

Anticipatory breach of contract and the necessity of adequate assurance under English law and Uniform Commercial Code

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*The doctrine of anticipatory breach of contract originated in English law and was adopted into the Uniform Commercial Code. The doctrine remained intact and rigid in English law but certain rules were modified in the UCC regime, which supplemented it by introducing the novel doctrine of adequate assurance, which is absent from English law. This article explores whether English law should undergo a legislative reform to introduce the doctrine of adequate assurance. One hypothesis that will be examined is that adequate assurance is a logical corollary to the doctrine of anticipatory breach of contract, being necessary to secure the full benefit of the latter. The decision in *The Pro Victor* is investigated: a party made a request for confirmation of performance and the other party's failure to provide constituted a renunciation—perhaps the first recognition by an English court of the adequate assurance doctrine. Doctrines in English law that may have similar functions to adequate assurance (eg, stoppage in transit, which carries with it a modification of contract and exerts pressure on the insolvent buyer to assure the seller about his performance) are examined in order to assess whether adequate assurance fits well into English commercial law. It is suggested that the doctrine of adequate assurance should formally be introduced as a new section in the Sale of Goods Act 1979.*

I. INTRODUCTION

The doctrine of anticipatory breach of contract, which originated in English law, holds that a breach occurs if a promisor, prior to the time at which he is bound to perform a contract, expresses an intention to break it, or acts in such a way as to lead a reasonable person

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The following abbreviations are used:

Benjamin: MG Bridge (ed), *Benjamin's Sale of Goods*, 10th edn (Sweet & Maxwell, 2017);

Chitty: HG Beale (ed), *Chitty on Contracts*, 14th edn (Sweet & Maxwell, 2015);

Goode: E McKendrick (ed), *Goode on Commercial Law*, 5th edn (Penguin Books, London, 2010);

Liu: Q Liu, *Anticipatory Breach* (Hart Publishing 2011)

Treitel: WE Peel, *Treitel: The Law of Contract*, 14th edn (Sweet & Maxwell, 2015).

to conclude that he does not intend to fulfil his obligation.¹ This type of breach, called anticipatory breach, entitles the promisee to exercise contractual remedies, even though the time for performance has not yet arrived. Anticipatory breach did not remain confined to English law, having been adopted into the Uniform Commercial Code (“UCC”) § 2-609. This regime modified certain rules of the doctrine, which remained intact and rigid in English law, and supplemented it by introducing the doctrine of adequate assurance. This doctrine stipulates that, in blurred circumstances, an insecure party, either seller or buyer, can demand adequate assurance from the other party that the contractual obligations will be performed.² Until the request is answered, the insecure party may withhold its own performance and, if the request is answered unsatisfactorily, the insecure party may hold the other in breach. The notion of adequate assurance, which is absent from English law, was introduced by Karl Llewellyn into the UCC.³

The central enquiry is whether English law should adopt the doctrine of adequate assurance. First, this article will provide general background to the doctrine of anticipatory breach under English law. Second, the doctrine of adequate assurance will be introduced and explained. The article will subsequently examine the necessity of this doctrine with reference to the principle of certainty and the mitigation policy. In particular, one hypothesis that will be explored is that adequate assurance is a logical corollary to the doctrine of anticipatory breach of contract, being necessary to secure the full benefit of the latter. Finally, the article will evaluate whether this doctrine can be transplanted into English law and will assess the objections that may arise from this legal regime.

II. GENERAL BACKGROUND TO ANTICIPATORY BREACH UNDER ENGLISH LAW

Anticipatory breach of contract is a notion which was first coherently prescribed in terms of legal principles in *Hochster v De la Tour*⁴ in England and *Howie v Anderson*⁵ in Scotland. An anticipatory breach of contract emerges when the promisor renounces the contract or disables itself from performing his obligations before the time for performance arrives.⁶ “A renunciation of a contract occurs when one party, by words or conduct, evinces an intention not to perform, or expressly declares that he is or will be unable to perform his obligations under the contract in some essential respect”.⁷ The promisor may have

1. *Hochster v De La Tour* (1853) 2 E & B 678; 118 ER 922.

2. S Vogenauer and J Kleinheisterkamp, *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)* (OUP 2009), 370.

3. LT Garvin, “Adequate assurance of performance: of risk, duress and cognition” (1998) 69 UCLR 71, 71. See also TM Campbell, “The right to assurance of performance under § UCC 2-609: toward a uniform rule of contract law” (1982) 5 FLR 1292.

4. (1853) 2 E & B 678; 118 ER 922.

5. (1848) 10 D 355.

6. Benjamin, [12.021]; Chitty, [24.022]; GH Treitel, *Remedies for Breach of Contract: A Comparative Account* (OUP, 1988), 379; S Rowan, *Remedies for Breach of Contract, A Comparative Analysis of Protection of Performance* (OUP, 2012), 75; R Bradgate and F White, “Rejection and termination in contracts for the sale of goods”, in J Birds, R Bradgate and C Villiers, *Termination of Contracts* (John Wiley & Sons, 2005), 20.

7. Chitty, [24.018]. See also Treitel, [17.074]; Benjamin, [12.019]; *Mersey Steel and Iron Co Ltd v Naylor, Benzon & Co* (1884) 9 App Cas 434; *Bradley v H Newsom Sons & Co* [1919] AC 16; *Brinkibon v Stahag Stahl und Stahlwarenhandels GmbH* [1980] 2 Lloyd’s Rep 556 (CA).

behaved in such a way that the promisee, on the balance of probabilities, could have drawn an inference that the promisor is likely to commit a breach when the time for performance arrives.⁸ In *Stocznia Gdanska SA v Latvian Shipping Co*,⁹ the court ruled that the previous conduct of the promisor in failing to fulfil another related contract is likely to lead to the inference that he will fail to perform the contract in question. However, in *The Hermosa*,¹⁰ the Court of Appeal ruled that the claimant's termination was unjustified, "not because the breach which [the claimant] anticipated was insubstantial, but because the conduct of [the defendant] did not justify a firm inference that there would be a further breach". The criterion of a fundamental breach should also be satisfied, signifying that the promisee can exercise its right to terminate a contract only when the breach is sufficiently serious.¹¹

When the promisee infers that prospective fundamental breach will occur, he has two choices thereafter. The first choice is to affirm the contract despite the professed repudiation, thereby keeping the contract alive, and continue to press for performance.¹² Another choice is to accept the renunciation, which has the following impacts: (i) to entitle the promisee to bring the contract to an end, thereby being discharged from that time onward from further performance; (ii) to allow the promisee to claim damages at once, without waiting for the time set for performance;¹³ (iii) to bring forward the promisee's duty to mitigate to the time when anticipatory breach was accepted.¹⁴ An anticipatory breach of contract therefore entitles the promisee to exercise appropriate contractual remedies, including termination of contract, even though the time for performance has not yet arrived.¹⁵ The reason(s) for this striking entitlement is not entirely clear and the scant scholarly materials have failed to provide precise explanations.

There are two major legal reasons justifying this striking entitlement. First, the "inferential breach theory" explains that, when the promisor, prior to the day of performance, evinces an intention probably indicating the occurrence of a fundamental breach of the contract in future, there is no reason to keep the contract alive.¹⁶ The major justification for such termination lies in an economically efficient response that English contract law provides by allowing the parties escape from the motions of performing a contract that is dead for practical purposes, thereby encouraging mitigation of losses.¹⁷ Shortly before *Hochster*, in the important case of *Warburton v Storr*,¹⁸ Abbott CJ stated that it is an established

8. *Johnstone v Milling* (1886) 16 QBD 460 (CA), 467. See also *Chitty*, [24.023].

9. [2002] EWCA Civ 889; [2002] 2 Lloyd's Rep 436.

10. *Chilean Nitrate Sales Corp v Pansuiza Cie de Navigacion SA (The Hermosa)* [1982] 1 Lloyd's Rep 570, 580.

11. *Afivos Shipping Co SA v R Pagnan & Fratelli (The Afivos)* [1983] 1 Lloyd's Rep 335; [1983] 1 WLR 195 (HL). See also *Fleming & Wendeln GmbH & Co v Sanofi SA/AG* [2003] EWHC 561 (Comm); [2003] 2 Lloyd's Rep 473; *Harvela Investments Ltd v Royal Trust Co of Canada (CI) Ltd* [1986] AC 207; *Liu*, [70–71]; *JW Carter, Carter's Breach of Contract* (Hart, 2012), 318.

12. *Treitel*, [17.079]; A Burrows (ed), *English Private Law*, 3rd edn (OUP, 2013), 600–601.

13. *Synge v Synge* [1894] 1 QB 466; *Lep Air Services Ltd v Rolloswin Investments Ltd* [1973] AC 331, 356.

14. *Hochster v De la Tour* (1853) 2 E & B 678; *Chitty*, [24.24].

15. *Chitty*, [17.081].

16. *Hochster v De la Tour* (1853) 2 E & B 678, 688.

17. *Bunge SA v Nidera BV* [2015] UKSC 43; [2015] 2 Lloyd's Rep 469; [2015] Bus LR 987, [12]. See also N Andrews, M Clarke, A Tettenborn and G Virgo, *Contractual Duties: Performance, Breach, Termination and Remedies*, 2nd edn (Sweet & Maxwell, 2017), 123.

