AN ASSESSMENT OF THE SOUTH AFRICAN LAW GOVERNING BREACH OF CONTRACT: A CONSIDERATION OF THE RELATIONSHIP BETWEEN THE CLASSIFICATION OF BREACH AND THE RESULTANT REMEDIES

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DECLARATION

I, the undersigned, hereby declare that the work contained in this thesis is my own original work and that I have not previously in its entirety or in part submitted it at any university for a degree.

SUMMARY

The South African system of breach of contract recognizes several distinct forms of breach, each encompassing its own set of requirements. Before one is able to determine the outcome and accordingly the rights of each contracting party in respect of an alleged breach of contract, the factual situation must be fitted into one of the recognized forms of breach. This has resulted in a highly complex system of breach of contract and resultant remedies.

The existence of a direct relationship between the form of breach present in a factual situation and the remedies available to the innocent party is a fundamental premise of South African law and one that is often accepted without much investigation. This thesis investigates the extent of this interdependence and to establish whether this intricate system is necessary from a practical and a theoretical point of view.

To this end, the thesis examines the less complex system of breach of contract as embodied in the United Nations Convention on Contracts for the International Sale of Goods ("CISG") which has been widely adopted in international trade, and which has provided a template for the reformation of various national systems of law. This study concludes that the South African approach to breach of contract and remedies is in need of reform, and that a unitary concept of breach could provide a basis for both a simplification and modernization of our law.

OPSOMMING

Die Suid-Afrikaanse Kontraktereg erken verskeie verskyningsvorms van kontrakbreuk, elk met sy eie besondere vereistes. Ten einde die uitkoms van probleemsituasies waarin kontrakbreuk beweer word te bepaal en derhalwe die regte van die betrokkenes uit te kristalliseer, moet die feitestel onder die een of ander vorm van kontrakbreuk tuisgebring te word. Hierdie benadering het 'n besonder komplekse stelsel van kontrakbreuk en remedies tot gevolg.

'n Fundamentele uitgangspunt van die Suid-Afrikaanse stelsel is dat daar 'n direkte korrelasie bestaan tussen die tipe van kontrakbreuk wat in 'n bepaalde geval teenwoordig is en die remedies waarop die onskuldige party kan staatmaak. Hierdie siening, wat meerendeel sonder bevraagtekening aanvaar word, vorm die fokuspunt van hierdie ondersoek. Die oogmerk is om die praktiese nuttigheid en teoretiese houbaarheid van die benadering vas te stel.

As 'n vergelykingspunt neem die tesis die vereenvoudigde sisteem van kontrakbreuk beliggaam in die Verenigde Nasies se Konvensie aangaande die Internasionale Koopkontrak ("CISG"). Hierdie verordening geniet wye erkenning in die Internasionale Handel en het alreeds die grondslag gevorm van verskeie inisiatiewe vir die hervorming van 'n aantal nasionale regstelsels. Die gevolgtrekking is dat die Suid-Afrikaanse benadering tot kontrakbreuk en die remedies daarvoor hervorming benodig en dat die opvatting van 'n sg uniforme kontrakbreuk as 'n basis kan dien vir die vereenvoudiging en modernisering van ons reg.

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CHAPTER ONE

1 1 Introduction

Globalization has taken place at a brisk pace in the 20th and now the 21st century. The development of a number of innovative communication methods led to an increase in the flow of people, goods, services and money;[1] the world became smaller and trade boomed. This has led to the breakdown of national borders, which are viewed as an obstacle to economic relationships, and the development of international trade.[2] As trade became more globalised new regulations were needed to support international commerce and finance.[3]

Modern contract law regulates the operation of commercial activity, at the heart of which lies the contract of sale.[4] The contract of sale is regarded as the principal instrument of international trade and as a result it has received significant attention at both domestic levels and internationally. The South African law of contract, particularly the law of purchase and sale, has, however, undergone only a handful of changes in the past 300 years despite the extensive advances that have taken place in this period.[5]

This is disconcerting if one considers that the international sale presents a unique factual situation and the needs of the international business community are different to those of their domestic counterparts.[6] There are additional risks involved due to the vast distances the goods need to travel and the fact that there are often many more parties involved in the transaction itself, and the handling of the goods. The parties are also less likely to know each other well, goods are often of significant value and the method of payment often involves foreign currency. It is consequently clear that the domestic laws do not always sufficiently address the needs of the international sale.

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[1] Dalhuisen *Dalhuisen on International Commercial, Financial and Trade law* (2000) 59.
[2] Ferrari *The Sphere of Application of the Vienna Sales Convention* (1995) 2.
[3] Dalhuisen *Dalhuisen on International* VII.
[4] Dalhuisen *Dalhuisen on International* 13.
[5] Lotz *Purchase and Sale* in Zimmermann & Visser (ed) *Southern Cross: civil law and common law in South Africa* (1996) 30.

To assess the effect of this lack of development through out the entire sphere of sale would be a mammoth task, one which would certainly not be appropriate for the present thesis and it will consequently be limited to an evaluation of the South African system of breach of contract and remedies.

The reason why this specific area was selected is because the legal rules governing breach of contract are in many ways the most important rules in the field of contract, as people usually only really resort to the law at this stage of their dealings.[7] It is consequently desirable that the law regulating disputes should be the most efficient possible, as it would be at this point, where the parties are at loggerheads and consequently have competing agendas, that clear answers will be the order of the day. The lack of a competent system to govern instances of breach of contract could further be a serious deterrent to trade, which in turn is essential for economic growth.

South Africa's approach to breach of contract is characterised as being "pigeon holed" as it consists of a number of unique forms of breach, each with its own set of requirements.[8] Before one is able to determine the outcome, and consequently the rights of each contracting party, in the event of an alleged breach of contract one first needs to classify the situation into one of the basic forms of breach. The system's complex and intricate approach to breach and remedies as well as the interdependence between the two, often results in confusion and considerable uncertainty.

But why is South Africa faced with such a system? The answer lies in her diverse legal roots, which produced an intricate system of breach. South Africa is characterised as a mixed legal system.[9] It comprises a legal structure which is neither exclusively based on the civil or common law but rather a intermingling of the two. The civil law was adopted in South Africa in the form of Roman Dutch law, which commenced with the Roman law occupation of the Cape in 1652. The common law manifests itself in the

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[6] Dalhuisen *Dalhuisen on International* 215.
[7] Cockrell *Breach of Contract* in Zimmermann & Visser (ed) *Southern Cross: civil law and common law in South Africa* (1996) 303 333.
[8] Cockrell *Breach of Contract* 303.

form of English law, which infiltrated South Africa as a result of a period of British annexation beginning at the end of the eighteenth century.[10]

The Roman Dutch (civil) system of law was therefore firmly in place when the English (common law) authorities gained power in South Africa. One would have thought that the new powers would attempt to put an end to the historically followed system of law and launch their common law system in all spheres. This was not however the case as an investigation into the viability of this led the powers that be to the belief that the present system adequately provided for most areas of law and the introduction of a new system would lead to "extreme confusion and distress".[11]

Despite this continued dominance of Roman-Dutch law, the influence of English law was unavoidable. This was felt on three basic levels: firstly by introduction in statutory enactments in certain areas of law:[12] secondly by way of court decisions:[13] and thirdly by tacit acceptance, examples of which are rife.[14] These developments have left a legacy of complexity and the law relating to breach of contract and remedies has proved to be no exception.

This particular area of contract provides ample examples of how existing legal doctrines have been developed and new ones adopted by relying on a mixture of Roman–Dutch and English authorities.[15] These two systems differ considerably in their approach to law.[16] This unavoidably leads to discrepancies in the application of the law and intricate and often overly elaborate principles, culminating in the conclusion that the South African

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[9] Thomas et al. *Historical Foundations of South African Private Law* (1998) 7.
[10] Palmer (ed) *Mixed Jurisdictions Worldwide – The Third Legal Family* (2001) 19; Lee *An Introduction to Roman- Dutch Law* 4th ed. (1946) 9.
[11] Palmer (ed) *The Third Legal Family* 24-25; See also Hahlo *The South African legal system* (1968) 575.
[12] Lee *Roman Dutch Law* 23; Palmer (ed) *The Third Legal Family* 69. The company legislation of South Africa is a modern day example of the introduction of English law into the country.
[13] Lee *Roman Dutch Law* 23; Palmer (ed) *The Third Legal Family* 69. There are ample examples of this in the field of breach of contract, some of which will be referred to in this thesis.
[14] Lee *Roman Dutch Law* 23 -24.
[15] Cockrell *Breach of Contract* 332.
[16] Watson *Roman Law and Comparative Law* (1991) 140.

system of breach and remedies is often overly academic and consequently fails to meet the needs of commercial trade.[17]

A further problem with the system is that while it encompasses certain general principles, it also provides definite and specific doctrines for certain specialised contracts. As the contract of sale is possibly the most common kind of contract in existence in South Africa (and the rest of the world) certain special rules have evolved for this specific genus of contract.[18] This has also been the case in the realm of breach of contract.[19] The effect of this is that in the event of breach of a contract of sale, parties need to consider both the general principles and remedies relating to breach of contract and those specifically relating to sale. This is a complex and time consuming process which one feels could and should have been avoided.

South Africa's legal system is one of the last staunchly uncodified mixed legal systems remaining in existence in the world.[20] One of the results of this is a composite set of sources, which are often inaccessible to the layman and usually require at least a basic level of legal knowledge to firstly find and secondly apply them to modern commercial transactions. This is particularly true of the complex South African structure of breach, which requires substantial legal knowledge in order to determine what form of breach a particular instance can be categorised as and consequently which remedies are available.

In conclusion, the South African system of breach and remedies appears extremely complex and often falls far short of providing the best or most advantageous outcome for the everyday commercial trader seeking clear cut practical answers.[21] This thesis will seek to determine whether this complexity is really necessary and more to the point whether the intricate interdependence between the forms of breach and remedies is functional.

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[17] Cockrell *Breach of Contract* 333.
[18] Havenga et al *General Principles of Commercial Law* 3rd ed (1997) 123.
[19] These specific rules applicable at the event of a breach of a contract of sale will be discussed in detail in chapter four.
[20] Watson *Roman Law* 232.
[21] This issue will be debated at length in Chapter two, three, four and five.

1 2 The way forward for the South African law governing breach of contract

As mentioned above, the contract of sale has received significant international attention in recent years. The culmination of this consideration is undoubtedly The Convention on Contracts for the International Sale of Goods [the CISG], which has been described as the centerpiece of harmonization of international trade law and the most significant piece of substantive contract legislation in effect at an international level.[22]

In direct contrast to South Africa, the CISG follows a so-called unitary approach to breach of contract. This means that the Convention adopts a unitary notion of breach of contractual duties, and implements this approach by making use of a unified remedial system.[23] This is a very simple system if one compares it to that of other legal systems,[24] as while the entire CISG consists of only 101 articles only a mere handful of these are expressly devoted to breach of contract.

1 2 1 The extent to which the South African law governing breach can be compared to that of the CISG.

The South African law regulating breach of contract was developed in an era far removed from the present day. A time when international trade was not rampant and the law thus developed in tune with the needs of the domestic trader. The rules of the CISG were however formed in an entirely different environment, by way of a completely distinct process and in response to incomparable needs. The question is thus plainly whether these two systems can be compared.

In a particular international sale, a trader who has a number of import and export partners from different countries and markets could quite possibly be faced with a different legal

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[22] Kritzer (ed) *International Contract Manual: Guide to Practical Applications of the United Nations Convention on Contracts for the International Sale of Goods* (1994) Front matter 1.

[23] Honnold *Uniform Law for International Sales under the 1980 United Nations Convention*, 3rd ed (1999) 26. This system will be explored in detail in chapter six.

[24] Bianca & Bonell *Commentary on the International Sales Law: The 1980 Vienna Sales Convention* (1987) 14.

system governing each individual contract.[25] One could even have the situation where one has uncertainty regarding which legal system is applicable, that of the importer, that of the exporter or possibly that of a third country. The answer to which could result in a vastly different outcome for either party.

Each country has its very own private international law rules stating how to approach contracts involving a system of law other that of that particular country.[26] These rules enable a country to determine which system of law is applicable at every situation. The application of the rules of private international law consequently makes the law of South Africa relevant at an international level in certain circumstances and based on this, it is fair to compare it to the CISG in the present thesis.

From a purely superficial point of view it would seem that the considerably less intricate system of the CISG provides the perfect model for the transformation of the South African system of breach and remedies. This stance still however needs to be investigated in order to give it substance. What is comforting is the fact that the recent reform of the German Civil Code,[27] including the provisions on breach, the intricacy of which is comparable to that of South Africa, was largely based on the CISG.[28]

This thesis seeks to determine to what extent the South African system of breach and remedies requires reconsideration, specifically focusing on the relationship between the classification of breach and the resultant remedies, and whether the substantially simpler system of the CISG should be used as the model for reform, if this proves necessary.

The thesis will commence this investigation by critically exploring South Africa's approach to breach of contract and remedies in chapter two and three respectively. Following this the specific principles applicable at the contract of sale will be investigated in chapter four. The overriding aim of these chapters is to determine whether

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[25] Eiselen "Adoption of the Vienna Convention for the International Sale of Goods (the CISG) in South Africa" 1999 *SALJ* 323 327.
[26] Koppenol-Laforce *Introduction* in Koppenol-Laforce (ed) *International Contracts* (1996) 113.
[27] Burgerliches Gesetzbuch, (BGB).

the South African structure of breach whereby the classification of one's conduct into a variant of breach determines ones remedies is both functional and necessary.

The conclusions reached regarding the interdependence of the South African system of breach and remedies will be discussed in chapter five, which will also attempt to ascertain the role of fault in the event of breach of contract.

The significantly less complex approach of the CISG to breach of contract and remedies will then be critically evaluated in chapter six.

The thesis will conclude with chapter seven which will provide recommendations for more effective solutions in the event of breach of contract, which if implemented could make South Africa's current approach to breach more stream lined and efficient and consequently ease the position of the South African trader operating in the rapidly paced complex world of international trade.

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[28] See chapter seven for more in this regard.

CHAPTER TWO

BREACH OF CONTRACT IN SOUTH AFRICAN LAW

2 1 Introduction

> "... While the history of South African contract law is essentially the story of a movement from a 'theory of specific contracts to a generalized 'theory of contract', the concept of breach has been moving - in an opposite direction, as it were - towards an increasingly fissured notion of 'specific breaches'."[1]

South African law has embraced a so-called fractured approach to breach of contract,[2] consisting of a number of unique forms of breach, each encompassing its own description or definition and unique requirements. In the event of breach, the parties to a contract first need to determine which "pigeon hole" of breach their individual set of circumstances fits into before they can establish what relief they can seek.[3]

This chapter will explore the various forms of breach recognised in South Africa, focusing on their historical roots and requirements. The discussion of the South African remedy system is undertaken in chapter three. Cancellation will, however, receive additional attention in the present chapter owing to the fact that its availability and application varies with regard to each individual form of breach. An added reason for this modus operandi is to illustrate how the form of breach determines the remedies available to a party and the extent to which this complicates the South African system of breach and remedies.

2 2 The South African classification of breach

At the conclusion of a contract, the parties determine what the result of their dealings will be. De Wet[4] describes breach of contract as being the act or omission of one of

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[1] Cockrell *Breach of Contract* in Zimmermann & Visser (ed) *Southern Cross: civil law and common law in South Africa* (1996) 303 304.
[2] Cockrell *Breach of Contract* 333.
[3] Cockrell *Breach of Contract* 333. The truth of this premise will be investigated in chapter five.
[4] De Wet & Van Wyk *Die Suid Afrikaanse Kontraktereg en Handelsreg* 5th ed (1992) 157.

the parties to the contract, which has the effect that the envisaged results of the contract are not achieved.[5]

These acts or omissions can traditionally be divided into those relating to the time aspect of the contract and those relating to the content of the performance envisioned by the contract.[6] Breach in relation to the time aspect of the contract is labeled as *mora debitoris* when committed by the debtor and *mora creditoris* when committed by the creditor, while a breach relating to the content of the contract is referred to as positive malperformance.[7] *Mora debitoris* and *mora creditoris* can also be grouped into one larger category, namely negative malperformance.[8]

Positive and negative malperformance (*mora debitoris* and *mora creditoris*) are, however, not the only forms of breach that are recognised in South Africa. An act or omission, which reasonably justifies the conclusion that a party is not going to perform in terms of the contract, is labeled as repudiation.[9] Similarly an act or omission by a party, which has the result that performance is no longer possible, is categorized as prevention of performance.[10]

De Wet recognises these above-mentioned forms of breach, namely *mora debitoris*, *mora creditoris*, positive malperformance, repudiation and prevention of performance, as the five basic forms in existence in South Africa.[11] Nienaber[12] prefers to group these five forms into two overriding categories namely malperformance, encompassing negative malperformance (*mora debitoris* and *mora creditoris*) and positive malperformance, and anticipatory breach which encompasses repudiation and prevention of performance.

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[5] There is, however, controversy regarding the exact definition of breach of contract. The present thesis takes as it's point of departure the view of De Wet and Van Wyk's classic work on contract (see n 4 *supra*). Other descriptions of it can however be found in Nienaber 1963 *THRHR* 32 and 1989 *TSAR* 1 and Van der Merwe et al *Contract General Principles* (2003) 2nd ed 299.

[6] Cockrell *Breach of Contract* 305.

[7] Cockrell *Breach of Contract* 305.

[8] Van der Merwe et al *General Principles* 308-309. The distinction between positive and negative malperformance is in place largely due to the work of Van Zijl Steyn. His thesis *Mora Debitoris volgens die Hedendaagse Romeins-Hollandse Reg* 1929 is the locus classicus on this topic. See in this regard Cockrell *Breach of Contract* 305.

[9] *White and Carter (Councils) Ltd v McGregor* 1962 AC 413.

[10] Van der Merwe et al *General Principles* 298.

[11] De Wet & Van Wyk *Kontraktereg* 157.

[12] Nienaber 1963 THRHR 19 as referred two in Van der Merwe et al *General Principles* 309.

This last mentioned classification appears the most functional in practice and will consequently be followed in the present thesis. The two principal categories of malperformance and anticipatory breach, together with their subdivisions, will be discussed from the position of an injured creditor facing the commission of the relevant breach by the debtor. All the above breaches can, however, also be committed by the creditor and consequently breach of contract by the creditor will be discussed as a further form in 2 3 3.

2 3 The various forms of breach recognised in South Africa

2 3 1 Malperformance

2 3 1 1 Negative Malperformance

As mentioned previously, negative malperformance encompasses both *mora debitoris* and *mora creditoris*. However, in order to facilitate the process of comparison later, instead of discussing mora *creditoris* with *mora debitoris* under the present heading, it will rather be considered below when breach of contract by the creditor is analysed.[13]

2 3 1 1 1 *Mora debitoris*

The concept *mora* is used to describe the state where a party to the contract fails to perform timeously.[14] When this failure to perform is carried out by a debtor it is referred to as *mora debitoris*. This delay in performance can arise in the form of a failure to tender any performance whatsoever at the required time, or in the tendering of a defective performance at the proper time, which is rejected lawfully by the creditor.[15]

The historical roots of *mora debitoris* are divergent. While the requirements which a specific act or omission must fulfill to be classified as a form of *mora debitoris* have their ancestry in the Roman-Dutch texts, the rules relating to cancellation on the

[13] See 2 3 3 *infra*.
[14] *Sweet v Ragerguhara* 1978 (1) SA 131 (D) 138. Cf. Christie *The law of Contract in South Africa* (2001) 578.

grounds of this form of breach were strongly influenced by English law.[16] The legal outlooks and principles of these two sources of law often differ significantly and Cockrell[17] consequently regards this lack of accord in the development of these two vital aspects of *mora debitoris* as the basis for the problems experienced under modern law.[18]

2 3 1 1 1 1 The requirements for *mora debitoris*

As mentioned, the requirements an act must meet before it can be classified as a form of *mora debitoris* are firmly ingrained in Roman Dutch law. The requirements are essentially as follows:

The first requirement is that the performance must remain possible despite the delay.[19] When the performance is no longer possible after the date it was originally required, the act of breach cannot be classified as *mora debitoris* but amounts rather to prevention of performance.[20] This will occur in situations where the time and content of a performance are inextricably bound to each other.[21]

The performance must secondly be due and enforceable.[22] This requirement is obvious if one considers that a performance can only be viewed as delayed if it is due and enforceable. In essence it entails the absence of a valid defence on the part of the debtor.[23] There can be no *mora* if the time determined in the contract has not yet

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[15] Van der Merwe et al *General Principles* 309.
[16] Cockrell *Breach of Contract* 306.
[17] Cockrell *Breach of Contract* 306.
[18] Of these problems will be highlighted below. Some writers regard this as a prerequisite rather then a requirement that needs to be proven to demonstrate that *mora debitoris* is in existence, one such writer is De Wet, see De Wet & Van Wyk *Kontraktereg* 158 -159.
[19] Van der Merwe et al *General Principles* 310.
[20] De Wet & Van Wyk *Kontraktereg* 159. This distinction is often difficult to make in practice, it is however vital that it is made as the consequences attaching to *mora debitoris* are quite different to those attaching to prevention of performance.
[21] De Wet & Van Wyk *Kontraktereg* 159; *Van der Merwe et al General Principles* 310.
[22] Zimmermann *The Law of Obligations: Roman Foundations of a Civilian Tradition* (1990) 791; Van der Merwe et al *General Principles* 311.
[23] Christie *The law of Contract* 578.

arrived, or in the case where no time has been set, a reasonable time has not yet elapsed.[24]

The third requirement is that the delay in performance must be wrongful. If a date for performance is prescribed in the contract itself, failure to perform by this day is wrongful and amounts to *mora*.[25] This form of *mora* is called *mora ex re*.[26]

If on the other hand no date for performance is fixed in the contract, the creditor has to institute a demand or notice against the debtor in order to place him in *mora*.[27] The demand, which may be in the form of a summons or other means and communicated either orally or in writing, must inform the debtor that he is expected to perform by a certain date, which must be reasonable in view of the circumstances.[28] A failure to perform by the date is wrongful and amounts to *mora ex persona*.[29]

There is uncertainty, largely as a result of the English doctrine of "time is of the essence", regarding whether or not a party falls into *mora* in the situation where the performance required by the contract is such that a delay in performance is unreasonable despite there being no date set in the contract or a demand issued by the creditor.[30]

It is submitted that the doctrine of "time is of the essence" should be limited to the sphere of the consequences of *mora* and should not be extended to an area developed under the helm of Roman-Dutch law.[31] These two spheres should be kept separate in order to avoid complicating an already highly complex situation.

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[24] Van der Merwe et al *General Principles* 311. The debt must further not have prescribed, be subject to a suspensive condition or rendered unenforceable by reliance on the so-called *exceptio non adimpleti contractus*. Cf. De Wet & Van Wyk *Kontraktereg* 162.

[25] De Wet & Van Wyk *Kontraktereg* 158. The date set in the contract must be certain in the sense that it must not only be clear when it will occur but also that it will occur. Cf. Lubbe & Murray *Farlam & Hathaway: Contract Cases, Materials and Commentary* 3rd ed (1988) 502.

[26] Zimmermann *Roman Foundations* 798.

[27] *Nel v Cloete* 1972 (2) SA 150 (A) 159; *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1977 (4) SA 310 T 347.

[28] *Nel v Cloete supra* 163; Van der Merwe et al *General Principles* 313-315.

[29] *C & T Products (Pty) Ltd v M H Goldschmidt (Pty) Ltd* 1981 (3) SA 619 (C) 631.

[30] De Wet & Van Wyk *Kontraktereg* 161 -162; Van der Merwe et al *General Principles* 315-317. Our courts have not decisively settled this matter yet.

[31] *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration supra* 347.

If this situation was recognised as a ground for *mora debitoris*, it could result in a debtor being ignorant of the fact that his conduct amounts to *mora* and consequently being blissfully unaware that he is in breach of contract and subject to the consequences thereof. This state of affairs should for the sake of fairness and certainty be avoided as far as possible.[32]

A possible solution to the situation where performance is so urgent that any delay would be unreasonable, is to view the debtor as being in *mora*, but to identify a new category of mora in such a case namely *mora ex lege*, *mora* arising by operation of law.[33] A further solution could be the identification of a tacit date for performance in such a situation due to the urgency of the matter.[34] Whatever the approach, a complex, uncertain outcome is inevitable.

The fourth requirement is that the delay must be due to the fault of the debtor. Fault on the part of the debtor appears to be a requirement for *mora debitoris*, but its existence is presumed[35] and it is up to the debtor to prove its non-existence if he wishes to escape liability on this basis.[36]

These requirements appear simple enough when outlined separately as they have been above, but in practice, when applied together, the outcome is often large-scale confusion. The requirement that provides the most ambiguity is clearly the third one. Determining when a delay in performance is wrongful and consequently amounts to *mora* is often not an easy question to answer. An additional problem, as will be seen below, is that the answering of this question is often not kept separate from the issue of when one may cancel on the basis of *mora debitoris*.

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[32] De Wet criticises *Federal Tobacco Works v Barron & Co* 1904 TS 483, the case which is most renowned for adopting this approach, as having no common law authority as a basis. Cf. De Wet & Van Wyk *Kontraktereg* 162. See McLennan "Mora Debitoris and Abandonment of Contract – Federal Tobaccos Revisited" 2000 *SALJ* 69 where an attempt is made to reconcile this case with the general principles applicable to mora debitoris.

[33] Van der Merwe et al *General Principles* 317. Cf. *C & T Products (Pty) Ltd v M H Goldschmidt (Pty) supra* 632.

[34] Van der Merwe et al *General Principles* 316-317.

[35] Zimmermann *Roman Foundations* 794.

[36] Cockrell *Breach of Contract* 307. The issue of fault at breach of contract will be discussed in chapter five.

Once the debtor's conduct is found to amount to *mora debitoris*, he is liable for performance even if the performance was to become impossible.[37] This is a special consequence of this form of breach.

2 3 1 1 1 2 Cancellation in the event of *mora debitoris*

As stated above, the requirements for *mora debitoris* have been adopted in an almost unaltered form from Roman Dutch law.[38] The Roman Dutch sources permitted cancellation only if there was a *lex commissoria*[39] in the contract.[40] Such a clause entitles the creditor to cancel the contract as soon as the debtor falls into *mora ex re*.[41] Where there is no date for performance the creditor would first need to place the debtor in *mora* by means of a demand before he could exercise the right to cancel conferred on him by the *lex commissoria*.[42]

This approach would lead to a sufficiently certain outcome providing each party with a clear view of the consequences of *mora debitoris* in their particular transaction. Unfortunately, as in many other instances in the South African law of contract, the influences of other legal systems found there way into this segment of our law resulting in unnecessary complexity.

Under the influence of English law the employment of the *lex commissoria* ceased to be the only method to evoke cancellation in the event of *mora debitoris*,[43] the remedy also being permitted "where time was of the essence of the contract".[44] This doctrine, which was imported in the middle of the nineteenth century[45] and as stated by DeWet,

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[37] Zimmermann *Roman Foundations* 799; De Wet & Van Wyk *Kontraktereg* 163; Van der Merwe et al *General Principles* 318; *Nel v Cloete supra* 160.

[38] Cockrell *Breach of Contract* 307.

