, p 565 *b*, p 566 *c to e*, p 567 *f g*, p 568 *a h* and p 570 *a to d*.

<sup>389</sup> *Cahave NV v Bemer Handelsgesellschaft mbH* (1975) 3 ALL ER 739. The stipulation in cl 7 that the goods were to be shipped 'in good condition' was not a condition in the strict sense and the sellers' breach of it did not go to the root of the contract. Accordingly the buyers were not entitled to reject the whole cargo because of the breach of that stipulation but were only entitled to claim damages.

<sup>390</sup> *NV v Bemer Handelsgesellschaft mbH* (1975) 3 ALL ER 739 p 746 *g* to p 747 *a c d* and *f* to *h*, p 748 *a to c*, p 754 *b* and *c*, p 755 *a* and *f*, p 756 *b g* and *h*, p 757 *d* to *h*, p 765 *f* and *g*, p 766 *d* to *f* and 767 *c* to *e*, post); dicta of Upjohn and Diplock LJJ in *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha* [1962] 1 All ER at 487, 487 applied.

<sup>391</sup> *Sweet and Maxwell Ltd v Universal News Services Ltd* (1964) 2 QB 699 (CA); *Federal Commerce and Navigation Co Ltd v Molena Alpha Inc (The Nanfri)* (1979) AC 757 (HL); *Woodar Investment Development Ltd v Wimpey Construction (UK) Ltd* (1980) 1 WLR 277 (HL).

<sup>392</sup> *Financings Ltd v Baldock* (1963) 2 QB 104 (CA); *Lombard North Central plc v Butterworth* (1987) 1 QB 527 (CA).

that contract?<sup>393</sup> Again, to what extent can contractual rights of termination be taken to exclude a concurrent right of termination under the common law?<sup>394</sup> Given the importance of contractual rights in the commercial context, these questions are of crucial importance. The English law has still not fully worked out a satisfactory approach to the problem.

#### **3.4.4 Non- performance and discharge**

One of the most important aspects of the right to discharge is the right to refuse performance. In the words of Lord Diplock, termination puts an end to the ‘primary obligations’ of the party not in default in so far as they have not already been performed at the time of the termination.<sup>395</sup>

The right to withhold performance may often crystallize into a right to terminate once the time for the other party’s performance has passed, or in other cases where it is clear that he/she will not be able to perform. In *Damon Cia Naviera SA v Hapag-Lloyd International SA*,<sup>396</sup> non-performance occurred when the memorandum was not signed and deposit not paid even after a contract for the sale of three ships took place between the sellers and the intending buyers for US\$2,365,000. Clause 2 provided for payment of a deposit of 10% on the execution of the contract and cl 13 provided that in the event of the buyers failing to pay the purchase price the sellers could cancel the contract and retain the deposit. Therefore, a deposit of 10% was to be paid by the buyers on signing of the memorandum of agreement. The sellers argued that a fundamental breach occurred as memorandum was not signed and deposit not paid. The court held that there was no indication that the agreed terms of sale were intended to be subject to the execution of a memorandum. Secondly, actual payment of the deposit was not necessarily a condition precedent to the formation of a contract.<sup>397</sup>

However, a party that is entitled to refuse performance is not necessarily entitled to discharge.<sup>398</sup>

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<sup>393</sup> *Sweet and Maxwell Ltd v Universal News Services Ltd* (1964) 2 QB 699 (CA); *Federal Commerce and Navigation Co Ltd v Molena Alpha Inc (The Nanfri)* (1979) AC 757 (HL); *Woodar Investment Development Ltd v Wimpey Construction (UK) Ltd* (1980) 1 WLR 277 (HL).

<sup>394</sup> *Stocznia Gdanska SA v Latvian Shipping Co (No 2)* (2002) EWCA Civ 889; (2002) 2 Lloyd’s Rep 436; *Stocznia Gdynia SA v Gearbulk Holdings Ltd* (2009) EWCA Civ 75; (2010) QB 27; *Shell Egypt West Manzala GmbH v Dana Gas Egypt Ltd* (2010) EWHC 465 (Comm).

<sup>395</sup> *Moschi v Lep Air Services Ltd* (1973) AC 331 (HL) 350. In this context Lord Diplock speaks of ‘rescission’, but he is referring to the process which in the present work is called ‘discharge’

<sup>396</sup> *The Birkenstein* (1985) 1 All ER 475.

<sup>397</sup> see p 481 *ef* and *h* to p 482 *a*, p 484 *a* to *f*, p 485 *f* to *h*, p 488 *j*, p 489 *c* to *j*, p 490 *e* to p 491 *b* and p 492 *g*, post); dictum of Goulding J in *Myton Ltd v Schwab-Morris* [1974] 1 All ER at 331 and *Millichamp v Jones* [1983] 1 All ER 267 applied; *Myton Ltd v Schwab-Morris* [1974] 1 All ER 326 disapproved in part.

<sup>398</sup> Beale *Remedies* 91.

Thus an employer is normally entitled to withhold the payment of wages in certain circumstances, but this does not mean that the contract is terminated. The employee would have to be properly dismissed.<sup>399</sup> Again, if a seller tenders goods that are not in conformity with the contract, the buyer may reject them, but this does not mean that the contract is terminated, as the seller may still have time to produce other goods that do meet that specification.<sup>400</sup> The buyer may only refuse a fresh tender of performance if it is made too late,<sup>401</sup> or alternatively if the original tender was so bad as to amount to a repudiation of the contract.<sup>402</sup>

The right to withhold performance may often crystallize into a right to terminate once the time for the other party's performance has passed, or in other cases where it is clear that he/she will not be able to perform. This is well illustrated by the famous case of *Cutter v Powell*<sup>403</sup>, where a seaman agreed to serve on board ship for a voyage from Jamaica to Liverpool. The contract provided that his wages were to be paid ten days after arrival, provided that he had performed all his duties on the voyage. The seaman having died during the course of the voyage, it was held that his widow could recover nothing. In this case what was originally merely a right to withhold performance (until ten days after the arrival of the ship at Liverpool) was effectively converted by the seaman's death into a right to terminate.

This case also illustrates another reason for the difficulty, which is historical. Prior to the beginning of the nineteenth century, questions of discharge were often couched in terms of whether a party to a contract had performed all the necessary 'conditions precedent' required to earn the right to demand performance from the other side.

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<sup>399</sup> Thus an employee will normally have to work for a certain period before wages become due, and wages may also be withheld for non-performance in certain cases without the contract being terminated: see G Mead, 'Employer's Right to Withhold Wages' (1990) 106 LQR 192.

<sup>400</sup> *Agricultores Federados Argentinos Sociedad Co-operativa Lda v Ampro SA Commerciale, Industrielle et Financiere* [1965] 2 Lloyd's Rep 157 (QBD: Widgery J); *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp of India (The Kanchenjunga)* [1990] 1 Lloyd's Rep 391 (HL). This can cause problems where the seller seeks to repair and re-tender defective goods after they have been rejected by the buyer: see *J & H Ritchie v Lloyd Ltd* [2007] UKHL 9.

<sup>401</sup> *Kwei Tek Chao v British Traders and Shippers Ltd* [1954] 2 QB 459 (QBD: Devlin J).

<sup>402</sup> *Texaco Ltd v Eurogulf Shipping Co Ltd (The Texaco)* [1987] 2 Lloyd's Rep 541 (QBD: Commercial Ct); Beale, *Remedies for Breach of Contract* (n 20); Peel, *Treitel*, para 17-004 (n 15).

<sup>403</sup> *Cutter v Powell* (1795) 6 TR 320, 101 ER 573 (KB).

Thus, in *Cutter v Powell*<sup>404</sup> the key finding of the court was that performance of the complete voyage was intended as a condition precedent to the right to recover wages.<sup>405</sup> Nevertheless, it is important that the two rights in question are not confused. The right to withhold performance is essentially a temporary one, and depends basically on the agreed order of performance; if the contract provides that A should not have to perform until B has performed, then party A is entitled to withhold performance until this has happened. The right to discharge, on the other hand, assuming that it is not waived by the injured party, is fixed and final in nature, and depends not only on the intention of the parties but also on the nature and consequences of the other party's breach.

### 3.4.5 Repudiatory Breach

Breach by anticipatory repudiation is a doctrine that justifies the plaintiff's action of avoiding wasteful expenditure of preparing for performance which it had been already told would not be accepted.<sup>406</sup> According to the Sale of Goods Acts repudiation implies wrongful refusal to perform.<sup>407</sup> This is echoed by Lord Wright<sup>408</sup> who argues that the word 'repudiation' can be used in a wide sense to describe any 'fundamental' breach,<sup>409</sup> or in a narrower sense to mean a refusal by a party to perform his or her obligations under the contract.<sup>410</sup> In some cases the term is used to describe, justified or unjustified, refusal.<sup>411</sup>

For a repudiatory breach to occur, a party intimates by words or conduct that it does not intend to honor its contractual obligations when they fall due in the future and discharges

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<sup>404</sup> *Cutter v Powell* (1795) 6 TR 320, 101 ER 573 (KB).

<sup>405</sup> *Cutter v Powell* (1795) 6 TR 320, 325, 101 ER 573, 576 (Ashhurst J).

<sup>406</sup> *Poole Contracts* 334.

<sup>407</sup> Sale of Goods Act 1893, s 11(1)(b); Sale of Goods Act 1979, s 11(3); *Chancery Lane Developments Ltd v Wades Departmental Stores Ltd* (1987) 53 P & CR 306 (CA) 310 (Slade LJ); *Credit Suisse Asset Management Ltd v Armstrong and ors* [1996] ICR 882 (CA) 891 (Neill LJ); *Golden Ocean Group Ltd v Salgaocar Mining Indus 3.4.5tries Pvt Ltd* [2011] EWHC 56 (Comm); [2011] 1 CLC 125, 128 (Christopher Clarke J).

<sup>408</sup> *Heyman v Darwins Ltd* [1942] AC 356 (HL) 378 (Lord Wright); Carter, *Carter's Breach of Contract*, paras 7-03–7-04

<sup>409</sup> *UCB Leasing Ltd v Holtom (t/a David Holtom & Co)* [1987] RTR 362 (CA) 369 (Lloyd LJ); *Glencore Grain Rotterdam BV v Lebanese Organisation for International Commerce* [1997] CLC 1274 (CA) 1281 (Evans LJ); *Gisda Cyf v Barratt* [2010] UKSC 41; [2010] ICR 1475, para 24 (Lord Kerr of Tonaghmore).

<sup>410</sup> *Shearson Lehman Bros Inc v Maclaine, Watson & Co Ltd (Damages: Interim Payments)* [1987] 1 WLR 480 (CA) 488 (Lloyd LJ); *Ali Shipping Corp v Shipyard Trogir* (1998) CLC 566 (CA) 581 (Potter LJ); *Pittack v Naviede* (2010) EWHC 1509 (Ch); (2010) 1 WLR 1666, para 24 (Mark Herbert QC).

<sup>411</sup> *Behn v Burness* (1863) 3 B & S 751 (Exchequer Chamber) 755, 122 ER 281, 283 (Williams J); *Goodman v Winchester & Alton Rly plc* (1985) 1 WLR 141 (CA) 144 (Lawton LJ); *Lancaster v Bird* (2000) 2 TCLR 136 (CA) 141 (Chadwick LJ).

the contract when the party is not entitled to do so lawfully.<sup>412</sup> Repudiation can be implicit or explicit. An explicit repudiation occurred in *Hochester v De la Tour*,<sup>413</sup> where the defendant agreed to employ the plaintiff as his courier in April but changed his mind on May 11 through a letter. Plaintiff sued for damages before 1 June and succeeded. An implicit repudiation occurs when the reasonable inference from the defendant's conduct is that it no longer intends to perform its' side of the contract.<sup>414</sup> In cases of repudiation, the innocent party acquires an immediate cause of action, but need not immediately enforce it. The plaintiff can either stay its hand and wait for the day of performance to arrive or treat the contract as having been discharged and take immediate action. According to Delvin J the injured party is allowed to anticipate an inevitable breach from the moment that the actual breach becomes inevitable and not wait for the breach to occur.<sup>415</sup> The assumed inevitable failure of performance at a future date when performance would have been required is what leads the contract to come to an end. It is a promissory or prospective or possible breach, which may never occur.<sup>416</sup>

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<sup>412</sup> As per Megaw LJ, in *Maredelanto Compania Naviera SA v Bergbau-Handel GmbH The Mihalis Angelos* (1970) 3 All ER 125 p145; per Upjohn LJ *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha, Ltd* (1962) 1 All ER 474 at 474 and 484. The remedies open to the innocent party for breach of a stipulation depend entirely on the nature of the breach and its foreseeable consequence. Breaches of stipulation fall, naturally, into two classes. First, there is the case where the owner by his conduct indicates that he considers himself no longer bound to perform his part of the contract; the innocent party may accept the repudiation and treat the contract as at an end. The second class of case is, , due to misfortune such as the perils of the sea, engine failures, incompetence of the crew and so on, the owner is unable to perform a particular stipulation precisely in accordance with the terms of the contract. Does the breach of the stipulation go so much to the root of the contract that it makes further commercial performance of the contract impossible or is the whole contract frustrated? If yea, the innocent party may treat the contract as at an end. If nay, his claim sounds in damages only.

<sup>413</sup> (1853) 2 E & B 678.

<sup>414</sup> Sir Alexander Cockburn CJ observing *Frost v Knight* (1872) LR 7 Exch at 114, (1861–73) All ER Rep at 225 as per Edmund Davies LJ. In *Maredelanto Compania Naviera SA v Bergbau-Handel GmbH The Mihalis Angelos* (1970) 3 All ER 125 p135.

<sup>415</sup> *Universal Cargo Carriers Corp v Citati*, (1957) 2 All ER 70 at 85, (1957) 2 QB at 438; *Maredelanto Compania Naviera SA v Bergbau-Handel GmbH The Mihalis Angelos* as per Mocatta J (1970) 1 All ER 673 at 684, (1970) 2 WLR at 922.

<sup>416</sup> In *Frost v Knight*, where the defendant had promised to marry the plaintiff as soon as the defendant's father died but nevertheless married another during his father's lifetime, it was held that the plaintiff was entitled to recover damages while the father was still alive, Sir Alexander Cockburn CJ observing ((1872) LR 7 Exch at 114, (1861–73) All ER Rep at 225); Devlin J in *Universal Cargo Carriers Corp v Citati*, founding himself largely on the fact that a renunciation, when acted on, became final, and that is essential to the concept of anticipatory breach that (1957) 2 All ER at 85, (1957) 2 QB at 438.

Though repudiation in this sense will normally amount to a fundamental breach, not every fundamental breach will be repudiation. The distinction is that whereas the emphasis in fundamental breach is on what the defaulting party has done (or rather, not done) *in the past*, the emphasis in repudiation is on what he or she is likely to do (or rather, not do) *in the future*.

An example is to be found in a contract for the sale of goods to be delivered by installments which are to be separately paid for. Either the seller makes short deliveries or the buyer neglects to pay for one or more installments. A default of either kind does not necessarily lead or amount to a discharge. The Sale of Goods Act of 1979<sup>417</sup> suggests that discharge depends upon the uniqueness of each case, terms of the contract and the particular circumstances whether or not the breach is repudiation of the contract as a whole or merely as a ground to recover damages<sup>418</sup>. According to *Male Flock Co Ltd v Universal Furniture Products (Wembley) Ltd*<sup>419</sup> it will often be difficult in a contract for delivery by installments to decide whether or not a particular breach defeats the whole object of the contract so as to amount to a complete repudiation of obligations by the party in default. However, the chief considerations are the ratio quantitatively which the breach bears to the contract as a whole and the degree of probability or improbability that such a breach will be repeated.<sup>420</sup>

### 3.4.6 Conclusion

The section above analyzed the concept of repudiation and demonstrated that it is the assumed inevitable failure of performance, by the injured party, at a future date when performance would have been required. Poole states that repudiation is a doctrine that justifies the plaintiff's action of avoiding wasteful expenditure of preparing for performance which it had been already told would not be accepted.<sup>421</sup> According to the Sale of Goods Acts repudiation implies wrongful refusal to perform.<sup>422</sup> The section

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<sup>417</sup> S 31 (2)

<sup>418</sup> *Decro-Walling International SA V Practitioners in Marketing Ltd* (1971) 2 ALL ER 216 and (1971) 1 WLR 361.

<sup>419</sup> (1934) 1 KB 148 at 157.

<sup>420</sup> Court Of Appeal in *Male Flock Co Ltd v Universal Furniture Products (Wembley) Ltd* (1934) 1 kb 148 at 157.

<sup>421</sup> Poole *Contracts* 334.

<sup>422</sup> Sale of Goods Act 1893, s 11(1)(b); Sale of Goods Act 1979, s 11(3); *Chancery Lane Developments Ltd v Wades Departmental Stores Ltd* (1987) 53 P & CR 306 (CA) 310 (Slade LJ); *Credit Suisse Asset Management Ltd v Armstrong and ors* [1996] ICR 882 (CA) 891 (Neill LJ); *Golden Ocean Group Ltd v Salgaocar Mining Indus3.4.5tries Pvt Ltd* [2011] EWHC 56 (Comm); [2011] 1 CLC 125, 128(Christopher Clarke J).

revealed that it is a term used to describe, justified or unjustified, refusal<sup>423</sup> to perform contractual obligations in frustrated contracts.<sup>424</sup> Evans LJ in *Glencore Grain Rotterdam BV v Lebanese Organisation for International and* Lord Kerr of Tonaghmore *Gisda Cyf v Barratt* support the above statement by adding that the word ‘repudiation’ can be used in a wide sense to describe any ‘fundamental’ breach,<sup>425</sup> or, according to Lloyd LJ; Potter LJ and Mark Herbert QC, in a narrower sense to mean a refusal by a party to perform his or her obligations under the contract.<sup>426</sup> The section revealed that conditions under which repudiation occurs depend on the nature of the contract. Megaw LJ, in *Maredelanto Compania Naviera SA v Bergbau-Handel GmbH The Mihalis Angelos*<sup>427</sup>; words or conduct from the guilty party implied that it does not intend to honor its contractual obligations when they fall due in the future. According to Upjohn LJ *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha, Ltd*<sup>428</sup> misfortunes and fundamental breach frustrates the contract and lead to discharge.<sup>429</sup>

However, *Frost v Knight* used the term to describe a promissory or prospective or possible breach, which may never occur.<sup>430</sup> The above case illustrates that though repudiation in this

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<sup>423</sup> *Behn v Burness* (1863) 3 B & S 751 (Exchequer Chamber) 755, 122 ER 281, 283 (Williams J); *Goodman v Winchester & Alton Rly plc* (1985) 1 WLR 141 (CA) 144 (Lawton LJ); *Lancaster v Bird* (2000) 2 TCLR 136 (CA) 141 (Chadwick LJ).

<sup>424</sup> *Maredelanto Compania Naviera SA v Bergbau-Handel GmbH The Mihalis Angelos* (1970) 3 All ER 125 p135.

<sup>425</sup> *UCB Leasing Ltd v Holtom (t/a David Holtom & Co)* [1987] RTR 362 (CA) 369 (Lloyd LJ); *Glencore Grain Rotterdam BV v Lebanese Organisation for International Commerce* [1997] CLC 1274 (CA) 1281 (Evans LJ); *Gisda Cyf v Barratt* [2010] UKSC 41; [2010] ICR 1475, para 24 (Lord Kerr of Tonaghmore).

<sup>426</sup> *Shearson Lehman Bros Inc v Maclaine, Watson & Co Ltd (Damages: Interim Payments)* [1987] 1 WLR 480 (CA) 488 (Lloyd LJ); *Ali Shipping Corp v Shipyard Trogir* (1998) CLC 566 (CA) 581 (Potter LJ); *Pittack v Naviede* (2010) EWHC 1509 (Ch); (2010) 1 WLR 1666, para 24 (Mark Herbert QC).

<sup>427</sup> (1970) 3 All ER 125 p145.

<sup>428</sup> (1962) 1 All ER 474 at 474 and 484.

<sup>429</sup> As per Megaw LJ, in *Maredelanto Compania Naviera SA v Bergbau-Handel GmbH The Mihalis Angelos* (1970) 3 All ER 125 p145; per Upjohn LJ *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha, Ltd* (1962) 1 All ER 474 at 474 and 484. The remedies open to the innocent party for breach of a stipulation depend entirely on the nature of the breach and its foreseeable consequence. Breaches of stipulation fall, naturally, into two classes. First, there is the case where the owner by his conduct indicates that he considers himself no longer bound to perform his part of the contract; the innocent party may accept the repudiation and treat the contract as at an end. The second class of case is, due to misfortune such as the perils of the sea, engine failures, incompetence of the crew and so on, the owner is unable to perform a particular stipulation precisely in accordance with the terms of the contract. Does the breach of the stipulation go so much to the root of the contract that it makes further commercial performance of the contract impossible or is the whole contract frustrated? If yes, the innocent party may treat the contract as at an end. If nay, his claim sounds in damages only.

<sup>430</sup> In *Frost v Knight*, where the defendant had promised to marry the plaintiff as soon as the defendant’s father died but nevertheless married another during his father’s lifetime, it was held that the plaintiff was entitled to

sense will normally amount to a fundamental breach, not every fundamental breach will be repudiation. The Sale of Goods Act of 1979<sup>431</sup> suggests that discharge depends upon the uniqueness of each case, terms of the contract and the particular circumstances whether or not the breach is repudiation of the contract as a whole or merely as a ground to recover damages.<sup>432</sup> According to *Male Flock Co Ltd v Universal Furniture Products (Wembley) Ltd*<sup>433</sup> it will often be difficult in a contract for delivery by installments to decide whether or not a particular breach defeats the whole object of the contract so as to amount to a complete repudiation of obligations by the party in default. Whereas, repudiation was demonstrated as the assumed inevitable failure of performance, by the injured party, at a future date, the next section analyses how failure to perform on time leads to discharge.

### **3.4.7 Late performance**

#### **3.4.7.1 Introduction**

This section debates the notion of late performance and demonstrates the different ways common law and equity have approached the question courts have had to administer both sets of principles since the Judicature Act of 1873. Nevertheless, the section will reiterate that whilst there has been a fusion of jurisdictions, equity and common law still continue to exist as separate bodies of doctrine. To paraphrase the famous words of Walter Ashburner,<sup>434</sup>whilst the two streams now run in a common channel, the waters are not yet merged.<sup>435</sup> The section argues that as far as discharge for breach is concerned, ‘time is of essence’, and ‘election’ are two sets of rules which have not been met with universal approval by equity lawyers.

#### **3.4.7.2 Time is of essence**

The most obvious area of tension, at least from an historical perspective, has been the different approach of common law and equity to time stipulations. According to the traditional approach, the courts of common law were more ready to allow termination for breach of a time stipulation

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recover damages while the father was still alive, Sir Alexander Cockburn CJ observing ((1872) LR 7 Exch at 114, (1861–73) All ER Rep at 225); Devlin J in *Universal Cargo Carriers Corp v Citati*, founding himself largely on the fact that a renunciation, when acted on, became final, and that is essential to the concept of anticipatory breach that (1957) 2 All ER at 85, (1957) 2 QB at 438.

<sup>431</sup> S 31 (2)

<sup>432</sup> *Decro-Walling International SA V Practitioners in Marketing Ltd* (1971) 2 ALL ER 216 and (1971) 1 WLR 361.

<sup>433</sup> (1934) 1 KB 148 at 157.

<sup>434</sup> *Browne Ashburner* 18; *Martin Hanbury* paras 1-020–1-023.