18. (1825) 4 B&C 103, 106; 107 ER 997, 998. See also Q Liu, "Inferring Future Breach: Towards a Unifying Test of Anticipatory Breach of Contract" (2007) 66 CLJ 574; M Mustill, "The Golden Victory—Some Reflections" (2008) 124 LQR 569, 571–572.

rule of law that “if a party covenants to do a certain thing, and afterwards, by his own act, disables [itself] from performing it, that is in itself a breach of the covenant”. The rationale for entitling the promisee to treat the contract as at an end before the time for performance is the reasonable inference of the inevitability of non-performance.¹⁹ The “eventual non-performance” can, by anticipation, “be treated as a cause of action” for the availability of remedies.²⁰ In other words, what holds sway is not what has already occurred but what is likely to occur. The promisee is allowed to predict on the basis of the promisor’s conduct that a breach will inevitably happen and thereby he is not bound to wait until it actually happens.²¹ As a result, anticipatory breach means that the promisor is in breach from the moment that the future breach becomes inevitable. It must then follow that the anticipated breach is of exactly the same character as the breach which would actually have happened if the promisee had waited.²² Although there may be scenarios where there is an absolute certainty about future breaches, it seems difficult and somewhat implausible to predict accurately the nature and character of those breaches. Indeed, an anticipated breach is still not a certain, unequivocal breach, as the promisor may, prior to the day fixed for fulfilling the act, put itself in a situation to perform the contract. The promisor may, for example, repurchase the goods so as to be in a situation to sell and deliver them to the promisee. Nevertheless, this theory has played a key role in explaining and justifying the promisee’s entitlement to remedies due to an anticipatory breach of contract.²³

Another reason lies in the “implied promise” theory that took a dominant role for a considerable period after *Hochster*.²⁴ This theory, which originally emerged in *Elderton v Emmens*²⁵ concerning a contract of personal service, suggests that a contract involves mutual covenants embracing an implied promise that neither party will repudiate its duties.²⁶ Although *Elderton* was concerned with an employment case, Lord Campbell CJ in *Hochster* undertook the bold step of extending the implied promise theory into a general doctrine being applicable to every type of contract.²⁷ In modern employment cases, this implied promise is usually translated to envisage that confidence and trust ought to be preserved between the parties.²⁸ According to this theory, a contract constitutes a relationship between the parties. The parties are under an obligation to hold themselves willing and able to perform; and, in the period between formation and performance of

19. *Geden Operations Ltd v Dry Bulk Handy Holdings Inc, M/V (The Bulk Uruguay)* [2014] EWHC 885 (Comm); [2014] 2 Lloyd’s Rep 66. See also *STX Mumbai v STX Mumbai* [2015] SGCA 35; [2016] 1 Lloyd’s Rep 157.

20. *Frost v Knight* (1872) LR 7 Ex 111 (Ex Ch), 112–113.

21. *Woodar Investment Development Ltd v Wimpey Construction UK Ltd* [1980] 1 WLR 277 (HL). See also *Johnstone v Milling* (1886) LR 16 QBD 460.

22. *Thorpe v Fasey* [1949] Ch 649.

23. English courts have used this theory in explaining the promisee’s striking entitlement in these cases: *Mersey Steel and Iron Co Ltd v Naylor, Benzon & Co* (1882) 9 QBD 648; *Maple Flock Co Ltd v Universal Furniture Products (Wembley) Ltd.* [1934] 1 KB 148; *Decro-Wall v Practitioners* [1971] 1 WLR 361; *Gunton v Richmond-upon-Thames London Borough Council* [1981] Ch 448; *Shyam Jewellers Ltd v Cheeseman* [2001] EWCA Civ 1818.

24. Liu, [32]; Goode, 139. See also *Elderton v Emmens* (1853) 4 HL Cas 624; 10 ER 606.

25. *Ibid.*

26. *Hochster* (1853) 2 E & B 678, 682.

27. *Hochster* (1853) 2 E & B 678, 688. See also *Guy-Pell v Foster* [1930] 2 Ch 169 (CA).

28. *British Aircraft Corp v Austin* [1978] IRLR 332; *Post Office v Roberts* [1980] IRLR 347; *Malik v Bank of Credit and Commerce International SA* [1998] AC 20; *Morrow v Safeway Stores Ltd* [2001] EmpLR 1303.

the contract, they impliedly promise that neither will do anything inconsistent with that relationship. If such an implied undertaking is breached, the promisee has the option to act upon such a breach and avail itself of a recession of the contract as an immediate right of action as well as sue for damages. Although this theory appears to be more persuasive than the previous one, as it more accurately explains the causal link between the present breach for an existing obligation and the immediate right to appropriate remedies, Lord Campbell CJ in *Hochster* failed to spell out clearly the legal basis for the implication of the promise to preserve the contractual relationship in every type of contract. Additionally, with the modernisation of the implication of promises and in particular the arrival of the "business efficacy" test,²⁹ the "implied promise" theory quickly dissipated.³⁰ However, this paper does not aim to scrutinise these reasons further.

Notwithstanding the reasons underlying the promisee's entitlement to remedies prior to the time for performance of a contract, anticipatory breach can be a trap. A promisee may misconstrue signals from an ostensibly underperforming promisor as repudiation. Also, the promisor may manifest highly ambiguous and frequently inconsistent expressions, raising doubts as to whether it will perform the contract. This would create a dubious and uncertain situation for the promisee. The doctrine of anticipatory breach, as it currently stands in English contract law, fails effectively to rescue a promisee who faces uncertain circumstances. A comparative investigation shows that UCC and CISG,³¹ proving themselves to be more realistic, modified certain rules of this doctrine which have remained rigid in English law.³² The former legal regimes supplemented the doctrine by introducing the obligee's right to demand adequate assurance that the contractual obligations will be fulfilled. The rest of this paper strives to provide a response to the normative question of whether the right to demand adequate assurance should be introduced into English law.

III. THE DOCTRINE OF ADEQUATE ASSURANCE: DEFINITION AND BACKGROUND

The notion of adequate assurance was one of the innovations that drafters introduced into the UCC.³³ Llewellyn, who led the drafters, believed that law is an instrument to achieve social ends which needs to be constantly assessed in terms of its purpose and its effect to realise whether it fits the society it purports to serve.³⁴ In this regard, Llewellyn, as a legal realist, espoused the approach of considering how the law actually functions by

29. *The Moorcock* (1889) 14 PD 64 (CA).

30. Liu, [33].

31. UN (Vienna) Convention on Contracts for the International Sale of Goods 1980.

32. M Vanwikck-Alexandre, "Anticipatory Breach and Instalment Contracts in the CISG" [2001] IBLJ 353, 355.

33. See generally LT Garvin, "Adequate Assurance of Performance: of Risk, Duress and Cognition" (1998) 69 UCLR 71; TM Campbell, "The Right to Assurance of Performance under UCC § 2-609: Toward a Uniform Rule of Contract Law" (1982) 5 FLR 1292; GS Crespi, "The Adequate Assurance Doctrine after UCC § 2-609: A Test of the Efficiency of the Common Law" (1993) 38 VLR 179.

34. K Llewellyn, *The Common Law Tradition: Deciding Appeals* (Little Brown, 1960), 122; K Llewellyn, "Some Realism about Realism-Responding to Dean Pound" (1931) 44 HLR 1222, 1265; K Llewellyn, "Why We Need the Uniform Commercial Code" (1957) 10 UFLR 367; WD Malcolm, "The Proposed Commercial Code" (1951) 6 BLJ 113, 126.

setting goals and devising laws to accomplish these goals, and then monitoring the success of the legislation.³⁵ As part of his innovations, he endeavoured to design a set of rules which took group practices and their prevailing norms as its central principle. Merchants, in Llewellyn's view, were different from, for example, "housewives, farmers and mere lawyers".³⁶ The presumption was that the considerations present in a commercial context were distinct from those in a non-commercial context, thus demanding unique treatment for each. Perhaps this was so because the merchants bore responsibilities imposed by explicit law and by case law, which were different from those for lay people.³⁷ He thought that merchants are normally reluctant to adopt commercial rules into their contracts and that there was a need to create a law that is more widely used by merchants.³⁸ Also, he was aware that legal rules could be functional only if they were clear, thereby enabling merchants to achieve certainty in commercial contracts. In statements before the New York Revision Commission, he argued that Art.2 would "produce intelligent and workable commercial law", and would render commercial law and practice "clear, sane and safe".³⁹ Llewellyn, therefore, attempted to craft a body of sales laws accommodating the goal of certainty.

As part of his attempt to modernise and modify the law of sales, Llewellyn introduced the doctrine of adequate assurance into the Uniform Commercial Code. This doctrine represents Llewellyn's attempt to create certain and properly adjusted rules for commercial transactions. He was very keen on designing rules which could deal with commercial parties in troubled times.⁴⁰ As already explained, the doctrine of anticipatory breach of contract may lead to difficult and blurred situations for promisees, especially when promisors behave inconsistently.⁴¹ These promisees required a mechanism by which such blurred situations would be crystallised, thus enabling them to make decisions with sufficient confidence. Adequate assurance is likely to address this legitimate concern of promisees by obliging promisors to confirm future fulfilment of their contractual duty.

35. AR Kamp, "Between-the-wars social thought: Karl Llewellyn, legal realism, and the Uniform Commercial Code in context" (1995) 59 ALR 325, 339; see also W Twining, *Karl Llewellyn and the Realist Movement* (Weidenfeld & Nicolson, 1973), 316.

36. State of New York Law Revision Committee Report, *Hearing on the Uniform Commercial Code* (1954), 108. See also J Whitman, "Commercial Law and the American Volk: A Note on Llewellyn's German Sources for the Uniform Commercial Code" (1987) 97 YLJ 156, 163.

37. H Kripke, "The Principles Underlying the Drafting of the Uniform Commercial Code" (1962) UILR 321, 331; see also W Hawkland, "Uniform Commercial Code Methodology" (1962) UILR 291, 295.

38. IM Hillinger, "The Article 2 Merchant Rules: Karl Llewellyn's Attempt to Achieve the Good, the True, the Beautiful in Commercial Law" (1985) Boston College Law School Faculty Paper 1163.

39. State of New York Law Revision Committee Report, *Hearing on the Uniform Commercial Code* (1954), 113; see also S Williston, "The Law of Sales in the Proposed Uniform Commercial Code" (1950) 63 HLR 561, 572; Whitman (1987) 97 YLJ 156, 162.

