

Short notes on:

## **THE REPUDIATION OF CONTRACTS**

### ***Introduction***

A contract is a document signed by two or more parties and gives rise to rights and duties. The terms and conditions stipulated within a contract, therefore, determine the parties' obligations towards each other. Unfortunately, in some cases, the parties to a legally binding contract will neglect the obligations thereto, thus creating a breach of contract. Therefore, this article will explore repudiation as a form of breach of contract.

### ***What Is A Contract?***

A valid contract is an agreement entered into by two or more parties who have the intention of creating legal obligations. The agreement is recognized by law as being binding on the parties. The purpose of the contract is to ensure that the parties honour the promises that they have made to each other. Should either of the parties fail to do so, the aggrieved party may rely on the law to hold the offending party liable to the contract. The law, therefore, provides mechanisms for the enforcement of promises when they are broken.<sup>1</sup> Additionally, legislation regulates the conclusion and performance of agreements to ensure parties appropriately conduct themselves.

### ***When Does Repudiation Occur?***

When a party to a legally binding contract expresses the intention to be no longer bound by the contract or any obligations arising out of the contract, a breach of contract occurs. This breach of contract is referred to as repudiation. Repudiation can occur either expressly or by conduct.

Repudiation is determined by using an objective test. The test considers whether a reasonable person would believe that the party accused of repudiation has acted in a way that shows that they no longer have the intention to fulfil or completely fulfil their duties in terms of the contract.<sup>2</sup> If the party accused of repudiation acted in good faith by misunderstanding the content of the contract,

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<sup>1</sup> Hutchison (ED), Pretorius C(ED), Naude T et al (2017), *"The Law of Contract"*, Third Edition. South Africa: Oxford University Press Southern Africa (Pty) Limited.

<sup>2</sup> Hutchison (ED), Pretorius C(ED), Naude T et al (2017), *"The Law of Contract"*, Third Edition. South Africa: Oxford University Press Southern Africa (Pty) Limited.

they would still be liable for breach in terms of repudiation. Thus, repudiation includes: an unjustified attempt to cancel the contract, denying the existence of a contract, refusing to perform or accept performance, notification of inability to perform, offering incomplete or defective performance as full performance, insufficient notification of the termination of the contract or the unjustified refusal of an employer to allow their employee to perform their duties.

Repudiation is also known as anticipatory breach because, in some cases, the breach may not have actually occurred yet. The anticipation of repudiation can occur when the accused party notifies the other party that it will not be able to perform on the stipulated date. The repudiation must also be of a continuing nature, in that the party accused of repudiation must have been allowed to correct the breach.<sup>3</sup>

### ***The Consequences Of Repudiation***

When repudiation occurs, the innocent party is allowed the option to reject the repudiation and enforce the continuation of performance in terms of the contract, or the contract may be rescinded.

If the repudiation is accepted, the breach must be of such a severe nature that the cancellation of the contract is justified. If the cancellation of the contract is in anticipation of the breach, it must be of such a nature that if the breach were to occur, the reasonable person could not be expected to abide by the contract. Where the breach occurs in the form of late payment of a debt, then cancellation can only happen if time is of the essence. If not, then the innocent party is not immediately entitled to rescind the contract; instead, they may notify the party that it will rescind if repudiation continues.

Additionally, suppose the contract terms prescribe a procedure to be followed before the innocent party rescinds the contract due to repudiation. In that case, the innocent party is not bound by those terms. However, once the innocent party informs the guilty party of their decision to rescind, then any performance made by the innocent party must be restored by the guilty party.

If the repudiation is rejected, then the guilty party may be forced to perform its duties in terms of the contract. This means that the relationship between the parties will continue as if no repudiation has occurred. Thus, there can be no claim for specific performance or damages arising from the breach.

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<sup>3</sup> Hutchison (ED), Pretorius C(ED), Naude T et al (2017), *“The Law of Contract”*, Third Edition. South Africa: Oxford University Press Southern Africa (Pty) Limited.

The repudiation does, however, allow the innocent party to suspend their duties and obligations for the duration of the repudiation.<sup>4</sup>

## **Conclusion**

Repudiation occurs when one of the parties to a legally binding contract refuses to render performance or renders incomplete performance. Repudiation is a breach of contract that can also occur in anticipation of non-performance. The innocent party of repudiation is entitled to either: accept the repudiation and thus cancel the contract, or they may reject the repudiation, in which case the repudiation will be ignored, and the terms of the contract will remain enforceable.

Contact an attorney at SchoemanLaw for assistance on issues relating to contract, breach, or dispute resolution.

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<sup>4</sup> Hutchison (ED), Pretorius C(ED), Naude T et al (2017), “*The Law of Contract*”, Third Edition. South Africa: Oxford University Press Southern Africa (Pty) Limited.