<sup>435</sup> *United Scientific Holdings v Burnley Borough Council* [1978] AC 904 (HL) 925 Lord Diplock declared that this metaphor was no longer helpful, but the extent to which a fusion of principles has taken place continues to be a matter of hot dispute among equity lawyers.



than those of equity, or as it was said, time was generally of the essence at common law, but not in equity. This is well expressed by Maitland in his famous lecture on specific performance:<sup>436</sup>

... As a general rule a man cannot sue upon a contract at law if he himself has broken that contract, though of course as you know there are many exceptions to this statement. Now in contracts for the sale of land it very frequently happens that a breach of the terms of the contract has been committed by the person who wishes to enforce it. Such a contract will be full of stipulations that certain acts are to be done within certain times. . .

Equity held as a general rule that these stipulations as to time were not of the essence of the contract—that for example a purchaser might sue for specific performance although he had not in all respects kept the days assigned to him/her by the contract of sale for his/her various acts. This was the general rule—these stipulations as to time were not essential unless the parties declared them to be so.

The passage above is noteworthy for three reasons. The first is that it shows the close connection between the equitable rules as to time and the doctrine of specific performance. The common law approach is to ask whether the innocent party can *terminate*, the general rule being that this can only be done if the breach *is* a sufficiently serious one. Equity, on the other hand, looks at the problem as it were from the other end, by asking whether or not the defaulting party can *enforce the contract*, the general rule being that this can be done provided that the breach is *not* too serious. Secondly, in declaring that someone ‘cannot sue upon a contract at law if he himself has broken that contract’, it assumes that the common law regarded termination as the norm in cases of breach rather than as the exception.<sup>437</sup> Thirdly, it shows that the whole point of the equitable rule in this regard was to enforce contracts which could be validly terminated at law. Indeed, for this reason, the equitable grant of specific performance in these cases was often accompanied by what was called a ‘common injunction’ to prevent the injured party taking proceedings at law on that basis.<sup>438</sup> The status of these rules following the Judicature Act of 1873 has long been a matter of controversy.<sup>439</sup> Section 25(7) of the Act provided that stipulations in contracts, as to time or otherwise, which would not prior to the passing of the Act, have been deemed to be or to

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<sup>436</sup> Maitland *Equity* CUP.

<sup>437</sup> *Lang v Gale* (1813) 1 M & S 111 (KB) 105 ER 42, *Stowell v Robinson* (1837) 3 Bing NC 928 (Common Pleas), 132 ER 668 and *Sansom v Rhodes* (1840) 6 Bing NC 261 (Common Pleas), 133 ER 103.

<sup>438</sup> As in *Hearne v Tenant* (1807) 13 Ves J 287 (High Ct of Chancery), 33 ER 301 (action for ejection); *Levy v Lindo* (1817) 3 Mer 84 (High Ct of Chancery), 36 ER 32 (action for return of deposit).

<sup>439</sup> McGhee *Snells* para1.016.

have become of the essence, should henceforth receive in all courts the same construction and effect that they would have had in equity.

However, according to the House of Lords in *Stickney v Keeble*,<sup>440</sup> this did not change the substantive law; in particular, the defaulting party would not be given relief where formerly a decree of specific performance would not have been granted.<sup>441</sup> The effect of this was to preserve the equitable jurisdiction in a kind of bubble, insulated from the rest of the law. However, in 1978 an attempt was made by Lord Simon, in *United Scientific Holdings v Burnley Borough Council*,<sup>442</sup> to reformulate the equitable doctrine in common law terms. In the words of Lord Simon<sup>443</sup>

The law may well come to inquire whether a contractual stipulation as to time is (a) so fundamental to the efficacy of the contract that any breach discharges the other party from his contractual obligations ('essence'), or (b) such that a serious breach discharges the other party, a less serious breach giving rise to damages (if any) (or interest), or (c) such that no breach does more than give a right to damages (if any) (or interest) ('non-essential')

To put it in another way, to say that time is of the essence would be another way of saying that timely performance is a 'condition'. To say that time is not of the essence would mean that it is a 'warranty'. There is also the possibility that it is an 'intermediate' or 'innominate' term, though this possibility is not reflected in the equitable classification.

Attractive though, the above analysis<sup>444</sup> in may be at first sight, there are a number of problems with it. In particular, while it works reasonably well for cases where time is of the essence, it falls down in cases where it is not. One can agree that where time is of the essence, untimely performance will be a breach of condition, and specific performance will not be available to the party in default. However, to equate a non-essential time stipulation with one 'such that no breach does more than give a right to damages' does violence to the historical roots of the doctrine, which was grounded on the assumption that the breach *did* give a greater right at

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<sup>440</sup> (1915), AC 386.

<sup>441</sup> *Stickney v Keeble*, (1915) AC 417 (Lord Parker)

<sup>442</sup> (1978) AC 904 (HL)

<sup>443</sup> *United Scientific Holdings v Burnley BC* (1978) AC 904 (HL).

<sup>444</sup> *Borough Council*(1978) AC 904 (HL)

common law, namely the right to terminate. Furthermore, the whole point of the doctrine was that where time was not of the essence, a decree of specific performance would be granted. But even though it may now be true to say that a party whose untimely performance amounts to a breach of warranty may obtain specific performance in *some* cases, such a remedy is by no means available in all situations.

### 3.4.7.3 Election

Stipulations as to time in mercantile contracts were generally to be treated as conditions (breach of which, no matter how minor, entitled the innocent party to treat the contract as at an end).<sup>445</sup> The expression ‘fundamental breach’ should be confined to an event resulting from the failure by one party to perform a primary obligation which has the effect of depriving the other party of substantially the whole benefit which it was the intention of the parties that he/she should obtain from the contract, so that the party not in default may elect to put an end to all primary obligations of both parties remaining unperformed.<sup>446</sup> For the purposes of the common law doctrine of election, where a person had an unrestricted choice between two mutually inconsistent courses of action which affected his rights, knowledge of the right to elect was a precondition to making an effective election and there could be no knowledge of the right to elect unless the person knew his legal rights as well as the facts giving rise to those rights.<sup>447</sup>

If a party no longer intends to be bound to the contract it makes an offer to the other party that the contract be discharged. If the innocent party chooses the contract to be in force, with full knowledge of the facts, makes it clear by words or even by silence, the contract remains in being for the future for both sides.<sup>448</sup> If the innocent party elects to treat the contract as discharged, it must make its decision known to the party in default. Once it has done this, the innocent party’s election is final and cannot be retracted.

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<sup>445</sup> *Bunge Corporation v Tradax SA* (1981) 2 All ER 513 p 540 j); dictum of Diplock LJ in *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* (1962) 1 All ER at 485–489 distinguished. to (see p 540 j).

<sup>446</sup> *Photo Production Ltd v Securicor Transport Ltd* (1980) 1 All ER 556.

<sup>447</sup> *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd* (1970) 2 All ER 871

<sup>448</sup> *Johnson v Agnew* (1980) AC 367; (1979) 1 ALL ER 883 and *Horsler v Zorro* (1975) 1 ALL ER 584.

In *Peyman v Lanjani and others*,<sup>449</sup> it was stated that the plaintiff was not aware of his right to rescind by the 9 of February and by his actions the plaintiff could not be said to have elected to affirm the contract by his subsequent actions distinguished. In *The Mihaios Xilas*,<sup>450</sup> if the plaintiff had, by an unequivocal act or statement, demonstrated to the defendant that he/she still intended to proceed with the contract notwithstanding the defendant's breach, and if the plaintiff's conduct had been adverse to the defendant or caused him/her to act to his/her detriment, the plaintiff would then have been deemed to have elected to affirm the contract. On the facts, however, the plaintiff's actions after he had learnt of the deception of the landlords by the impersonation could not be construed as an unequivocal representation to the defendant that the plaintiff was affirming the contract, nor were they adverse to the defendant, nor did the defendant act on them to his detriment.<sup>451</sup> Termination must be clear and unequivocal; mere inactivity will not normally suffice, although in the circumstances it may convey a decision to terminate.<sup>452</sup> The innocent party is not bound to elect at once and can wait for performance or negotiate in the hope of settlement.<sup>453</sup>

However, as Rix LJ<sup>454</sup> explains, the innocent party runs a risk while making up his/her mind. Election to terminate the contract must generally be communicated to the contract breaker, but it requires no particular form. The aggrieved party need not personally, or by agent, notify the repudiatory party... It is sufficient that the fact of the election comes to the repudiating party's attention.<sup>455</sup> The effect is to discharge future contractual obligations as from the moment the election is communicated to the party in breach. The breach does not operate retrospectively but, the previous existence of the contract is still relevant with regards to the past acts and defaults of

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<sup>449</sup> (1984) 3 All ER 703. ( p 721 g h, p 724 j, p 725 j, p 728 h j, p 729 j to p 730 a, p 731 c to f, p 734 f to h, p 735 b c and p 736 j, post); dicta of Romilly MR in *Vyvyan v Vyvyan* (1861); *Matthews v Smallwood* [1908–10] All ER Rep 536, *Evans v Bartlam* (1937) 2 All ER 646; *Young v Bristol Aeroplane Co Ltd* [1946] 1 All ER 98 and *Leathley v John Fowler & Co Ltd* (1946) 2 All ER 326.

<sup>450</sup> *The Mihaios Xilas* (1979) 2 All ER 1044; *Coastal Estates Pty Ltd v Melevende* [1965] VR 433 and *China National Foreign Trade Transportation Corp v Evlogia Shipping Co SA of Panama*.

<sup>451</sup> *Peyman v Lanjani and others* (1984) 3 All ER 703 (see p 725 f h j, p 727 f to j, p 728 a d h j, p 731 c to f, p 735 d e and g to j and p 736 b to d and g to j,

<sup>452</sup> *Vitol SA v Norelf Ltd (The Santa Clara)* (1996) 800, HL at 811

<sup>453</sup> *China National Foreign Trade Transportation Corporation v Evlogia Shipping Co SA of Panama* *The Mihaios Xilas* (1976) 3 All ER 657) *The Mihaios Xillas* (1978) at 1272.

<sup>454</sup> *Stocznia Gdanska SA v Latvian Shipping Co* (No2), (2002) para 87

<sup>455</sup> *Vitol SA v Norelf Ltd* per Lord Steyn at 810.

the parties. Thus the party in default is liable in damages both for any earlier breaches and also for the breach that has led to the discharge of contract, but excused from further performance.<sup>456</sup>

#### **3.4.7.4 Conclusion**

The section above analyzed the concept of late performance and demonstrated it to mean failure to perform contractual stipulations on time. The section argued that time is of essence and election is grounds for late performance. However, the section argued that if the innocent party no longer intends to be bound to the contract it has an election to affirm or rescind the contract. But after electing to end the contract either unilaterally or bilateral, by notice, statute, law, implication, one is expected to give notice, seek extension of time then discharge.

Attractive though, the above analysis<sup>457</sup> is at first sight, there are a number of problems with it. Firstly, where time is of the essence, untimely performance will be a breach of condition, and specific performance will not be available to the party in default. Secondly to equate a non-essential time stipulation with one such that no breach does more than give a right to damages does violence to the historical roots of the doctrine, which was grounded on the assumption that the breach *did* give a greater right at common law, namely the right to terminate. Where time was not of the essence, a decree of specific performance would be granted. But even though it may now be true to say that a party whose untimely performance amounts to a breach of warranty may obtain specific performance in *some* cases, such a remedy is by no means available in all situations.

#### **3.4.7.5 The notice procedure**

The doctrine of equity allows for time to be made of the essence by notice.<sup>458</sup> This can happen in two cases, one being where the other party is in breach of a non-essential time stipulation,<sup>459</sup> and the other being when time was originally of the essence but the right to timely performance has been waived.<sup>460</sup>

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<sup>456</sup> *Mussen v Van Diemen's Land Co* (1938) ch 253 at 260, (1938) 1ALL ER 210 at 216; *R v Ward Ltd v Bignall* (1967) 1 QB 534 at 548, (1967) ALL ER 499 at 455 as per Lord Diplock LJ.

<sup>457</sup> *Borough Council* (1978) AC 904 (HL)

<sup>458</sup> *Stannard Delay* 29, 178

<sup>459</sup> *Taylor v Brown* (1839) 2 Beav 180 (Rolls Court) 183, 48 ER 1149, 1150 (Lord Langdale MR); *Green v Sevin* (1879) 13 Ch D 589 (High Ct); *Compton v Bagley* [1892] 1 Ch 313 (High Ct); *Re Barr's Contract* [1956] Ch 551 (High Ct); *Behzadi v Shaftesbury Hotels* (CA) [1992] ch1.

<sup>460</sup> *Charles Rickards Ltd v Oppenheim* (1950) 1 KB 616 (CA).

The issue of such a notice can result in setting a deadline for performance by the defaulting party; if this is not forthcoming, the right to specific performance is lost and the other party may terminate. As in the case where time is originally of the essence, attempts have been made to reformulate the equitable doctrine in common law terms. However, in *United Scientific Holdings Ltd v Burnley Borough Council* <sup>461</sup> Lord Simon got round this problem by making use of the notion of repudiation, saying <sup>462</sup>

The notice operates as evidence that the promisee considers that a reasonable time for performance has elapsed by the date of the notice and as evidence of the date by which the promisee now considers it reasonable for the contractual obligation to be performed.

The promisor is put on notice of these matters. It is only in this sense that time is made of the essence of a contract in which it was previously non-essential. The promisee is really saying, 'Unless you perform by such-and-such a date, I shall treat your failure as a repudiation of the contract.' Once again, this is an attractive approach, and has the particular advantage of covering both types of case in which the procedure operates (that is to say cases where time was not of the essence to start with, and cases where an essential time stipulation has been waived). <sup>463</sup>

The use of the notice procedure in the latter situation is clearly not confined to cases where a decree of specific performance may be granted. However, once again the fit between the notice procedure and the doctrine of repudiation is not an exact one; in particular, whereas failure by a party in default to comply with a properly served notice allows the other party to terminate more or less as a matter of course such failure, as Lord Simon concedes, can at best be *evidence* of repudiation. Once again, therefore, it is probably still too early to dispense with the distinction between the doctrines of common law and equity in the present context. <sup>464</sup> In the next section,

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<sup>461</sup> *Rainieri v Miles* (1981) AC 1050 (HL) 1085–6 (Lord Edmund-Davies); *Behzadi v Shaftesbury Hotels* (1990) Ch 1 (CA) 12 (Nourse LJ) and 24 (Purchas LJ); *Re Olympia & York Canary Wharf Ltd (No 2)* (1993) BCC 159 (Ch D: Companies Ct), 171–3 (Morritt J).

<sup>462</sup> *United Scientific Holdings v Burnley BC*, 906; see also *Taylor v Raglan Developments Pty Ltd* [1981] 2 NSWLR 117 (SC NSW Equity Division) 131 (Powell J); *Louinder v Leis* (1982) 149 CLR 509 (HCA) 526 (Mason J).

<sup>463</sup> *Re Olympia & York Canary Wharf Ltd (No 2)* (1993) BCC 159 (Ch D: Companies Ct) at 171–3 per Morritt J; *Morris v Robert Jones Investments Ltd* (1994) NZLR 275 (CA NZ) at 280 per Hardie Boys J; *United Scientific Holdings v Burnley B* (1978) AC 904 (HL) at 906; *Louinder v Leis* (1982) 149 CLR 509 (HCA) 526 per Mason J; *Laurinda Pty Ltd v Capalpa Park Shopping Centre Pty Ltd* (1989) 166 CLR 623 (HCA) at 644–5 per Brennan J.

<sup>464</sup> *United Scientific Holdings v Burnley Borough Council* [1978] AC 904 (HL) 925 Lord Diplock; *Taylor v Raglan Developments Pty Ltd* [1981] 2 NSWLR 117 (SC NSW Equity Division) 131 (Powell J); *Louinder v Leis* (1982) 149 CLR 509 (HCA) 526 (Mason J).

the chapter will focus on the right, requirements, limitations and exceptions for restitution under English law.

## **3.5 Restitution**

### **3.5.1 Introduction**

This section analyzes the concept of restitution and demonstrates that it is available to both parties as a consequence of breach.<sup>465</sup> This section will illustrate that restitution places a claimant in the same position as if contractual obligation of the contract were performed. Restitution is available for failure of consideration, that is, where there is a failure in the performance of the other party's consideration. A claimant's restitutionary interest is the most worthy of protection since the claimant's minus is reflected in the defendant's corresponding plus. However the contract takes priority and in general, restitution is only available if the contract has been discharged for breach.<sup>466</sup>

### **3.5.2 Requirements for Restitution**

Restitution is the form of damage that will place the innocent party in the same situation as if the contract was completed. The innocent party puts an end to the primary obligations of both parties. Compensation in the form of restitution is a requirement for discharge and is claimed by the innocent party when a fundamental breach occurs. Primary obligations of the guilty party are replaced by secondary obligations to pay damages to the innocent party. The claimant has a right to recover the benefit conferred on the defendant where: the expectation and /or the reliance losses are too speculative to quantify and the benefit conferred is substantially the claimant's whole loss.<sup>467</sup>

Traditionally, a claimant can only recover money if there has been a total failure of consideration in the sense that the claimant received little or nothing of the performance it contracted for. In *Damon Cia Naviera SA v Hapag-Lloyd International SA The Blankenstein*,<sup>468</sup> Goff LJ argued that the sellers were entitled to restitutionary damages that would place them in the same position as if the company's contractual obligation to sign the memorandum had been performed. It is also argued that receiving benefits from the guilty party does not bar recovery if it is not what

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<sup>465</sup> *Kwei Tek Chao v British traders and Shippers Ltd (1954) 2 QB 459-473 and Damon Cia Naviera SA v Hapag-Lloyd International SA The Blankenstein*, (1985) 1 All ER 475.

<sup>466</sup> *Kwei Tek Chao v British traders and Shippers Ltd (1954) 2 QB 459-473.*

<sup>467</sup> Chen-Wishart, (2005) *Contracts*, p522.

<sup>468</sup> *The Blankenstein* (1985) 1 All ER 475

was contracted for.<sup>469</sup> Recovery of benefits is barred if the defendant has conferred any part of the contractual benefit.<sup>470</sup> However, the requirement is unfair, unnecessary and it is subject to exceptions.<sup>471</sup>

However, the innocent party's claim for restitution of non-monetary benefits is guaranteed. For example, a party that has completed its non-monetary performance can sue for the agreed price. *In De Bernard v Harding* (1853) H, in a breach of contract, did not pay D for arranging the sale of tickets to see the Duke of Wellington's funeral procession. Alderson B recognized D's right to sue for breach or to terminate and sue on a *quantum meruit* for the work actually done. Such non-money claims have never been explicitly conditional on the other party's failure of performance. The controversy here is in identifying and measuring the enrichment. What is more, a difficult case is *Planche v Colburn* (1831) where P agreed to write a book for a series published by C for £100. After P had done much work, C abandoned the project. P was entitled to a £50 *quantum meruit* award although he/she never handed over any of his/her work and could not be said to have conferred any meaningful benefit on the defendant. Beatson argues that this has more to do with protecting the claimant's injurious reliance than with reversing the defendant's unjust enrichment.<sup>472</sup>

Restitution cannot be claimed in addition to expectation if this would amount to double recovery. In *Rogers v Parish (Scarborough) Ltd*,<sup>473</sup> it was argued that one cannot get back X (restitution) and claim what one gave X. In general, restitution can be combined with a reliance claim if it does not amount to a double recovery but it cannot be combined with a claim for expectation damages since this would amount to double recovery.<sup>474</sup>

In English law, the question of how much can be claimed for is also addressed. For example, restitution is a type of a reliance loss but it excludes wasted expenditure or loss which does not

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<sup>469</sup> Chen-Wishart *Contracts* 522.

<sup>470</sup> *Rogers v Parish (Scarborough) Ltd* (1987); it was argued that you cannot get back X (restitution) and claim what you gave X in order to get (expectation).

<sup>471</sup> Chen-Wishart *Contracts* 522.

<sup>472</sup> Beatson *Restitution* 5-8; 21; 31-9.

<sup>473</sup> *Rogers v Parish (Scarborough) Ltd* (1987) QB 933-574,577. it was argued that you cannot get back X (restitution) and claim what you gave X in order to get (expectation).

<sup>474</sup> *Rogers v Parish (Scarborough) Ltd* (1987) QB 933, 933-934.



enrich the defendant. The claimant is entitled to choose the basis upon which to make their claim, but there are certain restrictions or limitations. Where the claimant has made a 'bad bargain' they will not be entitled to claim restitution putting them in a better position than they would have been in had the contract been performed. In any event, it is for the defendant to prove that the claimant has made a bad bargain. In the case of *C and P Haulage v Middleton* (1983), the claimant had hired a garage for 6 months and it was agreed that any improvements would be the property of the defendant. When the defendant breached the contract, the claimant sued for the cost of the improvements. The court held that even if the contract had not been breached, the expenditure would have been wasted.

In general, restitution can be combined with a reliance claim if it does not amount to a double recovery but it cannot be combined with a claim for expectation damages since this would amount to double recovery.<sup>475</sup>

Claims for restitution are available even if they would allow claimants to escape from bad bargains. In *Bush v Canfield*<sup>476</sup> B paid a \$5,000 deposit on an agreement to buy wheat at \$7 a barrel. When C failed to deliver, B was allowed to recover his deposit although the market price had fallen to \$5.50 a barrel. Similarly in *Wilkinson v Lloyd*<sup>477</sup> W paid for L's shares in a mining company, but did not receive the shares. He recovered the purchase price, although the shares had fallen in value. Claimants for the restitution of non-money performance can even make a claim in excess of what the defendant would have paid under the contract. In *Lodder v Slowey*<sup>478</sup> L terminated the contract for S's breach and was awarded a *quantum meruit* for his part performance although he could not prove that he could have made a profit from full performance under the contract. More dramatically, in *Boomer v Muir*<sup>479</sup> M's breach entitled B to quit his work and recover \$250,000 as the reasonable value of his work, although only \$20,000 was due under the contract. According to Chen-Wishart<sup>480</sup>, it is arguable that allowing the claimant to circumvent a bad bargain by making the contract breaker give back the claimant's payment is

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<sup>475</sup> *Rogers v Parish (Scarborough) Ltd* (1987) QB 933,933-934.

<sup>476</sup> (1818) 2 Conn in Chen-Wishart, 577.

<sup>477</sup> (1845) 7 QB 25 in Chen-Wishart, 577

<sup>478</sup> (1904) AC 442,PC (NZ) in Chen Wishart, 577.

<sup>479</sup> (1933) 24P (2d) 570.

<sup>480</sup> Chen-Wishart *Contracts* 577.

quite different from making the contract breaker pay for the claimant's non-money performance to the recipient is the contract valuation agreed.

### 3.5.3 Conclusion

Restitution is a requirement for discharge and is awarded to a claimant as a consequence of breach. Restitution places a claimant in the same position as if contractual obligations of the contract were performed. It is awarded to both the innocent party and the guilty party. A party can recover both monetary and non-monetary benefits but are limited to the contractual value. However, the contract takes priority and in general, and restitution is only available if the contract has been discharged for breach.<sup>481</sup> Furthermore, restitution can be combined with a reliance claim if it does not amount to a double recovery but it cannot be combined with a claim for expectation damages since this would amount to double recovery.<sup>482</sup> There are also problems concerning the relationship between discharge and damages. One problem is the extent to which the two overlap. The other problem is that the right to restitution damages can exist without there being any question of discharge; this will be the case where there has been a breach of contract, but the term broken is not a condition and there is no evidence of repudiation or fundamental breach. A party to a contract may also be discharged from the obligation to perform without having any right to damages. In *Jackson v Union Marine Insurance Co Ltd*,<sup>483</sup> the exclusion clause had the effect of excusing the ship owner, but gave him no right.<sup>484</sup> In the words of Bramwell<sup>485</sup> '...the fact that the charterer had no right to damages did not...' deprive him of the right to throw up the charter. The above brings out an important point which is that though termination is an important remedy for breach of contract the discharge of contractual obligations is by no means confined to that situation.

