

CHAPTER NINE

PERFORMANCE AND DISCHARGE OF DUTIES

9.1 Introduction

Parties to contracts may ask courts to resolve disputes about whether contracts are enforceable, and what the contracts mean. This text has already examined how courts decide whether contracts are enforceable (in Chapters 2-7) and what contracts mean (in Chapter 8).

However, once courts make these decisions about contracts, they must often also decide whether parties have actually performed the contracts properly, and whether any contract duties remain to be performed. This Chapter discusses some of the important rules courts use to make these decisions about contract performance. Then, Chapter 10 (“Remedies”) will discuss remedies courts may choose to order if they decide that a contract has not been performed properly.

In free market jurisdictions, a great deal of business, government and other activity is based on contracts. In general, this system works well, without any involvement by the courts. The system basically regulates itself. The reason is that most parties to contracts perform the contracts with no problems. They do not need or want to get involved in litigation, which can be expensive, time-consuming, and unpleasant.

Unfortunately, sometimes one or more parties to a contract are not satisfied with how a contract is performed, and there is a dispute. Such disputes can be difficult and complex--and so some of the rules about contract performance are also difficult and complex. As noted above, when parties have a dispute about contract performance, the dispute usually concerns whether contract duties have become due for performance, and whether those duties have ended or remain to be performed.

In general, contract duties end when they are discharged. This can occur through proper performance, or in a number of other ways. This idea is introduced in Section 9.2 below.

Whether contract duties have become due for performance and whether they have been discharged may depend on the nature of performances required by the contract. Specifically, the status of contract duties may depend on whether any conditions to performance have been fulfilled or excused, and whether promises in the contract have been performed when they were due to be performed. Conditions are events which must occur or be excused in order for a duty of performance to become due or terminate. Conditions may be classified by when they occur (precedent, subsequent, or concurrent), and by how they are created (express, implied-in-fact, or implied-in-law). Promises are basically statements that a party will perform a duty when that performance is due. This is explained in Section 9.3, below.

In general, contract duties become due and must be performed when any condition on which they depend is fulfilled or excused. If such a condition is not fulfilled or excused, then the duty of performance depending on the condition never becomes due--so the party with that duty need not perform it! A condition is fulfilled if by its occurrence; by complete performance; or in the case of implied-in-law conditions, by substantial performance. A condition may be excused in a number of ways, including anticipatory repudiation; prospective inability or unwillingness to perform; failure or occurrence of a prior condition; improper rejection of a tender of performance; wrongful prevention or hindrance of a tender of performance; waiver or estoppel; or impossibility of performance. The failure of a condition may not affect the whole contract if it is severable. And conditions of approval by parties or non-parties are subject to a number of limits. These difficult but important ideas are discussed in Section 9.4.

The above rules about performance may work a little differently in particular situations. Section 9.5 examines some special rules about performance of construction contracts and sale of goods contracts. It also explains how the duty of good faith and fair dealing applies to contract performance in many jurisdictions.

When a contract duty is due to be performed, the duty may be discharged in a number of ways. It may be discharged by performance as promised in the contract; by a breach (failure to perform properly), anticipatory repudiation, or improper rejection of a tender by the other party to the contract; or by other events directly related to the performance of the contract, such as the occurrence of a condition subsequent or avoidance of a voidable contract. Discharge of duties in these ways is discussed in Section 9.6.

In addition, even if contract duties are not discharged in the above ways, the duties may be discharged by a later agreement or statement of the parties themselves. Important examples include mutual rescissions, releases, substitute contracts, accords and satisfactions, novations, and accounts stated. These possibilities are discussed in Section 9.7.

Finally, duties may be discharged by operation of law. That could occur through impossibility or impracticability of performance; frustration of purpose; bankruptcy proceedings; a final court judgment or arbitration award; or the passing of the time set by a statute of limitations. This is discussed in Section 9.8.

The analysis of contract performance and discharge of duties in this Chapter is based mainly on the common law tradition. It appears that the practical effects of the civil law approach to contract performance are generally compatible with the approach discussed in this Chapter, although the civil law approach is expressed somewhat differently. Of course, as always, it is important to check the specific law relevant to any contract in a particular case.

***** ADDITIONAL REFERENCE:** Chapter 1 (“Basic Aspects of Contract Law”), Section 1.4h contains a more concise discussion of performance and discharge of duties.

9.2 Duties to Perform under Contracts End When the Duties Are Discharged

Most enforceable contracts require each party to do something. That is, each party to a contract generally has duties to perform under that contract. In fact, the reason a party makes a contract is usually to make sure that the other party will perform the duties the first party wants to be performed! So when courts try to resolve disputes about the performance of contracts, perhaps the most basic questions they ask are whether these duties of performance of the parties have become due, and whether the duties have ended, or been discharged.

***** DEFINITION:** A **discharge** is basically an ending of a duty to perform under a contract.

For example, if a party properly performs his obligation to pay a certain amount for bananas under a contract for the sale of bananas, courts say that that party’s duty to pay for the bananas has been discharged.

Usually, duties to perform under contracts are discharged by proper performance of the parties. But unfortunately, as noted above, disputes sometimes occur about whether parties really have performed their duties properly according to the contract. And duties may also be discharged in ways other than proper performance.

In order to understand the status of duties under a contract, courts often must first examine whether those duties are actually due to be performed. Courts then ask whether the contract duties have been discharged.

If a contract duty is due to be performed but has not been discharged, and a party complains to a court, the court may choose to order one of the remedies discussed in Chapter 10 (“Remedies”).

***** WHY IS THIS IMPORTANT?** Why do courts consider whether duties have become due, and whether they have been discharged, in resolving disputes about contract performance?

Courts consider these questions in order to analyze the current status of the parties’ performance of the contract. The final goal of every contract is that all obligations under the contract be ended through full, proper performance by all parties. Obviously, the reason parties make contracts is to achieve full performance, and gain the benefits of that performance. Courts want to see if that has occurred.

To find out if it has occurred, courts ask whether the obligations under the contract have become due, and whether they have ended for some reason. If duties under the contract have not become due, courts must decide if any remedy is appropriate. If the duties under the contract are due but have not been discharged, then the court must generally decide on an appropriate remedy. But if the obligations under the contract have been discharged, then there may be no need for the court to go further and decide on appropriate remedies to resolve the dispute between the parties. In addition, in each of these situations, the potential remedies may differ. So when courts ask whether contract duties have become due and whether they have been discharged, it is really a way of analyzing the performance of the contract, in order to help the court decide how it should resolve the dispute of the parties.

***** ADDITIONAL REFERENCE:** Chapter 10 (“Remedies”) contains further discussion of remedies courts may choose when parties ask the courts to resolve contract disputes.

9.3 Whether Contract Duties Have Become Due, and Whether They Have Been Discharged, May Depend on the Nature of the Performances the Contract Requires

When courts consider the performance of a contract, they ask whether the duties in the contract have become due, and whether those duties have been discharged, as noted above. However, in order to learn the answers to those questions, courts must first understand the nature of the performances required by the contract. Specifically, in order to determine what the contract requires, courts must analyze conditions and promises in the contract.

9.3a **Conditions vs. Promises: Conditions Are Events Which Must Occur or Be Excused for a Duty of Performance to Become Due or Terminate, And Promises Are Statements That a Party Will Perform a Duty When That Performance Is Due**

In analyzing contract performance, it is very important to understand the difference between conditions and promises. All contracts contain promises, which create legal duties. Many contracts also contain conditions, which affect whether those legal duties are due to be performed or not.

*** **DEFINITION:** A **promise** is basically a statement that a party will perform a contract duty when that performance is due.

*** **DEFINITION:** A **condition** is a particular future event which is not certain to occur, but which must occur or be excused for a contract duty to become due for performance, or for that duty to be terminated if the duty is already due.

So the basic difference between promises and conditions is that promises are statements that create legal duties, but conditions are events that affect whether parties are actually required to perform duties or not! Since the distinction between promises and conditions is one of the most important in contract law, this text will explain it in more detail.

Promises are statements by parties to a contract that they will actually do something in the future. That is, promises create legal duties to perform under contracts. In common law jurisdictions, unilateral contracts are created by an exchange of a promise for an act, and bilateral contracts are created by an exchange of a promise for a promise, as explained in previous Chapters.

For example, if Him promises to pay Lim 1,000 riels in exchange for Lim's promise to climb a certain tree, the parties' promises have created their legal duties: Him's promise has created a legal duty for him to pay 1,000 riels, and Lim's promise has created a legal duty for her to climb the tree.

If a party fails to perform according to his promise when that performance is due, he has breached the contract. That means the other party has the right to ask a court to award him an appropriate remedy for the damage caused by the breach, such as money damages. In the example above, if Him failed to pay when his duty to pay was due, that would breach the contract, and so Lim could ask the court for a remedy. Likewise, if Lim failed to climb the tree when that duty to perform was due, that would be a breach, and Him could ask the court for a remedy. Breach of contract will be further discussed in Sections 9.4 and 9.6, below.

Conditions are events that must occur before contract duties actually become due or are terminated. In other words, conditions affect whether contract duties are actually due to be performed or not.

For example, suppose Him and Lim made the same agreement described above, except the agreement said Lim was required to climb the tree only if Ponlee returned from Kompong Speu by Friday. In that case, there would still be two promises (and legal duties) in the contract: Him's promise (and duty) to pay and Lim's promise (and duty) to climb. But Lim's promise (duty) in this situation is subject to a condition: her duty to climb does not become due for performance unless Ponlee returns from Kompong Speu by Friday. That means that if Ponlee does not return from Kompong Speu by Friday, Lim's duty to climb the tree never becomes due for performance! In that case, Lim will not be legally required to climb the tree. This is a condition, because it is an event that is not certain to occur--Ponlee may not return by Friday--but that must occur for Lim's duty to climb to become due. A contract might also say that Lim must climb the tree unless Ponlee returns from Kompong Speu by Friday. In other words, it might say that Lim's duty to climb is due unless Ponlee returns by Friday. This is also a condition, but one whose occurrence terminates Lim's duty to climb the tree. The different types of conditions will be discussed in more detail in Sections 9.3b and 9.3c, below.

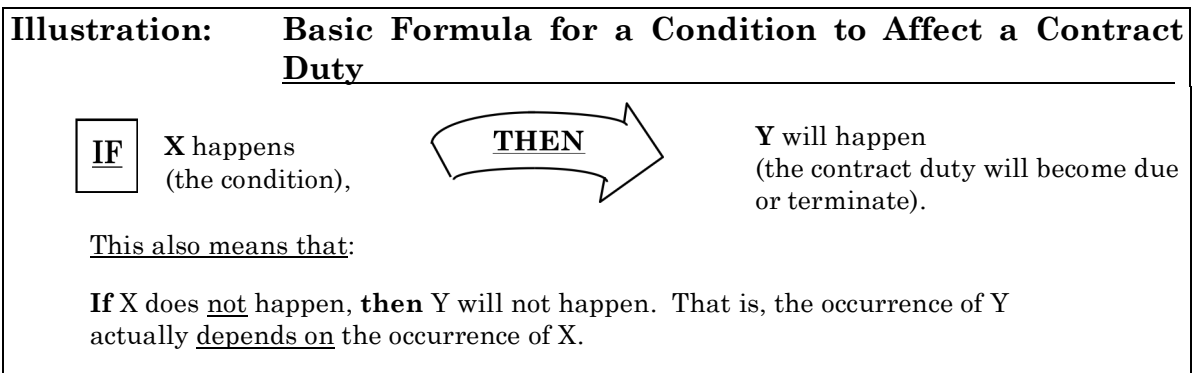
On the other hand, events that are certain to occur cannot be conditions. For example, if the contract simply said that Lim was not required to climb the tree until Friday, that would not be a condition, because Friday is certain to occur. Lim's duty is certain to become due (unless it is discharged before Friday by one of the special circumstances discussed in Sections 9.6-9.8 below). So courts say the duty is not conditional.

Because conditions are events that are not certain to occur, there is always some risk that they will not occur. This risk may make it appear that the duty which is subject to the condition is really illusory, since it may never be due for performance. And of course, common law jurisdictions say that illusory promises are not consideration, as discussed in Chapter 3 ("Consideration"), Section 3.5d. However, most duties subject to conditions are not illusory, because the party with the duty is taking the risk that the duty will become due! This risk is a real legal detriment. If a condition occurs and causes the duty to become due, then the party with the duty cannot avoid it. The only way such a duty might be illusory would be if the condition on which the duty depended was completely within the control of the party who had the duty. For example, if Lim's duty to climb a tree was conditioned on her own return from Kompong Speu, it seems likely that would be viewed as an illusory promise (and duty) in common law jurisdictions. This is because Lim would probably have complete control over whether she returned from Kompong Speu or not.

Likewise, contracts with conditions may seem as if they do not have a real agreement of the parties, since it is possible that one or both parties will never be required to perform, because of the condition. However, in contracts with conditions, there is nothing conditional about the parties' real agreement: the parties have unconditionally agreed to the contract itself. And even though there is always a risk that the contract will not be fully performed--

whether because of conditions or some other reason--both parties have definitely agreed to take that risk. So the agreement itself is definite and unconditional. It is only some part of the performance of the agreement that is subject to a condition. Conditions were also discussed in Chapter 2 (“Real Agreement (Offer and Acceptance)”), Sections 2.6b and 2.10b.

In the discussion of conditions in Chapter 2, Section 2.6b explained how conditions can terminate an offer, and Section 2.10b explained how acceptances must be unconditional in order to create bilateral contracts. As discussed in those Sections, one way to think about conditions is as an “if-then” relationship between events: if X happens, then Y will happen. In analyzing the performance of contracts, conditions basically mean that if X (a condition) happens, then Y (a legal duty) will become due for performance, or terminate if it is already due. And of course, if X (a condition) does not happen, then Y (a legal duty) will not be affected. This is illustrated in the chart below.



Sometimes a condition is an event that is not one of the duties under the contract, and the failure of that condition to occur will not breach the contract. For instance, in the tree climbing examples above, the conditions were simply related to the return of Ponlee from Kompong Speu, which was not a duty under the contract. That is, the contract did not require Ponlee to return from Kompong Speu--Ponlee never promised to do so--and her failure to return would not breach the contract. In fact, Ponlee was not even a party to the contract! And in general, a condition can be an event that really does not relate to the parties, such as whether it rains on a certain day, or whether a certain event happens in a particular financial market. Obviously, the failure of such conditions would not breach a contract either.

However, sometimes one part of the contract can be both a promise and a condition! In other words, sometimes the performance of a promise of a party--the performance of a legal duty--is also a condition to the performance of a party's promise. In that case, the failure of the condition to occur might also be a failure of a party to perform a legal duty under the contract. And as noted above, a failure to perform a legal duty when it is due is a breach of the contract.

Often the performance promised by one party is actually a condition to the performance of the other party. If the first party failed to provide such a performance when it was due, it would mean that the other party would not be required to provide the performance that depended on the condition occurring. Of course, the first party's failure to perform would also breach the contract, and the other party could ask a court for a remedy, such as money damages. For example, suppose a real estate sale contract says that the seller will have no duty to provide the property unless the buyer first pays the entire sale price in cash. In that case, the buyer's statement that she will pay in cash is a promise, and the buyer's performance of that promise is a condition to the seller's duty to provide the property. If the buyer fails to pay the money when it is due, the seller's duty to provide the property will not become due. And the buyer's failure to pay will also breach the contract.

And it is also possible that one part of a contract can contain a promise of one party and a condition to the performance of that same party. In the real estate example above, this might occur if the contract said that the buyer's duty to pay was conditioned on the buyer getting a mortgage loan at a certain interest rate, which the buyer might promise to use reasonable efforts to obtain. In that case, the performance of the buyer's promise to try to get the loan would affect the buyer's own duty to pay for the property! This is because getting the loan would actually be a condition to the buyer's own duty to pay. If the buyer tried but failed to get the loan--and so the condition failed to occur--then the buyer's own duty to pay would not become due, and of course the seller's duty to provide the property would not become due.

This contract might seem to contain an illusory promise, as discussed above, since the buyer's duty to pay was conditioned on the buyer's own attempt to get the loan. However, the contract also required the buyer to use reasonable efforts to get the loan, and if the buyer failed to do that, he would breach the contract. So the buyer did not have complete control over whether the condition occurred, and the buyer's duty to pay for the property was not illusory. Of course, if the buyer's duty to pay was simply conditioned on the buyer obtaining the loan--with no promise to use reasonable efforts--that would probably be an illusory promise, since the buyer would not really be obligated to do anything.

Obviously, the relationship between promises and conditions can be somewhat confusing. The following Case Study illustrates the possibility that one part of a contract can be both a promise and a condition.

CASE STUDY 195

FACTS The farmers Peo and Rhet agree that Peo will harvest Rhet's red pepper crop for 100,000 riels "provided that Rhet will have no duty to pay Peo unless the crop is completely harvested." Peo begins to harvest the crop.

Soon after Peo begins to harvest the crop, he asks Rhet to pay him the 100,000 riels immediately. Peo says that it will take him a few more weeks to complete the harvest, but he needs the money sooner than that. But Rhet says he has no duty to pay anything until Peo has completely harvested the crop. Peo says he will do no more work unless Rhet pays him the money now. The parties ask the court to resolve their dispute.

QUESTION OF LAW Can Peo get his money under this contract before he completes the harvest?

DECISION No. Rhet has no obligation to pay Peo the 100,000 riels yet, because Rhet has no duty to pay under the contract until the condition of Peo completing the harvest occurs.

When a contract says that a particular legal duty is not due for performance until a particular condition occurs, the party who has the duty need not perform the duty until that condition occurs. And if the condition does not occur, then the legal duty does not become due. In this case, the parties' contract contained two promises: Peo promised to harvest a red pepper crop, and Rhet promised to pay Peo 100,000 riels. But the contract also contained a condition: it said Rhet had no duty to pay--no duty to perform the legal duty his promise created--unless Peo completely harvested the crop. Peo demanded the money before he had completed the harvest. But under the contract, Rhet had no duty to pay until Peo completed the harvest. So a court will not order Rhet to pay Peo until Peo completes the harvest. Condition has not occurred = duty of performance is not due.

If Peo did not continue to harvest the crop, then Rhet's duty to pay him would never become due. In addition, such a failure to continue would be a breach of the contract by Peo--a failure to obey his promise to harvest the crop--and Rhet could also ask the court for a remedy to compensate him for Peo's breach. Of course, Peo might be able to persuade the court to award him restitution of the reasonable value of the work he had completed for Rhet, under the doctrine of quasi-contract, minus any damages Peo's breach caused to Rhet. This will be discussed further in Section 9.4, below.

***** WHY IS THIS IMPORTANT?** Why does it matter whether a part of a contract is subject to a condition or not?

Whether a part of a contract is subject to a condition or not can make a big difference in how the parties must perform under the contract. When parties promise to do something under a contract, they have a legal duty to perform that promise. If they fail to perform when their duty is due, then they have breached the contract, and the other party can ask the court to award an appropriate remedy, such as money damages.

But if some performance under the contract is also subject to a condition, that means the performance will never even become due unless

the condition occurs! So making a performance subject to a condition provides another option--and often a more powerful option--for parties who want to make sure that a certain event occurs as part of their contract.

The practical effect of these rules is that if parties want the failure of a performance to result in a party being able to ask a court for a remedy like money damages, then the parties should make sure that performance is contained in a promise in the contract. But if the parties also want the failure of one performance (or any other event) to result in a party simply not being required to provide his performance, then the parties should make sure that latter performance is subject to a condition that will achieve the result the parties want.

For example, in Case Study 195, Rhet wanted the right to ask a court for a remedy if Peo failed to harvest the red pepper crop. So Rhet made sure that Peo's promise to harvest the crop was part of the contract. But Rhet wanted another alternative which really gave him added power in the contract, and made it more likely that Peo would finish the job. To achieve this goal, Rhet put a condition in the contract. The contract said that Rhet had no duty to pay unless Peo completed the harvest. This condition meant that Peo had no right to any money under the contract until he completely finished the harvest, and that if Peo failed to do that--meaning the required condition did not occur--then Rhet had no contract duty to pay him at all! By contrast, if Rhet was required to pay before Peo finished the harvest, then Rhet would be taking a risk that Peo might not complete it--since Peo could simply go away after receiving the money. Then Rhet would have to go to the trouble and expense of trying to get compensation for this breach of the contract. And because of the many practical difficulties in litigation, it is possible Rhet would be unable to recover anything at all from Peo! Of course, as noted above, even if Peo stopped work and Rhet had no contract duty to pay him, courts might award Peo restitution for work he did for Rhet, if that was necessary to avoid injustice. But the condition in this contract meant Rhet had no duty under the contract itself to pay Peo unless Peo completed the harvest.

Obviously, a condition can be a very powerful part of any contract. So parties who make contracts should always consider whether they do--or do not--want conditions in their contracts.

The following chart shows some of the differences between promises and conditions.



Illustration: Comparison: Promises and Conditions

	Promise	Condition
1. What is it?	A <u>statement</u> that a party will perform a contract duty when the duty is due	An <u>event</u> that makes a duty to perform become due or terminate
2. What is its legal effect?	Creates a legal duty to perform	Occurrence makes a legal duty become due or terminate
3. What happens if the duty is not performed when due, or the condition fails?	Breach of contract, and court may award money damages or other remedy	A legal duty does not become due, or remains due if it is already due
4. Key Differences	(a) is a statement that creates a contract duty (b) failure to be performed when due is breach of contract	(a) is an event whose occurrence makes a contract duty become due or terminate (b) failure to occur may affect whether contract duty is due or not

Sometimes it can be difficult to tell whether part of a contract actually is a condition or not. One reason for this is that not all conditions are expressly stated in the contract, as the conditions in Case Study 195 and the other examples above were. In fact, conditions can be express or implied. And as noted above, they can make the performance of a legal duty become due, or terminate that duty. Unfortunately, this can sometimes make it difficult to tell whether a part of a contract really is a condition or not! So Sections 9.3b and 9.3c below will look more closely at the different types of conditions that may occur in contracts.

In addition, the law says that conditions may be excused in particular situations where it would be unfair or inappropriate to expect them to occur. When a condition is excused, the duty that depends on that condition becomes due--even though the condition has not occurred! So the effect is the same as if the condition had actually occurred. The various ways conditions may be excused are discussed in detail in Section 9.4, below.

The result when a condition fails to occur or be excused is that the duty subject to the condition does not become due, as noted above. Obviously, this can result in unjust enrichment, such as in the situation where a party provided some benefit to the other party but failed to fulfill a condition on which the other party's duty to perform depended. For example, this might occur in Case Study 195 if Peo performed some of the red pepper harvest and then stopped. In these situations, the party who has provided some benefit may be able to get restitution of what he has provided to the other party,

under the doctrine of quasi-contract. Of course, if the condition failed because one party failed to perform, the amount such a party would recover would be reduced by any damage caused to the “innocent” party because of the other party’s failure to fulfill the condition. In addition, such restitution may not provide a party with as much as that party would have received under the contract if he had actually fulfilled the condition. This will be discussed further in Sections 9.3c, 9.4, and 9.5, below.

***** ADDITIONAL REFERENCE:** Chapter 1 (“Basic Aspects of Contract Law”), Section 1.5 explained quasi-contracts; Chapter 2 (“Real Agreement (Offer and Acceptance)”), Section 2.6b discussed how conditions can terminate contract offers, and Section 2.10b explained how acceptances must be unconditional to create bilateral contracts; Chapter 3 (“Consideration”), Section 3.5d discussed how illusory promises are not generally consideration in common law jurisdictions; and Chapter 10 (“Remedies”) contains further discussion of what courts do when parties fail to perform contracts properly.

9.3b Conditions Classified by When They May Occur: Precedent, Subsequent and Concurrent

One way courts classify conditions is by when they may occur in relation to the performance of the contract duties that the conditions affect. When conditions are classified this way, there are three types:

- (1) conditions precedent,
- (2) conditions subsequent,
- and (3) conditions concurrent.

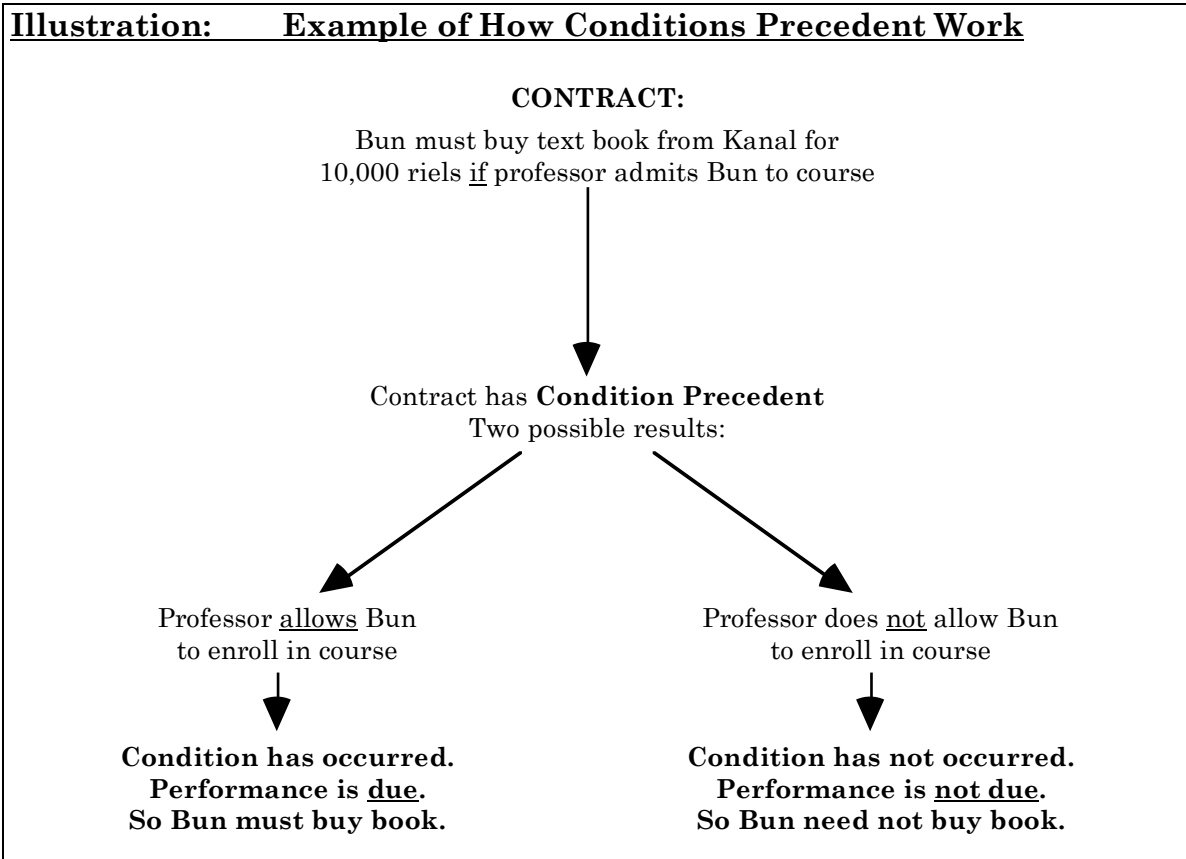
Although the names of these three types may sound difficult, it may be helpful to keep in mind that there really is not much practical difference among the three types: all three simply affect whether a contract duty is due or not. The reason courts make these distinctions is to help them analyze when contract duties are due, as explained below.

(1) Conditions Precedent Are Those That Must Occur Before a Duty of Performance Becomes Due

Conditions precedent are those that must occur before the duty which depends on them becomes due for performance. That is, if the condition precedent does not occur first, the duty of performance does not become due! Most conditions appear to be some form of condition precedent.

For example, the condition in Case Study 195 was a condition precedent: the complete harvesting of the red pepper crop by Peo was a condition precedent to Rhet’s duty to pay Peo for harvesting the crop. If Peo did not complete the harvest, then Rhet had no contract duty to pay. And in the tree climbing example in Section 9.3a above, where Lim had no duty to climb

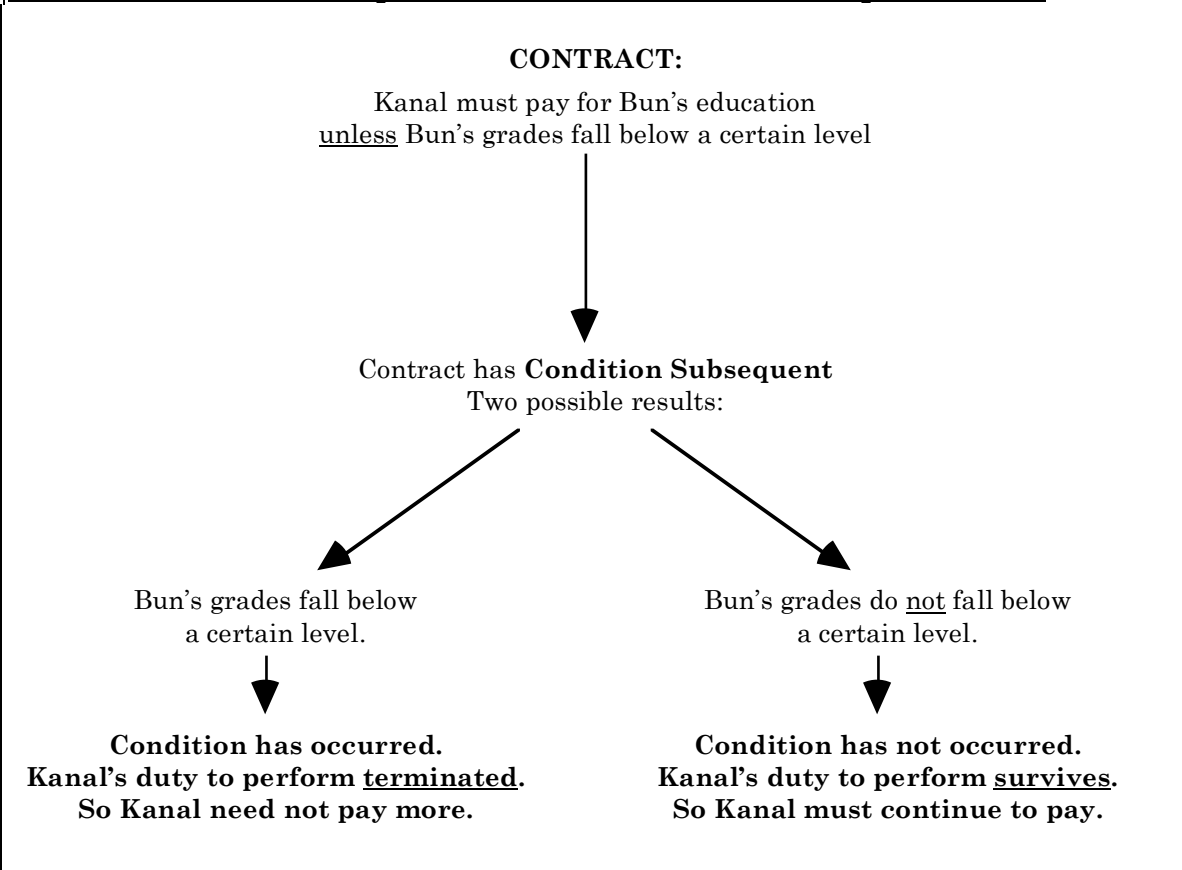
unless Ponlee returned from Kompong Speu by Friday, Ponlee's return was a condition precedent to Lim's duty to climb. And if Bun agreed to buy Kanal's literature text book for 10,000 riels only if a professor allowed Bun to enroll in a particular literature course, Bun's admission to the course would be a condition precedent to Bun's own duty to buy the book. The following chart illustrates conditions precedent.



(2) Conditions Subsequent Are Those That Terminate a Duty of Performance That Is Already Due

Conditions subsequent are in a way the opposite of conditions precedent. Instead of causing a legal duty to become due for performance, conditions subsequent actually terminate a legal duty which is already due for performance.

For instance, suppose Bun and Kanal agreed that Bun would attend university, and that Kanal would pay for Bun's education unless Kanal's grades fell below a certain level. In that situation, there would be a condition subsequent: if Bun's grades fell below a certain level, then Kanal's duty to pay for Bun's education would terminate. The illustration below explains this possibility.

Illustration: Example of How Conditions Subsequent Work

Although conditions subsequent are in a way the opposite of conditions precedent, in practice there is generally no important difference between the two! One reason for this is that most conditions subsequent are basically conditions precedent that are simply stated in reverse. That is, most conditions subsequent are really just conditions precedent stated in a different way. For instance, in the university example above, where Kanal's duty will terminate if Bun's grades fall below a certain level, another way to describe the situation would be to say that Kanal's duty to pay will become due if Bun's grades remain at that level or above--which is really a condition precedent.

In fact, some authorities say that conditions like the one above are not "true" conditions subsequent, since they are really just conditions precedent stated in a different way. In other words, these authorities would say that the duty of Kanal in the example above is not due until the event described fails to occur--it is not due unless Bun keeps his grades at a certain level. So in a way it is really just a condition precedent!

These authorities say that "true" conditions subsequent--conditions that really terminate an existing duty, rather than merely seem to do so--are rare. One area in which they might occur is in insurance contracts. In such contracts, after a claim that was covered by the policy occurred, a policyholder might have only a certain amount of time to bring a lawsuit to enforce

that claim against the insurance company. In that situation, the insurer's duty to pay the covered claim would really be due already--but that duty would be terminated by the policyholder's failure to bring a lawsuit about it within a certain time. That would be a "true" condition subsequent.

(3) Conditions Concurrent Are Those That Must Occur Roughly Simultaneously in Order for Each Party's Duty to Perform to Become Due

Conditions concurrent exist where the performances of the contract duties of the parties can occur roughly simultaneously, and where each party's duty to perform is conditioned on the performance of a duty by the other party. In fact, the general rule about these conditions is that they exist whenever:

- (1) the performances promised by the parties can be performed roughly simultaneously;
- AND (2) the contract does not expressly require that one performance occur first.

When these requirements are met, courts imply that the performance of each party is a condition to the duty of the other party to perform. One important situation where this often happens is in sale of goods contracts. Courts imply such concurrent conditions even though the contract itself says nothing about which party must perform first! Such "implied-in-law" conditions will be discussed in detail in Section 9.3c, below. Of course, the parties could also choose to create concurrent conditions expressly in their contract.

Conditions concurrent can be:

- (1) fulfilled by performance, or
- (2) excused by a proper tender of performance.

A "tender" of performance basically means a party's offer to perform with the present ability to do so. For example, a seller's tender in a sale of goods contract might be delivering the goods to a buyer's place of business and offering the goods to the buyer. Where there are conditions concurrent, either proper performance or a proper tender will cause the other party's duty to become due. This means that each party can cause the other party's duty to become due merely by properly offering performance according to the contract, while giving some indication that the party has the ability to perform--even if the other party rejects that tender! Of course, the tender of performance must be proper in order to be effective. Tender of performance as an excuse of contract conditions will be discussed in more detail in Section 9.4g, below.

For instance, in the text book example above, suppose Bun and Kanal put no express conditions in their contract, but merely said Bun would buy Kanal's book for 10,000 riels. In that case, each party's duty to perform would be a condition concurrent to the other party's duty to perform--even though

there were no express conditions in the contract. In other words, Bun's payment of 10,000 riels to Kanal would be a condition whose occurrence would cause Kanal's duty to provide the book to become due. And Kanal's providing the book to Bun would be a condition whose occurrence would cause Bun's duty to pay to become due.

One result of concurrent conditions is that if both parties wait forever to perform or tender their performance, and the conditions are not excused for any other reason, then neither party's duty to perform his promise will ever be due! And of course, if neither party's duty to perform his promise is ever due, then there can be no breach of the contract. So a party who wishes to have such contracts performed generally must perform or tender his own performance in order to make the other's party's duty to perform become due.

Concurrent conditions are basically two conditions precedent that are linked to each other. As with conditions precedent, each condition concurrent must occur or be excused before a particular party's duty to perform becomes due. Of course, the event whose occurrence leads to each party's contract duties becoming due is the other party's performance! So although each party's duty to perform depends on the other party performing first, at least one party must perform or tender performance if he ever wants the contract to be executed (assuming the duty is not excused for some other reason).

Many contracts contain implied-in-law concurrent conditions. The reason is that there are many contracts in which the parties can perform their promises simultaneously and the contract does not require otherwise. Perhaps the most important examples are sale of goods contracts and land sale contracts. The illustration and Case Study below explain how concurrent conditions work.