[39] A clause providing a party with the right to cancel. See in this regard De Wet & Van Wyk *Kontraktereg* 164 n 43.

[40] *Nel v Cloete* supra 160.Cf. Cockrell *Breach of Contract* 307.

[41] Van der Merwe et al *General Principles* 318.

[42] Van der Merwe et al *General Principles* 318; De Wet & Van Wyk *Kontraktereg* 164.

[43] Lubbe & Murray *Contract* 504; *Van der Merwe et al General Principles* 319. See *Nel v Cloete supra* 160. Zimmermann feels the courts did not take great effort to analyse the Roman-Dutch sources in order to find a basis for disappointed creditors to rescind the contract, see Zimmermann *Roman Foundations* 805.

[44] Cockrell *Breach of Contract* 307; Zimmermann *Roman Foundations* 804.

[45] Cockrell *Breach of Contract* 307.

"het aansienlike verwarring gestig."[46] allows cancellation of the contract where there is no *lex commissoria* but the nature of the contract is such that prompt performance is of vital importance.[47] This may be because the goods are subject to continuous price fluctuations or only have a limited lifespan (such as perishable foodstuffs).[48] If the contract is found to be of such a nature, a right to cancel is extended to the creditor.[49]

South African courts have also recognised that a creditor can make "time of the essence of the contract" by addressing a notice of rescission to the debtor.[50] This is a notice to the debtor, who is already in *mora*, informing him that if he fails to perform by a certain date the creditor reserves the right to cancel.[51] If the debtor does not perform by the date the creditor may cancel the contract and provide the debtor with a notice of such cancellation.[52] A notice of rescission may be combined with a demand to serve the dual function of putting the debtor in *mora* and acquiring a right to cancel.[53] A right to resile will only however be granted if the debtor is in *mora* and if the delay related to a material term of the contract.[54]

The above situation is anything but clear-cut and simple. There is room for tremendous confusion in almost every sphere of the concept of 'time is of the essence' and the various consequential rights to cancel arising from it. The concept itself is very vague and when the nature of a contract can be regarded as such will often be a difficult issue to master. Further, the extension of this doctrine appears to create unnecessary intricacy.

It was mentioned above that the incorporation of this doctrine into the concept of when a debtor is in *mora* could result in a confusion of the requirements for *mora ex*

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[46] De Wet & Van Wyk *Kontraktereg* 164.
[47] Lubbe & Murray *Contract* 504 -505: De Wet & Van Wyk *Kontraktereg* 165: Cockrell *Breach of Contract* 309 where attempts have been made to reconcile the doctrine to Roman Dutch principles by construing it as a tacit *lex commissoria*.
[48] Van der Merwe et al *General Principles* 319: De Wet & Van Wyk *Kontraktereg* 165.
[49] De Wet & Van Wyk *Kontraktereg* 165.
[50] Nel v Cloete *supra* 160: Zimmermann *Roman Foundations* 806. Cf. Harker "The Nature and Scope of Rescission as a Remedy for Breach of contract in American and South African law" 1980 *Acta Juridica* 61 77.
[51] Lubbe & Murray *Contract* 505: Van der Merwe et al *General Principles* 319.
[52] Van der Merwe et al *General Principles* 319.
[53] *Nel v Cloete supra* 163-164:: Zimmermann *Roman Foundations* 806.
[54] *Sweet v Ragerguhara* 1978 (1) SA 131 (D) 135. This concept "material breach" will be discussed in greater detail in chapter three.

re with the doctrine of 'time is of the essence'.[55] There is also the fear that where the time and content of the performance are closely connected 'time of the essence' and impossibility of performance may be confused.[56] It is clear that the incorporation of this foreign doctrine has largely done more harm then good.

In conclusion, it can be clearly stated that whether or not a debtor has fallen into *mora*, and if so when a creditor can cancel as a result, is often a highly intricate question in South African law. One needs to ponder the exact practical utility of such a complex system and whether a finding of *mora* really affects the remedies at one's disposal.[57]

2 3 1 2 Positive Malperformance

Positive malperformance relates to the content of the contract, and can take one of two forms: the party performs (whether timeous or not) but it is inadequate or defective as it does not meet the terms of the agreement,[58] or the one party does something he is not entitled to do in terms of the agreement.[59] This form of breach has been described as satisfying a residual purpose in that it encompasses breaches, which cannot be slotted in elsewhere.[60]

Once the debtor has tendered the defective performance, there are essentially two possibilities: retention of the performance and the claiming of damages or rejecting the performance and claiming proper performance or damages as a substitute.[61] If the latter option is followed, the tender of defective performance does not amount to positive malperformance, although the debtor may be in *mora*. Only once the

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[55] De Wet & Van Wyk *Kontraktereg* 167; Zimmermann *Roman Foundations* 805.
[56] De Wet & Van Wyk *Kontraktereg* 167.
[57] See chapter five where this will be extensively discussed.
[58] Of importance here in the context of sale is the seller's duty to guard the buyer against eviction and latent defects which will be discussed further in chapter four.
[59] Van der Merwe et al *General Principles* 321; De Wet & Van Wyk *Kontraktereg* 177.
[60] Cockrell *Breach of Contract* 312.
[61] De Wet & Van Wyk *Kontraktereg* 177. Cf. *Radiotronics (Pty) Ltd v Scott, Lindberg & Co Ltd* 1951 (1) SA 312 (C) 328. Rejection is only permissible when the breach is of a material nature. The test is the same as the one employed to determine if cancellation is possible, which will be discussed *infra* and in chapter three. See however Van der Merwe et al *General Principles* 327 for a new theory in this regard applying to non-reciprocal contracts based on the findings made in *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 1 SA 391 (A) This case will be looked at in greater detail when enforcement of performance is discussed below in chapter three.

defective performance is accepted, in other words option one is followed, can positive malperformance be deemed to be present.[62]

Whether a positive malperformance has occurred entails the determination of the contractual content and the provision of evidence to show that the performance did not conform therewith.

Whether or not fault is a requirement for positive malperformance is a question, which has not as of yet been settled, in South African law. It will not however be discussed here but rather in chapter five where fault as a possible requirement for breach of contract will receive separate attention.

2 3 1 2 1 Cancellation on the basis of positive malperformance

Starting once again from the root of Roman-Dutch law, it is not surprising that cancellation could only really take place on this basis if the contract expressly provided a right to do so. In other words what was again required was a *lex commissoria*.[63]

South African law has nevertheless once again developed away from a wholly Romanist approach and has adopted a more lenient outlook in this respect. A party is said to be permitted to cancel if the breach was serious enough to justify such a drastic consequence.[64] Unfortunately, determining when this situation prevails has proved to be a problem in practice, and clear-cut formulas or rules have not as of yet been developed. Our courts have instead invoked a series of expressions in this regard.[65] One of the most popular of which is that the breach of contract has to "go to the root of the contract".[66] Essentially the process is one of judicial discretion, which needs to be exercised in each individual circumstance in order to determine whether the breach

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[62] Van der Merwe et al *General Principles* 322.
[63] Cockrell *Breach of Contract* 313.
[64] Van der Merwe et al *General Principles* 328. Cf. Harker "The Nature and Scope of Rescission" 70.
[65] De Wet & Van Wyk *Kontraktereg* 179. See chapter three, where the concept of material breach is discussed further.
[66] De Wet & Van Wyk *Kontraktereg* 179.

is so serious that a party cannot be expected to retain the defective performance and simply claim damages for the breach he has suffered.[67]

The development of a general right to cancel by the South African courts is attributed to the influence of English law.[68] It is clear that in the absence of a *lex commissoria*, the parties will find themselves in the undesirable situation that they will not be sure if the contract will be subject to cancellation until the courts have exercised their judicial discretion in this regard. It is submitted that once again the influence of a foreign judicial system has affected the domestic legal system in such a way that ambiguity and uncertainty are the unavoidable by - products.

2 3 2 Anticipatory Breach

2 3 2 1 Repudiation

In sharp contrast to the first two forms of breach discussed, repudiation is purely of English descent.[69] Roman-Dutch writers did not recognize repudiation and it is accordingly one of the newest forms of breach in existence in South Africa.[70] It was only accepted as an independent form of breach in the middle of the nineteenth century.[71]

Repudiation occurs when a contracting party, by his unequivocal conduct, creates the reasonable impression that non-compliance with the contract, will ensue in due course.[72] The examples of such conduct are widely divergent.[73] Essentially the conduct presupposes an element of wrongfulness, which is determined by employing

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[67] *Singh v Mcarthy Retail Ltd t a McIntosh Motors* 2000 (4) SA 795 (SCA) 803: De Wet & Van Wyk *Kontraktereg* 179.

[68] One if the earliest uses of this formulation can be found in *Transvaal Cold Storage Co v SA Meat Export Co Ltd* 1917 TPD 413 as referred to in Cockrell *Breach of Contract* 313. Most of the tests employed to test the materiality of a breach have their origins in English law: the complexities of which will be discussed in chapter three when the remedy of cancellation will be explored in greater detail.

[69] *Tuckers Land and Development Corporation (Pty) Ltd v Hovis* 1980 (1) SA 645 A 650: De Wet & Van Wyk *Kontraktereg* 168.

[70] Cockrell *Breach of Contract* 314.

[71] Van der Merwe et al *General Principles* 330.

[72] De Wet & Van Wyk *Kontraktereg* 168: Van der Merwe et al *General Principles* 333.Cf. *Erasmus v Pienaar* 1984 (4) SA 9 (T).

an objective test:[74] "the test as to whether conduct amounts to such repudiation is whether fairly interpreted it exhibits a deliberate and unequivocal intention no longer to be bound."[75]

Once conduct is found to amount to repudiation, the other party is faced with a choice.[76] He can either reject the repudiation and hold the party to his obligations or he can in certain circumstances "accept" it and avail himself of the remedies available for breach of contract in that instance.[77] If the former is chosen, the obligations remain in operation and the innocent party looks to performance under the contract.[78]

There has been much quarrelling in the past regarding whether the "acceptance" of the repudiation should be regarded as a prerequisite for its recognition as a form of breach.[79] In recent years the courts have in certain instances adopted the stance that once conduct is seen as amounting to repudiation it is an autonomous form of breach and by accepting it a party simply exercises his election to cancel the contract.[80]

2 3 2 1 1 Cancellation on the grounds of repudiation

A party may only cancel a contract if it is a repudiation of the contract as a whole or a material part of it. The commentators, who define anticipatory breach as conduct that envisages malperformance, adopt as a test in this regard whether the anticipated malperformance would justify such action.[81] In other words one would have to apply the principles relevant at that particular form of breach, be it *mora debitoris* or positive malperformance.

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[73] See Van der Merwe et al *General Principles* 334; De Wet & Van Wyk *Kontraktereg* 168 for examples of such conduct.
[74] Lubbe & Murray *Contract* 477.
[75] *Street v Dublin* 1961 (2) SA 4 (W) 10 as quoted with approval in *Culverwell and another v Brown* 1990 (1) SA 7 14.
[76] *Culverwell v Brown supra* 17.
[77] De Wet & Van Wyk *Kontraktereg* 170- 171.
[78] *Erasmus v Pienaar supra* 26-27.
[79] Cockrell *Breach of Contract* 315; Van der Merwe et al *General Principles* 330-333.
[80] See *Stewart Wrightson (Pty) Ltd v Thorpe* 1977 (2) SA 943 (A) where the offer and acceptance model was rejected.

2 3 2 2 Prevention of Performance

Prevention of performance arises where one party's conduct is such that it renders performance impossible.[82] The impossibility may be partial or total: it may also result in the performance being either absolutely or relatively impossible.[83] While absolute prevention of performance points to the fact that malperformance is a certainty, relative prevention only points to this eventuality with relative certainty.[84] Nienaber[85] contends that relative impossibility should rather be classified as repudiation and only absolute prevention should be categorized as prevention of performance. On the other hand other writers, including De Wet,[86] are of the opinion that both absolute and relative impossibility fall under the overriding branding of impossibility of performance. This issue will be debated further when cancellation at this form of breach is explored.

It is generally accepted that fault is a requirement for this form of breach.[87] As in the case of *mora*, the presence of fault is presumed and the onus appears to be on the guilty party to prove its absence.[88] If the guilty party is in *mora* he cannot rely on his lack of fault to resist liability.[89] If the party creating the impossibility of performance has no fault, the obligations are simply terminated.[90]

Where prevention of performance results in a total impossibility of performance, the innocent party is for obvious reasons unable to claim specific performance of the contract. What is less clear is the effect of this on the obligations. De Wet is of the opinion that the obligations are not in fact extinguished and the guilty party remains bound.[91] The innocent party may then cancel[92] or uphold the contract, and claim

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[81] Van der Merwe et al *General Principles* 337. Cf. *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd* 2001 (2) SA 284 (SCA) 294.
[82] Cockrell *Breach of Contract* 316.
[83] Van der Merwe et al *General Principles* 338.
[84] Van der Merwe et al *General Principles* 338.
[85] Nienaber *Repudiation* (1989) *TSAR* 1 as referred to in Van der Merwe et al *General Principles* 338.
[86] De Wet & Van Wyk *Kontraktereg* 176 -177.
[87] This matter will be discussed more extensively in chapter five.
[88] *Grobbelaar v Bosch* 1964 (3) SA 687 (E) 691.
[89] See 2 3 1 1 1 1 *supra*.
[90] De Wet & Van Wyk *Kontraktereg* 175. See the implications of this at the discussion of fault in chapter five.
[91] De Wet & Van Wyk *Kontraktereg* 175.
[92] See *infra* for more in this regard.

damages as a substitute for performance. A further view is that although a total impossibility terminates the obligations, the guilty party remains liable to compensate the innocent party for damage suffered.[93]

2 3 2 2 1 Cancellation in the event of prevention of performance.

This form of breach is deemed sufficiently serious to permit the innocent party to cancel the contract whenever it should arise.[94] It is not, however, clear if this notion rings true for all cases and there is the view that the innocent party will only be permitted to cancel the contract when the breach is material.[95]

A partial prevention of performance permits the innocent party to cancel the contract if the performance is divisible.[96] The position is more intricate where the performance is indivisible. It has been submitted that the innocent party could here resile from the entire contract and claim damages or alternatively accept partial performance and claim damages as far as he has suffered damages for the part that failed to be performed.[97] Partial performance may, however, lead to a further problem as if the guilty party were to perform in terms of his remaining obligations, this could be deemed to amount to positive malperformance.[98] The innocent party's right to cancel here will be governed by the principles governing cancellation at positive malperformance.

In the case of relative impossibility, i.e. where the eventual impossibility of performance is not yet certain, it has been submitted that the innocent party gains a right to cancel after the lapse of a certain period of time.[99] When this right arises is not entirely clear and is apparently subject to judicial discretion.

A more effective solution might be to regard relative impossibility as a form of repudiation rather then impossibility of performance and apply the cancellation rules

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[93] De Wet & Van Wyk *Kontraktereg* 176; Van der Merwe et al *General Principles* 340.
[94] Van der Merwe et al *General Principles* 340.
[95] Lubbe & Murray *Contract* 483.
[96] De Wet & Van Wyk *Kontraktereg* 176 as referred to in Van der Merwe et al *General Principles* 340.
[97] Van der Merwe et al *General Principles* 341.
[98] Van der Merwe et al *General Principles* 340.
[99] De Wet & Van Wyk *Kontraktereg* 176.

of repudiation in order to determine when the innocent party may cancel. The relationship of this form of breach with the other forms remains obscure and it would appear that prevention of performance is by no means clearly established in South African law.[100]

2 3 3 Breach by the Creditor

The above forms of breach, with the exception of *mora debitoris*, have been discussed generally without specifying which party, the debtor or creditor, are guilty of breach. The reason for this is that all of the forms, with the exception once again of *mora debitoris*, can be committed by both parties and the same principles apply *mutatis mutandis*.[101] Similarly to *mora debitoris*, however, *mora creditoris* can only be committed by the creditor and consequently warrants further attention.

2 3 3 1 *Mora Creditoris*

Mora creditoris is exclusively committed by a creditor. This form of breach relates to the timeous performance of the creditor's duty to co-operate with the debtor in order to facilitate performance by the latter.[102] It should not thus be used as a label for all the breaches committed by a creditor.

It seems futile to have such an independent form of breach if it relates to the very same obligations, which are infringed at the case of *mora debitoris*.[103] Cockrell[104] correctly asserts that this development can only be understood if a creditor's duty to co-operate is substantially different from the duties of the debtor. De Wet[105] strongly asserts the uniqueness of this form of breach on account of its distinct requirements

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[100] Cockrell *Breach of Contract* 318. See chapter seven where suggestions are made pertaining to the future of this form of breach.
[101] Van der Merwe et al *General Principles* 343.
[102] *Ranch International Pipelines (Transvaal)(Pty) Ltd v LMG Construction (City)(Pty) Ltd* 1984 (3) SA 861 (W) 877 which refers to the definition of *mora creditoris* as compiled by De Wet. Cf. Van der Merwe et al *General Principles* 343.
[103] See Reinecke "'n Paar opmerkinge oor die aard, gevolge en indeling van kontrakbreuk" 1990 *TSAR* 677 679- 680.
[104] Cockrell *Breach of Contract* 310.
[105] De Wet & Van Wyk *Kontraktereg* 182. This viewpoint of De Wet is largely based on the thesis by De Villiers *Mora Creditoris as Vorm van Kontrakbreuk* (1953). Cf. *Ranch International Pipelines (Transvaal)(Pty) Ltd v LMG Construction (City)(Pty) Ltd supra* 877.

and consequences and strongly advocates its treatment as an independent form of breach. The examination of this form of breach affords the opportunity to establish if this approach is tenable.

2 3 3 1 1 The requirements for *mora creditoris*

From the definition of *mora creditoris*, it is obvious that it can only arise where the debtor required the creditor's co-operation to meet his obligations.[106] *Mora creditoris* can occur before performance by the debtor takes place or when it takes place.[107] As in the instance of *mora debitoris*,[108] *mora creditoris* is only possible where the performance by the creditor is still possible. Where the time and content of the obligation of the creditor are so closely connected that performance at a later stage is no longer viable, the creditor is not guilty of *mora creditoris* but rather prevention of performance.[109]

The first requirement is that the debt must be capable of fulfilment.[110] The debt must not be subject to a suspensive condition or contain a time clause *pro creditore*.[111] This requirement is essentially the requirement of *mora debitoris* that the debt must be due and enforceable, adapted to the case of *mora creditoris*. The underlying principle is the same in both instances, namely that the respective creditor or debtor cannot be found to be in *mora* until their respective obligations are due.

The second requirement is that the debtor must have made a proper tender of performance. The debtor must have done everything necessary from his side that did not require the assistance of the creditor and then inform the creditor of the need for his co-operation.[112] Where a time and place has been set for performance, the creditor must perform his obligation accordingly. Where no such arrangements have been

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[106] De Wet & Van Wyk *Kontraktereg* 182.
[107] Van der Merwe et al *General Principles* 343. An example of where the duty to co-operate arises prior to the date for performance by the debtor is where the buyer may have to nominate a ship on which the seller must load the goods and an example of where the duty to co-operate occurs at performance is where the buyer has to open the premises to receive delivery.
[108] See 2 3 1 1 1 1 *supra*.
[109] De Wet & Van Wyk *Kontraktereg* 183.
[110] Van der Merwe et al *General Principles* 344; De Wet & Van Wyk *Kontraktereg* 183.
[111] Van der Merwe et al *General Principles* 344 n 284.
[112] Zimmermann *Roman Foundations* 819; De Wet & Van Wyk *Kontraktereg* 184.

made, or the debtor wishes to perform before or after the performance time, the debtor must give him a reasonable time to do so.[113] The performance tendered by the debtor must be proper in the sense that co-operation by the creditor will have the effect of terminating the obligations.[114] What is required by the debtor depends on the nature of the performance, the requirements of the contract and the provisions regulating the discharge by performance.[115] As long as the defect is not serious enough to empower the creditor to be able to reject performance, he may not refuse to accept the performance even if the article is defective.[116]

The third requirement is that the creditor must fail to receive the performance tendered. If the day set for performance arrives and the creditor fails to receive performance he is deemed to be in *mora*.[117] As mentioned above, where no date for the performance has been set the creditor must be given a reasonable opportunity to make arrangements to receive the performance and deliver the counter-performance if necessary.[118] Once this reasonable time has lapsed the creditor falls in *mora* if he has still not performed.[119] A time for performance may also possibly be inferred from a demand instituted by the creditor as against the debtor.[120]

The fourth requirement is that the debt must be due to the fault of the creditor. De Wet is of the opinion that, as in the case of *mora debitoris*, the creditor should not be seen as being in *mora* if his inability to receive performance is not due to his own failing. As is the case with *mora debitoris*, fault is a required for *mora creditoris* and it is presumed to be present unless the creditor establishes an excuse.[121]

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[113] Van der Merwe et al *General Principles* 344. See however *Martin Harris & Sons OVS (Edms) Bpk v Qwa Qwa Regeringsdiens* 2000 (3) SA 339 SCA 349.
[114] De Wet & Van Wyk *Kontraktereg* 184.
[115] Lubbe & Murray *Contract* 528.
[116] De Wet & Van Wyk *Kontraktereg* 184.
[117] De Wet & Van Wyk *Kontraktereg* 184.
[118] De Wet & Van Wyk *Kontraktereg* 186.
[119] This requirement can clearly be likened to the third requirement outlined in the above discussion of *mora debitoris* which states that the debtor's lack of performance must be wrongful for him to fall into *mora*, see 2 3 1 1 1 1 *supra*.
[120] Lubbe & Murray *Contract* 528.
[121] Van der Merwe et al *General Principles* 344 n 285; see 2 3 1 1 1 1 *supra*.

2 3 3 1 2 The consequences and remedies of *mora creditoris.*

If a creditor falls into *mora*, any *mora* by the debtor relating to that obligation is terminated, as the debtor and creditor cannot be in *mora* simultaneously.[122] As is the case at *mora debitoris*, once the creditor falls into *mora* he bears the risk of supervening impossibility and the debtor's duty of care is significantly reduced.[123]

The debtor can allegedly cancel the contract on the grounds of *mora creditoris* in the same circumstances as *mora debitoris*.[124] The issue of consignation, whereby a debtor releases himself by performing to a judicial officer in the face of the creditor's refusal to co-operate is, with certain obscure statutory exceptions, only of historical significance.[125]

It is obvious that the requirements for *mora creditoris* are by and large a modified version of those set for *mora debitoris*. One of the observations made while investigating the above forms of breach is that the requirements and uniqueness of each has lent itself to the development of distinct grounds for cancellation for each and every form. This has not been the case in respect of *mora creditoris*, which has in fact mirrored the grounds that have come to pass at *mora debitoris*.[126] This development is clearly curious if one considers that *mora creditoris* is regarded as being materially different from *mora debitoris* and consequently requiring independent recognition.[127]

2 4 Conclusion

The structure of breach presently confronting South African merchants, and often international traders, is extremely intricate. Its complexity warrants the possession of a substantial level of legal knowledge and experience to determine the form of breach an instance can be classified into, which in turn determines the remedies available.

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[122] *Erasmus v Pienaar* 1984 (4) SA 9 (T) 20.
[123] Lubbe & Murray *Contract* 528-529; Van der Merwe et al *General Principles* 345.
[124] Van der Merwe et al *General Principles* 346.
[125] Lubbe & Murray *Contract* 529. See De Wet & Van Wyk *Kontraktereg* 188- 191 for more on this notion.
[126] De Wet & Van Wyk *Kontraktereg* 191.
[127] This matter will be examined further in chapter seven.

This considerable intricacy is unfortunate as it prevents a layman from attaining certainty regarding the resolution of disputes and accordingly creates an atmosphere of cynicism surrounding this area of law. This in turn discourages the undertaking of contractual commitments which stunts growth and development. It is thus imperative that a revision of the structure of the system of breach be considered.[128]

[128] Suggestions in this regard are made in chapter seven.

CHAPTER THREE

THE PRINCIPAL REMEDIES AVAILABLE IN SOUTH AFRICAN LAW

3 1 Introduction

The focus of an examination of breach of contract ought to be the remedies available to the injured party. Owing, however, to the fundamental position fulfilled by the form of breach in the determination of the remedies available, the emphasis has shifted to the classification of the parties conduct into one of the recognised forms of breach. In order to accurately portray the extent of this relationship one, nonetheless, needs to make a study of the principal remedies recognised in South African law. This will be done in the present chapter where particular attention will be directed to the discovery of the precise relationship between the form of breach and the remedies available.[1]

Enforcement of performance, damages and cancellation are the three key remedies available for breach of contract in South African law. The choice between these remedies rests with the injured party. He may choose to implement more than one of them together or in the alternative as long as the remedies are not inconsistent and he is not overcompensated.[2]

3 2 The remedy of enforcement of performance

In South African law the primary remedy for an aggrieved party in the event of breach of contract is specific performance or enforcement of performance.[3] The Law of Contract subscribes to the notion of *pacta sunt servanda*[4] and as this remedy is aimed

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[1] Findings made in this regard will be presented in chapter five.
[2] Christie *The law of Contract* 605.
[3] *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A) 782. See 3 2 3 *infra* for a discussion regarding the correctness of such an approach. There remain clear arguments in case law that the right to claim performance arises from the contract itself, with the result that performance can be claimed if the debt is due regardless if the existence of a breach has been established or not. Cf. *Theron v Theron* 1973 (3) SA 667 (C). This concept will be discussed further in chapter five when the relationship between the breach found to be in existence and the remedies available as a result will be discussed at length.
[4] The strict enforcement of obligations.

at the performance of the duties under the contract, it is regarded as the natural remedy for breach.[5] Subject only to a broad judicial discretion,[6] a party always has the right to claim performance of the obligations when the other party is found guilty of breach, regardless of which form it takes.[7]

De Wet[8] suggests that enforcement of performance can take the form of either performance in *forma specifica* i.e. performance as envisioned by the contract enforced by judicial proceedings or a surrogate performance in the form of the monetary value of the performance. De Wet labelled this monetary claim as one for "damages": this seems incorrect, as it does not entail compensation for loss, as is normally the case with a claim for damages.[9] The majority of the Appellate Division in *ISEP Structural Engineering and Plating (Pty) Ltd v Inland Exploration Co (Pty) Ltd* [10] found that a claim for surrogate performance is not available in South African law as a remedy independent from a claim for compensation for loss.[11] There have since however been decisions questioning the correctness of this view.[12]

3 2 1 The role of the *exceptio non adimpleti contractus* in a claim for enforcement of performance

Certain extraordinary principles are applicable in respect to performance claims concerning reciprocal contracts. The focal point of comparison of this thesis, the contract of sale, is a prime example of such a contract. Accordingly it is necessary to

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[5] Van der Merwe et al *General Principles* 351.
[6] See 3 2 3 *infra*.
[7] *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A) 782; *Haynes v Kingwilliamstown Municipality* 1951 (2) SA 371 (A) 378; See n 129.
[8] De Wet & Van Wyk *Kontraktereg* 209.
[9] Van der Merwe et al *General Principles* 352.
[10] 1981 (4) SA 1 (A) 7.
[11] Cf. Van der Merwe et al *General Principles* 353 n 13.
[12] *Mostert v Old Mutual* 2001 (4) SA 159 186. See also the various criticisms of ignoring surrogate performance as listed in this source. If surrogate performance were found to be an independent remedy in existence in South Africa, it would probably be subject to the same discretionary power as applicable at specific performance in the usual sense. Cf. *Van Immerzeel & Pohl and another v Samancor Ltd* 2001 (2) SA 90 (SCA). As a result of this uncertainty still existing in our case law, this thesis will use the term performance or enforcement of performance rather then specific performance, which is usually used in South African law. See however Van der Merwe et al *General Principles* 353-354 for submissions favouring the non-acceptance of surrogate performance as an independenet form of breach.

ascertain the precise role of these principles and more importantly, for the objective of this thesis, whether there applicability depends on the form of breach in existence

Under reciprocal contracts each party undertakes to perform in exchange for the counter performance of the other party.[13] These contracts are regulated by the principle of reciprocity, which is applicable if the parties are required to perform simultaneously or the plaintiff is required to perform before the other contracting party.[14] The principle requires the performance or tender of performance by the plaintiff in order to implement his demand for counter-performance.[15] It also entitles a party to hold back his performance, i.e. raise the *exceptio non adimpleti contractus*[16] until the other party has performed.[17]

The practical effect is that the said claimant must allege in his pleading that he has already performed or that he is prepared and equipped to do so.[18] If the pleadings do not contain such contentions, the other party is free to argue that the pleadings do not supply a cause of action.[19] Should the claimant provide such assertions in his pleadings, the co-contractant is at liberty to deny them but the ball is in his court as far as issues of proof are concerned.[20]

It is thus clear that the *exceptio* is not in itself a remedy for breach but rather a pre-requisite for the claiming of performance in respect of reciprocal obligations.[21] Through this function it does, however, satisfy a further role in that it presents a defence for a party facing a claim for performance.