40. UCC, Art.2 contains the following provisions designed particularly for merchants: § 2-103(1)(b) (good faith); § 2-201(2) (statute of frauds "between merchants"); § 2-205 (firm offer); § 2-207(2) (additional terms in acceptance "between merchants"); § 2-209(2) (modification, rescission and waiver "between merchants"); § 2-312(3) (warranty of title and against infringement); § 2-314(1) (implied warranty of merchantability); § 2-327(1)(c) (sale on approval); § 2-402(2) (rights of seller's creditors); § 2-403(2) (entrusting); § 2-509(3) (risk of loss); § 2-603(1) (rightful rejection); § 2-605(1)(b) (waiver of buyer's objections by failure to particularise); and § 2-609(2) (adequate assurance of performance).

41. *Ante*, text between fnn 29–33.

The right to adequate assurance was first prescribed in UCC § 2-609, which states:

- “(1) A contract for sale imposes an obligation on each party that the other’s expectation of receiving due performance will not be impaired. When reasonable grounds for insecurity arise with respect to the performance of either party the other may in writing demand adequate assurance of due performance and until he receives such assurance may if commercially reasonable suspend any performance for which he has not already received the agreed return.
- (2) Between merchants the reasonableness of grounds for insecurity and the adequacy of any assurance offered shall be determined according to commercial standards.
- (3) Acceptance of any improper delivery or payment does not prejudice the aggrieved party’s right to demand assurance of future performance.
- (4) After receipt of a justified demand failure to provide within a reasonable time not exceeding thirty days such assurance of due performance as is adequate under the circumstances of the particular case is a repudiation of the contract.”

This article highlights the importance of “a continuing sense of reliance and security that the promised performance will be forthcoming”.⁴² To protect this interest, the promisee is entitled to demand adequate assurance of performance when there are reasonable grounds for insecurity regarding the other party’s willingness or ability to perform. Adequate assurance is considered a form of self-help and thus a non-judicial mechanism.⁴³ It prescribes the promisee’s immediate reaction to a perceived problem, which would make it unnecessary to resort to judicial remedies or third-party intervention.⁴⁴ After demanding an assurance, the promisee is entitled to suspend its performance. If reasonably adequate assurance is not received, the promisee has strong grounds to treat the failure to provide assurance as a material breach justifying termination of contract.

Although the wording used in the UCC for describing this doctrine is somewhat self-explanatory, there are a number of vague terms that require explanation. It can be argued that the major sources of uncertainty in § 2-609 are the terms of “adequate assurance” and “reasonable grounds for insecurity”. Unfortunately, the UCC has provided no clear guideline for interpreting them, although the official commentary has striven to clarify these obscure terms.⁴⁵ The drafters of the UCC intended commercial or business standards to be applicable.⁴⁶ This may indicate that the UCC requires an objective factual basis to assess the adequacy or inadequacy of assurance, just as for the determination of reasonable grounds for insecurity, suggesting that courts should follow common sense and reasonable business practices, which are varied in different scenarios.

42. UCC Official Comment n.1 to § 2-609. CISG Art.72 (2) has worded the doctrine of adequate assurance in a similar manner to UCC § 2-609, which reads: “(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.”

43. MJ Borden, “The Promissory Character of Adequate Assurances of Performance” (2010) 76 BLR 167, 206; see also MW Sargis, “The Uniform Commercial Code Section 2-609: a Return to Certainty” (1980) 14 JMLR 113, 120; MP Gergen, “A Theory of Self-help Remedies in Contract” (2009) 89 BULR 1397, 1447.

44. D Harris and D Campbell and R Halson, *Remedies in Contract and Tort*, 2nd edn (Butterworths LexisNexis, 2002), 62; also DI Brandon, “Self-Help: Extrajudicial Rights, Privileges and Remedies in Contemporary American Society” (1984) 37 VLR 845.

45. UCC Official Comments.

46. PR Tepper, *The Law of Contracts and the Uniform Commercial Code*, 3rd edn (Cengage Learning, 2014), 452.

It seems uncertain and difficult for the promisee to figure out what reasonable grounds constitute sufficient insecurity to allow him to demand an adequate assurance. To realise whether there are reasonable grounds for insecurity, many factors, including the promisor's exact words or conduct, the course of dealing or performance between the parties involved, and the nature of the industry should all be taken into account.⁴⁷ Insolvency is perhaps the most significant cause of insecurity. For instance, in the American case of *Atwood-Kellogg v Nickeson Farms*,⁴⁸ farmers entered into a contract to sell corn and soybeans to Farmers Elevator Company of Eden (FEC). Atwood-Kellogg provided financing to FEC and maintained a security interest in FEC's accounts receivables and contract rights. After concluding the contract, FEC fell into serious financial difficulties and became insolvent. FEC's insolvency was undisputed by the parties. Although it was clear that the buyer was unable to fulfil his contract duties, the farmers requested adequate assurance that the finance company would pay them the specified amount. The finance company could not provide sufficient documentation showing adequate assurance of future payment by the buyer, and therefore the farmers repudiated the entire contract. In the similar case of *Wells v Hartford*,⁴⁹ the buyer faced financial difficulties and fell into arrears on its payment under a supply contract. As a result, he asked the seller to slow down and stop its shipments; shortly after, the buyer was placed into receivership. It was argued that the seller was likely to have "a suspicion amounting to a firm belief on its part" that the buyer would not perform its obligations.⁵⁰ However, suspicion and belief are not substitutes for the certainties required to infer a probable prospective breach, and therefore repudiation of contract by the seller was not justified. In this situation, the seller was absolutely entitled to demand from the buyer a guarantee of payment. Other case law illustrations of reasonable foundations for insecurity include: a seller who withheld producing the machines to be delivered under the contract,⁵¹ goods similar to those contracted for by other buyers are delivered but fail to work as anticipated,⁵² and where the seller announces that the contract price is too low to guarantee the fulfilment of his obligation.⁵³

To examine what constitutes an adequate assurance, regard should be given to the minimum kinds of promises or acts on the part of the promisor that would satisfy a reasonable merchant in the position of the promisee that his expectation of receiving due performance will be fulfilled.⁵⁴ Thus, the key factor for determining the adequacy of an

47. UCC Official Comment n.2 to § 2-609; see also Garvin (1998) 69 UCLR 71, 102; MW Sargis, "The Uniform Commercial Code Section 2-609: a Return to Certainty" (1980) 14 JMLR 113, 124.

48. (1999) 602 NW 2d 749. See also *Universal Builders Corp v United Methodist Convalescent Homes Inc* (1986) 7 Conn App 318; 508 A 2d 819; 1 UCC 2d 763; *Validsa, Inc v PDVSA Services Inc* (2011) 424 Fed Appx 862.

49. (1903) 76 Conn 27; 55 Atl 599. See also *Corn Products Refining Co v Fasola* (1920) NJL 181; 109 A 505; *Slaughter v Barnett* (1934) 154 So 134.

50. (1903) 76 Conn 27; 55 Atl 599, 612.

51. *AMF Inc v McDonald's Corp* (1976) 536 F 2d 1167, 1170: the prototype cash register did not perform adequately during one-year trial, and the seller then stopped producing manufacturing the remaining machines.

52. *Creusot-Loire International Inc v Coppus Engineering Corp* (1983) 585 F Supp 45: the court confirmed that the buyer of precision parts has reasonable grounds for insecurity when he learns that his seller is conducting defective deliveries of such parts to other buyers with similar needs.

53. *Kaiser-Francis Oil Co v Producer's Gas Co* (1989) 870 F 2d 563; 8 UCC2d 1048 : the seller had clearly reasonable grounds for insecurity as a matter of law, since the buyer of natural gas explicitly failed to carry on performing unless the seller agreed to modify "take-or-pay" provision.

54. UCC Official Comment, n.4 to § 2-609. See also *By-Lo Oil Co Inc v Partech Inc* (2001) 11 Fed Appx 538.

assurance is whether the assurance given by the promisor in light of all the circumstances can resolve the promisee's suspicion about future performance such that he would resume fulfilling his contractual duties.⁵⁵ The promisee's satisfaction must, however, be based "upon reason and must not be arbitrary or capricious".⁵⁶ This doctrine also begs for something that the promisor would not otherwise be obliged to provide, something which is not contractually agreed by the parties.⁵⁷ An adequate assurance is wide-ranging, and could comprise a mere promise to perform or could entail the provision of a guarantee bond. It is not unreasonable if the promisee demands "an extension of contractual guarantee" or "the posting of a letter of credit" in light of the circumstances.⁵⁸ In *Louisiana Power & Light Co v Allegheny Ludlum Industries Inc.*,⁵⁹ the parties had known each other through the course of dealings for about five years, and, when a suspicion arose as to whether the supplier would fulfil his duties following a change of circumstances, the buyer demanded written assurances that the supplier would fully and properly perform as stated under the contract. This was deemed by the court to be an adequate assurance. However, in most cases a reasonable demand may extend to a guarantee. For example, in *Hornell Brewing Co Inc v Spry*,⁶⁰ the distributor failed to provide documentation of the factoring agreement, giving rise to a reasonable ground for the supplier's insecurity regarding whether payment would be forthcoming. The supplier then demanded a documented line of credit or similarly powerful guarantee as a form of adequate assurance, which in the court's view was reasonable. The promisee should, however, be cautious when demanding assurance, because, if the assurances sought are more than "adequate" and the other party rejects to accede to the excessive demands, the court may rule that the promisee itself was in repudiatory breach, thus entitling the other party to terminate the contract.⁶¹

IV. THE NECESSITY OF ADEQUATE ASSURANCE

An important goal of the law governing contractual remedies is broadly to satisfy commercial needs and expectations.⁶² However, the difficulty of deciding what those expectations actually are and exploring what laws best fit their needs should not be

55. Sargis (1980) 14 JMLR 113, 135. See also TM Quinn, *Quinn's Uniform Commercial Code, Commentary and Law Digest*, 2nd edn (Thomson Reuters, 2009), 430.

56. *Richmond Leasing Co v Capital Bank, NA* (1985) 762 F 2d 1303, 1309; see also *Cinicola v Scharffenberger* (2001) 248 F 3d 110, 120.