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<sup>481</sup> *Kwei Tek Chao v British traders and Shippers Ltd* (1954) 2 QB 459-473.

<sup>482</sup> *Rogers v Parish (Scarborough) Ltd* (1987) QB 933-574,577.

<sup>483</sup> (1874-75) LR 10 CP 125 (Exchequer Chamber). where a charter party from Liverpool to Newport, and there load a cargo of iron rails for San Francisco. Soon after leaving Liverpool the ship went aground and was severely damaged, by which time the charterer had thrown up the charter and chartered another ship. A claim was subsequently brought by the ship owner on a policy of insurance on the chartered freight, and in this context the question arose whether the charterer had been bound to load the ship. It was found as a fact that the delay caused by the accident was sufficient to put an end to the commercial speculation entered upon by the parties to the contract, but the insurers sought to argue that the owner was protected by the exception relating to perils of the seas. However, this was held not to affect the matter.

<sup>484</sup> *Jackson v Union Marine Insurance Co Ltd* (1874-75) LR 10 CP 125,144.

<sup>485</sup> *Jackson v Union Marine Insurance Co Ltd* (1874-75) LR 10 CP 125, 144.

A further problem is that the quantum of damages recoverable may vary depending on the basis upon which termination took place. Where the termination has been occasioned by repudiation or fundamental breach, the law allows the injured party to recover damages not only for the particular breach but for loss of the expected benefit of the contract as a whole.<sup>486</sup> The same principle has been held to apply to breaches of condition, on the ground that these are deemed to amount to a repudiation of the contract.<sup>487</sup> But where the termination takes place under an express clause giving the right to do so, damages can only be recovered for the breach that has actually occurred.<sup>488</sup> The distinction between these different cases can be an exceedingly fine one, and can lead to seemingly arbitrary results. For this reason it has been suggested that the law would be better if the two issues were separated. In particular, the fact that termination is available should not necessarily carry with it a right to damages either at a particular level<sup>489</sup> or indeed at all.

### 3.6 Conclusion to the chapter

The discussion in this chapter debated the terms used for ending a contract in English law. It was argued that though repudiation is a breach, it is not the appropriate term to describe a situation where the refusal or inability to perform is justified. It was revealed that rescission is claimed by a party who claims to be innocent and is valid when there is a material breach. But it was considered more appropriate to talk of termination or discharge rather than rescission when the innocent party chooses to treat the contract as having ended.<sup>490</sup> The chapter then debated discharge, and stated that it refers to the ending of the obligations under the contract.<sup>491</sup> The chapter argued that discharge is a term better used when a contract ends due to breach as it represents the point at which one party is no longer bound by its' obligations under the contract.<sup>492</sup> It is not the contract itself that is terminated, but rather the obligations of the injured party to perform its obligations under that contract. Discharge as a process requires the injured party to elect to discharge contractual obligations, give notice and claim restitution.

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<sup>486</sup> *Yeoman Credit v Latter* (1961) 1 WLR 828, (CA) 168; *Overstone Ltd v Shipway* (1962) 1 WLR 117, 587. (CA).

<sup>487</sup> *Lombard North Central plc v Butterworth* [1987] QB 527 (CA); *Wallis, Son and Wells v Pratt and Haynes* (1910) 2 KB 1003 (CA) 1012. (Fletcher Moulton LJ).

<sup>488</sup> *Financings Ltd v Baldock* [1963] 2 QB 104 (CA) 514; *Shevill and anor v Builders' Licensing Board* (1982) 149 CLR 620 (HC Australia).

<sup>489</sup> *Stannard Delay* 178.

<sup>490</sup> *Johnson v Agnew* (1980) AC 367, (1979) 1 ALL ER 883

<sup>491</sup> *Martin and Turner Contract*, 400.

<sup>492</sup> *Furmstone Contracts*, chs 18–20; *Beatson Contracts* chs 13–16.

The chapter proceeded to analyze the requirements for discharge. It was found out that the breach of condition gives rise to a right to terminate, while the breach of warranty is where a breach *never* or at any rate, hardly ever gives rise to a right to terminate. Furthermore it was observed that courts have accepted the idea of an innominate term.<sup>493</sup> The chapter analyzed the concept of repudiation and demonstrated that it is the assumed inevitable failure of performance, by the injured party, at a future date when performance would have been required. Poole stated that repudiation is a doctrine that justifies the plaintiff's action of avoiding wasteful expenditure of preparing for performance which it had been already told would not be accepted.<sup>494</sup> According to the Sale of Goods Acts repudiation implies wrongful refusal to perform.<sup>495</sup> The argument of this chapter was that repudiation describes, justified or unjustified, refusal<sup>496</sup> to perform contractual obligations in frustrated contracts.<sup>497</sup>

The chapter then analyzed the concept of late performance and demonstrated that it means failure to perform contractual stipulations on time. It was argued that time is of essence and election is necessary grounds for late performance. However, the chapter argued that after electing to end the contract either unilaterally or bilateral, by notice, statute, law, implication, one is expected to give notice, seek extension of time then discharge. Attractive though, the above analysis<sup>498</sup> is at first sight, there are a number of problems with it. Firstly, where time is of the essence, untimely performance will be a breach of condition, and specific performance will not be available to the party in default. Secondly, to equate a non-essential time stipulation with one such that no breach does more than give a right to damages does violence to the historical roots of the doctrine, which was grounded on the assumption that the breach *did* give a greater right at common law, namely the right to terminate. Where time was not of the essence, a decree of specific performance would be granted. But even though it may now be true to say that a party whose

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<sup>493</sup> Carter, (1981), 'Classification, 219.

<sup>494</sup> Poole, *Contracts*, (2008); 334.

<sup>495</sup> Sale of Goods Act 1893, s 11(1)(b); Sale of Goods Act 1979, s 11(3); *Chancery Lane Developments Ltd v Wades Departmental Stores Ltd* (1987) 53 P & CR 306 (CA) 310 (Slade LJ); *Credit Suisse Asset Management Ltd v Armstrong and ors* [1996] ICR 882 (CA) 891 (Neill LJ); *Golden Ocean Group Ltd v Salgaocar Mining Indus 3.4.5 tries Pty Ltd* [2011] EWHC 56 (Comm); [2011] 1 CLC 125, 128 (Clarke J).

<sup>496</sup> *Goodman v Winchester & Alton Rly plc* (1985) 1 WLR 141 (CA) 144 (Lawton LJ); *Lancaster v Bird* (2000) 2 TCLR 136 (CA) 141 (Chadwick LJ).

<sup>497</sup> *Maredelanto Compania Naviera SA v Bergbau-Handel GmbH The Mihalis Angelos* (1970) 3 All ER 125 p135.

<sup>498</sup> *Borough Council* (1978) AC 904 (HL)

untimely performance amounts to a breach of warranty may obtain specific performance in *some* cases, such a remedy is by no means available in all situations.

The chapter showed that there problems concerning the relationship between discharge and damages. One problem is the extent to which the two overlap. The right to restitution damages can exist without there being any question of discharge; this will be the case where there has been a breach of contract, but the term broken is not a condition and there is no evidence of repudiation or fundamental breach. A party to a contract may also be discharged from the obligation to perform without having any right to damages. In *Jackson v Union Marine Insurance Co Ltd*,<sup>499</sup> the exclusion clause had the effect of excusing the ship owner, but gave him no right.<sup>500</sup> In the words of Bramwell B<sup>501</sup> ‘...the fact that the charterer had no right to damages did not...’ deprive him of the right to throw up the charter. This brings out an important point which is that though termination is an important remedy for breach of contract the discharge of contractual obligations is by no means confined to that situation.

A further problem is that the quantum of damages recoverable may vary depending on the basis upon which termination took place. Where the termination has been occasioned by repudiation or fundamental breach, the law allows the injured party to recover damages not only for the particular breach but for loss of the expected benefit of the contract as a whole.<sup>502</sup> The same principle has been held to apply to breaches of condition, on the ground that these are deemed to amount to a repudiation of the contract.<sup>503</sup> But where the termination takes place under an express clause giving the right to do so, damages can only be recovered for the breach that has

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<sup>499</sup> (1874–75) LR 10 CP 125 (Exchequer Chamber). where a charterparty from Liverpool to Newport, and there load a cargo of iron rails for San Francisco. Soon after leaving Liverpool the ship went aground and was severely damaged, by which time the charterer had thrown up the charter and chartered another ship. A claim was subsequently brought by the ship owner on a policy of insurance on the chartered freight, and in this context the question arose whether the charterer had been bound to load the ship. It was found as a fact that the delay caused by the accident was sufficient to put an end to the commercial speculation entered upon by the parties to the contract, but the insurers sought to argue that the owner was protected by the exception relating to perils of the seas. However, this was held not to affect the matter.

<sup>500</sup> *Jackson v Union Marine Insurance Co Ltd* (1874–75) LR 10 CP 125 144.

<sup>501</sup> *Jackson v Union Marine Insurance Co Ltd* (1874–75) LR 10 CP 125 144.

<sup>502</sup> *Yeoman Credit v Latter* (1961) 1 WLR 828, (CA) 168; *Overstone Ltd v Shipway* [1962] 1 WLR 117, 587. (CA).

<sup>503</sup> *Lombard North Central plc v Butterworth* [1987] QB 527 (CA); *Wallis, Son and Wells v Pratt and Haynes* [1910] 2 KB 1003 (CA) 1012 (Fletcher Moulton LJ).

actually occurred.<sup>504</sup>The distinction between these different cases can be an exceedingly fine one, and can lead to seemingly arbitrary results. For this reason it has been suggested that the law would be better if the two issues were separated. In particular, the fact that termination is available should not necessarily carry with it a right to damages either at a particular level<sup>505</sup> or indeed at all. The next chapter will focus on avoidance as remedy under the CISG.

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<sup>504</sup> *Financings Ltd v Baldock* (1963) 2 QB 104 (CA) 514; *Shevill and anor v Builders' Licensing Board* (1982) 149 CLR 620 (HC Australia).

<sup>505</sup> *Stannard Delay JCL* 178.

## 4.0 Chapter 4: Avoidance as a Remedy for Breach of Contract under the CISG

### 4.1 Introduction

The aim of this chapter is to analyze the necessary requirements of avoidance under the CISG. The CISG was promulgated by the United Nations through its Commission on International Trade Law (UNCITRAL) in 1980. It came into force on January 1, 1988 following adoption by eleven states. It is now 2016 and there are 84 members in the CISG. This brings diverse traditions of contract law, thus enriching it, but also provided uniformity and certainty to law governing commercial transactions.<sup>506</sup> Without a unifying international convention in place, an international commercial transaction would be subject to a myriad of non-uniform laws of the nations involved in the transaction. The CISG is a Convention which has not been changed and is unlikely to be changed due to the fact that there are 85 member countries at this time.<sup>507</sup> The point is that the CISG is interpreted and through application and interpretation it may be understood or applied in a new way. Organizations like the CISG Advisory Council and UNCITRAL aims to aid uniform interpretation and allocation by publishing Opinions or Case Digest.

One advantage of the broadly defined, clearly elaborated and closely nuanced provisions of contract law such as those found in the CISG is that when “two parties are evenly matched, much time and energy [is] saved by agreeing not on a neutral law but a unified law [that] keeps transaction costs...at a low level [and]...the logical extension to the CISG is also to include UNIDROIT principles or PECL into the contract”.<sup>508</sup> The United States and more than sixty-one other nations representing quite different legal systems (common law, civil law, and other types of legal systems) participated in the working groups and provided their input thereby further enriching CISG laws to enable it to anticipate unforeseen disputes on avoidance as a remedy for breach of contracts.<sup>509</sup> Within the CISG international academics, corporations, traders, diplomats, and lawyers have weighed in with their research contributions to the amending of the laws and this brings or introduces different perspectives to CISG law reform and principles that

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<sup>506</sup> Hull D. 2005. *United States and International Sales. Lease & Licensing Law: Cases and Problems*. Oxford: Oxford University Press

<sup>507</sup> See [www.org/UNCITRAL/en/UNCCITRAL-texts/sale-goods/1980CISG-status.html](http://www.org/UNCITRAL/en/UNCCITRAL-texts/sale-goods/1980CISG-status.html) for the status of signatory to the Convention with Azerbaijan which became a member on 3 May 2016. Accessed 4<sup>th</sup> July 2016.

<sup>508</sup> Zeller, op cit 627.

<sup>509</sup> MacNamara T [a1]

are “internationally accepted which constitute a concise, comprehensive and workable set of rules”<sup>510</sup>. The existence of the CISG law in officially several languages such as Arabic, Chinese, English<sup>511</sup> adds new vocabulary used to describe concepts that would otherwise have remained confined to municipal laws. The CISG upon adoption becomes the domestic law of the country. However, there is an imperative in relation to Art 7 of the CISG, to interpret it in view of its international nature. It, therefore, creates a parallel sales regime, one for domestic sales and another for international sales.<sup>512</sup>

Substantive work done on remedies, breaches and performance in contract law by well-known academic writers and legal scholars, worldwide has been carried out under the Vienna Convention for International Sale of Goods (CISG) for more than 30 years.<sup>513</sup> This has created a repertoire of legal rules and regulation for the principles of the CISG on interpretation of contracts that have been readily accepted by more 85 countries.<sup>514</sup> Article 25 defines a fundamental breach. Articles 45-52 summarize remedies available to the buyer due to breach of contract by the seller. Article 49 sets out the preconditions for the buyer’s right to avoid the contract in the event of the seller’s breach of contract. Articles 61 – 64 state seller’s remedies for breach of contract by the buyer.<sup>515</sup>

The cornerstone requirement of avoidance is fundamental breach in Article 25.<sup>516</sup> Article 25 further describes the forms of conduct detrimental to a contract and reveals the scope and purpose of each form of breach under the CISG. A contract takes precedence under the CISG (Article 6). Since avoidance is a remedy of last resort under the CISG, the chapter also critically analyses the importance of the *Nachfrist* period and its requirements when establishing the occurrence of a fundamental breach. The chapter argues that under the CISG, opting for avoidance as the remedy of last resort also imposes on the aggrieved party further requirements

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<sup>510</sup> Fountoulakis, C. 2005. ‘The Parties Choice of Neutral law’ in International Sales Contracts’ (7) European Journal of Law reform, 303

<sup>511</sup> Helner J. 1986. The Vienna Convention and Standard Form Contracts in Sarcevic, P and Vilken P, (eds). International Sale of Goods: Dubrovnik Lectures Oceana 335 at 336.

<sup>512</sup> Schwenger, Fountoulakis and Dimsey *Sales.V,2*.

<sup>513</sup> Lookofsky, J. 2010. CISG Case Commentary on Concurrent Remedies in Pamesa v. Mendelson [decision of the Israel Supreme Court dated 19 March 2009.

<sup>514</sup> See [www.org/UNCITRAL/en/UNCCITRAL-texts/sale-goods/1980CISG-status.html](http://www.org/UNCITRAL/en/UNCCITRAL-texts/sale-goods/1980CISG-status.html) for the status of signatory to the Convention with Azerbaijan which became a member on 3 May 2016. Accessed 4<sup>th</sup> July 2016.

<sup>515</sup> Schwenger, I. Commentary on the CISG. Oxford, New York, 2001.

<sup>516</sup> Koch *Sales* 124-133.



to observe and uphold restrictions on time limits, notice and burden of proof that are essential to avoid. It is the choice of the innocent part to avoid. This argument of the chapter will be illustrated through the use of selected cases to explain the link between fundamental breach and avoidance.

New researchers are encouraged to make use of cases from "...several jurisdictions from around the world, both domestic and international".<sup>517</sup> The significance of using cases from domestic and international jurisdictions is that it may provide comparisons of how cases are interpreted in different contexts. It also may allow critics to evaluate the applicability of concepts from different regions. Therefore, this chapter four follows the wise and correct advice offered by scholars on the CISG<sup>518</sup> who argue that "a casebook serves as a selection process whereby those cases of particular interest and significance are emphasized and their legal reasoning discussed".<sup>519</sup> This view is relevant to my study and also realistic because as the scholars on the CISG further argue, "it is not only impractical, but also in efficient and laborious to discuss every case ever decided....".<sup>520</sup> The section below discusses critical terms of the chapter.

## **4.2 Definition of Terms**

### **4.2.1 Introduction**

There are a number of terms used to describe the ending of a contractual relationship under the CISG. These terms include avoidance and rescission, but not all of them are suitable to justify a remedy as a last resort or explain the seriousness of a breach.

### **4.2.2 Rescission**

The concept and the terminology most often used in relation to rescission is important when deciding its suitability as a term under the CISG. Common law uses the terms "rescission of a contract," "repudiation," "cancellation," "termination" and "rejection of the goods" interchangeably to denote the effects of termination or the end of a contractual relationship.<sup>521</sup>

Rescission is a term commonly used to describe the termination of a contractual relationship obtained through fraudulent means. The meaning of the term rescission in the English language does not reflect the real nature of the remedy under the CISG. "Rescission" of the contract *ab*

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<sup>517</sup> Schwenger, Fountoulakis and Dimsey *Sales 2*.

<sup>518</sup> Schwenger, Fountoulakis and Dimsey *Sales V*.

<sup>519</sup> Schwenger, Fountoulakis and Dimsey *Sales.V*.

<sup>520</sup> Schwenger, Fountoulakis and Dimsey *Sales V*.

<sup>521</sup> Treitel *Remedies* 319-320; Atiyah *Contracts* 398-403; Goode *Commercial Law* 84.

*initio* is in principle retrospective. "Termination" is not retrospective and may be exercised when the party is guilty of breach of contract.<sup>522</sup> Because the term rescission does not conform to principles of good faith it cannot be used as a remedy to end contractual relationships.<sup>523</sup> In *Photo production Ltd v Securior Transport Ltd*,<sup>524</sup> per Curiam it was stated that

Much of the difficulty regarding the 'termination' of a contract and its effect on the plaintiff's claim for damages arise from uncertain or inconsistent terminology; in particular (per Lord Wilberforce) the use of rescission' as an equivalent for discharge, though justifiable in some contexts, may lead to confusion in others.

On the basis of the reasons mentioned above, rescission is not the appropriate term.<sup>525</sup>

### 4.2.3 Repudiation

Repudiation is a term used when the conduct by a party to a contract makes it clear that it will not perform its contractual obligations in the future. The failure amounts to a fundamental breach as it calls for an early ending to contractual relationship before the due date. According to Article 72 of the CISG,<sup>526</sup> repudiation incorporates all forms of breach. Critics who favored the term repudiation also emphasize the idea that it is a central term that incorporates all material breaches which are likely to happen in the future.<sup>527</sup> However, mainstream critics believe that the term repudiation is not appropriate because it is not concerned with the fact whether the breach is caused by the guilty party or by circumstances beyond its control<sup>528</sup>. It is further argued by these critics that the term repudiation is also not appropriate because a party does not have to wait for the due date of performance and can hasten to end the contract despite the fact that it is not due to the fault of the other party. It appears therefore, that different countries have different concepts of repudiation making it difficult to harmonize and adopt it as a suitable term for ending a contractual relationship. But as I will argue below, it is not always the case that the conduct of the other party will necessarily lead to a material breach. Eventually and because of the

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<sup>522</sup> Atiyah *Contracts* 339.

<sup>523</sup> *Pacta sunt servanda*"

<sup>524</sup> (1980) 1 ALL ER 556. see p 562 *e to h*, p 565 *e f* and p 566 *h to p 567 a*, post).

<sup>525</sup> Treitel *Remedies* 318.

<sup>526</sup> Eiselen Art 71/72 461; Lookofsky *CISG* 63.

<sup>527</sup> Lookofsky *CISG* 63.

<sup>528</sup> Eiselen Art 71/72, *Sales* ; Schlechtriem *Sales* 207-209; Staudinger *Sales* 207-209.

limitations of the term repudiation, mainstream critics found it fit to adopt a technical term which they called avoidance.

#### 4.2.4 Avoidance

Article 25 of the CISG states that:

a breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.<sup>529</sup>

Avoidance is a term that is used to show the end of a contractual relation between two parties when a fundamental breach occurs. The concept of avoidance refers to a legal remedy under contract law, which takes effect in situations when a party to a contract is aggrieved as a result of not obtaining the performance for which it bargained for. The aggrieved party wishes to terminate or end the contractual relation due to breach of fundamental contractual principles.<sup>530</sup>

The 1964 Hague Convention relating to a Uniform Law on International Sale( ULIS arts. 43 and 62) and the 1980 United Nations Convention on Contracts for the International Sale of Goods CISG arts. 49 and 64) adopted the term "to avoid a contract." "Avoidance" under the Vienna Convention is a term which denotes an early end to the contract and comprises international concepts of rescission as well as termination.<sup>531</sup> "Avoidance of the contract" is technical term, adopted and given a uniform meaning, in the Convention whose wording or expression in other languages does not always have the same definite legal significance attributed to it.<sup>532</sup>

The question of terminology is closely connected to the problem of which interpretation should be applied under the Convention<sup>533</sup> without referring to the meaning of the terms in national legal systems.<sup>534</sup> The precise and detailed legal significance of term "avoidance" was defined autonomously<sup>535</sup> taking into account its context and function. Such a compromise<sup>536</sup> on

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<sup>529</sup> Schlechtriem and Schwenger *ICM section 87*; Lookofsky *Contracts* 63; Ferrari *Breaches* 489–550; Magnus *Avoidance* 423–436; Zeller *Breaches* 81–94.

<sup>530</sup> Treitel *Remedies* 318.

<sup>531</sup> Enderlein and Maskow *Sales* 340; Enderlein *Rights and Obligations* 195; Tallon *Avoidance* 602.

<sup>532</sup> Enderlein and Maskow *Sales* 340 .

<sup>533</sup> Honnold *Uniform Law*,

<sup>534</sup> It is rightfully admitted "That in view of the high differentiation in national legal languages, this goal could not consistently be reached as new adequate terms may not be found for all legal problems or the originality obtained be lost again with the translation."

<sup>535</sup> Bonell *Commentary* 74.

<sup>536</sup> CISG, Vienna Convention (1980), U.N. Doc.A/CONF. 97/18, Annex I, *reprinted in* 19 I.L.M, 668.

terminology was accepted by the legislators during the Vienna Conference.<sup>537</sup> The interpretation of the terminology used should be based on its contents, having regard to the international character of the CISG.

The CISG was drafted partly as a compromise between Common Law and Civil Law and the drafters wished to avoid the baggage that came with certain terms such as rescission, termination and repudiation. Diverse domestic rules needed to be replaced with uniform international laws. Compromise and Consensus was reached between lawyers representing different cultural and legal backgrounds and a neutral language upon which they could reach an agreement was adopted<sup>538</sup> were accepted and achieved on the norm or principle to be used when the term avoidance was accepted without referring to the meaning of the terms in national legal systems. A compromise and consensus had to be reached and accepted by the legislators on the suitability of the use of the term avoidance.<sup>539</sup> Such a compromise emphasizes the need to replace diverse domestic rules with uniform international law.<sup>540</sup>

#### 4.2.5 Conclusion

The section above discussed and argued that avoidance ends contractual relationships where the conduct by one party in the contract deprives the other party of what it is entitled to receive or expect under the contract. The debate on the meaning of avoidance is governed by art. 61.<sup>541</sup> From the debate it emerged that the CISG was drafted partly as a compromise between Common law drafters and Civil Law drafters who wished to avoid the baggage that came with certain terms such as rescission, termination and repudiation. Furthermore, the discussion above revealed that critics arrived at the word 'avoidance' as a technical term, adopted and given a

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<sup>537</sup> The United Nations Conference on Contracts for the International Sale of Goods was held in Vienna, from 10 March to 11 April 1980. It approved the UN Convention on Contracts for the International Sale of Goods.