The overriding aim of this thesis is the establishment of the exact relationship between the form of breach found to be in existence and the remedies available as a result. It is

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[13] De Wet & Van Wyk *Kontraktereg* 196.
[14] Van der Merwe et al *General Principles* 359. It is important for the purposes of this thesis to note that at a contract of sale the parties usually perform simultaneously.
[15] Van der Merwe et al *General Principles* 359.
[16] Hereafter the *exceptio*.
[17] *BK Tooling (Edms) Bpk v Scope Precision Engineering supra* 415-416.
[18] Van der Merwe et al *General Principles* 359.
[19] De Wet & Van Wyk *Kontraktereg* 197; Van der Merwe et al *General Principles* 359.
[20] *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk supra* 419.
[21] Van der Merwe et al *General Principles* 361. Cf. *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk supra* 419. See *infra* for the effect of this finding.

therefore necessary to determine whether the form of breach a party's conduct is classified as has any bearing on the application of *exceptio*.

While it is apparent that the *exceptio* is available at all attempts to enforce the obligations of reciprocal contracts, there is one aspect of this defence which is only applicable at positive malperformance and not at any of the other forms, namely the prospect of its relaxation.

The application of the *exceptio* proves problematic when the claimant has performed or tendered performance but the performance proved to be defective. The defendant could then reject the performance, if he was entitled to do so in the circumstances, and then raise the *exceptio*.[22] This situation does not give rise to great difficulty. Problems arise when the defendant is not at liberty to reject the performance.

On a strict application of the above principles even if he was not permitted to reject the very same defective performance, the defendant could raise the *exceptio* on the basis that the claimant has not rendered a proper performance.[23] In *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* the appellate division ushered in a discretionary power for the courts to relax the principle of reciprocity and grant the plaintiff a contractual claim[24] for a reduced price.[25] This case brought a fresh and equitable end to the above stalemate and is hailed as "an outstanding blend of legal scholarship and pragmatic common sense...".[26]

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[22] De Wet & Van Wyk *Kontraktereg* 200.

[23] De Wet & Van Wyk *Kontraktereg* 200-201. De Wet suggests that the doctrine of substantial performance comes to the rescue here, this doctrine has, however been rejected by the Appellate Divivision in *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk supra* 436G-437A, at least in as far as its application at the principle of reciprocity is concerned.

[24] Rather then a claim based on enrichment as was advocated by other case law. See n 25 *infra*.

[25] Cockrell *Breach of Contract* 314. The judgment saw the end of the so-called "trilogy" of cases on this matter which consisted of *Hauman v Nortjie* 1914 AD 293; *Breslin v Hichens* 1914 AD 312; *Van Rensburg v Straughan* 1914 AD 317.The trilogy was believed to stipulate that while the *exceptio* stopped the plaintiff from claiming performance from the defendant, he could institute a claim for a *quantum meruit*, which was calculated by deducing the cost of remedying the defective performance from the contract price on the basis of unjust enrichment. Cf. Lubbe & Murray *Contract* 570.

[26] Cockrell *Breach of Contract* 314. Before such discretion is exercised, the plaintiff has to convince the court that the defendant has utilised the defective performance to his advantage and following this that special circumstances exist requiring the court to exercise its discretion. In other words he needs to persuade them that fairness demands that this discretion be implemented. The plaintiff also needs to supply the amount that the contract price should be reduced to. *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk supra* 435.This amount is usually derived by taking into account the

The exact scope of the court's discretionary power and its sphere of application has not, however, been fully ascertained yet.[27] The fact that it, however, fulfils the function of a procedural prerequisite rather then a remedy diminishes its relevance for present purposes as it does not aid the exploration of the relationship between breach and remedies but simply shows that their may be procedural distinctions at the application of the remedies in respect of different forms of breach.

3 2 2 The courts discretion to order the enforcement of performance

> " [T]he Court has a discretion to grant or to refuse an order for performance...Once that is realized (sic), it seems clear, both logically and as a matter of principle that any curtailment of the Court's discretion inevitably entails an erosion of the plaintiff's right in some way or another."[28]

These modest lines hailed the conclusion of numerous years of uncertainty.[29] It conveyed clarity concerning the extent of the court's powers in context of enforcing performance and how it should exercise its discretion. The court clearly rejected the resort to a number of "crystallized instances in which specific performance should be refused"[30] developed in earlier case law.[31] Although rejected as mechanical rules, the instances still, however, remain relevant in the form of guidelines.[32]

Cockrell[33] argues that this discretion of the court encroaches excessively on a party's fundamental right to performance of the contract. It could be argued that the lack of clear rules to be taken into account when exercising this discretion could result in legal uncertainty. In view of the conservatism of judicial thinking, it is submitted that

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cost of remedying the defective performance, which is one of the quantification measures used to determine damages, see 3 3 2 *infra*.

[27] It appears that on the basis of fairness the discretionary power can still be exercised even where the *exceptio* can no longer be instituted as a fulfillment mechanism, see *Thompson v Scholtz* 1999 (1) SA 232 (SCA).

[28] *Benson v SA Mutual Life Assurance Society supra* 782 – 783.

[29] See in this regard Beck "The coming of age of specific performance" 1987 *Comparative & International law Journal of South Africa* 190 195-208; Cockrell *Breach of Contract* 328 – 330.

[30] Cockrell *Breach of Contract* 328. For a list of these instances see Christie *The law of contract* 608-615.

[31] *Haynes v Kingwilliamstown Municipality* 1951 (2) SA 371 (A). Although this case did not set the factors as rigid rules, over time they were seen as such.

[32] There still exists uncertainty in our law regarding the resort to an order of specific performance in the case of service contracts. See in this regard Van der Merwe et al *General Principles* 355-356; Lubbe & Murray *Contract* 543- 545.

the factors used in the past to determine when a court should exercise its discretion will continue to play an important if not overriding role in this regard.

3 2 3 Should enforcement of performance be regarded as the principal remedy for breach?

The emphasis on enforcement of performance as the chief or primary remedy for breach can be traced back to a strict adherence to the notion of *pacta sunt servanda.*[34] The idea of a man's worth being directly proportional to his word seemed to form the basis of contract law in earlier times.

The question is whether this idea still is feasible today and whether it is viable from an economic point of view in view of the radically different approach evident in common law systems[35] and criticism of enforcement of performance as an obstacle in the way of economic efficiency.[36]

It is submitted that if enforcement of performance were not available generally, as is presently the case, South Africa's entire system of contract law, notwithstanding her system of breach would be turned on its head. Absent a strict adherence to the obligations as created by contracts, contractants would be forced to forego a significant degree of certainty in the event of breach. A legal system comprising uncertain and thus uneasy parties is bound to display a substantial degree of inadequacy whether it is in the form of conflicting legal opinions or in deterrence to trade. All of which will result in economic waste.

In conclusion thus South Africa's present regard for the remedy of enforcement of performance as the principal remedy at breach has proved to be sufficiently adequate. The general discretion of the court not to order performance in certain instances will

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[33] Cockrell *Breach of Contract* 330.
[34] See 3 2 *supra*.
[35] See 3 3 *infra*.
[36] See in this regard the comments by Farnsworth and Posner in Van Heerden "An Exploratory Introduction to the Economic Analysis of Law" 1981 *Responsa Meridiana* 152 154 – 157; Cockrell *Breach of Contract* 331 and the references quoted at n 170. See also *Unibank Savings and Loans Ltd v Absa Bank Ltd* 2000 (4) SA 191 (W) regarding the issue of economic waste arising from an order of performance.

further satisfactorily provide for those instances where it may not prove to be the most viable remedy.[37]

3 3 Damages

In South African law, as unequivocally pointed out above, enforcement of performance is regarded as the principal remedy for breach. This once again stems directly from the country's richly Roman-Dutch bloodline.[38] In direct contrast English law regards damages as the primary remedy and enforcement of performance merely enjoys the status of an exceptional remedy awarded on the basis of equity when a verdict of damages would prove inadequate.[39]

The cancellation path, as has been gauged from the above discussion on the forms of breach, is not always accessible to an injured party. Even where it is available, both it and enforcement of performance do not in all situations adequately provide for the loss suffered by the injured party.[40] In certain situations this loss or disadvantage he endured can only be sufficiently addressed by the guilty party paying a monetary sum in the form of damages.[41] Accordingly in South African law, the remedy of damages is always available to the injured party, irrespective of whether he decides to enforce the contract or cancel it.[42] The claim can further be instituted in conjunction with an order of performance or a cancellation claim, or it can stand on its own.[43]

Over the years a particular structure has developed in the South African law of damages. At the forefront of this structure rest certain general principles which are always to be taken into account by the courts. As time passed, however, various measures of quantification were developed, which are used to calculate loss at the various standard forms of breach. These measures of quantification have, nevertheless, developed on the basis of the general principles and should only be

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[37] *Unibank Savings and Loans Ltd v Absa Bank Ltd supra* 209.
[38] Cockrell *Breach of Contract* 325.
[39] Christie *The law of Contract* 605; Cockrell *Breach of Contract* 325-326.
[40] De Wet & Van Wyk *Kontraktereg* 195.
[41] De Wet & Van Wyk *Kontraktereg* 195.
[42] Van der Merwe et al *General Principles* 351.
[43] Lubbe & Murray *Contract* 602. See also the above remarks on damages as a 'surrogate' for specific performance.

applied as far as they give effect to them.[44] Accordingly they should always be viewed with circumspection and their practical effectiveness should be assessed on a continuous basis.

The general principles applicable at damages will now be examined briefly, following which one of the measures of quantification, which may prove of particular interest for the present thesis will be explored.

3 3 1 General principles

When claiming damages, a party must not only prove the existence of his loss but also the extent of it.[45] If the plaintiff has, however, proved damage or loss by the best evidence available the court will determine the extent of the damages to be awarded.[46] The law of contract does further not concern itself with non-patrimonial loss and merely awards damages for patrimonial loss.[47]

The standard approach employed by the courts to measure damages has enjoyed many different labels over the years, the most popular of which have been the "difference" or "differential"theory"[48] and the interesse principle. Essentially it entails a comparison between the present patrimonial position of the plaintiff after the damage causing event and his hypothetical patrimonial position had the damage-causing event not occurred.[49] The difference is known as the interesse of the party and represents the loss suffered.[50]

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[44] De Wet & Van Wyk *Kontraktereg* 231.

[45] *Swart v Van der Vyver* 1970 (1) SA 633 (A) 643. The South African courts are not prepared to award damages (nominal damages) on mere proof by the plaintiff that a breach of contract exists. Cf. Lubbe & Murray *Contract* 602.

[46] Van der Merwe et al *General Principles* 386.

[47] *Administrator Natal v Edouard* 1990 (3) SA 581 (A). Cf. Van der Merwe et al *General Principles* 389. Often however the loss suffered due to the breach of contract extends past the infringement of patrimonial interests and effects non-patrimonial interests such as bodily injury or an infringement of one's personality, interests covered by the law of delict. The interests of a party can unfortunately not always be separated into neat little boxes and once again the threat of an overlap between the law of delict and contract arises. Cf. Lubbe & Murray *Contract* 602-604.

[48] Van der Merwe et al *General Principles* 387: Lubbe & Murray *Contract* 604.

[49] *Swart v Van der Vyver supra.*

[50] Van der Merwe et al *General Principles* 387. This approach may prove difficult to apply. Owing to the fact that damages may be instituted along with other remedies, when determining the actual position of the parties effect must be given to any remedies the parties may have instituted, see Lubbe & Murray *Contract* 605. Both the negative and positive consequences of the damage causing event

The approach seems complex enough without any additional distinctions or divisions. The situation, however, goes from murky to anarchic when one refines the interesse principle into positive and negative interesse. The point of departure in South African contract law when assessing damages is that the injured party is entitled to be placed in the position he would have been in if the breach of contract had not occurred.[51] This entitles the injured party to positive interesse which entails envisioning the hypothetical patrimonial position of the party should the breach of contract never have occurred. Negative interesse, which is traditionally the approach employed when assessing damages in the law of delict, seeks to place the party in the position he would have been in had the delict never occurred.[52] If negative interesse is thus employed in the law of contract the damage causing event would be the contract itself rather then the breach.[53]

The only advantage one appears to gain by claiming negative interesse is the ability to claim the expenses incurred to conclude the contract.[54] In *Hamer v Wall*[55] it was, however, stated that these expenses can be claimed as part of positive interesse. This case also held that a plaintiff does not have a right to elect to claim damages on the basis of negative interesse and is limited to a claim calculated on the basis of positive interesse.[56]

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must be taken into account. De Wet & Van Wyk *Kontraktereg* 225. See Lubbe & Murray *Contract* 605 regarding the 'breakeven principle'.

[51] *Probert v Baker* 1983 (3) SA 229 (D) 223; De Wet & Van Wyk *Kontraktereg* 222.

[52] Lubbe & Murray *Contract* 604.

[53] Van der Merwe et al *General Principles* 391-392. It is submitted that when viewed correctly there is no real distinction between the two. Cf. Van Aswegen "Damages for Negative Interesse in Cases of Breach of Contract" 1993 *SA Merc LJ* 265 266 and the authorities quoted in n 7 therein. While positive interesse is viewed as the principal approach at contract, case law has given rise to the view that after the cancellation of a contract a party is at liberty to choose whether to institute positive or negative interesse. *Probert v Baker* 1983 (3) SA 229 (D); obiter in *Svorinic v Biggs* 1985 (2) SA 753 (W). Cf. Lubbe & Murray *Contract* 613-616. See Van Aswegen "Damages for Negative Interesse" 269-275 for criticism of the factors which gave rise to such a finding.

[54] Van der Merwe et al *General Principles* 392. Looking at negative interesse from a purely theoretical view, it simply appears paradoxical to base one's claim on the breach of a contract and then think away the very same contract to determine what one has lost due to the lack of its continuation. In effect one is viewing the conclusion of the contract as the damage causing event rather then the breach. VanAswegen "Damages for Negative Interesse" 273.

[55] 1993 (1) SA 235 (T). See also Van Aswegen "Damages for Negative Interesse" 272-273.

[56] *Hamer v Wall supra* 241. See in this regard Van der Merwe et al *General Principles* 392-395. An alternative approach involving the identification of contractual interests giving rise a party's claim was identified in Anglo-American law by Fuller & Purdue and is investigated further in Lubbe & Murray *Contract* 606.

Adding to an already uncertain situation, is the view that the focus at the assessment of damages can either be subjective, in terms of which the actual position and factors facing the party who has suffered by the breach are taken into account, or objective, where the typical damage suffered by a party at such a breach is examined.[57] It is however submitted, that as the aim of damages is to compensate the injured party for the loss he actually suffered, the point of departure should be subjective.[58]

Damages will only be granted if there is a direct causal link between such damages and the breach of contract. This principle seems logical and simple, yet in the age-old tradition of South African law, a number of ambiguous and complex theories and viewpoints have developed in this regard.

The law will not hold the guilty party liable for all the damage caused by the contract, and for this reason a party is only liable if both factual and legal causation are established.[59] A number of theories have developed to determine the remoteness of the loss to the breach of contract.[60] The most practically pleasing of which appears to be the test of reasonable foreseeability as expressed in *Steenkamp v Du Toit*.[61]

From a purely external point of view, one would expect that the actual application of the test would cause no more problems than that caused by the "officious bystander test" as applied to determine the presence of tacit terms, as both tests would seem to apply the same sort of practical inference by the judicial officer. The use of it by the

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[57] Lubbe & Murray *Contract* 604.

[58] An objective approach will however rear its head at an application of the measures of quantification. Lubbe & Murray *Contract* 604 -606.

[59] Van der Merwe et al *General Principles* 390 & 395. To determine factual causation the *condictio sine qua non* test is employed. Christie *The Law of Contract* 629. In terms of this test the breach of contract is thought away and if the breach also disappears, the damage is deemed to be as a result of the breach. It is however put forward that as such a deduction is purely common-sense, there is no need for such a specially devised test.

[60] Van der Merwe et al *General Principles* 395; Lubbe & Murray *Contract* 624. This process in fact determines whether legal causation, which is the causation required to hold a party liable, is present.

[61] 1910 TS 171 175 as referred to in Lubbe & Murray *Contract* 624: "[I]n cases not complicated by the existence of fraud or other exceptional features, a person who has rendered himself liable for damages, is responsible for the *natural and probable consequences* of his act, these consequences being ascertained with reference to the defendant's knowledge at the time. A man, therefore, who has failed to carry out his contractual obligation, is liable for such damages as he must *reasonably* have known would *naturally and probably* result from the breach; such damages in other words, as given his knowledge of the circumstances, might naturally be expected to follow the breach." (author's emphasis).

courts has, however, been complicated by English case law[62] and a distinction developed by Pothier.[63] Both the last mentioned sources have embraced a distinction between general (intrinsic) and special (extrinsic) loss, a distinction which has also been adopted by our courts.[64]

General (intrinsic) damages are assumed to have been foreseen by the parties, or "being within their contemplation".[65] and are generally recoverable and accordingly do not need to be specially pleaded.[66] Extrinsic (special) damages are on the other hand only recoverable in special circumstances and need to be specially pleaded by the plaintiff.[67] Two tests have traditionally been employed by the courts to determine whether extrinsic damages are recoverable.[68] These are namely the contemplation principle and the convention principle.

The contemplation principle requires the damage to have been contemplated or reasonably foreseen by the parties at the conclusion of the contract.[69] Extraordinary losses are allegedly foreseeable if special circumstances making the loss a probable result of the breach were or ought to have been known to the party responsible for breach.[70] The convention principle states that the damages will only be recoverable if the plaintiff is able to prove that the guilty party contractually undertook to be accountable for such damage.[71] It must be proved that the guilty party was sufficiently aware of the risk of that particular damage, that it can be held that he agreed to be liable.[72]

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[62] *Hadley v Baxendale* 1854 9 Ex 341, 1854 156 ER 145.
[63] *Obligations* par. 159-167 as referred to in Lubbe & Murray *Contract* 624 -625.
[64] *Shatz investments (Pty) Ltd v Kalovyrnas* 1976 (2) SA 545 (A) and the other case law referred to in Van der Merwe et al *General Principles* 296 n 299.
[65] Lubbe & Murray *Contract* 625.
[66] Van der Merwe et al *General Principles* 397.
[67] Van der Merwe et al *General Principles* 399; Lubbe & Murray *Contract* 625. Although various general examples of each have been developed, whether damage should be regarded as extrinsic or intrinsic will ultimately depend on the circumstances of every case. This distinction has further been likened to the distinction made between a subjective and objective focus at the assessment of damages, see Lubbe & Murray *Contract* 626. The use of the circumstances of the case to determine whether damages are extrinsic or intrinsic could be viewed a possible continuation of the subjective approach, as the actual circumstances of the parties are regarded as paramount.
[68] Lubbe & Murray *Contract* 626; Van der Merwe et al *General Principles* 399-401.
[69] Van der Merwe et al *General Principles* 399.
[70] Lubbe & Murray *Contract* 626.
[71] Lubbe & Murray *Contract* 626.
[72] The Appellate division has seemed to have favored the convention principle, see *Lavery & Co Ltd v Jungheinrich* 1931 AD 156; *Shatz investments (Pty) Ltd v Kalovyrnas* 1976 *supra* 554 F-G; *Holmdene*

It is submitted that the contemplation principle should on the basis of the above criticism be accepted above the rather impractical convention principle. The foundation of the contemplation principle is sound and based on the very essence of the foreseeability principle as originally stated. Further, the acceptance of this principle seems to do away with the need for a distinction between special and general damages, as the principle is equally applicable at both.[73] A distinction which is arbitrary if one considers the issue of breach from a purely subjective point of view.[74]

3 3 2 Quantification measures.

Now that the basic principles applicable to the claim for damages have very briefly been explored, one of the measures of quantification used to give effect to them, namely the market value rule will be dealt with in order to show illustrate how the quantification measures are regarded as an extension of the general principles set out above.[75] An attempt will also be made to determine whether this measure of quantification has developed in line with specific forms of breach.

3 3 2 1 The market value rule

The damages suffered at breach of contract consist principally of a monetary value representing the performance the innocent party has had to forego as a consequence of the breach.[76] This monetary value of marketable performances is usually accepted to

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Brickworks (Pty) Ltd v Roberts Construction Co Ltd 1977 (3) SA 670 (A) as referred to in Van der Merwe et al *General Principles* 401 n 329. This principle is not, however, free from criticism as an illusory construction of an agreement to pay damages seems perplexing. It is doubtful, barring at the discussion of penalty clauses, which the contractants would have considered the undertaking of liability for breach by one or both of them, breach would at this point simply not have been an issue. See Van der Merwe et al *General Principles* 399-401; Christie *The Law of Contract* 640 for further criticism of the convention principle.

[73] Lubbe & Murray *Contract* 628.

[74] See *Thoroughbred Breeder's Association v Price Waterhouse Coopers* 2001 (4) SA 551 (SCA) 582 where it was suggested obither that the flexible test of law of delict should be imported into the law of contract. Cf. Van der Merwe et al *General Principles* 400-401.

[75] This rule is discussed in light of the particular focus of this thesis: the contract of sale. Other quantification measures can be found in De Wet & Van Wyk *Kontraktereg* 230-231; Van der Merwe et al *General Principles* 403-412.

[76] Van der Merwe et al *General Principles* 405. This amount will be adjusted by the monetary value of any performance still owing by him in the event of cancellation, or by the monetary value of the performance he may already have received.

be the market value or market price of the lost performance.[77] Damages are thus frequently assessed with reference to this yardstick, which is referred to as the market value rule.[78]

Thus where the one party has delivered a defective performance, the market value of such performance can be subtracted from the market value which the proper performance would represent, and in so doing one would arrive at the damages the innocent party could claim for the positive malperformance.[79] *Novick v Benjamin*[80] refers to the use of this remedy at non-performance in the form of non-delivery by the seller or non-acceptance by the purchaser.

The market value rule presents a fair and workable method to calculate damages and appears accordingly to be available at most forms of breach.[81] Beyond the fact that the measure cannot be used in as far as it does not give effect to the general principles, it is not possible to prescribe rigid rules in regard to its application.[82]

In essence the applicability of the remedy mainly revolves around the definition of a "marketable performance". It is clear that a market for the goods needs to be in existence, yet a market in the traditional organised sense does not have to be present, and is regarded as any location where there exists a demand for and a supply of the performance.[83] The market value is usually calculated with reference to the time and place at which the performance would have taken place.[84] The time of determination may prove important as various market forces could provide for vast changes in prices in a relatively short period of time.[85]

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[77] *Novick v Benjamin* 1972 (2) SA 842 (A) 860; Van der Merwe et al *General Principles* 405; De Wet & Van Wyk *Kontraktereg* 231.
[78] *Katzenellenbogen Ltd v Mullin* 1977 (4) SA 855 (A) 879-880.
[79] De Wet & Van Wyk *Kontraktereg* 232.
[80] *Supra* 860.
[81] Van der Merwe et al *General Principles* 405-406. See however 406 n 359.
[82] De Wet & Van Wyk *Kontraktereg* 232-233, who also provide an example of where the principle will not be applicable.
[83] See Lubbe & Murray *Contract* 639 for the definition as set out in *Katzenellenbogen Ltd v Mullin* 1977 (4) SA 855 (A) 878-879 which was subsequently confirmed in *Kangra Holdings (Pty) Ltd v Minister of Water Affairs* 1998 (4) SA 330 (SCA) 336.
[84] De Wet & Van Wyk *Kontraktereg* 233; *Novick v Benjamin supra* 861.

It is thus evident that while this measure does provide a useful method to determine damages, it must always be remembered that it merely represents a crystallisation of the general principles. The latter can always be relied on by the injured party to quantify damages. What does however prove problematic in practice is the tendency of the courts to slavishly adhere to this measure and accordingly require a party to expressly provide grounds to justify a deviation from this process.[86] As reiterated through out this section on damages, the point of departure must be the general principles and the quantification measures ought only to be applied as far as they give effect to such.

3 4 Cancellation

Cancellation, in contrast to the other two remedies, is viewed as an extraordinary remedy and its accessibility is accordingly restricted.[87] In the above sections it was pointed out how the availability of the remedy largely depends on the relevant form of breach. Any investigation into a possible unification of the forms of breach would unavoidably thus involve a quest to determine a complementary uniform approach to this remedy in contract.[88] The clarification of the various opportunities to cancel as arising at each form of breach was delved into adequately above and this section will simply seek to make a few further general comments on this exceptional yet severe remedy.

3 4 1 The notion of material breach

An historical survey of the role of cancellation in South African law does not leave much to work with and it is irrefutable that the modern day approach to cancellation is markedly more liberal then in Roman Dutch times.[89] This was shown to be largely due to foreign influence, particularly in the form of English law.[90]

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[85] Whether damages are claimed on their own, or in conjunction with a claim for cancellation or enforcement of performance, will also be a factor determining the time and place at which the market value will be determined. Van der Merwe et al *General Principles* 407-408.
[86] Van der Merwe et al *General Principles* 409; De Wet & Van Wyk *Kontraktereg* 232.
[87] Van der Merwe et al *General Principles* 351.
[88] See the discussion below and the recommendations made in chapter seven.
[89] Cockrell *Breach of Contract* 321; Harker "The Nature and Scope of Rescission" 67-70.
[90] Cockrell *Breach of Contract* 321.