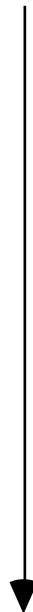
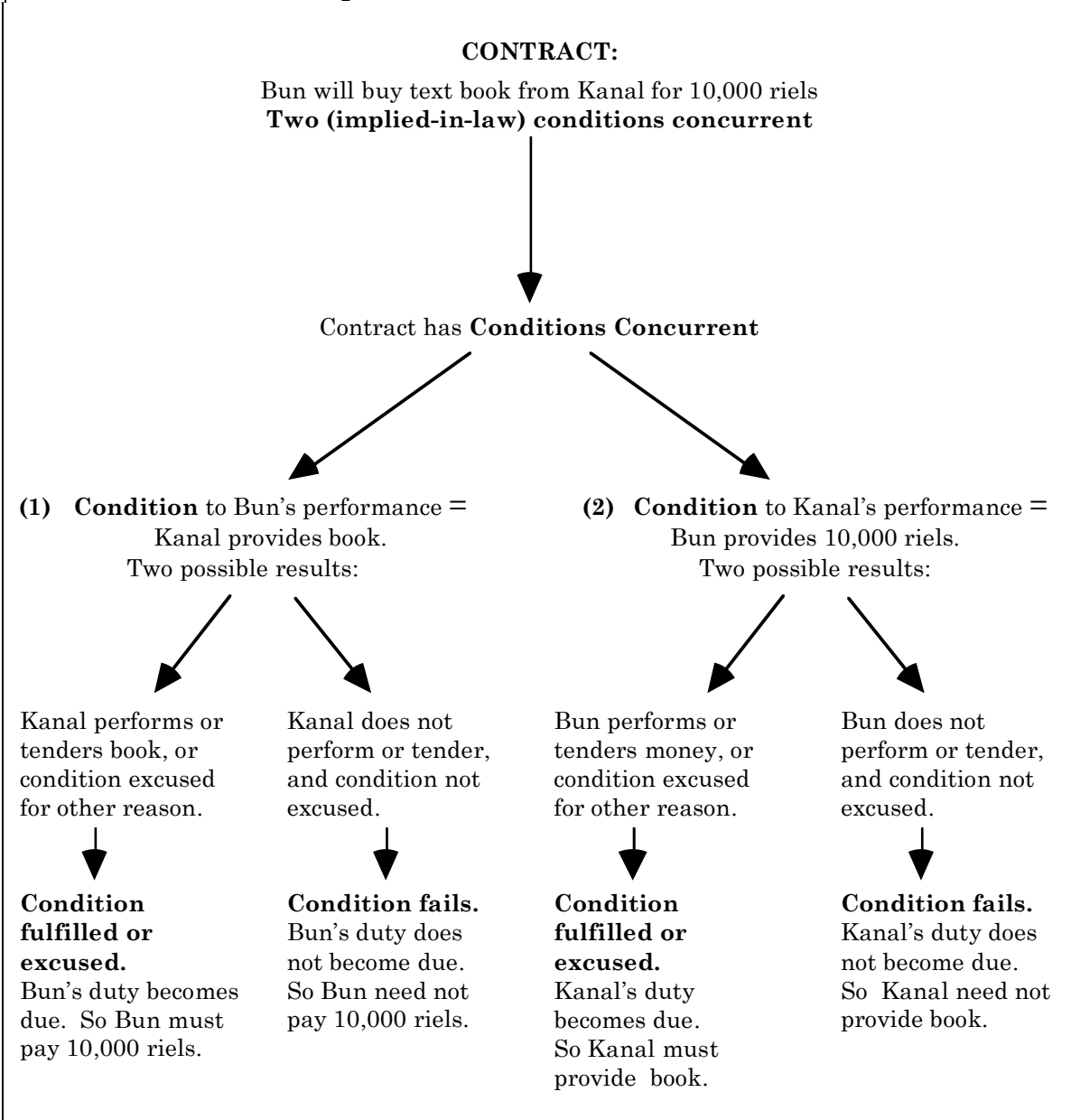


Illustration: Example of How Conditions Concurrent Work*********CASE STUDY 196**

FACTS Samath and Chhon signed an agreement which said that Samath agreed to buy Chhon's car for \$5,000. The agreement said nothing about any conditions to the performance of either party. It did say that Chhon would deliver the car to Samath in a week.

A few days after the parties signed the agreement, Chhon phoned Samath and said that he would like to have the \$5,000 before he delivered the car. Samath said she would give Chhon the money at the same time as he delivered the car. Chhon insisted on getting the money first. But Samath

did not trust Chhon completely. So she did not want to give him the money before she got the car, or at least saw that he was about to provide it to her.

QUESTION OF LAW Does Samath have a duty to pay the money to Chhon before the car is delivered to her under this contract?

DECISION No. Samath has no obligation to pay Chhon the \$5,000 yet, because the parties' duties are concurrent conditions, and Samath generally will have no duty to pay until Chhon provides or tenders the car.

When contract duties can be performed roughly simultaneously and the contract does not provide otherwise, each party's duty to perform is concurrently conditioned on the other party's performance. In this case, Samath agreed to buy Chhon's car for \$5,000, and the contract contained no express conditions. In this situation, the parties' performances can occur roughly simultaneously--since Samath and Chhon can exchange the money and the car at about the same time--and the contract does not expressly require that one performance occur first. So the performances of the parties' duties are concurrent conditions. That means that neither party's duty to perform is due until the other party performs (or tenders). Therefore, Samath's duty to perform by paying the \$5,000 is not due until Chhon performs by providing the car (or tenders performance). Since Chhon has not done either of those things, Samath's duty to pay the money is not due yet. Condition has not occurred or been excused = duty of performance depending on the condition is not due yet.

9.3c Conditions Classified by How They Are Created: Express, Implied-in-Fact and Implied-in-Law

As noted above, conditions may be created in more than one way. Not all of them are expressly stated in the contract, as the pepper harvesting condition in Case Study 195 was. Some conditions are actually implied by the courts, as the concurrent conditions in the car sale contract in Case Study 196 were. In fact, when conditions are classified by how they are created, there are basically three different kinds of conditions:

- (1) express conditions,
- (2) implied-in-fact conditions, and
- (3) implied-in-law conditions.

Each of these types of conditions is discussed below.

(1) Express Conditions Are Those Created by Words in the Contract

Express conditions are simply those created by the words of the contract itself. For instance, all of the conditions in the examples in Section 9.3a were express: the Him and Lim tree climbing examples, the real estate contract

examples, and the pepper harvesting contract in Case Study 195. In each of these cases, the parties put a particular condition in the words of their contract. The contracts actually said that a performance (such as a duty to climb a tree) would become due, or cease to be due, only if a particular condition occurred (such as a person's return from Kompong Speu).

In fact, the particular words the parties use in their contracts can be an important sign that the contract has an express condition. Examples of words parties often use to put express conditions in their contracts include "if," "on condition that," "subject to," and "provided that."

However, no particular words are required for an express condition to exist. What matters is that the words clearly show that the parties intended the condition to exist. For example, the parties can also create an express condition by saying that "the duty to pay will not be due unless Chheang first resigns from his job."

One very important aspect of express conditions is that courts generally require that they be completely and exactly fulfilled (or excused) in order for the duties which depend on them to become due. In other words, where an express condition exists, it is generally not enough that it be partly or even mostly fulfilled. In order for the duty subject to the condition to become due, the condition must be completely fulfilled (or excused). Otherwise, the duty is not due.

This can be very important because, as will be discussed below, it means that express conditions are treated differently from "implied-in-law" conditions. Implied-in-law conditions may be satisfied--and the duties on which they depend can become due--even if the conditions are only substantially fulfilled. But if it is an express condition that a party provide some performance, then that party must perform completely, or risk not receiving anything in return for that performance! This result can be very harsh. In fact, it might result in what some courts call a "forfeiture."

***** DEFINITION:** A **forfeiture** is basically a loss of something to another person because of a breach of contract, or other failure to act as required by law, with no adequate legal remedy for the party suffering the loss.

For example, if a contractor in a service contract did a lot of work for an employer but had no legal way to receive anything in return, that would be a forfeiture. The reason is that there would be no way the contractor could get the value of his work back except to be paid for it. Courts generally do not like forfeitures, because they can be harsh and may result in unjust enrichment.

Because of this potential for harsh results, many courts prefer not to find that express conditions exist in contracts, unless it is clear that the parties intended an express condition. Of course, this depends on the language

in the contract. If that language does not very clearly create an express condition, then courts will find that there is no express condition. In addition, even if such a condition exists and is not fulfilled or excused, courts generally provide restitution to a party who has given some benefit to another party, if that is necessary to avoid unjust enrichment, under the doctrine of quasi-contract. However, it is usually better (more profitable) for a party to be paid under the contract itself than to attempt to get restitution of the reasonable value of what has been given. This will also be discussed in Sections 9.4 and 9.5, below. The potential for forfeiture where there are express conditions in construction contracts will be discussed in Section 9.5a.

One example of this “complete performance” rule is Case Study 195. In that case, the parties made a contract with the express condition that Peo finish the harvest before Rhet had any duty to pay. Because this was an express condition, Peo was required to complete the harvest, or the condition would not be fulfilled and Rhet would have no duty to pay. So even if Peo completed all of the harvest except for a small portion of one field--and the condition was not excused--Rhet would have no duty to pay! But if the condition of Peo finishing the harvest was only an implied-in-law condition, then the condition would be fulfilled if Peo substantially finished harvesting the peppers--even if Peo did not finish completely. Of course, if Peo failed to finish completely in either situation, it would be a breach of Peo’s promise to harvest the peppers. So Rhet would be entitled to a remedy for the harm the breach caused to him, as will be discussed in Section 9.4c, below. But the important thing about implied-in-law conditions is that--unlike with express conditions--Rhet would have a duty to pay Peo for the work he had performed under the contract. Of course, as noted above, even where a condition is not fulfilled or excused, a party like Peo might be able to get restitution of what he has provided to the other party under the contract.

***** WHY IS THIS IMPORTANT?** Why should parties consider putting express conditions in their contracts?

There are several reasons parties should consider putting express conditions in their contracts. One reason is that, as discussed in Section 9.3a, all conditions can give more power to the party whose duty to perform depends on the condition. That was the situation in Case Study 195, where the condition in the pepper harvesting contract gave Rhet more power to encourage Peo to complete the harvest, and more protection from Peo’s failure to do so.

And of course, this power is especially great with express conditions, since they must be completely fulfilled for the duty that depends on them to become due. In fact, the power is so great that courts will not interpret contract language to create express conditions unless it is clearly what the parties wanted, because of the danger it will result in injustice, as discussed above. And even where it is clear that the parties created

an express condition, the potential for forfeiture remains. So express conditions are a very powerful tool.

Another reason parties should consider using express conditions is that, in some situations, such conditions can actually help the party whose performance is a condition. For example, in the real estate examples in Section 9.3a, the condition of the buyer getting an adequate loan actually helped the buyer. The reason is that if that condition did not occur, then the buyer's own duty to pay for the land would never become due. So in that case the buyer would not have to perform the rest of the contract, which might be difficult or impossible without the loan. And of course, the seller's duty to provide the land would never arise either, since that duty would probably be conditioned on the buyer providing or tendering the money.

(2) Implied-in-Fact Conditions Are Those That Courts Find Exist Because of the Apparent Intentions of the Parties to the Specific Contract, Even Though the Conditions Are Not Expressly Stated in the Contract

Sometimes courts find that conditions exist in contracts because of the apparent intentions of the parties to the specific contract, even though the conditions are not expressly stated in the contract. In particular, courts may find that such "implied-in-fact" conditions are part of contracts where one party must do something in order for the other party to be able to perform under the contract. Courts say that this shows the parties intended the condition to be part of their contract, even though they did not actually express the condition in the contract.

For example, suppose Ban and Son agree that Ban will paint Son's house with a color of paint that matches a small sample of painted wood which Son will provide to Ban. In that situation, courts would probably find that Son's provision of the sample to Ban is an implied-in-fact condition to Ban's duty to paint the house. The reason is that the parties cannot have intended that Ban be expected to paint the house with the color Son chooses if Son does not tell Ban what that color is! So in this case, if Son fails to provide the paint sample to Ban, Ban's duty to paint the house will not become due. The following Case Study contains another example of an implied-in-fact condition.

CASE STUDY 197

FACTS An experienced bank executive named Sopheap became the new president of a large commercial bank with headquarters in Phnom Penh. Because counterfeit money had recently been a problem in the city, Sopheap decided that it would be a good idea to find out whether the currency in the bank's vaults was genuine. So she hired a reliable company called Real Currency Services to perform an inspection of the money in the vaults, for a certain fee.

However, on the day when the Real Currency inspectors came to the bank to inspect the money, the guards at the front door merely laughed and told the inspectors to go away or they would be shot. The inspectors went away.

Later that day, Sopheap's assistant telephoned Real Currency to get the results of the inspection. The Real Currency inspectors told the assistant that they had not been permitted to examine the money that day, and asked if they could arrange to have the president or her assistant help them gain access on another day. But the assistant became angry. He said that it was Real Currency's responsibility to examine the money, not the bank's responsibility. The inspectors said they had no duty to do anything until the bank allowed them access to the vaults.

QUESTION OF LAW Does this contract require the bank to allow the Real Currency inspectors access to its vaults before Real Currency's duty to inspect the money becomes due?

DECISION Yes. The bank must allow Real Currency access to the vaults if it wishes the inspection to occur, because allowing this access is actually an implied-in-fact condition to Real Currency's duty to inspect the money.

Courts say that implied-in-fact conditions exist because of the apparent intentions of the parties to the specific contract, especially where one party must do something in order for the other party to be able to perform. In this case, Sopheap and Real Currency agreed that Real Currency would inspect the money in the bank's vaults for a certain fee. There were no express conditions in the contract. However, it would be impossible for Real Currency to perform its duties under the contract--to inspect the money--unless the bank allowed its inspectors access to the vaults. Therefore, this access is an implied-in-fact condition to Real Currency's duty to inspect the money. If the bank does not provide the access, then Real Currency's duty to inspect the money will not become due.

As with express conditions, courts generally require that implied-in-fact conditions be completely and exactly fulfilled in order for the duties which depend on them to become due. So if such conditions are not completely fulfilled (or excused), such duties are not due. Many courts say that implied-in-fact conditions should be treated the same way as express conditions, because both types are based on the intentions of the parties to the specific contract in the case.

However, in practice, courts have some discretion to state implied-in-fact conditions in a way that can reduce some of the harshness and the risks of forfeiture described above. In other words, courts do have some flexibility to find that implied-in-fact conditions exist in a way that reflects the real intentions of the parties, in the circumstances of a particular case.

For instance, in the house painting example above, suppose that Son does not provide Ban with a “small sample of painted wood” to show which color he wants. However, Son does provide Ban with a colored shirt, and says he wants the house painted that color. In this situation, it appears that a court might say that the implied-in-fact condition was really that Son indicate to Ban in some reasonable way what color of paint to use. Although Son chose to do that in a way that was a little different from what the contract said, it appears that courts would find that the implied-in-fact condition had been fulfilled--Son did show Ban what color to use--and that Ban’s duty to paint the house had become due. Of course, technically, Son did not follow a promise in the contract, and this might be a breach. But it might be difficult for Son to show any real damage from such a breach, and it seems unlikely that it would have any real effect on the performance of the contract.

(3) Implied-in-Law Conditions Are Those That Courts Find Exist in Contracts in Order to Achieve Justice in Certain Types of Situations

Implied-in-law conditions are those that courts find exist in contracts in order to achieve justice in certain types of situations. In these situations, the law imposes certain conditions on contracts without regard to what the parties may have actually intended when they made their contract (unless the parties expressly put a different condition in their contract).

Implied-in-law conditions are also called constructive conditions, because in these situations the court actually “builds” the conditions into the contract! This is similar to the situation with quasi-contracts, which are sometimes called “constructive contracts” because the courts may impose them in certain situations, even if the parties never actually had any agreement.

***** ADDITIONAL REFERENCE:** Chapter 1 (“Basic Aspects of Contract Law”), Section 1.5 contains further discussion of quasi-contracts.

There are several types of situations where courts find that implied-in-law conditions exist, unless the contract itself says something different. Three of the most important of these situations are where:

- (1) the performances of the parties can occur roughly simultaneously, in which case each performance is a condition concurrent to the other party’s duty to perform (as explained above in Section 9.3b);
- (2) one party’s duty requires a period of time to perform and the other party’s duty does not, in which case the performance that takes more time is generally a condition precedent to the other party's duty;

and (3) one party's performance is to occur earlier in time than the other party's performance, in which case the earlier performance is generally a condition precedent to the duty to provide the later performance.

Each of these types of situations is briefly explained below.

(1) Where the performances of the parties can occur roughly simultaneously, each performance is generally a condition concurrent to the other party's duty to perform. This idea was already explained briefly in Section 9.3b above, which discussed conditions concurrent. Where the performances of the parties can occur roughly simultaneously and the contract does not provide otherwise, courts imply that the performance of each party is a condition concurrent to the duty of performance of the other party. Each party must perform in order for the other party's duty to become due. And as explained above, courts imply such concurrent conditions even though the contract itself says nothing about which party must perform first!

There are many examples of situations where courts might find implied-in-law conditions concurrent. These conditions often exist in land sale and sale of goods contracts, because those can typically be performed roughly simultaneously. One example is the one in Section 9.3b about the contract for the sale of a textbook by Kanal to Bun for 10,000 riels. That was a situation where a court would find an implied-in-law condition that the parties' duties to perform were each conditioned on the other party's performance. And Case Study 196 is another example. In that case, where Samath agreed to buy Chhon's car for \$5,000, the court found that there was an implied-in-law condition that each party's duty to perform was conditioned on the performance of the other party. So Chhon had no right to demand that Samath pay the money before Chhon provided (or tendered) the car.

The reason courts imply concurrent conditions in these situations is to do justice. The law says that, unless the parties agree otherwise, it would generally not be fair to require one party in these situations to perform a substantial amount of time before the other party performs, or at least tenders performance. Since the parties can perform basically at the same time, the law wants to encourage them to do so. So it says that each party must at least tender performance before the other party's duty to perform is due. This rule gives the parties some protection from the risk that they will perform first but never receive a performance in return.

(2) Where one party's duty requires a period of time to perform and the other party's does not, the performance that takes more time is generally a condition precedent to the other duty. In many contracts, the performance of one party takes a certain amount of time, but the performance of the other party can occur almost instantaneously. For instance, in the house painting example in Section 9.3c above, the painting of the house would take a substantial period of time for Ban to perform. But the payment by Son

could be accomplished in only a few seconds. So courts would probably imply that Ban's painting of the house would be a condition precedent to Son's duty to pay. In other words, Son would have no duty to pay for the painting until Ban actually finished painting the house.

Another example might be where a passenger hires a moto driver to take him to a certain destination. In that situation, the moto driver's performance (driving to a destination) would probably take a certain amount of time, but the passenger's performance (paying the fare) would not take much time. So unless the contract said something different, a court would probably imply that the moto driver's duty to perform would be a condition that would have to be fulfilled (or excused) before the passenger's duty to pay became due.

The following Case Study contains another example of the way courts imply conditions in this situation.

CASE STUDY 198

FACTS The Ministry of Roads signed a contract with the Tough Construction Company in which Tough agreed to make some repairs to one of the most important highways in the nation. The parties agreed that the Ministry would pay \$100,000 for the work, and they anticipated that the work would take about two months to complete. The contract said nothing about when payment would occur.

A few weeks after the work began, the Tough Company became concerned about security on the road. The Company asked the Ministry to pay for all of the work within the next week. But the Ministry refused, saying the contract did not require that. The Company threatened to stop work unless the Ministry paid the money right away.

QUESTION OF LAW Does the Tough Company have the right to be paid for the road work before it performs the repairs?

DECISION No. The Tough Company does not have the right to be paid before it performs the repairs, because its performance of the repairs is an implied-in-law condition precedent to the Ministry's duty to pay for the work.

In many jurisdictions, courts say that implied-in-law conditions exist where the performance of one party's duties requires a substantial amount of time to complete, but the performance of the other party's duties does not, even where there is no express condition in the contract. Specifically, courts say that the performance of the duty that takes more time is a condition precedent which must occur (or be excused) for the duty of the other party to become due.

In this case, the Ministry and the Tough Company agreed that the Tough Company would perform about 2 months of road repairs for \$100,000. Obviously the repairs will take a substantial amount of time, but the payment

of the money can be performed almost instantaneously. In this type of situation, the performance that will take some time (the Tough Company's road repairs) is a condition precedent which must occur in order for the duty of the other party (the Ministry's duty to pay) to become due. So in this case, a court would probably say that the Ministry's duty to pay will not be due until the Tough Company actually performs the repairs. The Ministry is not required to pay the money until the Tough Company performs the repairs.

***** WHY IS THIS IMPORTANT?** Why do courts imply conditions in situations where one party's performance takes some time and the other party's performance does not?

Courts imply conditions in this situation in order to do justice by offering some protection to the party who can perform almost instantaneously. In many cases, if the party who could perform quickly was required to do so before the other party performed, the other party might be less likely to complete performance. For example, in Case Study 198 above, if the Ministry was required to pay Tough Construction before Tough performed the work, it might be less likely that the Company would actually finish on time--or finish at all.

In addition, it appears that there are many situations where the party who can perform quickly (often by paying money) is more established in a particular place than the other party. This means that if anything goes wrong in the performance of the contract, it may be easier for the other party to find that more established party and seek compensation than for the established party to find the first party. For example, if one party hires another to do some work on the first party's car, building, real estate, or other object in return for money, the party performing the work generally knows where to find the paying party, or at least has some control over the other party's property (as with repairs on a car). But the party doing the work may be harder to locate, especially if that party does not reside nearby, since the work that party is doing does not relate to his own property. In fact, in some cases, if such parties were paid before they did their work, they might be tempted to simply go away before completing their performance! This may also be true of many employment contracts, where the employee (whose duties take some time to perform) may be harder to locate than an established employer (who can usually perform quickly by simply paying money). It might be true of some transportation contracts, such as moto driving contracts, where the moto driver (whose duties take some time to perform) may be harder to locate than the passenger (who can usually perform quickly by simply paying money). And the moto driver might find it much easier to simply go away without performing than the passenger on foot would!

In any case, in these situations, the law appears to want to discourage parties who can receive so quickly all the benefits of a contract from failing to perform their own duties fully. And the law wants to give the other parties to such contracts some protection against this. So performances that take

some time to complete are generally conditions precedent to duties that can be performed almost instantaneously. Of course, it might also be argued that this rule tends to help more established or wealthier parties--such as employers and property owners--by requiring that they receive full performance of various services before they are required to pay for them.

(3) Where the performance of one party's duty is to occur earlier than the performance of the other party's duty under the contract, the performance of the earlier duty is generally a condition precedent to the later duty. Sometimes contracts do not contain express conditions, but do provide that the performance of one party is to occur at an earlier time than the performance of the other party. For example, a contract may state that one party is to perform one week after the contract date, and the other party is to perform two weeks after the contract date. In this type of situation, the law says that the performance which is to occur earlier is generally a condition precedent to the duty to provide a performance that is to occur later.

One example of this rule might be if the terms of a contract between a ferry company and a passenger were that the passenger would pay for a trip across a river, and that after that, the ferry would take him across the river. In that situation, courts would probably imply that the passenger's payment of the fare was a condition precedent to the ferry company's duty to take him across the river. This is because the terms of the contract say that the passenger's performance is to occur first. This is true even though the performance of the ferry company (taking the passenger across the river) will obviously take longer than the performance of the passenger (simply paying the money)! The reason is that the contract in this example actually says something that helps the court decide which performance should occur first. The things parties actually say in their contracts are often stronger than general legal rules, such as the general rule that performances that take some time are usually conditions precedent to duties of performances that do not take much time.

***** WHY IS THIS IMPORTANT?** Why do courts imply conditions in situations where the performance of one party is due before the performance of the other party under the contract?

The reason courts imply conditions in this situation is to offer some protection to the party whose performance is due later under the contract itself. It appears that the law assumes that, unless the parties agree otherwise, it is generally fair to require the party whose performance is to occur first under the contract to actually perform before the other party's duty is due.

For instance, this may be the case with some transportation contracts, such as the ferry example above. In that case, even though it is the passenger who can perform quickly and the ferry company whose performance will take some time, it may actually be the ferry company that needs more protection!

This is because it may be the ferry company that is more established and easier to locate in the event of a performance problem. And it may actually be the passenger who would find it easier not to perform--and go away quickly--if he was able to cross the river without paying until he reached the other side! These might be reasons why the ferry company might insist in the contract itself that the passenger perform first. So the law may want to protect the party whose performance takes longer in that type of situation.

However, courts do not imply this type of condition where the contract says nothing about when the parties' performances are to occur, as may be the case in many other transportation contracts. For example, as discussed above, in moto contracts, it may be the passenger who needs more protection, and the law will probably assume that the moto driver must perform first unless the contract says otherwise. And even with a ferry contract, if the contract itself said nothing about the time of performance, the law would probably assume that the ferry operator's performance would be a condition precedent to the passenger's duty to pay.

One of the most important aspects of implied-in-law conditions is that they can be fulfilled by complete performance, or by substantial performance. This means that, unlike the situation with express and implied-in-fact contracts, full and complete performance is not required for implied-in-law conditions to be fulfilled. So as long as an implied-in-law condition is substantially performed, the duty which depends on that condition becomes due.

Substantial performance can occur even if there is a breach of the promise of that performance, as long as it is only a minor breach. In fact, substantial performance actually means that there has not been any material (important) breach. On the other hand, if there is a material (important) breach of such a promise, then the condition has not been substantially fulfilled. Of course, where there is a minor breach, the party who is injured by the breach is entitled to a remedy for the damage caused to him by the other party's failure to perform fully. But the non-breaching party's duty to perform is due despite the minor breach by the other party. Whether there is substantial performance (and only a minor breach), or whether there is not substantial performance (and a material breach), will depend on the circumstances of each individual case. These will be discussed in much more detail in Section 9.4c below. For now, it is important simply to understand that implied-in-law conditions may be fulfilled by complete performance, or by substantial performance, and that in the substantial performance situation, the duty of the other party will become due even though there has not been complete performance! Obviously, whether a condition is implied-in-law or not can have a big impact on the performance of a contract.

For instance, in Case Study 198, suppose the road repair contract said nothing about the time of performance, and that the Tough Company substantially finished the work, but did not completely finish it. The Company

may have finished all the work except for some minor repairs to the road surface in a few places. If a court decided that the Company had substantially finished the work--because the breach of its promise to perform was only minor--the court would say that the implied-in-law condition in the contract had been fulfilled. That would mean that the duty of the Ministry to pay for the work would become due--despite the fact that the work was not completely finished! Of course, the Ministry would be entitled to a remedy for the amount of damage caused by the Tough Company's failure to perform completely, and so the Ministry might not have to pay the full amount due under the terms of the contract. By comparison, if complete performance was required for the Ministry's duty to pay to become due, then the Ministry would have no duty to pay under the contract unless the Tough Company completely finished the road repairs--including the minor repairs to the road surface.

The basic reason for this "substantial performance" rule appears to be that the law feels that the party whose performance depends on the condition will receive the substantial benefit of his bargain. It seems that when courts impose conditions on contracts that the specific parties may never have intended--implied-in-law conditions--the courts are reluctant to require also that the conditions be completely performed before the duty that depends on them becomes due! It may be that courts feel this could often be unfair to the party who is required to complete such a performance, in cases where that party may have never expected to be required to perform so exactly in order to receive any performance in return. By contrast, courts seem to feel that express and implied-in-fact conditions should generally require complete performance, since those are more closely connected to the actual intentions of the particular parties to the contract.

Of course, a particular contract may contain many different duties. And courts must examine each contract carefully to see which duties relate to which other duties. The explanations above are general guidelines about what may happen when it is fairly clear that a particular performance by one party is being exchanged for a particular performance by another party. If a contract required many different performances between the parties, the court would have to examine all the relevant circumstances to determine the relationships between all the duties.

(4) Summary of Some Basic Differences among Express, Implied-In-Fact, and Implied-In-Law Conditions

The chart below illustrates some of the basic differences among express, implied-in-fact, and implied-in-law conditions.



Illustration:	Comparison:	Express,	Implied-in-Fact, and
	<u>Implied-in-Law</u> Conditions		
	EXPRESS	IMPLIED-IN-FACT	IMPLIED-IN-LAW
1. How is it created?	<u>Expressly</u> in the contract.	Implied based on the <u>apparent intentions</u> of the parties to the specific contract.	Implied by courts to <u>achieve justice in certain types of</u> situations.
2. What is its legal effect?	Must be fulfilled or excused for a certain contract duty to become due.	Must be fulfilled or excused for a certain contract duty to become due.	Must be fulfilled or excused for a certain contract duty to become due.
3. What is required for it to be fulfilled?	Requires <u>complete</u> performance.	Requires <u>complete</u> performance (though courts have some discretion to state in fair way to achieve justice).	Requires at least <u>substantial</u> performance (will also be fulfilled if there is complete performance).

9.4 A Contract Duty Does Not Become Due Until Any Conditions on Which the Duty Depends Are Fulfilled or Excused

As noted in Section 9.3, when contract duties depend on conditions, those duties do not become due for performance until any conditions on which they depend are fulfilled or excused. This basically means that the conditions must actually occur, or be excused for some reason the law says makes it unfair to expect them to occur. If such conditions are fulfilled or excused, then the duties that depend on them become due (except for conditions subsequent, which terminate duties). If such conditions are not fulfilled or excused, then the duties that depend on them do not become due, and the party who has those duties is not legally required to perform them.

Conditions are generally fulfilled if they actually occur as stated in the contract, or by the law (in the case of implied conditions). This is true whether the conditions are actually some performance by a party, or an independent event, such as whether it rains on a particular day. Where the condition is an independent event, it is fulfilled when it occurs, as explained in Section 9.4a below. Where the condition is the performance of a party, it is fulfilled by complete performance, as discussed in Section 9.4b below. Where the condition is implied-in-law, it may also be fulfilled by substantial performance, as explained in Section 9.4c below.

Conditions are excused in certain situations where the law basically says it would be unfair to expect them to be fulfilled. For example, a condition on which one party's duty depends will generally be excused where that party improperly rejects a tender of performance, such as a tender of goods in a sale of goods contract. If that occurs, then courts say the condition is excused,

which means the tendering party need not actually fulfill the condition in order to make the other party's duty become due. Instead, because of the improper rejection, the rejecting party's duty becomes due even though the condition is not fulfilled! Some of the important ways in which conditions may be excused are discussed in Sections 9.4 below. In particular, conditions may be excused by:

- (1) an anticipatory repudiation (Section 9.4d);
- (2) prospective inability or unwillingness to perform (Section 9.4e);
- (3) the failure or occurrence of a prior condition (Section 9.4f);
- (4) improper rejection of a tender of performance (Section 9.4g);
- (5) wrongful prevention or hindrance (Section 9.4h);
- (6) waiver or estoppel (Section 9.4i); or
- (7) impossibility of performance (Section 9.4j).

It appears that the rules about excuse of conditions are applied most frequently to conditions precedent and conditions concurrent. Where there are conditions subsequent, the duty to perform is already due, and there seem to be fewer situations where some circumstance will excuse a condition that will terminate that duty.

There are also a few limits on the rules about fulfillment and excuse of duties in particular situations. Where a contract is severable, the failure of a condition may not affect the whole contract, as discussed in Section 9.4k. And the law imposes certain limits on conditions that are actually the approval of a party to the contract or a third party, as discussed in Section 9.4l.

Before discussing the particular ways conditions may be fulfilled or excused, it is important to explain one general aspect of the rules about conditions. As noted above, even where a condition is not fulfilled or excused (or where a condition subsequent has terminated a duty), a party who has provided some benefit to the other party can generally get restitution of what he has provided, to the extent needed to avoid unjust enrichment. Of course, this amount may be less than the amount the party might have been paid under the contract. And the amount will be reduced by any damage caused to the other party, if the party seeking restitution breached the contract. The effects of breaches of contracts will be further discussed in Section 9.6b, below.

9.4a Occurrence Fulfills a Condition

The basic, general rule about conditions is that a condition is fulfilled if it occurs as stated in a contract, or as stated by the law (in the case of implied conditions). If a condition is fulfilled, then the duty that depends on that condition becomes due, and the party with that duty must perform it (except for conditions subsequent). This general rule applies where the condition is a performance promised by one of the parties, such as completing electrical work

in a construction contract. It also applies where the condition is some event unrelated to the parties' performance, such as whether the price of gold is above a certain level on a certain date. The different types of conditions were discussed in Section 9.3 above. The Case Study below is an example of how the occurrence of a condition which is not a performance of the parties can cause the duty of a party to perform to become due.

CASE STUDY 199

FACTS The Ministry of Education bought fire insurance for 100 of its primary schools from the Reliable Insurance Company. The insurance policy stated, among other things, that if any of the insured schools was damaged by fire during the policy period and the Ministry gave adequate notice of this to Reliable, then Reliable would pay within a reasonable time for all property damage to that school, up to a \$100,000 limit per school. The policy period was three years.

Two years after the policy went into effect, one of the schools covered by the policy was badly damaged in a fire. The Ministry learned that the damage would cost \$80,000 to repair. The Ministry notified Reliable immediately, and asked for the money to repair the school. Reliable investigated the policy claim and found that it was covered by the policy. However, Reliable said the Ministry had to wait until the end of the policy period to get its money, because the money was not available right then. The Ministry asked the court for help.

QUESTION OF LAW Does the insurance contract require Reliable to pay for the damage to the Ministry's school within a reasonable time?

DECISION Yes. Reliable is required to pay for the damage within a reasonable time because the damage to the school by fire and the Ministry's adequate notice of that event fulfilled the conditions precedent to the insurance company's duty to pay for the damage.

Conditions are fulfilled when they occur, whether the conditions involve performances of the parties or other events. When conditions occur, the duties that depend on them become due for performance (or are terminated, for conditions subsequent).

In this case, a fire insurance policy stated that, if one of the Ministry's insured schools was damaged by fire and the Ministry gave adequate notice of that damage to Reliable, then Reliable was required to pay within a reasonable time for the damage to that school, up to \$100,000 per school. One of the schools actually was damaged in this way, the Ministry gave adequate notice, and Reliable admitted that the claim was covered by the policy. In this situation, the damage to the school by fire and the proper notice were express conditions precedent which both had to occur in order for Reliable's duty to pay for the damage to become due. And that is what happened: both conditions

occurred. One was an independent event (the fire), and one was a performance of the Ministry (giving the notice). Therefore, Reliable has a duty to pay for the damage to the school within a reasonable time. The end of the policy period is probably not a reasonable time.

9.4b Where a Condition Is Also a Performance Promised in the Contract, Complete Performance Fulfills the Condition

In many cases, a condition is also a performance promised by one of the parties under the contract. In that situation, the ideal way for the condition to be fulfilled is for the party who has promised that performance simply to provide complete performance. Complete performance means the party performing does exactly what the contract requires. If that party does perform completely, then the duty which depends on the condition becomes due for performance (or is terminated, in the case of conditions subsequent). This is true whether the condition is express, implied-in-fact, or implied-in-law. And it is true whether the condition is a condition precedent, a condition concurrent, or a condition subsequent. Complete performance always fulfills a condition.

For example, in Case Study 195, Peo's harvesting of the red peppers was an express condition precedent to Rhet's duty to pay for the harvesting. In that case, if Peo had completely performed the harvest, Rhet's duty to pay Peo 100,000 riels for the harvest would have become due.

The Case Study below contains another example.

CASE STUDY 200

FACTS The Rubber Development Company agrees to sell 1,000 tons of rubber to the Everlasting Tire Company for use in manufacturing heavy duty truck tires. The Rubber Company delivers all of the rubber as required by the contract, and the Tire Company accepts the rubber.

After a few weeks, the Rubber Company has not received payment for the rubber. So the Rubber Company sends several written requests for payment to the Tire Company, saying that the Tire Company's duty to pay for the rubber is due. The Rubber Company also places a number of telephone calls to the Tire Company. However, the Tire Company does not respond to the Rubber Company's communications. So the Rubber Company asks the court for help.

QUESTION OF LAW Does the contract require the Tire Company to pay for the rubber that the Rubber Company has delivered?

DECISION Yes. The Tire Company's duty to pay for the rubber has become due because the Rubber Company's delivery of the rubber

was a condition concurrent to the Tire Company's duty to pay, and that condition has been fulfilled by the Rubber Company's complete performance.

When a condition is also a performance promised by one of the parties to the contract, the condition can be fulfilled by complete performance, no matter what kind of condition it is. When such a condition is fulfilled by complete performance, the duty that depends on it becomes due for performance (or is terminated, in the case of conditions subsequent).

In this case, the Rubber Company promised to provide 1,000 tons of rubber to the Tire Company, and the Rubber Company completely performed its promise. When the Rubber Company completely performed, it actually fulfilled an implied-in-law condition concurrent to the Tire Company's duty to pay. This is because the duties of the parties in this sale of goods contract could be performed roughly simultaneously. And because of the Rubber Company's complete performance, the Tire Company's duty to pay for the rubber is due. In this situation, the court will order a remedy to help the Rubber Company.

In addition to fulfilling any condition, complete performance also discharges the duty of the performing party to provide that performance. This effect will be further discussed in Section 9.6a, below.

9.4c Substantial Performance Fulfills an Implied-in-Law Condition

As explained above in Section 9.3, implied-in-law conditions can be fulfilled by complete performance or by substantial performance. In other words, complete performance is not required for implied-in-law conditions to be fulfilled! So substantial performance will fulfill that kind of condition, and will cause the duty that depends on such a condition to become due for performance. This means that substantial performance can occur even though there is a minor breach of the contract, since a party who performs only substantially has obviously failed to perform completely according to the contract.

However, this substantial performance rule applies only to implied-in-law conditions. This is because courts say that express conditions and implied-in-fact conditions must be completely fulfilled (or excused), or else the duties on which those conditions depend do not become due.

Exactly how much performance is required for performance to be "substantial" can be difficult to determine. It will depend on the particular circumstances of each case, as discussed below.

One example of substantial performance which was already explained in Section 9.3c uses the facts in Case Study 198. In Case Study 198, suppose the Tough Company substantially performed the road repair contract because

all that remained to be performed were a few minor repairs to the road surface. In that situation, the implied-in-law condition on which the Ministry's duty to pay depended would be fulfilled, and the Ministry's duty to pay would become due. Of course, as noted above, the Ministry would be entitled to a remedy for the damage caused by the Tough Company's failure to perform completely. So the Ministry might not have to pay the full amount due under the terms of the contract.

(1) Substantial Performance and Breach of Contract

One of the most important parts of the rule about substantial performance is the relationship between substantial performance and breach of contract.

***** DEFINITION:** A **breach of contract** is a failure to perform a contract promise without any legal excuse.

A breach is basically a failure to perform according to a promise (express or implied) that a party has made in a contract, when the duty to perform that promise has become due. Of course, a contract duty might not become due at all because of a failure of a condition to occur (as explained in Section 9.3). In addition, such a duty might not be due because it has been discharged by a breach or some other event related directly to performance of the contract (as explained in Section 9.6); by a later agreement or statement of the parties (as explained in Section 9.7); or by operation of law (as explained in Section 9.8). Circumstances like those might be considered legal excuses for a failure to perform a contract promise.

In any event, assuming the duty to perform a promise is due, the way to find if a breach has occurred is simply to ask whether the party with that duty has failed to perform it when that party was required to do so. For example, if a party makes a contract in which he promises to repair a road for a Ministry, but the party fails to repair that road according to the contract, then the party has breached the contract. The reason is that the party has failed to perform according to the promise he made in the contract.

A breach can also occur where a party fails to perform according to an implied promise. This might occur where a party prevents another party from performing or receiving the benefits of the contract. Some courts might consider such behavior to violate an implied promise not to interfere with the other party's performance or enjoyment of the benefits of contract. It would also violate the implied duty of good faith and fair dealing, as discussed in Chapter 8 ("Interpretation of Contracts"), Section 8.3j, and as will be explained in Section 9.5c, below. For instance, in the road repair example, such a breach might occur if the Ministry did not allow the road repairer access to the road to make repairs. Of course, allowing such access would probably also be an implied-in-fact condition to the duty to perform the repairs.