57. JJ White and RS Summers, *Uniform Commercial Code*, 5th edn (West Group, 2000), 198–199–200; see also *Pittsburgh-Des Moines Steel Co v Brookhaven Manor Water Co* (1976) 532 F 2d 572, 18 UCC 931; *Creusot-Loire International, Inc v Copus Eng'g Corp* (1983) 585 F Supp 45, 39 UCC 186.

58. *Creusot-Loire International Inc v Coppus Engineering Corp* (1983) 585 F Supp 39, 45; see also *American Bronze Corp v Streamway Products* (1982) 8 Ohio App 3d 223.

59. (1981) 517 F Supp 1319; see also *Norcon Power Partners LP v Niagara Mohawk Power Corp* (1998) 92 NY 2d 458.

60. (1997) 174 Misc 2d 451; see also *State v Pellegrino* (1998) 39, 577 NW 2d 590; *Carolina Consulting Corp v Ajax Paving Industries, Inc of Florida* (2012) 86 So 3d 502; *Carolina Consulting Corp v Ajax Paving Industries, Inc of Florida* (2012) 86 So 3d 502.

61. JJ White and RS Summers, *Uniform Commercial Code*, 5th edn (West Group, 2000), 199. See also *Erwin Weller Co v Talon Inc* (1980) 295 NW 2d 172.

62. See generally G Cuniberti, "The International Market for Contracts, the Most Attractive Contract Laws" (2014) 34 NJILB 455.

underestimated. Commercial parties enjoy the freedom of choosing which law should apply to their contracts. It is therefore possible for them to opt out of the general law of contract of a legal system. The more the law of contract departs from what commercial parties want, the more likely they are to opt out of it altogether.⁶³ The law of remedies, which falls short of fulfilling parties' expectations, plays a key role in the exclusion of the entire law of contract of a legal system. In a global and competitive marketplace for laws, parties are free to prefer and opt for the law of any jurisdiction that satisfies their preferences over one that does not. A significant factor which is likely at least partly to satisfy parties' expectations is the degree to which the law of contractual remedies is certain and predictable. It has been argued that "certainty ... is the most indispensable quality of mercantile contracts".⁶⁴ This is because the commercial parties "must be able to do business with confidence in the legal results of their actions".⁶⁵ For instance, it is believed the reason for the disproportionate attraction of New York law for commercial contracts within the USA in comparison with Californian law is that the former contains more hard-edged and formal principles than the contextual and all-things-considered principles of the latter.⁶⁶ The formalist approach offers more certainty, since it strictly seeks to enforce the contract's agreed-upon terms by relying on the plain meaning rules of interpretation. On this basis, the law of anticipatory breach of contract as an instance of the law of remedies needs to be precisely prescribed in order to provide definite scope for the injured party's rights and duties in situations where there is the potential for prospective non-performance of contracts.

In light of the necessity of legal certainty sketched in this Part, one hypothesis that should be examined is that adequate assurance is a logical corollary of the doctrine of anticipatory breach of contract.⁶⁷ An important requirement for utilising the doctrine of anticipatory breach is that a purported repudiation be done with utmost clarity.⁶⁸ The promisee should demonstrate that the refusal to perform was distinct, unequivocal and absolute. These elements are necessary for constituting a valid cause of action. A serious repudiation can be easily identified by a promisee who confronts situations where a promisor clearly indicates his future non-performance. The promisor may do this either by making a definite statement indicating that he will not or cannot substantially fulfil his contractual duties or by acting in such a way as to render the performance of the contract obligations out of his abilities. In such circumstances, anticipatory breach effectively protects the promisee by entitling him to invoke appropriate remedies.

Complications begin when the promisor exhibits inconsistent behaviours that place the promisee in an ambiguous situation. Promisors, who do not aim to breach but are

63. See generally L Bernstein, "Merchant Law in a Modern Economy", in G Letsas and G Klass, *The Philosophical Foundations of Contract Law* (OUP, 2014); S Macaulay, "Non-contractual Relations in Business: a Preliminary Study" (1963) 28 ASR 55.

64. *Bunge v Tradax* [1981] 1 WLR 711, 715; [1981] 2 Lloyd's Rep 1, 5. See also JH Merryman, "On the convergence (and divergence) of the civil law and the common law" (1981) 17 SJIL 357; EA Farnsworth, "Developing international trade law" (1979) 9 CWILJ 461.

65. *Bunge v Tradax* [1981] 1 WLR 711, 720; [1981] 2 Lloyd's Rep 1, 9. See also JR Maxeiner, "Legal certainty: A European alternative to American legal indeterminacy" (2007) 15 TJCL 541, 549.

66. GP Miller, "Bargains bicoastal: New light on contract theory" (2010) 31 CLR 1475.

67. Crespi (1993) 38 VLR 179, 181.

68. Liu, 11.

unable to fulfil, may often convey thoroughly vague signals. This may occur when, for example, the promisor has become insolvent, or when it fails to perform other contracts comparable with the one concluded with the promisee. For instance, in the American case of *Hornell Brewing Co v Spry*,⁶⁹ the distributor's failure to sell even a small fraction of the product led the supplier to have reasonable doubts about the distributor's ability to perform in the future. In this case, the distributor declined expressly to manifest his intention or ability not to perform the contract, thereby putting the promisee in an uncertain circumstance. Such an anticipatory breach hence places the promisee, who has perceived an apparent repudiation, in a difficult dilemma and hence at serious risk. If the promisee terminates the contract and sues for breach on the basis of the apparent repudiation, it is at risk of being found to have breached the contract itself if the court rules that the repudiation was not sufficiently clear to constitute an anticipatory breach. Not only is this unfair to the promisee, but it would lead to economic inefficiency. The reason is that, if the promisee wrongly decides that repudiation has occurred and terminates the contract, any subsequent performance by the promisor fulfilled before the promisor becomes aware of the promisee's decision may be partially or wholly wasted.⁷⁰ This is exactly what happened in the English case of *Gulf Agri Trade FZCO v Aston Agro Industrial AG*.⁷¹ In this case, the seller had to ship 6,000 metric tonnes of Russian Feed Barley during the period 10 August to 10 October 2004. The seller had made no shipment by the end of September 2004. The buyer therefore decided to declare notice of default to the seller on 4 October, demanding an "amicable settlement in order to close this file".⁷² In this notice, the buyer stated that they considered the contract as defaulted and claimed an amount to be paid as compensation. Because the seller failed to purport any action showing his willingness or ability to perform the contract by the end of September, the buyer assumed that it would be impossible for the seller to ship the goods in a timely manner in accordance with the contractual arrangements. The buyer thus took action on the basis of an apparent repudiation of contract. However, it seems clear that when the buyer gave notice of default to the seller, as a matter of fact, the buyer could not have been reasonably certain that the seller "could not or would not perform the contract".⁷³ The notice of termination was therefore held to be premature and thus unjustified, which convinced the GAFTA Appeal Board to rule that "[the buyer] could not reasonably have concluded that [the seller] were in anticipatory breach of the contract through impossibility or renunciation".⁷⁴ If the doctrine of adequate assurance was formally recognised and prescribed in English contract law, the buyer with reasonable doubts could demand confirmation that contractual performance will be rendered by the seller. The buyer in the aforementioned case relied on the seller's contractual undertakings, expected to receive those goods and, as such, they entered into contract with a number of sub-buyers. Because the seller failed to execute his obligations, the buyer had to pay damages for losses incurred to his sub-buyers. Having

69. (1997) 174 Misc 2d 451; 664 NYS 2d 698.

70. Crespi (1993) 38 VLR 179, 183; D DeNooyer, "Remedying Anticipatory Repudiation- Past, Present, and Future" (1999) 52 SMU Law Review 1787, 1790.

71. [2008] EWHC 1252 (Comm); [2009] 1 All ER (Comm) 991. See also *Fleming & Wendeln GmbH & Co v Sanofi Sa* [2003] EWHC 561 (Comm); [2003] 2 Lloyd's Rep 473.

72. [2008] EWHC 1252 (Comm); [2008] 1 All ER (Comm) 991, [5].

73. *Ibid*, [23].

74. *Ibid*.

understood that the seller is unwilling or unable to perform the contract in due time, the buyer would have had the chance to notify its sub-buyers so that they could have started searching for alternatives with a reasonable amount of time, which could perhaps reduce the economic waste. This case strongly reinforces the suggestion that English contract law should introduce the doctrine of adequate assurance.

In a similar, controversial case, *Universal Cargo Carriers Corporation v Citati*,⁷⁵ the owner of a vessel was accused of wrongful termination of contract, despite the apparent repudiation by the charterer. In this case, the charterer was contractually obliged to furnish a cargo of 6,000 tons of scrap iron, to load it at the rate of 1,000 tons per day, and to complete the loading by 21 July. However, he failed to provide any cargo by 18 July. On this day, the owner terminated the contract by rechartering the vessel to another charterer, because the original charterer failed to provide any cargo three days before the lay days were due to expire under the charterparty.⁷⁶ The owner justified this action by claiming that on or before 18 July the charterer had committed an actual or anticipatory breach of its obligations under the charter. In other words, they believed that on that day 6,000 tons could not possibly have been loaded in the lay time remaining. The issue was then whether the charterer's failure to load the goods on 18 July could lead to the reasonable inference that there would be prospective fundamental breach of contract. In other words, the question was whether it could be reasonably anticipated that the charterer would fail to perform its duties by the end of the lay days or within a reasonable time thereafter.⁷⁷ To convince the court, the shipowner had to show "that on July 18 the charterer was unable to load a cargo within such a time as would not have frustrated the venture".⁷⁸ While it is well settled that the obligation to load within the lay days is a warranty and its breach gives rise to a claim for damages only,⁷⁹ the injured party is allowed to terminate if the delay becomes so prolonged that the breach is characterised so grave as to go to the root of the contract.⁸⁰ It was a question of fact to assess a period of delay to be sufficient to constitute the frustration of charterparty as Devlin J opined that "an anticipatory breach must be proved in fact and not in supposition".⁸¹ The doctrine of adequate assurance could have shed light on the blurred factual situations of this case. If this doctrine were recognised in English law, the shipowner could use it to justify its termination of the contract because, although the charterer was willing to perform, it could not possibly load the goods until 18 July owing to the period of delay incurred. In other words, for the shipowner to be entitled to terminate the contract, it should have been sure that the charterer's inability to perform was inexorable or sufficiently probable. Failing to furnish an adequate assurance by the charterer would have led to a reasonable anticipation that the charterparty will not be performed, thus providing a strong ground for the owner rightfully to terminate the charterparty.