Today the South African courts are said to recognise a general right to cancel in the event of a material breach of contract.[91] It was shown that specific rules as regards the right to cancel have developed in respect of the forms of breach, but it has been submitted that the concept of a material breach remains at the core of these rules.[92]

When the possibility of cancellation on the grounds of positive malperformance was discussed above, it was shown that the availability of the remedy depends entirely on the severity or materiality of the breach.[93] It was, however, pointed out that the meaning of this concept has not as of yet been explicitly and clearly decided by our courts. Criticism of this situation was also provided. To facilitate the comparison which will be made later as between South African law and the CISG, which embraces the correlative idea of fundamental breach, this profuse lack of clarity needs to be investigated further.

Cancellation is a drastic remedy and the requirement of a "minimum degree of seriousness" for the breach as a prerequisite for cancellation is seen as a way to curb its impact.[94] The proof of such seriousness often places a weighty burden on the shoulders of the party wishing to terminate. Parties are often forced for the sake of certainty to include a *lex commissoria* in the contract and in so doing avoid the ambiguity associated with the concept of a material breach.[95]

The fact that contractants need to avoid the working of their legal system due to the fear of its ambiguities and vagueness is extremely undesirable. It is clear that in addition to the need for elucidation of this notion of material breach, the approach to cancellation as a whole requires significant clarification.

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[91] Harker "The Nature and Scope of Rescission" 70.
[92] Naudé & Lubbe "Cancellation for 'material' or 'fundamental' breach: A comparative analysis of South African law, The UN Convention on Contracts for the International Sale of Goods (CISG) and The Unidroit Principles on International Commercial Contracts" 2001 *Stell LR* 371 371-372.
[93] See 2 3 1 2 1 *supra*.
[94] Harker "The Nature and Scope of Rescission" 79.
[95] Otto "Die konsensuele terugtredingsreg (lex commissoria). Breidelloos afdwingbaar?" 2001 *TSAR* 203 204.

In South African law there have been various attempts to develop a more uniform approach. One of these has already been visited in chapter two, namely that of De Wet & Van Wyk who state that cancellation is available where the breach is so serious that the aggrieved party cannot reasonably be expected to abide by the contract and be satisfied with damages.[96] A further approach corresponding to the reformulation of the forms of breach by Nienaber as referred to above.[97] has also been suggested.[98] Both these approaches however fail to make any headway in the quest to provide more tangible rules in this regard.

There is however dissent on whether the theory of material breach can be stated in more concrete terms. Harker[99] is of the opinion that this is not possible due to two factors: firstly the sheer number of ways a breach can arise, and secondly the fact that the interests of both parties need to be balanced. He is of the opinion that as every case involves a significant degree of judicial discretion only general principles as apposed to rigid rules can be developed.[100]

While these points are not without merit, there is nothing standing in the way of the development of a number of concrete factors, based on experiences in practice, to aid the court in their decisions in this regard thereby providing some sort of stability in the sea of uncertainty that presently presents itself.

By basing the factors on instances which occur regularly in practice, one could introduce an air of objectivity but at the same time the subjective situation of the parties concerned can be taken into account by leaving the final decision to the judicial discretion of the presiding official.[101] [102]

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[96] De Wet & Van Wyk *Kontraktereg* 179 as referred to in Naudé and Lubbe "Cancellation for 'Material or 'Fundamental' breach" 373.
[97] See 2 2 and chapter two n 12 *supra*.
[98] Naudé and Lubbe "Cancellation for 'Material or 'Fundamental' breach" 373-374.
[99] Harker "The Nature and Scope of Rescission" 79.
[100] Harker "The Nature and Scope of Rescission" 79.
[101] A number of such factors, based on the CISG and the UNIDROIT principles were identified in Naudé and Lubbe "Cancellation for 'Material or 'Fundamental' breach" 372-373.
[102] Some further suggestions on these factors will be made in chapter seven.

3 5 Conclusion

The present chapter sought to impart a concise portrayal of the remedial system presently facing South Africa. This was done with the specific objective of facilitating the discovery of the exact relationship between the form of breach found to be in existence and the remedies available as a result. The findings made in this regard will be divulged in chapter five.

While outlining this remedy system, numerous instances of unnecessary complexity and ambiguity were unearthed. This does not bode well for the fostering of greater certainty in contractual undertakings and consequently the system needs to be reformed.[103]

[103] Proposals in this regard are made in chapter seven.

CHAPTER FOUR

ASPECTS OF THE SOUTH AFRICAN SYSTEM OF BREACH PERTAINING TO THE CONTRACT OF SALE

4 1 Introduction

The intricate set of principles governing the South African system of breach and remedies was set out in chapter two and three respectively. The situation however becomes more intricate in certain instances owing to the persistence of additional principles, over and above the general ones, for a range of specific contracts.

The focal point of this thesis, the contract of sale is one of the areas where supplementary principles and rules have surfaced. These further principles include certain instances of additional responsibility for the seller and additional modes of relief for the buyer. As these additional developments are not readily regarded as falling within the traditional system of breach and remedies, they may affect the relationship between the forms of breach and remedies and will accordingly be explored in the present chapter.

4 2 The seller's obligations

A contract of sale is a reciprocal agreement whereby the seller undertakes to deliver an object to the buyer, who undertakes to pay the seller a sum of money in exchange.[1] The obligations of the seller have traditionally received the most attention. Two of these obligations namely the duty to warrant the buyer against eviction and the liability for defective goods, particularly latent defects, have received particular consideration in case law and distinctive principles have developed in regard to each. The exact foundation and tenor of these principles often give rise to much confusion and ambiguity and this will accordingly be dealt with below.

[1] De Wet & Van Wyk *Kontraktereg* 313.

4 2 1 The seller's liability for eviction

The seller is obligated to warrant the buyer against eviction. This obligation entails the assurance that a person with a stronger title then the buyer will not oust the *merx* from him thereby depriving him of the use and enjoyment of it.[2]

The exact scope of this obligation was developed over a considerable period of time and the buyer is today no longer regarded as having been evicted only if he has suffered judicial dispossession of the *merx*.[3] Eviction is also deemed to be present if the buyer was forced to pay a sum of money to a claimant to keep the *merx*, as is the case with an intermediate buyer in a chain of successive sales, who was forced to make a payment to a further buyer as a result of the latter's eviction.[4] To hold the seller responsible for the eviction, the buyer needs to inform the seller once he is threatened with an eviction, so he can come to his aid. Even in the absence of the seller's assistance, the buyer is still expected to put up a proper defence (*virilis defensio*).[5] If the buyer neglects to inform the seller or provide a proper defence, he can still hold the seller liable, provided he can prove that the other party's title was sufficiently strong that the above attempts would have been fruitless.[6]

The classification of the buyer's liability when this obligation is infringed is not certain. It has not yet been clearly established whether it can be regarded as one of the traditional forms of breach of contract or some sort of *sui generis* liability governed by specific principles and giving rise to *sui generis* remedies. This uncertainty stems from a lack of clarity regarding the exact foundation of the obligation to warrant against eviction. The case law has not as of yet provided much assistance in this regard.[7]

4 2 1 1 The evicted buyer's remedies

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[2] De Wet & Van Wyk *Kontraktereg* 329; Lotz *Purchase and Sale* 374.
[3] Lotz *Purchase and Sale* 374.
[4] *Garden City Motors (Pty) Ltd v Bank of the Orange Free State Ltd* 1983 (2) SA 104 (N); *Louis Botha Motors v James & Slabbert Motors (Pty) Ltd* 1983 (3) SA 793 (A).
[5] De Wet & Van Wyk *Kontraktereg* 330; see Lotz *Purchase and Sale* 375 for a discussion of what a *virilis defensio* entails.
[6] *Lammers and Lammers v Giovannoni* 1955 (3) SA 385 (A) 390.
[7] Suggestions in this regard are provided in chapter seven.

De Wet and Van Wyk are of the opinion that on eviction, the buyer is entitled to make use of the normal remedies that a buyer has at his disposal in the event of breach of contract by the seller.[8] In other words, cancellation of the contract if the breach is material,[9] which would usually be the case in this context, and claiming back the purchase price and damages or maintaining the contract and claiming damages.[10]

If the buyer was further aware that he had a defective title and failed to inform the buyer of such, he could be held liable for this misrepresentation, which would once again conjure up the law of delict in addition to the contractual principles.[11]

The fact that the infringement of the obligation results in the use of traditional contractual remedies gives rise to the assumption that it should be regarded as a form of breach of contract. The question is, however, whether it can be classified as one of the traditional forms or a new form requiring separate recognition? Case law has also further confused the situation by finding that certain of the traditional remedies are not available for infringement of this obligation,[12] as well as providing set measures for the determination of damages in this instance.[13] This suggests that the infringement of the obligation and its remedies are not regarded as falling within the traditional classification of breach of contract and its resultant remedies.

4 2 2 The seller's liability for defects

When positive malperformance was analysed above,[14] the general principles applicable to cases of defective performance were explored. If one applies these general

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[8] De Wet & Van Wyk *Kontraktereg* 330.

[9] See, however, *Hendler Bros Garage (Pty) Ltd v Lambons Ltd* 1967 (4) SA 115 (O) where it was held that an evicted buyer is only entitled to damages not cancellation and the damages amount is determined as the value of the subject of the sale at eviction.

[10] Lotz *Purchase and Sale* 376. In *Alpha Trust (Edms) Bpk v Van der Watt* 1975 (3) SA 734 (A) 747, it was held that compensation for damage suffered could be claimed in the event of eviction, with the purchase price as the minimum. The result being that the purchase price can be recovered in the form of damages even if the contract is upheld. Most writers have however suggested that this is incorrect. Cf. Lotz *Purchase and Sale* 376; De Wet & Van Wyk *Kontraktereg* 331 n 102. See however Kerr *The Law of Sale and Lease* (1996) 182-184. See also n 9 *supra*.

[11] De Wet & Van Wyk *Kontraktereg* 332.

[12] *Hendler Bros Garage (Pty) Ltd v Lambons Ltd* as referred to *supra* in n 9.

[13] See n 9 and 10 *supra*.

[14] See 2 3 1 2.

principles to the contract of sale, the *merx* would need to possess nothing more at delivery than the characteristics which it had at the conclusion of the agreement, unless the existence or non-existence of further characteristics are guaranteed, whether tacitly or expressly.[15] If the *merx* falls short of the guarantee the seller will be guilty of breach of contract in the form of positive malperformance.[16] The normal contractual remedies for breach of contract can then be claimed by means of the *actio empti* (the action on the contract of sale).[17]

The seller might also possibly be liable *ex delicto* for representations made regarding the character of the thing which prove to be unfounded.[18] Here the principles of the law of delict would come into play, adding an additional dimension of complexity.

In a contract of sale certain additional obligations are borne by the seller, resulting in him bearing a substantially greater responsibility for the goods. This burden essentially entails his obligation to guard against latent defects. In *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* [19] a latent defect is defined as "an abnormal quality or attribute which destroys or substantially impairs the utility or effectiveness of the *res vendita*, for the purpose for which it has been sold or for which it is commonly used". His failure to provide the latter assurance results in the buyer becoming entitled to additional remedies.

4 2 2 1 Additional remedies available to the buyer in the event of a latent defect

4 2 2 1 1 Remedies enforced by means of the actio empti

Where the seller is the manufacturer of the object sold[20] or the merchant seller dealing in these goods,[21] the buyer can institute an action for damages or consequential loss if

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[15] De Wet & Van Wyk *Kontraktereg* 332.
[16] Zimmermann *Roman Foundations* 328, see 2 3 1 2 *supra*.
[17] Lotz *Purchase and Sale* 377; Zimmermann *Roman Foundations* 328.
[18] De Wet & Van Wyk *Kontraktereg* 332.
[19] 1977 (3) SA 670 (A) 683.
[20] This action is based on the writings of Voet. See Lotz *Purchase and Sale* 378; De Wet & Van Wyk *Kontraktereg* 341.
[21] This liability stems from the writings of the French author Pothier: it was however adapted by our courts and the further requirement was added in *Kroonstad Westlike Boere-Ko-operatiewe Vereniging*

the *merx* contains latent defects, even in the absence of a guarantee or misrepresentation on the part of the seller.[22] The merchant seller is liable even where he is unaware of the defect and "publicly professes to have attributes of skill and expert knowledge in relation to the kind of goods sold".[23] This is an extremely vague proposition and fails to provide sufficiently clear guidelines for determining when such a situation arises in practice.[24] While the *actio empti* remains the basis of these claims, it is not clear whether the actions are based on breach of contract or misrepresentation.[25]

4 2 2 1 2 The *Aedilitian* Actions

There is still a further possibility for liability on the part of the seller based on the *Aedilitian* actions. These actions have their roots firmly entrenched in Roman-Dutch law and were developed by the *Aediles Curules*.[26] They are available even where the seller is neither a merchant professing to have expert skill and knowledge in relation to the goods nor the manufacturer of the goods.[27] The liability is independent of a guarantee or misrepresentation of the seller and even a lack of knowledge regarding the existence of a latent defect.[28] The buyer's claim is however restricted in extent.

The *actio redhibitoria* provides for the cancellation of the contract and places both parties, as far as possible, in the position they would have been in had they not concluded the contract.[29] It enables the buyer to receive a repayment of the purchase price including interest and the reasonable expenses incurred by him with regards to the merx.[30] The *actio quanti minoris* allows the buyer to claim a reduction in the purchase

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Bpk v Botha 1964 (3) SA 561 (A) 571. See *Langeberg Voedsel Bpk v Sarculum Boerdery Bpk* 1996 (2) SA 565 (A) 571-572 for criticism of the approach in the *Kroonstad* case.

[22] De Wet & Van Wyk *Kontraktereg* 341.

[23] *Kroonstad Westlike Boere-Ko-operatiewe Vereniging Bpk v Botha supra* 571.

[24] Lotz *Purchase and Sale* 379.

[25] De Wet & Van Wyk *Kontraktereg* 342; Lotz *Purchase and Sale* 379.

[26] These were magistrates entrusted with certain specific duties in the markets.

[27] Lotz *Purchase and Sale* 379.

[28] This lack of knowledge by the seller is regarded by Kerr as being the main reason for the survival of the aedilitian actions today, as but for these actions if the seller did not fall into the above categories of manufacturer or merchant seller he would not be liable should he not be aware of the defect, see Kerr *Sale and Lease* 105. Cf. De Wet & Van Wyk *Kontraktereg* 342.

[29] Kerr Sale and Lease 95.

[30] Lotz *Purchase and Sale* 380; De Wet & Van Wyk *Kontraktereg* 344.

price, which is calculated as the difference between the purchase price and the value of the defective article.[31]

The remedies accordingly do not enable a party to recover consequential damages. De Wet's[32] explanation for this is that the remedies arise in the situation where the party who is claimed against is not in fact guilty of breach of contract and for this reason his liability is unexpected and accordingly curtailed. This point is important, if one considers the presumption as set out in the beginning of this chapter, that the classification of one's conduct as firstly breach and then secondly a particular type of breach determines one's remedies. This is one area where there may exist clear proof that this is not the case.[33]

For liability to arise in the instance of a latent defect, the following requirements need to be met: the defect must not be insignificant: it must be latent: the buyer must be unaware of it and the defect must have existed when the contract was concluded.[34]

These remedies are not only available where there is a latent defect but also in the event of a *dictum et promissum*.[35] A *dictum et promissum* is "a material statement made by the seller to the buyer during the negotiations, bearing on the quality of the *res vendita* and going beyond mere praise and commendation".[36] There appears to be little to no authority in the Roman-Dutch law for this definition.[37] De Wet[38] is of the opinion that the Appellate Division were in a "wetgewende stemming..." when they developed this definition. It is, however, submitted that the very fact a doctrine or legal concept lacks historical authority should not in itself be a reason to view it with speculation or disdain. One of the main criticisms of the South African legal system is that it is antiquated and often fails to deal with the realities of modern trade. It thus appears imprudent to continue trying to find historical support for legal rules rather then simply adopting them in the spirit of fairness and their effectiveness in modern trade.

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[31] De Wet & Van Wyk *Kontraktereg* 344: Lotz *Purchase and Sale* 380.
[32] De Wet & Van Wyk *Kontraktereg* 343.
[33] See *infra* and chapter seven for more in this regard, as well as criticism of De Wet's view.
[34] De Wet & Van Wyk *Kontraktereg* 343: Lotz *Purchase and Sale* 381.
[35] Lotz *Purchase and Sale* 381.
[36] *Phame (Pty) Ltd v Paizes* 1973 (3) SA 397 (A) 418 A.
[37] Lötz " Aanspreeklikheidsgrondslag vir Skuldlose Wanvoorstelling: Die Koopkontrak, Ou Koeie en ander Gediertes uit die Sloot" 1997 *De Jure* 159 – 164.
[38] De Wet & Van Wyk *Kontraktereg* 346.

The criticism of the concept of *dictum et promissum* based on its inadequateness or vagueness is however a point deserving debate. *Phame v Paizes*[39] itself provides certain guidelines to enable one to infer when the circumstances are such that the relevant statement amounts to more than mere praise and commendation. While the concept appears to go beyond mere puffing, it seems to be restricted to representations and does not extend to warranties.[40] Once again the courts have thus ventured into the complex issue of misrepresentations and in so doing continue to expose law of contract to delictual principles.[41]

The buyer is entitled to make use of the *actio redhibitoria* when he is able to prove that a reasonable person would not have bought the article if he had been aware of the defect.[42] A further ground for the remedy arises where the defect is so serious that it makes the article useless.[43] If he were not able to do so he would have to make use of the *actio quanti minoris*.

4 3 Conclusion

It would thus appear that in the instance of a contract of sale, a buyer is often faced with a complex set of remedies, the applicability of each further depending on a number of requirements and preconditions. In some situations a party would need to make a choice between the use of the *aedilition* actions, or one of the general remedies enforced by way of the *actio empti*.[44]

It is further not absolutely clear whether infringement of the obligations discussed above are to be regarded as a form of breach of contract in the traditional sense or a new form of breach or simply a *sui generis* liability? The same problems are accordingly

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[39] *Supra* 418 A.
[40] Kerr *Sale and Lease* 107.
[41] Zimmermann *Roman Foundations* 303. While the overlap of delictual and contractual liability remains an ever-growing problem in South Africa, beyond a few general comments, it will not be addressed at length in this thesis.
[42] Lotz *Purchase and Sale* 380.
[43] De Wet & Van Wyk *Kontraktereg* 344.
[44] Kerr *Sale and Lease* 91. The choice would normally be influenced by that which the party wishes to claim with the remedy. If he wishes to claim consequential damages, he would rather make use of the

experienced when endeavouring to determine the exact foundation of the remedies applicable at the infringement of both obligations. As it not clear whether they are to be deemed as remedies for breach of contract, whether in the traditional sense or a new form, or some sort of *sui generis* remedies available in the situations outlined above.[45] This adds additional confusion to an already overly complex system.

From a strictly commercial point of view this situation seems highly unsatisfactory and it is submitted that the every day trader should have access to a far more streamlined system, one providing clearer and more commercially sound solutions. [46]

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general remedies as consequential damages, as mentioned above, can not be claimed with the *aedilitian action*.

[45] Cf Olivier "Aanspreeklikheid weens Onskuldige Wanvoorstelling by Kontraksluiting" 1964 *THRHR* 20; Lubbe & Murray *Contract* 354-355.

[46] This issue will be considered further in Chapter seven where recommendations for a more effective system will be offered.

CHAPTER FIVE

CONCLUSIONS DRAWN IN THE ANALYSIS OF THE SOUTH AFRICAN SYSTEM OF BREACH OF CONTRACT AND REMEDIES

5 1 Introduction

Following the dissection of the South African system of breach of contract and remedies in chapters two, three and four, it is possible to draw a number of very interesting and in some instances worrying conclusions.

At this stage it seems pertinent to consider the contentious issue of fault in relation to breach and deliver an overriding evaluation of the system's need for it. The chapter will then conclude with an investigation into an issue that essentially cuts to the very heart of the South African system of breach, namely the supposed relationship between the form of breach in existence and the resultant remedies.

If it were to be found that the form of breach one's conduct fell into does not have a bearing on one's remedies the very premise the system is based on will be turned on its head. The cement holding together the foundation of this intricate structure of breach will vanish leaving in its wake an overly complex, non-functional system severely lacking any logical purpose.

5 2 The role, if any, of fault in the event of breach of contract

5 2 1 General Remarks

Fault cannot thus far be regarded as having found its rightful standing in respect of breach of contract, at least in as far as the level of agreement amongst writers on the subject is anything to gauge from.[1] While fault was allegedly a requirement for breach of contract in Roman-Dutch law,[2] its existence as such in South African law remains controversial.

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[1] See inter alia Van der Merwe et al *General Principles* 301-305;
[2] Stoop "The relevance of fault in breach of contract" 1998 THRHR 1 9.

In the instance of breach of contract fault appears to play one of two principal roles. It can either exist as a requirement to determine the existence of a breach of contract itself, or it can be a factor in the determination of the remedies available at breach, a position that it most commonly assumes in civil law countries.[3]

At the start of this thesis, South Africa's complex legal genealogy was set out and by this stage it should be clear that she could not simply be neatly slotted into one of the above legal traditions and their divergent attitudes to fault. Experience has shown that the South African law of contract, as in the case of most other spheres of law, has largely developed its own distinct approach and it is submitted that the issue of fault is no exception.

In *Administrator, Natal v Edouard* [4] it was plainly stated that in contrast to delict "fault is not a requirement for a claim for damages based upon a breach of contract." It is clear that this statement cannot, without further deliberation, be accepted as black letter law in all cases of breach. It does however give rise to an interesting point regarding the convergence of delict and the law of contract.

It is generally accepted in South African law that the same cause of action can give rise to both a delictual and a contractual claim, as long as the requirements for each have been met.[5] The essential dividing line here appears to be fault, which is always a requirement for delictual liability. It is submitted that if fault were viewed as an invariable requirement for contractual liability, the dividing line between delict and contract would virtually disappear. Owing to a number of divergent reasons these two spheres must be kept distinct.[6]

To deduce the exact function of fault, it is necessary to explore its role, if any, in relation to each of the five above-mentioned forms of breach, following which proposals will be made regarding its future status.

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[3] Treitel *Remedies for Breach of Contract* (1988) 7.
[4] 1990 (3) SA 581 (A) 597. Cf. Van der Merwe et al *General Priciples* 302.
[5] Hutchison & Van Heerden "The tort/contract divide seen from the South African perspective" 1997 *Acta Juridica* 97 98.

5 2 2 The role of fault in respect of each of the recognised forms of breach

5 2 2 1 *Mora debitoris* and *mora creditoris*

Owing to the similarities between these two forms of breach, the issue of fault in relation to each of them will be discussed simultaneously. In *Nel v Cloete*[7] the Appellate Division assumed that fault was a requirement for *mora*. Its exact function is, however, not clear at all, but it appears that a party who is late is presumed to be at fault, and that is incumbent on that party to establish the absence of fault. In this way, the absence of fault serves as an excuse or a possible ground on which to escape liability for the violation of a contractual duty.[8]

5 2 2 2 Repudiation

The test for this form of breach requires a "deliberate and unequivocal intention no longer to be bound".[9] Although this test might seem to point to the existence of fault on the part of the guilty party, it must be remembered that the test is objective so that there is no basis for the contention that fault is built into the concept of repudiation.[10] It has, however, again been suggested that the absence of fault may be a defence to resist a claim based on repudiation.[11]

5 2 2 3 Prevention of Performance

Whether fault is a requirement for liability at prevention of performance has not yet been conclusively decided. In *Grobbelaar v Bosch*[12] it was held that if a contractant cannot be blamed for the impossibility of performance, he is excused from performance. This apparent requirement for the breach should therefore be understood as providing a ground for escaping liability should it not be present.

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[6] For reasons why these two areas of law cannot be merged see Van der Merwe et al *General Principles* 304-305.
[7] 1972 (2) SA 150 (A) 167 as referred to in Van der Merwe et al *General Principles* 317 n 119.
[8] See 2 3 1 1 1 1 *supra* and 2 3 3 1 1 *supra*.
[9] See 2 3 2 1 *supra*.
[10] See *Tuckers Land and Development Corporation (Pty) Ltd v Hovis supra* 653; *DataColor International (Pty) Ltd v Intamarket (Pty) Ltd* 2002 (2) SA 284 (SCA 294.
[11] Van der Merwe et al *General Principles* 335.
[12] 1964 (3) SA 687 (E) 691 as referred to in Van der Merwe et al *General Principles* 339.

With a view to the promotion of certainty, it is submitted that a contractant should only be permitted to an excuse from liability for breach of contract if the impossibility of performance is due to *vis maior* or *casus fortuitus*. Lack of fault in circumstances which do not fall under either of these rubrics ought not to free one from liability.[13]

5 2 2 4 Positive Malperformance

The focus point of academic wrangling regarding the role of fault as a requirement for breach seems to relate to positive malperformance.[14] The opinions on this topic range from the failure to even mention the existence of such a possibility[15] to the view that it is a general requirement.[16] Others, however, state that the topic has not as of yet been decided with any real certainty, thereby indicating the current state of the affairs.[17]

The fact that there is a dearth of case law on the subject is surprising until one takes into account that when this form of breach developed, proper performance was usually warranted, expressly, tacitly or by operation of law. On this basis, the question of fault becomes immaterial.[18] But what of the situations where the assumption of liability does not involve the undertaking of a warranty? The law of sale in particular has developed to such an extent that such situations are quite limited. This means that the issue of a further requirement in the form of fault will not often arise in practice.

It appears that it can broadly be stated that unless provided differently in the contract, fault is not a definite requirement for positive malperformance.[19]

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[13] It must, however, be highlighted that should the guilty party be in *mora*, he cannot use his lack of fault as a justification to avoid liability, see *supra* 2 3 2 2.
[14] Cockrell *Breach of Contract* 312.
[15] See the references quoted in Stoop "The relevance of fault" 10 n 59.
[16] See the references quoted in Cockrell *Breach of Contract* 312 n 50.
[17] Lubbe & Murray *Contract* 490.
[18] Van der Merwe et al *General Principles* 325.
[19] Van der Merwe et al *General Principles* 326. See however *infra* for suggestions regarding where it could play a role.

5 2 3 Conclusions and Suggestions for the future role of fault in South African law

It is clear that the role of fault reflects the fragmented concept of breach and that it cannot be viewed as a universal requirement for all of the forms of breach recognised in South Africa. This lack of uniformity results in uncertainty and divergent judgements,[20] which heightens the air of uncertainty characterising the South African system of breach. If fault does not constitute a distinct requirement for breach, the question is whether it should simply be discarded or whether the matter should not be approached differently.

Fault may serve a purpose by providing an excuse for a party's actions.[21] The more correct and commercially effective approach would be to ignore fault as an express requirement for the existence of breach and simply regard it as a means to escape liability once a breach is found.[22] It is, however, only where fault is excluded as a result of *vis maior* or *casus fortuitus* that such an excuse should be allowed. Such an approach will provide clear-cut practical results as it is based on an objective standard. If it is not adopted, difficult issues regarding the precise degree of blamelessness that would permit an escape from liability will have to be decided, adding additional uncertainty to an already intricate system.

This approach would give rise to the same effects as a finding of supervening impossibility, which results in extinction of the obligations if non-performance is due to *vis maior*. If this construction of the role of fault were to be followed, the need for prevention of performance as a distinct form of breach would cease fall away, as it would be subsumed under the doctrine of impossibility of performance.[23]

5 3 The relationship between the form of breach and the available remedies

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[20] For example in *Nel v Cloete supra* 167 the Appellate Division held that fault is a requirement for a finding of mora yet in *Administrator Natal v Edouard supra* 597 it held that fault is not a requirement for breach of contract.