Any failure to perform according to the promises in a contract, without a legal excuse, is a breach. That is, in determining whether there is a breach or not, it does not matter whether the failure to follow the promise was a complete failure, a moderate failure, or only a small failure! It does not matter whether a party performed half the contract correctly but did no more, or whether the party tried to perform the whole contract but did so in an incorrect way. And it does not matter whether the party who failed to perform intended to breach the contract or not. Any failure to perform according to the contract, without a legal excuse, is a breach.

However, the legal effects of the breach will vary according to how serious the breach is. Specifically, the legal effects depend on whether the breach is material (important) or minor. Determining whether a breach is material or minor can be difficult. This will be explained in detail below. In addition, the more serious a breach is, the more serious the remedy a court orders is likely to be.

It is very important to remember that a breach is different from the failure of a condition to occur. A breach is basically a failure to perform according to a promise in the contract. But a failure of a condition to occur simply means that an event specified by the contract or the law has not occurred. That event might be the performance of a legal duty under the contract, or it might be some other event. So a condition can be fulfilled even though a breach occurs, as in the case of substantial performance. And a condition can fail even though there is no breach!

Another important difference between a breach and a failure of a condition to occur is the legal result. Where a breach occurs, it gives the non-breaching party the right to seek a remedy (such as money damages) from a court for the harm the breach has caused. But where there is a failure of a condition to occur, it simply means the legal duty which depends on the condition does not become due for performance. So the failure of a condition to occur does not--by itself--give a party the right to ask a court for a remedy. It simply gives a party the right not to perform the duty which depended on the condition. On the other hand, as noted above, a condition may be fulfilled by a performance that is also a breach! That is what occurs when there is substantial performance that fulfills an implied-in-law condition: the condition is fulfilled, but the failure to perform completely is still a breach. Of course, since conditions are often some performance of the parties, the failure of a condition to occur is often also a failure to perform according to a promise in the contract--a breach. So in that situation, a duty would not become due and a party would have the right to ask a court for a remedy because of the breach. But breaches do not occur because of conditions. Breaches occur because a party has failed to perform a duty he promised to perform in the contract. These differences are also discussed in Section 9.3, above.

As noted above, the difference between a minor breach and a material (important) breach is also very important in understanding

substantial performance, which will fulfill implied-in-law conditions. Substantial performance can occur even if there is a breach of the promise of that performance as long as it is only a minor breach. In fact, one way to explain substantial performance is to say that there has been no material (important) breach of the contract, but only a minor breach. This minor breach does not prevent an implied-in-law condition from being fulfilled. Of course, where there is a minor breach, the party who is injured by the breach is entitled to a legal remedy for the damage caused to him because of the minor breach. But in the case of implied-in-law conditions, the non-breaching party's duty to perform is due despite the minor breach by the other party. So in that situation, the non-breaching party must perform.

On the other hand, if there is a material (important) breach, then there has not been substantial performance. Where there is a material breach--and a condition has not been fulfilled--the party injured by the breach may seek a remedy for the breach, and the duty that depended on the unfulfilled condition does not become due for performance. So the injured party may seek a remedy and the party need not perform the duty affected by the condition. In fact, that harmed party's duty to perform his own duty may actually be discharged by the material breach of the other party. This important potential effect will be discussed further in Section 9.6b, below.

The illustration below shows the basic relationship among performance, conditions and breach of contract.



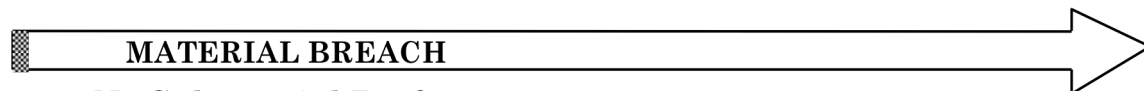
Illustration: Performance, Conditions and Breach of Contract**1. Complete Performance**

(no breach)

- fulfills any condition
- no breach

**2. Substantial Performance**

- fulfills implied-in-law conditions
- does not fulfill express conditions or implied-in-fact conditions
- minor breach

**3. No Substantial Performance**

- does not fulfill any conditions
- material (important) breach

Please Note: In this Illustration, the basic differences between minor and material breaches are shown in diagram form to promote easier understanding. This Illustration is not meant to suggest that there is any specific, measurable distance from complete performance that means a breach is “minor” or “material.” That will depend on the circumstances in each case, as discussed below.

(2) How to Tell Whether There Has Been Substantial Performance

The issue of whether there has been substantial performance (and only a minor breach)--or whether there has been no substantial performance (and a material breach)--has a very big effect on what parties and courts do when

there is a contract dispute. If the performance of a contract duty is an implied-in-law condition, substantial performance will fulfill the condition and cause the duty that depends on the condition to become due.

Whether performance is substantial or not depends on the circumstances in each case. In general, potential examples of minor breaches include minor delays in completing performance where time is not crucial, or minor problems in the quality or quantity of performance, such as the minor road repair problems discussed above. Potential examples of material breaches include delivering a completely wrong kind of goods in a sale of goods contract, or failing to perform a large part of the work required in a service contract.

Courts have developed some general rules to help them determine whether substantial performance has occurred (a minor breach), or whether such performance has not occurred (a material breach). For example, courts in the United States generally examine the five factors below to see if there has been substantial performance.

Factor No. 1: The more the party harmed has received the benefit he reasonably expected from the contract, the more likely it is that substantial performance has occurred. This is perhaps the most basic factor courts examine in determining whether performance is substantial. It simply asks how much the party harmed has received compared to what he could have reasonably expected to receive from the contract.

For example, if a buyer in a sale of goods contract receives 99% of the goods specified in the contract, it seems likely that substantial performance has occurred, based on this factor. Of course, a court would examine all the relevant factors before reaching a final decision about substantial performance.

Factor No. 2: The more the party harmed can be adequately compensated by money damages, the more likely it is that substantial performance has occurred. Money damages means a court orders the breaching party to pay money to the non-breaching party, in order to compensate that party for harm caused by the breach. This factor may depend on how easily a court can measure money damages for the breach. For example, if there is a breach of a contract for the sale of a very common item such as rice, it would probably be easy for a court to measure money damages. But it might be more difficult to calculate money damages for contract breaches involving new businesses, special services, or the loss of unique items.

The importance of this factor varies in different jurisdictions. In particular, it appears that common law courts generally award money damages more frequently than civil law courts do. Civil law courts, such as those in Germany, are more likely than common law courts to award

specific performance. Ordering specific performance means actually ordering a party to obey the contract, rather than merely ordering the party to pay money to compensate another party who has been harmed. As a result, it would seem that civil law courts would be less likely to say that this second factor was important to determining how serious a breach was.

*** **ADDITIONAL REFERENCE:** Chapter 10 (“Remedies”) contains further discussion of remedies courts may choose when parties fail to perform contracts properly, including specific performance in Section 10.7a.

Factor No. 3: The more the party failing to perform will suffer forfeiture or hardship if the breach is considered material, the more likely it is that substantial performance has occurred. The idea of this factor is to consider how much the party failing to perform will be harmed if his breach is considered material. If the breach is material, the non-breaching party generally will have the right to not perform his own duties, and to ask a court for remedies--in other words, the right to basically terminate the contract. If the party failing to perform has already performed to a significant extent, then that party will be more likely to suffer hardship if the contract is terminated.

For example, if a party to a one day service contract worked all but one half hour of the required eight hours in that day, the working party would suffer a great hardship if his breach was considered material and the employer had no contract duty to pay him. Of course, the worker could still ask a court for restitution of the reasonable value of his services.

Factor No. 4: The more likely it is that the party failing to perform will fix or “cure” his failure and perform fully, the more likely it is that substantial performance has occurred. This factor focuses on how likely a breaching party is to perform his duty fully in the future. Many jurisdictions say that the non-breaching party must allow the breaching party a reasonable opportunity to fix or “cure” his breach, if that is still possible in the circumstances. One part of this factor which courts may consider is whether the party failing to perform has stated that he will perform fully, and how credible any such statement is. For example, perhaps the parties have dealt with each other many times before. If the breaching party has always performed with no problems in the past, or has always fixed any problems adequately in the past, it might be more likely that that party will perform fully. But if the party has been unreliable in the past, then that party may be less likely to complete or “cure” performance. And in some cases, it may be impossible to fix a defective performance, such as where it is too late for further performance to be of any use. This factor may be less important in some cases, such as situations where it would be relatively easy for the non-breaching party to find someone else to finish performance. The possibility that a breaching party may cure his breach is discussed more fully in Section 9.6b, below.

Factor No. 5: The more the party failing to perform has followed standards of good faith and fair dealing, the more likely that

substantial performance has occurred. The standards of good faith and fair dealing have already been discussed in detail in other parts of this text, such as Chapter 8 (“Interpretation of Contracts”), Section 8.3j, and these standards will be discussed again in Section 9.5c below. These standards basically mean that a party to a contract should act honestly and not seek unfair advantage over another party (good faith), and should follow reasonable standards of fair conduct in the contract (fair dealing).

This fifth factor can be very important in helping courts decide whether breaches are material. In fact, it appears that many courts actually refuse to find substantial performance has occurred where a party’s failure to perform is “willful” or in bad faith, regardless of the other four factors above! It appears that these courts reach this result based on the “good faith” part of the standard above, and not on the objective standards of fair dealing. That is, these courts basically say that a party who fails to perform in good faith has not substantially performed: “no good faith = no substantial performance.” For example, if the evidence showed that a party failed to perform completely simply because he wanted to see how the other party would react--perhaps to see if he could take advantage of that party in future dealings--that would probably be a failure to follow standards of good faith. However, it appears that some of these jurisdictions do not follow this “no good faith = no substantial performance” rule in the situation where the breach is very minor. In other words, a willful or bad faith breach may not prevent substantial performance if that breach is very minor.

***** ADDITIONAL REFERENCE:** Chapter 7 (“Other Contract Formation Problems”), Section 7.4a and Chapter 8 (“Interpretation of Contracts”), Section 8.3j contain further discussion of the duty of good faith and fair dealing.

Courts generally look at all of the five factors above in deciding whether a breach is material. So no single factor will generally determine whether a breach is material, with the possible exception of the good faith part of the fifth factor. However, some factors may be more relevant or important than others in particular cases. In addition, in many cases, some factors will suggest that a breach is material, and other factors will suggest that a breach is minor. In those situations, courts do not simply add up factors to see which party wins! Instead, courts make their decisions based on which factors seem most important in the case they are considering.

The following Case Studies show how courts might apply these factors in two different situations. Case Study 201 is about a construction contract, which is a type of contract to which courts often apply the substantial performance rule.

***** CASE STUDY 201**

FACTS Samnang makes a contract with the New Day Construction Company in which New Day agrees to build Samnang a new house on a

large piece of land Samnang has recently bought. New Day agrees to follow a set of plans that Samnang provides, and Samnang agrees to pay a total of \$10,000 for all the labor and materials. The contract contains no express conditions.

After several months, New Day stops work and notifies Samnang that it has finished the job. It asks for the \$10,000 Samnang promised to pay under the parties' contract. But when Samnang goes to look at the house, he finds some problems. Specifically, New Day has failed to put railings on the balconies, and failed to attach an apsara decoration to the front of the second floor of the house, as the building plans required.

Samnang is very upset, and he refuses to pay New Day any money until New Day fixes the problems. New Day says it is sorry Samnang is not happy, but it has finished the house, and in any event all of its workers are now far away in a different province on another, much bigger construction job. Samnang still refuses to pay any money. New Day asks the court for help.

QUESTION OF LAW Has Samnang's duty to pay New Day for the construction of the house become due?

DECISION Yes. Samnang's duty to pay for the construction of the house has become due because New Day has fulfilled the implied-in-law condition precedent to Samnang's duty to pay, by substantially performing the construction work required by the contract.

Where one party's performance will require a substantial amount of time to complete but the other party's performance can occur almost instantaneously, courts generally say that the completion of the longer performance is an implied-in-law condition precedent to the duty of the other party to provide the shorter performance.

In this case, the construction contract between the parties said that New Day had a duty to build a house according to the plans Samnang supplied, and that Samnang had a duty to pay New Day \$10,000 for that construction. The contract had no express conditions. In this situation, a court would probably say that New Day's duty to construct the house was an implied-in-law condition precedent to Samnang's duty to pay the \$10,000, since the construction would take some time to perform but the payment could basically occur in a moment. So the important question in this case is whether the condition precedent to Samnang's duty to pay has been fulfilled.

Where contracts contain implied-in-law conditions, those conditions may be fulfilled by complete performance or substantial performance. In this case, New Day failed to complete the house according to the plans Samnang supplied, because the balcony railings and the apsara decoration were missing. So the court will find that New Day did not provide complete performance, and New Day breached the contract.

Next, the court will ask whether New Day provided substantial performance, which is possible despite New Day's breach. In order to determine whether a party provided substantial performance, many courts in the United States look at five factors: (1) how much benefit the other party received; (2) how well the other party can be compensated by money damages; (3) how much hardship or forfeiture the party failing to perform will suffer if the breach is considered material; (4) the likelihood that the party failing to perform will perform fully in the future; and (5) whether the party failing to perform has acted according to the standards of good faith and fair dealing.

In this case, it appears that Samnang has received almost all of the benefit he expected, since he has an entire new house except for some railings and an apsara decoration. It also appears that he could be adequately compensated for the breach by money damages. This is because it is probably fairly easy to calculate how much it would cost to have the work finished, and probably not hard to find someone to finish the work. In addition, it appears that New Day would suffer considerable hardship if the breach was treated as material and New Day did not receive compensation under the contract. This is because New Day performed a great deal of work--almost everything in the contract. On the other hand, it is not likely that New Day will finish the work here, since its workers are all far away on another job. But there is no evidence that New Day violated the standards of good faith, since there is no evidence that it acted dishonestly or sought unfair advantage. It is possible that New Day's failure to complete the work violated reasonable standards of fair conduct, since a reasonable builder might have made sure to finish the railings and the apsara. But it is unlikely that a court would find such a violation to be very important, since the failure was not very serious compared to the size of the rest of the construction job.

On the whole, based on the factors above, it seems likely that a court would find that New Day substantially performed this contract. The important factors in this case--including the great benefit to Samnang, the adequacy of money damages, and the great potential hardship to New Day--appear to indicate that substantial performance has occurred. So the implied-in-law condition precedent to Samnang's duty to pay was fulfilled, and Samnang's duty to pay became due. Of course, Samnang is entitled to a remedy for the damage he has suffered because of New Day's failure to perform completely.

CASE STUDY 202

FACTS Vanna is the president of a book publishing company. One day, she decides that there would be a good market for some comprehensive law books about important subjects. So she contacts several legal scholars to ask if they would consider writing such books for her company. One of the contracts she makes is with a prominent law professor named Emma. Emma and Vanna agree that Emma will write an authoritative text on contract law. The contract says that Emma is required to finish her final draft of the book

within one year of the contract date, and that Vanna's company will pay Emma \$10,000 for writing the book one month after Vanna receives the final draft.

Emma works on the book for about five months, and is about half way through her first draft, when she gets a telephone call from an executive at the Big Bear Beer Company. The executive tells Emma that she has won a big beer contest! Her prize is an all-expenses-paid, 4-month tour of the biggest nations on earth, including Russia, China, Canada and Brazil. Emma celebrates all night at the Heart of Blackness pub, and leaves within a week on her free tour. She leaves her book draft behind and never works on it again.

At the end of the year, Vanna visits Emma's house to ask about the law book. Vanna learns from a friend of Emma's that has Emma taken an attorney job representing indigenous peoples in the Brazilian rain forest, and that she is unlikely to work in Asia for several years. Vanna finds the first draft of the book Emma had agreed to write, but Vanna sees that it will require a lot of work before it might be ready for publication. Within a few weeks, Emma returns on a brief trip from Brazil and demands the contract price from Vanna, saying she has substantially performed the contract. Vanna refuses to pay. Emma asks the court for help.

QUESTION OF LAW Has Vanna's duty to pay for the contract law book become due?

DECISION Probably not. Vanna's duty to pay for the book has probably not become due because Emma has probably not substantially performed her promise to write the book.

Where a contract says that one party's performance will occur at an earlier time than the other party's performance, courts generally say that the earlier performance is an implied-in-law condition precedent to the duty of the other party to provide the later performance. In this case, Vanna and Emma agreed that Emma would write and supply the final draft of a contract law book within one year, and that Vanna's company would pay Emma \$10,000 for the book within one month after receiving the final draft. The contract had no express conditions. A court would probably say that Emma's duty to write the book was an implied-in-law condition precedent to Vanna's duty to pay the \$10,000, since the writing of the book was scheduled to occur earlier than the payment of the money. So the important question in this case is whether the condition precedent to Vanna's duty to pay has been fulfilled.

Where contracts contain implied-in-law conditions, those conditions may be fulfilled by complete performance or substantial performance. In this case, Emma failed to complete her work on the book. So she has not provided complete performance, and she has breached the contract.

Next, the court will ask whether Emma provided substantial performance, which is possible despite her breach. In order to determine whether a party provided substantial performance, many courts in the United States look at five factors: (1) how much benefit the non-breaching party received; (2) how well the non-breaching party can be compensated by money damages; (3) how much hardship or forfeiture the party failing to perform will suffer if the breach is considered material; (4) the likelihood that the party failing to perform will perform fully in the future; and (5) whether the party failing to perform has acted according to the standards of good faith and fair dealing.

In this case, Vanna received some benefit, since she did receive about half of a first draft of a contract law text. However, what Vanna received is not anything like what she reasonably expected to receive. She expected a complete final draft, not merely half of a first draft. In addition, it may be difficult for Vanna to be adequately compensated by money damages. This is because it may be difficult to measure how much she has been damaged by Emma's failure to perform. Vanna may be able to hire another scholar to complete the text--or the scholar may insist on starting over again. In addition, Vanna's company may have lost profits because, no matter what happens, it will not be able to start selling its contract law book as soon as it would have if Emma had completed the book on time. On the other hand, it appears that Emma will suffer some hardship or forfeiture if her breach is treated as material and she cannot recover money under the contract, since she did work on the text for about 5 months. It is not likely that she will complete her performance by finishing the text, since she has not made a new promise to do so, and since she is living far away and working at another busy job. This factor might be important in this situation, since Emma might be able to finish the book far more efficiently (and cheaply) than anyone else, because of all the special knowledge she has gained in working on the first draft. In addition, a court might well find that Emma had not acted according to the standards of good faith and fair dealing, since she basically abandoned her contract obligations in order to have fun on a free trip around the world. A court might find that this behavior was dishonest, or at least very unfair to Vanna's company. It might also violate reasonable standards of fair dealing, since a reasonable person would probably not abandon an important contract in that way.

On the whole, based on the factors above, it seems likely that a court would find that Emma did not substantially perform this contract, and that her breach was material. The important factors in this case--including the inadequacy of what Vanna received, the potential problems with money damages, and Emma's apparent lack of good faith--suggest that substantial performance has not occurred. So the implied-in-law condition precedent to Vanna's duty to pay probably was not fulfilled, and Vanna's duty to pay probably did not become due. Therefore, Vanna has no duty to pay Emma under the contract. Of course, Emma could ask the court for restitution of the reasonable value of what Vanna did receive. However, in these circumstances

Emma might have trouble showing that there was much unjust enrichment of Vanna, especially because of how much it will cost Vanna to have the book finished, the profits Vanna has lost because of Emma's breach, and Emma's apparent lack of good faith. In addition, since Emma has breached the contract, Vanna could file a breach of contract lawsuit against Emma and ask for a remedy for the damage caused to her.

One potential problem in the performance of contracts is whether substantial performance can exist even though there is some delay in the performance. In other words, if a party's performance occurs later than the contract expressly requires, courts must decide whether the performance is substantial (and there is only a minor breach), or whether substantial performance has not occurred (and there is a material breach). In general, in resolving this problem, courts will apply factors such as the five discussed above, as courts would with any other failure to perform the contract completely as required.

However, there are also some special rules to consider where the failure to perform is actually a delay in performance. First, it appears that courts generally assume that a delay in performance is not a material breach--and that substantial performance is still possible--unless that delay significantly deprives the other party of the benefit of the contract. In general, a delay may have such a serious effect where:

- (1) performance by a certain time is an express condition in the contract;
- (2) the contract states that "time is of the essence;"
- OR (3) other circumstances indicate that the time for performance really is a crucial part of the contract.

First, the parties can actually make time an express condition in the contract. For example, the contract may say: "Saray will have no duty to pay for the goods unless they are delivered no later than November 1." In that situation, only complete performance (with no delay) will fulfill the express condition, and any delay will be a breach that causes the condition to fail. This has already been discussed.

Second, if the parties have actually stated in the contract that "time is of the essence," then courts generally say that even a short delay can create a material breach and prevent substantial performance from occurring. However, it appears that many courts say that a very short delay is a not a material breach, despite a "time is of the essence" clause, unless other circumstances indicate that such a very short delay really is very important to the agreement.

Third, even if the contract itself does not say that time is of the essence, courts might imply that time is crucial based on the particular circumstances

of the case. For example, if someone has a contract to repair a boat for a boat racing team no later than the day of the big races during the Water Festival, completion of the repair work even one day late might be a material breach and prevent substantial performance. Of course, in that situation, it seems likely that the boat repairer could recover some amount of restitution.

However, in situations other than the three described above, most courts are likely to find that some delay in performance does not prevent substantial performance from occurring, and that such a delay is only a minor breach. In particular, it appears that minor delays in performance of land sale contracts are unlikely to prevent substantial performance. In those situations, the substantial performance would fulfill an implied-in-law condition, and any duty that depended on that condition would become due for performance. Of course, even where a delay is only a minor breach, the party harmed may ask a court for a remedy for the damage caused by the minor breach. In addition, in any contract, there is some point in time at which a delay will become a material breach--a party cannot delay indefinitely and expect a court to find that he has substantially performed!

Many jurisdictions also have special rules about the rights of the buyer and the seller when there has been some failure to perform fully a sale of goods contract. In particular, these rules describe what performance by the seller will cause the buyer's duty to pay to become due. In this text, some of these rules will be discussed in detail in Section 9.5b.

***** WHY IS THIS IMPORTANT?** Why do courts say that substantial performance can fulfill an implied-in-law condition and cause the duty that depends on that condition to become due?

One reason for the substantial performance rule is fairness. As noted in Section 9.3c above, it appears that courts feel the rule achieves justice because the party whose performance depends on the condition has received the substantial benefit of his bargain--and the other party has provided that benefit. It seems that when courts impose conditions that the specific parties may never have intended--implied-in-law conditions--the courts are reluctant to also require that the conditions be completely fulfilled before the duty that depends on them becomes due! Courts may feel this could result in unfairness to the party who is required to complete such a performance, where the party may have never expected to be required to perform so exactly in order to receive any performance in return. The five factors discussed above are one way a court could try to make sure that a party has actually received the substantial benefit of his bargain, and that it is therefore fair to require him to provide his performance in return.

In addition, if courts required complete and exact performance of every contract duty that was a condition to another party's duty, it could lead to great inefficiencies in the performance of contracts and the operation of the economy. It is often much more efficient, where there is only a minor breach,

to say that the party harmed does not owe the full consideration described in the contract, rather than to require the other party to perform completely or else receive nothing under the contract. This was probably the situation in Case Study 201, where it would probably have been much more efficient for Samnang to simply hire someone else to finish the minor work on his house, rather than make the busy New Day Company bring its workers all the way back from the provinces for so little work if it wished to be paid under the contract.

In fact, to require complete performance of all duties in all cases might even discourage some parties from making contracts at all. That is because the parties would be taking a big risk of forfeiture in the event that they did not quite complete the contract exactly. As everyone knows, it is difficult to complete large projects without making any errors at all. In general, the law wants to compensate fairly those who are harmed by contract breaches. But it does not wish to impede unnecessarily the operation of the market economy. So the law tries to provide fair compensation to those harmed by contract breaches, without taking punitive or extreme amounts from those who breach the contracts.

*** **ADDITIONAL REFERENCE:** Chapter 10 (“Remedies”) contains further discussion of what courts do when parties fail to perform contracts properly.

9.4d Anticipatory Repudiation by the Party Whose Duty Depends on a Condition May Excuse the Condition

As noted above in Section 9.4, conditions are excused in certain situations where the law basically says it would be unfair or impractical to expect them to be fulfilled. If a condition is excused, it need not be fulfilled in order for the duty which depends on it to become due. In these situations, the law says that it is fair to expect the party with the duty that depends on the condition to perform that duty--even though the condition has not been fulfilled! In fact, that duty becomes due as if the condition had been fulfilled.

One of the most important reasons conditions may be excused is anticipatory repudiation by the party whose duty depends on the condition.

*** **DEFINITION:** An **anticipatory repudiation** is generally considered to be a statement by one contract party to another contract party that clearly shows that the first party does not intend to perform a contract duty in the future when that performance is due.

Basically, an anticipatory repudiation occurs where a party to an executory contract makes a statement to another party that clearly shows he will not perform a duty under the contract when that performance becomes due. Such a repudiation can occur expressly through words, or impliedly through conduct, as long as the statement clearly shows a party

will not perform. When anticipatory repudiation occurs, it excuses any conditions on which the repudiating party's duty depends, and that party's duty will become due for performance even though the conditions have not been fulfilled.

For example, suppose Sann makes a contract to sell two tons of peanuts to Chamrath, with delivery to occur in two weeks. Sann's delivery of the peanuts will be an implied-in-law condition concurrent to Chamrath's duty to pay for the peanuts. If Chamrath contacts Sann one week before delivery is to occur and says "I am sorry but I will not honor our peanut contract," then Chamrath has made an anticipatory repudiation. In that situation, Chamrath's statement excuses the condition concurrent to his duty to pay--Sann's delivery of the peanuts--and Chamrath's duty to pay will become due even though the condition has not been fulfilled.

Anticipatory repudiation also generally gives the other party the right to treat the repudiation as a material breach, and immediately ask a court for a remedy such as damages, among other options. So in the example above, Sann would have the option to treat Chamrath's repudiation as a material breach and ask the court for a remedy immediately. This will be further discussed later in this Section and in Section 9.6c, below.

An important requirement for anticipatory repudiation to exist is that the statement of repudiation must be clear. In other words, it must be clear from the words or conduct of the repudiating party that that party does not intend to perform his duty under the contract. For instance, in the peanut example above, Chamrath's statement that he would not honor his contract was clear. It left no doubt about what he intended to do. However, Chamrath's intent would not have been so clear--and there would have been no anticipatory repudiation--if he had made statements such as:

- "Business is not going well and I am not sure about our contract;"
- "This contract may be difficult for me to perform;"
- "I don't know when I will be able to pay you for the peanuts;"

or even • "I think we should cancel this contract."

Although the statements above show doubt about whether performance of a contract duty will occur or should occur, they do not clearly show an intent not to perform. So they are not anticipatory repudiations.

The effects of an anticipatory repudiation of a contract duty vary depending on what the non-repudiating party wishes to do. Of course, as noted above, one important effect is that such a repudiation excuses any condition on which the duty depends, and causes that duty to become due for performance even though the condition has not occurred. In fact, this basically means that the non-repudiating party need not go forward with his own

performance, if that performance is a condition to the repudiating party's performance.

In addition, as noted above, such a repudiation also generally gives the non-repudiating party the right to treat the repudiation as a breach of the contract and immediately ask a court for remedies such as money damages. This is true even though the repudiating party's duty might not normally be due until the non-repudiating party has performed, because the repudiation has actually excused the condition that is the non-repudiating party's performance. In fact, if the non-repudiating party chooses to treat the repudiation as a material breach, then that party's duty to perform his own duty will actually be discharged. This important effect will be discussed further in Section 9.6c, below.

It appears that some courts have said that if the non-repudiating party has already fully performed his own duties under the contract, then that party must wait for the time at which the repudiating party's duty would normally be due to bring a lawsuit for breach of contract. Of course, that would really mean that innocent party would be forced to wait until the repudiating party actually breached the contract by failing to perform when that repudiating party's duty to perform would normally have been due. So in that situation, the repudiating party would have the opportunity to change his mind and perform, up until the time his performance was due. However, it is not clear how widespread this exception is. For example, the Uniform Commercial Code in the United States says the non-repudiating party may treat the repudiation as a breach and bring a lawsuit immediately in all cases involving sale of goods contracts.

In any case, the non-repudiating party generally has the following four options when an anticipatory repudiation occurs:

- (1) stop his own performance, treat the anticipatory repudiation as a material breach and ask a court for remedies such as money damages immediately;
 - (2) stop his own performance and wait until the repudiating party's duty would normally be due to ask a court for remedies;
 - (3) stop his own performance, treat the repudiation as an offer to rescind the contract and simply treat the contract as discharged (ended);
- OR
- (4) urge the repudiating party to perform and wait to see if he does perform before bringing any lawsuit.

If a non-repudiating party treats an anticipatory repudiation as a breach and asks a court for remedies because of the repudiation, that party must show the court that he could have performed the contract if the other party had not repudiated. In other words, the non-repudiating party

must show that he was willing and able to perform his duties under the contract at the time they were due.

For instance, in the peanut example above, if Sann decided to bring a lawsuit against Chamrath for breach of contract because of Chamrath's anticipatory repudiation, Sann would have to show the court that Sann could have delivered the peanuts according to the contract in order to get a remedy on the basis of the contract. If Sann could not show this, he would not be able to recover. For example, if Sann actually could not have gotten any peanuts to sell and could not have performed the contract even if Chamrath had not repudiated, then Sann could not recover in a lawsuit against Chamrath.

Of course, if Sann received the repudiation from Chamrath and later made a different contract to sell the peanuts to Sathya, that would not prevent Sann from recovering for the breach. The reason is that Sann's new contract in that situation would actually be an effort to avoid (or "mitigate") the damages he would suffer because of Chamrath's breach. In fact, courts generally say that parties cannot recover damages that they could reasonably have avoided.

***** ADDITIONAL REFERENCE:** Chapter 10 ("Remedies"), Section 10.6c contains further discussion of the important rule that parties to contracts cannot recover for damages that they could reasonably have avoided.

CASE STUDY 203

FACTS Bayon Airlines decided that it needed a new airplane to meet the growing demands of its passengers, who wanted to fly all over Cambodia all the time. So Bayon contacted the Blue Sky Aircraft Corporation and ordered a new plane. The parties signed a contract stating that Bayon would pay \$3,000,000 to Blue Sky three months after the contract was signed, and that Blue Sky would deliver the plane to Bayon within 10 days after receipt of the money.

Unfortunately, several weeks after the parties signed their contract, Blue Sky sent Bayon an electronic mail message stating that it did not think it would be able to fill Bayon's order for the plane, because there might not be any of the right kind of plane available until the following year! The president of Bayon was furious, and she sent an e-mail to the president of Blue Sky demanding to know whether it would deliver the plane or not. One week later, Blue Sky notified Bayon that it would not deliver the type of plane Bayon had ordered. However, Blue Sky said it had several of its larger \$5,000,000 planes available, and it would be happy to sell Bayon one of those.

The president of Bayon is not sure what to do. She does not need a \$5,000,000 plane. She asks her lawyer what the legal status of the contract is, and what her options are.

QUESTION OF LAW What is the legal status of the contract between Blue Sky and Bayon, and what options does Bayon have?

DECISION Blue Sky has made an anticipatory repudiation of this contract. When the repudiation occurred, the condition on which Blue Sky's duty to deliver the plane depended--Bayon's payment of \$3,000,000--was excused by Blue Sky's repudiation. Bayon now has several options, including: stopping its own performance, treating the repudiation as a material breach and asking a court for a remedy immediately; or stopping its performance, treating the repudiation as an offer to rescind and treating the contract as discharged.

When one party makes an anticipatory repudiation of a contract duty, that repudiation excuses any conditions on which that duty depended, and the duty will become due for performance even though the conditions have not been fulfilled. An anticipatory repudiation occurs where one party makes a clear statement that he will not perform according to the contract in the future when his performance is due. Where one party repudiates, the other party has several options, including stopping his own performance, treating the repudiation as a breach and asking a court for an appropriate remedy; or stopping his own performance, treating the repudiation as an offer to rescind and treating the contract as discharged.

In this case, Bayon's duty to pay \$3,000,000 was probably an implied-in-law condition precedent to Blue Sky's duty to deliver the plane, since the contract said that the payment was to occur first. However, Blue Sky made two statements to Bayon long before either of the performances was due. First, Bayon said that it did not think it would be able to deliver the plane. This statement was not an anticipatory repudiation, because it merely showed doubt; it did not clearly state that Blue Sky would not perform. However, Blue Sky's next statement was that it would not deliver the plane. This statement was clear, and it was an anticipatory repudiation. Blue Sky's anticipatory repudiation means that its duty to deliver the plane will become due even though the condition on which that duty depended--Bayon's payment of \$3,000,000--has not been fulfilled. This is because Blue Sky's repudiation excused the condition.

The repudiation means that Bayon has several options. First, Bayon may stop its own performance, treat Blue Sky's repudiation as a material breach of the contract, and immediately ask a court for a remedy. Second, Bayon may stop its own performance and wait until Blue Sky's duty would normally be due to ask a court for remedies, which in this case would be no later than three months and ten days from the contract date. Third, Bayon may stop its own performance, treat the repudiation as an offer to rescind the contract, and treat the contract as discharged. Fourth, Bayon may choose to urge Blue Sky to perform and wait to see if Blue Sky performs before bringing any lawsuit. In this case, it seems unlikely that Blue Sky will perform. Bayon might be wise to simply treat the contract as discharged. But if Bayon

had damages that would make a lawsuit worthwhile, it could treat the repudiation as a material breach, and immediately ask a court for a remedy such as money damages to compensate Bayon for Blue Sky's breach. If Bayon does wish to recover in a lawsuit, it should take reasonable efforts to avoid unnecessary damages, probably by getting a comparable plane from another aircraft supplier.

A party who repudiates a contract duty may retract his repudiation up until the time his performance would normally be due under the contract unless the non-repudiating party has:

- (1) accepted the repudiation; or
- (2) detrimentally relied on the repudiation.

A party has accepted a repudiation if that party has somehow indicated that he considers the repudiation final and does not wish to proceed with the contract. For example, filing a lawsuit for breach of contract would probably show that a party considered a repudiation final.

A party has detrimentally relied on the repudiation if he has somehow changed his position in reliance on the repudiation and it would be unfair to the non-repudiating party to allow the repudiating party to retract. Detrimental reliance was discussed in detail in Chapter 7 ("Other Contract Formation Problems"), Section 7.8, which explained promissory estoppel. In this kind of situation, it appears that courts basically treat the statement of repudiation as a promise not to perform; if the other party detrimentally relies on that statement, then the non-repudiating party will be compensated for the effects of the statement as justice requires, as with promissory estoppel.

For instance, in the peanut example above, Chamrath could actually retract his repudiation and go forward according to the contract unless Sann had accepted or detrimentally relied on the repudiation. So if Sann received the repudiation and did nothing, and Chamrath sent a note soon afterwards saying "I retract, and I will perform our contract," then the repudiation would be retracted and the contract would be as it was before. But if Sann responded to the repudiation by saying "fine, the contract is canceled," Sann would have accepted the repudiation, and Chamrath could not retract it. Or if Chamrath did make a new contract to sell the same peanuts to Sathya in order to avoid damages, Sann would have detrimentally relied on the repudiation by making a new obligation to do something else with the peanuts. In that situation, it might be unfair to allow Chamrath to retract his repudiation and enforce the contract against Sann, because Sann might not be able to meet both obligations. So Chamrath might not be permitted to retract.

***** WHY IS THIS IMPORTANT?** Why does an anticipatory repudiation of a contract duty excuse any conditions on which that duty depends, and give the non-repudiating party the option to treat the repudiation as a breach and ask a court for a remedy immediately?

An anticipatory repudiation excuses conditions, and gives the non-repudiating party the option to seek a remedy immediately, because it could be very unfair to the non-repudiating party to force him to fulfill a condition when he knows that the other party will not perform. In addition to causing the non-repudiating party unnecessary trouble, it might be difficult, as a practical matter, to recover the consideration the non-repudiating party provided. This is because it might require a court order, which could be difficult and time-consuming to get and to enforce. In addition, it might cause the non-repudiating party damage he could not recover in court, because it might cause him damage he could reasonably have avoided! Damages might increase because the non-repudiating party did not have the use of his money or other consideration during the time it was in the repudiating party's possession. It might also interfere with the non-repudiating party's ability to find another party with whom to contract, which is a common way to avoid unnecessary damages. And of course, it could waste the court's (or arbitrator's) time and resources, by creating a problem that need not have been created: how to get the non-repudiating party's consideration back to him. In fact, some of the options the non-repudiating party has--such as simply treating the contract as discharged--may not involve courts or arbitrators at all.

For example, in Case Study 203, if Bayon was forced to pay Blue Sky the \$3,000,000 even though it knew Blue Sky would not perform, it would be a waste of Blue Sky's time and money. The damages would grow larger, since Bayon would not have the use of the \$3,000,000 (and could not earn interest or other income on the money) for the time Blue Sky had the money. Bayon might have difficulty getting the money back. If Bayon had to pay the \$3,000,000 to Blue Sky on schedule, it might also interfere with Bayon's ability to find another aircraft manufacturer to sell it a plane. Finally, it might waste some of the courts' time if they had to resolve a matter--how to get Bayon's money back to Bayon--that need never have come before the courts. Basically, forcing Bayon to go through with this contract could create legal and economic waste.

9.4e The Prospective Inability or Unwillingness to Perform of the Party Whose Duty Depends on a Condition May Excuse the Condition

Sometimes it appears that a party will not be able or willing to perform a contract duty, even if there has been no clear statement creating an anticipatory repudiation. When circumstances provide a reason to believe that it is unlikely that a party will be able or willing to perform a contract duty, that party may have a prospective inability or unwillingness to perform. If that happens, any condition on which that duty depends will be excused.

***** DEFINITION:** A **prospective inability or unwillingness to perform** exists where circumstances provide a reason to believe that it is likely that a party will be unable or unwilling to perform a contract duty.

Where there is a prospective inability or unwillingness to perform a contract duty, the inability or unwillingness excuses any conditions on which that duty depends. So the duty to perform becomes due for performance even though the condition has not been fulfilled.