<sup>538</sup> Bonell *Commentary* 74.

<sup>539</sup> Harvard *Unification* 97.

<sup>540</sup> Tallon *Avoidance* 602.

<sup>541</sup> *If the buyer fails to perform any of his obligations under the contract or the Convention, the seller may:*

(a) *Exercise the rights provided in Articles 62 to 65;*

(b) *Claim damages as provided in Articles 74 to 77.*

(2) *The seller is not deprived of any right he may have to claim damages by exercising his right to either remedy.*

(3) *No period of grace may be granted to the buyer by a court or arbitral tribunal when the seller resorts to a remedy for breach of contract.*

uniform meaning in the Convention whose wording or expression in other languages does not always have the same definite legal significance attributed to it. Diverse domestic rules needed to be replaced with uniform international laws. The section argued that a compromise and consensus had to be reached and accepted by the legislators on the suitability of the use of the term avoidance.<sup>542</sup> Furthermore the discussion maintained that under the Vienna Convention avoidance denotes an early end to the contract and comprises national concepts of rescission and termination.<sup>543</sup>

### 4.3 Seller's right to avoidance

The seller's right to avoid a contract is governed by Art 61 of the CISG. Article 61 of the CISG<sup>544</sup> states that

- (1) *if the buyer fails to perform any of his obligations under the contract or the Convention, the seller may:*
  - (a) *Exercise the rights provided in Articles 62 to 65;*
  - (b) *Claim damages as provided in Articles 74 to 77;*
- (2) *The seller is not deprived of any right he may have to claim damages by exercising his right to either remedy.*
- (3) *No period of grace may be granted to the buyer by a court or arbitral tribunal when the seller resorts to a remedy for breach of contract.*

Article 61 provides a cohesive catalogue of the principal remedies available to the seller if the buyer does not comply with any of its duties under the contract.<sup>545</sup> A right for the seller to declare the contract avoided is also governed by the *Nachfrist* period under Article 63 and 64 of the CISG.<sup>546</sup> The *Nachfrist* period stipulates that a seller may fix an additional period of time for performance by the buyer. The aim of the *Nachfrist* is to notify buyer of non-performance and demand performance within that period.<sup>547</sup> A *Nachfrist* notice is limited to non-payment of goods and taking delivery and where the seller wants to provide the basis for avoidance without

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<sup>542</sup> Harvard *Unification* 97.

<sup>543</sup> Enderlein and Maskow *Sales* 340; Enderlein *Rights and Obligations* 195; Tallon *Avoidance* 602; Bianca and Bonell *Commentary* 28.

<sup>544</sup> Honnold *Uniform Law* 377.

<sup>545</sup> Bortolotti *Remedies* 335-338.

<sup>546</sup> Koch *CISG-UP Art. 63 /64* 198, 463, 446.

<sup>547</sup> Felemegas *Sales* 437,379.

proof that the delay constitutes a fundamental breach.<sup>548</sup> Seller is limited from avoidance if there is late performance or any fundamental breach.<sup>549</sup>

#### **4.3.1 Buyer's right to avoidance**

Remedies<sup>550</sup> available to the buyer when the seller breaches contractual obligations are provided in Article 45 of the CISG<sup>551</sup> which states the following:

- (1) If the seller fails to perform any of his obligations under the contract or this Convention, the buyer may:*
- (a) Exercise the rights provided in Articles 46 to 52;*
  - (b) Claim remedies as provided in Articles 74 to 77;*
- (2) The buyer is not deprived of any right he may have to claim damages by exercising his right to other remedies;*
- (3) No period of grace may be granted to a seller by a court or arbitral tribunal when the buyer resorts to a remedy for breach of contract;*

Article 45 of the CISG contain an overview of the buyer's remedies in the event of the seller's failure to perform contractual obligations 45 and 61, which set forth reciprocal remedies for the buyer and seller, respectively. Art. 45(1) gives right to performance, right to avoid the contract, right to claim damages, and the right to reduce the price.<sup>552</sup> Article 45 (2) CISG clarifies that Article 45(1) (a) and (b) can operate concurrently, a question that was disputed in the German legal systems.<sup>553</sup> Article 45(3) CISG alludes to and clarifies the position under legal systems based on French Law.<sup>554</sup>

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<sup>548</sup> Felemegas *Sales* 200, 448.

<sup>549</sup> Koch *CISG-UP* 205; Yovel *CISG-PECL* 542.

<sup>550</sup> *Shoe case* CISG Article 49(2) -- In cases where the seller has delivered the goods, the buyer loses the right to declare the contract avoided unless he does so within a reasonable time. The declaration of avoidance of this contract was "within a reasonable time period" because the telegram was mailed the day after the trade fair ended. In (*Soinco v. NKAP*) Specific performance was awarded. Switzerland 31 May 1996 Zürich Arbitration proceeding : <http://cisgw3.law.pace.edu/cases/960531s1.html>

<sup>551</sup> Chingwei *Art. 45/61, CISG-PECL* 366.

<sup>552</sup> Schletriem and Butler *Sales*.

<sup>553</sup> Schwenger and Fountoulakis *Sales* 347.

<sup>554</sup> *op cit.*

In an ICC International Court of Arbitration, Award No, 9978/199<sup>555</sup>, a dispute arose due to non-delivery of goods to the seller though documents were delivered and amount was paid. Claimant had a right to damages under Article 45 (1) and right to avoid the contract as failure to deliver constituted a fundamental breach. A causal relationship exists between the breach and the right. The buyer's right to avoid a contract under the CISG is based on fundamental breach of contract. Non-compliance with the *Nachfrist* period is also a fundamental cause for avoidance under the CISG. The *Nachfrist* notice is governed by Articles 47 and 49(1)(b) of the CISG.<sup>556</sup> The meaning of *Nachfrist* to the buyer is that an additional period to perform is added and failure to perform results in avoidance of contract.<sup>557</sup> The purpose or aim is to warn the buyer of avoidance due to non-delivery of goods and delivery of an *aluid*. The seller's non-compliance with the *Nachfrist* might result in automatic avoidance as a notice would have been sent already.

## **4.4 Requirements for Avoidance**

### **4.4.1 Introduction**

The main requirements of avoidance are a fundamental breach, notice of avoidance including the *Nachfrist* period and restitution. These requirements are discussed below beginning with the concept of fundamental breach.

### **4.4.2 Fundamental Breach**

#### **4.4.2.1 Introduction**

Article 25<sup>558</sup> of the CISG states that:

A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.

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<sup>555</sup> Award No, 9978/99, CISG on line 708

<sup>556</sup> Zeller *Sales* 378-379; Koch *Sales* 179.

<sup>557</sup> Yovel *Sales* 405 442.

<sup>558</sup> Schlechtriem and Schwenger *ICM* 87; Lookofsky *Contracts* 63; Ferrari *Article 25* 489–550; Magnus *Avoidance* 423–436; Zeller *Breaches* 81–94.

From the definition above, the three elements that define fundamental breach are detriment, substantial deprivation and foreseeability. The first element is substantial detriment of what the other party is entitled to expect under the contract.<sup>559</sup> The first part of Art.25 qualifies the detriment caused by one party to the other party, which substantially deprives him/her of what he/she is entitled to expect under the contract. The content of the provision relies on a distinction between elements relating to the aggrieved party and elements concerning the party in breach. "Substantial detriment" and "contractual expectation" relate to the aggrieved party.

The second element is whether or not the party in breach or a reasonable person of the same kind in the same circumstances as the party in breach would have foreseen such substantial detriment.<sup>560</sup> The second part of art.25 is conditional and allows the party in breach to prevent avoidance provided that the party proves that it did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.<sup>561</sup> The third element is the content of the provision which relies on elements concerning the party in breach which are "foreseeability" and "the reasonable person of the same kind standard".

However, art. 25 CISG does not provide guidelines for a distinction between fundamental and non-fundamental breach. The article simply provides general interpretive guidelines.<sup>562</sup> In addition, on further analyzing the above three elements, it emerges that there are two limbs to the fundamental breach test set out above.<sup>563</sup> Of these two limbs, one relates to the aggrieved party and the other to the guilty party. The next section is going to analyze elements relating to the aggrieved or innocent party.

#### **4.4.2.2 Elements relating to the aggrieved party: "substantial detriment" and "contractual expectation"**

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<sup>559</sup> Schlechtriem and Schwenger *ICM* 286.

<sup>560</sup> Schlechtriem and Schwenger *ICM* 286, 287.

<sup>561</sup> *Will Commentary* Art. 25; *Bonell Commentary* 215, stating that: "the unforeseeability test in the final conditional clause of the article constitutes a further innovation of the Convention"; Pauly,( 2000 ) 225.

<sup>562</sup> *Bonell Commentary* 28, stating that the language of art. 25 is "vague and ambiguous"; *Babiak Breaches* 113.

<sup>563</sup> *Honnold Uniform Law* 276; *Babiak Breaches* 113, 118



Graffi states that the CISG does not contain any definition for the terms "substantial detriment" and "contractual expectation" but gives general interpretive guidelines.<sup>564</sup> But it is unclear if detriment refers to actual injury, damage, or material loss or intangible loss.<sup>565</sup> The Secretariat Commentary on the 1978 Draft Convention states that the determination whether or not the injury is substantial must be made in the light of circumstances in each case.<sup>566</sup> It appears that art 25 makes a tautology between the adjectives fundamental and substantial, which makes it hard to establish when substantial detriment equals fundamental breach.<sup>567</sup> Schlechtriem believes that substantiality is tied to the aggrieved party's detriment and causes the aggrieved party to lose what it expected in the contract. Substantial deprivation is fundamental regardless of whether it occurred in respect of a main obligation or an ancillary obligation.<sup>568</sup> Moreover, "detriment does not equal damage nor does it equal loss or any similar international or national term of art" but much broader than that of damage.<sup>569</sup> Subjective interests, contractual agreements on performance are crucial for establishing if substantial deprivation occurred.<sup>570</sup> The party's special interest in receiving performance is also a key element for establishing whether a breach is substantial.<sup>571</sup> For determining the party's contractual expectation two blended concepts of substantial detriment and contractual expectation can lead to fundamental breach if the aggrieved party has lost interest in receiving performance. According to Koch it is not the objective weight of the breach of contract, or the extent of the damage that determines whether a breach is fundamental, but rather the significance of the contract for the creditor is the key consideration.<sup>572</sup> Two more concepts that further define substantial detriment are discussed below. These are foreseeability and reasonable person of the same kind.

#### **4.4.2.3. Elements concerning the party in breach: "foreseeability" and the "reasonable person of the same kind" standard**

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<sup>564</sup> Graffi *Breaches* 338. <http://cisgw3.law.pace.edu/cisg/biblio/ulr96.html>.

<sup>565</sup> Bonell *Commentary* 28, stating that the language of art. 25 is "vague and ambiguous".

<sup>566</sup> Commentary on the Draft Convention on Contracts for the International Sale of Goods, Document A/Conf.97/5 (Secretariat Commentary). Comment 3, Art. 23 of the 1978 Draft Convention (which became CISG Art.25). <http://cisgw3.law.pace.edu/cisg/texts/secomm-25html>.

<sup>567</sup> Ferrari *Interpretation* 12, 183; Cook *Contracts* 257.

<sup>568</sup> *Slechtriem Sales* 177; *Enderlein and Maskow Sales* 112; *OLG Frankfurt, Germany*, 17 September 1991, *ULR* 1991 381; *HG Kantons Aargau*, 26 September 1997, CLOUT case no. 217.

<sup>569</sup> *Ziegel Remedies* 16; *Enderlein and Maskow Sales* 113; *Slechtriem Sales* 177; *Will Sales* 211.

<sup>570</sup> *Slechtriem Commentary* 177.

<sup>571</sup> *Enderlein and Maskow* 114; *Neuymayer and Ming* 209

<sup>572</sup> Koch *Breaches* 351 .

This section is going to discuss elements concerning the party in breach which are foreseeability and the reasonable person of the same kind. The foreseeability element is a filter, which enables the party in breach to escape from contract avoidance.<sup>573</sup> The conditional clause states that: “unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such result”. This phraseology means that foreseeability is not only a burden of proof rule but requires taking into account the breaching party’s knowledge or foreseeability of the harsh consequences of the breach in determining whether or not it is fundamental.<sup>574</sup> Lack of foreseeability is a ground or excuse, and, if proven, will prevent or limit the rights of the aggrieved party and also helps to determine the severity of breach.<sup>575</sup>

Conversely, when the contract does not clearly state the importance of an obligation, the conduct of the party in breach may be interpreted with more tolerance<sup>576</sup> if business people of the same trade sector would have foreseen the event.<sup>577</sup> Therefore, the foreseeability test serves only to exempt the party in breach, and cannot contribute to qualifying breach as fundamental.<sup>578</sup>

From the above analysis, it should be noted that the CISG does not define detriment, substantial deprivation and foreseeability. But the fact that the CISG mentions these terms implicitly provide some directions to critics to interpret the terms in the different ways they do. This point is important because it is the courts and commentators that describe detriment, substantial deprivation and foreseeability with regards to different forms of breach and the context of the case. In addition, it should be stated that the courts and commentators also differ in what they emphasize. On one hand some courts and commentators focus and give different emphasis on high percentage of defective goods. On the other hand other courts and commentators focus on the merchantability of goods, defective documents, wrong destination and failure to give notice of avoidance to define detriment, substantial deprivation and foreseeability.

#### **4.4.3 Conclusion**

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<sup>573</sup> Will *Sales* 215.

<sup>574</sup> Schlechtriem *Commentary* 177; Will *Sales* 216 “the burden of proving unforeseeability rests with the party in breach.”

<sup>575</sup> Enderlein and Maskow *Sales* “Art 25”, 4.1.

<sup>576</sup> Babiak *Sales* 118; Koch *Sales* 264.

<sup>577</sup> *Slechtriem Sales* 179.

<sup>578</sup> Babiak *Sales* 118; Koch *Breaches* 264.

The above section discussed detriment, substantial deprivation and foreseeability and demonstrated that these are guidelines used by courts and commentators to define fundamental breach. The section argued that fundamental breach entitles a party to remedies that lead to termination of the contract.<sup>579</sup> However, some critics believe that detriment does not equal damage nor does it equal loss or any similar international or national term of art.<sup>580</sup> In the above view, it appears that the notion of detriment is much broader than that of damage.<sup>581</sup> Other critical voices insist that subjective interests and contractual agreements are crucial to establishing if substantial deprivation occurred.<sup>582</sup> Unfortunately, these elements are defined too generically to enable the interpreter to grasp the concept of fundamental breach.<sup>583</sup> Koch agrees with the above view by saying that it is not necessarily the objective weight of the breach of contract, or the extent of the damages that determines whether a breach is fundamental, but rather the significance of the contract for the creditor is the key consideration.<sup>584</sup>

The section further revealed that the foreseeability element is a filter, which enables the party in breach to escape from contractual avoidance.<sup>585</sup> This can mean that foreseeability is not only a burden of proof but an element<sup>586</sup> but can prevent or limit the rights of the aggrieved party and determine the severity of breach.<sup>587</sup> However, it was also noted in this section that when the contract does not clearly state the importance of an obligation, the conduct of the party in breach may be interpreted with more tolerance.<sup>588</sup> Therefore, the foreseeability test serves only to exempt the party in breach, and cannot contribute to qualifying breach as fundamental.<sup>589</sup> The next section debates how substantial detriment and foreseeability manifest as forms of fundamental breaches.

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<sup>579</sup> Pauly *Breaches* 225.

<sup>580</sup> Ziegel *Remedies* 16; Enderlein and Maskow *Sales* 113. Schlechtriem *Commentary* 177; Will *Sales* 211.

<sup>581</sup> The economic loss suffered by the aggrieved party is not necessarily the only decisive element for establishing if a fundamental breach occurred. Will *Sales* 211.

<sup>582</sup> Schlechtriem *Commentary*, 177.

<sup>583</sup> Honnold *Sales* 206; Pauly *Breaches* 229.

<sup>584</sup> Koch *Breaches* 351.

<sup>585</sup> Will *Sales* 215.

<sup>586</sup> Schlechtriem *Commentary* 177; Will *Sales* 216 "the burden of proving unforeseeability rests with the party in breach.

<sup>587</sup> Enderlein and Maskow *Sales* Art 25 4.1.

<sup>588</sup> Babiak *Sales* 118; Koch *Sales* 264.

<sup>589</sup> Babiak *Sales* 118; Koch *Sales* 264.

## 4.5 Forms of Breach of Contract

### 4.5.1 Introduction

The aim of this section is to describe and critically analyze the nature of performance in a contract that determines the type of breach. There are a number of breaches found under the CISG, but not all of them lead to avoidance. The assumption of the discussion in this section is that a fundamental breach warrants avoidance but it is the decision or choice of the innocent party to exercise the remedy. This section focuses on non-performance, non-conformity, late performance or late delivery, and anticipatory breach and highlights the significance of the *Nachfrist* period as a core requirement for avoidance. The section discusses these forms of breach showing the rights, requirements, limitations and exceptions of the buyer and the seller. As each breach is discussed, it is linked to the concepts of detriment, substantial deprivation and foreseeability. It is argued in the sections below that it is the choice of the innocent part to avoid the contract.

### 4.5.2 Non-Performance

Article 49 (1) CISG<sup>590</sup> makes avoidance available if a fundamental breach of a seller's obligation occurs and if there is non-delivery of goods within the additional period of time under Art 49 (1) b CISG. Article 49 (1) reads;

The buyer may declare the contract avoided:

- (a) If the failure by the seller to perform any of its obligations under the contract amounts to a fundamental breach; or
- (b) In case of non-delivery, if the seller does not deliver the goods within the additional period of time fixed by the buyer in accordance with paragraph (1) of article 47 or declares that he will not deliver within the period so fixed.

### 4.5.3 Requirements

Two alternative requirements of non-performance are fundamental breach and *Nachfrist* period. Non-performance is a form of fundamental breach which calls for the *ultima ratio* remedy or remedy of last resort available.<sup>591</sup> By fixing additional period of time in the case of non-

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<sup>590</sup> Schwenger, Fountoulakis and Dimsey *Sales* 382.

<sup>591</sup> Yovel *CISG-PECL* 397-410.

delivery, a potentially non-fundamental breach is elevated to a fundamental one.<sup>592</sup> Non-performance of a contractual obligation has detrimental effects to the parties and substantially deprives the aggrieved party of what it is entitled to receive in the contract. This breach violates the principle of good faith making the other party to foresee the possibility of a fundamental breach.

Under the CISG “violation of a duty that the seller was obliged to fulfill under the contract is the first element in establishing a fundamental breach”<sup>593</sup> that may entitle the buyer to avoid the contract. Article 49(1) (a) states that “The buyer may declare the contract avoided if failure by the seller to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract.” The notion of the right to avoid for fundamental breach under Article 49 (1) (a) of the CISG must be understood in conjunction with article 25 of the CISG. In the *Chinese Compound fertilizer case*<sup>594</sup>, non-performance of the contract was regarded as a fundamental breach as seller was not able to deliver the goods.

#### **4.5.4 Article 49(1)(b) *Nachfrist***

According to Article 49(1)(b)<sup>595</sup> of the CISG non-delivery is not a fundamental breach that allows avoidance but buyer may avoid the contract after an additional period of time has lapsed for the seller to perform its obligations.<sup>596</sup> Article 49(1)(b) of the CISG permits a buyer to avoid a contract following suitable notice in the event of non-delivery in instances in which the contract may not indicate that late delivery shall be regarded as a fundamental breach of contract. The buyer does not have to prove the occurrence of a fundamental breach. Article 51(2)<sup>597</sup> of the CISG empowers the buyer to declare the contract avoided in its entirety only if the failure to make delivery completely or in conformity with the contract amounts to a fundamental breach of the contract.<sup>598</sup>

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<sup>592</sup> Schwenger, Fountoulakis and Dimsey *Sales* 386.

<sup>593</sup> Schwenger, Fountoulakis and Dimsey *Sales* 387.

<sup>594</sup> China 30 January 1996 CIETAC Arbitration proceeding (*Compound fertilizer case*) [<http://cisgw3.law.pace.edu/cases/960130c1.html>].

<sup>595</sup> Yovel *CISG –UP* 187.

<sup>596</sup> Schwenger, Fountoulakis and Dimsey *Sales* 386, 399.

<sup>597</sup> *Ying Art 33/52* 360.

<sup>598</sup> Schwenger, Fountoulakis and Dimsey *Sales* 386, 399.

In an *ICC Arbitration Case*,<sup>599</sup> the facts were that the respondent refused to deliver the letter of credit. In addition, the respondent declared in its telefax dated 14 April that it will not accept any further shipment before July [of that year]. The conduct of the respondent caused a fundamental breach in two ways. Firstly, the respondent delayed and finally refused the delivery of the required letter of credit, thus causing claimant to re-book the shipment which resulted in more costs for the claimant. This conduct alone constitutes a fundamental breach because it deprived the claimant of what it could expect under the sales contract. Secondly, the respondent refused to accept any installment before July. According to the contract concluded between the parties, the last installment was to be shipped in July/August. Thus, the statement of respondent in its telefax dated 14 April can be seen as a final refusal to perform because the installment following the April installment was already due for May/June. Consequently, the respondent declared that it would not accept the April installment. A final refusal of performance constituted a fundamental breach in the sense described in Article 25 read with art 72.<sup>600</sup>

#### **4.5.5 Failure to establish a letter of credit by buyer**

In the *Downs Investments case*,<sup>601</sup> an Australian court determined that the refusal to establish a timely letter of credit was clearly a fundamental breach within the meaning of Article 25 and Article 64(1)(a) of the Convention.<sup>602</sup> This case underscores the significance of a letter of credit, and how, not submitting it causes fundamental breach and avoidance of contract.<sup>603</sup> Article 54 of the Convention provides that the buyer's obligation to pay the price includes taking such steps and complying with such formalities as may be required under the contract or any laws and regulations to enable payment to be made. Not establishing a letter of credit in the circumstances of this case was a failure by the buyer to meet his/her “obligation to pay the price” of the goods under the contract of sale.

#### **4.5.6 Refusal to take delivery by buyer**

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<sup>599</sup> ICC Arbitration Case No. 10274 of 1999 [English text] [<http://cisgw3.law.pace.edu/cases/990274i1.html>].

<sup>600</sup> CISG Article 72, 19 I.L.M. p. 688. (If prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach of contract, the other party may declare the contract avoided.)

<sup>601</sup> Australia 17 November 2000 Supreme Court of Queensland (*Downs Investments v. Perwaja Steel*) (<http://cisgw3.law.pace.edu/cases/001117a2.html>).

<sup>602</sup> *Helen Kaminiski Pty Ltd v Marketing Products Inc* (US Dist CT 21 July 1997 per Cote J)

<sup>603</sup> *Trans Trust SPRL v Danubien Trading Company Ltd.* (1952) 2 QB 297 per Lord Denning at 305.