[21] See Treitel *Remedies* 9 for a discussion of fault as a ground for justification.

[22] A similar approach was suggested by Van Rensburg et al *Contract* par 221 in Joubert (ed) *The Law of South Africa* V (1978).

[23] See chapter seven for more on this notion.

Now that the various forms of breach and remedies recognised in South African law have been dealt with, the exact relationship between the form of breach and the resultant remedies can be considered. This after all is the fundamental premise of the fractured system, namely that the form of breach dictates the remedies available to the contractants. If it were to be found that the form of breach does not determine the remedy available to the party, in other words that there is no real difference as to the relief available for each form of breach, the need for this complex system of categories of breach would fall away.

5 3 1 The relationship, if any, between a finding of a specific breach and enforcement of performance

As shown above, subject only to a broad judicial discretion, a party always has the right to claim enforcement of performance when the other party is found to have committed breach, regardless of the form, which it assumes.

But is the finding of breach in any event the catalyst bringing about this claim? Must such a finding be present to entitle a party to claim the performance of the obligations envisioned by the contract?

In *Theron v Theron*[24] a very interesting and astute point was raised in the following way

> "While it is necessary, in the case of a contract under which the time for performance has not been fixed, that the debtor (i.e. the party by whom performance must be made) be placed in *mora* before the contract can be cancelled on the ground of the debtor's failure to perform ...or before damages or interest can be claimed by reason of the debtor's non timeous performance...it is not the law that a debtor must be placed in *mora* before he may be sued for specific performance"[25]

The creditor's claim for performance arises from the contract itself and there is no need to first prove the existence of *mora* for the right to arise. This idea clearly

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[24] 1973 3 SA 667 (C). The judge referred to Van Zyl Steyn *Mora Debitoris supra* 83-85. Case law used as authority for this finding include *Standard Finance Coporation of SA Ltd. v Langeberg Kooperasie Bpk* 1967 (4) SA 686 (AD) 691; *Blundell v McCawley* 1948 (4) SA 473 (W) which further relied on the decisions of *Ridley v Marais* 1939 AD 5 and *Fluxman v Brittain* 1941 AD 273. See also *Lamprecht v Lyttleton Township (Pty) Ltd 1948* (4) SA 526 (T); *Nel v Cloete supra* 159.

[25] 1973 3 SA 667 (C) 672. Cf. Lubbe & Murray *Contract* 504.

follows from the fundamental premise of *pacta sunt servanda* and accordingly finds a very secure foothold in South African contract law.[26]

The same principle can very easily be applied to the other forms of breach, with the result that whether a party's conduct does or does not satisfy the requirements of one or other of the forms of breach is of absolutely no consequence as far as the other party's right to enforce the contractual obligations is concerned. The right to enforce performance simply arises from the contract itself and the question is simply whether the relevant duty is due and enforceable. The fact that specific performance will in a factual sense often be sought when a debtor is in breach does not detract from this.

5 3 2 The relationship, if any, between a finding of a specific breach and the availability of a claim for damages.

The right to claim damages does not depend on the specific form of breach. The remedy becomes available on the basis of certain general principles wherever a party acts wrongfully by infringing a contractual duty. These general principles have clearly not been developed in response to the classification of the various breaches and are applicable regardless of the form of breach found to have been committed.

It is true that various so-called measures of quantification have developed in respect of particular forms of breach that frequently arise in practice and that there is in this sense an inter-connection between the remedy and certain breaches. If, however, one bears in mind that these specific measures of quantification are themselves based on the general principles and are only applicable as far as they give effect to the latter, it is clear that not too much can be made of this. This fact is also evident from the above discussion of one of the quantification measures, namely the market value rule, which is clearly applicable to all the forms of breach.

5 3 3 The relationship, if any, between a finding of a specific breach and the availability of a right to cancel

[26] See in this regard *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk supra* 433.

Cancellation has proved to be the most controversial remedy due to the fact that it is not generally available, and its availability is further said to depend on the form of breach that has occurred. Consequently in most discussions of the topic, and the present thesis, it is dealt with in relation to each form of breach. It has, however, been submitted that what is at the core of these rules is the concept of a material breach rather than the various forms of breach.[27] A closer inspection of each of the forms of breach and their consequent remedies reveals the truth of this statement.

Originally the parties could only cancel the contract if there was an applicable *lex commissoria* in the contract, which was usually only the case if the breach was serious enough to warrant such an outcome. As time, however passed, new rules developed. In the case of *mora debitoris* and (as shown above) consequently *mora creditoris*, the whole concept of "time is of the essence" can be traced back to the desire to grant a right to cancel only if the breach is serious enough to warrant this. Cancellation on the basis of positive malperformance is completely based on the seriousness of the breach in question. Repudiation is based on the principles applicable to the other breaches and prevention of performance usually leads to cancellation because of the serious nature of the breach.

In conclusion, therefore, the discussion reveals that the rules applicable to the right to cancel are founded on the notion of material breach. There is no practical reason for the complex rules on cancellation which are presently in existence. Accordingly the need to differentiate so strictly between the various forms of breach seems to fade further into oblivion.

5 4 Conclusion

From the above it is apparent that the present system can by no stretch of the imagination be regarded as ideal. It was developed in a largely ad-hoc fashion, is based on antiquated ideas and principles which, with a few exceptions, have not as of yet received any real adaptation to bring it in line with the demands of modern day

[27] See chapter 3 4 1 and the references referred to in chapter 3 n 92.

commercial life. In respect of the contract of sale, discussed in chapter 4, the position is even more complex.

It was pointed out that the injured party is, in the case of a breach of a contract of sale faced with a situation of some complexity. This is owing to the fact that both general and specific remedies are applicable to him. This is particularly the case where the *merx* is latently defective, a situation that occurs frequently in trade. Adding to his dilemma is the threat of a possible over-lap between the principles of contract and delict and the uncertainty regarding the theoretical basis for some of the remedies at his disposal.

In the present chapter it was shown that no real practical benefit is gained by following a fragmented approach to breach. On the contrary it simply creates greater obscurity and consequently adds to the uncertainty already facing the parties in the event of breach. One marvels at the fact that traders in today's rapidly paced world of commerce are expected to rely on this anarchic and overly intricate system of breach and remedies. The lack of certainty inherent in the system must to some degree place South African traders on an unequal footing to the rest of the world and amount to an obstacle in the development of global trade and economic growth. This situation is in due need of rectification.

CHAPTER SIX

BREACH OF CONTRACT UNDER THE CISG

6 1 Introduction

> "[W]hat the drafters sought was not superior sales law, but rather uniform sales law. The theory behind this approach was that uniform law - whether or not it represented substantive improvement- would at least eliminate the complexities, uncertainties and costs of the system of subjecting international sales transactions to national sales law designated by private international law rules."[1]

In the previous chapters the South African system of breach and remedies was examined and it was determined that the intricate structure of breach is without a functional basis and that reconstruction should consequently be considered.[2] Part of this process will be the determination of an alternative structure. The United Nations Convention on Contracts for the International Sale of Goods (The CISG) is arguably one of the most modern approaches to the international contract of sale.[3] As repeatedly mentioned through out this thesis.[4] the CISG is said to have embraced a unitary system of breach of contract.[5] This approach, unlike that which obtains in South Africa,[6] and many other legal systems, does not identify various forms of breach, each with their own set of

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[1] Erauw & Flechtner *Remedies under the CISG and Limits to their Uniform Character* in Sarcevic & Volken (ed) *The International Sale of Goods Revisited* (2003) 35 42.

[2] See particularly chapter five.

[3] The CISG was prepared by the United Nations Commission on the International Trade law (UNCITRAL) and was adopted at the Vienna Convention on 11 April 1980 and finally entered into force on 1 January 1988. For an overview of the historical background of the CISG consult inter alia: Bianca & Bonell *International Sales Law* 3-7; Ferrari *The Sphere of Application of the Vienna Sales Convention* (1995) 2-6; Schlechtriem (ed) *Commentary on the UN Convention* on the International Sale of Goods (CISG) 2nd ed (1998) 1-7; Eiselen "Adoption of the Vienna Convention" 333-338; Nicoll "The United Nations Convention on Contracts for the International Sale of Goods: The Vienna Sales Convention 1980" August 1993 *New Zealand Law Journal* 305 305; Nicholas "The Vienna Convention on International Sales Law" 1989 *The Law Quarterly Review* 201 201-204; Sono *The Vienna Sales Convention: History and Perspective* http://www.cisg.law.pace.edu/cisg/biblio/sono (12/10/03); Felemegas *The United Nations Convention on Contracts for the International Sale of Goods Article 7 and Uniform Interpretation* http://www.cisg.law.pace.edu/cisg/biblio/felemegas (12/10/03).

[4] See chapter one and the references quoted therein.

[5] This premise will be debated *infra*.

requirements, which need to be met before the breach and its consequences are regarded as arising. Under a unitary system of breach any non-fulfillment of an obligation by a party, whether expressly stated in the Convention or merely akin to the contractants' individual undertakings, is regarded as a breach of contract, which at least in principle attracts the self-same consequences.[7] This chapter will endeavor to determine the extent to which the CISG meets the needs of the international trader and accordingly its viability as a model for the reconstruction of South Africa's system of breach of contract.

6 2 The CISG's remedial system

The remedies for breach of contract available under the CISG are dealt with in a distinctive manner. The buyer and seller's remedies are segregated and dealt with after the obligations of each party are set out. Following which a number of remedies available to both parties are dealt with. The reason for this mode of treatment is obviously the differences between the form and effect of the buyer and seller's acts of breach. Typically the buyer's obligations are fewer and far less intricate then those of his counterpart and he also normally has more control over them.[8]

This section will start with a brief synopsis of the exclusive remedies available to the buyer and seller as set out in articles 45 and 61 respectively. As will become apparent later, these remedies that the convention makes available to the buyer or seller respectively, are essentially identical and consequently they will be considered simultaneously following which the general remedies pertaining to both parties will be discussed.

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[6] See Chapter two and four for an overview of the South African system of breach and chapter five for conclusions drawn after a study of the system.

[7] Cf. Article 45 and 61 and 6 2 1 *infra*.

[8] See Ziegel *The Remedial Provisions in the Vienna Sales Convention: Some Common Law Perspectives* in Galston & Smit (ed) *International Sales: The United Nations Convention on Contracts for the International Sale of Goods* (1984) 9-1 9-29. Despite the distinction between the remedies available to buyer and the seller, some writers feel that significant discrepancies between the two sets of obligations and their consequent breach warrant further attention.

6 2 1 A brief synopsis of the remedies that the Convention exclusively bestows on each of the respective parties

Article 45 and 61 constitute the core of the buyer and seller's remedies in the event of breach of contract.[9] The discrepancies between the two provisions are almost non-existent and for this reason they will be discussed together.

Although the articles seem simplistic, they reveal the essence of the CISG's unitary outlook on breach. It is clear that in theory any infringement of his obligations provides the buyer and seller respectively with a range of remedies.[10] The chief remedies identifiable in the articles are: enforcement of performance.[11] avoidance (including the availability and consequences of a resort to the *Nachfrist* mechanism).[12] damages.[13] reduction in price[14] and interest.[15]

6 2 2 The principal remedies available in the event of breach

6 2 2 1 Enforcement of performance

If one were to pin point one area of law that epitomizes the chasm lying between the civil and common law legal traditions, it would probably be their deeply divergent outlooks on

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[9] Article 45 provides: 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 damages as provided in articles 74 to 77. (1) The buyer is not deprived of any right he may have to claim damages by exercising his right to other remedies. (2) No period of grace may be granted to the seller by a court or arbitral tribunal when the buyer resorts to a remedy for breach of contract. Article 61 provides: (1)If the buyer fails to perform any of his obligations under the contract or this Convention, the seller may: (a)exercise the rights provided in articles 62 to 65; (b) claim damages as provided in articles 74-77. (1) The seller is not deprived of any right he may have to claim damages by exercising his right to other remedies. (2) 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.

[10] The availability of some, such as avoidance, is however restricted.

[11] See 6 2 2 1.

[12] See 6 2 2 2.

[13] See 6 2 2 3.

[14] See 6 2 2 4.

[15] See 6 2 2 5.

the remedy of enforced performance.[16] In Civil law, this remedy occupies the position of the primary remedy for breach, while in Common law legal systems it is regarded as an extraordinary remedy, granted only in certain exceptional circumstances.[17]

The adoption or non-adoption of this remedy as part of the CISG would thus always prove problematic. The Convention sought to resolve this tension by incorporating a largely unrestricted right to require performance, mirroring the approach followed in civil law counties, while retaining a wide reaching reservation regarding the application of this remedy in order to placate common law countries.[18] This reservation, entrenched in article 28, will be discussed after a consideration of the broad right to require performance as outlined in article 46 and 62.

Article 46 and 62 represent the basic provisions entitling the buyer and seller to demand performance from their respective counterparts.[19] As mentioned before, this right is laid out quite extensively with only a few exceptions. It is based on the idea of *pacta sunt servanda*.[20]

Article 46(1) is available in the case of any non-performance by the seller and only withholds the right to require performance when the buyer has resorted to an inconsistent

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[16] See Ziegel *The Remedial Provisions* 9-10 – 9-11 for a discussion on the actual extent of the gulf separating the two legal systems' attitudes to specific performance, particularly the modern day adherence to ideas forged long ago on. See also 3 2 in chapter three in this regard.

[17] Bianca & Bonell *International Sales Law* 232 & 333-334; Schlechtriem *Commentary on the UN Convention* 198-199. The extent of the common law tradition of not fervently granting performance enforcement remedies is, however sometimes thought to be overemphasized. Cf. Honnold *Uniform Law for International Sales under the 1980 United Nations Convention* (1999) 306; Bianca & Bonell *International Sales Law* 334. See 3 2 in chapter three where this distinction was also highlighted.

[18] Erauw & Flechtner *Remedies under the CISG* 46-47.Cf. Honnold *Uniform Law for International Sales* 305; Schlechtriem *Commentary on the UN Convention* 198-200.

[19] Article 46 provides: (1) The buyer may require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with this requirement (2) If the goods do not conform with the contract, the buyer may require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach of contract and a request for substitute goods is made either in conjunction with notice given under article 39 or within a reasonable time thereafter. (3) If the goods do not conform with the contract, the buyer may require the seller to remedy the lack of conformity by repair, unless this is unreasonable having regard to all the circumstances. A request for repair must be made either in conjunction with notice given under article 39 or within a reasonable time thereafter. Article 62 provides: The seller may require the buyer to pay the price, take delivery or perform his other obligations, unless the seller has resorted to a remedy which is inconsistent with this requirement.

remedy.[21] An example of such conduct is where the relevant party has already avoided the contract. This remedy is obviously inconsistent with a claim for performance and precludes the enforcement of the contract.[22]

Article 46(1) provides the buyer with relief in the case of a total failure of performance by the seller.[23] As a result of the additional complexity associated with the seller's obligations in comparison with that of the buyer, especially with regard to his duty to deliver conforming goods and the buyer's consequent right to require performance, article 46 includes certain further provisions to deal with particular circumstances of non-conforming delivery.[24] This is thus clearly an instance where specific remedial provisions have developed in regard to a particular form of breach.[25]

Article 46(2) precludes the buyer from demanding the delivery of substitute goods unless the breach is found to be fundamental.[26] It further states that the goods must be requested in conjunction with or within a reasonable time after the necessary notice of the lack of conformity, as prescribed in article 39, is given. The reason for restricting the claim of substitute goods to instances of a fundamental breach is obvious if one considers the resultant hardship on the seller.[27]

Article 46(3) entitles the buyer to demand repair of the goods even if the breach is not fundamental unless this would be unreasonable.[28] The cost of repair in relation to the value of the goods or the significant trouble the seller will need to go to satisfy the

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[20] Bianca & Bonell *International Sales Law* 335.
[21] Schlechtriem *Commentary on the UN Convention* 378; Bianca & Bonell *International Sales Law* 335. See below regarding the exceptions to this right as arising from article 79.
[22] Honnold *Uniform Law for International Sales* 306-307.
[23] Lookofsky & Bernstein *Understanding the CISG in Europe: A compact guide to the 1980 United Nations Convention on Contracts for the International Sale of Goods* (1997) 84.
[24] Bianca & Bonell *International Sales Law* 333.
[25] This would traditionally be regarded in South African law as positive malperformance.
[26] See the discussion of what constitutes a fundamental breach in 6 3 1 *infra*.
[27] Schlechtriem *Commentary on the UN Convention* 377; Bianca & Bonell *International Sales Law* 338. See also the discussion of fundamental breach in 6 3 1 *infra*.
[28] Honnold *Uniform Law for International Sales* 309.

demand may indicate that it is unreasonable to insist on this variant of the performance remedy.[29]

The Right to cure

If the date for performance has not yet arrived, Article 37 gives the seller, subject to certain conditions, the right to cure his delivery of defective goods before the day arrives. This concession is further extended by article 48 which provides that the seller is entitled to cure even after the delivery date. This right is, however, not unqualified. In such a case, the right to cure depends on it being capable of being effected without unreasonable delay, inconvenience or uncertainty regarding the reimbursement of expenses advanced by the buyer.

This right is quite intrusive on the remedies available to the buyer, but once one considers that the circumstances of the buyer must be taken into account to determine if the right should be allowed, its influence appears to diminish. The article also contains a further premise as it is subject to article 49.[30] Honnold, however, submits that a hasty declaration of avoidance by the buyer cannot trump this right to cure by the seller.[31] A further correlation between the seller's right to cure and avoidance should be considered, namely that the determination of whether the breach can be cured may play a role in the determination of its materiality, which is required to determine if it is fundamental and consequently warrants avoidance.[32]

The article 48 right to cure is clearly a further part of the Convention's ongoing plan to ensure the preservation of contracts rather then their avoidance, but it is submitted that it

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[29] Enderlein & Maskow *International Sales law* 180.
[30] Schlechtriem *Commentary on the UN Convention* 406.
[31] Honnold *Uniform Law for International Sales* 375-376 as referred to in Lookofsky & Bernstein *Understanding the CISG in Europe* 91 and Kritzer (ed) *Detailed Analysis* in *Guide to Practical Applications* 404. Cf. Ziegel *The Remedial Provisions* 9-23; Lorenz *Fundamental Breach under the CISG* http://www.law.pace.edu/cisg/biblio/lorenz.html (12/10/03); Schneider "The Seller's right to cure under the Uniform Commercial Code and The United Nations Convention on Contracts for the International Sale of Goods" *1989 Arizona Journal of International and Comparative Law* 69 86-90.
[32] Nicholas "The Vienna Convention on International Sales Law" 224.

does more harm then good by creating unnecessary uncertainty. Once again it can be pointed out that this right is not available in all cases of breach but only in respect of the delivery of non-conforming goods.[33] Once again it is clear that distinct provisions apply to traditionally recognised variants of breach.

Article 62 states that the seller may demand performance in the event of failure by the buyer to perform his obligations as long as the seller has not resorted to a inconsistent remedy. This articled is considerably shorter then its article 46 counterpart due to the fact that compelling the buyer to pay for the goods once he has received and retained them is often far less problematic then enforcing delivery of the goods by the seller.[34]

6 2 2 1 1 The reservation of the right to enforce performance as entrenched in article 28.

Article 28

> If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgment for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention.

These simple words attempt to provide the bridge between the common law and civil law approaches to enforcement of performance and to resolve one of the main obstacles facing the unification process. It appears to adequately provide for the common law approach to enforcement of performance and thus to address the concerns of both systems of law. Schlechtriem, however, submits that this is not entirely the case and that the Convention does not result in the same outcomes as its domestic counterparts.[35]

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[33] There are, however, suggestions that the delay in performance can also be cured. See Kritzer (ed) *Detailed Analysis* in *Guide to Practical Applications* 407. There is no corresponding right to cure available for the buyer.

[34] Honnold *Uniform Law for International Sales* 378.

[35] Schlechtriem *Commentary on the UN Convention* 201.

It is clear from the wording of article 28 that the relevant court is only entitled not to grant a remedy for 'specific performance', which suggests that not all the remedies resulting in the enforcement of performance are affected.[36] The remedies which are not affected are often, however, difficult to establish. The very phrase 'specific performance' bears a number of different meanings and constructions, which makes determining the exact scope of the provision difficult.[37]

The general view is that the phrase encompasses the performance of all contractual obligations and thus covers all the remedies invoked in terms of article 46 and 62.[38] It does not apparently extend to claiming of restitution of goods or money after avoidance of the contract.[39]

By once again putting the ball in the court of the relevant domestic court, which, of course, presupposes a recourse to the complex rules of private international law to determine the applicable national law, article 28 defeats one of the chief objectives of the Convention.[40] This clearly militates against the spirit of uniformity underlying the convention and once again results in uncertainty.[41]

Some writers suggest that the solution to this problem is to view the relevant domestic court's (forum) national law as being applicable rather then its private international law rules.[42] Schlechtriem submits that "(t)he reference to the 'own law' of the court would be confusing and superfluous if article 28 intended to refer to the private international law of the forum state."[43] He feels that "the wording, purpose and legislative history" of this

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[36] Erauw & Flechtner *Remedies under the CISG* 56.
[37] See Erauw & Flechtner *Remedies under the CISG* 56; Schlechtriem *Commentary on the UN Convention* 203 for examples.
[38] Honnold *Uniform Law for International Sales* 382; Schlechtriem *Commentary on the UN Convention* 203. There remains debate, however, regarding the classification of the seller's action for the price. See Ziegel *The Remedial Provisions* 9-31.
[39] Schlechtriem *Commentary on the UN Convention* 203.
[40] For examples of typical quandaries arising from this provision, see Honnold *Uniform Law for International Sales* 223-224.
[41] Erauw & Flechtner *Remedies under the CISG* 55.
[42] Schlechtriem *Commentary on the UN Convention* 205; Honnold *Uniform Law for International Sales* 223-224.
[43] Schlechtriem *Commentary on the UN Convention* 205.

article advocate against this point of view.[44] While this latter submission seems far more feasible and would prevent the need to venture into the often complex world of private international law, it still results in the domestic rules of one of the trading partners being applicable rather then an independent impartial convention.

This difficulty is marginally tempered by the fact that should the court decide to grant the remedy of specific performance, it cannot follow the national rules in this regard but must instead return to the rules of the CISG.[45]

This blatant lack of homogeneity in the CISG's approach to enforcement of performance is not widely stressed. One of the reasons for this is the structure of the articles applicable to enforcement of performance within the Convention.[46] Article 28 falls under the general provisions and is not situated within the Parts dealing with remedies, as its counterparts, articles 46 and 62 are.

While the need for this article is fully understandable in light of the divergent outlooks on this remedy held by the two principal global legal systems, one cannot shy away from the fact that it does reduce the issue of specific performance to an area of uncertainty.[47] This outcome is unacceptable in a Convention of the stature of the CISG and should be reconsidered.[48]

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[44] Schlechtriem *Commentary on the UN Convention* 205.

[45] Erauw & Flechtner *Remedies under the CISG* 55. It should, however, be noted that neither article 46(1) nor 62 provide how a judgment is to be enforced. The law of the country where it must be enforced must determine this. Cf. Bianca & Bonell *International Sales Law* 238.

[46] Erauw & Flechtner *Remedies under the CISG* 47.

[47] Some writers underplay the divide existing between the common law and civil law outlook to specific performance. See Bianca & Bonell *International Sales Law* 233-234.

[48] A possible less drastic solution may be to apply the exemption embodied in article 28 as restrictively as possible. Cf. Erauw & Flechtner *Remedies under the CISG* 64. Bianca & Bonell suggest that the article was in fact not necessary as a greater compromise could have been reached between the two disciplines. See Bianca & Bonell *International Sales Law* 236-237.

6 2 2 2 Avoidance and the effect of the right to fix a *Nachfrist*

Article 49 and 64 determine when the buyer and seller may respectively avoid the contract.[49]

Generally a seller or buyer only has the right to avoid the contract if the breach is found to be fundamental.[50] This article is in line with the universally accepted notion that a breach must be sufficiently serious for it to justify the drastic consequence of avoidance.[51] Essentially it is a process of 'balancing the buyer's concern for predictability and certainty against the seller's need for protection against contracts canceled on minor or capricious grounds."[52]

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[49] Article 49 provides: (1) The buyer may declare the contract avoided: (a) if the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; 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. (2) However, in cases where the seller has delivered the goods, the buyer loses the right to declare the contract avoided unless he does so: (a) in respect of late delivery, within a reasonable time after he has become aware that delivery has been made; (b) in respect of any breach other than late delivery, within a reasonable time: (i) after he knew or ought to have known of the breach (ii) after the expiration of any additional period of time fixed by the buyer in accordance with paragraph (1) of article 47, or after the seller has declared that he will not perform his obligations within such an additional period; or (iii) after the expiration of any additional period of time indicated by the seller in accordance with paragraph (2) of article 48, or after the buyer has declared that he will not accept performance. Article 64 provides: (1) The seller may declare the contract avoided: (a) if the failure by the buyer to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or (b) if the buyer does not, within the additional period of time fixed by the seller in accordance with paragraph (1) of article 63, perform his obligation to pay the price or take delivery of the goods, or if he declares that he will not do so within the period so fixed. (2) However, in cases where the buyer has paid the price, the seller loses the right to declare the contract avoided unless he does so:(a) in respect of late performance by the buyer, before the seller has become aware that performance has been rendered; or (b) in respect of any breach other then late performance by the buyer , within a reasonable time: (i) after the seller knew or ought to have known of the breach; or (ii) after the expiration of any additional period of time fixed by the seller in accordance with paragraph (1) of article 63, or after the buyer has declared that he will not perform his obligations within such an additional period.

[50] Article 49 (1)(a) and 64 (1)(a). See the discussion in 6 3 1 *infra* regarding what constitutes a fundamental breach.

[51] The need for a sufficiently serious breach before avoidance is justified is even more pertinent in international transactions which often involve far greater volumes of goods, currency and far larger distances to travel. Cf. Pauly "The concept of fundamental breach as an international principle to create uniformity of commercial law" 2000 *Journal of Law and Commerce* 221 225.

[52] Ziegel *The Remedial Provisions* 9-12.

The Convention also gives both the aggrieved buyer and seller the right to fix an additional period of time or "*Nachfrist*" as a deadline for performance by the breaching party.[53] This remedy is provided in article 47 and 63 for the buyer and seller respectively.[54] Owing to the effects of this "remedy" on the availability of avoidance, it appears pertinent to consider it here.[55]

The fixing of an additional period of time for performance brings with it certain additional legal implications both for the buyer and the seller.[56] Article 49 (1)(b) makes it clear that if the buyer has fixed an additional period for delivery and the seller still does not deliver, he may declare the contract avoided whether the failure amounts to a fundamental breach of contract or not.[57] This is the most important function of this power to fix an additional period of time.[58] It must be observed, however, that this concession is only applicable to cases of non-delivery and not to all failures to perform, which indicates an implicit fragmentation of the unitary concept of breach by the seller into delay and the other instances.[59]

By virtue of article 47 the buyer is entitled to fix an additional period for the seller to perform any of his obligations after the seller has failed to perform.[60] This additional period must be 'reasonable' in light of the circumstances. Ziegel submits that the only

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[53] Erauw & Flechtner *Remedies under the CISG* 44.