For example, suppose Chhorn and Leng agree that Chhorn will buy Leng's bicycle, and that delivery will occur in three days. If Leng sells his bicycle to Sokha on the day after the contract is made, that act creates a prospective inability to perform the contract with Chhorn. That is because it creates a reason to believe that it is unlikely that Leng will be able to perform the contract. This is true even though Leng has made no statement to Chhorn, and even though it is not certain that Leng will be unable to perform, since he could possibly buy the bicycle back from Sokha before his duty to supply the bicycle to Chhorn is due. In this situation, where Chhorn's payment for the bicycle is an implied-in-law condition concurrent to Leng's duty to provide the bicycle to Chhorn, the condition is excused by Leng's prospective inability to perform. So Chhorn is no longer required to provide his own performance in order to cause Leng's duty to provide the bicycle to become due.

One of the most important things to understand about prospective inability or unwillingness to perform is how it differs from anticipatory repudiation. This appears to be a difficult issue, about which even courts and legal authorities do not always agree! It seems that the most basic difference is that an anticipatory repudiation is a clear statement by one party that he will not perform, whereas a prospective inability or unwillingness to perform results from any circumstances that create a reason to believe that it is unlikely that a party will perform.

Prospective inability or unwillingness to perform is judged by an objective, "reasonable person" standard. That means that it exists where a reasonable person would believe that it is unlikely the other party will perform. So in order for prospective inability or unwillingness to exist, no statement from the other party is required, and it need not be clear that the other party will not perform.

In fact, it appears that the circumstances showing prospective inability or unwillingness to perform are usually something other than statements by the party who may not perform. One example would be the bicycle example above, where Leng made no statement to Chhorn, but Chhorn learned of circumstances that showed it was unlikely Leng would perform. Another example might be the situation where a money lender learns information about a debtor that shows it is unlikely that the debtor will be able to repay a debt--even though there has been no statement from the debtor to the lender. In these situations, the circumstances surrounding the contract might show prospective inability or unwillingness of one party to perform a contract duty. If the circumstances showed that, it would excuse any condition on which the duty depended.

However, it also appears that prospective inability or unwillingness to perform may result from statements by a party that give reason to believe that it is unlikely that he will perform. Such statements would not need to be strong or clear enough to be anticipatory repudiations. But they would probably have to be stronger than the four examples in Section 9.4d of statements that would be too weak to be anticipatory repudiations, such as “this contract may be difficult for me to perform.” In other words, the examples in Section 9.4d would probably be too weak to create anticipatory repudiations and too weak to show prospective inability or unwillingness to perform.

In order to create a prospective inability or unwillingness to perform through statements, it would seem that a party would have to make statements that were as strong as “I doubt very much that I can perform,” or “it is unlikely I can perform.” Obviously, the main difference is in how clear it is that the party making the statement will not perform. The following chart tries to illustrate this distinction.

Illustration: Statements Creating Anticipatory Repudiation vs. Statements Showing Prospective Inability or Unwillingness to Perform			
What Statement Basically Says about Performance:			
Clearly Will Not Occur	→	Unlikely to Occur	→ May Not Occur
Anticipatory Repudiation		Prospective Inability or Unwillingness to Perform	Probably neither One
“I will not perform.”		“I doubt very much that I will perform.”	“I have some doubt about whether I will perform.”
“I cannot perform.”		“There is almost no way I can perform.”	“It will be difficult for me to perform.”
“I have no intention of delivering the goods.”		“It’s unlikely that I will deliver the goods.”	“I am not sure about delivering the goods.”

One important effect of prospective inability or unwillingness to perform a contract duty is that it excuses any condition on which that duty may depend, as noted above. This means that the condition need not be fulfilled in order for the performance of the duty which depends on it to become due.

In addition, if that condition is actually the performance of a party, the other party may stop his own performance and wait to see if the party whose performance is uncertain performs or not. And it appears that some jurisdictions actually say that the party who may be harmed by a prospective inability or unwillingness to perform may not only stop his performance,

but may also treat the inability or unwillingness as a material breach and sue for breach of contract! However, it appears that other courts say the party who may be harmed must wait for the time the uncertain performance is due to bring such a lawsuit. That might be a better rule in a situation where it is not clear whether a party will perform or not. If a party could terminate a contract merely because he had reason to believe that the other party's performance was unlikely, it might result in the cancellation of contracts--and in costly litigation--in situations where those events were not necessary.

Another effect of prospective inability or unwillingness under laws in many jurisdictions (such as the Uniform Commercial Code in the United States) is that the party who is concerned about the other party's performance may request adequate assurances from the party whose performance appears unlikely. In fact, laws like the Uniform Commercial Code allow a party to request such assurances where there is reason to doubt whether the performance will occur--which would occur in far more situations than those where there is a reason to believe performance is unlikely. It appears that not all assurances are "adequate," and that an unconvincing assurance would not meet this standard. For example, a mere statement by a party that he is willing and able to pay money may not be enough. Some proof of assets (such as a bank statement) might be required.

Where a party has a right to request assurances of performance and that party does request them, a failure by the other party to give adequate assurances may actually convert the prospective inability or unwillingness into an anticipatory repudiation! This is because some laws say that the party whose performance seems unlikely has a limited time to provide adequate assurances before his failure actually becomes a repudiation. For example, under the Uniform Commercial Code, these assurances must be given within a reasonable time, which is not to be longer than 30 days. In fact, in some circumstances, a reasonable time might be much less than 30 days.

For instance, in the bicycle sale example above, when Chhorn learned that Leng had sold the bicycle to someone else, many jurisdictions would say Chhorn had the right to request adequate assurances that Leng would perform the contract. If Leng failed to provide such assurances within a reasonable time--which in this situation might be as short as a few hours--then Leng's prospective inability to perform would actually become an anticipatory repudiation! In that case, Chhorn would have all the options discussed in Section 9.4d above, including the right to treat the repudiation as a material breach and immediately bring a breach of contract lawsuit.

CASE STUDY 204

FACTS A real estate investment company named Chantou and Associates agrees to buy a large piece of land in the center of Stung Treng from Sophal. The parties sign a contract on October 2 in which they agree that the price

will be 20,000,000,000 riels, and that the parties will exchange the land title and the money on December 1.

In late October, Sophal hears rumors that Chantou's company has been having serious financial trouble. She calls Chantou on the telephone, but learns that Chantou's phone has been turned off for non-payment. Then she hears that Chantou's company has filed for bankruptcy protection! Sophal becomes very worried about whether Chantou's company will honor the contract. In fact, Sophal is especially anxious to know because she has found another potential buyer named the Queen Group. The Queen Group is also willing to pay 20,000,000,000 riels for the land, but only if it can obtain title no later than November 21--10 days earlier than Sophal has agreed to transfer the land to Chantou's company.

Sophal writes a letter to Chantou's company demanding to know whether it will perform its duties under the contract. The letter notes that Sophal has another potential buyer who will agree to buy the land if it can get title no later than November 21. On November 1, Sophal has the letter hand delivered to Chantou's last known business and home addresses. Sophal never receives a reply to her letter. On November 15, Sophal delivers another letter to Chantou stating that she is treating Chantou's failure to respond as an anticipatory repudiation. On November 17, Sophal agrees to sell the land to the Queen Group, which she does. On December 15, Chantou's lawyer calls Sophal to say that Sophal has breached the contract with Chantou's company!

QUESTION OF LAW Did Sophal have any obligation to transfer the land in this contract to Chantou's company on December 1?

DECISION No. Sophal had no obligation to perform under this contract because the circumstances in this case showed a prospective inability to perform, followed by an anticipatory repudiation by Chantou's company.

Where circumstances give reason to believe that a party to a contract is unlikely to perform a contract duty, there is a prospective inability or unwillingness to perform, and any condition on which that duty depends will be excused. And in many jurisdictions, if the party who may be harmed by such non-performance requests adequate assurances, but fails to receive them, then there is an anticipatory repudiation.

In this case, Sophal's duty to transfer the land title on December 1 was an implied-in-law condition concurrent to Chantou's duty to pay the 20,000,000,000 riels, since both performances could occur at roughly the same time. However, Sophal had reason to doubt whether Chantou's company would perform the contract--particularly because of the apparent bankruptcy of Chantou's company. In fact, these circumstances gave Sophal reason to believe that it was unlikely that Chantou's company would actually perform the contract with Sophal. So there was a prospective inability to perform. This excused the condition to Chantou's duty to pay, and meant that Sophal

was not required to transfer the land to Chantou in order for Chantou's duty to pay to become due.

However, in this case, Sophal did not wish to wait to see if Chantou really would perform. She had another potential buyer for the land--the Queen Group--which was ready to pay the same price, as long as it could get the land title no later than November 21. Of course, this date was earlier than December 1, the performance date of the contract between Sophal and Chantou.

So Sophal decided to request adequate assurances that Chantou would perform her contract duties. Sophal requested those assurances on November 1, but she received no reply from Chantou within a reasonable time. A reasonable time would probably be less than the 16 days Sophal waited, because of the urgent nature of the other potential contract with the Queen Group.

In fact, Chantou's failure to give adequate assurances converted the prospective inability to perform into an anticipatory repudiation, and gave Sophal all the options explained in Section 9.4d, above. One option Sophal had was the option to treat the repudiation as an offer to rescind, and treat the contract as discharged. This may be what Sophal did here, since she made a new contract with the Queen Group, but did not file a lawsuit against Chantou's company for any remedy. However, if Sophal did wish to bring a breach of contract action to get a remedy for any damage caused by Chantou's breach, Sophal would be entitled to do so. Of course, Sophal has done such a good job at avoiding damage--by selling the land immediately to another buyer at the same price--that she may not have suffered much damage.

***** WHY IS THIS IMPORTANT?** Why do laws in some jurisdictions say that parties may seek adequate assurances where there is a prospective inability or unwillingness to perform, and that failure to receive such assurances may actually convert that apparent inability or unwillingness into an anticipatory repudiation?

The reason laws in some jurisdictions provide this mechanism appears to be to give a party who might be harmed by such a prospective inability or unwillingness more options, and more power to protect his interests. Basically, this mechanism gives parties in such uncertain situations the power to find out more definitely whether the other party actually will perform or not! If the other party gives adequate assurances, then the first party has at least some more confidence that the contract will be performed. If the other party fails to provide such assurances, then there is a repudiation. In that case, the first party has many options to protect himself, including treating the repudiation as a material breach and immediately asking a court for remedies, as discussed in Section 9.4d. So a party in this situation need not take the risk of providing his own performance without knowing if he will receive anything in return, or the risk of waiting for the other party to actually breach before

bringing a lawsuit for breach of the contract. Providing this option promotes better clarity in the performance of contracts.

In addition, this option appears to promote economic efficiency. That is because it provides parties who fear that another party will not perform with a better way to avoid damage. For example, it could give such parties more confidence that they can make another contract to substitute for the one that is unlikely to be performed. The sooner parties get this knowledge, the better they can avoid unnecessary damage.

As with anticipatory repudiation, a party who is prospectively unable or unwilling to perform may be able to fix or “retract” his inability or unwillingness to perform. In other words, if the party manages to fix whatever problem led to the prospective inability or unwillingness to perform, then he may be able to reinstate the condition and continue with the contract. In order for that to occur, the party's new ability or willingness must somehow be communicated to the other party. If that occurs, then any conditions on which the retracting party's duties depend will not be excused, and the other party must resume his performance. However, as with anticipatory repudiation, if the party whose performance is not in doubt has detrimentally relied on the prospective inability or unwillingness in a substantial way, then the prospective inability or unwillingness cannot be fixed. If the party only relied in a minor way, such as by merely stopping preparations for his own performance, that party might be given a reasonable amount of additional time to fulfill the condition.

For example, in Case Study 204 above, Chantou's company might have been able to continue with the land sale contract if it could somehow have overcome its prospective inability to perform and that fact was communicated to Sophal. This might have occurred if Chantou was having some financial difficulties, but the rumors about bankruptcy were not true, and she was able to find loans to meet her company's obligations. However, once Sophal had detrimentally relied on the prospective inability--in this case by failing to receive the adequate assurances she requested and making the new contract with the Queen Group--Chantou's company would not be able to overcome its prospective inability and continue with the contract. By contrast, if Sophal's reliance was only that she did not prepare the land to be transferred according to the contract, Chantou might still be able to continue with the contract. In that case, Sophal might be given the additional time required in order to perform her contract duties, and to fulfill the condition concurrent to Chantou's duties.

The following chart compares some of the important aspects of anticipatory repudiation and prospective inability or unwillingness to perform.

Illustration:	Anticipatory Repudiation vs. Prospective Inability or Unwillingness to Perform	
	Anticipatory Repudiation	Prospective Inability or Unwillingness to Perform
1. What is it?	A <u>clear statement</u> by a party that he will not perform a contract duty	Situation where <u>circumstances</u> give <u>reason to believe</u> that it is <u>unlikely</u> a party will perform
2. How certain must it be that party will not perform?"	A <u>clear</u> statement is required	It must appear <u>unlikely</u> to a reasonable person that the party will perform
3. What is the legal effect?	Conditions excused; party harmed may stop his own performance, treat as breach and sue immediately, or choose other options	Conditions excused; other party may stop his own performance; some courts allow lawsuit for contract breach immediately
4. Is retraction or reinstatement of contract possible?	Yes, unless other party has accepted repudiation or detrimentally relied	Yes, unless other party has detrimentally relied
5. What are the main differences?	(a) Must be <u>clear statement</u> that repudiating party <u>does not intend</u> to perform (b) Excuses conditions <u>and</u> allows immediate lawsuit for breach, among other options	(a) <u>Circumstances</u> provide <u>reason to believe it is unlikely</u> that party will perform (b) Excuses conditions (some courts allow immediate lawsuit for breach)

9.4f The Failure or Occurrence of a Prior Condition May Excuse a Condition

Sometimes a contract duty depends on one condition, and the occurrence of that condition actually depends on the occurrence of another condition! In that situation, if the earlier condition does not occur, then the later condition might be excused, and the duty which depends on that later condition might become due for performance--even though the later condition has not occurred.

For example, suppose a banana seller agrees to sell “the 1,000 of Seller’s bananas that Buyer chooses” to a certain banana buyer. Courts would say that each party’s duty to perform (provide bananas or money) would be subject to the implied-in-law condition concurrent that the other party perform (provide bananas or money), since both of those performances could occur roughly simultaneously. However, in this case, the banana seller’s duty

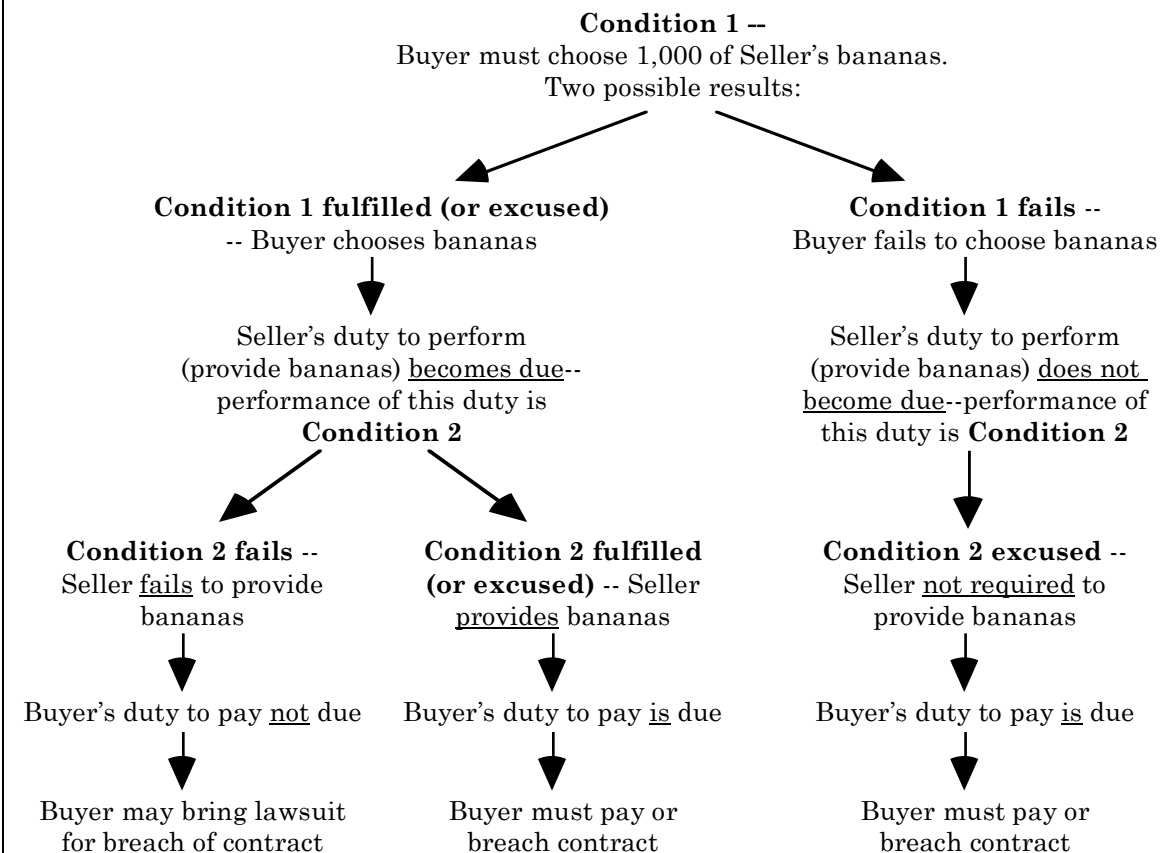
to perform would also be subject to an implied-in-fact condition precedent: the buyer's actually choosing the particular 1,000 bananas he wanted! So if the buyer failed to select those 1,000 bananas, that implied-in-fact condition would not occur. In that case, the condition concurrent that was the banana seller's performance would be excused--since he could not provide bananas of the buyer's choice if he did not know what that choice was. So the banana buyer's duty to perform would become due even though the condition concurrent on which it depended had not been fulfilled. The buyer would be required to perform. If the buyer did perform--and selected the bananas--then the seller would also have to perform, or breach the contract. But if the buyer did not perform, then the buyer would breach the contract.

There might be a similar result if the occurrence of one condition actually depended on the non-occurrence of a different condition subsequent. In that situation, the occurrence of the condition subsequent would actually terminate the duty of performance that depended on it. If that performance was also a condition to some other duty, then that condition would be excused, and the other duty would become due for performance. However, for ease of discussion, this Section will focus on the failure of conditions precedent and concurrent.

The situation where a condition may be excused by failure of a prior condition to occur is illustrated in the chart below.



Illustration: Example of How a Condition May Be Excused by Failure of a Prior Condition to Occur



CASE STUDY 205

FACTS In March, Sokhun and Vitah make a construction contract under which Vitah agrees to build four new homes on a large piece of property Sokhun owns. The property is in a very low-lying area. Under the contract, construction is to begin in May. The contract also says that the new homes will be “built on specific sites to be designated by Sokhun.”

Vitah has trouble getting Sokhun to tell him the exact sites on which the homes are to be built. Finally, August arrives, and Sokhun has still not designated the sites on which the homes are to be built. Meanwhile, rainy season has also arrived, and Sokhun's land is so badly flooded that construction cannot begin until the end of the year! Vitah tells Sokhun that his construction crews will not be available at the end of the year, and that he is suing Sokhun for breach of contract. Sokhun says he could not have breached the contract, because his duty to pay was subject to the condition precedent that Vitah build the homes, and Vitah never did that.

QUESTION OF LAW Has Sokhun's duty to pay become due?

DECISION Yes. The implied-in-law condition precedent to Sokhun's duty to pay--that Vitah build the homes--was a performance that was itself subject to the implied-in-fact condition precedent that Sokhun designate the specific sites for the homes. Since the "designating" condition did not occur, the "building" condition precedent to Sokhun's duty to pay was excused, and Sokhun's duty to pay became due.

Where one condition depends on the occurrence of another condition, and the earlier condition fails, then the later condition is excused, and the duty that depends on it becomes due for performance. In this case, Sokhun's duty to pay for the construction of the homes depended on the implied-in-law condition precedent that Vitah actually build the homes, since the construction would take a substantial amount of time to complete and the payment could occur quickly. However, Vitah's duty to build the homes depended on the implied-in-fact condition precedent that Sokhun actually show Vitah where to build the homes. This is because Vitah could not build the homes "on specific sites to be designated by Sokhun" unless Sokhun actually designated the sites! Here, Sokhun failed to do that before rainy season, making it impossible for Vitah to build the homes according to the contract. So the condition precedent to Vitah's duty to build the homes never occurred, and that duty never became due. Since Vitah's duty to build never became due, the condition precedent to Sokhun's duty to pay--the construction--was actually excused. So Sokhun's duty to pay became due even though the homes were not built. Sokhun's behavior could also be analyzed as a wrongful prevention or hindrance, or as a violation of the duty of good faith and fair dealing, which are discussed in later Sections.

In any case, in this situation, Vitah's duty to build the homes has not become due. And Vitah has a claim for breach of contract against Sokhun because of Sokhun's failure to perform according to the contract. Of course, Sokhun is not required to pay the entire contract price even though he has received nothing under the contract. A court would probably award Vitah a remedy such as what Vitah lost by not being able to perform the construction work, if that could be determined with reasonable certainty.

9.4g An Improper Rejection of a Tender of Performance May Excuse a Condition

Sometimes one party properly tenders performance to another party, but that tender is rejected. When that occurs, and the rejected performance is also a condition to some duty, the improper rejection of the tender excuses the condition. So the duty that depended on that condition becomes due, even though the condition has not been fulfilled.

***** DEFINITION:** A **tender of performance** is basically a party's offer to perform his existing contract duties, with the present ability to do so.

In this situation, an "offer" is not the same as the "offers" discussed in Chapter 2 ("Real Agreement (Offer and Acceptance)"). In this situation, an "offer" to perform means some indication that a party is ready to perform his existing contract duties.

As explained above, a rejection of a proper tender of performance will excuse a condition, and cause the other party's duty to become due. This means that a party can cause the other party's duty to become due merely by properly offering performance according to the contract, while giving some indication that the party has the ability to perform--even if the other party rejects that offer! A rejection of a tender is basically a refusal to accept what is offered.

For example, suppose a seller in a land sale contract properly tenders performance by offering to transfer the land title and provide any other required documents to the buyer, with the present ability to complete that transfer. If the buyer rejects that tender by refusing to accept the title, the condition concurrent to the buyer's duty to pay for the land--which is the seller's performance of his duty to transfer the property--is excused. Because that condition is excused, the buyer's duty to perform by paying for the land becomes due. If the buyer does not pay the money due under the contract, the seller may file a lawsuit for breach of contract.

Although rejection of a tender of performance can occur in many situations, it appears that this rule is particularly important where conditions concurrent exist, especially in sale of goods and sale of land contracts. This appears to be because rejection of a tender is most likely to occur in situations where conditions are also performances that can be accomplished quickly, generally by presenting something to another party. In fact, some of the rules about how an improper rejection of a tender of performance may excuse conditions were already discussed in Section 9.3b, which explained conditions concurrent.

As part of this rule, courts must determine what is a proper tender of performance. Obviously, not all tenders are proper, and parties are not required to accept tenders that are not proper. In general, a proper tender is an offer to perform with the present ability to do so as required by the contract. In other words, a proper tender is generally an offer to perform in a way that would actually fulfill a condition, either through complete performance, or substantial performance, if that is permitted.

However, there are also some special rules about what is a proper tender in some jurisdictions. For example, it appears that many jurisdictions say that a proper tender of money must generally be in cash (currency), rather than by check or some other means. And many jurisdictions also have particular rules about what is a proper tender in specific types of contracts, such as the rules about what is a proper tender of goods in a sale of goods contract. Some laws like this generally require a seller of goods to tender

complete performance--with no non-conformities--in order to make a proper tender, or else the buyer has the right to reject the goods. Some of these special rules will be discussed in detail in Section 9.5b, below.

It is also possible for a party to “waive” his right to claim that a condition was not fulfilled because of an improper tender. To “waive” a right is basically to knowingly give up that right. This difficult area will be discussed more fully in Section 9.4i below, but a few general rules follow. If a party waives his right to insist that a condition occur, then that condition is excused, and the party cannot later claim that his duty did not become due because the condition was not fulfilled. Where a tender is not proper, it appears that a party may waive the right to claim that a condition has not been fulfilled either expressly, or impliedly by merely continuing his performance of the contract or accepting benefits under the contract. A waiver of a problem in a tender could occur where a party accepts a tender, but later claims there is some problem with the tender. Or it could occur where a party rejects a tender for one reason, then later says he also rejected the tender for a different reason! In general, a waiver will occur following a rejection only if the rejecting party knew or should have known of the problem about which he failed to complain, and the other party would have been able to fix the problem if he had been told of it. However, even if a party waives his right to claim that a problem in tender prevented a condition from being fulfilled, that party does not waive his right to a remedy for any breach of contract caused by the problem, unless the waiver is part of an enforceable modification of the contract. Excuse of conditions because of waiver will be discussed in more detail in Section 9.4i, below.

One important effect of an improper rejection of a tender of performance is to excuse any condition which consisted of that performance, and to cause any duties that depended on that condition to become due. If the rejecting party does not perform the duties, then the other party may file a lawsuit for breach of contract. Another possible effect of such an improper rejection is to actually discharge the duty to provide the performance that was tendered and improperly rejected. However, that only occurs in particular situations. Those situations will be discussed in Section 9.6d, below.

CASE STUDY 206

FACTS A farmer named Vannay decided to buy a tractor in order to improve the operation of her farm. She made a contract with a merchant named Souley to buy a tractor for \$5,000, with delivery to occur in a week.

A week later, Vannay came to see Souley and tried to give him \$5,000 in cash for the tractor. But Souley refused to accept the money, saying it was not enough! Souley also said that Vannay had not actually performed her duty of paying him the money, so any duty he might have to provide the tractor had not become due. Vannay asks the court for help.

QUESTION OF LAW Has Souley's duty to provide the tractor become due?

DECISION Yes. Souley's duty to provide the tractor has become due because Souley improperly rejected Vannay's tender of the \$5,000, and this excused the condition concurrent to Souley's duty to provide the tractor.

Where a party improperly rejects a tender of a performance which is also a condition, that rejection excuses the condition, and the duty that depends on that condition becomes due. In this case, Vannay's duty to pay Souley \$5,000 was an implied-in-law condition concurrent to Souley's duty to provide the tractor. Vannay made a proper tender of performance of her duty to pay the \$5,000 by offering Souley the money in cash at the time the parties had agreed. But Souley rejected this tender. This improper rejection excused the condition concurrent on which Souley's duty to provide the tractor depended, and it caused that duty to become due for performance. If Souley does not perform, Vannay's duty to perform will not become due. In that situation, Vannay may also file a lawsuit for breach of contract because of Souley's failure to keep his promise.

9.4h Wrongful Prevention or Hindrance by the Party Whose Duty Depends on a Condition May Excuse the Condition

Sometimes a party whose duty depends on a condition wrongfully stops the condition from occurring, or makes its occurrence very difficult. Often, this happens where one party actually prevents or hinders the performance of the other party. When a party wrongfully prevents or hinders the occurrence of a condition, that condition is excused, and the duty that depends on the condition becomes due for performance. It appears that the wrongful actions need not actually prevent the condition from occurring, but that a condition may be excused if a party has merely made the condition very difficult to fulfill.

These excuses are somewhat comparable to the doctrines of impossibility and impracticability, although impossibility and impracticability occur because of events that are not the actions of the parties themselves. Impossibility may excuse conditions, as discussed in Section 9.4j below. And impossibility and impracticability may discharge duties, as discussed in Section 9.8a below.

For example, suppose Samy agrees to take care of Bunchin for the rest of Bunchin's life, in exchange for Bunchin's promise to leave all of Bunchin's property to Samy when Bunchin dies. Samy's caring for Bunchin for the rest of his life would be a condition precedent to Bunchin's duty to leave Samy the property. But suppose Bunchin wrongfully prevented Samy from fulfilling that condition--perhaps by throwing Samy out of the house and telling him never to come back! In that case, the condition would be excused, and Bunchin's duty to leave Samy the property would become due. Of course, many courts would be unlikely to order Bunchin to actually transfer

all his property to Samy at Bunchin's death--and to have Samy continue caring for Bunchin until that time--because of the difficulties that might be involved in performing and enforcing such an order. Instead, a court might try to find some other fair way to compensate Samy for the breach, using the methods described in Chapter 10 ("Remedies").

*** **ADDITIONAL REFERENCE:** Chapter 10 ("Remedies") contains further discussion of what courts might do when there is a breach of contract.

The most important requirement for prevention or hindrance to excuse a condition is that the prevention or hindrance must be wrongful. What is "wrongful" is difficult to define, and it will vary in different circumstances. However, it appears to be conduct that unjustifiably prevents or hinders the other party's performance under the contract.

One factor many courts say is important in determining whether such conduct is wrongful is that the other party did not assume the risk of that type of conduct occurring at the time the contract was made. For instance, in the example above, Samy probably did not assume the risk that Bunchin would make Samy's performance impossible by simply ordering him to leave the house forever. However, if Samy claimed that Bunchin had forced him to leave merely by behaving strangely--even though Samy had known Bunchin well and observed such behavior before the contract was made--a court might say that Bunchin had assumed the risk of that type of behavior in making the contract.

Courts also say that buyers and sellers of goods generally assume the risk that their performance will be hindered due to a change in the market supply or price of such goods before the time for delivery--including the risk that the other party to the contract will actually cause this change! So that kind of a change generally will not excuse a condition. However, it appears this general rule may not apply if that change actually prevents performance--especially if the other party causes the change knowing the effect it will have on the first party.

For example, suppose one party agrees to buy a particular kind of steel from another party. Suppose the buyer then buys so much of this kind of steel from other sources that the supply of the steel becomes very limited, and the price rises drastically! Of course, this could greatly hinder the seller's performance of the contract, by making it difficult for him to obtain the steel at a reasonable price. But as discussed above, many courts would say that the seller assumed the risk that the market would change in this way. So the courts would say that the condition concurrent to the seller delivering the steel would not be excused. However, it seems that if the buyer knew that he was eliminating the seller's only source of supply of that type of steel, then courts would be likely to find the buyer's behavior wrongful, and to say that the condition to the buyer's duty to pay was excused. This kind of

assumption of risk will be discussed further in Section 9.8a, which explains impossibility and impracticality.

An improper rejection of a tender of performance might also be viewed as a wrongful prevention or hindrance. This is because such a rejection would really be a kind of prevention of the tendering party's performance! For example, it seems that Souley's improper rejection of Vannay's tender of the money in Case Study 206 would probably meet the requirements for a wrongful prevention. So the condition to Souley's duty to provide the tractor could probably be excused on that basis, in addition to the basis that it was an improper rejection of a tender. Improper rejection of a tender of performance was discussed in Section 9.4g, above.

CASE STUDY 207

FACTS The De-mining Foundation wanted to get some special, complex de-mining equipment manufactured. So the Foundation and the Special Equipment Company agreed that the Company would manufacture 100 sets of the special equipment for a certain price. The contract said that the Foundation would have "no duty to pay for the equipment unless it was delivered no later than four months after the contract date." The contract also said that the Foundation would actually supply designs and some of the raw materials for the special equipment, since the Foundation had special needs and plans for its use.

Unfortunately, the Foundation had some trouble getting the plans and materials to the Special Equipment Company. In fact, the Special Company received one set of plans two months after the contract date, and received a conflicting set of plans two weeks after that! The conflicts took another week to resolve. In addition, the Special Company did not receive the raw materials from the Foundation until three months after the contract date. In these circumstances, the Special Company was prevented from completing the work by the time it was due under the contract, despite diligent efforts to do so.

When the finished de-mining equipment finally arrived--late--the Foundation refused to accept or pay for it. The Foundation said that its duty to pay never became due because the Special Company failed to complete the work on time, as required by an express condition in the contract. The Special Company asked the court for help.

QUESTION OF LAW Has the Foundation's duty to pay for the equipment become due?

DECISION Yes. The Foundation's duty to pay for the equipment has become due, because the Foundation wrongfully prevented the Special Company from performing and fulfilling the express condition precedent to the Foundation's duty to pay, and this wrongful prevention excused the condition.

Where a party wrongly prevents or hinders a performance which is also a condition, that wrongful conduct excuses the condition, and the duty that depends on that condition becomes due. In this case, the Special Company's delivery of the special de-mining equipment within four months of the contract date was an express condition precedent to the Foundation's duty to pay. However, the Foundation failed to supply clear plans or raw materials that the Special Company needed in order to construct the equipment by the four month deadline. As a result, the Company was unable to meet that deadline, despite diligent efforts to do so. In this situation, the Foundation's actions were a wrongful prevention of the Special Company's performance. This is because these actions actually prevented the Company from performing according to the contract. And it is very unlikely that the Company assumed the risk that the Foundation would act in this way. As a result, the express condition that the Company complete the work within four months will be excused, and the Foundation's duty to pay is due.

This situation could also be analyzed as the failure of an implied-in-fact condition precedent to the Company's duty to perform. The implied-in-fact condition would be the Foundation's supplying of clear plans and materials within a reasonable time. Under this analysis, the express condition to complete the work within four months would be excused by the failure of this prior condition. The failure or occurrence of prior conditions as an excuse was discussed in Section 9.4f, above.

There are several possible explanations for the rule that wrongful prevention or hindrance will excuse a condition, and cause the duty that depends on the condition to become due for performance. One idea is that a party's act of preventing or hindering the other party's performance is actually an implied condition subsequent, which would terminate the other party's duty to perform if it occurred. Or a party's act of not preventing or hindering the other party's performance might be considered an implied condition precedent to that other party's duty to provide the performance. So where there is a wrongful prevention or hindrance, it might actually be like the condition is excused because of the failure or occurrence of a prior condition, as discussed in Case Study 207 and Section 9.4f. In fact, this situation might be similar to many implied-in-fact conditions, which may exist where one party must cooperate in some way (such as by supplying plans or raw materials) if the other party is to perform.

Another possible explanation is that all contracts contain implied promises to cooperate, and not prevent or hinder the other party's performance. Under this idea, if a party does hinder or prevent another party's performance, that is a material breach. Such a material breach would also excuse any condition which consisted of the performance that was prevented or hindered. In a way, a breach like this would be similar to an anticipatory repudiation that was treated as a breach. This is because, in both situations, a party has breached before his main duty to perform was even supposed to be due! If the wrongful prevention was also a breach,

the party harmed (such as the Special Company in Case Study 207) would be entitled to stop his own performance, and to ask a court for a remedy for any damage caused by that breach. Anticipatory repudiation was discussed in Section 9.4d, above.

A wrongful prevention or hindrance might also be a material breach of the implied duty of good faith and fair dealing, although bad faith does not seem to be required for a wrongful prevention or hindrance to exist. The results of such a breach would be similar to the results of a breach of an implied promise to cooperate, as discussed above. The duty of good faith and fair dealing will be further discussed in Section 9.5c, below.

Finally, some courts say that a wrongful prevention or hindrance really creates a kind of estoppel. Estoppel is different from promissory estoppel. In general, estoppel occurs where a court says one party cannot make a particular legal claim or argument because he has acted in a way that is somehow inconsistent with that claim or argument. In the area of conditions, estoppel basically occurs where a party who has acted wrongly is prevented by his own acts from claiming in court that a condition was required to be fulfilled. Estoppel as an excuse of conditions will be discussed in Section 9.4i.

An important effect of a wrongful prevention or hindrance of the occurrence of a condition is to excuse that condition, and to cause the duty that depends on that condition to become due for performance. Another potential effect of wrongful prevention or hindrance would be a material breach of the contract, since the party who acts wrongfully could be viewed as violating implied promises not to do so, as discussed above. If a wrongful prevention or hindrance by one party was a material breach, it could discharge the duties of the other party, and also give the other party the right to ask a court for remedies for the breach. The effects of material breach, including the discharge of the duties of the non-breaching party, are further discussed in Section 9.4c, above, and Section 9.6b, below. A wrongful prevention or hindrance might also mean that a duty would not become due for performance at the time specified in the contract, and so a party's failure to perform that duty might not breach the contract. For example, this would probably be the case in Case Study 207, where the Special Company's late delivery of the de-mining equipment would probably not breach the contract.

9.4i Waiver or Estoppel of the Party Whose Duty Depends on a Condition May Excuse the Condition

Sometimes a party whose contract duty depends on a condition indicates through words or conduct that he will not insist that that condition be fulfilled in order for his duty to become due. This may result in a waiver, which will excuse the condition, and the waiving party's duty will become due even though the condition has not occurred.

A similar situation exists where estoppel applies. Estoppel basically occurs where the law says that it would be unfair to allow a party to make a certain legal claim or argument--such as that a condition must occur--because of inconsistent prior actions by that party. Estoppel may also excuse conditions, and cause the estopped party's duty to perform to become due.

The following Sections explain how waiver and estoppel can excuse conditions.

(1) Introduction to Waiver of Conditions

As noted above, if a party waives the right to insist on a condition, that condition is excused, and the duty that depends on the condition will become due.

***** DEFINITION:** A **waiver** is often defined as the intentional relinquishing or giving up of a legal right that is known by the holder of that right.

Although the above definition is a common one, it appears that a waiver may occur even if it is not so clear that a party actually "knew" he had the benefit of a condition, or that he "intended" to give it up. It seems that courts can imply that a party "knew" about his right to the benefit of a condition, and that he "intended" to give up that right, because of the actions of that party. In reality, what seems to matter is that the party knew the factual situation relating to his contract--not that he actually knew his exact legal rights. For example, if an employer in a service contract knowingly accepts some performance that is less than what the contract requires, this can be a waiver even if it is not clear that the employer actually knew he had the benefit of a condition, or actually intended to give it up. This will be explained in more detail below.

There are basically two important situations where a party may waive his right to argue that his contract duty is not due because a condition has not occurred. These situations are where a party waives this right: (1) before the condition is scheduled to occur; and (2) after the condition fails to occur. The rules about these two situations are explained in some detail in the Sections below. However, the paragraphs immediately below try to summarize the basic, general rules.

Before a condition is scheduled to occur, it appears that a party whose duty depends on the condition generally can waive the right to the benefit of that condition, except that most material, express conditions cannot be waived in common law jurisdictions. The reason for this exception appears to be that such waivers are likely to change the basic nature of the parties' agreement but leave the waiving party without an adequate legal remedy, as will be explained below. But there also appear to be limits on this exception,

and it may not apply where promissory estoppel exists, or where special statutes such as those governing the sale of goods apply.