75. [1958] 2 Lloyd's Rep 17; [1957] 2 QB 401.

76. [1958] 2 Lloyd's Rep 17, 19; [1957] 2 QB 401, 420.

77. [1958] 2 Lloyd's Rep 17, 20; [1957] 2 QB 401, 440.

78. [1958] 2 Lloyd's Rep 17, 23; [1957] 2 QB 401, 450.

79. *Thorpe v Fasey* [1949] Ch 649.

80. *Evera S.A. Commercial v North Shipping Co. Ltd* [1956] 2 Lloyd's Rep 367. See also Andrews, Clarke, Tettenborn & Virgo, *Contractual Duties: Performance, Breach, Termination and Remedies*, 2nd edn (Sweet & Maxwell, 2017), 133.

81. [1958] 2 Lloyd's Rep 17, 23; [1957] 2 QB 401, 450. See also *Forslind v Bechely-Crundall* 1922 SC (HL) 173, 192.

In the more recent and similar case of *SK Shipping (S) Pte Ltd v Petroexport Ltd (The Pro Victor)*,⁸² the Commercial Court reached a different conclusion. In this case, SK Shipping chartered to Petroexport for a voyage from Karachi, Pakistan carrying naphtha to Mailia, Taiwan. The charterparty provided that the vessel had to start loading by 27 August and the lay days were to last for three consecutive days. However, after the conclusion of the charterparty and before the vessel arrived in Karachi, the charterer faced some difficulties both in securing sufficient naphtha from its suppliers and finding a customer. As a result, the charterer ordered the vessel to slow steam. Furthermore, it never returned the copy of the charterparty sent by the owner for signature, which aimed at procuring freight text exemption. When the owner learned that the charterer experienced hardship in finding a buyer and might not proceed with the charterparty, it initiated a series of email exchanges to ascertain whether the charterer would perform the contract. In other words, the owner made several requests for confirmation of performance by the charterer, but the requests were answered elusively.⁸³ Having received no persuasive confirmation, the owner sent a final email aiming at terminating the charterparty as a response to the charterer's alleged renunciation. The Commercial Court upheld the owner's decision to terminate the contract and recharter the vessel for another voyage on the basis that the charterer's words and conduct gave rise to the renunciation of the charterparty. Although the Commercial Court ruled in favour of the owner, it was unpredictable as to whether the charterer's conduct would lead to repudiation of performance, as indicated in its judgment that courts should take account of "the totality of the relevant words and conduct relied upon, in the light of all the circumstances, including the history of the contractual relationship".⁸⁴

As shown above, the absence of the doctrine of adequate assurance in English law can lead to inconsistent decisions by courts in broadly factually similar cases, which ultimately impairs certainty with regard to future similar cases. These decisions clearly demonstrate that English contract law lacks an effective mechanism by which the suspicious party can draw the inference that a prospective non-performance or fundamental breach is likely, on the balance of probabilities, to materialise at the time for performance. Such inference would be particularly difficult in blurred situations where the promisor has behaved inconsistently, indicating that it lacks clearness of purpose or has insufficient understanding of business and markets which necessitate prompt and accurate compliance with obligations. The promisee should carry out an objective assessment as well as psychological operations within the mind of the promisor.⁸⁵ Lord Shaw of Dunfermline explains that, when there is likely to be prospective non-performance, "the accent of the psychology is not upon the mind of the person who is defiant or heedless of his obligation" but rests on the mind of the person who is likely to suffer from the defiance.⁸⁶ The doctrine of adequate assurance can therefore function to alleviate the position for the promisee, in

82. [2009] EWHC 2974 (Comm); [2010] 2 Lloyd's Rep 158.

83. *Ibid.*, [30–38].

84. *Ibid.*, [88]. See also *Maredelanto Compania Naviera SA v Bergbau-Handel GmbH (The Mihalios Angelos)* [1971] 1 QB 164, 210; [1970] 2 Lloyd's Rep 43; *BS & N Ltd (BVI) v Micado Shipping Ltd (Malta) (The Seaflower)* [2000] 2 Lloyd's Rep 37.

85. *Morris Carswell v Richard R. Collard* (1893) 20 R (HL) 47; [1893] AC 635.

86. *Forslind v Bechely-Crundall* 1922 SC (HL) 173, 191.

that the failure by the promisor to provide the assurance will make it safer and hence more certain to terminate the contract.⁸⁷

The second justification for the necessity of adequate assurance emanates from the policy of mitigation, which can provide a rigorous explanation. The mitigation policy under American contract law maintains that, when the promisee carries on performing after an apparent repudiation, but it is subsequently determined that an anticipatory breach took place, the promisee may not be able to obtain compensation for post-repudiation expenditures owing to his failure to avoid those expenses.⁸⁸ This would also lead to economic waste, because the promisee might have the ability to take reasonable steps to minimise the loss by avoiding the post-repudiation expenditures of performing his own contractual duties. In the significant American case of *Rockingham County v Luten Bridge Co*,⁸⁹ after the company had started to construct a bridge, as agreed, the County repudiated the contract and instructed the company to stop work. Nevertheless, the company built the bridge and claimed the contract price. The court held that the company could not recover the contract price, and ruled that the duty to mitigate required the company to stop work, thereby restricting damages to the costs incurred up to the time of repudiation, as well as lost profits. The American rule⁹⁰ is not entirely similar to the rule adopted in English law; as demonstrated in the English case of *White & Carter (Councils) Ltd v McGregor*,⁹¹ however, the mitigation policy generally necessitates the doctrine of adequate assurance, which will be explained.

The strict view under English law holds that a claimant should not do nothing to minimise or avoid loss flowing from a wrong; rather, it should use its resources to do what is reasonable to place itself in as good a financial position as it would be in if the contract were performed or the tort not committed.⁹² The mitigation principle aims at encouraging the claimant, once a wrong has occurred, to be reasonably self-reliant or, in economics terminology, to be efficient, rather than ascribing all loss to the defendant.⁹³ This analysis shows that it is not entirely clear whether the promisee's duty to mitigate can be activated in blurred situations where the promisor behaves suspiciously with respect to the fulfilment of its duties. The reason is that an apparent but yet unaccepted repudiation is a "thing writ in water and of no value to anybody";⁹⁴ until accepted, it does not count as breach of contract which triggers the duty to mitigate. This was reiterated

87. The proposal to introduce the doctrine of adequate assurance was also put forward by Scottish Law Commission, *Discussion Paper on Remedies for Breach of Contract* (Sc LC 109, 1999), [9.2].

88. WF Snyder, "Duty to mitigate upon anticipatory breach of forward contract of sale" (1949) Mich LR 538, 540; MA Eisenberg, "Actual and Virtual Specific Performance, the Theory of Efficient Breach, and the Indifference Principle in Contract Law" (2005) 93 Cal LR 975, 1023.

89. (1929) 22 Ill 35 F 2d 301.

90. For further explanations, see AG Dowling, "A Right to Adequate Assurance of Performance in All Transactions: UCC 2-609, Beyond Sales of Goods" (1975) 48 SCLR 1358, 1376–1380.

91. [1962] AC 413; [1962] SC (HL) 1.

92. *Treitel*, [20.115]; *Chitty*, [26.079]. See also *Thai Airways International Public Co Ltd v KI Holdings Co Ltd* [2015] EWHC 1250 (Comm); [2016] 1 All ER (Comm) 675; *Hussey v Eels* [1990] 2 QB 227; *Gebrüder Metelmann GmbH & Co KG v NBR Ltd* [1984] 1 Lloyd's Rep 614; *British Westinghouse Electric Co Ltd v Underground Electric Railways Co of London Ltd* [1912] AC 673.

93. A Burrows, *Remedies for Torts and Breach of Contract*, 3rd edn (OUP, 2004), 122.

94. *Howard v Pickford Tool Co Ltd* [1951] 1 KB 417, 421. See also *Frost v Knight* (1872) LR 7 Ex 111; *Michael v Hart & Co* [1902] 1 KB 482, 490; *Johnstone v Milling* (1886) 16 QBD 460; *Heyman v Darwins Ltd* [1942] AC 356; *Golding v London and Edinburgh Insurance Co Ltd* (1932) 43 Ll L Rep 487.

by McGregor, who explained that a buyer is not required to go into the market after anticipatory repudiation and “is entitled to sit back on a rising market”, as it “has no duty to mitigate”.⁹⁵ The landmark case of *White & Carter (Councils) Ltd v M’Gregor*⁹⁶ endorsed this reasoning, although it introduced new qualifications to the innocent party’s choice. In this case, a garage owner entered into a service contract by which an advertising company agreed to display advertisements for the respondent’s garage on local authority bins for a three-year period. However, the garage owner repudiated the contract several months prior to the commencement of performance. The advertising company refused to accept the cancellation and continued with performance of the contract. The garage owner then refused to pay for the advertisements, so the company sued for the full sum payable under the contract. The House of Lords ruled that the company was allowed to recover the price, holding that the rules of mitigation do not apply to the innocent party’s option: he may either accept the cancellation and treat it forthwith as a breach or he may continue to treat the contract as binding and fulfil his duties, notwithstanding a repudiation by the other party.⁹⁷

Nevertheless, it can be argued that a contract institutionalises an economic and social relationship, in which legitimate self-interest is normative action followed by parties within a substantially cooperative structure, “of which mitigation is a fundamental pillar”.⁹⁸ This demonstrates that mitigation policy generally holds that reasonable steps should be taken to avoid or diminish loss when the repudiation is communicated.⁹⁹ The reason is that if this duty strictly arises only after the acceptance of repudiation, a corollary would be that the repudiatee is free to increase his potential losses by confirming the contract and rendering unwanted performance.¹⁰⁰ Viscount Haldane LC, in *British Westinghouse Electric & Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd (No2)*,¹⁰¹ opined that promisees who fail to take reasonable steps to mitigate their loss should be unable to recover such loss as they reasonably could have avoided. The dissenting Lords Morton of Henryton and Keith of Avonholm in *White and Carter* reasoned that the promisee was obliged to minimise its loss and that the promisor should have accepted the repudiation and looked for alternative customers who wanted their services.¹⁰² In *The*

95. H McGregor, *McGregor on Damages*, 19th edn (Sweet & Maxwell 2012), [7.021], [20.017]; see now J Edelman, H McGregor, *McGregor on Damages*, 20th edn (Sweet & Maxwell 2018), [9.015], [9.094]; *McGregor* cites the numerous authorities that make it seem that the *ratio* of *White and Carter* actually applies to sales of goods.