[54] Article 47 provides: (1) The buyer may fix an additional period of time of reasonable length for performance by the seller of his obligations. (2) Unless the buyer has received notice from the seller that he will not perform within the period so fixed, the buyer may not, during that period, resort to any remedy for breach of contract. However, the buyer is not deprived thereby of any right he may have to claim damages for delay in performance. Article 63 provides: (1) The seller may fix an additional period of time of reasonable length for performance by the buyer of his obligations.(2) Unless the seller has received notice from the buyer that he will not perform within the period so fixed, the seller may not, during that period, resort to a remedy for breach of contract. However, the seller is not deprived of any right he may have to claim damages for delay in performance.

[55] See the submissions made *infra* and in chapter seven regarding the exact nature of this right.

[56] Schlechtriem *Commentary on the UN Convention* 394.

[57] Fletcher feels that the omission to provide rules on the materiality of the performance not delivered may undermine the fundamental breach standard. Fletcher *Remedies under the New International Sales Convention: The Perspective from Article 2 of the U.C.C.* http://www.cisg.law.pace.edu/cisg/biblio/flecht (12/10/03).

[58] Schlechtriem *Commentary on the UN Convention* 394.

[59] See Schneider "The Seller's right to cure" *Arizona Journal of International and Comparative Law* 83-90 for a discussion on the wisdom in restricting this additional right to avoid the contract to non-delivery.

[60] Schlechtriem *Commentary on the UN Convention* 397.

function that article 47(1) serves is to fix a "terminal date" for the goods to be delivered where the contract does not make the delivery of the goods an essential obligation of the contract.[61]

A second important function of this article is to provide a buyer, who has lost his right to avoid the contract when the seller has delivered defective goods due to the fact that he did not report the breach within a reasonable period as prescribed by article 49(2)(b), with a right to avoid the contract on the basis of article 49(1)(b).[62]

The fixing of an additional period of time provides the seller with a supplementary period wherein the buyer may not resort to any remedy other than a claim for damages for delay in performance.[63]

Although article 63 is in wording identical to 47, its practical effect on the parties, however, differs slightly. Article 64(1)(b) states that if the buyer does not make payment or take delivery within the additional time fixed, the seller may avoid the contract notwithstanding the fact that the breach is not fundamental. Thus by separating the consequences of non payment or non acceptance of the goods by the buyer from the other forms of non-performance, article 64 continues the trend of fracturing the unitary notion of breach.

It is submitted that the inclusion of this right is a praiseworthy step as it creates greater certainty in the minds of both seller and buyer regarding some of their respective obligations and remedies.[64] Notwithstanding this, it must be stressed that even though the wording of both articles would appear to cover all forms of breach, the practical effect

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[61] Ziegel *The Remedial Provisions* 9-17. This idea is similar to the whole idea of 'making time of the essence of the contract" as discussed in chapter two.

[62] Schlechtriem *Commentary on the UN Convention* 395.

[63] Schlechtriem *Commentary on the UN Convention* 395. This results in the exclusion of the application of all the other remedies granted in article 45. The buyer may, however evoke the remedy of avoidance within this period if the seller were to for example deliver substitute goods containing a serious enough defect to be regarded as a fundamental breach. Cf. Schlechtriem *Commentary on the UN Convention* 399.

[64] See Bridge *The Bifocal World of International Sales: Vienna and Non-Vienna* in Cranston (ed) *Making Commercial Law: Essays in Honour of Roy Goode* (1997) 277 290.

of this remedy is restricted to certain forms.[65] thus illustrating the splintering of the apparent unitary system of breach.

There is also much confusion regarding the exact classification and function of this right. While it is often classified as a remedy, its function is essentially the same as the role of a notice of rescission in terms of the doctrine of "time is of the essence", as received in South African law.[66]

In the preceding discussion on *Nachfrist*, it was pointed out that the most important consequence of this concession of an additional period in which to perform was that it enabled the buyer and seller to avoid the contract in the event that certain forms of breach still continued after the lapse of the additional period, notwithstanding the fact that they were not fundamental breaches. This provision is set out in article 49 (1) (b) and 64(1) (b) for the buyer and seller respectively.

As briefly pointed out above, on a closer inspection of these articles it becomes apparent that this additional right to avoid the contract is not available for all the cases of non-performance after the lapse of an additional period of time. In the case of article 49(1)(b) it is only applicable at non-delivery by the seller and on application of article 64(1)(b) it is clear that it is only available when the buyer has not yet paid the price or taken delivery of the goods at the lapse of the additional period.

This blatant division between the above-mentioned instances of non-performance and the other possible instances is curious in light of the Conventions stringent adherence to the notion of a unitary form of breach. An apparent reason for this segregation is the essential role of these obligations in practice,[67] resulting in the view that the continued non-performance of these obligations would constitute a fundamental breach justifying avoidance.[68] This explanation is debatable as it assumes a prior classification of the

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[65] Lookofsky & Bernstein *Understanding the CISG in Europe* 92.
[66] See 2 3 1 1 1 2 *supra* for the use of a notice of rescission in South African law.
[67] Bianca & Bonell *International Sales Law* 363.
[68] Schlechtriem *Commentary on the UN Convention* 416.

materiality of obligations applicable in all instances: this does not seem feasible in light of the enormous energy spent on the formulation of article 25 in order to determine the fundamentality of a breach in every individual situation.[69]

This additional ground for avoidance was further not extended to the other forms of non-performance due to the fact that this would be too harsh a consequence for the seller or buyer, whichever the case may be, if an insignificant breach could lead to the far-reaching remedy of avoidance.[70] This clearly points out that a hierarchy of breach is alive and well within the Convention despite the continued claims to the contrary.

Article 49(2) and 64(2) provide some of the preconditions on the right to avoid the contract.[71] The basic premise underlying the provisions is that the buyer or seller who wishes to avoid the contract must make their intentions clear within a reasonable time. Once again one finds different provisions being made applicable to various instances of non-performance. Article 49(2) draws a clear distinction between a delivery which is still outstanding and a delivery which has already been made, while 49 (2)(a) draws a distinction between late delivery and other breaches. If the seller has not yet delivered after the time for delivery has passed, whether it be the original time set or the additional time set, the buyer may take as long as he wishes to avoid the contract.[72] If, however, the seller has delivered the goods and the buyer is entitled to avoid the contract on the basis of article 49 (1)(a) he must do so in a reasonable time.[73] Similarly article 64(2) differentiates between the payment and non-payment of the purchase price while article 64 (2)(a) makes a clear distinction between late performance by the buyer and the other non-performances. Once again the convention differentiates between various breaches, treating some more stringently then others.

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[69] See 6 3 1 *infra* for a discussion of article 25.
[70] Bianca & Bonell *International Sales Law* 364.
[71] Others can be found in Article 39, 43, 82, see *supra*.
[72] Schlechtriem *Commentary on the UN Convention* 427. This principle is applicable whether he wishes to avoid the contract on the basis of article 49(1)(a) or 49(1)(b).
[73] See article 73 regarding the issue of avoidance at instalment transactions.

The buyer's right of avoidance is further subject to additional notice requirements as set out in article 39 and 43. Article 39 is applicable in the case of non-conforming goods and requires the buyer to give notice of the lack of conformity of the goods within a reasonable time and sets a maximum time limit of two years. If he does not do so he loses the right to rely on the non-conformity and thus he could possibly lose the right to avoid the contract should the breach prove to be fundamental. These time limits further prevail over the ones set in 49(2).[74] Article 40, however, precludes the seller from relying on article 39 to avoid liability when he was aware or could not have been unaware of the lack of conformity.

Article 43 is applicable when the buyer has received goods which are subject to a third party claim and requires the buyer to inform the seller within a reasonable time after becoming aware or after he ought to become aware of such claims. This once again may affect the buyer's right to avoid the contract should the breach prove to be fundamental. Article 43 trumps the working of 49(2) but sets no time limit as is the case in article 39.[75] Section 43(2) further states that the seller is not entitled to rely on 43(1) to escape liability if he knew of the third party's right to claim.

Article 26 states that a declaration of avoidance is only effective if notice is given to the other party. The Convention does not prescribe any formal requirements for such a notice, which can even be made tacitly.[76] The buyer may also combine a notice of an additional period for performance with a conditional declaration that the contract will be avoided if performance does not take place within this period.[77]

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[74] Bianca & Bonell *International Sales Law* 365.
[75] Bianca & Bonell *International Sales Law* 366.
[76] Schlechtriem *Commentary on the UN Convention* 425.
[77] Schlechtriem *Commentary on the UN Convention* 425. Articles 81-84 determine the effects of avoidance of the contract by the buyer and seller.

6 2 2 3 Damages

The CISG gives the claim for damages a prominent position in its remedial system. It can be instituted both as a supplementary remedy to specific performance or avoidance or as the only remedy.[78]

The Convention's damage provisions are contained in article 74-77 and are applicable to both the buyer and the seller. Article 74 summarises in a few words the basic elements and limitations on the claiming of damages under the CISG.[79] Article 74 states that there must be a causal connection between the breach and the damages and if this is the case, the innocent party may claim damages including loss of profit. This remedy is consequently available for all forms of breach, whether fundamental or not. It is clear that the underlying principle of the damages remedy is to place the injured party in the position he would have been in if the contract was performed.[80] Because article 74 is applicable to all forms of loss including indirect or ancillary loss, and is applicable to both the buyer and the seller,[81] it does not provide any rules to determine the actual loss suffered as a consequence of the breach.[82]

The only limitation on the claim is that the loss may not exceed the loss which the party in breach foresaw or ought to have foreseen as a possible consequence of the breach at the conclusion of the contract.[83] This rather wide construction of the foreseeability test may appear overly vague and lacking in structured rules, but in light of its extensive function the lack of concrete rules is understandable. The

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[78] Lookofsky & Bernstein *Understanding the CISG in Europe* 96.
[79] Schlechtriem *Commentary on the UN Convention* 553.
[80] Kritzer (ed) *Detailed Analysis* in *Guide to Practical Applications* 582. This is interesting to note in light of the heated debate regarding the use of either positive or negative *interresse* in South African law. See chapter three.
[81] Lookofsky & Bernstein *Understanding the CISG in Europe* 98; Kritzer (ed) *Detailed Analysis* in *Guide to Practical Applications* 582.
[82] Under article 74 the loss is, however, said to be calculated concretely as only losses actually determinable and incurred are taken into account: Schlechtriem *Commentary on the UN Convention* 565.
[83] Article 74. Cf. Lookofsky & Bernstein *Understanding the CISG in Europe* 100-101; Schlechtriem *Commentary on the UN Convention* 567-569.

provision has accordingly been described as a "remarkable triumph for international uniformity".[84] It is clear that the Convention leaves the development of detailed rules to the case law.

Article 75 provides a more specific remedy in the event of the avoidance of the contract. If, after avoidance, the buyer has bought goods in replacement or the seller has resold the goods within a reasonable time and manner, article 75 allows the party claiming damages to recover the difference between the contract price and the substitute transaction. It also allows a claim of any further damages recoverable on the basis of article 74.

The determination of a reasonable time and manner is based on the premise that the seller will wish to make a resale at the highest price possible while the buyer will wish to recover the goods at the lowest price possible.[85] If the time and manner is found not to be reasonable, the party is not left without a remedy as he can still make use of the general damages article set out in article 74.[86]

Article 76 provides for an alternative means of measuring damages at the avoidance of the contract where no substitute transaction has ensued. It provides that in this instance the claimant may, barring the carrying out of a repurchase or resale in terms of article 75, recover the difference between the contract price and the current price and further damages in terms of article 74. The current price represents the price prevailing when avoidance ensues, determined at the place where delivery of the goods should have been made or, if this does not exist, the price at another place serving as a reasonable substitute. If avoidance takes place after the goods have been taken over, the current price is determined at the time of taking over.

The mitigation of damages is prescribed by article 77. The party relying on the breach is required to take such measures as may be reasonable in the circumstances to curb his

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[84] Ziegel *The Remedial Provisions* 9-37.
[85] Kritzer (ed) *Detailed Analysis* in *Guide to Practical Applications* 594.
[86] Kritzer (ed) *Detailed Analysis* in *Guide to Practical Applications* 594.

losses. If he fails to do so, the breaching party may claim a reduction in damages.[87] Thus while this article can not be regarded as placing a duty to mitigate loss on the parties, it does provide a heavy incentive to do so.[88]

In conclusion, it is evident that there is no real relationship made between the form of breach suffered and the ability to claim damages as a result. Consequently, at least in this part of the Convention, there is no obvious erosion of the unitary concept of breach.

6 2 2 4 Reduction in Price

When non-conforming goods have been delivered, the buyer may in terms of article 50, reduce the price in the same proportion as the value of the goods at delivery bears to the actual value that the conforming goods would have had.[89] This right is, however, subject to the right of the seller to cure the breach on the basis of article 37 or 48. If the seller has made use of these rights, or even if he attempted to do so but the buyer refused him the right to do, the buyer may not make use of the remedy of price reduction.

Once again, therefore, a particular form of breach, namely non-conformity of the goods, entitles a party to a special remedy, while other instances of breach do not receive the same treatment.

6 2 2 5 Interest

If a party fails to pay the price or other money in arrears, the other party can claim interest on it on the basis of article 78. This claiming of interest does not affect any claim for damages he may have in terms of article 74.[90]

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[87] There are some writers who feel that this mitigation duty should be extended to remedies other then breach. See Kritzer (ed) *Detailed Analysis* in *Guide to Practical Applications* 610-611.

[88] See Lookofsky & Bernstein *Understanding the CISG in Europe* 102-103.

[89] This right can allegedly be traced back to the *actio quanti minoris* as found in Roman law, see Schlechtriem *Commentary on the UN Convention* 437. As shown in chapter four, this remedy is still alive and well in South African law.

[90] Article 84 also provides a duty on the seller to pay interest on the price from the date it was first paid if he has to repay it after avoidance.

6 2 2 6 Concluding Remarks

This thesis has repeatedly referred to the Convention's paramount goal of uniformity. Its approach to remedies does not, however, seem to follow this trend. Rather then attempting to fashion the approaches of different legal traditions into an elegant, commercially effective integrated set of remedies, it adopted the often conflicting approaches of different legal systems, with modest alterations, into a complex set of remedies.[91]

A further problem is the tendency of the Convention to develop various specific provisions relating specifically to variants of breach, thereby deviating from the unitary notion of breach, which the CISG allegedly embraces. Following the above discussion, it is clear that there is at least to some extent an implicit classification of breach within in the text of the Convention pertaining to remedies. This anomaly is quite curious if one considers the simple, almost non-existent categorization of breach offered by the text of the Convention and the idea that the remedies available are independent of the classification of the wrongful conduct.

It is submitted that an analysis proceeding from the remedial provisions of the CISG will present a perspective on the classification of breach which differs from that provided for in the text. This will militate against the premise that the remedies for breach do not relate to the form of breach. The correctness of this submission will be examined below after a consideration of the categories of breach provided for in the text of the CISG.

6 3 The classification of breach in the CISG

From the above, it is clear that, despite the theory of a unitary system of breach adverted to in 6 1 above, the CISG draws a distinction between two groups of breaches. The first distinction is abundantly clear from a reading of the Convention, namely the distinction

[91] Erauw & Flechtner *Remedies under the CISG* 43.

between a fundamental and non-fundamental breach. This will be examined at length below.[92] The second distinction, which is less clear and only becomes ascertainable on a closer inspection of the remedial provisions,[93] entails a differentiation between between delay (*mora*) and other breaches.

Intriguingly, there are two further traditionally recognised forms of breach which enjoy their own separate recognition and consequences in the system of the Convention, in spite of the premise that the CISG embraces a unitary notion of breach. These are anticipatory breach and impossibility of performance. The former will be discussed in the following section, while the latter will be discussed in relation to the issue of impossibility and exemptions from liability under the CISG.

6 3 1 The distinction between fundamental and non-fundamental breach.

6 3 1 1 The significance of the distinction

The most obvious relevance of the distinction between a fundamental and non-fundamental breach is to determine when a contract can be avoided.[94] Typically, legal systems prescribe a certain minimum level of seriousness for a breach to warrant the resort to the drastic remedy of termination,[95] and the CISG is no different.[96]

The distinction also determines whether or not the innocent party may claim the delivery of substitute goods.[97] If one considers the enormous costs of transportation in international trade, it is understandable that the breach needs to meet a certain threshold of seriousness before a request for new substitute merchandise can be warranted.[98] A

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[92] See 6 3 1 *infra*.
[93] See 6 2 *supra*.
[94] In the CISG the word avoidance is used to refer to what is traditionally labeled as cancellation in South African law.
[95] Treitel *Remedies* 161 as referred to in Schlechtriem (ed) *Commentary on the UN Convention* 174.
[96] See 6 2 2 2 *supra* for a more in-depth study of avoidance.
[97] Article 46(2).
[98] Schlechtriem (ed) *Commentary on the UN Convention* 176.

fundamental breach of contract by the seller further results in the buyer maintaining all his remedies despite the transfer of risk.[99]

There is, however, a further much less publicized use for the notion of materiality which is the most noteworthy for the purposes of this thesis, and that is its relevance as the principal standard for the classification of breach of contract.[100] As mentioned above, this is the only express basis for a differentiation between different instances of breach recognised by the CISG.

6 3 1 2 The meaning of the provision

In view of the magnitude of its effect and the centrality of its role in the CISG's system of breach, a thorough examination of the distinction between a fundamental and non-fundamental breach is required.

This essentially entails a scrutiny of article 25 of the Convention, which reads as follows:

> 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.

As with many other articles in the Convention, the notion of a fundamental breach is a legal concept "born from compromise".[101] The quest for a concise definition acceptable to all the participating nations once again resulted in the introduction of vague concepts, open to a number of different interpretations.[102] The result is an open-ended and accordingly imprecise definition of a central idea. This lack of certainty is highly

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[99] Article 70. Cf. Schlechtriem (ed) *Commentary on the UN Convention* 176; Bianca & Bonell *International Sales Law* 205 & 211.

[100] Enderlein & Maskow *International Sales Law: United Nations Convention on Contracts for the International Sale of Goods* (1992) 112.

[101] Bianca & Bonell *International Sales Law* 210.

[102] See Schlechtriem (ed) *Commentary on the UN Convention* 174 – 176; Kritzer (ed) *General Provisions* in *Guide to Practical Applications* 201; Bianca & Bonell *International Sales Law* 205 – 209 on the process and compromises made before the article was eventually drafted.

undesirable, especially in light of the enormous role this distinction plays as under the CISG.[103]

The abstract nature of this article also prohibits a complete depiction of its meaning and the present section will therefore simply attempt to sketch the gist of it.[104] The two tests for a fundamental breach are plainly "substantial detriment" and "unforeseeability".

6 3 1 2 1 The meaning of "substantial detriment"

Schlechtriem is of the opinion that the scope of the detriment element does not pertain to the extent of the actual damage caused by the breach, but relates rather to the importance to the injured party of the contractual interests infringed by the breach.[105] The implication of such a subjective perception of the notion of detriment is that it is up to the the parties themselves to indicate the exact importance of the various contractual obligations in their agreement.[106] By explicitly stating which obligations would upon breach give rise to detriment significant enough to warrant avoidance, uncertainty will be prevented. If this is not done, the courts will need to evaluate the weight or significance of the interest of the innocent party that has been infringed.

This approach is highly subjective, and for this reason some writers advocate the use of a different method, which does not determine the fundamentality of a breach by way of a strict, uncompromising adherance to the terms of the contract.[107] Effect is rather given to the interaction between the contractual description of the interests of the promisee in the contract and the consequences of breach in a particular instance.[108] It is, submitted, however, that this approach will result in uncertainty, as it proposes that the

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[103] See 6 3 1 1 *supra*.
[104] See 6 5 *infra* for a discussion of the application of the definition in case law.
[105] Schlechtriem *Commentary on the UN Convention* 175.
[106] Schlechtriem (ed) *Commentary on the UN Convention* 177. Cf. Babiak "Defining Fundamental breach" 120.
[107] See inter alia Bianca & Bonell *International Sales Law* 214-215; Koch " The Concept of Fundamental Breach of Contract under the United Nations Convention for the International Sale of Goods" *Pace Review of the Convention on Contracts for the International Sale of Goods* (CISG) 1998 1999 177 328-329.
[108] Naude & Lubbe "Cancellation for 'Material or 'Fundamental' breach" 378 who rely on Koch "Fundamental Breach" 330.

fundamentality of the breach and the consequent remedies be determined with reference to the time of the breach. According to the first mentioned view the parties will be aware of the conduct which will give rise to a fundamental breach and its resultant consequences as from the conclusion of the contract.

Unless the importance of the interests infringed were known to both parties, a strict application of the test adopted by Schlechtriem could, however, lead to uncertainty regarding the exact finding which will be made by the courts and consequently the remedies attending the breach. This uncertainty could, however, be addressed by recourse to established business norms of everyday trade in order to determine which interests are traditionally regarded as significant enough to result in substantial detriment if infringed. This would involve a common sense approach by the courts and would introduce a certain level of objectivity. Further, obligations which do not conventionally form part of such contracts, but are rather unique to a particular contractual understanding can very often, based simply on their express inclusion by the parties, be viewed as being important enough to be result in substantial detriment if breached.[109] The situation does not therefore seem as problematic as it appeared initially.[110]

6 3 1 2 2 The meaning of "unforeseeability"

As suggested above, the issue of "substantial detriment" essentially revolves around the interests of the injured party as envisioned by him when entering the contract.[111] Article 25, however, incorporates a further test, that of foreseeability, which theoretically at least would seem to limit the supposedly subjective consequences of the first test. This test appears to have been introduced on the grounds of equity and enables the breaching party to escape a finding of a fundamental breach and the attendant consequences if he can show that neither he himself nor a reasonable person could have foreseen the result.[112]

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[109] Schlechtriem (ed) *Commentary on the UN Convention* 178.
[110] See, however, the divergent outlook of other writers cited in n 107 & 108 *supra*.
[111] See the divergent outlooks of the writers cited in n 107 & 108 *supra*.
[112] Bianca & Bonell *International Sales Law* 215. The time the result must have been foreseen remains controversial, see Kritzer (ed) *Detailed Analysis* in *Guide to Practical Applications* 216. In the author's opinion the conclusion of the contract should be regarded as the relevant time. This is also the view adopted

It is obvious that this route will not be open where the parties have made it clear in their contract or contractual negations that an obligation, if infringed, is to be regarded as resulting in a fundamental breach.[113] It would appear that the only time that foreseeability may prove to be an issue is where the importance of the obligation, which has been infringed, has not been unequivocally identified as being of a fundamental nature in the contract or the contractual negotiations.[114]

In this last situation one would need to determine whether a reasonable person in the same branch of trade would have foreseen such a result. Essentially this once again gravitates towards the idea of whether or not commercial life views that particular obligation as important enough to warrant the regard of its infringement as a fundamental breach.[115] In other words, the same objective factors taken into account when determining the existence of substantial detriment, are to be taken into account here.

If it is found that the reasonable person would have regarded the obligation as of substantial importance, the fact that the actual infringing party did not foresee the result is of no consequence.[116] Where things become more involved is where the objective reasonable man would not have foreseen the result. This would normally be where the obligation agreed to is not that which typically arises in such an agreement but rather reflects the individual bargain of the parties. One would then need to determine whether the infringing party was sufficiently aware of the obligation's importance and consequently the fundamentality of its breach. The burden of proof rests on the guilty party.[117] Once more, however, the uniqueness of the obligation would normally entail

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by Schlechtriem, see Schlechtriem (ed) *Commentary on the UN Convention* 180. Cf. Lorenz *Fundamental Breach under the CISG* http://cisg.law.pace.edu/cisg/biblio/lorenz (12/10/03).

[113] Schlechtriem (ed) *Commentary on the UN Convention* 178.

[114] Schlechtriem (ed) *Commentary on the UN Convention* 179. See, however, Naude & Lubbe "Cancellation for 'Material or 'Fundamental' breach" 379 and the authorities cited therein, particularly in notes XX57-61.

[115] Schlechtriem (ed) *Commentary on the UN Convention* 179. Cf. Babiak "Defining Fundamental breach" 122.

[116] Schlechtriem (ed) *Commentary on the UN Convention* 179.

[117] Bianca & Bonell *International Sales Law* 216; Schlechtriem *Commentary on the UN Convention* 181.

considerable discussion which will more often than not imply an awareness of its importance.

It thus appears that the "unforeseeability test" does nothing more then invoke the very same scrutiny invoked by the "substantial detriment test", and similarly attempts to determine the exact importance of the obligations and the consequent seriousness of their breach. The only area were this test will seemingly play a role is in the event of the infringement of an obligation which is not typical or usual for a particular kind of transaction, and the importance of which was not firmly established as between the parties. This situation, as illustrated above, will not arise often and the additional test embodied in article 25 merely provides a further safety net.

The test for fundamental breach therefore essentially involves a determination of the exact importance the injured party has attached to the obligation and a subsequent determination of the reasonability of this view.[118] Both tests emphase the intention of the parties, as deduced from the contract and negotiations and if this is not ascertainable, the application of the very same set of commercially based objective factors.[119]

6 3 2 Anticipatory breach

In the course of the discussion of the remedies available to the buyer and seller in 6 2 1, it was pointed out that these only become available when the buyer or seller have not performed their obligations. This is usually only discernible once the date for performance arrives.[120]

The Convention does, however, provide relief for a party should it become apparent before the date for performance that the other party will commit a fundamental breach of

[118] Once again it must be pointed out that by unequivocally stating the most important obligations in their respective contract, the parties will ensure the greatest degree of certainty regarding the classification of breach should it arise and its resultant remedies. See Babiak "Defining Fundamental breach" 142, which sets out guidelines for the preparation of the contract in order to achieve the greatest level of clarity regarding the classification of a breach as a fundamental breach.

[119] See 6 5 *infra* where the interpretation of fundamental breach in case law will be analysed.

contract.[121] Article 72, subject to certain provisos.[122] provides that the contract may be avoided in this instance.[123] Article 72(1) provides that where it is "clear" that a party will commit a fundamental breach, the other party may avoid the contract. There is an obvious lack of certainty here and therefore some degree of protection is provided for the innocent party by article 72(2), which requires the guilty party to give the former reasonable notice of his intent to avoid should time permit it.[124] This then enables the "guilty" party to give assurance of his performance, and if this is not provided, it is "clear" that he will commit a fundamental breach.[125] Article 72(3) applies to the situation where the guilty party has declared that he will not perform, and there is consequently no need for an additional "clarity" provided for by 72(2), which is consequently not applicable to this instance.

While article 72 is aimed at providing the innocent party with the right to avoid the contract in the event of anticipatory breach, article 71 attempts to ensure the enforcement of the contract.[126] It entitles the innocent party to suspend his performance if it becomes apparent that the other party will not perform a substantial part of his obligations due to a serious deficiency in his ability to perform or his creditworthiness or by his conduct.[127] As the relief provided by this article is far less drastic than that provided by article 72, it is not necessary to prove that there is danger of a fundamental breach ensuing or that a

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[120] Lookofsky & Bernstein *Understanding the CISG in Europe* 92.

[121] See article 73(2) for the provision of relief in installment sale transactions.