After a condition fails to occur, a party whose duty depends on the condition may elect to continue with the contract despite the failure of the condition. If a party does this--either by saying so expressly, or impliedly by continuing his own performance or by accepting benefits under the contract--then that party will have waived his right to argue that a contract duty has not become due because the condition failed. This kind of waiver appears to be possible as to all kinds of conditions, whether they are material or not.

However, even if a party does waive his right in these ways, that party still generally has the right to ask a court for a remedy to compensate him for any breach that may result from the other party's failure to perform a promise. Such waivers affect only conditions--not promises, nor the breaches that occur when such promises are broken.

One other important point about waivers of conditions is that they are generally not subject to several requirements that modifications of contracts normally are. Specifically, such waivers are generally not subject to writing requirements, requirements of real agreement between the parties, or consideration requirements in common law jurisdictions. Of course, such waivers must meet certain other requirements to be effective, as will be discussed below.

With regard to consideration, as discussed in Chapter 3 ("Consideration"), Section 3.7, common law jurisdictions generally require new consideration for modifications of contracts, since such modifications are really new contracts. This means that parties cannot generally waive the right to a performance under a contract--the right to receive the benefit of a promise--unless there is some new consideration. But conditions are different from promises. As noted above, a waiver of a condition does not mean the party is waiving the right to the benefit of a promise. Waiving a promise would generally change the basic nature of an agreement, and require new consideration. But waiving a condition generally will not cause such a change in the basic nature of an agreement, except in particular situations that will be explained below. So conditions are treated differently from promises, and they can generally be waived without new consideration.

***** ADDITIONAL REFERENCE:** Chapter 3 ("Consideration"), Section 3.7 discussed the general rule that common law jurisdictions require consideration for modifications of contracts.

***** WHY IS THIS IMPORTANT?** Why does the law say that parties may waive the right to insist on conditions?

There are several possible reasons the law says that conditions may be excused by waiver. One potential reason is to try to be fair to both parties

to a contract. Where waiver applies, the waiving party has given the other party reason to believe that the waiving party will not insist on the occurrence of a condition. In particular, where there is a waiver, parties will often detrimentally rely on the waiver. Where there is such reliance, it would be unfair to say that the condition had to be fulfilled in order for the other party's duty of performance to become due.

Of course, the law also recognizes the importance of conditions and wants to protect them. That is why common law jurisdictions say that most material express conditions cannot be waived, in the absence of justifiable reliance or some other exception. Such waivers might change the basic nature of the parties' agreement but leave the waiving party without an adequate legal remedy. The law also provides that waivers before conditions are scheduled to occur can be revoked, unless there is justifiable reliance. These rules give some protection to the parties who waive, and try to ensure that the rules about waivers are not applied so broadly that they actually weaken contracts.

Another potential reason for the rules allowing waiver of conditions is economic flexibility and efficiency. The law wants to give some flexibility to parties to adjust their behavior to accord with the realities of the modern world. As noted above, waivers are not generally subject to several of the important requirements that contract modifications usually are (such as the requirement of consideration in common law jurisdictions). These rules allow parties to perform their contracts and react to changing circumstances without having to worry too much about the technical rules of conditions. They also allow more contracts to be performed--and more economic activity to occur--by allowing parties to choose not to insist that the rules on conditions apply strictly in certain cases. This is especially true of the rules about waiver and modifications in commercial contracts, such as sale of goods contracts. For example, as explained below, some commercial laws in common law jurisdictions require no consideration for modifications of sale of goods contracts.

(2) Waiver Before a Condition Is Scheduled to Occur May Excuse That Condition

Sometimes a party whose duty depends on a condition indicates--before that condition is scheduled to occur--that he will not insist on the fulfillment of the condition. In this situation, it appears that a party generally can waive the right to the benefit of the condition. This waiver will excuse the condition, and the duty that depends on the condition will become due even though the condition has not occurred. But such waivers affect only conditions--not promises. So they do not affect the breaches that occur when promises are not followed.

For example, where a builder agrees to build a house on certain property of a land owner, the land owner could probably waive a condition

that required the construction to be completed by a certain date. If the owner did waive such a condition, then the condition would be excused, and the owner's duty to pay would become due even though the condition had not occurred. Of course, as will be explained below, the owner would still have a right to bring a lawsuit for any damage caused by the failure of the builder to follow the contract--by the builder's breach.

However, there appears to be an important exception to the general rule that conditions can be waived before those conditions are scheduled to occur. This exception is that in many common law jurisdictions, most material express conditions cannot be waived. Material conditions are basically those that are important to the bargain between the parties, and whose loss would cause an important change to the contract. Common law jurisdictions generally require consideration for changes like that.

For instance, in a property insurance contract, the insurance company could not waive the condition that there must be some damage to the property in order for its duty to pay for that damage to become due, because that would clearly change the fundamental idea of the contract. It would also appear to cause the insurer's duty to pay to become due for no reason, and the insurer might have no adequate legal remedy, since there would be no breach by the other party for which the insurer could get a legal remedy.

On the other hand, there appear to be two limits on this exception. Where these limits apply, it may be possible to waive even material express conditions. Specifically, a party may be able to waive his right to the benefit of even such conditions where:

- (1) promissory estoppel applies;
- or (2) certain statutes allow it, such as statutes governing the sale of goods.

This exception and the limits on the exception are discussed below.

(1) Most material, express conditions cannot be waived in many common law jurisdictions. Many common law jurisdictions say that, before a material express condition is due to occur, the party whose duty depends on that condition may not waive the right to the condition.

Authorities do not appear to be consistent or clear about the scope of this exception. Some authorities seem to say that no fundamental conditions can be waived, while others appear to say that no material conditions can be waived--not only material express conditions. However, such broader exceptions might make less sense. The reason material, express conditions cannot be waived is to protect parties like the insurance company in the example above from having to perform duties without receiving anything in return, and without any legal remedy, since there may be no breach in such situations. Obviously the insurance company could not waive the express

condition of there being some damage to the property in order for its duty to pay for that damage to become due--how could the insurance company's duty to pay for damage become due if there was no damage?

However, in the case of implied-in-law conditions, even if a party waives the right to insist on a material condition, the party still has the right to ask a court for a remedy if the other party fails to perform. This is because implied-in-law conditions tend to actually be performances that the parties have promised in the contract.

For example, suppose a land owner who is having a house built on his land waives his right to have substantial performance occur--the implied-in-law condition precedent--before his duty to pay becomes due. It is true that the land owner would waive the right to withhold payment until this substantial performance occurs. But the builder would still be obligated by his contract promise to build the house according to the contract. If the builder failed to build the house according to the contract, the land owner could still ask a court for a remedy for that breach. All the land owner would waive would be the right to withhold payment--the right to have the other party perform first. This might be a useful right, as explained in Section 9.3 above. But to waive it would not necessarily cause a material change in the nature of the contract--because it would appear that all that would change in many cases would be the sequence of performance!

Another example might be where the buyer in a sale of goods contract says to the seller: "I will not require that you deliver the goods when I pay--I waive the condition of getting your performance at that time." This would be a waiver of the implied-in-law condition concurrent to the buyer's duty to pay. But again, in that situation, the buyer does not waive the right to damages for a breach. So if the seller fails to perform--by failing to deliver the goods--the buyer can still bring a lawsuit for the breach. In any event, it is important to check the local law in the relevant jurisdiction about this area of the law.

(a) Conditions may be waived if all the requirements of promissory estoppel are met. In common law jurisdictions, before a condition is due to occur, the party whose duty depends on that condition may waive the right to the condition if the requirements of promissory estoppel are met. This would appear to limit the exception that material express conditions cannot be waived. The reason is that no consideration is required where a promise is enforceable because of promissory estoppel--even if the condition waived is a material one. This text has already discussed promissory estoppel (detrimental reliance) in detail, particularly in Chapter 7 ("Other Contract Formation Problems"), Section 7.8.

As discussed in detail in Chapter 7, promissory estoppel applies where one party justifiably relies on a promise by another party, and a court decides that it is necessary to enforce the promise in order to avoid injustice--

even though the promise would not otherwise be enforceable because of a lack of consideration or some other problem.

For example, suppose a law professor agreed to write a law book for a publisher, and the contract stated that the law professor would be paid 10,000 riels per page provided that the professor drank no alcohol during the period in which he wrote the book. If the professor did drink alcohol, then the payment would be only 3,000 riels per page. Suppose the professor starts writing, and then the publisher assures him that he need not comply with the alcohol provision, and the professor reasonably relies on that promise in finishing the book. In that case, a court might find that justice required enforcing the publisher's promise that the publisher would not require that the professor follow the express condition. In other words, a court might find that the publisher could not argue that the professor failed to fulfill the alcohol condition, and that the publisher's duty to pay 10,000 riels per page became due. And this would be true even though the alcohol provision might be a material express condition in this contract, since it would affect the contract price and perhaps other aspects of the performance so greatly.

*** **ADDITIONAL REFERENCE:** Chapter 7 ("Other Contract Formation Problems"), Section 7.8 discussed promissory estoppel in detail.

(b) Certain statutes, such as some statutes governing the sale of goods, may have the effect of allowing waivers even as to material express conditions. Sometimes particular statutes in common law jurisdictions may have the effect of allowing waivers even as to material parts of contracts. This is because those statutes may say that consideration is not required as to certain types of agreements.

For example, under the Uniform Commercial Code in the United States, no consideration is required for agreements to modify sale of goods contracts, as long as such modifications are made in good faith. The effect of this exception to the consideration requirement would appear to be that parties can also waive conditions in sale of goods contracts--even if they are material express conditions. For example, it would appear that this exception would allow a party to waive an express condition that he must receive goods of a certain quality before his duty to pay becomes due, even though that kind of change might create a material change in the bargain.

*** **ADDITIONAL REFERENCE:** Chapter 3 ("Consideration"), Section 3.7a discussed the exceptions to the general rule that common law jurisdictions require consideration for modifications of contracts, including the exception for sale of goods contracts in some jurisdictions.

One important element of waivers of conditions before the conditions are scheduled to occur is that the waivers can generally be revoked until the time that the other party justifiably relies on the waiver. This basically means that a party who waives the right to insist on the occurrence of a condition

may change his mind, and insist on that occurrence, until the other party justifiably relies on the waiver. If that occurs, the waiver cannot be revoked anymore, because under the doctrine of promissory estoppel a promise (including a waiver) is enforceable to the extent necessary to avoid injustice if a party justifiably relies on that promise.

For instance, in the example above about the law professor and the “no alcohol” condition, the publisher could have revoked its waiver of the condition up until the time the law professor justifiably relied on it. But after the time such reliance occurred--which might have been the time when the law professor started to drink alcohol as he wrote--the publisher’s waiver could no longer be revoked.

As noted above, the effect of a waiver of the right to insist that a condition occur is that the condition is excused, and the duty that depended on that condition will become due even though the condition has not occurred. However, even if a party does waive this right, he still generally has the right to ask a court for a remedy such as money damages to compensate him for any breach that may result from the failure of the other party to perform a contract duty, unless the failure is permitted by a binding modification of the contract.

For instance, in the house building example above, the land owner might waive the right to insist on a condition such as that the house be completed by a certain date. But since the builder’s failure to complete the house by that date would still be a breach of the contract--because it would be a breach of the builder’s contract promise--the land owner could still ask a court for a remedy to compensate him for the breach.

CASE STUDY 208

FACTS Ngneth is a bean farmer. She makes a contract to sell 10 tons of beans to the Big Bear Beans Corporation at a certain price per ton, with delivery to occur one month from the date the contract is signed.

One week before delivery is to occur, Ngneth contacts the Beans Corporation and says that she will be able to deliver only 8 tons, because she has had a poor harvest. The Beans Corporation sends Ngneth a note that says: “That’s all right. We cannot agree to change the amount of beans due under the contract, but we’ll take 8 tons.”

However, when Ngneth delivers 8 tons of beans to the Beans Corporation, the Corporation refuses to accept the beans! The Corporation says that it has no duty to pay for any beans, because Ngneth has failed to fulfill the implied-in-law condition concurrent to its duty to pay, by failing to deliver the 10 tons required by the contract. Ngneth asks the court for help.

QUESTION OF LAW Has the Beans Corporation’s duty to pay for the beans become due?

DECISION Probably. The Beans Corporation's duty to pay for the beans has probably become due, because the implied-in-law condition that was the delivery of 10 tons of beans was excused by the Beans Corporation's waiver of its right to insist that the full 10 tons be delivered in order for its duty to pay to become due. And the Corporation's improper rejection of Ngneth's tender of 8 tons of beans caused the Corporation's duty to pay to become due. The Corporation must pay for the beans as required by the contract--but it can also ask a court for a remedy for any damage caused by Ngneth's failure to deliver the full 10 tons as she promised in the contract.

Where a party waives his right to insist on the occurrence of a condition before that condition is scheduled to occur, that waiver excuses the condition, and the duty that depends on that condition becomes due. In this case, the Beans Corporation told Ngneth that it would not insist on the full 10 tons of beans required by their contract, when it said that it would accept the 8 tons that Ngneth would be able to deliver. This was a waiver of the Beans Corporation's right to insist that the full 10 tons of beans be delivered before its duty to pay became due--a waiver of the implied-in-law condition concurrent to the Corporation's duty to pay for the beans. And since this was an implied-in-law condition--and a sale of goods contract--it does not appear to matter whether the condition is considered to be a material part of the contract or not. Therefore, the condition that 10 tons of beans be delivered was excused, and Ngneth was required to deliver only 8 tons of beans in order for the Corporation's duty to pay to become due.

However, when Ngneth tendered 8 tons of beans, the Corporation rejected her tender. This rejection was improper, because the Corporation had waived its right to insist that the full 10 tons be delivered in order for its duty to pay to become due. The Corporation was required to accept 8 tons of beans--but it did not. This improper rejection excused the condition that was Ngneth's delivery of the beans, and the Corporation's duty to pay became due. If the Corporation does not pay for the beans, Ngneth may ask a court for a remedy for any damage caused by the Corporation's failure to perform its duty to pay.

On the other hand, it is important to remember that the Corporation will also have the right to ask the court for a remedy for Ngneth's breach of the contract! Ngneth breached the contract because she failed to deliver the 10 tons as she promised in the contract, and she will be liable for any damage this breach caused to the Corporation. The Corporation waived its right to insist on the occurrence of the condition on which its duty to pay depended. But it did not agree to modify the amount of beans due under the contract, and it did not waive the right to receive a remedy for Ngneth's breach of the contract. So while the Corporation must pay for the beans, Ngneth must pay for any damage caused to the Corporation by Ngneth's failure to deliver the full amount she promised to deliver. Obviously, this damage will include damage suffered by the Corporation because it did not receive two tons of beans required by the contract.

(3) Waiver After a Condition Fails May Excuse That Condition

Waivers may also occur after a condition has actually failed to occur. In particular, after a condition fails to occur, a party whose duty depends on the condition may elect to continue with the contract despite the failure of the condition. A party may show that he has chosen to continue with a contract despite the failure of a condition in several ways. Specifically, a party may show that he has chosen to do this expressly. He may also do so impliedly, by continuing his own performance or accepting benefits under the contract. In those situations, the party waives his right to argue that his contract duty has not become due because the condition failed. It appears that this kind of waiver could occur even as to material express conditions in common law jurisdictions. In addition, courts say that this kind of waiver generally cannot be revoked.

However, as noted above, even if a party does waive his right to the benefit of such conditions, that party still generally has the right to ask a court for a remedy to compensate him for any breach that may result from a failure to perform duties under the contract, unless the waiver is also a binding modification of the contract. Binding modifications of contracts are generally subject to all the usual formation requirements, including offer and acceptance, consideration, and formality requirements.

When a condition fails to occur because a party has failed to fulfill it, and the condition has not been excused, the party whose duty depends on that condition really has a choice, or an “election” to make. Specifically, that party may choose to:

- (1) stop his performance and ask a court for a remedy for any damage caused by the other party’s breach;

OR (2) continue under the contract.

A party cannot do both of these things at the same time. Therefore, that party must choose or “elect” one option. If he elects to continue with the contract, he has waived the right to the benefit of the condition that failed, although he will still have the right to recover any damages caused by the other party’s breach.

For example, suppose a contract for the sale of a radio contains an express condition that the radio will be delivered in “perfect working order,” or else the buyer will have no duty to pay. If the radio is delivered in less than “perfect working order,” perhaps because it cannot receive certain radio stations well, then the buyer has an election to make. The buyer may choose to reject the radio and sue for breach of the contract promise that the radio would be in “perfect working order.” Or the buyer may choose to continue under the contract, which could occur if the buyer accepts the radio. In that case, the buyer has waived his right to insist on the condition that the radio be delivered in perfect working order in order for the buyer’s duty to pay to become due. So the buyer must pay for the radio even though it does not

work perfectly. Of course, even if the buyer chooses to accept the radio, he still generally has the right to a remedy for any damage caused to him by the seller's breach of the promise that the radio work perfectly, unless his waiver is also a binding modification of the contract.

If a party does choose to continue with a contract--and waive the right to insist on the benefit of a condition--that party may waive the condition expressly or impliedly. An express waiver occurs where a party basically says in words that he will not insist on the benefit of a condition. For instance, in the radio example above, suppose the buyer receiving the defective radio simply said: "That's OK--I will not insist on the condition that the radio be perfect in order for me to pay." Those words would be an express waiver, and the buyer's duty to pay for the radio would become due--though the buyer would still be entitled to compensation for any damage caused by the seller's breach, unless there was a binding modification of the contract.

An implied waiver of a condition will generally occur where the party who has the benefit of the condition:

- (1) continues his own performance under the contract after learning that the condition has failed;
- OR (2) accepts benefits under the contract after learning that the condition has failed.

For instance, in the radio example, the buyer might be considered to have continued his performance under the contract if he paid the seller the purchase price, even though he saw that the radio did not work perfectly. Another example might be where a service contract contained a condition that the employer pay a contractor in advance for some work. If the employer's payment was clearly defective, but the contractor elected to perform the work anyway, then the contractor would have continued performance under the contract, and waived the condition precedent to his duty to do the work. Examples of accepting benefits under a contract might be if the radio buyer accepted the radio, or if the contractor accepted some portion of the payment he was due. In these cases, the party would have waived his right to insist that the condition occur, and his duty to perform would have become due.

One very important aspect of waivers of conditions after those conditions fail to occur is that such waivers are generally irrevocable. That means that, once a party elects to waive his right to insist on the occurrence of such a condition, that party generally cannot change his mind and try to insist on the condition. For example, once the contractor in the above example decided to accept benefits or continue his own performance under the contract, he could no longer choose to insist on the condition he waived. Potential reasons for this rule include that courts feel that parties should be able to rely on such elections, and that courts wish to promote finality in the performance of contracts. However, laws in some jurisdictions may allow the revocation of such waivers in certain circumstances. For example, it appears that

the Uniform Commercial Code in the United States allows a buyer to “revoke” his acceptance of goods under certain circumstances. This will be further discussed in Section 9.5b, below.

One problem that may occur where a party elects not to continue with a contract because of the failure of a condition is what the party says--or does not say--about why he is rejecting the performance of the other party. The general rule appears to be that a party is not required to say why he is rejecting a performance in order to preserve his right to insist on the benefit of the condition. In other words, as long as the condition is not fulfilled, the other party may simply refuse to continue with the contract, without giving any reason.

However, sometimes a party does state a reason why he is not continuing with the contract--but that reason is not what caused the condition to fail! For example, this might happen if the buyer in the radio sale contract rejected the radio because it was the wrong color--not because it failed to work perfectly. Even in that situation, it appears that the party generally has not waived the condition unless:

- (1) the other party would have been able to fix or “cure” the problem if he knew about it;
- and (2) the rejecting party knew or should have known that.

Again, this rule applies only if a party chooses to say why he is rejecting performance under the contract. It appears that the rejecting party is generally not required to say why he is rejecting.

However, these rules about stating the reason for failure to fulfill conditions may be somewhat different under certain statutes governing the sale of goods, or other specific types of contracts. For example, the Uniform Commercial Code in the United States says that if a buyer rejects goods but fails to specify a particular defect of the goods, then the buyer cannot rely on that particular defect to justify his failure to continue with the contract if:

- (1) the seller could have fixed the defect if he knew about it within a reasonable time;
- OR (2) the buyer and seller are both merchants, and the seller makes a written request for a full statement of all defects, but the buyer fails to include the particular problem on any such list.

This kind of rule--which does not allow the buyer to say nothing about why he is rejecting in the two situations above--puts more pressure on buyers of goods to state the correct reason they are rejecting goods. Section 9.5b below discusses when buyers have the right to reject goods under the Uniform Commercial Code. In any case, it is important to check the law related to the contract in question.

Another way to think about the kind of waiver discussed in this Section is as the waiver of a right to a completely perfect tender. However, as explained above, there are limits on a party's ability to make such a waiver. Improper rejection of a tender as an excuse for conditions was discussed in Section 9.4g, above.

One effect of a waiver of the right to insist on the fulfillment of a condition after the condition has failed is that the condition will be excused. And the waiving party's duty will become due even though the condition has not occurred.

However, as discussed above, the waiver of a condition does not mean that the waiving party loses the right to ask a court for a remedy for any damage caused by a breach of the contract, unless the waiver is also a binding modification of the contract. In other words, if a condition consists of a performance by a party under the contract, and the other party waives the right to insist that that condition occur in order for the duty that depends on it to become due, the waiving party still generally has the right to a remedy for any damage caused by the other party's failure to fulfill the condition--damage from the other party's breach.

Laws in some jurisdictions do provide that where the waiving party accepts a performance, that party must notify the other party about the breach within a reasonable time if he wishes to seek a remedy for any breach in that performance. For example, the Uniform Commercial Code in the United States says that a buyer who accepts goods must provide such notice within a reasonable time after he discovers or should have discovered such a breach.

CASE STUDY 209

FACTS The Double Happiness Import-Export Company makes a property insurance contract with Kamco Insurance Company. Under the contract, Kamco agrees to insure Double Happiness' new warehouse for damage that might be caused in a number of ways, for three years, for a certain premium. Part of the contract says that Kamco "will have no duty to pay for any loss claimed under this insurance policy unless the policyholder provides notice of that loss to Kamco within one month of the loss." Another part of the contract states that the contract can be modified only in writing.

One year later, Double Happiness' warehouse is heavily damaged by a fire, which is a type of loss covered by the insurance policy. However, because of all the confusion surrounding the fire, Double Happiness fails to give notice to Kamco about the loss until two months after the fire.

At first, Kamco says nothing about the notice clause in the contract. Instead, Kamco spends a lot of time gathering information about Double Happiness' claim, and negotiating with Double Happiness about the amount of a possible settlement of the claim. Unfortunately, the parties are unable

to reach an agreement about the amount of loss Double Happiness has suffered. Suddenly, Kamco claims that the loss is not covered at all because Double Happiness failed to give timely notice, and this was an express condition to any payment by Kamco! Double Happiness asks the court for help.

QUESTION OF LAW Has Kamco's duty to pay for the loss to the warehouse failed to become due because of Double Happiness' failure to give timely notice?

DECISION No. Although Kamco's duty to pay for any claim was expressly conditioned on Double Happiness providing timely notice of loss, Kamco waived the right to insist on that condition by continuing to perform under the contract, so its duty to pay for the loss will become due (assuming the loss is covered otherwise).

Where a party waives his right to insist on the occurrence of a condition after that condition has failed to occur, that waiver excuses the condition, and the duty that depends on that condition becomes due. Such a waiver can occur expressly, or impliedly if the waiving party accepts benefits under the policy or continues its own performance under the policy.

In this case, the property insurance policy Kamco issued to Double Happiness contained an express condition: Kamco would have no duty to pay for any loss unless Double Happiness provided notice of that loss within one month. And in this case, Double Happiness failed to give that notice on time. However, Kamco at first said nothing about the notice. In fact, Kamco fully investigated Double Happiness' claim, and conducted negotiations to try to reach an agreement with Double Happiness about the amount of loss. It was only after the parties could not agree about this amount that Kamco said the claim was not covered because of the lack of timely notice. Under these circumstances, Kamco has waived its right to insist that the express condition of timely notice occur. This is because Kamco has clearly continued its own performance under the policy, by investigating and negotiating about the claim. Therefore, the condition has been waived. The waiver cannot be revoked, and Kamco's duty to pay will become due despite the failure of the condition to occur (assuming the claim is covered by the policy in other respects).

This waiver was not an enforceable modification of the contract, since it was not written as the contract itself requires, and perhaps for other reasons. So Kamco will be entitled to a remedy for any damage it has suffered because of Double Happiness' breach: the failure to give timely notice as it promised in the contract.

The illustration below compares some basic aspects of waivers before a condition is scheduled to occur and waivers after a condition has failed.

Illustration:	Waiver Before Condition Is Scheduled to Occur and Waiver After Condition Fails to Occur	
	Waiver Before Condition Scheduled to Occur	Waiver After Condition Fails to Occur
1. What is it?	A party gives up his right to insist that a condition occur in order for his duty to become due	A party gives up his right to insist that a condition occur in order for his duty to become due
2. Can it apply to any condition?	No--material express conditions cannot generally be waived in many common law jurisdictions, unless an exception like promissory estoppel applies	Apparently yes
3. What is the legal effect?	The condition is excused	The condition is excused
4. May party still ask for remedy for breach?	Yes, unless the waiver is part of a binding modification of the contract	Yes, unless the waiver is part of a binding modification of the contract
5. Is retraction or revocation of waiver possible?	Generally yes, until the other party justifiably relies on the waiver	Generally no
6. What are the main differences?	(a) Does not generally apply to <u>material express</u> conditions in many common law jurisdictions	(a) Apparently <u>no limit</u> on conditions that may be waived after failure
	(b) Generally revocable	(b) Generally <u>not</u> revocable

(4) **Estoppel May Excuse a Condition**

A similar doctrine that--like waiver--says the actions of a party can result in that party no longer being able to insist on a condition is the doctrine of estoppel. Estoppel can occur because of the conduct of a party, rather than just because of a promise.

*** **DEFINITION: Estoppel** generally occurs where a court says a party cannot make a particular legal claim or argument because of some action of that party that is inconsistent with the claim or argument.

Estoppel is somewhat similar to waiver. Both doctrines basically say that, because of some action (either words or conduct) by a party, that party cannot insist that a condition occur in order for his duty to become due for performance. Estoppel is particularly similar to implied waivers made after

a condition fails to occur, since both events involve some action by a party that means the party cannot insist on the occurrence of a condition.

Estoppel is also similar to promissory estoppel (detrimental reliance), but it is not the same. Like promissory estoppel, estoppel involves some activity by a party that results in that party losing some legal right, whether it is the right to not perform a promise (as with promissory estoppel), or the right to make a particular legal claim or argument (as with estoppel). But estoppel does not require a promise, and it does not require justifiable reliance. Instead, it occurs in particular situations where the law says it would be unfair to allow a party to make a particular legal claim or argument, because of some conduct of that party that is inconsistent with that claim or argument. If estoppel exists, a party may be unable to insist on the occurrence of a condition.

One important situation where estoppel may occur is where there is wrongful prevention or hindrance. One way to analyze that situation is to say that the party who acted wrongly is estopped by his own acts from claiming in court that the condition was not fulfilled. The reason is that the party's actions--in actually preventing or hindering the occurrence of the condition--are inconsistent with such a claim.

For example, in Case Study 207, a court might say that the De-mining Foundation was estopped from claiming that the Special Equipment Company had failed to fulfill the express condition that it deliver the equipment within four months. A court might say this because the conduct of the Foundation in preventing the condition from being fulfilled was inconsistent with such a claim. Therefore, the express condition that was the Special Company's delivery of the equipment within that time would be excused. So the Foundation's duty to pay for the equipment would become due even though that condition was not fulfilled.

9.4j Impossibility of Performance May Excuse a Condition

Sometimes a condition cannot be fulfilled because it actually becomes impossible for it to be fulfilled, through no fault of either of the parties. For example, a condition may become impossible to fulfill because the government passes a law making that type of activity illegal. When impossibility occurs, the condition will be excused if:

- (1) the condition does not involve a material part of the contract; and
- (2) a forfeiture could result from the failure to fulfill the condition.

If the condition is excused, then the duty that depends on that condition will become due even though the condition was not fulfilled.

To understand the exact situations where impossibility occurs can be difficult, and those situations will not be discussed in detail here.

Impossibility is discussed in Section 9.8a, which explains how it may discharge contract duties.

The practical result of this rule varies depending on what type of condition has become impossible. It appears that implied-in-law conditions generally cannot be excused by impossibility, since such conditions generally consist of performances that are material parts of contracts, and forfeiture is less likely to result because of their failure. But it appears that express conditions and implied-in-fact conditions generally will be excused by impossibility, provided that they do not involve material parts of the contract and there is a risk of forfeiture. The effects of this rule on the different types of conditions are briefly discussed below.

(1) Implied-in-law conditions generally are not excused by impossibility. Implied-in-law conditions generally involve material parts of contracts, and their failure is less likely to result in forfeiture. So courts say that they generally cannot be excused because of impossibility. For example, the conditions concurrent that courts often imply in sale of goods or sale of land contracts, and the conditions precedent that courts generally imply in service contracts, all involve performances that are material parts of the contract. This is because they involve performances that are basically the whole performances of the parties to the contract. In addition, in those situations, the risk of forfeiture is usually not present, because forfeiture basically means losing something significant with no adequate legal remedy. If these kinds of conditions fail, it is usually because the parties have simply failed to provide the performance on which the duties depend. Where parties have simply failed to provide their performances under these contracts, courts do not seem to feel that those parties have lost something significant, since they generally have not provided their performances. So even if it becomes impossible to fulfill this kind of condition--such as the condition that a shipment of goods be delivered--that condition will not be excused, and the duty that depends on it will not become due.

However, even though an implied-in-law condition will probably not be excused because of impossibility, the party who would normally be required to fulfill that condition under the contract will not be required to do so by a court. This is because the impossibility will discharge the duty of that party to provide the impossible performance. And the party who cannot perform will not be required to provide a remedy to the other party because of his failure to perform. So the party whose performance is the condition will not be liable for his non-performance, and the other party's duty will never become due, since the condition precedent or concurrent to it will not be fulfilled or excused. In other words, neither party will be required to perform his duty under the contract. If courts did not have such a rule, then forfeiture could occur more often as a result of the failure of implied-in-law conditions. And of course, if the party whose performance becomes impossible has already given some benefit to the other party when the rest of his performance becomes impossible, the performing party may be able to recover restitution.

The ways impossibility can discharge duties are discussed further in Section 9.8a, below.

(2) Express conditions and implied-in-fact conditions may be excused by impossibility if they do not involve material parts of the contract and there is a risk of forfeiture. Express conditions and implied-in-fact conditions exist because of the particular intentions or situations of the parties to each contract, rather than the legal rules courts make to apply to broad classes of contracts. So express or implied-in-fact conditions may be less likely to involve material parts of contracts. In fact, such conditions will be excused because of impossibility, and the duties that depend on them will become due, where two requirements are met:

- (a) the condition does not involve a material part of the contract;
- AND (b) there is a risk of forfeiture because of the failure of the condition.

For example, suppose there was an express condition in a service contract that said the employer would have no duty to pay the contractor for his work unless the contractor came to see the employer on the day the work was finished, in order to tell him the good news. If the contractor finished the work, but the express condition was impossible to fulfill--perhaps because the contractor was detained by the police for the rest of that day--then the condition would likely be excused. The reason is that the condition probably did not involve a material part of the contract, and its failure would result in a forfeiture in this case. It was not material because it did not involve the main performances of the parties under the contract (work for money). And the risk of forfeiture was great because if the condition failed, the contractor would have no way to recover the money due to him under the contract itself--since the employer's duty to pay would not become due. The law wants to avoid that situation. Another example appears in the following Case Study.

CASE STUDY 210

FACTS Socheatra makes a contract with the Big White Villa Construction Company. Under the contract, Big White agrees to build Socheatra a new house on some land she owns, for a certain price. One part of the contract says that Socheatra will be required to pay the contract price "only on condition that the architect Seng Meng first issue an architect's certificate of adequate construction."

Big White builds the house according to the plans, but before the Company can obtain the certificate from Seng Meng, Seng Meng dies. Big White asks Socheatra to pay for the house without the certificate, since it is now impossible to get a certificate from Seng Meng. But Socheatra says she is not required to pay, since the express condition to her duty has not been fulfilled.

QUESTION OF LAW Has Socheatra's duty to pay for the construction of the house become due?

DECISION Yes. Socheatra's duty to pay for the construction has become due because the express condition to that duty--the obtaining of the architect's certificate from Seng Meng--will be excused because of impossibility.

Where the occurrence of a condition becomes impossible, the condition does not involve a material part of the contract, and there is a risk of forfeiture, the condition will be excused, and the duty that depends on that condition will become due even though the condition has not been fulfilled.

In this case, the construction contract between Big White and Socheatra contained an express condition precedent to Socheatra's duty to pay for the house: that Socheatra obtain an architect's certificate from Seng Meng. Big White finished the house as required by the contract, but unfortunately, Seng Meng died before he could issue the certificate. In this situation, the express condition will be excused, and Socheatra's duty to pay for the house will become due. The reason is that this express condition--the obtaining of the certificate--does not involve a material part of the contract. It does not involve the main exchange of performances under the contract (construction for money). In addition, there is a great risk of forfeiture: Big White built the house, but if the condition is not excused, Socheatra will have no contract duty to pay for it! So a court would excuse the condition. This will eliminate a risk of forfeiture by Big White, which might otherwise build an entire house and receive nothing in return.

9.4k Failure of a Condition to Occur May Not Affect the Whole Contract If the Contract Is Severable

In some contracts, the performances of the parties can be fairly divided into more than one corresponding part, because of the nature of those performances. Courts say that such contracts are "severable" or "divisible."

Where a contract is severable, the failure of a condition to occur with respect to one part of the contract does not affect the performance of the other part or parts. In other words, even if a party fails to fulfill a condition as to one part of such a contract, the party can still perform the rest of the contract, fulfill conditions as to the rest of the contract, and cause the duties of the other party to become due as to the rest of the contract. So the duty of the other party to provide his performance as to the rest of the contract may become due even if the first party has completely failed to perform one part of the contract! In these situations, the courts are really treating the different parts of the contract to some extent as if they were separate contracts. Of course, if the failure of a condition is also a material breach of the whole contract, the duties under the contract may be discharged, as discussed in Section 9.6b below.

However, many contracts are not severable. If a contract is not severable, courts say that it is “entire.” The rules discussed in this Section do not apply to contracts that are entire.

For example, suppose a watch repairer makes a contract to repair a watch for a watch owner for 10,000 riels. Courts will generally find that the repair of the watch will be an implied-in-law condition precedent to the watch owner’s duty to pay for the repairs, since the repairs will probably take some time, but the payment can occur in an instant. If the repairer fails to substantially perform the repairs, the watch owner’s duty to pay will not become due. This is an example of an “entire” contract.

But if the watch repairer made a contract in which he agreed to repair two different watches for the watch owner—one for 10,000 riels and one for 7,000 riels—then a court might find a severable contract. The reason is that the performances of the parties can probably be fairly divided into more than one corresponding part. In this case, there might be two parts: (1) the repair of the first watch in exchange for 10,000 riels; and (2) the repair of the second watch in exchange for 7,000 riels. The effect of this contract being severable is that the watch repairer’s failure to fulfill the condition precedent as to the first watch will not affect the performance of the contract as to the second watch. Suppose the repairer fails to substantially perform the repairs on the first watch, but does substantially perform the repairs on the second watch. In that situation, the watch owner’s duty to pay 10,000 riels for the repair of the first watch will not become due, because the condition precedent to that duty has failed. But the watch owner’s duty to pay 7,000 riels for the repair of the second watch will become due! This is because the watch repairer has fulfilled the condition precedent to that duty, by substantially performing the repairs on the second watch.

As noted above, only certain contracts are severable with regard to conditions. The general rule is that contracts are severable, for the purpose of analyzing conditions, if the performances of duties under the contract can be fairly divided into more than one corresponding part. More specifically, many jurisdictions say that such contracts are severable if three requirements are met:

- (1) performance by each party can be divided into more than one part;
- (2) the number of parts due from each party is the same;
- AND (3) performance of each part by one party appears to be the agreed exchange for the performance of the corresponding part by the other party.

When courts apply this test to determine whether a contract is severable, they generally try to determine whether the parties appear to have intended that the contract be severable at the time they made the contract. One thing

that might help a court decide whether a contract was severable would be if the contract actually said that it was not severable. In that situation, it appears that a court would generally find the contract not to be severable.

The analysis of whether a contract is severable with regard to conditions may differ from the analysis with regard to other areas. Of course, the idea of severing parts of contracts was already explained in previous Chapters, including Chapter 5 (“Legality”), Section 5.5b, in the discussion of severing illegal parts of agreements, and also in Chapter 7 (“Other Contract Formation Problems”), Section 7.7c, in the discussion of severing unconscionable parts of agreements. Although the rules about severance that courts apply in these different situations may not be exactly the same, the basic idea is the same.

***** ADDITIONAL REFERENCE:** Chapter 5 (“Legality”), Section 5.5b discussed severing illegal parts of agreements, and Chapter 7 (“Other Contract Formation Problems”), Section 7.7c, discussed severing unconscionable parts of agreements.

The analysis of whether a contract is severable with regard to conditions may also vary by the type of contract involved. For example, with respect to conditions, it appears that construction contracts are generally entire. But employment contracts appear to be severable in most cases, often by pay periods. Of course, some employment contracts--such as a contract to teach a long academic course--might not be severable into smaller periods. The severability of sale of goods contracts is often controlled by statutes. This will be discussed in Section 9.5b below.

The most important effect on contract performance when a court finds that a contract is severable is that a problem with conditions as to one part of the contract will not affect the rest of the contract. So failure of a condition to occur as to one part of the contract does not affect the rest of the contract. Suppose a party fails to fulfill a condition by failing to perform with respect to one part of a severable contract. Despite this failure, the party can still perform the rest of the contract, fulfill conditions as to the rest of the contract, and cause the duties that depend on those conditions to become due. Of course, the party whose duty has not become due as to one part of a severable contract has no duty to perform as to that part of the contract. And that party also has a right to a remedy for any damage caused by the other party’s failure to perform that part of the contract--a remedy for the other party’s breach.

