

Acceptance Of Repudiation By Silence Or Non-Performance

6 March 2026

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When a party repudiates a contract, the innocent party faces an election: to affirm the contract and insist on performance, or to accept the repudiation and treat the contract as discharged. Repudiation alone does not terminate the contract; termination occurs only when the aggrieved party accepts the repudiation.

A longstanding question has been whether acceptance must be expressed, or whether it may arise through conduct, particularly through a failure to perform further contractual obligations.

The House of Lords in *Vitol SA v Norelf Ltd; The Santa Clara* [1996] 3 All ER 193 resolved this definitively. The Court held that acceptance of repudiation does not require formal words. In suitable circumstances, failure to continue performance may itself constitute acceptance, provided that, objectively, it conveys an election to treat the contract as at an end.

This clarification carries significant commercial importance. In fast-moving markets, responses to repudiation often take the form of practical decisions such as ceasing performance, reselling goods, or disengaging from the contractual framework rather than formal notices. Such conduct can have decisive legal consequences.

Brief Facts

The dispute arose under a cif contract for propane. Delivery was to occur within a specified window. Before loading was completed, the buyers claimed the shipment would be late and repudiated the contract.

The sellers did not insist on performance. They failed to tender the bill of lading i.e. an essential precondition to payment and took no further steps in pursuance of the contract. Instead, they resold the cargo at a lower price and later claimed damages for anticipatory breach.

The buyers contended that the sellers had never accepted the repudiation. The central legal question was whether failure to perform without express or formal acceptance sufficed to terminate the contract.

Acceptance May Be Communicated Through Conduct, Including Non-Performance

The House of Lords ruled that acceptance of repudiation does not require express communication. What matters is conduct which, objectively, shows that the aggrieved party has elected to treat the contract as at an end.

Crucially, the Court rejected any absolute rule that non-performance is always ambiguous. Its legal effect depends on the contractual context and surrounding circumstances. In appropriate cases, failure to perform contractual obligations *per se* can clearly communicate acceptance of repudiation.

The inquiry is not concerned with formal words or overt inconsistent acts, but whether the aggrieved party's conduct would convey to a reasonable counterparty that the contract is being treated as discharged. An omission may, in context, be as telling as an express statement.

The House of Lords gave two illustrations:

- Contractor/employer: If an employer tells a contractor at the end of the day that the contract is repudiated and the contractor does not return the next day or ever the contractor's absence may signal, objectively, that the contract is at an end.
- Overseas sale: Where a buyer repudiates before shipment, and the seller, knowing this, fails to obtain an export licence or take other essential steps, the seller's inaction may communicate that they are treating the contract as discharged.

Applying these principles, the House of Lords concluded that the sellers' failure to tender the bill of lading and cessation of performance amounted to acceptance of the buyers' repudiation. The arbitrator's finding was upheld as a proper exercise of fact-finding, not an error of law.

The decision confirms that acceptance is a matter of substance, not form, assessed in its full commercial context. Consider a contract for the sale of shares in a listed company at a fixed price, where completion would have required the seller to undertake certain agreed steps such as procuring shareholder approvals, participating in a corporate exercise, or appointing directors initially nominated by

the buyer. If the buyer repudiates, and the seller, in response, ceases to pursue those steps or otherwise acts in a manner inconsistent with the contractual framework, that conduct may objectively communicate that the seller has treated the contract as discharged.

The same logic applies across commodity and financial markets. A seller faced with repudiation may mitigate its position by reselling the asset, particularly in a falling market. It would be commercially artificial to require the seller to continue performing the original contract, or to insist on formal words of acceptance, when its conduct has already conveyed its election with clarity.

Recognising such conduct as effective acceptance ensures that the law reflects commercial reality. Parties communicate not only through words, but through decisive commercial acts that are intelligible to any reasonable counterparty.

The principle has since been accepted in Malaysia in *Sutures (M) Sdn Bhd v Worldwide Holdings Bhd & Ors* [2015] 8 MLJ 659.

Acceptance Of Repudiation Is A Matter Of Objective Communication

Three points emerge.

First, acceptance does not require express or formal words. There is no prescribed form of acceptance. The law asks whether the aggrieved party's actions objectively indicate election to treat the contract as at an end.

Second, non-performance may constitute acceptance where it is unequivocal in context. While silence or inaction can be ambiguous, in context it may admit of only one reasonable inference that the contract is terminated. This is especially true where continued performance would make sense only if the contract remained alive.

Third, the inquiry is intensely fact sensitive. The sufficiency of non-performance depends on the circumstances. Where the objective inference is clear, acceptance is effective even without formal notification.

The approach rejects rigid formalism in favour of commercial realism grounded in objective meaning.

Practical Implications For Commercial Parties

The decision affirms that acceptance of repudiation turns on objective meaning, not formal declaration. An aggrieved party's conduct particularly a deliberate cessation of performance may at itself communicate an election to treat the contract as discharged.

In practice, repudiation is an election that may be exercised implicitly. Conduct inconsistent with continuing the contract such as declining to perform essential obligations, reselling subject matter, or otherwise disengaging from the contractual framework can amount to acceptance.

The essential discipline is intentionality: parties must act consistently with their chosen position. Inaction, in context, may carry decisive legal effect.

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