Besides the failure to provide a letter of credit, the refusal to take delivery by the buyer is also a ground leading to avoidance due to fundamental breach. In the *Belgian Van Heygen Staal* case,<sup>604</sup> the buyer refused without sufficient reason to accept delivery of goods. The Court ruled that the seller wrongly alleged that avoidance took place when it (Seller) decided to avoid the contract and that it still had to grant Buyer an additional period of time for undue receipt of the goods. It appears at first that Seller proceeded with the cover sale even before declaration of avoidance on 12 June 1996 and without any cogent reason, which means implicitly but certainly, that it considered the contract to be avoided. It further appeared that Buyer was not willing to accept the delivery even before the steel coils were offered for delivery. The Buyer's letter of 27 September 1995, read: "Since the delivery dates were not met, we are forced to annul both contracts." The Buyer confirmed this position in two letters of 11 October 1995 and 26 October 1995. Such unlawful refusal of acceptance is a fundamental breach, which would in itself justify an avoidance of contract after an additional period of time.

#### **4.5.7 Conclusion**

The discussion above debated non-performance. It was argued that it does not lead to avoidance. The analysis showed that fixing additional period of time in the case of non-delivery, can potentially elevate a non-fundamental breach to a fundamental one.<sup>605</sup> The sticky point is that when language is vague and ambiguous on what amounts to a fundamental non-performance this is left to the discretion of the aggrieved party. It was clarified that non-performance is a form of fundamental breach which calls for the *ultima ratio* remedy which means a remedy of last resort available. The discussion also revealed that failure to establish a letter of credit and a refusal to take delivery by a buyer are possible fundamental breaches of non-performance that justify avoidance. This is so because commentators still differ in their interpretation on whether it is the buyer or the seller who has the final say when contractual stipulations are not followed. Whereas in non-performance obligations are not fulfilled, in non-conformity a party performs but not to required standard.

#### **4.6 Non-conformity**

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<sup>604</sup> Belgium 20 October 2004 Hof van Beroep (Appellate Court) Gent (*NV Van Heygen Staal v. GmbH Stahl- und Metalhandel Klockner*) [<http://cisgw3.law.pace.edu/cases/041020b1.html>]. See also Switzerland 12 December 2002 Kantonsgericht (District Court), Zug (*Methyl tertiary-butyl ether case*) (<http://cisgw3.law.pace.edu/cases/021212s1.html>).

<sup>605</sup> Schwenger, Fountoulakis and Dimsey *Sales* 386.

Delivery of goods which do not follow contractual stipulations and obligations may amount to a fundamental breach. Contractual stipulations and obligations are of paramount importance when deciding on a fundamental breach due to deficiencies in the products. The nature of deficiency and failure to follow obligations by contractual parties leads to the concept of non-conformity in goods. According to Article 35<sup>606</sup> of the CISG, non-conformity can be defined as the delivery of defective goods which are deficient according to the contract in relation to quality, quantity, description, texture or packaging. Delivery of an *aliud*, estimated cost of repairing the goods and failure to carry out contractual obligations can be viewed as possible fundamental breaches.

Delivery of goods which do not follow contractual stipulations and obligations can be regarded as a fundamental breach, but it depends on the seriousness of the deficiency and interpretation of the court. This is supported by Graffi,<sup>607</sup> who states that:

The delivery of defective goods is certainly the most recurrent situation in international sales litigation. The number of decisions dealing with this issue is remarkably high, but often it is rather problematic to establish which kind of deficiencies in the goods may amount to a fundamental breach.

In the CISG, the notion of lack of conformity or kinds of “deficiencies in the goods” are explained in Article 35(1), which states that “the seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract.” In *Delchi v. Rotorex*<sup>608</sup> it was ordered that the buyer had a right to avoid the contract because 93% of the goods did not conform to the contracted samples and did not satisfy the quality controls standards (the air condition compressors had low cooling capacity). In *Landshut (District Court)*<sup>609</sup> the court held that the buyer had suffered substantial detriment because the entire lump of sportswear delivered had shrunk about 10 to 15% after being washed. Under the CISG, the delivery of an *aliud* is also treated as delivery of non-conforming goods. In determining what type of deficiency may lead to a fundamental breach, the cases below seem to favor an economically oriented approach, based on the actual loss suffered

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<sup>606</sup> Henschel Art 35 166.

<sup>607</sup> Graffi *Breaches* 338–349.

<sup>608</sup> *United States Delchi Carrier, SpA v. Rotorex Corp.*, 1994 WL 495787 (N.D. N.Y. 1994), a|'d in part, rev'd in part, 71 F.3d 1024 (2d Cir. 1995).

<sup>609</sup> Germany 5 April 1995 (District Court) Landshut (*Sportclothing case*) (<http://cisgw3.law.pace.edu/cisg/wais/db/cases2/950405g1.html>).



by the aggrieved party.<sup>610</sup> Under the CISG, the delivery of an *aliud* is also treated as delivery of non-conforming goods. In determining what type of deficiency may lead to a fundamental breach, the cases below seem to favor an economically oriented approach, based on the actual loss suffered by the aggrieved party.<sup>611</sup> Article 35(2) lists specific standards, which represent a *conditio sine qua non* for the conformity of the goods.

However, the same Article 35 (2) also points out that except when the parties have agreed otherwise, the goods that do not conform with the contract, as pointed out in case law: or unless they are fit for the purposes for which goods of the description would ordinarily be used; or unless they possess the qualities of goods which the seller has held out to the buyer as a model or sample; and unless the goods are packed in the usual and necessary manner.<sup>612</sup>

In the *Hamm Court of Appeals*,<sup>613</sup> the percentage of defective goods was considered too small to justify the buyer's declaration of avoidance. In August 1989, the parties concluded a contract for the purchase and sale of 200 tons of frozen skinless bacon, which was to be delivered in ten installments. There was a disagreement in that the buyer wanted wrapped bacon, but the seller delivered unwrapped bacon. Four partial deliveries of 83.4 tons were made and 116.6 tons were outstanding. The buyer paid DM 821.21 but rejected the remaining of bacon though the sales contract was concluded with a suspensory condition applicable to the remaining amount of 116.6 tons as part of the previous four deliveries. The seller then declared the contract avoided because the buyer's failure to take delivery of more than half of the goods constituted a fundamental breach of contract. The seller also claimed damages in the amount of DM 30,652.00. The court held that the seller was entitled to claim damages according to articles 61(1)(b) and 74 CISG<sup>614</sup>. To assess damages, priority had to be given to the method of calculation under article 75 CISG.

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<sup>610</sup> *United States Delchi Carrier, SpA v. Rotorex Corp.*, 1994 WL 495787 (N.D. N.Y. 1994), a|'d in part, rev'd in part, 71 F.3d 1024 (2d Cir. 1995) and Germany 5 April 1995 (District Court) Landshut (*Sportclothing case*) (<http://cisgw3.law.pace.edu/cisg/wais/db/cases2/950405g1.html>).

<sup>611</sup> *United States Delchi Carrier, SpA v. Rotorex Corp.*, 1994 WL 495787 (N.D. N.Y. 1994), a|'d in part, rev'd in part, 71 F.3d 1024 (2d Cir. 1995) and Germany 5 April 1995 (District Court) Landshut (*Sportclothing case*) (<http://cisgw3.law.pace.edu/cisg/wais/db/cases2/950405g1.html>).

<sup>612</sup> Enderlein, and Maskow *Sales Article 35*. <http://cisgw3.law.pace.edu/cisg/biblio/enderlein.html#art35>. Henschel Art 35 *Sales* 167.

<sup>613</sup> Germany 22 September 1992 Oberlandesgericht (Appellate Court) Hamm (*Frozen bacon case*) (<http://cisgw3.law.pace.edu/cases/920922g1.html>).

<sup>614</sup> Hottler and Blasé *Art 74 CISG-PECL* 465-477.

In mitigating its loss, however, the seller was obliged to undertake a profitable resale of the goods under article 77 CISG.<sup>615</sup> Lastly, the court granted the outstanding purchase price under article 52 of the CISG and interest under article 78 of the CISG.<sup>616</sup>

From the figures above, it can be deduced that only a very high percentage of defective goods may entitle the buyer to declare the contract avoided. In this kind of situation fundamental breach is easy to assess, since virtually all the goods are defective and they are useless for the buyer. But other approaches to non-conformity favor the estimated cost of repair.

The estimated cost of repair was used in the *Austrian-Chinese case*. The scaffoldings provided by the seller did not conform to the sample given by the buyer. The buyer declared the contract avoided and the court approved. This judgment by the court is appropriate since the buyer would have incurred the costs of sorting out the defects that would have compared to one third of the total purchase price.

The Frankfurt Court of Appeals<sup>617</sup> favored the merchantability of defective goods approach to determine the non-conformity of goods. The court noted that the buyer did not specify whether the shoes were just below standards or totally unfit for resale, as a result avoidance was denied. In the *Cobalt Sulphur Case*<sup>618</sup> the court did not focus on unfitness for resell but on the fact that only one third was not conforming and, therefore, did not qualify for avoidance. In the *United States Delchi Carrier Spa v. Rotorex Corp.*,<sup>619</sup> the facts were that the parties agreed that the goods should be of British origin and that the seller should supply certificates of origin and of quality. After the receipt of the documents, the German buyer declared the contracts to be avoided, since the cobalt sulphate was made in South Africa and the certificate of origin was

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<sup>615</sup> Zeller *Sales* 486.

<sup>616</sup> Honnold *Uniform Law* 453 (Art. 76); Koch *Sales* 240. (fundamental breach (gravity of consequences of breach): contract's overall value and monetary loss suffered by aggrieved party; Bernstein & Lookofsky, (2003) *CISG* ss 3-8 n.71; ss 4-5 n.55; Graffi, (2003) *Breaches*, 338-349; Schlechtriem and Schwenger *Commentary CISG* Art. 8 paras. 19, 34; Art. 9 para. 21; Art. 18 para. 8; Art. 19 para. 13; Art. 64 para. 6 Art. 75 paras. 2, 3; Art. 76 paras. 1, 2, 4, 7, 9; Art. 77 para. 10; Schwenger and Fountoulakis *Sales* 158; Cross *Homeward Trend* 156-157.

<sup>617</sup> Germany 18 January 1994 Oberlandesgericht [Appellate Court] Frankfurt (*Shoes case*) (<http://cisgw3.law.pace.edu/cases/940118g1.html>).

<sup>618</sup> Germany 3 April 1996 Bundesgerichtshof [Federal Supreme Court] (*Cobalt sulphate case*) ([http://cisgw3.law.pace.edu/cisg/wais/db/cases2/960403\\_g1.html](http://cisgw3.law.pace.edu/cisg/wais/db/cases2/960403_g1.html)).

<sup>619</sup> *United States Delchi Carrier SpA v. Rotorex Corp.*, 71 F.3d 1024, 1028 (2d Cir. 1995).

wrong. The *Delchi Case* appears stricter in that it looks at the non-conformity of documentation and not the goods. From the above analysis of the concept of non-conformity it appears that the CISG offers wide interpretation of non-conformity which is acceptable and an effective solution on both domestic and international levels. However, the idea of wide interpretation can be a thorny issue because as it is rather problematic to establish which kind of deficiencies in the goods may amount to a fundamental breach.<sup>620</sup>

In support of the above view, Schlechtriem<sup>621</sup> argues that the decisive factor is not only the objective damages but the risk of non-conformity. Packaging is an element of conformity (Art. 35(d)). With respect to this obligation<sup>622</sup> therefore, wrong packaging can warrant avoidance, not only on damaging or endanger goods, but also on whether or not the packaging explicitly demanded by the buyer was necessary for further shipment or resale.

In the *German Used Shoes* case,<sup>623</sup> the Seller had fundamentally breached the contract concluded between the parties by delivering shoes not in conformity with the contract. The shoes delivered were not in conformity with the quality classes one and two agreed upon in the contract. As the Seller argued that the shoes were not perishable items and therefore could not “rot” in a container in a warehouse. The court held<sup>624</sup> that the seller was not entitled to any payment under Articles. 45(1)(b), 74, 8[4](1) CISG nor under any other provision due to the non-conformity of the shoes. Delivering lower grade shoes was seen as a fundamental breach which led to avoidance. And hence no payment was made to the seller.

Also in the *American Delchi Carrier* case<sup>625</sup>, shipping non-conforming goods to a buyer led to justified avoidance. The quality of the product and value deteriorated because the cooling power

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<sup>620</sup> Graffi *Breaches* 338–349.

<sup>621</sup> Schlechtriem *Commentary* 23.

<sup>622</sup> Schlechtriem *Commentary* 60

<sup>623</sup> Germany 11 April 2005 Landgericht [District Court] Frankfurt, (*Used shoes case*) (<http://cisgw3.law.pace.edu/cases/050411g1.html>). Germany 26 November 1999 Oberlandesgericht (Appellate Court) Hamburg, (*Jeans case*) (<http://cisgw3.law.pace.edu/cases/991126g1.html>).

<sup>624</sup> Germany 11 April 2005 Landgericht [District Court] Frankfurt, (*Used shoes case*) (<http://cisgw3.law.pace.edu/cases/050411g1.html>). See also Germany 26 November 1999 Oberlandesgericht (Appellate Court) Hamburg (*Jeans case*) (<http://cisgw3.law.pace.edu/cases/991126g1.html>).

<sup>625</sup> *United States Delchi Carrier SpA v. Rotorex Corp.*, 71 F.3d 1024, 1028 (2d Cir. 1995). Netherlands 28 June 2006 (District Court) Arnhem (*Silicon Biomedical Instruments B.V. v. Erich Jaeger GmbH*)

and energy consumption of an air conditioner compressor were non-conforming. This case shows that non-compliance in the manner or mode of transport by which goods are transported can result in the change of quality of goods when they arrive at the appropriate destination. In the *Chinese Bud rice* case,<sup>626</sup> the Seller exchanged high quality rice with moldy and deteriorated goods while loading without the knowledge of the Buyer. In this case seemingly fraudulent conduct led to avoidance.

#### **4.6.1 Conclusion**

In this section it was demonstrated that Article 35 defines non-conformity as the delivery of defective goods which are deficient according to the contract in relation to quality, quantity, description, texture or packaging. Cases were used and analyzed to illustrate that failure to examine the delivery of an *aluid*, high estimated cost of repairing the goods and failure to carry out contractual obligations can cause avoidance. Fraudulent conduct by the seller and shipment of non-conforming goods are conditions that can lead to creating grounds for avoidance. But this wide interpretation is a thorny issue because the commentators and courts in both domestic and international spheres differ on the interpretation of which elements of non-conformity warrants avoidance. The discussion in this section also revealed that the same Article 35 (2) also points out that except when the parties have agreed otherwise, the goods that do not conform with the contract, as pointed out in case law would ordinarily be used.<sup>627</sup> But the bone of contention is that it is not only the destruction of the goods because under the CISG, the buyer loses, in principle, its right to declare the contract avoided if it cannot return the goods in substantially the same condition in which it received them. It was argued in the section above that it is the choice of the innocent party to avoid the contract. Whereas in non-conformity performance occurred but failed to reach the expected standards, in late delivery standards of goods are as expected but delivery is not on time.

#### **4.7 Late delivery**

##### **4.7.1 Introduction**

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(<http://cisgw3.law.pace.edu/cases/060628n1.html>) for an example dealing with software supplied to hospitals that were held to be so defective as to amount to a fundamental breach.

<sup>626</sup>China 12 April 1999 CIETAC Arbitration proceeding, (*Bud rice dregs case*), (<http://cisgw3.law.pace.edu/cases/990412c1.html>).

<sup>627</sup> Enderlein and Maskow *Sales* Article 35. <http://cisgw3.law.pace.edu/cisg/biblio/enderlein.html#art35>. Henschel *Art 35* 167.

In late delivery a delay in performance in itself will not constitute a fundamental breach as required by Article 25.<sup>628</sup> However, there may be special circumstances which either expressly or implicitly indicate that time of performance is of particular importance to the other party.<sup>629</sup>

#### 4.7.2 Requirements

Certain requirements have to be met to warrant avoidance. These are late delivery or delay in performance, circumstances given on time of performance and notice to breaching party with the *Nachfrist* period. In the *Fashion textile* case, autumn goods were delivered late resulting in the buyer refusing to accept them and sent a notice of avoidance. But, because of failure by the seller to give additional period, avoidance was denied. In the *German Shoes case*,<sup>630</sup> the court held that the buyer was not entitled to declare the contract avoided with respect to the shoes not yet delivered without fixing an additional period of time for performance by the seller. In the first case above time was of essence because autumn clothes had to be worn in a specific time. In the second case the time for wearing shoes was not emphasized. Failure to give additional time was crucial in both cases.

In the *Chinese Silicon and Manganese Alloy case*,<sup>631</sup> the buyer issued the Letter of Credit (L/C) late. The seller reminded the buyer to correct the situation but the buyer refused and made it difficult for the seller to hand over the goods. Liability for failure of delivery of the goods would have been imposed on the buyer but the seller had not declared the contract avoided. Therefore late delivery occurred but did not amount to a fundamental breach. Late performance or a delay in performance in itself did not constitute a fundamental breach as required by Article 25. Requirements for fundamental breach and avoidance in the above case appear to be stricter in that avoidance was denied.

In a *Russian Arbitration Proceeding*<sup>632</sup> the concept of additional time was flexible and lenient in that the Seller got two and half years instead of six months in additional time but still failed to

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<sup>628</sup> Ferrari *Breaches* 389-400 ; Fletchner *et al Contracts*,

<sup>629</sup> Schlechtriem *Commentary* 281-298; Schwenger *Avoidance* 437-442.

<sup>630</sup> Germany 1 July 2002 Oberlandesgericht [Appellate Court] München (*Shoes case*) [<http://cisgw3.law.pace.edu/cases/020701g1.html>].

<sup>631</sup> China 1 February 2000 CIETAC Arbitration proceeding (*Silicon and manganese alloy case*) [<http://cisgw3.law.pace.edu/cases/000201c1.html>]. See also China Arbitration award of June 1999 (*Peanut kernel case*) [<http://cisgw3.law.pace.edu/cases/990600c1.html>].

<sup>632</sup> Russia 25 June 2004 Arbitration proceeding 120/2003 [<http://cisgw3.law.pace.edu/cases/040625r1.html>]. See also *Valero Marketing & Supply Company v. Greeni Oy*, 59 U.C.C. Rep. Serv. 2d 666 (D.N.J. 2006) where the

deliver. This entitled the buyer to declare the contract avoided by virtue of Article 49(1)(a) of the CISG.<sup>633</sup>

### **4.7.3 Conclusion**

This section has stated that late delivery is not performing contractual obligations on time. But the section has argued that late performance or a delay in performance in itself will not constitute a fundamental breach as required by Article 25. Where the contract deals with seasonal goods, or goods ordered for a special event, or where the buyer has informed the seller that it has a fixed date of delivery with its own sub-buyers a delay will constitute a fundamental breach.<sup>634</sup> The innocent party has a right to avoid when a fundamental breach occurs. The innocent party can, however, turn the delay into a fundamental breach by giving notice to the other party of its breach and setting an additional reasonable time. It is argued in the section above that it is the choice of the innocent part to avoid the contract.

## **4.8 Anticipatory breach**

### **4.8.1 Introduction**

The conduct by a party to a contract that makes it clear that the other party will not perform its contractual obligations in the future amounts to a fundamental breach called anticipatory breach. Article 72<sup>635</sup> is believed to be one of the substantive rules of greatest practical significance for international sales<sup>636</sup> in that it incorporates all forms of breach and includes both the buyer and the seller. This section analyses the provisions of Article 72<sup>637</sup> and defines the term “anticipatory breach” and states requirements necessary for anticipatory breach to occur.

### **4.8.2 Requirements**

Article 72(1)<sup>638</sup> states that “If prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach of contract, the other party may declare the contract avoided.” In the *Magellan International case*, the court<sup>639</sup> held that under the Convention an anticipatory repudiation pleader need simply allege (1) that the defendant

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question was raised but referred back for further evidence.

<sup>633</sup> Tune I Hague Conf. Records 365 (1964).

<sup>634</sup> Schlechtriem and Schwenger *ICM* ss37–41; Staudinger and Magnus *ICM* ss20–23.

<sup>635</sup> Eiselen *Art 71/72* 461.

<sup>636</sup> Lookofsky *CISG* 63.

<sup>637</sup> Eiselen *Art 71/72* 461.

<sup>638</sup> Eiselen *Art 71/72* 462.

<sup>639</sup> *United States Magellan Intern. Corp. v. Salzgitter Handel GmbH*, 1999, 76 F. Supp. 2d 919, 927, 53 Fed. R. Evid. Serv. 563, 40 U.C.C. Rep. Serv. 2d 321 (N.D. Ill.).

intended to breach the contract before the contract's performance date and (2) that such breach was fundamental. Magellan pleaded that Salzgitter's March 29 letter indicated its pre-performance intention not to perform the contract. Magellan also alleged that the bill of lading requirement was an essential part of the parties' bargain and that Salzgitter's insistence upon an amendment of that requirement would indeed be a fundamental breach. International sales are, to a large extent, documentary sales where many of the obligations of the parties consist of the handing over of agreed documentation such as letters of credit, invoices, insurance documents, and bills of lading. This is recognized by the CISG in Article 34. Failure to deliver such documents, or delivering defective documents, may force one to anticipate a fundamental breach and then avoid the contract.<sup>640</sup>

In the *Doolim Corp case*,<sup>641</sup> the seller first withheld performance due to a clear indication that the buyer would not be able to pay for future installments and then avoided the contract. Doolim permissibly withheld delivery of the November Surplus Garments to Doll because it became apparent that Doll would not be able to make any payments for those Garments.<sup>642</sup> Doolim cancelled the contract and permanently withheld delivery of the November Garments and the Surplus Garments because Doll's persistent failure to pay for the garments it ordered demonstrated that it was unable or unwilling to pay the agreed upon price for these garments.<sup>643</sup> By the end of January 2008, Doll had failed to secure the letter of credit for the K-M Article Garments, had failed to make the payments totaling \$530,000.00 that were due on December 14 and 28, 2007 and January 11 and 25, 2008, and had failed to give Doolim any security. Thus, it was evident that Doll would likely continue to breach its obligations under both the Modification Agreement and the purchase orders for the November and the Surplus Garments. In this situation, the seller appeared justified in anticipating failure to perform.

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<sup>640</sup> Babiak *Breaches* 114.

<sup>641</sup> *United States Doolim Corp. v. R Doll, LLC*, 2009 WL 1514913 (S.D. N.Y. 2009).

<sup>642</sup> CISG Article 71(1) 19 *ILM* 687–88. (A party may suspend the performance of his obligations if, after the conclusion of the contract, it becomes apparent that the other party will not perform a substantial part of his obligations as a result of . . . a serious deficiency in his ability to perform . . .)

<sup>643</sup> CISG Article 72, 19 *ILM* 688. (If prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach of contract, the other party may declare the contract avoided.)

Azeredo da Silveira<sup>644</sup> seems to agree with the above explanation by adding that Article 72(1) of the CISG requires, as a first condition, that the party that intends to declare the contract avoided should ensure that it is “clear” that the other party will commit a fundamental breach of contract. A mere suspicion, even a well-founded one, is not sufficient. Even though Article 72 CISG<sup>645</sup> does not explicitly identify the degree of clarity or certainty that ought to be reached, a higher degree of clarity is required for the application of Article 72 CISG than for the application of Article 71 CISG. Nevertheless, scholars and courts agree that Article 72 CISG does not require absolute and unshakable certainty that a breach will be committed.