96. [1962] AC 413; [1962] SC (HL) 1.

97. [1962] AC 413, 425; [1962] SC (HL) 1, 25; See also *Barclays Bank Plc v Unicredit Bank AG* [2012] EWHC 3655; *MSC Mediterranean Shipping Co SA v Cottonex Anstalt* [2016] EWCA 789; [2016] 2 Lloyd’s Rep 494; *Chitty*, [26.103]. For further clarifications, see J Morgan, “Smuggling Mitigation into *White & Carter v McGregor*: Time to Come Clean?” [2015] LMCLQ 575, 576; JW Carter, “*White & Carter v McGregor*—how unreasonable?” (2012) 128 LQR 490.

98. D Campbell, “Market Damages and the Invisible Hand” in L DiMatteo and M Hogg, *Comparative Contract Law, British and American Perspectives* (OUP 2015), 340; see also D Campbell, “Relational Constitution of Remedies” (2005) 11 TWLR 455, 465.

99. See generally Morgan [2013] LMCLQ 575; A Dyson and A Kramer, “There is no ‘breach date rule’: mitigation, difference in value and date of assessment” (2014) 130 LQR 259.

100. Liu, 567.

101. [1912] AC 673, 689. See A Dyson, “British Westinghouse Revisited” 2012] LMCLQ 412; *Hussey v Eels* [1990] 2 QB 227, 232–233; *Hooper v Oates* [2013] EWCA Civ 91; [2014] Ch 287.

102. [1962] AC 413, 433 (Lord Morton of Henryton), 435 (Lord Keith of Avonholm).

Golden Victory, Lord Bingham of Cornhill clarified that mitigation imposes an assumption that the claimant acted reasonably, “whether in fact the [innocent party] acts in that way or, for whatever reason, does not”.¹⁰³

Lord Campbell CJ, in the significant case of *Hochster v De La Tour*,¹⁰⁴ asserted that a function of the doctrine of anticipatory breach of contract is to avoid any further loss to the promisee which may incur from his continued performance after repudiation. This indicates that anticipatory breach of contract can facilitate mitigation of potential loss. This is because it would be beneficial for both parties, following the renunciation of the agreement by the party in breach, for the innocent party to have enough liberty to consider itself absolved from any future contractual duties and to seek similar goods or services from other suppliers. This is easy enough when the promisee is faced with unequivocal breach. If, however, the promisor behaves ambiguously, the promisee confronts a predicament. The promisee in this case would have to await either performance or unequivocal breach. This demonstrates that a reasonably suspicious and potentially injured promisee should be entitled to clarify this deadlock situation either to seek to execute its duty to mitigate following an unequivocal breach and accepting the breach, or to prepare itself to fulfil its contractual obligation following its counterparty’s performance. In other words, to implement the mitigation duty, the promisee needs an effective means to ascertain whether a repudiation has occurred to prevent both additional pointless expenditures and performance past the time when enhanced losses begin to accrue. The doctrine of adequate assurance is a compelling mechanism for forcing the promisor to crystallise the situation. If the promisor provides an assurance which is adequately reasonable, the promisee becomes certain that the contract will be fulfilled and that it does not need to take any other steps. But when the promisor declines to render an adequate assurance, it is a strong indication that the promisor will not perform the contract; thereby the promisee can accept the repudiation and should then actively attempt to reduce its loss to satisfy the mitigation requirement. The doctrine of adequate assurance is therefore capable of satisfying the goal of mitigation policy, in the sense that it can be used as an instrument to discover whether and when the promisee should begin its efforts to minimise the loss.

V. COMPATIBILITY OF ADEQUATE ASSURANCE WITH ENGLISH CONTRACT LAW

To verify whether adequate assurance fits neatly into English law, the nature of this doctrine should be taken into account. Adequate assurance has a promissory character, in the sense that the promisor pledges that its obligations will be fulfilled in future.¹⁰⁵ Assurances may consist of new undertakings, taking, for example, the form of granting the insecure party the right to inspect the books of a suspect merchant to confirm ongoing solvency.¹⁰⁶ To enforce the promisor’s undertaking to furnish adequate assurance, a serious objection may

103. *Golden Strait Corp v Nippon Kaisha* [2007] 2 Lloyd’s Rep 164, 168; [2007] 2 AC 353, 370.

104. (1853) 2 E & B 678, 690.

105. *Ante*, text between fnn 42–51.

106. *Ibid.*

arise from the rationale underlying the doctrine of consideration, as a complicated and multifarious body of rules aimed at limiting the enforceability of agreements in English law.¹⁰⁷ The doctrine of consideration is founded on the idea of reciprocity, indicating that "something of value in the eye of the law" must be provided in order for an enforceable contract to be constituted.¹⁰⁸ On this basis, adequate assurance may seem unlikely to be transplanted into English contract law, because this doctrine requires the promisor to provide something showing its intention regarding future performance without receiving anything in return from the promisee. As a result, the promisee obtains the benefit of an assurance aimed at confirming the future performance of the promise. However, this objection is unlikely to be serious enough to stall efforts at reforming the current status of the doctrine of anticipatory breach of contract, for two independent reasons.

One reason lies in the nature of the anticipatory breach of contract. The striking entitlement of being able to invoke significant remedies of damages and termination is justified in Anglo-American law on the ground that there is an implied undertaking by both parties that, from the time they enter into the contract, neither party will renounce its duties.¹⁰⁹ Because the promisor impairs this implied undertaking by his conduct, he may wish to rectify the misunderstanding perceived by the promisee with respect to the fulfilment of the contract. Communications concerning assurances encourage organic solidarity between the parties by ensuring that each remains committed to the contract.¹¹⁰ This should be emphasised in particular when commercial parties have maintained a long-term relationship, and cooperative behaviour is reasonably expected from them to sustain that relationship.¹¹¹ The essence of this cooperative behaviour is to protect the promisee's expectation interest, which is regarded as an important goal of contract remedies.¹¹² An appropriate course of action for eliminating or reducing that fatal misunderstanding originating from the promisor's conduct is to grant an adequate assurance. In other words, the promisor, by providing an assurance, seeks to retrieve the trust broken by his apparently harmful conduct. This also demonstrates that adequate assurance has a relational character, enabling parties to preserve and advance their relationship. As shown in *Gulf Agri Trade*, above, the seller failed to constructively react to the buyer's legitimate concern, which stemmed from the seller's failure to make any shipment by the end of September.¹¹³ This destructive behaviour could be amended by a convincing response from the seller indicating his willingness to perform the contract. Adequate assurance therefore simply seeks to clarify the situation and revert to the trust and confidence originally established by the contract. This suggests that the promisee is not, therefore, required to offer a financially valuable commitment in exchange for the assuring promise. However, it should be noted that this reasoning is compelling only when the promisor renders the weakest form of

107. *Chitty*, [4.001].

108. *Thomas v Thomas* (1842) 2 QB 851.

109. *Ante*, text between fnn 21–33.

110. Garvin (1998) 69 UCLR 71, 117. See also CR Taylor, "Self-help in Contract Law: An Exploration and Proposal" (1998) 33 WFLR 839, 852.

111. Campbell (2005) 11 TWLR 455, 456.

112. *Ibid.*, 457. See also D Campbell and D Harris, "Flexibility in Long-term Contractual Relationships: the Role of Co-operation" (1993) 20 JL & S 166, 168.

113. *Ante*, text between fnn 81–83.

assurance: the mere affirmation of one's intention to perform his obligation under the contract, which can normally be made by an oral promise.

The second reason deals with more sophisticated situations where the assurance involves more robust, substantive promises than a mere verbal affirmation of future performance, such as when the promisor furnishes a personal guaranty. It has been argued that perhaps consideration is rooted in the promisee's forbearing from suspending its performance.¹¹⁴ However, it has been remained unanswered whether and how the forbearance is a benefit to the promisor ("in that he may receive value"¹¹⁵) or a detriment to the promisee (!in that he may give value"¹¹⁶). At first blush, forbearance is likely to confer benefit to the promisor, in the sense that the promisee resumes performance of its contractual duties. According to the Official Commentary to UCC, §2-609, "the essential purpose of a contract between commercial men is actual performance and they do not bargain merely for a promise".¹¹⁷ It can also be argued that, when the promisee withholds performance of contract, he is likely to embark a lawsuit against the promisor in due course, and furnishing adequate assurance induces the promisee to forbear from pursuing his claim.¹¹⁸ Nevertheless, the extent to which such forbearances confer benefit on the promisor or incur detriment to the promisee cannot be easily determined. In other words, there might be situations where it is pointless to "imprison two parties in a long-term contract where there is absence of trust or the prospect of mounting, incremental losses", and that termination of contract is more beneficial for both parties.¹¹⁹

While this paper does not discount the importance of forbearance in satisfying consideration requirement, it intends to look at this issue from another perspective. As shown above, the promisor enjoys freedom in granting an adequate assurance. When the promisor is faced with a demand for adequate assurance, it has presumably had the chance to engage in a cost-benefit analysis following the conclusion of contract, in that it is able to evaluate the costs of full performance of the contract versus paying damages in the event of repudiation due to new circumstances in the market. In other words, the promisor's decision is likely to be informed by an assessment of whether it declines to provide an assurance, thus entitling the promisee to terminate the contract, as a result of which the former should pay damages to the latter. These costs could potentially be increased by the usual costs of concluding a new transaction with another party, especially when a commercial promisor is in urgent need of supplying its sub-buyers or other associated parties.¹²⁰ On the other hand, when the promisor positively responds to the promisee's request by providing assurance to the effect of continuation of contract, thereby forcing the promisee to forbear from

114. MJ Borden, "The Promissory Character of Adequate Assurances of Performance" (2010) 76 BLR 167, 184.

115. *Currie v Misa* (1875) LR 10 Ex; *Bainbridge v Firmstone* (1838) 8 A & E 743; 112 ER 1019; *Gore v Van der Lann* [1976] 2 QB 31;

116. *Modahl v British Athletics Federation Ltd* [2001] EWCA Civ 1447; [2002] 1 WLR 1192.

