

THE BASICS: TERMINATION FOR BREACH OF CONTRACT

10 July 2018

Terminating a contract because one party is in breach is not as straightforward as it sounds. Does the breach entitle you to terminate? Getting the answer right is crucial. Getting it wrong can be very costly.

Here, we consider:

- Repudiatory / anticipatory repudiatory breach of contract
- What do I do if the other party to my contract is in repudiatory breach or there is an anticipatory breach that would amount to repudiation?
- Contractual terms providing for termination
- What if the other party is not to blame for the non-performance?
- What do I need to think about?

Repudiatory breach of contract

A repudiatory breach of contract will allow the innocent party to treat the contract as being at an end. However not all breaches will be repudiatory breaches. The nature of the term and the breach itself are highly relevant.

- **Condition** - if a term is vital to performance of the contract it will be a condition and if the condition is breached the innocent party will be entitled to terminate the contract and claim damages - no matter how minor the consequences of the breach.
- **Warranty** - generally a statement or assurances about a factual matter. A breach of a warranty will not allow for termination, no matter how serious the breach may be. If a breach of warranty occurs the innocent party will only have a remedy in damages.

- **Intermediate term** - a breach of a term that is neither a condition nor a warranty will only justify termination of the contract if the breach is sufficiently serious. The breach must go to the root of the contract, frustrate its commercial purpose or deprive the innocent party of substantially the whole of its benefit. If it doesn't, the remedy will be damages.
- **Refusal to perform** - if a party declares an intention not to perform the contract or some essential aspects of it, the innocent party will be entitled to treat the contract as though it is at an end and will not be required to perform further obligations. Where this occurs before performance is due this will be an anticipatory repudiatory breach. A declaration of non-performance can be express or it can be inferred from conduct. Such conduct would require a reasonable person to conclude that the other party to the contract has no intention of performing its obligations.

Is there a repudiatory breach? In general:

- poor performance on its own will not necessarily amount to repudiatory conduct;
- failing to perform in time will not be a repudiatory breach, although it may be if the contract expressly provides that 'time is of the essence';
- non-payment is unlikely to amount to a repudiatory breach on its own, even if there is a significant delay in payment or a failure to pay more than one instalment; and
- multiple breaches may amount to a repudiatory breach, when one of the breaches on its own will not. For example, a chain of non-payments, particularly when coupled with a failure to engage in communications, could be repudiatory in nature.

What do I do if the other party to my contract is in repudiatory breach or there is an anticipatory breach that would amount to repudiation?

Unless (and until) a repudiation is accepted, the contract will continue and it won't terminate automatically. The innocent party can elect to accept the breach and treat the contract as at an end or it can affirm the contract and require the party in breach to continue to perform. In the case of an anticipatory repudiatory breach, the innocent party can also choose to wait and see if the other party will in fact perform the contract.

In all cases, the innocent party will retain the right to claim damages for the breach(es) in question.

Note, however, that an innocent party has a certain amount of time to decide whether to continue with the contract or to end it. If the decision takes too long, the law will treat the contract as having been affirmed.

The contract will also be treated as having been affirmed if the innocent party acts as though the contract is still in place or does something which can be viewed by the other party as waiving the right to terminate for repudiatory breach.

Affirming the contract means that the right to treat the contract as having come to an end will be lost and both parties will be required to continue to perform their obligations.

The innocent party must communicate its acceptance of the repudiation - and therefore the termination of the contract - to the other party. Once the repudiation has been accepted it cannot be withdrawn.

Contractual terms providing for termination

A contract can **also** expressly provide for termination on an event which would not otherwise be regarded as a repudiatory breach allowing for termination at common law. Some contracts allow for termination in the event of a material or substantial breach (such as breach of confidentiality or a failure to pay), or if there are repeated breaches.

Any contractual right to terminate will operate in addition to any common law rights to terminate - unless those termination rights are expressly excluded. Careful drafting will be required to ensure any termination provisions work and to make clear whether common law rights to terminate remain or are excluded.

Care must also be taken to ensure any notice of termination, which terminates a contract under a specific contract provision, does not then exclude a right for common law damages. The courts have held that any exclusion of common law remedies must be expressed clearly: there must be no ambiguity.

If a notice expressly confirms that termination is under a specified clause (for example a clause providing for termination on an insolvency event) and it makes no mention of the fact the receiving party is in breach of the contract, the innocent party will not be able to recover damages for a repudiatory breach, even if such a breach had occurred.

What if the other party is not to blame for the non-performance?

There may be circumstances that arise which mean a contract cannot be performed, but the non-performing party will not be in breach.

Frustration

A contract may be discharged on the grounds of frustration if something occurs after the contract has been concluded which means it is impossible or will be illegal for one or both parties to perform the contract - or if the obligation to perform is changed into something different to that which was intended.

A frustrating event is one which strikes to the root of the contract and is beyond what was contemplated by the parties at the outset. It must not be due to the fault of any party.

Examples could include:

- destruction of the subject matter by fire;
- unavailability of subject matter;
- a subsequent change in the law making performance illegal; and
- the cancellation of an expected event.

Force Majeure

A force majeure clause in a contract will typically excuse one or both parties to a contract from performing their obligations following the occurrence of specified events, which are outside of their control.

Examples could include:

- acts of God, flood, drought, earthquake or other natural disaster;
- terrorist attack, civil war, war, imposition of sanctions;
- collapse of buildings, fire, explosion or accident; and
- any law or action taken by a government or public body.

If a force majeure clause is triggered then in general:

- The contractual obligations are suspended for as long as the force majeure event continues;
- The non-performing party's liability for non-performance, or delayed performance, is removed - again, usually for as long as the force majeure continues;

- The party who is unable to perform will not be liable for that failure.

Although most force majeure clauses only suspend the performance of obligations some may allow for termination after a specified period, allowing alternative arrangements to be made.

In standard form terms of business force majeure clauses will, however, be subject to the reasonableness requirements set out in section 3(2) of the Unfair Contract Terms Act 1977 or in consumer contracts the Consumer Rights Act 2015 (in respect of which see more in our articles on the [limitations and exclusions of liability for breach of contract and exclusion clauses and the reasonableness test.](#)).

What do I need to think about?

Is termination the best commercial option?

Even if the other party is in breach of contract (in repudiatory breach or in breach of a term which allows for termination) make sure you think about whether termination is the best commercial option. In some instances it may be better commercially to affirm the contract - for example if no one else can supply the goods or services in question. The innocent party can still claim damages.

Be aware of the risks

If the contract is treated as being at an end when the other party is not, in fact, in repudiatory breach, the 'innocent' party could be deemed to have unlawfully terminated the contract and itself be in repudiatory breach. The 'innocent' party could then be liable for substantial damages.

However if, unknown to the 'innocent' party **at the time of termination**, there was a breach which did justify termination, that breach can later be relied on instead. However, this "newly discovered" breach cannot be raised later if it could have been put right (had the other party been given time) or if the party wishing to terminate has waived its right to rely on the breach or is estopped from doing so.

Be careful not to affirm a contract by mistake

Remember, don't take too long to confirm your decision if you are electing to terminate. Taking too long or engaging in conduct which could be read as affirmation could mean the innocent party loses its right to terminate the contract.

Are all contractual obligations extinguished?

Whether a contract term survives termination will depend on how the contract in question is constructed. Very often confidentiality and dispute resolution obligations will continue.

What about mitigation?

A repudiatory breach does not affect the duty of the innocent party to take reasonable steps to mitigate its losses. If a party fails to take reasonable steps to reduce its loss, or takes unreasonable steps which increase its losses, the breaching party will not be liable for such additional sums.

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