

REPUDIATION OF TECHNOLOGY CONTRACTS

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Failure to comply with non-essential terms of a contract may now allow the innocent party to terminate a contract.

It is generally accepted that breach of an essential term of a contract can entitle the innocent party to either terminate the contract based on repudiation, and recover damages for loss of the contract, or alternatively to keep the contract alive and recover damages for the particular breach in question. Whether a term is essential depends on whether the term is of such importance that the innocent party would not have entered into the contract unless that term had been included.

Generally, however, if the breach is of a non-essential, or intermediate, term, the only remedy available to the innocent party is seeking to recover damages for that particular breach – it does not entitle the innocent party to terminate the agreement.

However, in December 2007 the High Court in *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd [2007] HCA 61* held that a sufficiently serious breach of a non-essential, or intermediate, term of a contract could in certain circumstances allow the innocent party to terminate a contract for repudiation.

Whether a breach is sufficiently serious will depend on the importance of the intermediate term, and the consequences of the failure to comply with those terms. This is a question of construction of the contract in light of its commercial purpose, and the business relationship between the parties.

In the *Koompahtoo* case, Sanpine failed to prepare development programmes, control a joint venture account, and maintain proper books and records, as specified in the contract. The High Court held that while these terms were intermediate, in that a failure to comply with them was not a breach of an essential term, the breaches were significant and their consequences were serious in that they deprived the innocent party of a substantial benefit for which it had contracted.

In most technology development contracts there are a suite of intermediate, or non-essential terms, which often include such matters as the preparation of reports, the obligation to keep the other party informed of progress, maintenance of records, and other similar obligations. If a party (usually the software provider) fails to comply with these clauses and the consequences of such a failure are sufficiently serious in that they deprive the client of a substantial part of the benefit for which it contracted, a breach by the provider of those intermediate, or non-essential, terms of the contract could give rise to a right of the client to terminate the agreement.

An example of this could be where the provider fails to keep sufficient records of a software development process, which means that the client (or a third party provider) is unable to reconstruct work done by the provider, resulting in substantial loss of time and money to the client.

Suppliers should take note of the extension of existing legal principles in this case to ensure that they comply in all material respects with all terms of the contract, even though they may not at first glance appear to be essential terms of the contract, particularly where non-compliance could have serious consequences. This also emphasises the need to always ensure that obligation taken on in a contract are realistic and can be complied with.

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