117. UCC Official Comments §2-609, para.1.

118. Forbearance to start a legal action is formally recognised by English courts as a good consideration: *Alliance Bank v Broom* (1846) 2 Dr & Sm 289; 62 ER 632.

119. M Bridge, "Avoidance for Fundamental Breach of Contract under the UN Convention on the International Sale of Goods" (2010) 59 ICLQ 911, 915.

120. See eg *Hess Energy Inc v Lightning Oil Co Ltd* (2002) 276 F 3d 646; *Brisbin v Superior Valve Co* (2005) 398 F 3d 279.

suspension, the promisor should have been convinced that the costs of contract performance do not outweigh the costs of non-performance, ie, paying damages. This cost-benefit analysis conducted by the promisor shows that providing or declining to afford an adequate assurance confers in return a commercial advantage to it. This commercial advantage is the opportunity to operate an assessment of transaction costs in the interim between the times of conclusion and performance of a contract. This can constitute a good consideration, according to Kitchin LJ in the recent case of *MWB Business Exchange Centres Ltd v Rock Advertising Ltd*,¹²¹ since a practical benefit which offers a clear commercial advantage to the promisor is sufficient for enforcing a modification or variation promise. Therefore, notwithstanding the lack of consideration moving from the promisee, the benefit to the promisor resulting from his opportunity to conduct a financial assessment is capable of constituting good consideration for the promise to afford adequate assurance.

Another potential objection may arise from the absence of the doctrine of withholding performance under English law. Under the doctrine of adequate assurance, the suspicious promisee is entitled to withhold its performance and request an adequate assurance from the promisor showing its ability and willingness to perform. The problem would be that, if the promisee withholds its performance to achieve an adequate assurance, it itself may be suspected of breaching the contract, entitling the promisor to terminate. In other words, the promisee may be accused of unwillingness or inability to fulfil its contractual duties, and thus the suspension of performance may not be justified. Furthermore, withholding performance may not be justified here, because the promisee is demanding the action of giving assurance, which is in addition to what was agreed under the contract, thus the promisor is not obliged to provide this assurance. However, there are two reasons which would allow the promisee to suspend its performance.

First, while suspension of performance *per se* is not recognised as a remedy in English law,¹²² the traditional English law remedies of stoppage in transit and right to lien carry with themselves a form of modification of contract along with suspension. These two remedies can be invoked when the property in the goods has passed to the buyer, at which point the buyer is entitled to dispose of them and pass title to a third party.¹²³ These remedies are normally invoked in situations where the buyer has fallen into insolvency or the goods have been sold on credit but the term of credit has expired.¹²⁴ The right to stoppage in transit was first reported in *Wiseman v Vandeputt*,¹²⁵ where it was held that on the condition that a buyer becomes a bankrupt before the goods arrive, the seller “can by any means prevent the goods coming into the hands of the buyer”. The purpose of this doctrine is essentially to prevent the seller’s goods from being thrown into the mass of an insolvent state, thus leaving it to wait for a dividend with the creditors in general.¹²⁶ By stopping the

121. [2016] 2 Lloyd’s Rep 391, 388; [2017] QB 604, 613. For further explanations regarding practical benefit see *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1.

122. *Benjamin*, [19.152].

123. Stoppage in transit: *Lickbarrow v Mason* (1793) 6 East 21; 100 ER 35; *Gibson v Carruthers* (1842) 8 M & W 321; 47 ER 1179. Right to lien: *Goodall v Skelton* (1794) 2 H BI 316; 126 ER 570; *Miles v Gorton* (1834) 2 Cr & M 504; 149 ER 860. See also *Benjamin*, [15.062] (stoppage in transit) and [15.28] (right to lien).

124. *Martindale v Smith* (1841) 1 QB 389; 113 ER 1181; *Nippon Yusen Kaisha v Ramjiban Serowgee* [1938] AC 429; *DF Mount Ltd v Jay and Jay Co Ltd* [1960] 1 QB 159.

125. (1690) Eq Ca Ab 56, pl.2, SC.

126. *Gibson v Carruthers* (1841) 8 M & W 321.

goods in the course of their transit, the seller obliges the carrier to redeliver the goods to it, and thereby reacquires the possession of the goods. The justification proposed for this right is that the seller's delivery of the goods is only a conditional delivery of possession to the buyer, provided that the latter remains solvent up to the time he acquires actual possession of the goods from the carrier.¹²⁷ This right is believed to be derived from the customs of merchants, and given its manifest justice and utility, was formally introduced into the common law of England by the House of Lords in 1793 in *Lickbarrow v Mason*.¹²⁸ This common law doctrine was ultimately codified in Sale of Goods Act 1979, s.44.

The right to lien is derived from general usage and usually exists as a common law right, which is conceived to be a "passive right of retention that be exercised by the members of certain professions or callings against the owner where the lienec acquires possession of goods with the actual or apparent consent of the owner".¹²⁹ The seller's right to lien was first defined in the nineteenth century, as a "right in one man to retain that which is in his possession belonging to another, till certain demands of him the person in possession are satisfied".¹³⁰ This right can now be applied in the precise circumstances enumerated by the Sale of Goods Act 1979, s.41. This right therefore allows the seller to suspend the contract by retaining the goods until the buyer pays or tenders the whole of the price.¹³¹

These two common law rights consolidated in the sale of Goods Act 1979 demonstrate that the right to withhold performance is no stranger to English common law and that the seller is entitled to avoid delivering the goods in circumstances where there are serious doubts regarding the buyer's ability or willingness to tender payment. Halting delivery of the goods would force the buyer to clarify the situation by either tendering the whole of the price or clearly expressing his inability to perform, and subsequent outcomes will be followed.

Furthermore, if the promisee feels insecure about the promisor's ability or willingness to perform the contract in future on the basis of reasonable grounds, it is allowed to suspend its performance without fear of conducting a breach. This can be explained by reference to the doctrine of "fundamental breach". Fundamental or material breach is characterised as a breach that deprives the claimant of substantially the whole of the benefit for which he bargained.¹³² However, the House of Lords ruled that the principle of fundamental breach does not constitute a rule of law.¹³³ Lord Reid stated that "general use of the term fundamental breach is of recent origin, and I can find nothing to indicate that it means either more or less that the well-known type of breach which entitles the innocent party to treat as repudiatory and to rescind the contract".¹³⁴ Although the doctrine was ruled out by

127. *Bloxam v Sanders* (1825) 4 B & C 941, 948.

128. (1794) 6 TR 131.

129. *Lickbarrow v Mason* (1793) 6 East 21, 24; 100 ER 35, 38.

130. *Hammonds v Barclay* (1802) 2 East 227, 235.

131. *Martindale v Smith* (1841) 1 QB 389, 396.

132. M Bridge, "Avoidance for Fundamental Breach of Contract under the UN Convention on the International Sale of Goods" (2010) 59 ICLQ 911, 916. See also *Karsales (Harrow) Ltd v Wallis* [1956] 1 WLR 936 (CA), 941; *Cehave NV v Bremer Handelsgesellschaft mbH (The Hansa Nord)* [1975] 2 Lloyd's Rep 445; [1976] QB 44; *State Trading Corp of India Ltd v M Golodetz Ltd (The Sara D)* [1989] 2 Lloyd's Rep 277.

133. *Suisse Atlantique Société d'Armement SA v NV Rotterdamsche Kolen Centrale* [1966] 1 Lloyd's Rep 529; [1967] 1 AC 361 (HL). See also *UGS Finance v National Mortgage Bank of Greece and National Bank of Greece SA* [1964] 1 Lloyd's Rep 446 (CA), 450.

134. *Suisse Atlantique* [1966] 1 Lloyd's Rep 529, 550; [1967] 1 AC 361 (HL), 397.

the House of Lords, the understanding behind it still exists in English law, as it has been indicated that "the general principle is that any [deficiency in quality or quantity] must attain a certain minimum degree of seriousness to entitle the injured party to terminate".¹³⁵ In other words, "the [promisor] must have been guilty of a substantial failure to perform".¹³⁶ On this basis, withholding performance does not constitute fundamental breach of contract. The promisee's suspension of performance does not fundamentally impair the promisor's ability to perform.¹³⁷ The former temporarily discontinues performance under the contract, and seeks to force the promisor to clarify the deadlock situation. The promisee's action is a legitimate strategic behaviour aiming at shifting the burden towards the promisor, so that the latter can decide whether to continue with the contract by providing adequate assurance or decline the request and entitle the promisee to terminate. Accordingly, not only does the promisee's action not seek to reinforce the essential purpose of a commercial contract, which is the actual performance, but also nor does it either undermine or frustrate the commercial purpose of a contract. This Part has demonstrated that the promisee would not face any serious objection from English law when it suspends performance following a request for adequate assurance from the promisor.