For example, in the severable watch repair contract above, suppose the repairer substantially (but not completely) performed the repair of the first watch, and failed to perform the second watch repair at all. In that case, the watch owner would be obligated to pay for the repair of the first watch, but not for the repair of the second watch. If the watch owner did not pay for the repair of the first watch, that would be a breach of the contract, and the repairer could ask the court for a remedy. But the watch owner would have the right to ask a court for a remedy to compensate him for two breaches:

(1) the minor breach of the repairer in failing to completely fix the first watch; and (2) the material breach of the repairer in failing to substantially fix the second watch. The following Case Study is another example of the doctrine of severability of contracts.

CASE STUDY 211

FACTS Better Homes Construction Company agrees to build 10 houses for the Queen Group, a local real estate developer, on some land the Queen Group owns outside Battambang. The parties agree that the price for the construction will be \$30,000 per house, for a total price of \$300,000. The contract contains an arbitration clause.

Better Homes completes four of the houses. However, after starting the fifth house, Better Homes receives an offer to build 50 houses for the Big White Villa Company immediately! Better Homes decides that it must seize the opportunity to profit from this much larger contract, even though it will mean breaching the contract with the Queen Group. Better Homes removes its workers from the Queen Group work site and starts work on the Big White Villa houses.

Better Homes admits that it will have to pay any damages caused by its failure to build the last six houses for the Queen Group. But it asks the Queen Group for payment for the four houses that were completed. However, the Queen Group says it has no obligation to pay anything under the contract, because Better Homes failed to substantially complete the 10 houses. Better Homes asks the arbitrator for help.

QUESTION OF LAW Has the duty of the Queen Group to pay for the four houses that Better Homes built become due?

DECISION Yes. The Queen Group's duty to pay for these four houses has become due, because this contract was severable into 10 parts, and Better Homes substantially completed four of those parts (four houses).

When a contract is severable, the failure of a condition to occur as to one or more parts does not affect the performance of the remaining part or parts. Contracts are severable if the contract can fairly be divided into more than one corresponding part. Specifically, many jurisdictions say that contracts are severable if the performance by each party can be divided into more than one part; the number of parts due from each party is the same; and the performance of each part by one party appears to be the agreed exchange for the performance of the corresponding part by the other party.

In this case, the contract said that Better Homes was required to build 10 houses for the Queen Group for \$30,000 each. This is a severable contract, because the performances can be divided into more than one part (10 houses, 10 payments of \$30,000); the number of performances due from each party

is the same (10); and the performance of each part is obviously the agreed exchange for the performance of the corresponding part by the other party (one house in exchange for \$30,000). In addition, in this contract, the performance by Better Homes in building the houses will be an implied-in-law condition precedent to the duty of the Queen Group to pay for the homes, since the building will require substantial time, but the payments can occur in an instant.

Here, Better Homes built four of the houses required by the contract, but not the other six. Because the contract is severable, Better Homes has fulfilled the condition precedent to the Queen Group's duty to pay for those four houses, and that duty is due to be performed. Of course, the Queen Group has no duty to pay for the six houses Better Homes failed to build. And as Better Homes admitted, the Queen Group also has the right to ask the arbitrator for a remedy for any damages caused to it because of Better Homes' failure to build the last six houses, which was a breach of the contract.

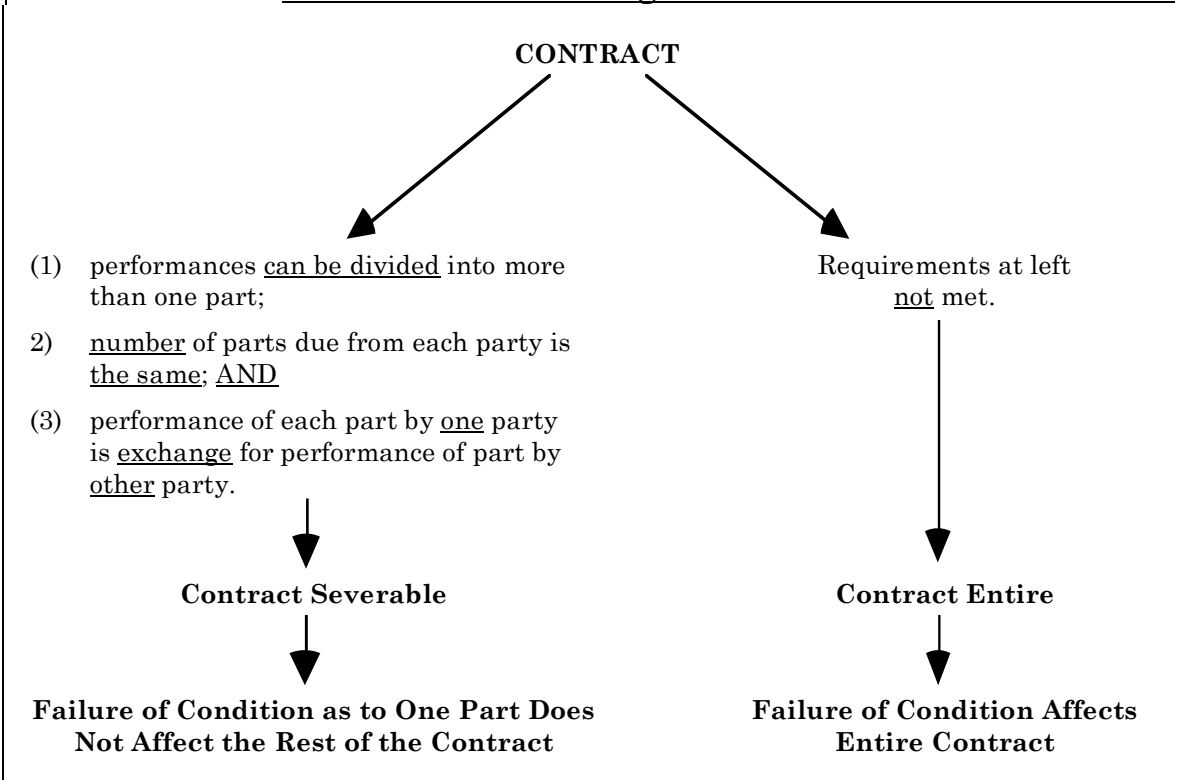
The situation in Case Study 211 creates an interesting issue with regard to remedies. Obviously, if the remedy in Case Study 211 was specific performance--actually ordering Better Homes to perform the rest of the contract--then Better Homes would be unable to follow its contract with the Big White Villa Company! Courts in common law jurisdictions will generally not order specific performance in cases like this. The main reasons are that those courts do not generally wish to get involved in supervising the performance of service contracts, and that ordering a party to pay money damages usually seems adequate to compensate injured parties in these contracts.

*** **ADDITIONAL REFERENCE:** Chapter 10 ("Remedies") contains further discussion of what remedies courts may choose in different situations.

The following chart shows some basic rules about how severability of contracts affects contract performance.



Illustration: How Severability of Contracts Affects Contract Performance with Regard to Conditions



***** WHY IS THIS IMPORTANT?** Why does the law say that the failure of conditions as to one part of a severable contract does not affect the performance of the rest of the contract?

The basic reason for this rule is to help parties who perform parts of severable contracts to avoid the risk of forfeiture and other hardships. In this way, the rule about severability is similar to the rule about substantial performance, which was discussed in Section 9.4c, above. By definition, severable contracts involve more than one separate performance by a party. In fact, such contracts often involve a long series of performances, as in construction contracts like the one in Case Study 211. In situations like these, the party who must perform first will often have problems if he must perform the whole contract before he can receive any compensation from the other party. This may create financial problems for such parties, because they may need money to perform the contract, and to survive during the period they are performing it--just as an employee might have difficulty if he was paid only at the end of every year of work.

Of course, if a party performed each part of a severable contract at the same time and the same rate--such as if Better Homes had built all 10 houses at the same time--then that party might do a lot of work but still fail to achieve substantial performance as to any one part of the contract! In that situation, this rule would not help parties like Better Homes, although such parties could

still ask for restitution of what they had provided to the other party under the doctrine of quasi-contract. Of course, that sort of remedy is often not as good as a remedy under the contract itself. Parties who plan to perform contracts in this way may choose to include a contract clause that says they will be paid some part of what they will receive under the contract at certain points during their performance, in order to reduce the risk of forfeiture. For example, a builder like the one in Case Study 211 might include a clause saying he will be paid some portion of the contract price when all the foundations are laid. And this may also be done where contracts are entire, and cannot be severed, but still involve long performances which cause parties to want some protection from the risk of forfeiture.

In addition, if severable contracts were not treated in this way, it might actually discourage parties from making such contracts, and reduce economic activity. The reason is that parties would be taking a great risk if they made a contract like the one in Case Study 211. They might have to wait a long time to receive any payment, with no assurance that they would ever be paid under the contract, if for some reason they were unable to perform the whole thing. Of course, as noted above, such parties might be able to get restitution under the doctrine of quasi-contract, even if they could not recover under the contract itself. And they might have no other choice except to try to do so, if they chose to perform each part of the contract at the same time and the same rate. But as noted above, that sort of remedy is often not as good as a remedy under the contract itself.

9.41 Conditions of Approval Are Subject to Certain Limits

Sometimes contracts contain express conditions that say that the duty of one of the parties to perform depends on the approval of that same party, or the approval of a person who is not a party to the contract (a “non-party”). In other words, such contracts say that the duty of a party does not become due for performance unless that party or someone else approves the performance of the other party. For example, a contract might say that a buyer in a sale of goods contract has no duty to accept a shipment of goods unless he “approves” their quality.

Where there are conditions of approval, the law says there are certain limits on the ability of parties to cause the conditions to fail, and to prevent the duties that depend on the conditions from becoming due. When many courts analyze these conditions, they divide them into conditions of approval by a party to the contract, and conditions of approval by a non-party.

Where there is a condition of approval by a party to the contract, common law jurisdictions say the party cannot have complete discretion to disapprove, or else his contract promise is illusory, and there is no consideration. Assuming there is an enforceable contract, it appears that many jurisdictions say that conditions of approval by a party that involve matters of aesthetics and taste will fail if the evaluating party

honestly disapproves of the performance. By contrast, it seems that conditions of approval by a party that involve matters of practical or utilitarian standards that can be measured more objectively will fail only if the evaluating party is reasonable in rejecting the performance.

Where there is a condition of approval by a non-party, many courts first ask whether there will be a forfeiture by a party if the non-party disapproves his performance. If there will be no forfeiture, it appears that the condition will generally fail unless fraud or collusion was involved in the rejection of the performance. But if there will be a forfeiture, then many courts ask whether the condition involves a matter of aesthetics and taste and whether the parties chose a special non-party to evaluate the performance (as opposed to a non-party chosen from a group of many who were qualified to analyze the performance). If the condition involves a matter of aesthetics and the parties chose a special non-party to analyze it, then the condition will fail if the analyzing party honestly disapproves of the performance. In all other situations involving forfeitures, it appears that courts examine four factors in deciding whether the non-party's rejection will actually cause the condition to fail. These factors are: (1) the size of the potential forfeiture; (2) the nature of the performance involved (aesthetic or utilitarian); (3) whether the non-party was reasonable in rejecting; and (4) the relevant expertise of the non-party.

Obviously, these rules are not simple, and they also will not apply the same way in every jurisdiction. Therefore, it is important to check the local law in the jurisdiction relevant to a contract that contains such a condition of approval.

When a party wrongly disapproves a performance under these rules, the courts say that the condition is excused, and any duty that depends on it becomes due even though the condition has not been fulfilled. In a way, this situation could be compared to the situations where a party wrongfully prevents the fulfillment of a condition, or where a party is estopped by his own actions from claiming that a condition has not been fulfilled. In all three of these situations, one party has done something that the law believes would make it unfair to expect the other party to fulfill a condition. Wrongful prevention was already discussed in Section 9.4h, and estoppel was discussed in Section 9.4i.

(1) Conditions of Approval by Parties to the Contract

If the condition is to be approved by a party to the contract, then courts in many jurisdictions will examine the three limits discussed below to see the effect of a disapproval. If the condition of approval violates the first limit below--that there actually be some limit on the party's discretion to disapprove--then there will be no contract in common law jurisdictions because of a lack of consideration. If the disapproval of such a party does not follow the second limit, which basically says that disapprovals about aesthetic matters must be honest, or the third limit, which basically says that disapprovals

about utilitarian matters must be reasonable, then the condition will be excused, and the duty that depends on it will become due.

(1) First Limit: In common law jurisdictions, a party to a contract cannot have complete discretion to disapprove of the other party's performance, or there is no consideration, and the agreement will generally be unenforceable. Where an agreement contains a condition of approval by a party to the contract, common law jurisdictions say the party cannot have complete discretion to disapprove, or else the agreement lacks consideration and is generally unenforceable.

The important question here is whether the contract actually gives the party complete discretion to disapprove. If the agreement does not actually say that the party has complete discretion, it appears that courts will generally assume there is some limit on the party's discretion to disapprove. Courts then proceed to the second and third limits below. But suppose an agreement actually says something like the party "may disapprove for absolutely any reason whatsoever," or that the party's "discretion to disapprove is completely unlimited." Then a court may find that the agreement really places no limits on the party's discretion to disapprove of the other party's performance. The problem with an agreement like that is that it means the promises of the party with the power to disapprove are actually illusory. They are illusory because they do not actually promise anything. In a situation like this, the party with the power to disapprove has complete power to choose not to perform the agreement: he can disapprove the other's party's performance, for any reason, and he will have no contract obligation at all! In that case, common law jurisdictions say that there is no consideration, and therefore no enforceable contract, as discussed in Chapter 3 ("Consideration"), Section 3.5d.

For example, suppose an agreement for the sale of 1,000 pens contained a clause that said "Buyer shall have no duty to pay for any of the pens unless Buyer, in his absolute and unlimited discretion, approves the pens." In a situation like that, it would appear that the buyer has complete discretion to disapprove of the pens for any reason. That means that the buyer has not really agreed to do anything in the agreement, since he has complete power to not perform it, merely by disapproving of the pens. So common law jurisdictions would say that there is an illusory promise, no consideration, and no contract. But if the agreement merely said that the "Buyer shall have no duty to pay unless he approves the pens," it seems that a court would probably imply that there was some limit on the buyer's discretion, and proceed to examine the second and third limits below.

***** ADDITIONAL REFERENCE:** Chapter 3 ("Consideration"), Section 3.5d contains further discussion of why illusory promises generally do not meet the requirement of consideration in common law jurisdictions.

(2) Second Limit: Many jurisdictions say that conditions of approval that involve matters of aesthetics and taste will fail if the evaluating party

honestly disapproves of the performance. When a contract contains a condition of approval by a party to the contract, and the approval involves a matter of aesthetics, it appears that many jurisdictions say the party has the right to disapprove of the other party's performance--and prevent his own duty of performance from becoming due--as long as he is honest in disapproving of that performance. If the party honestly disapproves of the other party's performance, then the condition will fail, and the duty that depended on that condition will not become due. But if a court decides that the party's disapproval is not honest, then the condition will be excused, and the duty that depended on the condition will become due.

For example, if a young singer agrees to sing at a nightclub in exchange for a fee to be paid by the club owner, the contract may say that the owner's payment will not be due unless the owner "approves" of the performance. That would be a condition involving an aesthetic matter. If the club owner honestly disapproves of the singing, then the owner's duty to pay will not become due.

There are two important elements to this limit:

- (a) the limit applies only where matters of aesthetics and taste are involved;
- and (b) a disapproval must be honest in order to cause the condition to fail.

Both of these elements are discussed below.

(a) Matters of aesthetics and taste are basically those that involve personal opinions about what is beautiful, or what has artistic value. In other words, such matters generally relate to "art," or at least to items that have some element of art in them. The quality of such matters cannot usually be measured objectively. Examples of such aesthetic matters are approvals relating to the quality of painting, sculpture, dance, music, or literature. Such things have no function that can be easily measured or defined. So it can be difficult to say what is "good" and has value, and what is "bad" and has little value. Of course, such items do generally have some monetary "value." But this appears to reflect the opinions of some group of people, rather than any quality that can be clearly measured. By contrast, matters with mostly utilitarian or practical qualities generally have functions that can be measured more objectively. Examples include tools, roads, chemicals, most machines, and many kinds of work.

For example, suppose Chuktema hired a painter to paint a portrait of his wife, and the contract contained a condition of approval. That would be a condition related to an aesthetic matter, since the quality of such a painting involves personal opinions that cannot be measured objectively. If Chuktema disapproved of the final painting, and his disapproval was honest, the condition would fail, and Chuktema's duty to pay would not become due.

However, if Chuktema hired the same painter to paint the walls of his house white, this would probably not be a matter of aesthetics. The reason is that it is much easier to measure the value or quality of basic wall painting done by a professional painter than it is to measure art, such as the painting of Chuktema's wife. So a court would probably say that the wall painting job was a practical or utilitarian matter, and require that any disapproval be reasonable, as discussed below.

Of course, some matters have both aesthetic and utilitarian aspects! For example, items like buildings, cars, clothing and food obviously have very practical uses. But part of their quality or value also relates to aesthetic factors, such as their attractiveness or taste. Many kinds of work may also have both practical and aesthetic elements. In any case, although it may sometimes be difficult, courts might try to decide whether a condition of approval concerns a matter that is mostly aesthetic or mostly utilitarian, and then apply the appropriate rule.

(b) Where aesthetics are involved, disapprovals must be honest if they are to cause a condition of approval to fail. "Honest" in this situation simply means that the disapproving party truly does not like the performance of the other party. Obviously, this is a subjective standard, since it depends on what is in a particular party's mind.

For example, in the portrait painting above, a disapproval by Chuktema would cause the condition of approval to fail as long as Chuktema honestly--truthfully--did not like the painting. It would not matter whether Chuktema's opinion was reasonable, whether Chuktema knew anything about art--or whether anyone else in the entire world agreed with him!

It might seem that this "honest" standard would almost always be met, since parties do not generally disapprove things unless they honestly dislike them. However, it is possible that a party might disapprove a performance even though he does not really dislike it. For example, a party like Chuktema might disapprove the painting not because he did not like it, but because he no longer had the money to pay for it. In addition, Chuktema might disapprove the painting not because he disliked it--but because he decided he had agreed to pay too much money for it! Chuktema might also make such a contract merely in order to hurt the painter, perhaps because he did not like him. And there may be other situations where a party like Chuktema might "dishonestly" disapprove a performance.

Unfortunately, it can be difficult for courts to decide the real reason a party disapproves a performance. Often, the only evidence will be the testimony of the party himself about his own opinions, although there may be other witnesses or documents with relevant information. Even though it is difficult, courts must try to decide the real reason the party disapproved--which may or may not be the reason that the party claims he disapproved. For example, Chuktema may claim he rejected the painting because he honestly

disliked it. But if the painter finds a letter from Chuktema to a friend admitting that he liked the painting but could not afford it, that might show that Chuktema's disapproval was not honest. In that case, the condition would be excused, and Chuktema's duty to pay would become due. However, evidence like this is rare, and often courts must base their decisions simply on whether they believe what the disapproving party says or not.

***** WHY IS THIS IMPORTANT?** Why does the law say that disapproval will cause a condition of approval related to aesthetic matters to fail as long as the disapproval is honest?

This rule may seem unfair to the party whose performance is subject to such disapproval. Obviously, such parties are taking a big risk of forfeiture. They might work hard on a performance that is disapproved, and the other party's duty to pay will not become due. However, it would seem that the parties in these cases are really assuming that risk when they make the contract. That is because they know from the start of the performance that they will not be paid unless the other party likes their work or product. If such parties do not wish to take this risk, they should not make such contracts. And of course, as noted elsewhere, courts do generally wish to enforce contracts in the way the parties intended them.

For similar reasons, it may be difficult to get restitution in such cases, because it may be difficult to show much unjust enrichment--if the disapproving party honestly dislikes the performance, how has he been enriched? And again, where a party assumes this risk, any enrichment may not be unjust. Of course, if a party has clearly given something of value to another party--such as a structurally perfect building whose appearance the disapproving party honestly does not like--it would seem that a court would be more likely to try to provide restitution to the party who has given the benefit.

On the other hand, these contracts obviously give a lot of power to the disapproving parties. It may be that these parties need this power. That is because, if those parties had to agree to pay for aesthetic performances before they knew whether they liked the performances, then they would be taking a big risk that they would not like the results! So such parties may choose to put conditions of approval in their contracts.

In a way, this requirement of honesty in disapprovals involving aesthetic matters is comparable to the standards of the duty of good faith in contract performance, which was discussed in Chapter 8 ("Interpretation of Contracts"), Section 8.3j, and which will be discussed again in Section 9.5c, below. As the reader will recall, the duty of good faith that many jurisdictions say is part of all contracts basically means that parties have an obligation to be honest and not seek unfair advantage in their contracts.

*** **ADDITIONAL REFERENCE:** Chapter 8 (“Interpretation of Contracts”), Section 8.3j contains further discussion of the duty of good faith that many jurisdictions say is present in all contracts.

(3) Third Limit: Many jurisdictions say that conditions of approval that involve practical or utilitarian matters will fail if the evaluating party is reasonable in rejecting the performance. Sometimes a contract contains a condition of approval by a party to the contract, and the approval involves a practical matter. In that situation, it appears that many jurisdictions say the party has the right to disapprove of the other party’s performance--and prevent his own duty of performance from becoming due--as long as he is reasonable in disapproving of that performance. If such a party reasonably disapproves of the other party’s performance, then the condition will fail, and the duty that depended on that condition will not become due. But if a court decides that the party’s disapproval is not reasonable, then the condition will be excused, and the duty that depended on the condition will become due.

For instance, suppose Chuktema in the house painting example above disapproved of the painter’s work in painting Chuktema’s walls white. Suppose Chuktema said that his reasons were that the painting was very uneven, and that the painter had actually missed large parts of the wall completely. In that situation, a court would be likely to find that Chuktema’s disapproval was reasonable. In that case, the condition of approval in the contract would fail, and Chuktema’s duty to pay for the painting would not become due. Of course, the painter could try to recover restitution of the benefit he had given to Chuktema.

There are two important elements to this limit on conditions of approval related to practical matters:

- (a) it applies only where practical or utilitarian matters are involved;
- and (b) any disapproval must be reasonable.

These two elements are discussed below.

(a) Utilitarian or practical matters are basically those that have functions that can be measured objectively, as noted above. They tend to be things that are more obviously “practical” or “useful” than aesthetic things. Examples of such “practical” things include machines, tools, roads, chemicals, medicines, and most kinds of goods, as well as many kinds of work or services, such as truck driving. Of course, as also discussed above, in some situations it can be difficult for courts to decide whether a matter subject to a condition of approval is actually more “aesthetic” or more “practical.”

(b) Many jurisdictions say that any disapproval must be reasonable in order to cause a condition of approval about practical matters to fail. What is “reasonable” in a particular case will depend on all the circumstances of that case. Of course, the reasonable standard is

an “objective” one, since it depends on what a reasonable person in the situation of the disapproving party would do. In fact, this will generally be a more difficult standard for the disapproving party to meet than the “honesty” standard discussed above. This is because the disapproving party cannot disapprove of a performance merely for any honest reason at all, as he can with aesthetic matters. In fact, for the reasonable standard, it does matter what other people might do in a similar situation. The reasons for disapproval must be justifiable, to the extent a “reasonable” person might disapprove for the same reasons.

For instance, in the pen sale example above, if the buyer rejected the pens for reasons such as that they did not work well, or that the exterior surfaces of the pens were rough and uncomfortable to use, a court might find that those were reasonable reasons to disapprove. In those cases, the conditions of approval would fail, and the buyer’s duty to pay would not become due.

But suppose the buyer rejected the pens merely because he decided he did not like pens anymore, or because he thought the pens would be able to speak French and they could not. Or suppose that he disapproved them without even looking at them. Those would be unlikely to be considered reasonable reasons for disapproving the pens. In those cases, the conditions of approval would probably be excused, and the buyer’s duty to pay would become due.

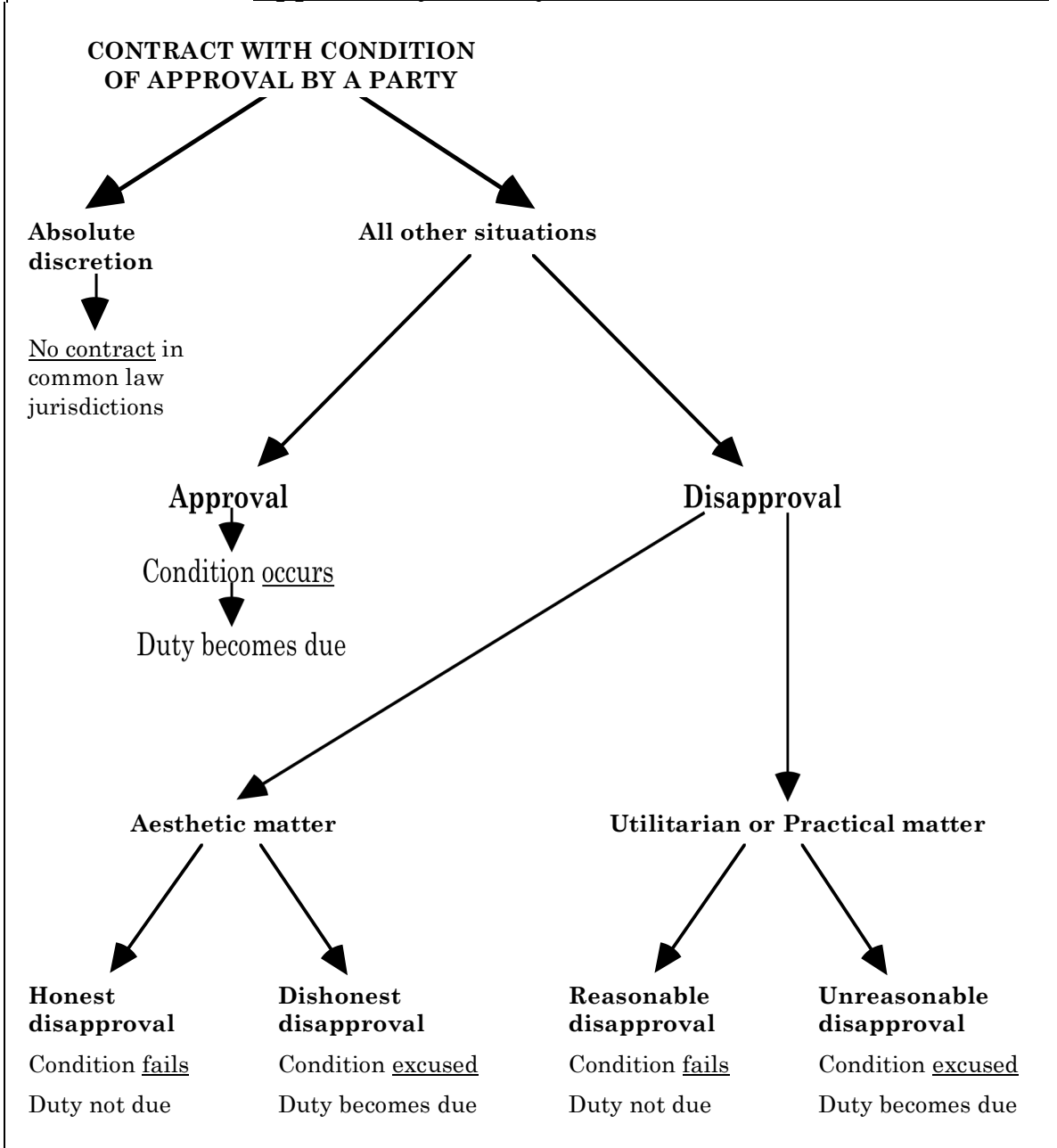
Just as the “honest” standard discussed earlier was somewhat comparable to the duty of good faith, this “reasonable” standard is somewhat comparable to the duty of fair dealing that some jurisdictions imply in contracts. Like that duty of fair dealing, this is an objective standard based on what reasonable parties would do in performing a particular contract. And like that duty, this standard is particularly useful for evaluating performance in commercial situations.

***** ADDITIONAL REFERENCE:** Chapter 8 (“Interpretation of Contracts”), Section 8.3j contains further discussion of the duty of fair dealing that many jurisdictions say is present in contracts.

The following chart shows some basic rules about limits courts may apply where a contract contains conditions of approval by a party to the contract.



Illustration: Limits Where a Contract Contains Conditions of Approval by a Party to the Contract



(2) Conditions of Approval by Non-Parties

In some cases, a condition of approval in a contract is to be approved by a non-party. In those situations, courts in many jurisdictions will examine the three rules discussed below to see the effect of a disapproval.

The first rule depends on whether there will be a forfeiture by a party if the non-party disapproves his performance. If there will be no forfeiture, it appears that the condition will generally fail unless the non-party actually

committed fraud or collusion in disapproving the performance. But if there will be a forfeiture, courts proceed to the second rule.

The second rule depends on whether the condition involves a matter of aesthetics and whether the parties chose a special non-party to evaluate the performance (as opposed to a non-party chosen from a group of those qualified to analyze the performance). If the condition involves a matter of aesthetics and the parties chose a special non-party to analyze it, the condition will fail if the analyzing party honestly disapproves of the performance. In all other situations, such courts proceed to the third rule.

The third rule analyzes whether the disapproval was proper based on four factors: (1) the size of the potential forfeiture; (2) the nature of the performance involved (aesthetic or practical); (3) whether the non-party was reasonable in rejecting; and (4) the relevant expertise of the non-party. These three rules will be discussed below.

(1) First Rule: If a disapproval by a non-party will cause no forfeiture, then it appears that the condition will not be excused unless the disapproval is actually the result of fraud or collusion. This first rule depends on whether the disapproval will cause a forfeiture. If the disapproval will cause a forfeiture, then courts proceed to the second rule, which is discussed below.

But if it will not cause a forfeiture, then courts in many jurisdictions appear to say that only fraud or collusion will excuse the condition. In other words, unless fraud or collusion is present, the condition will fail, and the duty that depends on it will not become due.

The two important elements of this first rule are:

- (a) whether there will be a forfeiture; and
- (b) whether there is fraud or collusion.

These elements will be briefly discussed below.

(a) The first element of this rule is whether the disapproval of the non-party will cause a forfeiture. Forfeiture was already explained in Section 9.3c above, which discussed express conditions, and Section 9.4j, which discussed impossibility as an excuse for conditions. As noted above, a forfeiture is basically a loss of something to another person because of a breach of contract or other failure to act as required by law, with no adequate remedy for the party suffering the loss. Because courts generally do not like forfeitures, they look more closely at disapprovals that will cause them. But if a disapproval will not cause a forfeiture, then only fraud or collusion will excuse the condition.

For example, suppose Sokung agreed to buy 50 boxes of ordinary computer paper from Thida for a certain price. Suppose the contract also said Sokung would have no duty to pay unless Vipheak approved of the paper. In that situation, even if Vipheak does not approve the paper, there is little risk of forfeiture. That is because Thida can simply take the paper back and sell it to someone else. In other words, Thida will probably not suffer great damage, except perhaps lost profits if Thida cannot sell the paper for as high a price as Sokung had agreed to pay. But if the paper was a very special kind that Thida had manufactured particularly for Sokung's factory, then there might be a real risk of forfeiture if Vipheak disapproved the paper. The reason is that Thida might have a very difficult time selling her special paper to anyone else. A disapproval by Vipheak might mean Thida would have no way to be compensated for all her work--since the failure of the condition of approval would mean Sokung's duty to pay for the paper would not become due! So in that situation, courts would look more closely at the condition, and would proceed to the second rule explained below.

Another important situation where courts ask whether a forfeiture would result is where there is a condition of approval in a construction contract, like the one in Case Study 210. In that Case Study, a construction contract contained a condition of approval of a house by an architect named Seng Meng. Unfortunately, Seng Meng died after the house was finished but before he could sign the certificate of approval. In that situation, the builder would have suffered an obvious forfeiture if the condition was not excused. This is because the builder would have lost all the work he put into the house and had no adequate legal remedy, since Socheatra's duty to pay for the work depended on the failed condition. So the condition in that case was excused under the doctrine of impossibility. And it probably could also have been excused under the rules about conditions of approval, since there is no way a dead architect can meet the other standards discussed in this Section (such as honesty or reasonableness).

However, if there was no risk of forfeiture--such as if the condition of approval merely said that the architect was to approve the construction plans before Big White even started to build--then it appears that even the architect's death would not have excused the condition, unless fraud or collusion was involved. In that case, the condition would not have been excused and Socheatra's duty to pay would not become due. But courts would not require Big White to perform the construction either, since the company's duty would probably be discharged by impossibility. These problems were also discussed in Section 9.4j above, and they will be discussed again in Section 9.8a, below.

(b) Where forfeiture will not occur, conditions of approval by non-parties will fail as a result of a disapproval only if fraud or collusion is involved. "Fraud" basically means the intentional use of deception or dishonesty to cheat or harm another person. In this area, fraud would probably occur if the non-party or the party whose duty depended on

the condition intentionally used deception or dishonesty to cause the disapproval. “Collusion” is basically an agreement to commit fraud or to obtain something illegally. Collusion would probably occur if the non-party and the party whose duty depended on the condition decided together that the non-party would disapprove the performance, either because the party paid money to the non-party, or for some other improper reason. It appears that the doctrines of fraud and collusion overlap, and that both ideas are similar to the “honesty” standards discussed above.

For instance, in the paper sale example above, suppose Sokung and Vipheak agreed that Vipheak--in exchange for a secret payment from Sokung--would never approve the paper. That might be collusion, and the condition of approval might be excused even though no forfeiture was involved. But in the absence of situations like that, even arbitrary or unreasonable disapprovals by the non-party will not excuse the condition.

(2) Second Rule: If forfeiture is involved, the condition involves a matter of aesthetics, and the parties chose a special non-party to evaluate the performance, the condition will fail if the analyzing party honestly disapproves the performance. Where there is a risk of forfeiture, many courts next ask whether the condition involves aesthetics, and whether the parties to the contract chose a special non-party to evaluate the performance. If the answers to both of those questions are yes, then courts say the non-party’s disapproval will cause the condition to fail as long as the disapproval is honest. In all other situations--that is, in all situations except where a special non-party is evaluating aesthetics--courts proceed to the third rule discussed below. So assuming forfeiture is involved, there are really three elements in this second rule:

- (a) whether the condition involves aesthetics;
- (b) whether the parties chose a special non-party to evaluate the performance; and
- (c) whether the disapproval was honest.

Elements (a) and (c) were already discussed above. Element (b) is discussed below.

This rule applies only where a “special” non-party is evaluating matters of aesthetics. It appears that a “special” non-party in this situation means one the parties selected because of his special qualifications to evaluate whatever aesthetic performance is involved in the contract. By contrast, parties who are not “special” in this way are those chosen from a group of persons qualified to analyze the performance. Courts seem to ask whether it is clear the parties wanted the evaluator they chose because that person was especially or uniquely qualified--or whether they simply wanted someone from a group of qualified persons, and the non-party described in the contract happened to be the person they got.

For instance, in the example above where Chuktema hired a painter to paint a portrait of Chuktema's wife, suppose the contract said that Chuktema's duty to pay depended on approval by Sakorn. And suppose Sakorn was a famous art expert chosen by the parties because he knew more about portraits than anyone else in Cambodia, and that Sakorn disapproved the painting because he honestly thought it was of poor quality. If the painter finished the painting before being paid, there would be a risk of forfeiture, since a disapproval could mean the painter would not be paid for all his work. In that case, many courts would ask whether aesthetics were involved, whether the parties chose a "special" non-party to evaluate the performance, and whether that non-party's disapproval was honest. First, aesthetics are involved, since portraits are a form of art that cannot be objectively measured. Second, it appears that Sakorn was chosen for his special abilities in judging portraits. Third, it appears that his disapproval was honest. Therefore, in this case, it appears that a court would find that the condition of approval in the contract would fail. So Chuktema's duty to pay would not become due. Of course, if Sakorn had been chosen merely because he was one of hundreds of graduates of an art school, this second rule would not apply, and the court would proceed to the third rule explained below.

(3) Third Rule: If forfeiture because of a non-party disapproval is involved in any other situation--any situation that does not involve a special non-party evaluating aesthetics--then many courts ask whether the disapproval was proper based on four factors. If there is a risk of forfeiture, but the situation discussed above involving aesthetics and special non-parties does not apply, then courts in many jurisdictions consider four factors in deciding whether a disapproval was proper. The four factors are:

- (a) the size of the potential forfeiture;
 - (b) the nature of the performance involved (aesthetic or practical);
 - (c) whether the non-party was reasonable in disapproving;
- AND (d) the relevant expertise of the non-party.

Each of these factors will be briefly discussed below.

(a) The first factor courts consider is the size of the potential forfeiture. This factor basically asks how much the party whose performance is being evaluated will lose as a result of a disapproval of the condition. The more this party will lose, the more closely courts examine whether the disapproval was proper. In other words, the larger the potential forfeiture, the more likely the disapproval will be found to be improper.

For instance, in the painting example above, if the painter had spent only 10 minutes making a quick sketch for Chuktema, there would probably not be a large forfeiture if Sakorn disapproved--the only loss would be 10 minutes of the painter's time. But if the painter had spent several weeks on

a careful, detailed painting, there could be a much larger forfeiture if Sakorn disapproved.

(b) The second factor courts consider is the nature of the performance that is being disapproved--that is, whether it is practical or aesthetic. This subject was discussed in detail above. As noted above, the non-party is allowed more discretion to disapprove of a performance related to aesthetics than a performance related to practical matters.

(c) The third factor courts consider is whether the non-party was reasonable in disapproving the performance. This subject was also discussed in detail above. If a disapproval is made for justifiable reasons--reasons that a reasonable person might give--then it is much more likely to be considered proper, and to cause a condition of approval to fail.

(d) The fourth factor courts consider is the level of expertise of the non-party who is doing the evaluating. If the non-party is a well-known expert in a certain field--as in one of the painting examples above, where Sakorn was a famous art expert--then the non-party usually has more discretion to disapprove. But if the non-party is merely one of a larger group of competent persons--such as the situation where Sakorn was merely one of many recent graduates of art school--then the non-party usually has less discretion to disapprove.

CASE STUDY 212

FACTS One day the Minister decided it was time to build a new Ministry building. So he asked his assistants to conduct a bidding process for the construction of a large new building. The result was a contract between the Ministry and the Big Bear Beams Construction Company for the Company to build the building within the next year. One clause in the contract said that the Ministry would have no duty to pay unless the finished building was approved by an engineer named Lam. Lam was only one of many qualified local engineers the parties thought about when they made the contract, but he happened to be the first one they were able to contact when they were making the agreement.