[122] See *infra*.

[123] Article 72 provides: (1) 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. (2) If time allows, the party intending to declare the contract avoided must give reasonable notice to the other party in order to permit him to provide adequate assurance of his performance. (3) The requirements of the preceding paragraph do not apply if the other party has declared that he will not perform his obligations.

[124] This concession is not applicable if the guilty party has declared that he will not perform his obligations. See article 72(3).

[125] Koch "Fundamental Breach" 304, (available online http://www.cisg.law.pace.edu/cisg/biblio/koch-72 (07/11/03)).

[126] Eiselen *Editorial remarks: Remarks on the manner in which the Principles of European Contract law may be used to interpret or supplement Articles 71 and 72 of the CISG* http://www.cisg.law.pace.edu./cisg/text/peclcomp71.72 (07/11/03).

[127] See Schlechtriem *Commentary on the UN Convention* 523 where it is pointed out that article 71 highlights the fact that the Convention is based on the notion that a contract of sale is a reciprocal contract. See chapter seven for comments regarding the South African equivalent of this remedy.

total repudiation will take place.[128] Once again the 'guilty' party must be provided with sufficient notice and once the "guilty party" provides adequate assurance of his performance, the suspension of performance is lifted.[129]

The relief provided to the innocent party by article 71 is of a temporary nature and is applicable "to all acts and omissions preparatory to his performance".[130] The exact role of this relief is not clear. It is not certain whether it is a distinct remedy for breach (whether in the traditional unitary sense or another form) or merely a tool employed in the quest to attain specific performance, or both.[131]

Article 72 is said to provide relief against a future breach of contract.[132] It can thus be gauged that this remedy is provided in regard to a breach in terms of the Convention's unitary notion, but which occurs in the future. It is, however, submitted that the relief provided is in response to a distinct form of breach already in existence in the form of "anticipatory breach" or "repudiation", rather then a future threat of breach in the unitary sense.[133] This submission is supported by Eiselen, who states that "article 72 is aimed at the phenomenon of anticipatory breach of contract, i.e. a breach of contract that takes place before the performance is due by the party in breach". This form of breach must consequently be viewed as entailing its own distinct requirements. Once again thus the unitary notion of breach is eroded.

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[128] Fletchner *Remedies under the New International Sales Convention: The Perspective from Article 2 of the U.C.C.* http://www.cisg.law.pace.edu/cisg/biblio/flecht.(12/10/03).

[129] Article 71(3). See article 71(2) which provides additional relief for the seller who has already dispatched the goods. Cf. Lookofsky & Bernstein *Understanding the CISG* in Europe 93.

[130] Schlechtriem *Commentary on the UN Convention* 527.

[131] Eiselen who regards this article as providing relief for both anticipatory breach and incomplete performance. Eiselen *Editorial Remarks* http://www.cisg.law.pace.edu./cisg/text/peclcomp71.72 (07/11/03). See *infra* regarding the status of anticipatory breach, and 7.4.1 *infra*.

[132] Schlechtriem *Commentary on the UN Convention* 533. Koch also frequently refers to "a future fundamental breach". Koch "Fundamental Breach" 303.

[133] Eiselen *Editorial Remarks* http://www.cisg.law.pace.edu./cisg/text/peclcomp71.72 (07/11/03). He also refers to the fact that "this remedy...allows the innocent party to avoid the contract when the breach occurs without having to wait until performance becomes due." Cf. Strub "The Convention on the International Sale of Goods: Anticipatory Repudiation Provisions and Developing Countries" 1989 *International and Comparative Law Quarterly* 475 479.

6 4 The role of fault in the CISG

As a point of departure, most commentators feel that the CISG has adopted a no-fault approach in respect of breach.[134] The foundation for this premise is article 45 (1)(b), which gives the buyer the right to claim damages for any breach without any mention of fault on the part of the seller.[135] Similarly, article 61 (1)(b) entrenches strict liability on the part of the buyer, as he is liable for damages for the mere failure to perform any of his obligations.[136]

This premise of strict liability is, however, subject to one exception in the form of article 79.

Article 79(1) provides that a party will not be liable for certain of the consequences of his breach if it is due to circumstances beyond his control and if at the time of conclusion of the contract, he cannot reasonably have been expected to have taken this impediment into consideration or have avoided or overcome its consequences. This exemption is also applicable in the event that a third party is responsible for a particular party's failure to perform as long as the third party and the breaching party are both excused from liability under article 79(1).[137] Article 79(4) requires that notice of the impediment and its consequences are to be given to the non-breaching party within a reasonable time after the breaching party became or ought to have become aware of it. The exemption from liability only lasts for the period that the impediment exists and affects no other remedy barring damages.[138] Some writers have, however, provided illustrations of circumstances when this exemption should also effect the granting of specific performance.[139] As this exemption has far-reaching effects, the party wishing to rely on it has the heavy task to establish the requirements set out above.[140]

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[134] Lookofsky & Bernstein *Understanding the CISG in* Europe 96; Erauw & Flechtner *Remedies under the CISG* 38-39; Schlechtriem *Commentary on the UN Convention* 603.
[135] Lookofsky & Bernstein *Understanding the CISG in Europe* 96.
[136] Lookofsky & Bernstein *Understanding the CISG in Europe* 117.
[137] Article 79(2).
[138] Article 79(3) and 79(5).
[139] See inter alia Lookofsky & Bernstein *Understanding the CISG in Europe* 110.
[140] Lookofsky & Bernstein *Understanding the CISG in Europe* 107-108.

There has been a tendency amongst civil lawyers, who are not familiar with the notion of strict liability, to interpret article 79 very widely with the result that it serves as a sort of exception from liability if the party liable is not at fault.[141]

It is submitted that this approach should be avoided as far as possible. This article was originally meant to provide a party with a means to escape liability in cases such as *force majeure*.[142] The sphere of trade covered by the convention excludes areas in need of consumer protection.[143] There is thus no need to provide an additional safety net in the form of a requirement of fault before a person can be found guilty of breach or even an exemption for liability based on a lack of fault stretching beyond that for *force majeure*. If such additional protection is required it should be provided for in the particular contract.

A further common sense remedy is provided in article 80 which provides that a party may not rely on the other party's failure to perform if this failure was caused by the first one's act or failure.

6 5 The relationship between the form of breach in existence and the remedies available as a result thereof.

Essentially, the convention's remedial system should be viewed as a skeleton on to which flesh still needs to be added. This approach was the only one which could provide a basis for a system acceptable to all the parties concerned. Unfortunately there is a danger that conflicting constructions will be given to the detail required by the basic framework. This will undermine the goal of uniformity and result in uncertainty.

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[141] Erauw & Flechtner *Remedies under the CISG* 39.
[142] See Magnus *Force Majeure and the CISG* in Sarcevic & Volken (ed) *The International Sale of Goods Revisited* (2003)1 8-33.
[143] See article 2, which sets out the areas which the Convention, does not govern.

Case law on the Convention thus has a very important function to fulfill and needs to develop with as little ambiguity as possible. In order to create the most satisfactory results, the CISG needs to "receive the same interpretation regardless of the nations and courts involved".[144] If this is not achieved, the ideal of an impartial and certain system of law in the event of breach of contract will be undermined. An examination of the case law is thus pertinent for the present thesis, which seeks to examine the practical application of the unitary system of breach as set out in the text of the Convention.

Regrettably, the various national courts and tribunals have often failed to adequately give effect to the Convention and the spirit in which it was promulgated by slavishly adhering to national outlooks and applications of the law. A recent example of this is identified by Romito and Sant'Elia in their discussion of a decision of the Superior Court of Milan of 20 March 1998 (*Italdecor S.A.S v Yiu's Industries (H.K.) Limited*).[145] The authors call for the development of a "new international methodology" pertaining to the CISG, one removed from the constraints of a nationalistic approach.[146] By not adhering to the purport of the Convention and its rules, the courts will fail to develop a set of clear cut rules and consequently generate uncertainty.[147]

In spite of the indications of a so-called homeward trend, there is nevertheless evidence of a tendency towards a uniform treatment of breach under the CISG. The decisions do not, however, assert a bland notion of unitary breach, but rather converge in recognizing the need to distinguish between various forms of breach implicit in the text of the CISG and their specific consequences and remedies.

By far the most identifiable of these distinctions is that drawn between delay and other instances of breach. A restriction on the right to avoid the contract when non-conforming goods are delivered is evident in case law, where it has been pointed out that the delivery

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[144] Fagan "The Remedial Provisions of the Vienna Convention on the International Sale of Goods 1980: A small business perspective" 1998 *Journal of Small and Emerging Business Law* 317 320.
[145] "CISG: Italian Court and Homeward Trend" 14 *Pace International Law Review* Spring 2002 179 185.
[146] "Italian Court and Homeward Trend" 185. Cf. Pauly "The concept of Fundamental Breach" 235-237.

of non-conforming goods does not amount to non-delivery and should not receive the same sanction.[148] Both the CISG itself and academic commentary on case law, has further time and again pointed out that avoidance for breach other than non-delivery is only permitted within a reasonable time.[149] The development of this clear distinction between the treatment of non-conforming delivery and a non-delivery of proper goods is clearly identifiable in the text of the Convention, which provides an additional mode of relief for non-delivery in the form of the *Nachfrist* period which is not extended to the delivery of non-conforming goods. Schlechtriem is of the opinion that the explanation for this development lies in the vast storage and transport costs and risks associated with international trade. It makes economic sense for the buyer rather to reduce the price and use the non-conforming goods as far as possible.[150] Any further loss can be addressed by way of damages.[151]

In chapter three it was submitted that the issue of avoidance of the contract comes down to the idea of materiality of the breach, which is just as difficult to define under the CISG as in South African law and which is applicable to all forms of breach just as required by the CISG.[152] Under the Convention this notion is referred to as fundamental breach and requires the application of article 25 as discussed above.[153]

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[147] For another example of a nationalistic approach see *Delchi Carriers SPA v Rotorex Corportation* 71 F. 3d 1024 (2nd Cir 1995) U.S. Court of Appeals for the Second Circuit. Cf. the discussion of this case in Pauly "The concept of fundamental breach" 235-237.

[148] Bundesgerichtshof: VIII ZR 51/95, 3 April 1996.

[149] See Schlechtriem's commentary on the Bundesgerichtshof of 15 February 1995 where the buyer lost his right to avoid the contract because he did not do so within a reasonable time. See http://www.cisg.law.pace.edu/cases/950215g1 (12/10/03) for a discussion of this case.

[150] Commentary on Bundesgerichtshof: VIII ZR 51/95, 3 April 1996. A discussion of the case is available online at http://www.cisg.law.pace.edu/cases/960403g1 (12/10/03).

[151] It seems difficult to determine when the date for delivery is an essential term of the contract to the extent that non-compliance with it amounts to a fundamental breach. In South African law the rules are intricate but are clearly spelt out. Under the CISG one has to show that late delivery would cause substantial detriment before one can avoid. The CISG does, however, provide for a *Nachfrist* period in which to perform timeously and to create certainty regarding when one can avoid the contract.

[152] As shown above, however, delay is elevated above the other forms of breach and one can even avoid the contract if the breach does not cause substantial detriment provided that the *Nachfrist* mechanism has been used.

[153] See 6 3 1 *supra*.

Many adjudicators, however, fail to delve into the meaning of article 25.[154] A study of the case law, nevertheless, reveals an encouraging inclination on the part of the courts to give effect to the wishes of the parties and where this is absent, to apply common sense factors.

In the decision by the Court of First Instance di Parma of 24 November 1989 (*Foliopack AG v Daniplast S.p.A*), the court found that correspondence between the parties gave rise to the conclusion that the time for delivery was of vital importance. In a decision by the Oberlandesgericht Frankfurt on 17 September 1991, the court held that non-compliance with a mere ancillary obligation should be regarded as a fundamental breach owing to the importance of the obligation to the parties as apparent from the agreement.[155] Similarly in the Helsinki Court of Appeal decision of 30 June 1998 (*EP S.A. v FP Oy*)[156] the court held that the contract determined that the non-conformity of the goods was sufficiently serious to justify avoidance. This clearly thus proves what was alluded to above,[157] namely that when interpreted correctly, the CISG seeks to give effect to the wishes of the contractants and to ensure that the most accurate and satisfactory effect is given to their contract, they need to clearly point out the obligations which they hold as essential to the contract.[158]

Where the fundamental nature of the obligation is not clear from the contract, the courts have developed certain rules of thumb for situations which occur often in commercial practice. In the decision of the Oberlandesgericht Hamburg on 28 February 1997,[159] the court held that the time for delivery was an essential term of the contract. They gauged this from the fact that the contract included a CIF term which, by definition, requires

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[154] See *inter alia* "Italian Court and Homeward Trend" 192.
[155] A discussion of this case is available at http://www.cisg.law.pace.edu/cases/910917g1 (12/10/03).
[156] A discussion of this case is available at http://www.cisg.law.pace.edu/cases/980630f5 (12/10/03).
[157] See 6 3 1 *supra*. See however the divergent opinions cited in n 108 and 109 *supra*.
[158] Other examples of case law where the fundamental nature of the breach giving rise to the avoidance of the contract was gauged from the contract include decision of Superior Court of Milan of 20 March 1998 (*Italdecor S.A.S v Yiu's Industries (H.K.) Limited*), (a discussion of this case is available online at http://www.cisg.law.pace.edu/cases/980320i3 (12/10/03)); *Downs Investments (Pty) Ltd v Perwaja Steel SDN BHD* (2000) QSC 421 (17 November 2000). A discussion of the case is available online at http://www.cisg.law.pace.edu/cases/001117a2 (12/10/03).
[159] OLG Hamburg 1 U 167/95, 28 February 1997.

delivery by a fixed date. The use of objective factors such as trade usages to determine the importance of obligations and their resultant consequences should be encouraged.

Similarly in a decision of the Court of Arbitration of the International Chamber of Commerce in January 1997, it was held that the delay in the delivery of clothing should be regarded as fundamental. This decision was based on a principle developed in the Oberlandesgericht Hamm, in its decision of 8 December 1980.[160] that the delay in the delivery of a seasonal product usually constitutes a fundamental breach. This development with regard to the obligations concerning certain types of goods is heartening for the proponents of certainty.

Up to this point, the only real distinction made between the forms of breach is between delay and other instances of breach of contract. There is, however, recognition of a further distinction implicit in the CISG, namely that between anticipatory breach and other instances of breach. In the Austrian decision by the Oberster Gerichtshof delivered on 6 February 1996.[161] the court clearly separated the consequences of breach of contract from the consequences of anticipatory breach.

6 6 Concluding Remarks

This brief study of the remedies available for breach and their application in recent case law has led to the conclusion that the tendency to differentiate between various forms of breach is alive and well both in the text of the CISG and the application thereof. The unitary notion that all forms of breach should give rise to the same consequences is clearly not an accurate portrayal of reality. The fragmentation of the notion of breach has been seen as productive of uncertainty and as one of the obstacles standing in the way of the widespread use of the CISG in commercial activities.[162] but all is not lost, however. The struggle for uniformity and certainty in the event of breach has reaped some rewards.

[160] For a discussion of this consult http://www.cisg.law.pace.edu/cases/970228g1.html (12/10/03).

[161] A discussion of this case is available: http://www.cisg.law.pace.edu/cases/960206a3.html(12/10/03).

especially in the development of a number of objective factors, based on experiences in practice, to determine the fundamentality of breach and the consequences thereof. The harmonising of results achieved in the sphere of damages is also encouraging.[163]

[162] Erauw & Flechtner *Remedies under the CISG* 75.
[163] See 6 2 2 3 *supra*.

CHAPTER SEVEN

RECOMMENDATIONS FOR THE REFORM OF THE SOUTH AFRICAN SYSTEM OF BREACH OF CONTRACT

7 1 Introduction

> "Commercial law will not remain civilian, but in due time gravitates toward the law of the dominant surrounding economy or major trading partners."[1]

The shortcomings of the South African system of breach and remedies were pointed out in Chapters two to four. The lack of a logical motivation for the intricate arrangement of the forms of breach was revealed in chapter five,[2] and the need for reform and modernisation was highlighted. Inspiration was sought in the CISG's system of breach, which was analysed in Chapter six.[3] The present chapter will now seek to outline the results achieved and offer recommendations for the future reconstruction of the South African system of breach.

After a general discussion of overriding issues pertinent to the comparative process, submissions relating to a potential reform of South African law by the adoption of a simplified classification of breach will be provided. The chapter will conclude with a reflection on the future of the South African system of remedies and suggest possible changes, which if implemented, could result in greater legal certainty.

The provisions of the German Civil Code relating to breach and liability of the seller have recently been reformed, in part under the influence of the CISG.[4] The changes implemented as a result of this process may provide useful comparative insights for the present chapter. This reform process will accordingly be referred to when relevant. In a similar vein, the UNIDROIT Principles of International Commercial

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[1] Palmer (ed) *The Third Legal Family* 20.
[2] This will be revisited in 7 3 *infra*.
[3] See Chapter one for the rationale underlying the comparison of the SA system with that of the CISG.
[4] *Bürgerliches Gesetzbuch*, hereafter referred to as the BGB. The legislative enactments effecting the reform came into operation on January 1, 2002. See generally: Palandt *Gesetz zur Modernizierung des Schuldrechts*; Ernst & Zimmermann (eds) *Zivilrechtswissenschaft und Schuldrechtsreform*; Westermann Das neue Kaufrecht *NJW* 2002 241.

Contracts[5] and the Principles of European Contract Law (PECL)[6] will be referred to where applicable in order to provide a further benchmark for any suggested reform of South African law.

7 2 Issues pertinent to the comparative process

In Chapter one it was stressed that while the South African law governing breach of contract is applicable to all contracts, the CISG's scope is limited to international commercial contracts of sale. Although the appropriateness and value of a comparison of these two systems was unequivocally established in chapter one, the substantial difference in the fields covered must be borne in mind when one attempts to refer to the CISG to reform the general principles of breach and remedies of South African law. In other words, one must tread lightly and continually bear in mind that the South African system addresses needs that differ from those dealt with by the CISG.

The requirements of the international sale should be addressed by the ratification of the CISG by South Africa in its entirety. This would still prove to be a prudent option despite the shortcomings of the system identified in Chapter six. The reasons for this conclusion are various.[7] The principal motivation is the fact that the convention was drawn up with the specific needs of the international trader in mind. There is no other legislation currently in force of the same magnitude or purpose. It has also been

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[5] Hereafter referred to as the UNIDROIT Principles. UNIDROIT is the International Institute for the Unification of Private law and it produced its Principles for the Unification of Private Law in 1994. The Preamble to these Principles reads as follows: These Principles set forth general rules for international commercial contracts. They shall be applied when the parties have agreed that their contracts be governed by them. They may be applied when the parties have agreed that their contract be governed by "general principles of law", the "*lex mercatoria*" or the like. They may provide a solution to an issue raised when it proves impossible to establish the relevant rule of the applicable law. They may be used to interpret or supplement international uniform law instruments. *They may serve as a model for national and international legislators* (author's emphasis). In the comment on the preamble it is stated that the principles may be useful for countries intending to update their law to "current international standards", par 7.

[6] Hereafter referred to as the PECL. The Principles of European Contract Law provide a statement of the principles of contract law shared by the member states of the European Union. These principles are regarded as an essential step towards the development of a European Civil Code. The Commission on European Contract Law. See: *Introduction to the Principles of European Contract* http//:www.cisg.law.pace.edu./cisg/textpeclcomments (07/11/03). These principles relating to non-performance and remedies will be consulted in this chapter where relevant.

[7] For further arguments both for and against ratification see Eiselen "Adoption of the Vienna Convention" (1999) 116 *SALJ* 323 339-371, who comes to the conclusion that ratification is necessary. See also Hugo "The United Nations Convention on the International Sale of Goods: Its Scope of Application from a South African Perspective" 1999 *SA Merc LJ* 1.

adopted by most of South Africa's chief trading partners and will provide the country's importers and exporters with the greatest degree of international uniformity and certainty currently possible.[8] As shown in chapter three, the lack of uniform application of the CISG in the case law constitutes a threat to the success of the Convention. This is a problem which requires attention at international level, and South Africa could play a role by correctly interpreting the CISG's provisions and in so doing fostering greater certainty and international harmony. This area of trade is further free from any substantial need for consumer protection. Principles which assure the greatest degree of economic certainty and accord can consequently be relied upon without any significant fear of harm to consumer interest.

At a domestic level the rules applicable to breach should be developed to more adequately provide for the needs of trade.[9] Legislation, applicable to consumer-orientated contracts should be promulgated to provide consumer protection and to counter abrasive effects resulting from the application out of context of principles applicable to commercial transactions.[10]

All in all it is submitted that much can be borrowed from the CISG when developing more efficient and updated principles applicable in cases of breach of contract.

7 3 The lack of interdependence between the form of breach and the remedies available to the injured party for breach of contract

The conclusions drawn from the analysis of the South African system of breach of contract and remedies was provided in chapter five. An important finding was that regarding the exact relationship between the classification of an instance of breach of contract and the remedies available as a result. The results come to undermine pre-conceived notions regarding this link and should prove instrumental for any future

[8] Cf. Eiselen "Adoption of the Vienna Convention" 348.
[9] Suggestions for a more simplified classification of breach and remedies will be provided in 7 4 *infra*.
[10] An example of such a provision enacted in current legislation is the cooling down period applicable to consumer contracts for the alienation of land as provided for in s 29A of the Alienation of Land Act 68 of 1981. Cf. South African Law Commission Project 47 and the proposed Bill on the control of unreasonableness, unconscionableness or oppressiveness in contracts or terms, available online at http//wwwserver.law.wits.ac.za/sale/report.pr47.contracts.pdf.

reform of the system. For this reason the inferences drawn in 5 3 will once again be outlined briefly.

Throughout the discussion of remedies in this thesis, the primacy of enforcement of performance has been asserted. As shown in 5 3 1, this remedy arises from the contract itself and it is accordingly not dependent on the proof of the existence of breach. There is consequently no necessary link whatsoever between a claim for performance and breach of contract.

Cancellation clearly arises from the proof of a breach of contract. It was, however, established in 5 3 3, that it is the materiality of the breach rather then its form or classification, which ultimately determines the availability of this remedy.

A claim for damages, finally, was shown to depend on the application of certain general principles of the law of damages rather then the existence of a specific form of breach. Although the various standard measures of quantification have developed in respect of recognised forms of breach, these measures reflect the general principles of damages and are only applicable as far as they give effect to them. There is in any event support for the view that a breach of contract could be regarded as a distinct wrongful act in the delictual sense, resulting in an obligation to pay damages.[11] The rules determining the existence of a breach are accordingly of a general delictual nature and independent of the recognition of particular forms of breach. The form of breach may be relevant to determining the wrongfulness aspect, but the manifestation of wrongfulness in a particular case does not affect the claim for damages.[12]

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[11] Van der Merwe et al *General Principles* 298 and see the references cited in n 4 & 5. The element of wrongfulness is satisfied by viewing the breach of an obligation as either the infringement of a right to claim performance or the transgression of a norm of conduct applicable to contractual relationships. Either way of looking at the situation gives rise to the finding that society demands that a party be held liable for a breach of contract. Van der Merwe et al *General Principles* 300. See also the above comments in chapter three n 74 regarding the obiter suggestions made in *Thoroughbred Breeder's Association v Price Waterhouse Coopers supra* 582 that the flexible test of law of delict should be imported into the law of contract.

[12] A further aspect requiring attention is the issue of fault, which is one of the delictual requirements, which needs to be met. It is suggested that this should occupy the same role as proposed in chapter five, namely it should be presumed and possibly provide a justification ground. See Van der Merwe et al *General Principles* 301-302.

In conclusion, the absence of any logical connection between the remedies available for breach and the traditional forms of breach is clear. This discovery is of extreme significance and provides the foundation for the suggestions for reform outlined below.

7 4 Recommendations for a new classification of breach

In chapter two the South African system of breach was extensively dissected and discussed. The inadequacies and limitations of the system were exposed and the need for reform was established. But what is the way forward?

Following the discovery of the lack of interdependence of the forms of breach and the resultant remedies, a simplification of the classification of the forms of breach is proposed. The more streamlined construction underlying the CISG's system of breach should be the template for this process. Although the notion of a wholly unitary concept of breach for the CISG has itself been shown to be in need of qualification in chapter six, the CISG's structure is still much simpler than that of South African law. As was the case with the BGB, the Convention may serve as a basis for the transformation of the overly complex system of breach that has developed in South African law.

South African law supposedly requires that conduct first needs to be classified as a particular form of breach before the remedies available to the parties can be discerned. In contrast the CISG's system of breach, at least in principle, regards any non-fulfillment of an obligation by a party, whether expressly stated in the Convention or prescribed by the contractants within their individual undertakings, as a breach of contract. The pre-eminent distinction made between the forms of breach in the CISG arises by virtue of the fact that some breaches are treated as more serious than others and so that correspondingly greater consequences attach to them. In the light of this change of emphasis, the distinction between various forms of breach apart from the seriousness of their effects, assume a diminished importance.[13] The traditional idea of various forms of breach, each with its own set of requirements, is replaced with the

idea that any infringement of an obligation is classified as a breach and that the seriousness of the said breach rather than its form, will determine its legal consequences.

A proposed re-classification of South African law along these lines is far-removed from the present system and will thus most likely attract considerable resistance. It has, however, been conclusively established in chapter five that there is no plausible need for the severe fragmentation currently in existence and thus no real danger in altering the system. As mentioned, the BGB has also recently been transformed and now embraces a far more streamlined system of breach, one which can be equated to that of the CISG, on which it was modelled.[14]

It is also comforting to note that the UNIDROIT Principles embrace a construction of breach similar to that of the CISG. Article 7.1.1 defines non-performance as the "failure by a party to perform any of his obligations under the contract, including defective performance or late performance." In the comments on this principle, it is further stated that there is no provision dealing with cumulation of remedies, the assumption underlying the principle is simply that all remedies which are not logically inconsistent may cumulate. On a further inspection of the remedies it is clear all of them are essentially available for non-performance, some however simply require it to be fundamental.[15] A similar approach is also followed by the PECL which states in article 8:101 that "whenever a party does not perform an obligation under the contract and the non-performance is not excused under article 8:108, the aggrieved party may resort to any of the remedies set out in Chapter 9.

It is accordingly clear that South Africa would find herself in good company should it adopt this new classification of breach.

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[13] See chapter six, where the classification of breach as arising within the text of the remedy provisions and within practice was set out.
[14] See paragraphs 433-479 BGB, particularly 433-435.
[15] Of these principles will be discussed below and include inter alia UNIDROIT Principles Art. 7.2.2; 7.3.1; 7.4.1.

7 4 1 The metamorphosis of the fractured system of breach to a more unitary system

The present section will attempt to provide an outline for the transformation of the South African doctrine of breach of contract by the substitution of a simplified classification of breach for the traditionally recognised forms.

Positive malperformance provides the easiest transition to the new concept of breach as even its traditional definition encompasses the notion of an infringement of an obligation without any further technical requirements that need to be satisfied. Proof of breach simply entails ascertaining what obligations flowed from the contract and determining whether they have been complied with or not. This is akin to what is required under the CISG for all instances of breach.