Khoo<sup>646</sup> argues that the Convention suggests that any questions concerning the burden of proof are to be left to the aggrieved party. The consensus was that such questions must be left to the court as matters of procedural law.<sup>647</sup> In the *Stockholm Chamber of Commerce Pressure sensors case*<sup>648</sup> the tribunal dealt with the onus and a lack of sufficient evidence and concluded that the Buyer had failed to establish that the sensors were defective. The Buyer had no right to avoid the agreement, nor had it any right to claim damages. In such a case, Mullis advises that “burden of proof” should be taken into account to the extent to which it solves such questions.<sup>649</sup> However, Reczei opines that at the center of anticipatory breach hinges the emphasis upon preservation of the contract as respect for solutions to concerns of developing and socialist countries.<sup>650</sup> He states that the approach which would have the termination of the contract as the first sanction of a breach of contract cannot be reconciled with a planned economy whose targets can be achieved by the performance of the contract and not by its ending. Audit and Honnold agree with Reczei on the need to preserve the contract but their reasons are that rescission would lead to unwanted inconvenience and expense of litigation.<sup>651</sup>

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<sup>644</sup> Azeredo da Silveira *Breaches* (<http://www.cisg.law.pace.edu/cisg/biblio/azeredo.html>).

<sup>645</sup> Eiselen *Art 71/72* 462.

<sup>646</sup> Bianca and Bonell *Commentary* 39; Enderlein and Maskow *Commentary* 34

<sup>647</sup> Official Records 295-298; Honnold *Uniform Law* ss183; Will, Bianca and Bonell *Commentary* 208; Graff *Sales* 150.

<sup>648</sup> Stockholm Chamber of Commerce Arbitration Award of 5 April 2007 (*Pressure sensors case*) [<http://cisgw3.law.pace.edu/cases/070405s5.html>].

<sup>649</sup> Mullis *Breaches* 326–355.

<sup>650</sup> Reczei *Rules* 55.

<sup>651</sup> Audit *Sales* 139–141.



In a *Russian arbitration case*,<sup>652</sup> the tribunal had to decide whether or not the provision of faulty preliminary sketches constituted a fundamental breach or whether or not the buyer should have afforded the seller further opportunities to correct the faulty sketches. In the Tribunal's opinion, the buyer had presented sufficient evidence at least of the fact that the preliminary sketches contained substantial flaws. The seller had the burden of proving that it was able to timely correct the flaws detected and to manufacture and deliver the equipment in accordance with the terms of the contract of 27 April 1992. The seller had not presented such evidence. By refusing to present relevant evidence, the contract was avoided.

### **4.8.3 Conclusion**

The section above debated the concept of anticipatory breach and defined it as a high probability that a failure to perform contractual obligations by the other party is likely to lead to an avoidance of the contract. If prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach of contract, the other party may declare the contract avoided.” The section further demonstrated that Article 72<sup>653</sup> requires a higher probability of certainty that the breach will occur. Failure to deliver such documents, or delivering defective documents, may force one to anticipate a fundamental breach and then avoid the contract. It furthermore requires that the breach would be a fundamental one.<sup>654</sup> There should be no need for the innocent party to await the anticipated breach. The conduct or circumstances that make it clear that such a breach will occur leads to the result that the other party is already in breach entitling the innocent party to avoid the contract. It does not matter whether the breach is caused by the guilty party or by circumstances beyond its control. In the latter instance, that party will have a defense against a claim for damages under Article 79, but the innocent party is still entitled to avoid the contract.<sup>655</sup> Although an anticipatory breach of contract by one of the parties can establish a fundamental breach and may entitle the innocent party to avoid the contract forthwith, the guilty party must be given notice to avoid by the innocent the contract.

## **4.9 Notice to avoid**

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<sup>652</sup> Russia 25 April 1995 Arbitration proceeding 161/1994 [<http://cisgw3.law.pace.edu/cases/950425r3.html>]; See also Germany 14 January 1994 (Appellate Court) Düsseldorf (*Shoes case*) (<http://cisgw3.law.pace.edu/cases/940114g1.html>).

<sup>653</sup> Eiselen Art 71/72 462.

<sup>654</sup> Hager Art 72 ss11–12; *Bridge Sales* 415–416 .

<sup>655</sup> Azeredo da Silveira, (2005) (<http://www.cisg.law.pace.edu/cisg/biblio/azeredo.html>).

### 4.9.1 Introduction

In the previous sections above the chapter debated fundamental breach as the first requirement for avoidance. In this present section, the chapter is going to critically explore the concept of notice as a second requirement for avoidance. When conduct or circumstances by a guilty party makes it clear that performance will no longer be possible, a warning on the time limit has to be sent. If performance has not been completed by that given date, avoidance of the contract will occur. Articles 26 and 72 of the CISG require timely notice for avoidance to take place.<sup>656</sup> Failure to declare a notice may result in avoidance being null and void.

### 4.9.2 Requirements

Article 26 allows reasonable time to be given before avoidance takes place. Any form of notice is required under Article 26 of the CISG. An anticipatory breach is governed by a notice under Article 72 of the CISG. There are two notices that may become relevant in terms of Article 72.<sup>657</sup> The first notice is the one to declare the contract avoided. This provision of Article 72(1)<sup>658</sup> repeats the requirement contained in Article 26<sup>659</sup> which is that in order for the avoidance to become effective, the innocent party must declare the contract avoided and notify the other party. Failure to notify the other party renders the declaration ineffective.<sup>660</sup> The second notice, in terms of Article 72(2),<sup>661</sup> requires that the innocent party must give notice of its intention to avoid the contract where time allows so as to permit the other party to give an adequate assurance of performance. But the party need not give this notice where time is pressing or where the other party has made a positive declaration that it will not perform its obligations. The object of this notice is to ensure that the contract is not avoided where there is still a possibility that the contract may be saved.

In the *ICC Metal concentrate case*, the buyer began making cover purchases, which led to the assumption that there was an *ipso facto* avoidance of the contract rather than a suspension of

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<sup>656</sup> Anderson *Art 26/39* 133-138.

<sup>657</sup> Eiselen *Art 71/72* 461.

<sup>658</sup> Eiselen *Art 71/72* 462.

<sup>659</sup> Anderson *Art 26/39* 133.

<sup>660</sup> China 1989 CIETAC Arbitration proceeding (*Thai-made Emulsion case*) (<http://cisgw3.law.pace.edu/cases/890000c1.html>).

<sup>661</sup> Eiselen *Art 71/72* 462.

avoidance under Article 71.<sup>662</sup> The CISG does not recognize the concept of *ipso facto* avoidance.<sup>663</sup> In the CISG, the contract is avoided as a result of the Buyer's breach only if the Seller declare(s) the contract avoided. Automatic or *ipso facto* avoidance was deleted from the remedial system in this Convention because it led to uncertainty as to whether the contract was still in force or *ipso facto* avoided. Under Article 60 of CISG the contract is still in force unless the Buyer has affirmatively declared it avoided. Thus, pursuant to CISG Article 72(2),<sup>664</sup> in the above case, buyer was required to give notice of its intent to declare the contract avoided and issue a subsequent declaration of avoidance. But Buyer did not give notice of intention although Buyer gave a declaration of avoidance in a letter dated 23 January 1995. However, this declaration was inconsequential because it was clearly not within a reasonable time after the circumstances.<sup>665</sup>

In the *Chinese Compound fertilizer case*<sup>666</sup>, the tribunal stated that avoidance of the contract and the declaration of avoidance under the circumstances of Seller's breach<sup>667</sup>, gave the buyer the right to declare the contract avoided. In fact, on 2 June 1994, the seller wrote to the buyer stating that, "It is impossible to deliver the goods. We will try to find other sources, but because it is hard to find such goods, the possibility is low . . . ."

This fax shows that the seller expressed clearly that it would not perform its delivery obligation. According to Article 72(3), under such circumstances, the party intending to declare the contract avoided need not notify the other party. Although the parties did not use the words "avoiding the contract" or "declaring the contract avoided", the intention of the parties to avoid the contract was clear. Therefore, the buyer needed not officially declare the contract avoided again. The notice of intention demands adequate assurance of performance from the defaulting party.<sup>668</sup>

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<sup>662</sup> Eiselen Art 71/72 462.

<sup>663</sup> Documentary History of the Uniform Law for International Sales, Kluwer (1989): . . .

<sup>664</sup> Eiselen Art 71/72 462.

<sup>665</sup> Article (49) (2) CISG, Felemegas Article 49 (2) 397.

<sup>666</sup> China 30 January 1996 CIETAC Arbitration proceeding (*Compound fertilizer case*) (<http://cisgw3.law.pace.edu/cases/960130c1.html>).

<sup>667</sup> Felemegas Article 49, 397, 451, 461.

<sup>668</sup> Azeredo da Silveira *Breaches* (<http://www.cisg.law.pace.edu/cisg/biblio/azeredo.html>).

Notification has problems with what is required timeliness and specificity under the CISG. The issue of time frame is so flexible and subject to different guidelines in its interpretation of a reasonable time.<sup>669</sup> Conflicts might arise as what is acceptable in one system of law is unacceptable in the other.<sup>670</sup> The notice to avoid should clearly show the breach and the intention to avoid the contract.

### 4.9.3 Conclusion

This section debated the notion of notice to avoid and observed that automatic avoidance is not permitted under the CISG. It was argued that the innocent party must send a notice of avoidance when a fundamental breach occurs or is about to occur. The contents of the notice should show the time frame and specify that avoidance will occur. However, problems with notice are evident when dealing with the flexibility of timeliness. For example, different countries have different guidelines when interpreting reasonable time. Also, conflicts might arise as what is acceptable in one system of law is unacceptable in the other. Though failure to notify the other party renders the declaration of avoidance ineffective, it is not always possible to give a notice in all situations. The object of this notice is to ensure that the contract is not avoided where there is still a possibility that the contract may be saved. When a contract has been avoided, the innocent party is entitled to restitution.

## 4.10 Restitution

### 4.10.1 Introduction

This section will analyze the concept of restitution as governed by Article 82 of the CISG. The section will demonstrate that restitution is traditionally an equitable remedy at common law and is viewed as a consequence of avoidance. Requirements for restitution involve both parties and are confined to performance received. *Metallic covers case*,<sup>671</sup> as well as the *Printing machine case*<sup>672</sup> can be used to illustrate the requirements of restitution. Restitution is linked to the amount of goods that the seller supplied or to the amount of money that the buyer has already paid in respect of goods ordered. However, parties that cannot make restitution at all, or who

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<sup>669</sup> Anderson Art 26/39 136.

<sup>670</sup> Anderson Art 26/39 138.

<sup>671</sup> Spain 28 April 2004 Appellate Court Barcelona (*Metallic covers case*) (Cite as: <http://cisgw3.law.pace.edu/cases/040428s4.html>).

<sup>672</sup> *Simancas Ediciones, S.A. v. Miracle Press Inc. Printing machine case* [Cite as: <http://cisgw3.law.pace.edu/cases/050926s4.html>]

cannot make restitution of the goods in substantially the same condition in which they received them, will lose the right to declare the contract avoided.<sup>673</sup> The section below debates the requirements of restitution.

#### 4.10.2 Requirements

The first requirement is that both the buyer and the seller have a right to claim restitution when declaring a contract avoided.<sup>674</sup> Restitution is made concurrently if both parties received performance.<sup>675</sup> Both parties are released from all obligations of the contract.<sup>676</sup> The second requirement is that this right is limited to what has been supplied or paid under the contract.<sup>677</sup> Avoidance is barred if one is not able to give back what it got under the contract. Avoidance is possible if goods can be returned substantially in the same condition buyer received them in.<sup>678</sup> The third requirement is that payment of interest and compensation for the benefits which a party derived from the goods, mainly from their use (Article 84). As in Article 78, the rate of interest has been deliberately left open. Equally, as in Article 78, this gap has to be filled by redress to the applicable national law as determined by the rules on conflicts of law.

In the *Metallic covers case*,<sup>679</sup> the buyer claimed restitution due to non-conformity. The buyer was awarded 50% of what it had claimed for because it had also contributed to the non-conformity by ordering wrong covers. There is nothing in the CISG preventing the aggrieved party from claiming damages in addition to restitution.<sup>680</sup> Restitution is not equivalent to damages.

In the *Printing machine case*<sup>681</sup> a printer manufactured by the seller was seriously unfit for the particular purpose and seller refused to repair the machine and the buyer replaced it. The buyer sought avoidance of the contract and asked for loss suffered due to failure of machine to work

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<sup>673</sup> Article 82 (1) ILM A similar approach is seen in the instance of specific performance where a party is denied the right to claim substitute goods in certain instances where they can no longer make restitution.

<sup>674</sup> Schlectriem *Article 81* 259 discusses the effects of avoidance, but does not state the manner in which restitution must be pleaded.

<sup>675</sup> Mazotta *CISG-PECL* 515.

<sup>676</sup> Mohs *CISG-UP* 252.

<sup>677</sup> Mohs *CISG-UP* 252.

<sup>678</sup> Mazotta *CISG-PECL* 515.

<sup>679</sup> Spain 28 April 2004 Appellate Court Barcelona (*Metallic covers case*) (Cite as: <http://cisgw3.law.pace.edu/cases/040428s4.html>).

<sup>680</sup> Articles 74, 75, 76, 81(2), 84. ILM

<sup>681</sup> *Simancas Ediciones, S.A. v. Miracle Press Inc. Printing machine case* [Cite as: <http://cisgw3.law.pace.edu/cases/050926s4.html>]

including the costs for the substitute purchase. The court granted buyer restitution pursuant to Article 45 and 74 of the CISG. This included the purchase price for the substitute machine less its resale price. The buyer was directed to return the printer and the seller was ordered to pay € 1,194,798.50 plus interest in arrears to buyer.

The buyer has three exceptions to avoidance under Article 82(2) of the CISG when the buyer will not lose its right to avoid the contract despite not being able to make restitution. Firstly, the buyer may avoid when the impossibility to perform is not due to the buyer's negligence.<sup>682</sup> Secondly, the buyer may avoid the contract if the goods, or part thereof, have perished or deteriorated as a result of the examination provided for in Article 38 of the CISG.<sup>683</sup> Thirdly, the buyer may avoid the contract if the goods, or part thereof, have been sold in the normal course of business or have been consumed or transformed by the buyer in the course of normal use before it discovered, or ought to have discovered, the lack of conformity.<sup>684</sup>

Avoidance can occur where the breach caused by the defect is fundamental or non-fundamental. This can cause confusion in cases where the buyer cannot make restitution of the goods, but has set a reasonable period of time in which the seller can perform its obligations. In such circumstances the buyer may possibly still lose its right to declare the contract avoided despite having set a reasonable time for performance with which the seller fails to comply. But, the buyer must make such restitution where it elected to declare the contract avoided or requested substitute goods, despite it being impossible for it to make proper restitution of the goods in whole, or part, or in substantially the same condition in which it received them.<sup>685</sup>

#### **4.10.3 Conclusion**

The section above analyzed the concept of restitution under the CISG and demonstrated that it occurs when the contract has been avoided due to a fundamental breach. The above section revealed that both parties are released from all obligations of the contract and can claim the right to restitution, but are limited to what has been supplied or paid under the contract. However, restitution is barred if one is not able to give back what it received under the contract. Payment

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<sup>682</sup> Kritzer and Eiselen Article 82(2) (a). *ILM*.

<sup>683</sup> Kritzer and Eiselen *ICM* Article 82(2) (b). Article 38 requires the buyer to examine, or have examined the goods as soon as is practicable after the time of delivery, *ICM*.

<sup>684</sup> Kritzer and Eiselen *ICM* Article 82(2) (c).

<sup>685</sup> Kritzer and Eiselen *ICM* Article 84 (2) (b).

of interest and compensation for the benefits which a party derived from the goods, mainly from their use is governed by Article 84 of the CISG. Equally, as in Article 78 of the CISG, this gap has to be filled by redress to the applicable national law as determined by the rules on conflicts of law. The CISG has to address the expenses incurred in making restitution, the right acquired by third parties and the location where restitution is to be made.

#### **4.11 Conclusion of the chapter**

This chapter debated the concept of avoidance under the CISG. The chapter began with a discussion of the different terms used to describe and explain the term avoidance. Rescission is a term commonly used to describe the termination of a contractual relationship obtained through fraudulent means. The meaning of the term rescission in the English language does not reflect the real nature of the remedy under the CISG. "Rescission" of the contract *ab initio* is in principle retrospective but "termination" is not retrospective and may be exercised when the party is guilty of breach of contract.<sup>686</sup> Some critics discussed in this chapter argued that the term rescission is not appropriate for avoidance. It was averred by these critics that rescission does not conform to principles of good faith because it is not always the case that a contract is ended due to fraudulence.<sup>687</sup> Most contracts that end are guided by good faith principles and they do not necessarily end because of a criminal element implied in the phrase fraudulent conduct. This narrow interpretation of why a contract ends as described in rescission may have encouraged other critics to adopt the term repudiation to indicate the ending of a contract. Critics who favored the term repudiation emphasized the idea that it is a central term that incorporates all material breaches which are likely to happen in the future. However, it emerged from analysis in this chapter that while this is true, it is not always the case that the conduct of the other party will necessarily lead to a material breach. Eventually and because of the limitations of the above terms mainstream critics found it fit to adopt a technical term which they called avoidance. "Avoidance" under the Vienna Convention is a term which denotes an early end to the contract and comprises international concepts of rescission as well as termination.<sup>688</sup> "Avoidance of the contract" remains a technical term adopted and given a uniform meaning, in the Convention whose wording or expression in other languages does not always have the same

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<sup>686</sup> Atiyah *Contracts* 339.

<sup>687</sup> *Pacta sunt servanda*"

<sup>688</sup> Enderlein and Maskow *Sales* 340; Enderlein *Rights and Obligations* 195; Tallon *Avoidance* 602.

definite legal significance attributed to it.<sup>689</sup> What is uniform is that (1) avoidance can explain rescission and repudiation, (2) avoidance is broad enough to include breach such as non-performance, non-conformity, late performance, repudiation and restitution; (3) avoidance allows one to specify what is fundamental or explain substantial deprivation. (4) Opting for avoidance as the remedy of last resort rests on observing the existence of fundamental breach as defined under article 25 of the CISG and upholding restrictions on time limits, giving notice and providing burden of proof that are essential to avoid.

The discussion on fundamental breach argued that the key words detriment, substantial deprivation and foreseeability are guidelines used by courts and commentators to determine the materiality of breach.<sup>690</sup> Non-performance, non-conformity, late performance, anticipatory breach and restitution are forms of fundamental breach found under the CISG and analyzed in this chapter. It was stated that a right for the seller to declare the contract avoided is governed by the *Nachfrist* period under Article 63 and 64 of the CISG which allows additional time for buyer before contract is avoided. A *Nachfrist* notice is limited to non-payment of goods and taking delivery and where the seller wants to provide the basis for avoidance without proof that the delay constitutes a fundamental breach. The seller's non-compliance with the *Nachfrist*, might result in automatic avoidance as a notice would have been sent already.

It was shown in this chapter that non-performance on its own does not lead to avoidance. But if there is non-delivery of goods within the additional period of time it is the choice of the innocent party to avoid the contract. The innocent party has to uphold restrictions on time limits, giving notice and providing burden of proof that are essential to avoid a contract. The analyses of non-conformity revealed that substantial detriment refers to the delivery of defective goods which are deficient according to the contract in relation to quality, quantity, description, texture or packaging.

The chapter also debated the views of commentators and courts that differ on their understanding and interpretation of which elements of non-conformity that can warrant avoidance. The bone of

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<sup>689</sup> Enderlein and Maskow *Sales* 340 .

<sup>690</sup> Schlechtriem and Schwenger *ICM* 87. Lookofsky *Contracts* 63; Ferrari *Article 25* 489–550; Magnus, *Avoidance* 423–436; Zeller *Sales* 81–94.



contention was that non-conformity may not refer to the destruction of the goods because under the CISG, the buyer loses, in principle, its right to declare the contract avoided if it cannot return the goods in substantially the same condition in which it received them. The innocent party not only elects to avoid but should also uphold restrictions on time limits, giving notice and providing burden of proof that are essential to avoid.

The chapter critically analyzed late or a delay in performance, and revealed that late performance in itself will not constitute a fundamental breach as described in Article 25 of the CISG. Critics agreed that only when the contract deals with seasonal goods, or goods ordered for a special event, or where the buyer has informed the seller that it has a fixed date of delivery with its own sub-buyers, a delay will constitute a fundamental breach. The innocent party can turn the delay into a fundamental breach by giving notice to the other party of its breach and setting an additional reasonable time. Furthermore, when opting to avoid, the innocent party still has to uphold restrictions on time limits, give notice and provide burden of proof that are essential to avoid.

The discussion on anticipatory breach argued that a higher probability of certainty must exist that the breach will occur.<sup>691</sup> It was also noted that repudiation is key to understanding the detriment and foreseeability in all material breaches. There should be no need for the innocent party to await the anticipated breach. The conduct or circumstances that make it clear that such a breach will occur can lead to the assumption that the other party is already in breach and this entitles the innocent party to avoid the contract. Some critics whose views were debated in this chapter argued that it does not matter whether or not the breach is caused by the guilty party or by circumstances beyond its control. In other words, while the guilty party can have a defense against a claim for damages under Article 79, the innocent party is still entitled to avoid the contract. The failure by a party to give adequate assurances that it will perform when properly requested to do so under Article 71(3) of the CISG may help make it “clear” that it will commit a

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<sup>691</sup> Germany 15 September 1994 Landgericht [District Court] Berlin (Shoes case) [<http://cisgw3.law.pace.edu/cases/940915g1.html>].

fundamental breach. Azeredo da Silveira<sup>692</sup> added that Article 72(1) CISG requires, as a first condition, that the party who intends to declare the contract avoided must ensure that it is “clear” that the other party will commit a fundamental breach. In other words, “repudiation involves conduct on the part of one party to the contract which when viewed objectively is such “as to convey to a reasonable person in the situation of the other party repudiation or disavowal either of the contract as a whole or of a fundamental obligation under it.”<sup>693</sup>

The chapter discussed restitution as a remedy that occurs when the contract has been avoided or ended earlier due to a fundamental breach. It was stated in the analysis on restitution that both parties are released from all obligations of the contract. A party loses the right to declare the contract avoided if it cannot return the goods in substantially the same condition in which they were received them.<sup>694</sup> It was then argued that it is possible that the right to avoid is excluded unless full restitution of the goods is performed. But some critics discussed in this chapter are of the opinion that partial restitution comes into play if full restitution of the goods is impossible. This above argument means that the right to restitution is limited to what has been supplied or paid under the contract.

Payment of interest and compensation for the benefits which a party derived from the goods, is not fixed and governed by Article 84 of the CISG. Equally, as in Article 78, this gap has to be filled by redress to the applicable national law as determined by the rules on conflicts of law. The analysis on restitution showed that the CISG still has to address the following on restitution; the expenses incurred in making restitution, right acquired by third parties and the location where restitution is to be made.

The chapter finally argued that ‘automatic’ avoidance is not permitted under the CISG. The innocent party must send a notice of avoidance when a fundamental breach occurs or is about to occur. The notice should show the time frame and specify that avoidance will occur. However,

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<sup>692</sup> (2005) “Anticipatory Breach under the United Nations Convention on Contracts for the International Sale of Goods” *Nordic Journal of Commercial Law* .[<http://www.cisg.law.pace.edu/cisg/biblio/azeredo.html>].

<sup>693</sup> *Laurinda (Pty) Ltd v Capalaba Park Shopping Centre (Pt)y Ltd* (1989) 166 CLR 623 per Deane and Dawson JJ.

<sup>694</sup> Article 82 (1) *ILM* A similar approach is seen in the instance of specific performance where a party is denied the right to claim substitute goods in certain instances where they can no longer make restitution.

problems with notice are evident when dealing with the flexibility of timeliness. Different countries have different guidelines when interpreting reasonable time. Conflicts might arise as what is acceptable in one system of law is unacceptable in the other. Although failure to notify the other party renders the declaration of avoidance ineffective, it is not always possible to give a notice in all situations. These exceptions show that the CISG is on one hand flexible in its requirements to avoid, and on the other hand, the CISG is sometimes inflexible as preservation of a contract its cornerstone principle. Avoidance is only considered as remedy of last resort. And even when that is granted, the innocent party must not only exercise the right to avoid but is required to uphold restrictions on time limits, give notice and provide burden of proof that are essential to avoid. Chapter 5 offers a critical and comparative analysis of the legal systems.