The Company worked on the building for one year. At the end of that time, the Company showed the finished building to Lam, and asked whether he would approve it. Lam examined the large building for about two weeks. Then he told the Company that some of the doorknobs on the interior doors did not work, and that he felt the building was unsafe because "it's too big." For these reasons, Lam disapproved the building. The Company is unable to persuade the Ministry to waive the condition of approval. So the Company asks the court for help.

QUESTION OF LAW Will the condition of approval in this contract be excused?

DECISION Probably. The condition of approval in this contract will probably be excused because Lam's disapproval of the building was probably not proper.

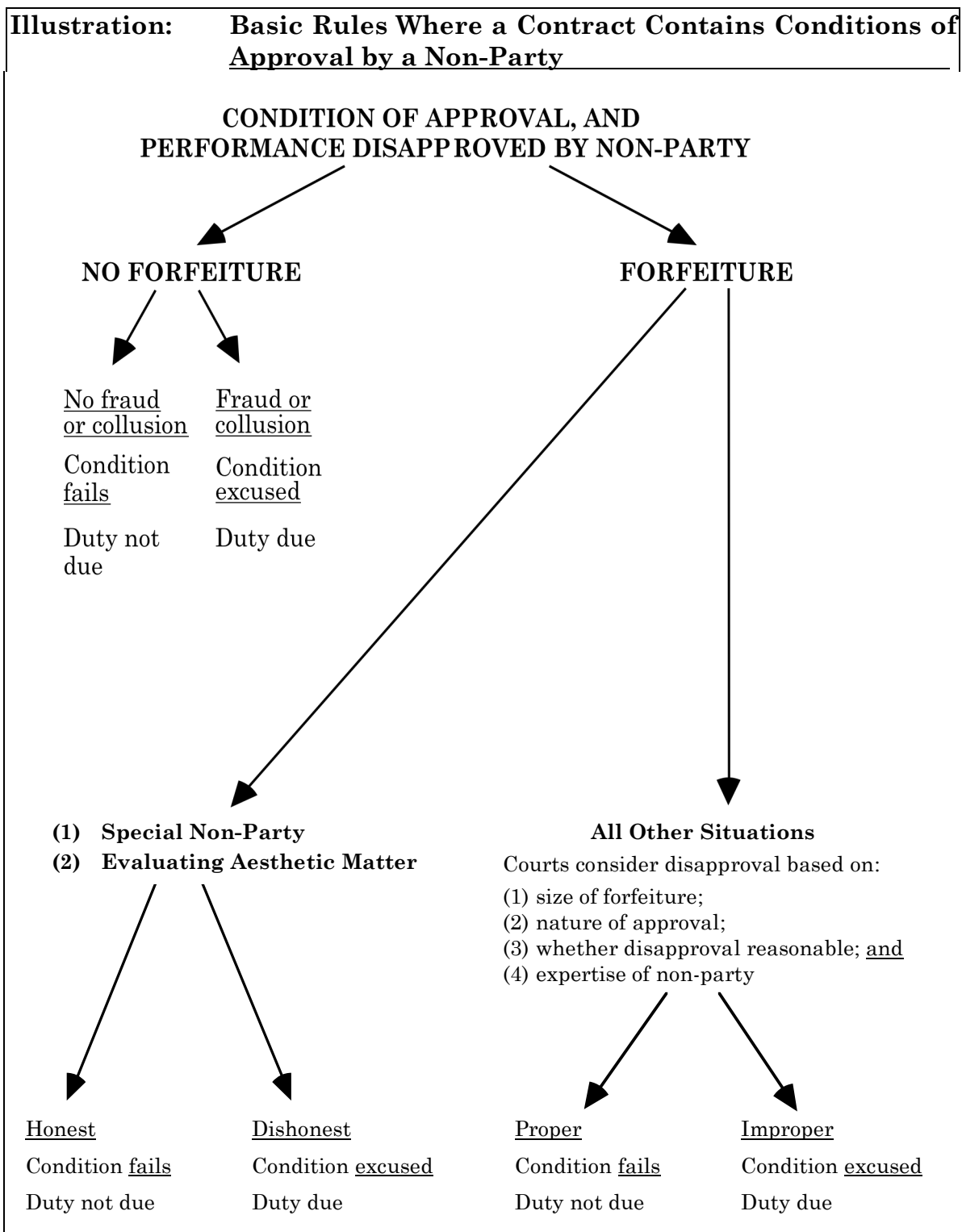
Where there is an express condition of approval by a non-party, courts first ask whether there will be a forfeiture if the condition fails. If there will, courts ask whether the situation involves a special non-party evaluating aesthetic matters. If it will not, courts then examine four factors to see if the disapproval was proper: the size of the forfeiture; the nature of the approval (aesthetic or practical); the reasonableness of the disapproval; and the expertise of the disapproving party.

In this case, Lam was an engineer who was asked to approve a large new building that the Big Bear Beams Company built for the Ministry. The Ministry's duty to pay is subject to the express condition that Lam approve the finished building. If the condition fails, there will be a large forfeiture, since the Company spent an entire year working on the building, and it risks a forfeiture of all its efforts during that year. In addition, this case does not involve a special non-party evaluating aesthetic matters. Although there may be some aesthetic qualities in a building, engineers are not generally selected to evaluate those, but to evaluate more practical aspects. And in any event, Lam was not a "special" non-party, since he was only one of many qualified persons who might have evaluated the building, and the parties did not choose him for any special reason.

Therefore, the court will examine the four factors listed above to see if Lam's disapproval was proper. First, the forfeiture will be large if the condition fails, as discussed above. Second, the approval sought is primarily practical or utilitarian, since an engineer like Lam is likely to be asked to evaluate the more practical aspects of a building--which is what he did in basing his disapproval on structural issues such as safety and whether the doorknobs worked. Third, Lam's disapproval is probably unreasonable. It may appear reasonable because he spent a fairly long time inspecting the building (about 2 weeks). But the reasons he gave--that a few doorknobs did not work and that the building was "too big"--are probably not reasonable justifications for his disapproval of this kind of project. Finally, Lam will probably not have great discretion to disapprove, since he is not a well-known expert, but merely one of a number of qualified persons the parties might have chosen to evaluate the building.

Considering all the factors, it seems likely that a court would find Lam's disapproval was not proper. Therefore, the condition of approval will probably be excused, and the Ministry's duty to pay will probably become due. Of course, if the doorknobs really are defective, the Ministry is entitled to a remedy for that kind of minor breach.

The following chart shows some of the basic rules that many jurisdictions apply where a contract contains conditions of approval by a non-party.



9.5 Performance of Contract Duties in Particular Situations

Sections 9.3 and 9.4 discussed some basic rules about the performance of contracts, particularly about how promises and conditions affect contract duties. However, it is important to recognize that the rules explained in Sections 9.3 and 9.4 do not apply exactly the same way in all situations, or in all jurisdictions. In fact, some rules may not apply at all in a particular situation or jurisdiction. In addition, there are some special rules for particular situations. Therefore, it is important to check the local law relevant to any contract in order to see whether and how these rules operate.

This Section will discuss a few examples of special rules about contract performance that may apply in particular situations. Many jurisdictions have some special rules for certain types of contracts. Two important examples are construction contracts (discussed in Section 9.5a) and sale of goods contracts (discussed in Section 9.5b). And as noted above, there may also be other rules that affect contract performance in particular jurisdictions, such as the duty of good faith and fair dealing (discussed in Section 9.5c).

9.5a Performance of Construction Contracts

Performance problems often occur in construction contracts. In fact, some of the important rules discussed in this Chapter appear to have been developed because of problems in the performance of these contracts. For example, the rules about substantial performance as a way to fulfill implied-in-law conditions, which were explained in Section 9.4c above, were developed in this way. In general, these rules appear to work well in providing guidelines for the performance of construction contracts, and in helping to resolve fairly most disputes that occur. For example, Case Studies 198, 201, 205, 210, 211, and 212 deal with construction contracts.

However, there is one special problem that may occur in the performance of construction contracts, or similar service contracts. Specifically, there is a potential for forfeiture in such contracts if the builder provides substantial performance-but the contract contains an express condition requiring complete performance. As discussed in Sections 9.3 and 9.4 above, only complete performance will fulfill an express condition. This situation presents a real risk of forfeiture, because the builder could complete all of a very large project except one small thing, but not be paid under the contract for any of his work! And in fact, as explained in Section 9.3c above, this high potential for forfeiture in some cases is the reason courts are often reluctant to interpret a part of a contract as an express condition.

For these reasons, courts prefer to interpret the language of a contract so that there is no express condition. If that is possible, and there is only an implied-in-law condition, substantial performance will fulfill the condition, and the duty which depended on the condition will become due for performance. But if that is not possible, the law is left with the choice of

enforcing the regular rules about express conditions, or finding a new rule to save the builder from forfeiture.

This is a difficult problem. On the one hand, all jurisdictions want parties to respect the law, and that cannot happen if the law is not applied as it is written. In addition, courts want to enforce what parties put in their contracts--or else the parties cannot rely on their contracts! And express conditions do motivate parties to perform their contracts well. But on the other hand, courts do not enforce what the parties put in their contracts in a few special, limited cases, such as where the contract is illegal. And in fact, the express condition rule could cause injustice in some cases.

So some authorities believe that the law should consider a new rule for construction cases. For example, there might be a rule that it is against public policy for courts to enforce express conditions where the result would be a great forfeiture, and so in that case the substantial performance rule should apply. Or maybe there should be a rule that the express condition will be enforced if the builder can fix the problem without great economic waste. An example of great economic waste might be if the builder had to tear a house apart to replace all the pipes simply because he had used the wrong brand of pipe! If enforcing the express condition would cause that kind of waste, perhaps the condition should be excused (though a remedy would still be available for any breach of the builder's duty). Or perhaps courts should consider whether it violates the duty of good faith and fair dealing for a land owner to try to enforce an express condition in this situation, even though he may technically have the right to do so. Perhaps a violation of that duty should excuse the condition. It appears that some courts will apply some variations of these new rules in construction cases, though they may have trouble explaining why they are not following the general rule. What do you think the rule should be in these situations?

CASE STUDY 213

FACTS A builder named Bun Ly agrees to build a new concrete villa for Mareth for a certain price. The contract says that Mareth's duty to pay is "expressly conditioned on Bun Ly completing the house exactly as specified in the Plans attached to this contract." Part of the Plans says that Bun Ly must build the house 15 feet from the back border of Mareth's land.

Bun Ly finishes the house on time, and everything is exactly as specified in the Plans--except that the house has been built 12 feet from the back border of Mareth's land! Mareth says the contract required that the house be completed exactly according to the Plans, and that he has no duty to pay. Bun Ly asks the court for help.

QUESTION OF LAW Has Mareth's duty to pay become due?

DECISION Maybe. Although the general rule says the duty has not become due, it appears that courts in some jurisdictions might say that Mareth's duty to pay has become due even though Bun Ly has not fulfilled the express condition, because Bun Ly risks a great forfeiture if the condition fails.

The general rule is that express conditions can be fulfilled only by complete performance. However, it appears that some courts will make an exception to this rule where there is a risk of a great forfeiture in construction cases.

In this case, the parties' construction contract contained an express condition saying that the owner Mareth's duty to pay for the work depended on complete performance by the builder Bun Ly according to the Plans attached to the contract. Bun Ly did finish building the house according to the plans--except that he built the house three feet from where the Plans specified. The general rule would say that Mareth's duty to pay has not become due.

However, it appears that some courts will make an exception because of the risk of great forfeiture. In this case, if Mareth's duty to pay does not become due, Bun Ly will receive nothing under the contract. And Bun Ly's error here is very minor. However, although it is a minor error, it would require great economic waste to fix--since Bun Ly would have to rebuild a large portion of a concrete house to do it! In that situation, it seems that some courts will excuse the express condition, and apply the doctrine of substantial performance. Applying that doctrine, Bun Ly has probably substantially performed, and Mareth's duty to pay has become due. Of course, if Mareth really has suffered any damage because of Bun Ly's failure to build the house in the right place--because of Bun Ly's breach--then Mareth is entitled to a remedy for that breach.

*** **ADDITIONAL REFERENCE:** Chapter 10 ("Remedies") discusses remedies courts may order when there is a contract breach.

9.5b Performance of Sale of Goods Contracts

Another important type of contract to which special performance rules may apply is sale of goods contracts. Many jurisdictions have special statutes that govern these contracts. These statutes may actually change some of the rules discussed in Sections 9.3 and 9.4 which relate to the performance of sale of goods contracts. The reasons these laws may modify the rules include helping parties to these contracts--especially businesses and governments--to conduct trade and other important activities efficiently.

This Section will briefly discuss a few examples of special rules which one of these statutes--the Uniform Commercial Code ("UCC") in the United States--contains for the performance of sale of goods contracts. Specifically, the Section will examine the UCC's special rules about (1) waiver and (2) tender of performance.

(1) Waiver in Sale of Goods Contracts

Waiver is one important area in which the UCC has special rules related to performance of contracts. The rules about waiver are different for sale of goods contracts because the rules about modification of contracts are different. The UCC allows parties to modify sale of goods contracts even if there is no new consideration for the modification, as long as the modification is made in good faith. This is true even though common law jurisdictions like those in the United States normally require consideration in order for such changes to be enforceable. This was already explained in Chapter 3 (“Consideration”), Section 3.7a.

The effects of this rule on the performance of contracts have also been explained above, in Section 9.4i of this Chapter. One important effect would appear to be that a party to a sale of goods contract could waive the right to receive the benefit of a condition in that contract, even if the condition was a material express condition. Another important effect would appear to be that a party could waive the right to receive a promised performance--the benefit of a duty of the other party--even if that performance was a material part of the contract! So it appears that the UCC permits parties to waive the rights to the benefit of both conditions and promises, as long as the change is made in good faith.

For example, suppose Sokvann made a contract to purchase 100 tons of tobacco from a rich and powerful merchant named Triv for a certain price. If the price of tobacco gets much higher before the delivery date, Triv will still be required to honor the contract as it is written, even though it has become a bad deal for him. But if Sokvann agrees to pay the same price but modify the quantity term to be 90 tons--perhaps because he hopes to persuade the rich and powerful Triv to enter into good deals with him in the future--that would be an enforceable modification under the UCC. This is true even though there is no new consideration, since Triv has promised to do nothing new. The effects of the modification would be that Sokvann has waived the right to receive 100 tons of tobacco, and that he has waived the right to the benefit of the condition concurrent to his duty to pay--which is that he receive 100 tons of tobacco before his duty to pay becomes due. So Triv will be required to deliver only 90 tons of tobacco, and if he does, Sokvann will still be required to pay the original contract price.

*** **ADDITIONAL REFERENCE:** Chapter 3 (“Consideration”), Section 3.7a discussed the sale of goods exception to the general rule that common law jurisdictions require consideration for modifications of contracts.

(2) Tender of Performance in Sale of Goods Contracts

The UCC also has a number of special rules about the rights and duties of the parties when there is a tender of goods. Basically, these rules control what happens when the buyer says that the seller has failed to make

a proper tender of the goods. When that occurs, jurisdictions that follow the UCC apply the rules discussed below. Sometimes these rules are somewhat different from the general rules about performance discussed in Sections 9.3 and 9.4 above. Obviously, these differences will affect the rules about improper rejection of a tender (discussed in Section 9.4g). But as explained below, the differences may also affect the rules about severability (discussed in Section 9.4k), substantial performance (discussed in Section 9.4c), and other important subjects.

Some of these special rules are very complex, and this text cannot explain them completely. The material below is merely a general overview of some of the important rules about this subject in one particular statute (the UCC). Of course, as always, it is important to check the local law in the jurisdiction relevant to the contract.

The UCC's rules about the rights of the parties where there is some problem with a tender may be divided into three basic parts:

- (a) how courts decide whether a contract is a "single lot" contract or an "installment" contract;
- (b) the rights of parties to "single lot" contracts; and
- (c) the rights of parties to "installment" contracts.

Each of these parts will be briefly discussed below.

(a) How courts decide whether a contract is a "single lot" contract or an "installment" contract -- Under the UCC, the rights of parties to sale of goods contracts differ depending on whether the contract is a "single lot" contract or an "installment" contract. The UCC says that all sale of goods contracts are single lot contracts except those that require or authorize the delivery of goods in separate lots, which are installment contracts. So single lot contracts are those that require tender of all the goods in one delivery, whereas installment contracts are those that require or allow tender of the goods in more than one delivery.

Contracts authorizing delivery in separate lots would appear to mean those that allow that kind of delivery either expressly or impliedly. This authorization might be implied where the circumstances of the contract indicate that is what the parties intended.

For example, suppose there is a contract for the delivery of a huge quantity of oil by railroad. If both parties know that trains that run on the relevant delivery route are never long enough to handle that much oil in one trip, a court would probably say the contract was an installment contract. The oil would have to be delivered in separate lots.

(b) The rights of parties to single lot contracts -- In single lot contracts, the general rule under the UCC is that the buyer has the right

to reject a tender of goods if that tender fails in any way to follow the terms of the contract. This rule is sometimes called the “perfect tender” rule, and it would seem to mean that the seller would not have the benefit of the substantial performance doctrine in sale of goods contracts.

However, so many limits have been imposed on this general rule that it appears the practical result is that courts often do not allow buyers to reject goods unless the non-conformity is serious--which is actually comparable to the substantial performance rule! So the “perfect tender” rule is not really an accurate name for the rule under the UCC. Even so, the UCC rules about single lots are probably more helpful to buyers overall, since the rules probably do give buyers more power to reject than they would otherwise have.

Specifically, in single lot contracts, the UCC gives a buyer three options when the tender of goods from the seller is “non-conforming”--does not conform to the contract--in some way. In that situation, the buyer may:

- (1) accept the whole tender;
- (2) reject the whole tender; or
- (3) accept any “commercial units” of the tender and reject the rest.

A “commercial unit” would appear to mean any part that could be separated from the tender without causing commercial waste. For example, it might be proper to accept only half of a rice shipment, but not accept half of one car.

If a buyer accepts the whole tender, it appears that his duty to pay generally becomes due, although he may actually revoke his acceptance in some circumstances. That will be explained below.

If a buyer rejects the whole tender, and his rejection is not affected by any of the limits discussed below, then it appears that the rejecting party’s duties under the contract are discharged. In other words, it seems that the rejecting party has the right to treat the non-conforming tender as a material breach. The buyer’s duty to pay would not become due, since it depended on the fulfillment of the implied-in-law condition that was the seller’s delivery, and the buyer could ask a court for a remedy to compensate him for the seller’s breach. Discharge of duties in this way will be further discussed in Section 9.6b, below.

If the buyer rejected only part of the tender, and none of the limits below applied to that rejection, it would seem that the buyer’s duty to pay would become due. Of course, the buyer would be entitled to a remedy to compensate him for the damage caused to him by the seller’s breach.

As noted above, there are many limits on the general rule about tender of goods in single lot contracts. These are limits on the buyer’s ability to reject the tender. It appears that these limits reduce the effect of the rule so much

that conditions in sale of goods contracts can often be fulfilled by substantial performance! This text briefly discusses five of these limits below.

First Limit: The parties may agree that a perfect tender will not be required. It appears that this kind of agreement could occur as part of the contract, or later, since modifications of sale of goods contracts do not require consideration under the UCC, as discussed above.

Second Limit: It appears that courts sometimes interpret contracts so that what looks like a minor non-conformity is not really a non-conformity. Some courts do this by examining the contract interpretation rules about the circumstances surrounding the contract, such as the course of performance, course of dealing, and trade usages, in order to find if a tender is really non-conforming. These rules were already discussed in Chapter 8 (“Interpretation of Contracts”), Section 8.3h.

For example, suppose the trade usage relevant to a contract is that a contract requiring the delivery of many boxes containing 20 items each is considered to be performed by the delivery of 19, 20 or 21 items in each box, perhaps because the fast pace of that particular business does not always allow such items to be precisely counted. In that situation, a court might say that a tender with 19 items in a particular box or boxes would be proper, that the buyer could not reject it, and that the buyer’s duty to pay would become due.

Of course, this kind of discretion could be very dangerous. This is not so much because it will cause the buyer great harm--since it appears that the buyer will always have the protection of the substantial performance rule, even if the seller is not required to perform exactly as the contract seems to say. However, this discretion could be dangerous because it might create a risk that the court would not follow the intentions of the parties, or not follow the will of the legislature that enacted the statute. Courts must be very careful to follow such intentions and such legislation.

***** ADDITIONAL REFERENCE:** Chapter 8 (“Interpretation of Contracts”), Section 8.3h discussed the rule that courts examine surrounding circumstances such as course of performance, course of dealing and trade usages in order to interpret contracts.

Third Limit: The seller has the right to “cure” or fix the non-conforming tender under several circumstances. This is probably the most important limit on the rule about tenders under the UCC. It basically means that, under some circumstances, the seller who gave a non-conforming tender has the right to fix it for some period of time, and if he does fix it, then the buyer cannot reject it!



Specifically, the UCC says that a seller has the right to cure a non-conforming tender where:

- (1) the time for performance (delivery) has not yet expired;
- OR (2) the time for performance has expired, but the seller tells the buyer of his intention to cure within a reasonable time, and the seller reasonably thought that either:
 - (a) the non-conforming tender would be acceptable, or
 - (b) the non-conforming tender would be acceptable with a tender of money damages to “cure” the non-conformity.

Of course, if it is not possible to cure the tender within a reasonable time, then the tender cannot be cured. The ability of parties to other kinds of contracts to cure non-conforming performances will be discussed in Section 9.6b, below.

This rule about “cure” seems complex, but it basically means a seller has the right to cure in two situations. The first situation occurs where there is still time left before delivery is finally due. In that case, the seller can cure the non-conformity--by delivering the right quality and quantity of goods--any time up until the time for delivery in the contract. The seller has this right no matter how big his breach is.

The second situation occurs where the seller has made a non-conforming tender, but the seller had reason to believe his tender would be acceptable even though it was non-conforming. This might be because the seller included some extra money to compensate the buyer for the difference between the tender and what the contract said.

For example, suppose a contract requires the delivery of 50 chairs, and the seller delivers 40 with an appropriate amount of money to compensate the buyer for the breach, but the buyer rejects. A court might find that the seller reasonably thought the tender would be acceptable, and give the seller more time to cure it--even after the time for performance under the contract has expired.

Although the UCC will give the seller extra time to fix his tender where the seller thought money damages would make the non-conforming tender proper, it is not clear whether the UCC will allow the seller to actually cure using money damages! However, some authorities think the UCC should permit that, and should also permit sellers to cure by providing goods that are different but of equal value to those in the contract, since business persons commonly use such methods to cure non-conforming tenders.

Fourth Limit: The buyer’s right to reject non-conforming tenders is subject to the duty of good faith under the UCC. This appears to mean that, although a buyer can generally reject even for a very small non-conformity in a tender, such a rejection must still be in good faith, or it will be

an improper rejection. Some authorities appear to say that a rejection is in good faith as long as the buyer is honestly dissatisfied with the tender. But if the buyer is really dissatisfied with the fact that he has made a bargain that is not favorable to him, and is merely using a tiny non-conformity in order to escape that bad bargain, that rejection is not in good faith! These rules are similar to some of the rules about conditions of disapproval, which were discussed in Section 9.4l, above. The duty of good faith in the performance of contracts will be further discussed in Section 9.5c, below.

For instance, in the tobacco sale example above, suppose the price of the tobacco became far lower than the contract price before the date of delivery. That would make the bargain a bad one for the buyer Sokvann, since he would have a contract duty to pay more than the current market price. Suppose also that Triv delivered one kilogram less than the 100 tons of tobacco the contract required, and Sokvann rejected that tender. In that case, courts would look very closely to see if Sokvann was really dissatisfied with the tender--or if he rejected because he wanted to escape his bad bargain! If the rejection was in bad faith, it appears that the rejection would be improper, and Sokvann's duty to pay would become due despite the small non-conformity.

Fifth Limit: There are technical limits on a buyer's ability to reject, or to revoke his acceptance of goods. If these limits are violated, the buyer may be required to accept the non-conforming tender. The UCC says that rejection must occur within a reasonable time after the tender, and the buyer must notify the seller about the rejection within a reasonable time, or else the rejection is not proper. In addition, rejection cannot occur after a buyer has "accepted" the goods. Very generally, a buyer may be considered to have accepted goods under the UCC if: the buyer indicates to the seller that the goods are acceptable after having a reasonable chance to inspect them; the buyer fails to reject within a reasonable time; or the buyer basically does something inconsistent with the seller's ownership, such as using the goods. If the buyer does accept goods that are non-conforming, she may recover the difference between the actual value of the goods she accepted and the value the goods would have had if they were conforming. This is further discussed in Chapter 10 ("Remedies"), Section 10.8a.

A buyer may "revoke" his acceptance of goods, but only in limited circumstances. A proper revocation of acceptance has the same effect as a proper rejection--the buyer's duty to pay does not become due, and he may seek a remedy to compensate for the seller's breach. But there are many requirements for a proper revocation, and the result of these would seem to be that it is difficult to make one. One requirement is that a buyer can revoke only if the non-conformity makes the goods substantially less valuable to the buyer. Another requirement is that such a revocation must occur within a reasonable time after the buyer knew or should have known of the reason for it. In addition, the revocation must occur before any substantial change in the condition of the goods which is not caused by the goods' own defects.

And the revocation is not effective until the buyer notifies the seller about it. Another requirement is that the buyer can revoke only where:

- (1) the buyer accepted because of his reasonable assumption that the non-conformity would be cured, and it has not been cured; or
- (2) the buyer accepted without discovering the non-conformity, and this was reasonably caused by the difficulty of discovering it or by assurances by the seller.

Since every revocation of acceptance must meet all these requirements, it would appear to be difficult to make a proper revocation once a buyer has accepted goods.

***** WHY IS THIS IMPORTANT?** Why does the UCC apply the above rules where there is some problem with the tender of goods in a single lot contract?

The general rule described above is that a buyer can reject a tender of goods in a single lot contract because of any non-conformity to the contract, no matter how small. This rule gives tremendous power to buyers in sale of goods contracts. If the rule was strictly applied, it might cause effects similar to express conditions, although it probably would not cause many forfeitures, since the seller could generally get his goods back following a rejection.

The reason for the rule may be to give buyers extra protection from having to accept something they do not want. Perhaps some buyers find it difficult to reject once a seller has already delivered, or difficult to seek a legal remedy every time a tender of goods is not perfect. It may also be that the law wishes to motivate sellers to be careful about filling orders for goods, and about delivering the goods in good condition.

But the many limits on the rule may often result in the rule having little effect, and in courts actually applying the substantial performance rule explained in Section 9.4c, above. These limits may show that the law is not happy with the harshness of its own rule, and that it wants to reduce that harshness in a number of situations where it could be unfair to sellers. In particular, the law appears to use the limits to reduce the ability of buyers to abuse their power, perhaps by using it to escape bad bargains, or to set unreasonable standards for tenders of goods. However, it is not clear whether trying to apply all the complex limits noted above is better than simply changing the general rule to something closer to the substantial performance rule.

CASE STUDY 214

(U.S. commercial code)

FACTS Sna agrees to buy a model A-100 flashlight from Pochin for a certain price. On the day before delivery is due, Pochin delivers to Sna a new model A-200 flashlight, which is actually a “new and improved” version of

the A-100. Pochin is happy to provide Sna with this new product, which he thinks is at least as good as the A-100 model.

However, Sna rejects the A-200 flashlight, and says he is terminating the contract. Pochin is unable to persuade Sna to accept the A-200--or even to accept one of the A-100 models! Sna says his rejection is permanent, and that there is nothing Pochin can do to continue under the contract. Pochin asks his attorney about his options.

QUESTION OF LAW Is there anything Pochin can do to continue under the contract despite Sna's rejection of the flashlight?

DECISION Yes. Pochin can cure his non-conforming tender by delivering an A-100 flashlight before the time for delivery expires--and probably even for a reasonable time after the time for delivery expires, if he notifies Sna about what he is doing.

In general, the UCC says a buyer may reject any non-conforming tender in a single lot contract, no matter how small the non-conformity. However, one of the many limits on this general rule is that a seller may cure his non-conforming tender by making a proper tender before the time for performance expires. In addition, if the seller reasonably thought the non-conforming tender would be acceptable to the buyer, the seller may notify the buyer and cure within a reasonable time even after the time for performance has expired.

In this case, Pochin did not deliver the A-100 flashlight the contract required, and Sna rejected it. However, Pochin did make the delivery one day before performance was due. So if Pochin still had time left under the contract, he could cure the tender, and Sna would be required to accept it. In addition, Pochin has another option, because he reasonably thought that the "new and improved" A-200 flashlight would be acceptable to Sna. Pochin's idea was reasonable because people often (though not always) like new and improved models of products at least as well as the old models. In this situation, if Pochin notifies Sna and delivers an A-100 flashlight within a reasonable time--even if that is after the time for performance under the contract expires--he will cure the tender.

(c) The rights of parties to installment contracts -- In installment contracts, the general rule is that the buyer can reject a non-conforming tender of an installment only if the non-conformity substantially reduces the value of the installment and it cannot be cured. Obviously, this rule is much different from the rule about single lot contracts. In fact, this rule is more favorable to sellers, because it appears to take an approach that is similar to the substantial performance rule discussed in Section 9.4c above. In other words, the buyer's duty to pay for the installment will probably become due as long as the non-conforming tender is not a serious breach of the contract.

The reason the UCC has a more favorable rule for sellers in installment contracts may be that it believes that defects in one installment of such contracts are less likely to cause substantial problems for the whole contract. The UCC may also want to make sure that a non-conformity really is serious before allowing it to threaten an installment contract, since such contracts are often large, long-term arrangements that should not be allowed to fail because of small problems. The rules about installment contracts are explained in more detail below.

Where one installment of an installment contract is a non-conforming tender, there are basically four possible situations:

- (1) the non-conformity does not substantially reduce the value of the installment;
- (2) the non-conformity substantially reduces the value of the installment but the problem can be cured;
- (3) the non-conformity substantially reduces the value of the installment and the problem cannot be cured; or
- (4) the non-conformity is so serious that it substantially reduces the value of the whole contract and it cannot be cured.

Each of these situations is briefly discussed below.

First, if the non-conformity does not substantially reduce the value of the installment, the buyer must accept it and continue with the contract. This is similar to the substantial performance rule discussed in Section 9.4c. In other words, it appears that “substantially reduces the value” means something similar to “is a material breach.” Factors that might be relevant to whether a non-conformity substantially reduces the value include the quality and quantity of the goods, and the time of delivery. Obviously this rule is much better for sellers than the general “single lot” rule discussed above, under which any non-conformity would give a buyer the right to reject the tender and end the contract. For example, it seems unlikely that the delivery of the “new and improved” flashlight in Case Study 214 could be rejected if it was an installment in an installment contract, since it is unlikely that it would substantially reduce the value of that installment. Of course, even though a buyer must accept non-conforming tenders that do not substantially reduce the value of the installment, the buyer may still seek a remedy for the seller’s breach in failing to follow the contract.

Second, if the non-conformity substantially reduces the value of the installment but the problem can be cured, and the seller cures or provides an adequate assurance that he will cure, then the buyer must accept the installment. If a non-conformity in the delivery of an installment does substantially reduce the value of the installment, but the problem can be cured by the seller, then it appears that the buyer cannot reject until it is clear that a cure will not occur. If the seller cures or gives an adequate assurance that

he will cure a non-conforming installment, the buyer must accept the installment. Of course, even if the seller cures, and the buyer's duty to pay becomes due, the buyer still has the right to recover any damages he suffered because of the non-conforming tender.

The UCC says that the buyer must accept an installment if the seller gives an “adequate assurance” that he will cure. Whether such an assurance is adequate under the UCC depends on the same factors that were discussed in Section 9.4e above, which explained prospective inability or unwillingness to perform. In other words, it appears that it must be an assurance that a party could reasonably believe. This situation is similar to the one where a party has reason to believe that the other party will not be able or willing to perform. In fact, a non-conforming installment could actually provide such a reason with respect to the rest of the contract! Section 9.4e discussed prospective inability or unwillingness to perform.

Of course, if the buyer accepts the goods in this situation but the seller fails to cure the problem, then the buyer may revoke his acceptance of the goods. Likewise, if the seller fails to give an adequate assurance that he will cure, the buyer may reject the installment. However, even if a buyer properly rejects an installment, that does not necessarily mean he has the right to end the whole contract! This will be discussed further below.

For example, if a restaurant made a contract to buy rice, to be delivered in installments of 200 kilos per month for one year, that would be an installment contract. If one delivery contained only 130 kilos, that non-conformity might substantially reduce the value of the installment. But if the non-conformity could be cured, as it probably could through the prompt delivery of 70 more kilos of rice, and the seller gave an adequate assurance of cure, then the restaurant would have to accept the delivery of the 130 kilos. If the rice seller gave the restaurant that assurance--perhaps by giving a believable assurance that this was just an error and that he would soon deliver 70 kilos from the tons of rice at his warehouse--then the restaurant would have to accept the installment. Of course, if the rice seller failed to cure, the restaurant could revoke its acceptance.

Third, if a non-conformity substantially reduces the value of the installment and the problem cannot be cured, the buyer may reject the installment. Where the non-conformity substantially impairs the value of the installment and it cannot be cured, the buyer may reject the installment right away. However, as will be discussed below, that does not mean the buyer can end the whole contract.

It is not exactly clear what kind of non-conformity in a sale of goods delivery “cannot be cured.” It would seem possible to replace or deliver more of most kinds of goods within a reasonable time. However, it may be that some goods are so rare, unique, difficult to make, or difficult to transport that a non-conforming tender could not be cured, at least in some cases.

For example, suppose a government and an airplane manufacturer made a contract for the manufacturer to deliver 30 new jet fighter planes, in three lots of 10 planes each over the next three years, and that one installment actually contained only six planes. In that case, it seems possible that the non-conformity could not be cured within a reasonable time, since four more planes might be impossible to manufacture and deliver within a reasonable time.

Fourth, if a non-conformity substantially reduces the value of the whole contract, the buyer may reject the installment, end the contract and ask a court for a remedy. It is possible for a non-conformity in an installment to be so serious that it substantially reduces the value of the whole contract. When that occurs, and cure is not possible, the effect under the UCC appears to be like a material breach--the buyer may end the contract and ask a court for a remedy like money damages. However, it would seem that a non-conformity in a particular installment would have to be very serious to substantially reduce the value of the whole contract. For instance, in the rice example above, it seems unlikely that a shortage of 70 kilos of rice in one installment would substantially reduce the value of the 2400 kilos of rice in the whole contract. However, suppose a manufacturer agreed to deliver the various parts of one large, specially manufactured machine in a number of installments. If one of these installments had a very serious problem that could not be cured--such as if an essential part was delivered in a broken state, there was no way it could be cured, and the whole machine could not work without the part--then the buyer would have the right to end the contract and ask a court for a remedy.

However, even when the value of an installment contract is substantially reduced, the UCC says that several particular actions by a buyer may actually have the effect of reinstating the contract. These actions will apparently cause the buyer to lose (or waive) his right to end the contract. This can occur in situations where the buyer:

- (a) accepts the non-conforming installment and fails to notify the seller that he is canceling the contract within a reasonable time;
- (b) asks a court for remedies only for problems with past installments;
- or (c) asks the seller to provide future installments.

So even where a non-conformity substantially reduces the value of the whole contract, the buyer must be careful to preserve his rights if he wishes to end the contract.

***** ADDITIONAL REFERENCE:** Chapter 10 ("Remedies"), Section 10.8a contains further discussion of remedies that may be available to parties where there is a performance problem with a sale of goods contract.

9.5c The Duty of Good Faith and Fair Dealing Applies to Contract Performance in Many Jurisdictions

Many jurisdictions say that the duty of good faith and fair dealing is present in every contract. This duty can be important in the performance of contracts. The duty has already been discussed in some detail in other parts of this text, especially in Chapter 8 (“Interpretation of Contracts”), Section 8.3j. The general result of a breach of this duty would appear to be that the party harmed would be entitled to a remedy to compensate him for any damage caused.

***** DEFINITION:** The **duty of good faith and fair dealing** basically requires a party to a contract to be honest and not seek unfair advantage over the other party (good faith), and to follow reasonable standards of fair conduct in the particular type of contract the parties made (fair dealing).

As discussed in Chapter 8, many jurisdictions say this duty applies to the performance and enforcement of contracts. In many civil law jurisdictions, such as France and Germany, the duty also applies during the negotiation stage of contracts. But in many common law jurisdictions, the duty does not generally apply at that stage.

In all jurisdictions, courts are careful to apply the duty of good faith and fair dealing only in situations where it is clear that the parties have not respected the contract. The reason is that the duty is very difficult to define, and the law does not want courts to use it too widely, or it might cause serious harm to the other rules about the performance and enforcement of contracts. Courts do not define the duty of good faith and fair dealing in a way that harms other legal rules. In fact, the duty is generally used to supplement or help define other rules, as explained below.

Unfortunately, authorities do not appear to agree about exactly what violates the duty of good faith and fair dealing. And as explained in Chapter 8, the rules about the duty of good faith and fair dealing do not always apply the same way in different situations. In some situations, courts may apply only the “good faith” standard, and not any duty of “fair dealing.” For example, the Uniform Commercial Code in the United States seems to apply only a “good faith” requirement to sale of goods contracts generally, but to apply that requirement and a “fair dealing” requirement to merchants involved in such contracts. In any case, it is important to check the local law about this uncertain area.



Some examples of conduct which some authorities say violates the duty of good faith and fair dealing in the performance of contracts are:

- (1) a lack of diligence in performing a contract;
- (2) intentionally giving an imperfect performance of a contract;
- (3) interfering with the other party's ability to benefit from the contract;
- or (4) interfering with the other party's performance.

Chapter 8 gave several examples of cases where these kinds of violations might occur. One was the situation where an insurance company denied coverage of a party's claim under a policy, even though the insurance company knew the claim really was covered. That forced the party to bring a lawsuit about the insurance coverage to court, and perhaps suffer other damage.

Another example was Case Study 188, in which parties to two nightclub singing contracts took a number of actions that may have violated the duty of good faith and fair dealing. These actions included interfering with the performance of other parties under the contract (tampering with a singer's sound system); intentionally giving an imperfect performance (intentionally singing badly); and preventing another party to the contract from receiving the benefits of the contract (doing either of the above things).