The most complex form of breach recognised in South African law is *mora*. In chapter two, the distinction drawn between *mora debitoris* and *mora creditoris* was debated. The need for this classification falls away if breach is understood as simply comprising the infringement of any obligation. Such an understanding places the elements traditionally required for a finding of *mora* in a different perspective. This will result in greater certainty and fewer pitfalls for both parties. A party would now simply need to prove the existence of an obligation, for example delivery by a specific date, and if this date is not clear from the contract it can be established in the usual method.[16] Proof that the other party has infringed the obligation would essentially involve the determination that the debt was due and enforceable and that performance was not made in accordance with it.[17] Then the remedies available to the party can be determined.[18]

Repudiation, however, proves more intricate. As shown in chapter six, anticipatory breach is regarded in the CISG as a separate form of breach giving rise to its own set

[16] See 2 3 1 1 1 1 *supra* in this regard.
[17] The *exceptio non adimpleti contractus* may play a role here, see *infra*.
[18] See the discussion on the role fault in 5 2 *supra* and *infra*.

of remedies, even though this is not expressly stated in the convention.[19] This would seem to be in direct contrast to the underlying notion of unitary breach. In South African law it is also regarded as a distinct form of breach, but in order to establish whether it is compatible with the unitary notion of breach, one needs to determine what it is that is being breached. It has been established that repudiation amounts to the breach of an existing obligation. It is thus clear that the courts regard the relevant obligation as in existence even before the date for performance under the contract.

In *Tuckers Land and Development v Hovis*,[20] Jansen JA stated that

> " (t)here can be little doubt that in grafting the doctrine of anticipatory breach upon our law, the view that such a breach is the breach of an existing obligation would be consonant with our law. It could be taken as and obligation ex lege, i.e implied by law."

This is analysis, it is submitted, is wholly consistent with a unitary notion of breach. If there is a separate *ex lege* duty not to repudiate, the act of repudiation is simply a non compliance or infringement of that duty, which is wholly consistent with the unitary notion of breach. A different explanation for repudiation is put forward by De Wet and Van Wyk. They hold that duties to perform under a contract arise as soon as the contract is concluded, even though they might be unenforceable because of a suspensive time clause or a condition.[21] Although this construction is contrary to that advanced in the *Hovis* case, it is also compatible with the notion of a unitary breach. What is being infringed is simply the obligation to perform. Although the absence of theoretical abstractions in the text and discussions of the CISG tends to obscure this aspect and to enforce the notion that anticipatory breach requires recognition as a separate form of breach, this does not appear to be a matter of logical necessity.

To determine whether repudiation warrants independent treatment, one needs to ascertain whether the remedies applicable to repudiation differ from those applicable to other breaches. Consistently with the notion that repudiation entails an actual rather than a prospective breach, South African law recognise the remedies that are generally available in cases of breach as applicable to a repudiation of a contract. To

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[19] See 6 3 2 *supra*.
[20] De Wet & Van Wyk *Kontraktereg en Handelsreg* 169: " maar hou 'n mens in gedagte dat die skuld nie eers by opeisbaarheid onstaan nie, is die glad nie 'n anomalie om van die skending van die verpligting te praat nie" (cf Lubbe & Murray *Contract* 477).
[21] See 6 3 2 *supra*.

the extent that specific performance is only available as from the performance date specified in the contract, this follows from the terms of the agreement rather than the character of the breach.[22] Other legal consequences, such as the fact that an unaccepted repudiation results in a suspension of the performance duties of the other party,[23] might, however, suggest a need to treat repudiation as a special form of breach. Whether such a conclusion necessarily follows from this phenomenon, is debatable, however. To the extent that the doctrine of *Erasmus v Pienaar* is based on waiver, as is suggested by older decisions,[24] the form of breach is of course irrelevant. The explanation advanced in *Erasmus v Pienaar*, namely that the suspension is indicated by the maxim *unicuique sua mora nocet*,[25] does not take the matter much further than the vague principle that a party ought not to rely on his or her own wrong, which again renders the particular form of breach irrelevant. More properly the rule laid down in *Erasmus's* case would seem to be a consequence of the principle of reciprocity, which implies, amongst other legal consequences, that a party need only perform if and to the extent that the other is willing and able to do so.[26] This approach, which suggests that what appears to be a particular legal consequence of a specific form of breach is in fact attributable to another legal principle, is echoed elsewhere.[27]

In the exploration of the practical consequences of the CISG it was established that the case law differentiates between the consequences of anticipatory breach and those of other forms of breach.[28] The satisfaction of requirements not mandatory for other instances of breach and resulting in divergent consequences, suggests that it should still receive independent recognition, as is the case under the CISG. Articles 71 and 72 of the CISG provide, respectively, for the suspension of performance by a party if the alleged breach is substantial (but not necessarily) fundamental, and for avoidance

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[22] See 5 3 *supra*.
[23] *Erasmus v Pienaar supra* 26-27; cf. Van der Merwe et al *General Principles* 347-348.
[24] See eg *Major's Estate v De Jager* 1944 TPD 96 103-104.
[25] *Erasmus v Pienaar supra* 29-30.
[26] *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 1 SA 391 (A); *Thompson v Scholtz* 1999 1 SA 232 (SCA) and cf Lubbe & Murray *Contract* 569 note 1 on the effect of the principle of reciprocity on the enforceability of obligations.
[27] Thus the traditional view is that a perpetuation of obligations is a particular consequence of *mora*. Seen in proper perspective, this rule is more properly regarded as a corollary of the doctrine of supervening impossibility of performance, and in particular of the rule that a party is not excused where the impossibility is imputable to him or her.
[28] See 6 5 *supra*.

if the breach, which is bound to ensue, would be fundamental in nature. Article 71 fulfills a function similar to the *exceptio non adimpleti contractus* in South African law, and should be regarded as a mechanism to facilitate the claim for enforcement of performance.[29] What is significant, therefore, is that as in the case of other breaches, the gravity of the breach largely determines the available remedies. If, on the analysis above, repudiation is to be assimilated to the actual infringement of a contractual duty, the need for differentiation form other forms of breach falls away, the availability of the remedy will depend on the seriousness of the breach. That the CISG and other international instruments might not go so far,[30] ought not to stand in the way of South African law taking this route.

Prevention of performance remains an anomaly in South African law. As indicated in chapter two, its exact construction and effect has not yet been decided with any real certainty. If fault is to assume the role suggested in chapter five, namely as a means to limit liability in the event of obstacles to performance in cases where the infringing party is without fault, this form of breach should be subsumed under this legal rubric.[31] A prevention of performance occurring after the date for performance amounts merely to an ordinary breach of an obligation, the effect of which depends on its materiality or otherwise. Because performance is no longer possible, cancellation of the contract should normally be available. Where prevention occurs before the delivery date and is due to the fault of a party, it becomes absolutely certain that performance will not be forthcoming. The difference between this supposed form of breach and repudiation – which indicates with reasonable certainty that performance will not be made – is therefore a matter of degree only. If, on the reasoning above, instances of so-called anticipatory breach involves the immediate infringement of an existing duty, the way is open to assimilate this problematic form of breach to a general unitary notion as well.

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[29] Article 9:201 (2) of the PECL states that the party may withhold performance for as long as it is clear that there will be a non-performance by the other party when his performance becomes due, which has the same impact as the *exceptio*. UNIDROIT Principles Art 7.1.3 embodies a provision similar to the South African construction of this concept and in the comments to this article it is stated that this is akin to the civilian notion of *exceptio non adimpleti contractus*.

[30] Both UNIDROIT Principles Art 7.3.4, and Article 9:304 of the PECL afford relief on the basis that the conduct of a party makes it clear that there will be a fundamental non-performance. This suggests that so-called anticipatory breach is premised on the idea of a future breach of an obligation rather than an actual, present breach.

[31] Consult in this regard the discussion in 5 2 *supra* on the role of fault in South African law.

7 4 2 The metamorphosis of specific forms of breach in respect of contracts of sale

In chapter four the principles specifically applicable to contracts of sale were identified. Two specific obligations of the seller, namely the obligation to guard against latent defects and to warrant against eviction were discussed along with the remedies available to the buyer should they not be met.[32] The question is whether it is in fact necessary to recognise the infringement of these obligations as independent forms of breach and more importantly, whether the remedies available for non-compliance with them merits independent recognition.

It is submitted that, despite the controversy in case law, discussed in chapter four, the infringement of the obligation to guard against eviction should simply be viewed as falling under the unitary notion of breach as an infringement of an obligation and the remedies available should be exactly the same as those arising from any other infringement of and obligation.[33]

Article 43 of the CISG, which regulates the seller's obligation to deliver goods free from third party claims, similarly states that the ordinary principles applicable to all other breaches are applicable in this instance. In the recent reform of paragraph 435 of the BGB, the notion of "defects in title" has been reformed and the word "defect" is now defined as any deviation from the contractual obligations. Paragraph 437 of the BGB states that the remedies available to the buyer arise in the event of defects and defects in title have therefore been brought within the more general notion of non-compliance of an obligation rather than an independent form of breach.[34]

It is clear, therefore, that the recognition of this specific "form of breach" and the controversy surrounding its exact foundation is unfounded. Accordingly, the often-complicated application of the infringement of this obligation in the case law may in the future be avoided. The specific measures of quantification for loss due to this

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[32] See 4 2 *supra*.
[33] See 4 2 1 *supra*.
[34] Westermann *NJW* 2002 241 242.

infringement should, however, be maintained to the extent that it is found to be functional.[35]

The position with regard to the seller's legal responsibility in respect of latent defects is more intricate. In South African law, it extends to the liability for consequential losses attaching to a merchant trader publicly professing skill and knowledge in relation to the goods sold, and a seller who is a manufacturer,[36] as well as liability under the aedilitian remedies for those sellers not falling into the above mentioned categories, even in the absence of a guarantee or warranty or delictual misrepresentations regarding the qualities of the goods sold.

The issue is therefore is whether the seller's liability in respect of latent defects should be recognised as a special case resulting in extraordinary remedies. A further more complicated question relates to the exact foundation of this liability. As mentioned in chapter four, it is not absolutely clear whether this liability is to be regarded as a form of breach of contract in the traditional sense or simply a *sui generis* liability. The same problem is experienced in respect of the exact foundation of the remedies which sanction the infringement of this liability.

In view of the approach adopted in the CISG, it is submitted that the nature of the contract of sale is such that justice dictates that the absence of a latent defect should always be impliedly assumed in a contractual sense regardless of the status of the seller or his lack of fault or knowledge.[37] Unfairness can be prevented by the inclusion in the contract of an exemption clause to protect the seller against such a general contractual liability for latent defects.

Such an approach would render it unnecessary to portray this liability as a special form of breach and the complexity brought about by the distinction between various kinds of sellers will be avoided. This construction not only provides the same degree of consumer protection as before, without the need to have regard to overly elaborate specific requirements, but is in tune with the notion of strict liability for trading

[35] See 4 2 1 1 *supra* particularly n 9 & 10.
[36] See 4 2 2 1 1 *supra*.
[37] Fault has further been ruled out as a requirement for breach of contract in 4 2 *supra*.

parties as incorporated by the CISG and the need to create greater certainty in both national and international trade.

On closer inspection, it is further evident that the specialised aedilition actions do not provide any substantially different relief than that provided by the traditionally recognised remedies. The *actio redihibitoria*, the availability of which depends on the materiality of the breach, provides the same relief traditionally provided for by cancellation.[38] The *actio quanti minoris* can, at least for South African law, be subsumed under the damages remedy on the basis that it amounts to a restitutional award according to negative interesse.[39] Thus there will be no real practical change in the relief obtained, if these traditionally recognised remedies were to be equated to the more general remedies available for breach of contract. A possible justification for such a reform is the need for the adoption of internationally recognised terms and remedies and the fact that the CISG's approach provides a widely accepted and streamlined approach to the remedies available to a seller.

By reducing the liability of a seller previously regulated by the aedilitian actions to the CISG's notion of a more simplified notion of breach, the complexity and confusion attendant on the threefold South African classification of the potential grounds for the liability of a seller, ie for breach of warranty (express or tacit), delictual misrepresentation and the aedilitian actions will be greatly obviated. In a similar manner, it is proposed that the *dictum et promissum* of South African law be treated as a guarantee or warranty, a breach of which results in the normal contractual remedies coming into operation, rather than an additional, and anomalous, basis of liability warranting independent recognition and remedies.[40]

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[38] See 7 5 1 3 *infra* for more on suggestions for cancellation.
[39] See Lubbe & Murray Contract 355 note 4 on the debate regarding the development of the *actio quanti minoris* into a general claim for a restitutional monetary award.
[40] See paragraph 434 BGB for a similar development, cf Westermann *NJW* 2002 242 245.

7 4 3 Concluding remarks

By way of conclusion, the system of breach proposed here can be summarised as being organised around the principle that any non-compliance with an obligation or a threatened non-compliance which itself constitutes an immediate breach according to the requirements of anticipatory breach, opens the way for the determination of the remedies available to the aggrieved party. The applicability of the remedies is governed by rules specifically designed to ensure their proper functioning in view of considerations of policy and fairness rather than on the formal classification of the breach that has taken place. There is thus no stringent or mechanical adherence to the notion that the availability of specific remedies is determined by the form of breach that has occurred.

7 5 Proposals for the future of South Africa's remedial system

The development of a simplified system of breach would contribute substantially to the modernisation of the South African law. The remedial system is, in addition, also in need of development to obviate uncertainty regarding the remedies available upon breach.

In chapter three the South African remedial system was examined. The conclusion was that the complexity of the system creates uncertainty and constitutes an obstacle to the efficient resolution of disputes. A discussion of the traditionally recognised remedies will provide a basis for reform of the remedial system with a view to more satisfactory outcomes.

7 5 1 The remedies traditionally recognised in South Africa

7 5 1 1 The enforcement of performance

This remedy was investigated and evaluated in chapter three. It was pointed out that the notion of *pacta sunt servanda* still resonates strongly through the legal system.

Accordingly, subject only to a broad judicial discretion, a party always has the right to claim performance of the obligations in cases of breach, regardless of which form it takes. This primacy of this remedy, in relation to the other remedies was confirmed in chapter five where it was submitted that the claim to performance in fact arises from the contract itself rather than from its breach. Uniquely amongst the traditional remedies, it is consequently unnecessary to prove the existence of a breach, in order to rely on this remedy.

As was stated in chapter three, I am of the opinion that the continued primacy of this remedy will not only provide the most just outcome but also the greatest degree of certainty for the parties to the contract.[41] In order for parties to be able to rely on the realisation of what was agreed in the contract, the right to enforcement should be regarded as arising automatically from the contract. Any injustice could be tempered by the court's discretion not to allow this remedy if it would be contrary to the interests of fairness and equity. While this discretion is not to be exercised in a mechanical manner with a view to set instances, it is submitted that a host of factors, which occur frequently in practice should be identified by the case law in order to provide guidelines for this discretion and discourage ambiguity.[42] This does not militate against the findings in *Benson v SA Mutual Life Assurance Society*,[43] as the goal of the development of these factors is not to curtail the discretion of the court but rather to provide guiding principles to facilitate greater clarity.

Article 46 of the CISG, which as mentioned before,[44] barring a few exceptions, grants a quite extensive right to claim performance. This approach is confirmed on an international level by the UNIDROIT Principles, which in Art 7.2.2 provide a right to claim performance of non-monetary obligations subject to certain qualifications.[45] Unlike the South African law, this remedy is not discretionary and it is clear from both the article itself and the comments to it that the right to performance is given an

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[41] For counter arguments regarding the primacy of this remedy see chapter 3 2 3 and the references cited in n 36. See Lubbe & Murray *Contract* 548 for a discussion of the contentions based on the economic analysis of law in this regard.

[42] It was submitted in chapter three that the list of "crystallized instances" used in the past as rigid rules could be adapted as factors to be taken into account in this respect, see 3 2 2 *supra*.

[43] See 3 2 2 *supra*.

[44] See 6 2 2 1 *supra*.

[45] UNIDROIT Principles Art. 7.2.1 also provides a right to claim performance of monetary obligations.

important role within the UNIDROIT Principles and is not easily dispensed with. The PECL also contains similar provisions to the UNIDROIT Principles in this regard.[46]

The right to reject performance and claim substitute goods if the defective performance proves serious enough, is part of both South African law and the CISG. The materiality of the defect is determined under the CISG with reference to the existence of a fundamental breach. Under South African law it is based on the same test used to determine the right to cancel.[47] The CISG also allows a claim for repair of the goods if this would not be unreasonable.[48] Based on the above discussion of the primacy of the right to have one's interests in the contract enforced, it is submitted that this latter approach of the CISG should be adopted by South African law in addition to the existing principles. The UNIDROIT Principles Art 7.2.3 also regard the right to performance as including in appropriate cases the right to require repair, replacement or other cure of defective performance.[49]

7 5 1 2 <u>The claim for damages</u>

It was observed in chapter three that the CISG's provisions on damages have received much praise for the concise and simple method in which it achieves its purpose. In direct contrast is the complexity associated with damages in South African law, as briefly highlighted to in chapter three.

All that the convention requires in order to recover loss is a causal connection between the breach (in the CISG's sense of any infringement of any obligation) and the damage and that the loss be foreseeable by the defendant at the conclusion of the contract.[50] This remedy is then available regardless of the form of breach or its degree of seriousness. While the same effect is essentially achieved in substance by

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[46] See article 9:101 and 9:102 in respect of monetary and non-monetary obligations respectively.
[47] See further on this below. See also 2 3 1 2 *supra* n 61 where authority for a new test based on the decision in *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk supra* which suggests that also in the case of non-reciprocal contracts, a party can reject defective but substantially complete performance to gain proper performance, even if the breach is not fundamental.
[48] Article 46(3). See 6 2 2 1 *supra*.
[49] As this these rights fall within the right to claim performance, they are subject to the same restrictions mentioned above in the discussion of UNIDROIT Principles Art. 7.2.2.
[50] See article 74 and 6 2 2 3 *supra*.

the general principles applicable in South African law, the process and principles to be applied are far more complex.[51]

The distinction made in South Africa between general principles and specific measures of quantification was highlighted in the chapter six, where it was pointed out that the latter must always be regarded as a manifestation of the former. To an extent, a similar approach is followed in the CISG in the event of avoidance, as in addition to the more general approach provided in article 74, it provides specific rules for the assessment of loss after avoidance of the contract.[52] The UNIDROIT Principles Art 7.4.5 and 7.4.6 also provide similar provisions,[53] as does the PECL in article 9:506 and 9:507. These provisions are based on recurrent practical situations. The specific measures of quantification have the same foundation.

In chapter five, it was suggested that the quantification measures have to a certain extent developed in line with certain instances of breach occurring often in practice. This may be an area where the traditional forms of breach play a greatly diminished role in the future, as a means of assessing the extent of loss.

It is suggested that in the future greater emphasis should be placed on the measures of quantification rather than the general principles in the assessment of loss.[54] While the quantification measures have developed in line with certain traditional forms of breach, they are still based on the general principles, which are independent from the form of breach in existence, and consequently this suggestion does not militate against the arguments concerning the independence of damages from breach.[55] The application of the more practically orientated quantitative measures can act as guidelines and prevent arbitrary decisions, while providing sufficient flexibility to ensure justice and fairness in every situation.

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[51] See 3 3 1 *supra*.
[52] Article 75 and 76.
[53] The comments to these articles further state that they correspond in substance with article 75 and 76 of the CISG. It is also stated that both articles establish a minimum right of recovery and additional loss. This points to the fact that the general principles are still applicable, and that these articles simply present a way to assess loss. A similar provision is provided in the PECL articles mentioned *supra*.
[54] See *Katzenellenbogen v Mullin supra* 880, which appears to support this view.
[55] In this regard, also see the argument provided in 7 3 *supra* regarding the viewing of breach as giving rise to a new independent claim for damages.

7 5 1 3 The availability of cancellation

When the forms of breach were discussed generally in chapter two it was illustrated that under South African law, the availability of cancellation is directly dependent on the form of breach. It was consequently concluded that any attempt to achieve a more unified system of breach would require a drastic reconsideration of the bases for the availability of a right to terminate the contract.

In 5 3 1 it was established that the materiality of the breach, rather than its form, lies at the basis of the right to cancel.[56] This was also shown to be the approach adopted by the CISG, which requires the proof of a fundamental breach before the contract can be avoided. The exact meaning of material breach remains obscure in South African law and it was submitted that there is a need for the development of more precise factors based on recurring practical instances.

Such a development has taken root within case law on the CISG, and should be regarded as one of the most fruitful developments to date in the quest to attain greater certainty. In the analysis of the convention's concept of fundamental breach in chapter six it was suggested that whether a breach is fundamental in nature is largely a function of the intention of the contractants.[57] The court must thus always attempt to determine the wishes of the parties, who themselves achieve certainty by making their wishes in this regard clear in the contract and the negotiations.[58]

In the absence of any basis for a definitive conclusion in this regard, one should turn to factors derived from recurrent practical instances in order to determine the severity of the breach and its consequences.[59] This development is based on the belief that if a

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[56] The development of a unitary notion of breach also refutes the contention of Harker, as stated in 3 4 1 *supra*, that the multiple forms of breach stand in the way of developing criteria for determining the materiality of a breach.

[57] See however the dissenting opinions on this proposal mentioned in 6 3 1 2 1 and the references cited in notes 108 and 109.

[58] While this has strong remnants of the historical requirement to include a *lex commissoria*, this parallel would be incorrect as the parties do not have to expressly state that an infringement of the obligations will result in cancellation (even though this would result in the greatest degree of certainty). All that is required that the importance of the obligation should be apparent from the contract itself or the negotiation process.

[59] See the case law provided in this regard in 6 5 *supra*.

particular obligation is not regarded as significant enough to warrant cancellation by commercial standards, it cannot be regarded as being of a fundamental nature.

Article 7.3.1 of the UNIDROIT Principles defines fundamental non-performance for the purposes of the termination of the contract and it postulates certain factors to determine whether the non-performance is fundamental. These include the determination of whether strict compliance with that obligation is of the essence of the contract, or whether non-compliance deprives the aggrieved party of what it was entitled to expect under the contract, unless the other party did not foresee and could not reasonable have foreseen that result. Article 8:103 of the PECL is to similar effect. It is accordingly clear that these articles largely adopts the approach of the CISG and places the intention of the contractants at the forefront of any enquiry into materiality.

In conclusion, it is strongly recommended that South Africa should base its determination of the materiality of the breach on the intention of the parties as derived from the contract or the negotiations. In the absence of clear evidence regarding the wishes of the parties, one should be able to have regard to factors developed on the basis of recurrent practical instances. This solution is not only based on sound reasoning, but will also avoid vague and arbitrary case law and thus uncertainty in the minds of traders. By giving affect to the desires of the parties as far as possible, and absent this, the norms of practice, the courts will ensure the most just outcome and avoid cancellation on the grounds of random and insignificant infringements.

7 5 2 Suggestions regarding the refinement of other areas of South African law based on aspects of the CISG

7 5 2 1 The possible recognition of the CISG's right to fix an additional period of time for performance-*Nachfrist*

As shown in chapter six,[60] the CISG provides both the buyer and the seller with the right to fix an additional period of time for their counterparts to perform certain specifically named obligations. The buyer may extend the time for delivery and the

[60] See *supra* 6 2 2 2.

seller may fix and additional period of time for payment or co-operation by the buyer. If at the lapse of this additional time period the relevant party has still not performed, the other party may cancel the contract even if the breach is not held to be fundamental.

This development was praised above,[61] for the additional certainty it provides regarding the obligations and remedies of the parties. As suggested in 6 5, the *Nachfrist* provision does not fulfil the function of a remedy in the CISG. It is simply a mechanism used to determine the time for performance if it was not set in the contract, and if it was set, it is used to gain the right to avoid the contract. The role performed by *Nachfrist* can be compared to the function fulfilled by the notice of rescission in South African law. There is however a difference between the two. While the sending of a notice of rescission indicating that cancellation will follow if delivery does not ensue by a certain date will bring about the same consequence as a *Nachfrist* notice, the giving of a notice of rescission depends on the breach being of a material nature.[62] It is submitted that the South African law should be adapted to conform to the *Nachfrist* provision. The CISG's approach does not differ much in substance from the South African equivalent, but nevertheless embodies a more streamlined approach. This is the approach of the UNIDROIT Principles in Art 7.1.5 and the PECL in Article 8:106. The text of both articles is almost identical and coincides with the wording of the CISG in this regard. Both articles only allow avoidance for non-fundamental breach in the event of a delay in performance.

The argument raised above against the extension of *Nachfrist* is not really applicable in South African law. There is, however, the fear that such an extension would result in the cancellation of the contract for arbitrary reasons. The obligations warranting the granting of an additional period for performance in the CISG are, however, normally essential to the contractual undertakings of the buyer and seller respectively. Thus the non-compliance with them, even once an additional period for performance has been set, would seem to validate cancellation of the contract without the fear of this causing substantial injustice. The same can at present not be said of other obligations under the contract. Nevertheless, it may be that if other obligations prove

[61] See *supra* 6 2 2 2.

to warrant this treatment in the future, the *Nachfrist* period could be extended to them as well.

7 5 2 2 Reduction of Price

The introduction into South African law of the CISG's remedy of price reduction was proposed in 6 2 2 4. This, it was submitted, would not bring about a substantive difference in the relief provided to the buyer by the *actio quanti minoris*. The measure for the calculation of the price reduction followed by article 50, by making use of the actual value of the conforming goods rather than the purchase price, adheres to what appears to be a more economically sensitive option.[63] While this benefit alone would probably not warrant the adoption of the CISG's version of the remedy, the proposed reform will result in a more streamlined and internationally recognised system of remedies. As was proposed above,[64] the adoption of a remedy which receives such international recognition would be an important step in the reformation process.

The international acceptance of the CISG's remedy of price reduction is reflected in the PECL, which provides for this remedy in article 9:401, in terms of which the price reduction is determined by the same method used in article 50 of the CISG. In the recent reform of the BGB, similarly, the remedy of price reduction was introduced by paragraph 441, which corresponds with article 50 of the CISG.[65]

As indicated above, the subsumtion of the liability previously regulated in South African law by the *aedilitian* actions under the CISG's notion of a more unitary notion of breach, will avoid much confusion and present a more certain system for international traders.[66]

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[62] See 2 3 1 1 1 2 *supra*.
[63] See 2 5 1 2 1 *supra*.
[64] See 7 4 1 2 *supra*.
[65] Westermann *NJW* 2002 241 149.
[66] See 7 4 1 2 *supra*.

7 6 Concluding Remarks

The South African system of breach is characterised by features that reflect its historical origins. The central concern of this thesis has been to establish that this approach, whereby the categorisation of a breach supposedly dictates the available remedies, is without substance. By establishing the non-existence of this link, the door is opened to the introduction of a modernised, efficient system of breach and remedies. The present chapter makes proposals, which, if implemented could also meet the demands of modern trade more adequately. The retention of specific principles applicable only to the contract of sale is rejected on the ground that to do so is unnecessary in light of the extensive remedial system already in existence which could adequately cater for the needs of the parties to the contract of sale.

In conclusion, it must, however, be stressed that both internationally and nationally, courts are reluctant to embrace reform of such a sweeping nature as is proposed here. The reality of the situation facing South Africa in law is nevertheless simply this: If we do not institute reform with a view to greater certainty, we will be left behind.

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