## 5.0 CHAPTER 5: Critical comparison of the concept of termination in South Africa, England and the CISG

### 5.1 Introduction

The aim of this chapter is to critically compare cancellation in South Africa, with discharge in England and avoidance for the CISG. There is a need to provide a brief context that should justify why it is important to compare English sale law, South Africa sale law and the CISG. Changes in socio-political and economic levels of advancement in the context of globalization affect legislative intention, legislative history, and influence or engineer the laws that States construct, use, amend or adopt in dealing with dispute resolution in contracts law. England and South Africa are not members of the CISG. Despite this fact English and South African sales law recognize the differences between primary contractual remedy regimes of common law versus civil law systems. However, in English sales law, damages constitute the primary remedy. Civil law systems have a strong adherence to the doctrine of *pacta sunt servanda*.<sup>695</sup> The differences between the primary remedies for breach of contract under South African and English law are most relevant for interpreting and understanding the differences between cancellation and discharge under South African law and English law respectively.

Furthermore, it is imperative to compare the two systems with the CISG that accommodates common law and civil law systems. CISG is most relevant for England which is a European Union member in light of the fact that all EU member states with the exception of Portugal are CISG contracting states.<sup>696</sup> The complexity of the CISG is that upon adoption it becomes the domestic law of the country. There is an imperative in relation to Art 7 of the CISG, to interpret it in view of its international nature since the CISG creates a parallel sales regime, one for domestic sales and one for international sales,<sup>697</sup> it is important to evaluate how the differences between domestic legal system and the convention can assist or enhance English and South Africa's sales law. At the same time, the CISG is constantly evolving, through revision, adding and amending of its sales laws.

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<sup>695</sup> South Africa has a mixed legal system evidencing both common law and civil law influences.

<sup>696</sup> My study does not address the new development that saw England successfully vote to move out of the EU after a referendum on the 23<sup>rd</sup> of June 2016. This study was carried out before BREXIT.

<sup>697</sup>

The chapter argues that all the three terms relate to the same remedy, namely the lawful termination of the contractual relationship by one of the parties due to a breach by the other party. But there are significant differences in the application of cancellation, discharge and avoidance that warrant a final critical reflection in this concluding chapter of the study. This chapter will do so by critically analysing whether the questions of the study have been answered and the objectives met.

## **5.2 Terms for termination under South Africa, English legal system and the CISG**

### **5.2.1 Introduction to terms**

The first question of the study was:

**What are the terms used to define termination under South Africa, England and the CISG?**

The study critically analysed three terms namely; cancellation for South Africa, discharge for English Law and the CISG.

### **5.2.2 South Africa: cancellation**

This study stated that cancellation<sup>698</sup> is the term used under South African law to terminate a contractual relationship due to a breach. Cancellation is an extraordinary remedy<sup>699</sup> available to the innocent party if the breach is sufficiently serious or material. Cancellation is aimed at the rescission of a contract.

### **5.2.3 English law: discharge**

England has a number of terms such as ‘rescission’<sup>700</sup>, ‘cancellation’<sup>701</sup>, and ‘termination’ to refer to undoing or ending a contractual relationship<sup>702</sup>. However, to avoid conceptual muddle<sup>703</sup>,

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<sup>698</sup>Eiselen *Remedies* 308; Hutchinson and Pretorius *Contracts* 304; .Hutchinson *Breaches* 278; Van Der Merwe *et al Contracts* 399.

<sup>699</sup>Eiselen *Remedies* 304; Eiselein *Comparison* 15; Christie *Contracts* 539.

<sup>700</sup>*Tropical Traders Ltd v Goonan*(1964) 111 CLR 41 (right to ‘rescind’ sale of land contract); *Hyundai Heavy Industries Co Ltd v Papadopoulos* (1980)1 WLR 1129;(1980) 2 All ER 29 (right to ‘rescind’ shipbuilding contract); *Legione v Hateley* (1983) 152 CLR 406; 46 ALR 1 (sale of land would become ‘rescinded’ on failure to remedy default following notice).

<sup>701</sup> *Bunge Corp v Tradax Export SA* (1980) 1 Lloyd’s Rep 294 at 309 (affirmed *sub nom Bunge Corp New York v Tradax Export SA Panama* (1981) 1 WLR 711). See also *International Therapeutics Inc v McGraw-Edison Co*, 721 F 2d 488 at 492 (5th Cir, 1984).

<sup>702</sup> Beale, *Bishop Furnstone Cases* 546; Treitel *Contracts* 319; Beatson *Contracts* 568; Furnstone *Contracts* 604; Atiyah *Contracts* 48; Poole *Textbook* 9.

<sup>703</sup> McBride

the term discharge was used in this study to refer to the state where a contract may be ‘avoided’,<sup>704</sup> or is brought to ‘an end’.<sup>705</sup>

#### 5.2.4 CISG: avoidance

The study also established and argued that avoidance<sup>706</sup> is the term used under CISG to end a contractual relationship and entitles a party to rescind a contract due to a fundamental or material breach<sup>707</sup>. Rescission is seen as an extraordinary remedy which should only be countenanced in the most serious of cases where the seriousness of the breach justifies avoidance.<sup>708</sup> Avoidance of a contract is generally viewed as a remedy of last resort under the CISG.<sup>709</sup>

#### 5.2.5 Conclusion on terms

In conclusion to the section describing the terms used in this study it was shown that South Africa, England and the CISG use cancellation, discharge and avoidance respectively, as analogous to termination of a contract. This study stated that cancellation<sup>710</sup> is the term used under South African law to terminate a contractual relationship due to a breach. Cancellation is an extraordinary remedy<sup>711</sup> available to the innocent party. The term cancellation implies a unilateral act of a valid contract<sup>712</sup> which entails a drastic step of bringing the transaction to an abrupt and premature end, contrary to the original intentions of the parties’.<sup>713</sup> The other terms used in South Africa are repudiation, and rescission. But, repudiation is a term that technically refers to a breach of contract and not the exercise of a remedy. Rescission is used when there is a misrepresentation inducing a party to a contract. As such rescission desires to set the contract aside *ab initio*. The study thus recommends lawmakers and researchers to strive for clarity of the use of legal language and precision of interpretation of cancellation, repudiation and rescission as argued above.

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<sup>704</sup> CISG, arts 49, 64 (right to ‘declare the contract avoided’).

<sup>705</sup> *Ashdown v Kirk* [1999] 2 Qd R 1 at 5 (sale of land to be ‘at an end’).

<sup>706</sup> El-Saghir *Article 25 CISG-UP* 124-133; Koch *Article 25 CISG-PECL* 335-339.

<sup>707</sup> El-Saghir *op cit* 131; Koch *op cit* 336; Schlechtriem and Schwenzler *Article 25* ss1-5; Kritzer and Eiselen *ICM* ss 87; Lookofsky *CISG* 63; Ferrari *Breaches JLC* 489.

<sup>708</sup> Schlechtriem and Schwenzler *Commentary* 399-402.

<sup>709</sup> *Op cit*

<sup>710</sup> Eiselen *Remedies* 308; Hutchinson and Pretorius 304; Hutchinson *Breaches* 278; Van der Merwe *et al Contracts* 399.

<sup>711</sup> Eiselen *Remedies* 304; Christie *Contracts* 539.

<sup>712</sup> Christie *Contracts* 539.

<sup>713</sup> Hawthorn and Pretorius *Contracts* 341.

It was found out in the study that England has a number of terms such as discharge, ‘rescission’<sup>714</sup>, and repudiation to refer to undoing or ending a contractual relationship<sup>715</sup>. The study argued that discharge is a term better used when a contract ends due to breach as it represents the point at which one party is no longer bound by its’ obligations under the contract<sup>716</sup>. As a remedy, discharge is a useful term because it refers also to the ending of the primary obligations and creation of secondary obligations under the contract.<sup>717</sup> It is not the contract itself that is terminated, but rather the obligations of the injured party to perform its obligations under that contract. Rescission was understood to refer to the retrospective cancellation of a contract *ab initio*, as for instance, when one party is guilty of fraudulent misrepresentation. It was argued that repudiation is a breach and, therefore, is not the appropriate term to describe a situation where the refusal or inability to perform is justified. From the above critical analysis the conceptual muddle<sup>718</sup> has been clarified. As pointed above, the term discharge was preferred in this study to refer to the state where a contract may be ‘avoided’<sup>719</sup> or is brought to ‘an end’.<sup>720</sup>

The study argued that avoidance ends contractual relationships where the conduct by one party in the contract deprives the other party of what it is entitled to receive or expect under the contract. The debate above on what avoidance is, is governed by art. 61.<sup>721</sup> From the debate it emerged that the CISG was drafted partly as a compromise between Common law drafters and Civil Law

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<sup>714</sup>*Tropical Traders Ltd v Goonan*(1964) 111 CLR 41 (right to ‘rescind’ sale of land contract); *Hyundai Heavy Industries Co Ltd v Papadopoulos* (1980) 1 WLR 1129; (1980) 2 All ER 29 (right to ‘rescind’ shipbuilding contract); *Legione v Hateley* (1983) 152 CLR 406; 46 ALR 1 (sale of land would become ‘rescinded’ on failure to remedy default following notice).

<sup>715</sup> Beale, *Bishop Furmston Cases*; *Treitel Contracts* 319; *Beatsons Contracts* 568; *Cheshire, Fifoot and Furmston Contracts* 604; *Atiyah Contracts* 48; *Poole Contracts* 9.

<sup>716</sup> *Furmston et al Contracts* chs 18–20; *Beatson Contracts*, chs 13–16.

<sup>717</sup> *Martin and Turner Contracts* 400.

<sup>718</sup> *Treitel Contracts* 139.

<sup>719</sup> *Honnold Uniform Law CISG*, Arts 49, 64 (right to ‘declare the contract avoided’).

<sup>720</sup> *Ashdown v Kirk* (1999) 2 Qd R 1 at 5 (sale of land to be ‘at an end’).

<sup>721</sup> *Honnold Uniform Law* 377; *Bortolotti Remedies* 335-338.

*If the buyer fails to perform any of his obligations under the contract or the Convention, the seller may:*

(c) *Exercise the rights provided in Articles 62 to 65;*

(d) *Claim damages as provided in Articles 74 to 77.*

(2) *The seller is not deprived of any right he may have to claim damages by exercising his right to either remedy.*

(3) *No period of grace may be granted to the buyer by a court or arbitral tribunal when the seller resorts to a remedy for breach of contract.*

drafters who wished to avoid the baggage that came with certain terms such as rescission, termination and repudiation. Furthermore, the discussion above revealed that critics arrived at the word 'avoidance' as a technical term, adopted and given a uniform meaning in the Convention whose wording or expression in other languages does not always have the same definite legal significance attributed to it. Diverse domestic rules needed to be replaced with uniform international laws. The section argued that a compromise and consensus had to be reached and accepted by the legislators on the suitability of the use of the term avoidance.<sup>722</sup> Furthermore the discussion maintained that under the CISG avoidance denotes an early end to the contract and comprises national concepts of rescission and termination.<sup>723</sup> As stated in the introduction to this chapter, all three terms, namely, cancellation, discharge and avoidance relate to the same remedy, namely the lawful termination of the contractual relationship by one of the parties due to a breach by the other party. But, it is cautioned in this study that researchers need to be aware of the possible confusion that may result from the use of different terminology if one is not careful when doing comparative research and reading foreign cases.

### **5.3 Requirements for cancellation, discharge and avoidance**

#### **5.3 .1 Introduction**

The third question of the study required a discussion of the requirements of termination of contract under South Africa, England and the CISG. The question was:

#### **What are the requirements for termination under South Africa, England and the CISG?**

In response to this question it was noted that the main requirements for termination of contract in South African law are the acknowledgment of the materiality of breach, production of notice of cancellation and mutual restitution. Under English law the main requires are fundamental or repudiatory breach, election, affirmation and termination, while for the CISG, the main requirements are fundamental breach, notice for avoidance and *Nachfrist* period. These requirements are critically analysed in the sections below.

#### **5.3 .2 Requirements for cancellation**

The study established that in South African law, there are three requirements necessary for cancellation. These are materiality, notice of cancellation and mutual restitution.<sup>724</sup> In order to

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<sup>722</sup> Harvard *Unification* 97.

<sup>723</sup> Enderlein and Maskow *Remedies* 340; Enderlein *Rights* 195; Tallon *Avoidance* 602; Bianca and Bonell *Commentary* 28.

<sup>724</sup> Eiselen *Remedies* 32-33; Hawthorn and Kushche *Contracts* 403.



show how significant these requirements are to cancelling or terminating a contract, it is important to recap the arguments made in chapter two, starting with the idea of materiality.

Chapter two identified late performance, positive mal-performance, prevention of performance, and repudiation, (anticipatory breach) as material/serious breaches that may result in the coming to an end of a contract<sup>725</sup>. The principles that inform the decision to bring a contract to an end have been discussed above, in this chapter. So, what is key and deserves emphasizing further in this section is the meaning of ‘materiality’ of a breach. Material breach is a serious breach that goes to the root of the contract. Going to the root means that the contract has been destroyed fundamentally, in such a way that it prevents a party from getting what it initially bargained for. However, a minor breach can result in an abrupt ending of a contract when a cancellation clause or *lex commissoria* is present.

It was also argued in chapter two that South African law requires that notice of cancellation be clear and unequivocal, and takes effect from the time it is communicated to the other party<sup>726</sup>. This means that once a major breach justifies cancellation, the innocent party is faced with an election either to affirm or cancel the contract. The innocent party is given reasonable time to elect.<sup>727</sup> An election once made is final and irrevocable, unless the other party consents to its reversal. If the injured party elects to cancel the contract, he/she must notify the other party of the decision, and the language in the notice of cancellation must not be ambiguous<sup>728</sup>. But, failure to make the election within a reasonable time, may lead to the inevitable conclusion that the innocent party has elected to keep the contract intact. In the event of late performance, the innocent party may only cancel the contract when the period of time stipulated in notice of cancellation of contract is reasonable under the circumstances.

The significance of notice of cancellation is that it spells out obligations of the party and reveals the procedures to be followed when one cancels within reasonable time. If these procedures are not followed one cannot cancel. Although the requirement of notice of cancellation mentions reasonable time what amounts to ‘reasonable time’ is a flexible concept. This fact suggests that

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<sup>725</sup>Eiselen *Remedies* 323; Hawthorn and Lotze *Contracts* 204 .

<sup>726</sup>Joubert *Contracts* 236; Kerr *Contracts*; Hutchinson *Contracts* 278; Eiselen *Remedies* 311 and 323.

<sup>727</sup>*Bwditch v Peel & Magil* 1921 AD 561 AT 572-3; *Culverwell v Brown* 1990 (1) SA7 (A) at 17.

<sup>728</sup>*Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd* 1985 (4) SA 809(A) at 830,842; *Swart v Volsoo* 1965 (1) SA 100 (A) at 105.

exactly how long reasonable time is, remains vague and a grey area. This legal ambiguity suggests that South Africa law needs to be precise with legal terms to avoid time wasting when dealing with cases that involve cancellation. Furthermore, there is need for South African legal experts to distinguish notice from choice to elect to end a contract and capture these terms separately in the country's published/printed sales law statutes.

In this study, it was argued that restitution is a consequence of cancellation under South African law<sup>729</sup>. Restitution requires both parties to restore or give back whatever performance that was received in the contract before it was cancelled<sup>730</sup>. This requirement is significant because cancellation extinguishes obligations as well as creating new obligations. On the positive side restitution restores confidence, certainty and each party is entitled to get damages in the end. However, this same requirement can be rather too strict for the parties because if there is no restitution, there is no cancellation. It is important to stress that in South African law restitution might not be exactly in the same manner in terms of quality and quantity as one would have invested time, money and effort which are measurable. There is, therefore, need to craft restitution laws that can come close and as precise as possible to the quantum of damage whether it is measured in money or performance and create an atmosphere of legal certainty of what penalties awaits the defaulting party.

### **5. 3.3 Requirements for discharge**

It was revealed in this study that the requirements for discharge are fundamental or repudiatory breach, election, affirmation and termination.<sup>731</sup> A fundamental breach undermines the core of contract. Anticipatory repudiation justifies the plaintiff's action of avoiding wasteful expenditure of preparing for performance which the plaintiff had been already told would not be accepted.<sup>732</sup> Every breach of contract can give rise to a claim for damages,<sup>733</sup> and this fact gives an aggrieved party the incentive and right to undo the contract by terminating or rescission. Requirements for rescission are order of performance and serious failure to perform resulting in depriving the

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<sup>729</sup> Chen-Winchart *Contracts* 532.

<sup>730</sup> Eiselen *Remedies* 325.

<sup>731</sup> Atiyah *Contracts* 404.

<sup>732</sup> Martin and Turner *Contracts* 450; Poole *Cases* 334.

<sup>733</sup> Poole *Contracts* 322.

injured party of ‘substantially the whole benefit’<sup>734</sup> which was intended and that one should obtain; or when the breach ‘goes to the root of the problem’.<sup>735</sup>

It was observed in the study that under English law, the requirements of performance maybe in the agreed order but deficient in quantity or quality, or may be tendered after the agreed time<sup>736</sup>. Furthermore, it was noted that the requirement may be expressed in vague phrases. However, on the positive side, English Law has anticipated the limitations of the façade behind the vague language. English courts have applied a number of practical tests to bring a sense of confidence and certainty to the ambiguous terms of the requirements<sup>737</sup>. For example, on the issue of deciding the adequacy of damages, the first test is meant to ensure that the injured party is adequately protected by either an action of damages or drastic remedy in the form of rescission.

On the requirement of reasonableness of time of accepting further performance, it was observed that English courts apply the relevant factor being the ratio of failure to the performance that was bargained for. In one case<sup>738</sup> and in another case,<sup>739</sup> a tenor had been engaged for the 1875 season at Covent Garden, which was to last for three and a half months. It was held that this failure to attend rehearsal on account of illness on 4 out of 6 days before the season opened did not justify dismissal. The test was used to determine whether or not failure to remedy the unseaworthiness of a chartered ship justifies rescission of the charter party.<sup>740</sup> The English courts have also used the ulterior motives test. In this test, a bad bargain is the cause why courts are reluctant to hold that failure was sufficiently serious as ‘contracts are made to be performed and not to be avoided according to the whims of the fluctuating markets’.<sup>741</sup>

It can be restated that, arguably the English law is flexible and possibly a realistic approach because a person may be held to have repudiated a contract without intending to do so<sup>742</sup>. However, it is not what the party intends that matters, but the reasonable interpretation that may

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<sup>734</sup> *Photo Production Ltd v Securior Transport Ltd* (1980) AC 827 at 849

<sup>735</sup> *Poussard v Spies and Pond* (1876) 1 QBD 410 at 414.

<sup>736</sup> *Poole Contracts* 334.

<sup>736</sup> *Martin and Turner Contracts* 450

<sup>737</sup> *Furmstone Contracts* 598-9, *Treitel Contracts* 319-20.

<sup>738</sup> *Maple Flock Co Ltd v Universal Furniture Products (Wembly) Ltd* (1934) 1 KB 148.

<sup>739</sup> *Bettini v Gye* (1876) 1 QBD 183

<sup>740</sup> *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* (1962) 2 QB 26; *The Hermosa* (1982) 1 Lloyd’s Republic 570.

<sup>741</sup> *The Hansa Nord* (1977) QB 44 at 71.

<sup>742</sup> *Treitel Remedies* 321-324

be placed on the party's words or behavior by the other party. Furthermore, a breach or repudiation is treated very much like a contractual offer in that it has no legal effect until it is accepted<sup>743</sup>. The other party is entitled to either accept or affirm the contract, and thus in effect reject the proposed termination. Acceptance may be express or inferred from conduct. However, a party may be bound by an acceptance of breach or repudiation either because it intended to accept it, or because the party has led the other party to believe that it intended to do so, and thereby induce the other party to act to its prejudice. In short, in English law, if the contract is affirmed following a repudiatory breach, both parties must continue to perform their contractual obligations.<sup>744</sup>

### 5.3.4 Requirements for avoidance

The main requirements for avoidance under the CISG are a fundamental or a material breach, notice for avoidance, and compliance with the *Nachfrist* period requirements in the case of late delivery.<sup>745</sup> Article 25 is central in its importance for the CISG.<sup>746</sup> The article emphasizes the preservation of the contract (*favor contractus*) and the relationship created under it. However, avoidance is seen as an extraordinary remedy.<sup>747</sup> Late delivery, non-conformity, non-performance and anticipatory breach are the forms of material breach under CISG<sup>748</sup>. However, what is emphasized in the interpretation of what is substantive of breach and that may result in avoidance is viewed different by scholars. For example, delivery does not in itself constitute a fundamental breach. It must be made fundamental by complying with the *Nachfrist* period requirements. But, non-conformity focuses on lack of conformity as a condition for avoiding. In contrast, failure to provide a letter of credit and refusal to take delivery justifies an avoidance of contract after an additional period of time. In anticipatory breach the innocent party is entitled to avoid a contract based on an expectation loss.<sup>749</sup> However, the aggrieved party has to prove the anticipated detriment to the contract and provide evidence of possible substantial deprivation that

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<sup>743</sup> Atiyah *Contracts* 49.

<sup>744</sup> Poole *Cases* 338.

<sup>745</sup> Schlechtriem and Schwenger *ICM section 87*; Lookofsky *Contracts* 63; Ferrari *Breaches* 489–550; Magnus *Avoidance* 423–436; Zeller *Breaches* 81–94.

<sup>746</sup> Schlechtriem and Schwenger *ICM section 87*; Staudinger and Magnus *Commentary* ss 1-3.

<sup>747</sup> Schlechtriem and Schwenger *Commentary* ss 1–5.

<sup>748</sup> Treitel *Remedies* 318

<sup>749</sup> Babiak *Breaches* 114.

the party did not foresee and that a reasonable party would not have foreseen such a loss.”<sup>750</sup> The study argued that although *Nachfrist* can lead to automatic avoidance, the CISG has an in-built understanding that assumes the aggrieved party must give notice and then elect to avoid a contract.

#### **5.4 Conclusions to requirements for cancellation, discharge and avoidance**

This conclusion critically summarized the analysis of the requirements of cancellation, discharge and avoidance in greater detail. The study revealed that South Africa uses the terms materiality, notice of cancellation and mutual restitution as requirements of terminating a contract. It was observed that each of these terms emphasize different aspects of what constitutes materiality. *Mora debitoris* entitles or warrants cancellation of a contract in the presence of a cancellation clause, when “time is of the essence”. But when time is not of essence a material breach has to be present. The significance of the notion “time is of the essence of the contract” relates to the consequences of the breach and not to the breach itself. However, there appears to be conflict of authority in that when no time for performance is fixed but, ‘time is of the essence’, the debtor is not in *mora* and the creditor cannot cancel for nonperformance unless a proper demand for performance has been made.

The study was supported by scholars<sup>751</sup> in arguing that *mora creditoris* is a material breach that occurs when the creditor culpably fails to cooperate timeously with the debtor so that the latter may perform his or her obligations.<sup>752</sup> But it also emerged in the analysis that the main effect of *mora creditoris* might shift responsibility for further delay or nonperformance onto the creditor<sup>753</sup> or might make it impossible for the debtor to perform on time.<sup>754</sup> In chapter four the study further argued and most mainstream scholars agreed that although giving notice usually justifies the grounds upon which the contract may be cancelled, the innocent party is faced with an election either to affirm or cancel the contract.<sup>755</sup> The study argued that restitution aims to

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<sup>750</sup> Babiak *Breaches* 114.