VI. RECOMMENDATION FOR LEGISLATION

The previous Parts of this article attempted to argue that the doctrine of adequate assurance, as a useful mechanism, can be invoked freely by commercial parties without any serious objections derived from common law and that the courts are encouraged to recognise and welcome this doctrine. Nevertheless, the much-anticipated question is whether this doctrine should be formally introduced through legislation. As argued above, at English common law, one party to a contract may suffer considerable and justifiable anxiety concerning the other party's willingness or ability to perform and yet have no legal ground for invoking any remedies. The doctrine of anticipatory breach of contract under English law fails to provide any protection for the party enduring reasonable doubts. It is worth noting that the Scottish Law Commission initially in 1999 put forward the proposal as to whether there is a need formally to introduce the doctrine of adequate assurance through legislation. The idea was to alleviate the uncertain position for the aggrieved party by demanding an assurance of due performance from the other party and that failure to provide the assurance will make it safer to terminate.¹³⁸ The proposal asked the consultees to consider a provision establishing the doctrine of adequate assurance. Although most of the respondents agreed with the proposal, there was an observation that such assurances could already be requested informally and introducing this doctrine would create more uncertainty.¹³⁹ It was also contended that withholding performance

135. *Treitel*, [7.025].

136. *Ibid.*

137. For further information regarding the nature of withholding performance, see WJ Geller, "The Problem of Withholding in Response to Breach: a Proposal to Minimize Risk in Continuing Contracts" (1993) 62 FLR 163; JW Carter, "Party Autonomy and Statutory Regulation: Sale of Goods" (1993) 6 JCL 93.

138. Scot Law Com (Sc LC 109, 1999), [9.2].

139. *Ibid.*

by the insecure party would likely be recognised by the courts in situations where it awaits the response to the demand for adequate assurance on the basis of reasonable doubts that fundamental non-performance will be occurred by the promisor.¹⁴⁰ This view concurs with our previous argument that withholding performance by the insecure party does not imperil the promisor's expectations and should not be viewed as an avenue for fundamental breach.¹⁴¹ However, the Commission made no recommendation concerning legislating this doctrine in 1999. Nevertheless, the Commission very recently in July 2017 reviewed the need and desirability of introducing the doctrine of adequate assurance into a legal provision in light of the decision made in *GL Group Plc v Ash*.¹⁴² In this case, AG had some doubts concerning GL's ability to pay in exchange for the services provided under a contract and thus sought immediate payment of the value of work rendered to date and payment in advance for future work. AG threatened GL by stating that they "would have no alternative but to resile from the contract" if GL declined to make payment by a certain deadline.¹⁴³ The court found AG to have wrongfully repudiated the contract and held that damages should be provided to GL. While the Commission agreed with the decision, they maintained that "it might have been helpful had the law provided a means of seeking or obtaining assurances of performance from GL while withholding AG's own performance".¹⁴⁴ Having enabled the creditor to request for adequate assurance would also mean that the debtor could resile "what might otherwise amount to anticipated breach".¹⁴⁵ Termination will therefore become plausible only when the debtor declines to reply to a demand for assurance of performance. In light of these arguments, the Commission has asked consultees on whether a legal provision should formally prescribe the doctrine of adequate assurance. The formal proposal will be published in 2018.¹⁴⁶

This article recommends that the English and Welsh Law Commission should consider the proposal to the effect that the doctrine of adequate assurance be formally recognised in English contract law, and be preferably introduced as a new section into the Sale of Goods Act 1979. The proposed section would read: "a party who has reasonable grounds for insecurity regarding the other party's ability or willingness to perform may demand an adequate assurance of due performance, and until it receives the assurance may suspend any performance for which it has not already received the agreed return". This proposed section serves several purposes. First, it seeks to tackle and cover the loophole in the doctrine of anticipatory breach of contract in the sense that it will formally be prescribed that an insecure party is entitled to apply the mechanism of adequate assurance in order to clarify dubious circumstances it is facing. In line with the pragmatist approach favoured in English law,¹⁴⁷ the suggested section does not intend to be abstract or general. Rather, this principle seeks to address the specific problems arisen from the application of anticipatory breach of contract. The provision thus provides an instrument protecting the insecure party

140. *Ibid*, [3.24].

141. *Ante*, text between fnn 131–138.

142. (1987) SCLR 149.

143. *Ibid*, 153.

144. Scottish Law Commission, *Discussion Paper on Remedies for Breach of Contract* (Sc LC 163, 2017), [3.50].

145. *Ibid*, [3.51].

146. *Ibid*.

147. PS Atiyah, *Pragmatism and Theory in English Law* (The Hamlyn Trust, London 1987), 26.

and striking a right balance between competing interests of contracting parties. Second, this principle is likely to give some overall structure or rational shape to the law concerning anticipatory breach of contract, thus satisfying not only the interest of elegance, but the interest of consistency and complying with the ambition to ensure that like is treated alike. It may, however, be argued that the suggested section entails a number of vague terms such as “reasonable grounds”, which may collide with the interests of certainty and predictability in a commercial transaction. As explained previously, ambiguities of those terms can be reduced by taking account of relevant business practices and important factors associated with the particular transaction at hand, which may lead to the organic growth of this area of law by encouraging the courts to interpret and implement the general policies aligned with business practices.¹⁴⁸ Third, this recommended section overcomes the aforementioned objections and difficulties that may arise from common law.¹⁴⁹ As such, judges, legal practitioners and commercial parties are able to recognise and utilise this doctrine with no concerns as to whether this doctrine is compatible or harmonious with common law rules, like the doctrine of consideration.

VII. CONCLUSION

The purpose of this article was to explore whether the doctrine of adequate assurance, introduced by Llewellyn in UCC, Art.2 should be adopted into English contract law. Although the doctrine of anticipatory breach of contract originated in English law, no modifications have been implemented to meet the reasonable expectations of commercial parties, namely certainty and predictability. An anticipatory breach of contract should be objectively inferred by taking account of the totality of the relevant words and conduct relied upon, in light of all of the circumstances, including the history of the contractual relationship.¹⁵⁰ The promisee may misjudge whether repudiation amounts to an actual breach, partly because the promisor has shown inconsistent behaviours by not performing comparable contracts or because the promisor has fallen into insolvency.

The doctrine of anticipatory breach of contract, as it currently stands in English contract law, fails to provide a solution for a promisee confronting uncertain and dubious circumstances, since it lacks a solid instrument to determine objectively whether the promisor will perform the contract. To extricate itself effectively from the risks and uncertainties involved in relying on anticipatory breach of contract, the promisee can invoke the doctrine of adequate assurance as an avenue for the detection of breach. To justify the necessity of this doctrine, this article examined the significant hypothesis that adequate assurance is a logical corollary of the doctrine of anticipatory breach of contract. Because the latter doctrine is utilised only when a purported repudiation occurs with utmost clarity, it is difficult for the promisee to meet this requirement in situations where promisors exhibit

148. R Goode, “The Codification of Commercial Law” (1988) 14 MLR 135, 150. See also A Burrows, “Legislative Reform of Remedies for Breach of Contract: the English Perspective” (1997) Edin LR 155, 156; DR Halson, “A Common Lawyer’s Perspective on Contract Codes” (2011) 15 J&GLR 1, 4.

149. *Ante*, Part V.

150. *SK Shipping (S) Pte Ltd v Petroexport Ltd (The Pro Victor)* [2009] EWHC 2974 (Comm); [2010] 2 Lloyd’s Rep 158.

inconsistent conduct. In such situations, the doctrine of adequate assurance can be applied to determine with sufficient certainty whether the promisor intends and is able to perform the contract. This doctrine was also justified by the mitigation policy. Although the scope of the promisee's duty to mitigate under English law is slightly narrower than in American law, it can be stated that mitigation policy generally supports the view that reasonable steps should be taken to avoid or diminish loss. In equivocal and dubious circumstances, the promisee is unlikely to realise when it is required to take reasonable steps to diminish loss. To implement the duty to mitigate effectively, the doctrine of adequate assurance as a compelling procedure forces the promisor to crystallise the situation, ascertaining whether or not a given behaviour is in fact repudiatory.

The article subsequently examined the compatibility of this doctrine with English contract law. The most robust objection may arise from the doctrine of consideration, due to the new undertakings that may be rendered by the promisor, without receiving anything of value in return. This view can be refuted by arguing that consideration can be found in the promisee's forbearing from suspension of performance. Another argument would be that by furnishing an adequate assurance and hence persuading the promisee to carry on the contract, the promisor is satisfied that the costs of contract performance do not outweigh the costs of non-performance, namely paying damages. The promisor will have had the chance to carry out a cost-benefit analysis with regard to performance or non-performance of the contract. This assessment of costs in the duration between conclusion and performance of the contract is indeed a commercial advantage, which can constitute good consideration. Another potential objection may originate from the absence of the doctrine of withholding performance under English law. The doctrine of adequate assurance allows the suspicious party to withhold its performance after demanding an assurance. Two reasons can be given to invalidate this objection. First, the suspension of performance comprises an important stage of traditional English law remedies of stoppage in transit and right to lien. These remedies carry with themselves a form of modification of contract along with suspension. Second, the doctrine of "fundamental breach" of contract allows the promisee to suspend its performance without being accused of a breach, thus entitling the promisor to terminate the contract. The promisee would not therefore face any restrictions so long as the suspension of performance does not substantially endanger the promisor's ability to perform. While no serious objections concerning the application of the doctrine of adequate assurance may arise from common law, it is recommended that the English and Welsh Law Commission consider the proposal formally prescribing the doctrine of adequate assurance and introducing it as a new section into the Sale of Goods Act 1979. The proposed section would read: "a party who has reasonable grounds for insecurity regarding the other party's ability or willingness to perform may demand an adequate assurance of due performance, and until it receives the assurance may suspend any performance for which it has not already received the agreed return". This section not only enhances the situation of the insecure party and strikes a reasonable balance between competing interests of contractual parties; it also improves this particular area of English contract law by reducing its uncertainty through an accessible legislative statement.