<sup>751</sup> Hutchinson and Pretorius *Breaches* 306.

<sup>752</sup> Hutchinson and Pretorius *Breaches* 306; Van der Merwe *et al Contracts* 290-291.

<sup>753</sup> Christie and Bradfield *Contracts* 534, 538–540.

<sup>754</sup> *Leviseur & Co v Highveld Supply Stores* 1922 OPD 233 239; *Leviseur v Frankfort Boere Ko Operatiewe Vereeniging* 1921 OPD 80.

<sup>755</sup> Eiselen *Remedies* 327-329; Christie and Bradfield *Contracts* 563.

return the parties to the position they were in before the contract,<sup>756</sup> either by payment of money equivalent or through the recovery of goods or duties already performed.<sup>757</sup>

On the requirements for discharge in England, the study revealed that emphasis is placed on fundamental or repudiatory breach, election, affirmation and termination. The study showed that all the breaches under English law are underwritten or defined by an assumption that time is of essence and also that one is expected to give notice, and elects to discharge. It was argued in the study that similar to South African law, as the analysis<sup>758</sup> on English law might appear at first sight, there are a number of differences. Firstly, in English law where time is of the essence, untimely performance will be a breach of condition, and specific performance will not be available to the party in default. Secondly, in English law, to equate a non-essential time stipulation with one such that no breach does more than give a right to damages does violence to the historical roots of the doctrine, which was grounded on the assumption that the breach *did* give a greater right at common law, namely the right to terminate. Where time was not of the essence, a decree of specific performance would be granted. But even though it may now be true to say that a party whose untimely performance amounts to a breach of warranty may obtain specific performance in some cases, such a remedy is by no means available in all situations.

The study demonstrated that in the CISG, fundamental or a material breach, notice for avoidance, and the *Nachfrist* period, are necessary requirements to justify avoidance. The debate on fundamental breach concluded that the key words detriment, substantial deprivation and foreseeability are guidelines used by courts and commentators to determine the materiality of breach.<sup>759</sup> The study stated that a right for the seller to declare the contract avoided is governed by the *Nachfrist* period under Article 63 and 64 of the CISG which allows additional time for buyer before contract is avoided. A *Nachfrist* notice is limited to non-payment of goods and taking delivery and where the seller wants to provide the basis for avoidance without proof that the delay constitutes a fundamental breach. The seller's non-compliance with the *Nachfrist*, might result in automatic avoidance as a notice would have been sent already. While it appears

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<sup>756</sup> Christie *Contracts* 447.

<sup>757</sup> *Van Gelderen v Schaff* 1912 CPD 76.

<sup>758</sup> *Borough Council* (1978) AC 904 (HL)

<sup>759</sup> Schlechtriem and Schwenzer *ICM* 87. Lookofsky *Contracts* 63; Ferrari *Article 25* 489–550; Magnus *Avoidance*, 423–436; Zeller, (2004), 81–94.

that in the CISG, *Nachfrist* can lead to automatic avoidance, in South Africa a party has to give notice to cancel unlike in English law where a party must first give notice and then chose to elect to discharge.

The CISG believes that in the interpretation, international case law should be used even though it is not binding. The thinking or reasoning behind the above assertion is that conflicts might arise because what is acceptable in one system of law may or actually is unacceptable in the other. In the CISG, although failure to notify the other party renders the declaration of avoidance ineffective, it is not always possible to give a notice in all situations. These exceptions show that the CISG is on one hand flexible in its requirements to avoid, and on the other hand, the CISG is sometimes inflexible as preservation of a contract its cornerstone principle. Avoidance is only considered as remedy of last resort. And even when that is granted, the innocent party must not only exercise the right to avoid but is required to uphold restrictions on time limits, give notice and provide burden of proof that are essential to avoid.

The three systems<sup>760</sup> analysed in this study are similar in that they distinguish between fundamental/material breach and non-fundamental or non-material breach.

The significance of this agreement among the three systems is that the above distinctions are viewed as being at the heart of what determines the life or death of a contract. South Africa and the CISG are further similar in that they seem reluctant to grant the remedy of cancellation and avoidance respectively. The two legal systems emphasize the preservation of the enforceability of the contract and therefore are strict in their application of the requirements of cancellation and avoidance.

While notice is crucial for termination of a contract in all the three systems, the CISG and England go further to stipulate that the party wishing to terminate a contract must elect to do so and communicate this intention to the other party.<sup>761</sup> Under the CISG, fundamental breach rests on a nuanced description of what is detrimental, substantial deprivation and foreseeability that may lead to voiding the contract. It is the existence of the meanings of several terms explained and included in the CISG articles that inclined my study to argue that the CISG reveals

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<sup>760</sup> Schwenger, Fountoulakis and Dimsey *Sales*, V,2.

<sup>761</sup> Eiselen *Remedies* 14.

considerable clarity and flexibility in the terms it uses. This can provide critics and lawmakers with interpretive space that is broad as well as specific, drawn from domestic and international context but still speaking to or addressing the uniqueness of the law of each of the country that is signatory to the CISG. This is unlike South African law that limits its definition of cancellation to materiality and fundamental breach. England simply describes its term as fundamental breach. The difference in the terminology used is significant in that it can sensitize researchers to be aware of the possibility of confusion that may arise when dealing with foreign cases.

However, one of the most important differences of the legal systems is that the CISG calls for the *Nachfrist* period while South Africa places the guilty party in *mora* under late performance. England uses *estoppel* to prevent the guilty party from performing. The CISG uses article 26 for notification, unlike the SGA which uses section 15. CISG and South Africa state that the time factor for giving notice should be reasonable. The CISG does not state the degree of reasonableness and therefore, it appears to be flexible. Furthermore the CISG and South Africa allow the seller to cure its breach, unlike England that does not give a long time because it is inclined to favor discharge.

## **5.5 Consequences of cancellation, discharge and avoidance**

### **5.5.1 Introduction**

The study explored the consequences of cancellation, discharge and avoidance under South Africa, England and the CISG respectively. It was found out that there are similarities and differences among the three legal systems and these are discussed in the sections below.

### **5.5.2 Consequences of cancellation under South African law**

Consequences of cancellation under South African Law are that parties are discharged from performing further obligations<sup>762</sup>. The party cancelling must also be able to restore performance. Exceptions are available due to impossibility such as the loss not being the fault of the guilty party or due to inherent defect. Damages also establish the necessary elements of one's claim such as a party committing a breach of contract or falling into *mora creditoris*, that the innocent

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<sup>762</sup> Eiselen *Remedies* 325.



party has suffered loss for which the guilty party is liable<sup>763</sup>. The object of the award of damages is to compensate the creditor for the loss it has suffered.

### 5.5.3 Consequences of discharge under English Law

The requirements for discharge are fundamental or repudiatory breach, election, affirmation and termination.<sup>764</sup> However, the consequences<sup>765</sup> for discharge relate to the obligations of parties for termination of contract. For example, while discharge absolves the guilty party from performing primary duties under the contract, the same primary duties are replaced by secondary obligations to pay damages. While the innocent party is absolved from having to perform any duties not yet due under the contract and is freed from all further liabilities, this absolution is subject to the question of obligations which should have been performed. Additionally, while both parties are liable in respect of accrued obligations which should have been performed before the termination, previously accrued obligations of the innocent party remain binding on it even after termination. In the case of the innocent party treating the contract as having ended, it would be better to talk of termination or discharge rather than rescission.<sup>766</sup> This is because the innocent party would have elected to treat the contract as discharged. However, the party must make its decision known to the party in default since breach does not operate retrospectively.<sup>767</sup>

### 5.5.4 Consequences of avoidance under the CISG

The study noted that the CISG also provides release from obligations, restitution of what has already been performed, the right to calculate damages in an abstract way, and the duty to preserve the goods as consequences of a valid avoidance of the contract<sup>768</sup>. Parties are released from contractual obligations when avoidance occurs. Central obligations under the contract must end when termination becomes effective (Article 81(1))<sup>769</sup>. However, jurisdiction, and arbitration clauses as well as damages remain in force despite any valid declaration of avoidance (Article

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<sup>763</sup>Van der Merwe *et al* *Contracts* 309.

<sup>764</sup>Atiyah *Contracts* 404.

<sup>765</sup>Chen-Winchart *Contracts* 601; Atiyah *Contracts* 404, Martin and Turner *Contracts* 400.

<sup>766</sup>*Johnson v Agnew* (1980) AC 367, (1979) 1 ALL ER 883; *Horsler v Zorro* (1975) 1 ALL ER 584.

<sup>767</sup>*Mussen V Van Diemen's Land Co* (1938) Ch 253 at 260, (1938) 1ALL ER 210 at 216; *R v Ward Ltd v Bignall* (1967) 1 QB 534 at 548, (1967) ALL ER 4499 at 455 as per Lord DiplockLj.

<sup>768</sup>Schlectriem and Schwenzler *Commentary* 1095 and 1101

Bianca, Bonell Tallo *Article 81* note 2,2; Honnold *Article 81* para 440.1; Kroll, Mistellis Viscasillas *Commentary* 110 para 4-5

<sup>769</sup>Eiselen *Articles 71/72 of the CISG* 461- 454.

81(1)<sup>770</sup>. Restitution entitles parties to reclaim what they supplied or paid under the contract (Article 81(2)<sup>771</sup>. Interest on any sum of money has to be repaid and compensation is provided for the benefits which a party derived from the use of the goods (Article 84)<sup>772</sup>. While an abstract calculation of damages for any loss occurs for any damage is made, the party in possession or control of the goods which require restitution has to take reasonable steps to preserve those goods in the interest of the other party, even if the contract has been rightfully terminated (Articles 85 and 86)<sup>773</sup>. This duty of preservation also survives the termination of the contract.

### **5.5.5 Conclusion on consequences of cancellation, discharge and avoidance**

From the above discussions on consequences of cancellation, discharge and avoidance, for South Africa, England and the CISG, it has been shown that the effects of ending a contract are more or less the same. These consequences are release from obligations, restitution of what has already been performed, the right to calculate damages in an abstract way, and the duty to preserve the goods which survives the termination of the contract. However, a point of difference that needs to be highlighted is that South African law emphasizes mutual restitution while English law and the CISG emphasize damages. In addition another point of major difference in the three legal systems is that in the CISG jurisdiction, arbitration clauses remain in force despite any valid declaration of avoidance. In contrast, under English Law the contract will not come to an end due to a wrongful repudiation or fundamental breach but will result in new obligations that have to be fulfilled.

### **5.6 Evaluation of cancellation, discharge and avoidance as a remedy for breach**

#### **5.6.1 Introduction**

The fourth question of the study required critical comparison and evaluation of the effectiveness and applicability of the concepts of cancellation, discharge and avoidance in terminating contracts. The question was:

**To what extent does a critical comparison and evaluation of the similarities or difference in the concepts of cancellation, discharge and avoidance construct and**

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<sup>770</sup> Schlectriem and Schwenzer *Commentary* 104-5.

<sup>771</sup> Schlectriem and Schwenzer *Commentary* 106-7.

<sup>772</sup> Mazzotta *Articles 78/84* 490-499.

<sup>773</sup> Kroll, Mistellis Viscasillas *Article 85-86* 1152-1155.

## **manifest their explanatory potential as remedy of breach in South Africa, England and the CISG?**

In response to this question, the study found out that there are key similarities and crucial differences in the ways the concepts cancellation, discharge and avoidance are interpreted and applied in South Africa, England and the CISG.

### **5.6.2. Critical Evaluation of cancellation, discharge and avoidance**

The similarities central or basic to cancellation, discharge and avoidance are that the terms are used as analogous to termination of a contract due to breach in South Africa, England and the CISG. In the three legal systems contractual obligations come to an abrupt end, and termination of primary obligations gives birth to secondary obligations to pay damages. Notice of intention to terminate a contract is a crucial requirement for all the three systems. The three legal systems are similar also in that they distinguish between fundamental/material breach and non-fundamental or non-material breach. The significance of these facts of the similarities determines the life or death of a contract.

However, there are crucial differences to the interpretation and application of the terms, cancellation, discharge and avoidance. Firstly, the three systems use different technical terms to mean termination. Secondly, South Africa uses the terms materiality, notice of cancellation and mutual restitution whereas England uses fundamental or repudiatory breach, election, affirmation and termination while the CISG fundamental or a material breach, notice for avoidance, and *Nachfrist* period.

Thirdly, English law is different from South African law and the CISG that seem reluctant to grant the remedy of cancellation and avoidance. This is because the two systems emphasize the preservation of the enforceability of the contract and therefore are strict in their application of the requirements of cancellation and avoidance. However, under the CISG fundamental breach rests on three pillars which are detriment, substantial deprivation and foreseeability. This is unlike South African law that limits its definition to materiality and fundamental breach and England that simply describes its term as fundamental breach. This difference is significant in that it reveals the flexibility of the terms used by the CISG.

Fourthly, the CISG calls for the *Nachfrist* period under Article 63 and 64. Placing *Nachfrist* under recognizable articles, allows the CISG to elaborate on the requirements of *Nachfrist*. The fact that the CISG is published means it is an official and identifiable document that would be widely accessible in different countries, and printed in different languages. This allows systematic reflection should lawmakers want to change or amend certain aspects of the articles. A published document is binding and can avoid or lessen differences of interpretation and refers researchers to articles that elaborate on notice and election to avoid.

Although South Africa places the guilty party in *mora* under late performance, there is need for a document that spells out the provisions in different articles. A published document for South Africa would be easy for referencing, intellectual reflection, may allow lawmakers to make amendments whenever conflicting ideas appear. Articles relating to notice might save time when researching because they are written and found in specific articles of the CISG. A published document directs researchers to specific sections or articles which would unambiguously state the need to separate giving notice from the process of exercising the choice to elect to avoid. It is advisable for South Africa to also follow the example provided by CISG to have a considerably detailed published document on sales law.

England uses *estoppel* to prevent the guilty party from performing on notice and election to discharge. In English law, where time is not of the essence, a decree of specific performance is granted. South Africa only emphasizes where time is of essence. It is therefore, advisable that South Africa consider cases where time is not of essence. The advantage is that this would address the problem where a party whose untimely performance amounts to a breach of warranty may obtain specific performance in some cases, even though such a remedy is by no means available in all situations.

The CISG uses article 26 for notification, unlike England which uses the SGA section 15. But the CISG and South Africa state that the time factor for giving notice should be reasonable, even though the CISG does not state the degree of reasonableness and therefore, it appears to be flexible. However, the CISG and South Africa allow the seller to cure it's breach, unlike England that does not give a long time because it is inclined to favoring discharge. It is preferable for South Africa to develop its sales law along the lines of the CISG and England because of their

relative flexibility that anticipate changes in international sales law. The CISG has a plethora of articles in part II and III of the Vienna Convention. These articles allow flexibility of interpretation, and the provisions in the articles allow for checks and balances within the CISG. South Africa needs to follow the CISG in having uniform sales law with detailed regulations that govern sale of goods. This can lead to a more liberal interpretation of the principles and regulations on cancellation. A further difference is that England is governed by the SGA of 1979 and has a number of terms to mean termination. This allows it to offer the remedy of discharge more readily.

### **5.6.3 Conclusion to evaluation of cancellation, discharge and avoidance**

From the critical observations made above on differences, South Africa lags behind England and the CISG in possessing flexible and sophisticated articles and nuanced provisions in its laws of sale of goods. This tends to limit interpretation awarded to legal practitioners and traders.

## **5.7 Conclusion to the chapter**

The aim of this chapter was to offer critical comparative analysis and evaluations of the choice of the terms, general principles, requirements and consequences of cancellation, discharge and avoidance under South Africa, England and the CISG, respectively. The chapter used the questions of the study to guide the analysis in order to give structure and clarify the argument of the study, in a manner that avoids repetition of information in the presentation of the argument. From the exposition above, it is clear that cancellation, discharge and avoidance are remedies in South Africa, England and the CISG respectively. The chapter argued that under South Africa, cancellation is an extraordinary remedy. In England discharge is a right and under the CISG avoidance is a remedy of last resort. The chapter found out that there are similarities and crucial differences key to the way cancellation, discharge and avoidance are interpreted and applied as remedies to breach of contract.

The main similarities are that cancellation, discharge and avoidance are used as analogous to termination of a contract due to breach in South Africa, England and the CISG respectively. Notice of intention to terminate a contract is a crucial requirement for all the three legal systems. In the three legal systems contractual obligations come to an abrupt end but this termination of primary obligations gives birth to secondary obligations to pay damages. The three systems are

similar also in that they distinguish between fundamental/material breach and non-fundamental or non-material breach. The significance of these distinctions is that they determine the life or death of a contract.

However, there are also major differences in the interpretation and application of the terms cancellation, discharge and avoidance under South Africa, England and the CISG respectively. It was highlighted that the three systems use different technical terms to mean termination. South Africa uses the terms materiality, notice of cancellation and mutual restitution whereas England uses fundamental or repudiatory breach, election, affirmation and termination. The CISG uses the terms fundamental or a material breach, notice for avoidance, *Nachfrist* period, and damages. It was also revealed that unlike England, South Africa and the CISG seem reluctant to grant the remedy of cancellation and avoidance respectively. This is because the two systems emphasize the preservation of the enforceability of the contract and therefore are strict in their application of the requirements of cancellation and avoidance. It was shown further that under the CISG fundamental breach rests detriment, substantial deprivation and foreseeability. This is unlike South Africa that limits its definition to materiality and fundamental breach. England merely describes her term as fundamental breach. This difference is significant in that it reveals the flexibility of the terms used by the CISG.

The CISG calls for the *Nachfrist* period while South Africa places the guilty party in *mora* under late performance. England uses *estoppel* to prevent the guilty party from performing. CISG uses article 26 for notification, unlike the SGA which uses section 15. The CISG and South Africa state that the time factor for giving notice should be reasonable. However, the CISG does not state the degree of reasonableness. This 'omission' of not state the degree of reasonableness might appear as flexible or inflexible depending on the cases that are being interpreted in domestic and international contexts. Both the CISG and South Africa allow the seller to cure it's breach, unlike England that does not give a long time because it is inclined to favoring discharge. Furthermore, the CISG has a plethora of articles in part II and III of the Vienna Convention. These articles allow flexibility of interpretation, and the provisions in the articles allow for checks and balances within the CISG. South Africa does not have a uniform sales law but has a number of regulations that govern sale of goods. This can lead to limited interpretation of the

principles and regulations on cancellation. England is governed by the SGA of 1979 and has a number of terms to mean termination. This allows it to offer the remedy of discharge more readily.

To conclude this study, it can safely be suggested that the critical analyses of the terms of ending a contract and sale of goods law on South Africa, in chapter two, revealed that in some important respects, the country has sound laws on sale of goods that have allowed the country to be an economic giant that it is today in Africa. South Africa has over the years developed terms such as cancellation to describe termination of contracts, defined different kinds of breach, put in place requirements for cancellation and suggested different forms of remedy due to breach of contract. To the extent that this economic arrangement based on the existing sale of goods laws- , whether written but not well elaborated or unwritten - has allowed South Africa to do trade with countries in Africa and the international world, it has been argued in this study that the term cancellation and sale of goods laws are satisfactory.

But the study has argued that to say that South African terms that denote termination of contract and sale of goods laws are satisfactory invites one to suggest that the country could develop new terms and better laws. This view was supported by the comparative nature of the study which revealed that in some many ways, English laws and the CISG have better terms for termination and laws that are more accommodative or responsive to the ever-changing international business and its transforming sale of goods laws. South African terms of terminating a contract and sale of goods law can adopt and adapt some progressive international terms and sale of goods laws from other countries or trade blocs. This means South Africa should consider acceding to the CISG. This suggestion is dictated by the fact that international trade is expanding and that South Africa is part of a global system called capitalism which thrives on innovation and change in terms and sale of goods laws. Therefore, new terms and a new sale of goods legislation built on some of the country's existing robust laws can be introduced carefully to enhance economic growth, and the development of the country. In the ever-changing global economic sphere, countries like South Africa find themselves willingly entering into new and complicated trade partnerships such as is demonstrated by the inclusion of the country into BRICS. This reality suggests that in order to keep abreast with fast changing domestic and international terms of ending a contract and the sale of goods law, South Africa should participate actively by sitting at various international

tables were new terms and sale of goods laws are constantly being re-created and modified to benefit countries that have entered into different trade blocs.

One possible way or direction of changing the terms of terminating a contract and sale of goods law for South Africa in order to fully exploit its trade potential is to carefully consider joining the CISG, and also adopt some superior terms of ending a contract and sale of goods laws. This view does not ignore the fact that South Africa belongs to a different legal family and bears strong civil law influence. The idea behind this recommendation is that common law should be adapted to include some of the solutions discussed on English and the CISG that are superior. The English law can be used to improve the domestic sales which will still be applicable even if the CISG is adopted as it only applies to international sales. The argument here is that, any adoption of sales laws from other legal systems that can enhance South African sales law should be considered necessary. While adopting the CISG will not automatically change the domestic law, this is a different solution. Thus, the rationale of adopting a comparative approach in the study of English, South Africa and the CISG sales would be validated further in identifying best practices and in seeking ways of incorporating superior laws to change South African terms of ending a contract and the sale laws. While this process can be externally induced, there is nothing that can prevent South Africa to initiate change of terms of ending a contract from reconsidering or rethinking its own system of sale of goods. A starting point would be for South Africa to move away from a fragmented sales law system towards codifying its legal system so that the sales laws are accessed in one document. This will assist legal researchers to consolidate, and deepen the interpretation of these laws through revision, adding and amending the sales law. The economic and political will to change terminology of ending a contract and the sale of goods law that is internally induced impacts on the meanings of the terms denoting termination. This can do away with the red-tape that prevents South Africans from moving away from constricting terms and maximizing sale of goods amongst its people in the country.

Since 1994, South Africa has been positively opening its economic doors to African countries to do trade and that reality creates an imperative for South Africa to update, modify and introduce new terminology for ending contract and new legislation on sale of goods laws that should benefit the country and the continent. Furthermore a willing desire to change and improve on South Africa's sale of goods law can benefit South Africa's project of modernization in such a



way that South Africa's potential to become an international economic giant is not exploited by other countries. In short, from the findings of the comparative analysis of terminologies of ending contracts and sale of goods law of South Africa, England and the CISG, it emerged that South Africa seems to lag behind in innovating with terms of ending contract and creating new sale of goods laws. The need to change South African terminology of termination cannot happen outside the desired change in some aspects of the sale of goods and this cannot be overemphasized. These changes in the terminology of ending contracts and that sale of laws are overdue.

## **Abbreviations**

CISG	Convention for International Sale of Goods
UN	United Nations
UNCITRAL	United Nations Centre for Trade Law
UNISA	University of South Africa
NYUILP	New York University of International Law & Politics
JCL	Journal of Commercial Law
PILR	Pace Institute Law Review
SALJ	South African Law Journal
SAMLJ	South African Mercantile Law Journal
JLP	Journal of Law and Peace
AJCL	American Journal of Comparative Law
JLC	Journal of Law and Commerce
IBLJ	International Business Law Journal
NWLILB	Northwestern Journal of International Law and Business
JLCICL	Journal of Law and Contemporary Issues in Commercial Law

## **Acts**

Marine Insurance Act 1906

Sale of Goods Act 1979

Sale of Goods Act 1979 (as amended by Sale of Goods Act 1994)

Sale of Goods Act 1893.

The English Companies Act 1985

Unfair Contract Terms Act 1977 (the “UCTA 1977”),

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