The duty of good faith and fair dealing also appears to be used as a way to help define or explain other legal rules about performance in a number of situations discussed in this Chapter. That is, the duty may be a way to help measure whether conditions are fulfilled or excused, or whether promises are performed or breached. In particular, it appears that certain violations of the duty of good faith and fair dealing may actually excuse conditions, because they may be basically the same as certain excuses explained in Section 9.4 above. So the duty may actually help courts analyze the performance of the rest of the contract.

One situation where the duty of good faith and fair dealing might apply is where there are conditions of approval. As discussed in Section 9.4l above, the law says there are certain limits on the ability of parties and non-parties to cause such conditions to fail by disapproving performances under the contract. If these limits are not followed, the condition will be excused, and the duty that depended on the condition will become due for performance. Some of these limits could also be defined by the duty of good faith and fair dealing. That is, some courts might say that when a party does not follow those limits, he is violating the duty of good faith and fair dealing in performing the contract. For example, where a party or a "special" non-party evaluates a matter of aesthetics, such as in the painting examples in Section 9.4l, courts in many jurisdictions say that the condition will fail only if the disapproving party is honestly dissatisfied with the performance. But since this "honesty"

is very similar to the duty of good faith, this rule could also be explained by saying that the condition of approval will fail in these situations only if the disapproving party follows the duty of good faith in evaluating the performance! And unreasonable disapprovals of performances related to practical matters might also be described as violations of the duty of fair dealing. This is because such disapprovals might not follow reasonable standards of fair conduct in the relevant trade. So this might be a different way for courts to achieve the same result in this kind of situation.

Another situation where the duty of good faith and fair dealing may apply is where one party wrongly prevents or hinders the occurrence of a condition in the contract. As explained in Section 9.4h above, where a party wrongly prevents or hinders the occurrence of a condition, the condition is excused, and the duty that depended on that condition becomes due. This kind of problem could also be defined by the duty of good faith and fair dealing. The reason is that this kind of wrongful behavior might also be considered an attempt to seek unfair advantage in the performance of the contract, and a failure to follow reasonable standards of fair conduct in the trade.

For example, in Case Study 207, the actions of the De-mining Foundation in wrongly preventing the Special Company from fulfilling the condition of delivering the special goods by a certain date--and then claiming that the Special Company had failed to fulfill the condition--could also be described as a violation of the duty of good faith and fair dealing. That is because these actions might be considered an attempt to seek unfair advantage and a failure to follow reasonable standards of fair conduct.

Another situation where the duty of good faith and fair dealing is relevant is where there is a rejection of a tender of performance. As explained in Section 9.4g, an improper rejection of a tender of performance will excuse conditions, and cause the duties that depend on those conditions to become due for performance. Such improper rejections could be considered violations of the duty of good faith and fair dealing, for reasons similar to those described above about wrongful prevention or hindrance. For example, in Case Study 206, Souley's rejection of Vannay's tender of the money for the tractor could be considered a violation of the duty of good faith and fair dealing. In addition, under the Uniform Commercial Code in the United States, a buyer in a single lot contract may not reject a tender of goods for a minor reason if that rejection is not in good faith. Good faith appears to generally mean that the buyer is honestly dissatisfied with the tender--rather than dissatisfied with his bargain. This is true even though the UCC generally allows buyers in such contracts to reject goods for any non-conformity.

Finally, the duty of good faith and fair dealing may be relevant in difficult situations such as those involving construction contracts, which were discussed in Section 9.5a above. As explained above, courts sometimes struggle with what to do when a builder in such a contract performs with only a minor defect, but the contract contains an express condition, so that a great

forfeiture may result if the condition fails. In that situation, some courts appear to apply new rules in order to avoid a forfeiture, and find that the land owner's duty to pay has become due. One way to analyze that situation might be to say that the land owner has actually violated the duty of good faith and fair dealing by withholding his performance (paying for the construction) on the basis of the failure of the express condition where it was so likely to cause a forfeiture. The land owner's acts in the situation might be an attempt to seek unfair advantage, or a failure to follow reasonable standards of fair conduct in the construction business. For example, this might be a different way to explain the result in Case Study 213. In that case, the land owner Mareth might not be permitted to withhold his payment for the construction of the house that Bun Ly had completed according to the contract--except for having built the house three feet away from where the contract required.

Many jurisdictions say that, in certain special situations, to breach a contract in violation of the duty of good faith and fair dealing--in "bad faith"--is actually a tort. This was already discussed in Chapter 8 ("Interpretation of Contracts"), Section 8.3j. Most courts have been careful to limit this tort to certain types of cases. These seem to be where:

- (1) there is some special relationship between the parties to the contract that involves elements such as the public interest and adhesion;
- or (2) a party's conduct in breaching is notably malicious, oppressive, unreasonable, or unjustifiable.

An important area in which courts have found this to occur is in insurance contracts, where an insurance company refuses in bad faith to pay a claim submitted by one of its policyholders. Another situation where some courts have found the tort of bad faith to exist is where a party denies without any legitimate reason that a contract even exists. In situations like these, punitive damages may be available, though that is unusual in contract disputes. This will be discussed in more detail in Chapter 10 ("Remedies"), Section 10.5d.

***** ADDITIONAL REFERENCE:** Chapter 7 ("Other Contract Formation Problems"), Section 7.4a discusses the duty of good faith and fair dealing in the context of misrepresentation in the inducement; Chapter 8 ("Interpretation of Contracts"), Section 8.3j discusses the duty of good faith and fair dealing in some detail; and Chapter 10 ("Remedies"), Section 10.5d discusses how a bad faith breach of contract can be a tort in limited situations.

9.6 Performance, Breach, or Other Events Related Directly to the Performance of the Contract May Discharge Contract Duties

Once a court has decided that a contract duty is due for performance--and sometimes even when the duty is not yet due for performance--the court must decide whether that duty has been discharged, or the duty is or

will be still due for performance. If the duty has been discharged, then the party with that duty will not be obligated to perform it. This could occur because the party already performed the duty, or for many other reasons, as will be explained in Sections 9.6-9.8 of this Chapter. If the duty is still due for performance, then the court may choose to order one of the remedies discussed in Chapter 10 (“Remedies”).

Contract duties may be discharged in ways that relate closely to the performance of the contract itself. In fact, contract duties may be discharged by performance, breach, or certain other events related directly to the performance of the contract. This Section will explore these ways that contract duties may be discharged. Specifically, the Section will discuss six situations where contract duties may be discharged:

- (1) complete performance discharges the contract duties of the performing party (Section 9.6a);
- (2) a breach may discharge the contract duties of the innocent party (Section 9.6b);
- (3) an anticipatory repudiation may discharge the contract duties of the innocent party (Section 9.6c);
- (4) an improper rejection of a tender of performance may discharge the contract duties of the innocent party (Section 9.6d);
- (5) the occurrence of a condition subsequent may discharge contract duties (Section 9.6e); and
- (6) the avoidance of contract duties in a voidable contract may discharge contract duties (Section 9.6f).

9.6a Complete Performance Discharges the Contract Duties of the Performing Party

Complete performance by all parties is the goal of every contract, and it is the ideal way for a contract to end. This may be easy to forget while studying the rules about how the law deals with contracts that are not completely performed, or that have some other problem. Most contracts end with complete performance by all parties--and the parties are happy to have no dispute about performance or other legal problems!

When one party provides complete performance of his contract duties, those duties are discharged. That means the party basically has no other duties to perform under the contract. Of course, the party may still have obligations not to interfere with the other party’s performance or benefits under the contract, or otherwise violate the duty of good faith and fair dealing, as discussed in Section 9.5c above. But complete performance generally means the party who performed is finished with the contract.

Complete performance as a way to fulfill conditions was already discussed in Section 9.4b, above. For example, in Case Study 200, when the Rubber Company delivered all the rubber required by its contract with the Tire Company, the Rubber Company had completely performed. In addition to fulfilling the condition concurrent to the Tire Company's duty to pay for the rubber, the Rubber Company's delivery discharged its own duties under the contract. In other words, the Rubber Company had nothing left to do under the contract. Case Study 200 is also an example of how one party's duties may be discharged, even though another party's duties are not discharged. In that case, the Rubber Company's duties were discharged, but the Tire Company's duties were not yet discharged. The following Case Study is another example of the effects of complete performance.

CASE STUDY 215

FACTS Vichit and Ry agreed that Ry would rent Vichit's car for one week, and that Ry would pay Vichit 50,000 riels right after Ry returned the car. Ry used the car for one week, and then returned it. Immediately after Ry returned the car, she paid Vichit 50,000 riels. The parties thanked each other for doing such a good job performing the contract. Then they went out to celebrate the fact that they had had no problems in performing the contract.

QUESTION OF LAW Are the duties of the parties to this contract discharged?

DECISION Yes. The duties of both Vichit and Ry have been discharged because both parties have completely performed those duties under the contract.

When a party completely performs a contract duty, that duty is discharged. So that party basically has no further obligation under the contract.

In this case, both Ry and Vichit completely performed their duties under the contract. Vichit had a duty to rent his car to Ry for one week. When that duty was completely performed--when Ry had had use of the car for one week--Vichit's duty under the contract was discharged. Ry had a duty to pay Vichit 50,000 riels. When that duty was completely performed--when Ry paid Vichit the full amount of money--Ry's duty under the contract was discharged. So both parties completely performed, and all duties in this contract were discharged. In fact, the contract is executed, since it has been fully performed by all parties.

*** **ADDITIONAL REFERENCE:** Chapter 1 ("Basic Aspects of Contract Law"), Section 1.3c contains further discussion of executed contracts.

Sometimes a performance looks complete, but in reality it is not. For example, suppose the 50,000 riels Ry paid in Case Study 215 turned out

to be counterfeit. In that case, Ry's performance would not have been complete, even though it may have looked complete, and even though Vichit may not have discovered the problem for some time. In fact, that would be a material breach of the contract, and Vichit would have the right to ask a court for a remedy because of Ry's failure to perform her duties. Another example might be where a builder builds a house under a contract. The house may look "complete," but if the house has not been built exactly according to the contract, the performance is not complete. So it is important to make sure that a party really has performed completely according to the contract, because that is what is required in order for that party's duties to be discharged.

It appears that substantial performance--which is less than complete--does not discharge the duty of the party who performed. This is because that party still has a duty to perform the minor part of the contract that he has failed to perform. He is not finished, so his duty has not ended. So even though a party who substantially performs has done enough to fulfill an implied-in-law condition, and cause the other party's duty to become due for performance, the party's own duty is not discharged. It appears that this duty may be finally discharged in several ways. First, in some cases it may be possible for the party to cure his breach and provide complete performance, as discussed in Section 9.5b, above, and as will be further discussed in Section 9.6b, below. In addition, if the innocent party asks a court for a remedy for the breach, and the court finally resolves the case and issues a final judgment about it, that will discharge the duties of the parties, as discussed in Section 9.8d below. And the duty may be discharged in other ways that will be explained in Sections 9.7 and 9.8.

9.6b A Breach May Discharge the Contract Duties of the Innocent Party

Another important way contract duties are discharged is by a breach of the contract. In certain situations, a breach of the contract by one party will discharge the contract duties of the other party to a contract.

In general, a breach may lead to the discharge of the duties of the non-breaching party where that breach causes a condition to fail--and therefore prevents the duty of the non-breaching party from becoming due for performance. In particular, this can occur if there is a material breach that causes an implied-in-law condition to fail, any breach that causes an express or implied-in-fact condition to fail, or any breach that causes a condition to fail because of a special statute. In other words, where a condition precedent to a duty is not fulfilled or excused, that duty will not become due, and that duty will often be discharged.

However, not every breach that causes a condition to fail necessarily discharges the duties of the non-breaching party. One reason is that the non-breaching party may choose not to treat the non-conforming performance as a breach. That generally results in a waiver of the non-breaching party's right

to insist that a condition occur before his own duty is due. Or the breaching party may be able to cure the breach, and cause the non-breaching party's duty to become due in that way.

As noted above, any breach that causes a duty not to become due may discharge duties. The most common way this occurs is where there is a material breach, and that situation will be the basis for our discussion below. However, the rules explained below would appear to be similar for other breaches that cause conditions to fail, including breaches that cause express and implied-in-fact conditions to fail, and also breaches that cause conditions to fail under special statutes, such as the Uniform Commercial Code in the United States. Obviously, these breaches need not be material in order to cause conditions to fail.

For example, the general rule under the Uniform Commercial Code is that any non-conformity in a tender in a single lot contract allows the buyer to reject, as explained in Section 9.5b. Of course, such a non-conformity would be a breach. A buyer's rejection in that situation would discharge the buyer's duties, unless it was affected by one of the limits discussed in Section 9.5b.

When one party fails to substantially perform--committing a material breach--the other party basically has three choices:

- (1) declare a material breach of the contract, end the contract, and cause his own duties to be discharged;
- (2) unilaterally rescind the contract, ending the contract, and causing all duties under the contract to be discharged;
- OR (3) choose to continue with the contract, which would generally result in a waiver of the right to insist that the condition occur before the waiving party's duty becomes due.

These options are discussed in more detail below.

First Option -- If the non-breaching party chooses the first option, he basically says the contract is over because the breaching party failed to perform it. The effect of this is to discharge the duties of the non-breaching party. Of course, the duties of the breaching party are not discharged, and the non-breaching party can (and often does) ask a court for a remedy to compensate him for the breach.

For example, suppose a seller materially breaches a contract for the sale of umbrellas by delivering only half the umbrellas required. In that case, the buyer would have the right to reject the umbrellas, declare a material breach, end the contract, and cause his own duty to pay to be discharged. Of course, the seller's duty would not be discharged, and the buyer could ask for a remedy to compensate him for the breach.

Second Option -- The non-breaching party may also choose the second option, and unilaterally rescind the contract. The idea of rescission was already introduced in Chapter 3 (“Consideration”), Section 3.7a. Rescission basically means canceling the contract. Like the first option above, rescission basically ends the contract. But the big difference is that rescission discharges all duties under the contract--including those of the breaching party! This would appear to prevent the non-breaching party from asking a court for a remedy for the breach of the contract, since the breaching party would have no duty left under the contract. So non-breaching parties must be careful not to unilaterally rescind contracts unless they are ready to give up the right to ask for such a remedy.

Of course, if there was a rescission, either party could still ask a court for restitution of what he had given to the other party under such a contract. For instance, in the umbrella example above, the buyer could choose to unilaterally rescind the contract after the seller’s breach. This would end the contract and discharge all duties--including the seller’s duties. In that situation, it appears that the buyer would not be able to ask a court for a remedy for the seller’s breach of the contract. So the court would not order the seller to actually perform, or to pay the buyer money damages he might have suffered as a result of the breach, such as lost profits. But either party could ask for restitution of what he had given to the other party. Rescission will be further discussed in Section 9.7a below, and in Chapter 10 (“Remedies”), Section 10.7b.

***** ADDITIONAL REFERENCE:** Chapter 3 (“Consideration”), Section 3.7a discussed rescission as an exception to the general rule that modifications of contracts require consideration in common law jurisdictions; and Chapter 10 (“Remedies”), Section 10.4 discusses restitution, and Section 10.7b discusses rescission.

Third Option -- If the non-breaching party chooses the third option, and continues under the contract, it generally means the party is waiving his right to insist that the condition occur before his duty becomes due. Of course, as discussed in Section 9.4i above, such a waiver does not generally affect the non-breaching party’s right to ask a court for a remedy for the breach, unless there is also a binding modification of the contract. But such a waiver would also mean that the non-breaching party’s duties were not discharged. In other words, the non-breaching party would still have a duty to perform. For instance, in the umbrella example above, the buyer might choose to waive his right to receive complete performance before his duty to pay would become due. In that case, his duty to pay would not be discharged until he paid. Of course, he would have the right to a remedy for damage he suffered because of the seller’s breach. Special rules might affect when a waiver might occur, such as the rules about waiver in sale of goods contracts which were discussed in Sections 9.5a and 9.5b, above. Section 9.4i discussed waiver as a way conditions might be excused.

Another way in which a breach would not cause the duties of the non-breaching party to be discharged is if the breaching party “cures” or fixes the breach. The breaching party’s ability to cure under special statutes about sale of goods contracts was already discussed in Section 9.5b, above. It appears that the general rule that applies to all kinds of contracts in many jurisdictions is that a breaching party may cure his breach if he can fix the problem within a reasonable or appropriate time. This would appear to mean the cure might even occur after the date for performance, if that was within a reasonable or appropriate time, unless there was an express or implied-in-fact condition that performance occur no later than that date. Where such a breach can be cured, many jurisdictions say that the duty of the non-breaching party is suspended until the breaching party has had a reasonable opportunity to cure. If the cure occurs within a reasonable time, the non-breaching party’s duty is not discharged. If the cure does not occur within a reasonable time, then the non-breaching party’s duty is discharged. These ideas are discussed in more detail below.

When there is a material breach, there are basically three possible situations with respect to cure by the breaching party:

- (1) the breach cannot be cured;
- (2) the breach can be cured but the breaching party fails to do so within a reasonable time;
- (3) the breach can be cured, and is cured within a reasonable time.

Some material breaches cannot be cured. Such breaches cause conditions to fail, and duties of the non-breaching party to be discharged. An example would be the sale of goods contract for the specially manufactured machine, discussed in Section 9.5b above, in which a crucial part of the machine was delivered in a defective state. In that situation, the seller could not possibly cure the delivery of the defective part within a reasonable time. So the duties of the buyer would be discharged.

Sometimes the material breach can be cured but the breaching party fails to do so within a reasonable time. In that situation, the breach will only suspend the duty of the non-breaching party while cure is still possible. But once cure is no longer possible, the breach will cause the condition to fail, and the duties of the non-breaching party will be discharged. For example, in the umbrella example above, it would seem fairly easy to cure the breach by delivering the rest of the umbrellas required by the contract. But if the seller failed to do that within a reasonable time, the duty of the buyer to pay would be discharged.

Finally, sometimes a material breach can be cured and is cured within a reasonable time. In that situation, the breach suspends the duty of the non-breaching party until the cure occurs. When the cure occurs, the performance is complete (or at least substantial), and it causes the duty of the

non-breaching party to become due for performance. So in that case, the breach does not discharge the duty of the non-breaching party. For instance, in the umbrella example, if the seller delivered the other umbrellas required by the contract within a reasonable time, then the seller's performance would be complete, and the buyer's duty would become due. The buyer's duty would not be discharged by the seller's breach.

One difficult question about cure of a breach is how much time is needed to give a breaching party a reasonable opportunity to cure. This will vary according to the circumstances of each case. Some factors that some jurisdictions say are important in deciding how much time the breaching party should have to cure are:

- (1) how much a delay in the performance harms the non-breaching party;
 - (2) how much risk of forfeiture the breaching party faces if the other party declares a material breach;
 - (3) how likely it is that the breaching party will cure;
 - (4) the subject matter of the contract;
- and (5) anything the contract itself says about the time for performance.

The factors above will influence how much time a breaching party has to cure. The more harm a delay in performance will cause the innocent party, the less time the breaching party will have to cure. On the other hand, the greater risk of forfeiture to the breaching party, the more time that party is likely to have to cure! For example, a builder might be given more time to cure because of the great risk of forfeiture in many construction contracts. In addition, the more likely it is that a breaching party will cure, the more time that party is likely to get to cure. For example, if a party gives adequate assurances of cure, the party is likely to get more time than if the party says nothing. Of course, if a party refuses to cure, or if cure is impossible within a reasonable time, the breaching party will get no time to cure, and the non-breaching party may declare a material breach immediately. A refusal to cure a material breach might be similar to an anticipatory repudiation, which will be discussed in Section 9.6c, below. Parties who breach some types of contracts may receive more time to cure. It appears that parties who breach sale of goods contracts generally receive less time to cure than parties to land sale or service contracts, since time is more likely to be important in sale of goods contracts. Finally, if the contract itself discusses the time for performance--such as if it says that "time is of the essence"--that will affect how much time a breaching party will have to cure.

Breaches that result in a discharge of duties may take forms other than a simple failure to perform completely when performance is scheduled to occur under the contract. For example, an anticipatory repudiation may result in a breach that discharges the non-repudiating party's duties, as will be explained

in Section 9.6c. In addition, it appears that some of the other events that may excuse conditions might also result in discharge of duties. For example, if a party prevents or hinders another party from performing, that would excuse any condition that consisted of the performance. But it might also be a breach of the contract that would discharge the duty of the other party to perform, if the breaching party prevented the other's performance in a way that meant the other party could not perform at all. It might be considered a breach of an implied promise to cooperate, or the duty of good faith and fair dealing. Excuse of conditions because of wrongful prevention or hindrance was discussed in Section 9.4h, and the duty of good faith and fair dealing was discussed in Section 9.5c.

Even if the duties of a party are discharged because of a breach, either party can generally ask a court for restitution of what he has provided to the other party under the contract, under the doctrine of quasi-contract. Of course, the breaching party will only be able to recover if he can show that there has been unjust enrichment. His recovery will be reduced by the damage he has caused the other party. And there are other limits on what he can recover. This is discussed in Chapter 1 ("Basic Aspects of Contract Law"), Section 1.5c, and Chapter 10 ("Remedies"), Section 10.4a.

CASE STUDY 216

FACTS Samean agreed to build a new addition onto Niam's house for a certain price. Samean worked on the house for several months. Finally, he told Niam that he was finished, and he asked for the money for the construction work.

The addition looked all right from the outside, but unfortunately, there were many problems with Samean's work. The walls had many large holes, the plumbing and electric did not work, and many of the doors and windows were missing or did not fit correctly. The roof leaked badly. Niam told Samean that he had done a lousy job, and she refused to pay him until he fixed the problems. Samean promised to fix the problems, but when his workers came back, they spent most of their time talking and smoking cigarettes. They only patched a few of the holes in the walls. Then they went away and never came back.

Several weeks after the workers left, Samean came and asked Niam for the money for the construction. Niam said Samean had not fixed most of the problems, and she refused to pay him. Samean asked the court for help.

QUESTION OF LAW Is Niam's duty to pay for the work discharged?

DECISION Yes. Niam's duty to pay Samean for the construction work is discharged because of Samean's material breach of the contract.

A breach of a contract that causes a condition to fail, such as a material breach, may discharge the duty that depended on that condition--the duty of the non-breaching party. In this case, Samean made a contract to build an addition onto Niam's house. But the work he did had many problems, and it seems clear that he did not substantially perform--that his performance was a material breach.

However, although this material breach suspended Niam's duty to pay, it did not discharge it, because Samean could have cured the breach within a reasonable time. Unfortunately, Samean failed to do that, because his workers fixed only a few of the holes in the walls, then went away and never came back. A builder in Samean's situation might receive a substantial amount of time to cure, because of the risk to forfeiture to him, and also because he said he would cure. However, Samean has failed to cure his breach, despite being given a substantial amount of time to do so. And there is no indication that he plans to do any more work. So Niam is justified in declaring a material breach and ending the contract. Niam's duty to pay for the work is discharged, and Niam could also ask the court for a remedy to compensate her for Samean's breach.

Of course, Samean could ask the court for restitution of the reasonable value of the work that he provided to Niam. But it is not clear how much unjust enrichment there was here. This might depend in part on how much money and time it would cost Niam to fix the problems with the work that Samean did.

*** **ADDITIONAL REFERENCE:** Chapter 1 ("Basic Aspects of Contract Law"), Section 1.5c, and Chapter 10 ("Remedies"), Section 10.4a discuss the possibility that a breaching party can recover restitution under the doctrine of quasi-contract.

9.6c An Anticipatory Repudiation May Discharge the Contract Duties of the Innocent Party

An anticipatory repudiation is basically a statement by a party that clearly shows that party does not intend to perform a contract duty when that performance is due. Anticipatory repudiation was already explained in some detail in Section 9.4d of this Chapter. As explained earlier, when an anticipatory repudiation occurs, it excuses any conditions on which the repudiating party's duty depends. So that duty will become due for performance, even though the condition has not been fulfilled.

But another important effect discussed in Section 9.4d is that an anticipatory repudiation generally gives the other party the right to treat the repudiation as a material breach and immediately ask a court for a remedy, among other options. If the non-repudiating party decides to treat the repudiation as a breach, then the non-repudiating party's duties under the contract will be discharged in the same way as with other material breaches,

as discussed in Section 9.6b, above. Another option the non-repudiating party has is to unilaterally rescind the contract. This would result in the discharge of all the duties in the contract, as also discussed in Section 9.6b. Of course, it is also possible for a repudiating party to retract a repudiation, unless the non-repudiating party has accepted or detrimentally relied on the repudiation. But it would seem that if the non-repudiating party chooses to declare the repudiation to be a breach or to rescind the contract, that would basically be an acceptance of the repudiation. The options of the non-repudiating party were already discussed in Section 9.4d.

For example, suppose Kia made a contract to buy a certain amount of silk from Visoth. If Kia told Visoth before the time for delivery that Kia was not going to perform the contract, that would be an anticipatory repudiation. In this situation, one of Visoth's options would be to treat the repudiation as a material breach. If Visoth did that, his duty to perform (deliver the silk) would be discharged, and he could also ask a court for a remedy for any damage caused by Kia's breach. Another option Visoth might choose would be to unilaterally rescind the contract. That would result in the discharge of all the duties under the contract. In that case, Visoth could not ask a court for remedies for the breach.

One requirement where a non-repudiating party treats an anticipatory repudiation as a breach and asks a court for remedies is that the party must show the court that he could have performed the contract if the other party had not repudiated. In other words, the non-repudiating party must show that he was willing and able to perform his duties under the contract at the time they were due.

For instance, in the silk example above, if Visoth decided to bring a lawsuit against Kia for breach of contract because of Kia's anticipatory repudiation, Visoth would have to show the court that Visoth could have delivered the silk according to the contract in order to get a remedy on the basis of the contract. If Visoth could not show this, he would not be able to recover for the breach.

Of course, if Visoth later made a different contract to avoid some of the damages he would suffer because of the breach, that would not prevent him from recovering anything. This is because courts wish to encourage parties to avoid damages. In fact, courts generally say that parties cannot recover damages which could reasonably have been avoided. This rule was already discussed in Section 9.4d, and it will be explained in detail in Section 10.6c.

***** ADDITIONAL REFERENCE:** Chapter 10 ("Remedies"), Section 10.6c contains further discussion of the rule that parties to contracts cannot recover for damages that they could reasonably have avoided.

CASE STUDY 217

FACTS The Government made a “build-operate-transfer” (BOT) agreement with a large international company called Big Bear BOT Company to build and operate a new airport. Under the contract, the BOT Company agreed to build the airport, and the Government agreed to let the Company operate and earn money from certain parts of the airport for 20 years. At the end of that time, control of the airport would be transferred to the Government.

Several weeks before construction is due to start on the new airport, the BOT Company sends the Government a letter. The letter says that the BOT Company will not perform its contract. The Government tries to persuade the BOT Company to perform the contract, but has no success.

Finally, the government tells the BOT Company that it is treating the letter as a breach, and politely advises the Company to find a good lawyer. The Company says it will agree to end the contract and not ask for any money for all the trouble it had getting ready to perform. The Company says this means all the duties under the contract are discharged.

QUESTION OF LAW Are all the duties under this contract discharged?

DECISION No. The Government’s duty to perform under the contract is discharged because it has decided to treat the BOT Company’s anticipatory repudiation as a material breach, but the duties of the BOT Company under the contract are not discharged.

Where one party makes an anticipatory repudiation, the non-repudiating party has the option to treat the repudiation as a material breach, which may discharge the duty of the non-repudiating party to perform. In this case, the BOT Company told the Government that it would not perform its BOT agreement. This was an anticipatory repudiation, because it was a clear statement that the Company would not perform its contract duties. In response, the Government chose to treat the repudiation as a material breach, and ask a court for a remedy. One effect of this decision was that the Government’s duties were discharged. The reason is that a court would probably find that the construction of the airport was a condition precedent to the Government’s duty to allow the Company to operate it--since the construction had to happen first--and that the Company’s breach means this condition will fail. Because the condition will fail, the Government’s duties will not become due. In fact, they will be discharged in the same way as in the case of any other material breach. However, the BOT Company’s duties are not discharged. They remain due for performance.

9.6d An Improper Rejection of a Tender of Performance May Discharge the Contract Duties of the Innocent Party

Sometimes one party properly tenders performance to another party, but the other party rejects that tender. Such an improper rejection will excuse any condition that consisted of the performance that was tendered. In that situation, the duty of the party who improperly rejects will become due for performance, even though the condition precedent or concurrent to that duty has not occurred. This was discussed in detail in Section 9.4g, above.

Of course, what is required for a “proper” tender will vary depending on what the contract says and what kind of contract it is. Obviously, contracts with express conditions have different standards from contracts with implied-in-law conditions, and certain kinds of contracts (like sale of goods contracts) may have special rules. So it is necessary to look carefully at all the circumstances to see which rules apply.

Another important effect of an improper rejection of a tender is that it may discharge the duties of the party who tendered the performance. The law actually treats this situation in a way that is similar to the way it treats a material breach.

Where one party improperly rejects a tender, the rejection suspends the duty of the party whose tender was rejected. It appears that, in most cases, the party who improperly made the rejection will then have some opportunity to cure his improper rejection, generally by actually tendering or performing his own duties under the contract within a reasonable time. If the party who improperly rejected a tender does perform his own duties in this way, then the other party’s duty to perform--which had been suspended--will become due again!

But sometimes the party who improperly rejected a tender fails to cure his improper rejection. It may also be that the rejection cannot be cured. This could happen where the contract contained an express condition requiring performance not later than a certain time, or said that time was of the essence in the performance of the contract. In those situations, the duty of the other party will be discharged. Of course, this is similar to the rules about suspension and discharge of duties by material breach, which were discussed in Section 9.6b.

For example, suppose Sin agrees to sell his moto to Hong for \$1,000, and the contract does not say when performance will occur. Suppose Hong tenders the money to Sin after a few days, but Sin improperly rejects the tender. This will suspend Hong’s duty to perform. However, it will not discharge Hong’s duty yet. Sin will still have some opportunity to cure his improper rejection. So if Sin comes to Hong and tenders the moto within a reasonable time--which may not be long for a sale of goods contract like this--then Hong’s duty to pay will become due again! Of course, if that happens, Hong will also be given

a reasonable amount of extra time to get the money to Sin. But if Sin fails to cure or retract his rejection in this way, then Hong's duty to pay will be discharged. On the other hand, if the contract had specified a date for performance and said that time was of the essence, then it appears that Sin would not be able to cure his improper rejection any later than that date. Of course, Sin's duty to perform would still be due--since the condition concurrent to it would be excused by Sin's own improper rejection--and Hong could then ask a court for a remedy to compensate him for Sin's breach.

As noted above, it appears that this kind of improper rejection of a tender is treated in a way that is similar to a material breach. In fact, this kind of improper action might actually be considered a breach of an implied duty to cooperate, or the duty of good faith and fair dealing. Obviously, many parties would be prevented from performing if the other party simply refused to accept their tender of performance, as the moto sale example above shows. In addition, refusing to accept a proper tender might violate the duty of good faith and fair dealing if it was considered an attempt to seek unfair advantage, or a failure to follow reasonable standards of fair dealing. The moto sale example above might also be analyzed in this way. Wrongful prevention or hindrance of performance as an excuse of conditions was explained in Section 9.4h, and the duty of good faith and fair dealing was discussed in Section 9.5c.

9.6e The Occurrence of a Condition Subsequent May Discharge Contract Duties

Contract duties may also be discharged by the occurrence of a condition subsequent. As explained in Section 9.3b2 above, a condition subsequent is a condition that actually terminates a legal duty that is already due for performance. Obviously, this means that the occurrence of this kind of condition actually discharges the duty. Examples of conditions subsequent were already given in Section 9.3b.

Conditions subsequent do not occur often. One of the most common ways they occur is in insurance contracts. Suppose Chhay makes an insurance contract in which an insurance company agrees to pay for all damages to Chhay's house which are caused by certain potential events over the next year. The insurance contract may contain a clause saying that, if there is damage to the house which is covered by the policy, the insurance company's duty to pay for it will not become due unless Chhay gives the insurance company notice--properly tells the company about his claim for the damage--within 30 days after the occurrence of the damage. That notice would be a condition precedent to the insurance company's duty to pay the claim. If Chhay failed to give that notice, the insurance company's duty to pay would not become due.

But the same insurance contract might also say that, if Chhay gave that notice of the claim and caused the insurance company's duty to become due, but the insurance company failed to pay the claim, then Chhay would have only one year more to bring a lawsuit to force the company to pay

for the damage. The contract might say that if Chhay failed to bring such a lawsuit within one year, the insurance company's duty to pay would terminate. That failure to bring a lawsuit would be a condition subsequent, because its occurrence would cause the insurance company's duty to pay to terminate. And if that actually happened--if there was damage to Chhay's house that was covered by the policy, Chhay gave notice to the insurance company within 30 days, the insurance company failed to pay, and Chhay failed to bring a lawsuit within one year--then the insurance company's duty to pay for the claim would be discharged. So the occurrence of the condition precedent--the notice--would have caused the duty to pay to become due. But the occurrence of the condition subsequent--Chhay's failure to bring a lawsuit against the insurer within one year--would cause that same duty to be discharged!

9.6f Avoidance of a Voidable Contract May Discharge Contract Duties

As discussed earlier, a voidable contract is one that one party has the right to set aside or avoid. Voidable contracts may result from a failure to meet various formation requirements, such as capacity, mistake, misrepresentation, duress, or undue influence. These reasons, and the ability of parties to avoid such contracts, were explained in detail in Chapters 1 and 4-7.

If parties with the right to avoid these contracts choose to avoid them, it appears that this will discharge the duties of all the parties under the contract, unless those duties have already been discharged. This kind of discharge of duties might occur when the party with the right to set the contract aside does so, without going to any court. Or it might occur where that party uses his right to avoid as a defense to a lawsuit by the other party to enforce the contract. If one or more of the parties to a voidable contract have not yet completely performed, an avoidance by one party would appear to discharge the duties that have not yet been performed. If one or more parties have already completely performed their duties at the time of the avoidance, then it would seem that the duties of the parties who have performed are already discharged!

When a party avoids a contract, the law will generally try to provide restitution of the reasonable value of what the parties have provided to each other under the contract. Of course, as explained in Chapters 4-7, the parties in such contracts who do not have the right to avoid may not always be able to recover full restitution of what they have given under the contract.

For example, in Case Study 103, a minor named Much made a contract to purchase a watch for \$20 from the S'aht Jewelry Company. If the parties had not yet exchanged the money for the watch, the effect of a disaffirmance by Much would appear to be that the duties of both parties would be discharged. If the parties had exchanged the money for the watch, the duties under the contract would already be discharged. So the effect of a disaffirmance by Much

would be that Much would have the right to restitution of his \$20 from the S'aht Jewelry Company. Of course, Much would also have to return the watch if he still had it in his possession.

***** ADDITIONAL REFERENCE:** Chapter 1 (“Basic Aspects of Contract Law”), Section 1.3a, Chapter 4 (“Capacity”), Sections 4.4-4.6, Chapter 5 (“Legality”), Section 5.5a, Chapter 6 (“Formality”), Sections 6.3 and 6.7, and Chapter 7 (“Other Contract Formation Problems”), Sections 7.3-7.6 discuss voidable contracts.

9.7 A Later Agreement or Later Statement of the Parties May Discharge Contract Duties

Sometimes the parties to a contract make an agreement, or one party makes a statement, after the contract is formed, that causes the duties under the contract to be discharged. In other words, even though the duties under the contract have not been discharged by performance, breach, or some related event, one or both of the parties may be able to simply decide that the duties under the contract will be discharged.

Most of the ways to discharge duties that will be discussed in this Section are agreements between the parties. Often, such agreements to discharge duties are actually new contracts! In order for such contracts to be enforceable in common law jurisdictions, they must often--but not always--have consideration. This will be discussed further below.

This Section will discuss six important ways that parties may discharge contract duties by a later agreement or statement. These are through:

- (1) a mutual rescission (Section 9.7a);
 - (2) a release (Section 9.7b);
 - (3) a substitute contract (Section 9.7c);
 - (4) an accord and satisfaction (Section 9.7d);
 - (5) a novation (Section 9.7e);
- and (6) an account stated (Section 9.7f).

***** WHY IS THIS IMPORTANT?** Why does the law say that parties may be able to discharge their contract duties merely by agreeing to do so after the contract is made?

Parties can agree to discharge contract duties--and end their contracts--for basically the same reasons that the law would enforce the contract itself. And in fact, the agreements to discharge duties discussed in this Section generally are new contracts themselves. The law generally wants parties to have the right to agree to affect their legal relations as much as they need

to in order to achieve their goals. This is one big reason why any contract is enforceable. There may also be special advantages for parties to be able to end their existing contracts. Sometimes contracts turn out to be a bad idea for the parties, or do not work out the way the parties hoped. The law wants to give parties the flexibility to react to these kinds of events, and to change their minds. Obviously, this will often make the parties happier.

These options may also result in a more efficient economy and judicial system. They give parties more freedom to do as they wish, and not waste time performing contracts that they no longer wish to perform. If the law said that parties could not agree to end their contracts, then some parties might feel that they had to perform their contracts, even though neither party thought it was a good idea. Of course, if all parties to a contract wish to end the contract, they could simply not perform it any more. As discussed earlier, courts have no power to interfere in contracts unless at least one party brings a dispute about the contract to the court. But if one party later changed his mind about ending the contract, that could lead to uncertainty and more legal disputes. The law wants to give parties the option to end their contracts and to know that the contracts are really ended. This gives the parties added security and certainty in conducting their affairs. It may also promote finality in the law, and reduce the number of disputes courts must resolve.

9.7a Mutual Rescission May Discharge Contract Duties

Sometimes parties simply decide to end their contracts, even though the contracts have not been fully performed. Parties can legally discharge all their remaining duties under a contract by agreeing to rescind that contract. This is called a mutual rescission.

***** DEFINITION:** A **mutual rescission** is basically the cancellation of a contract by agreement of the parties.

Such a mutual rescission is actually a new contract, and the law will enforce it. That is, the law will enforce provisions in the new contract that say neither party can enforce the old contract!

The basic effect of a mutual rescission is that the contract ends, and no contract duties remain, although parties may still get restitution of benefits they have provided. Rescission was already introduced in Chapter 3 (“Consideration”), Section 3.7a.

For example, suppose Sophon and Eang make a contract to form a partnership to start an import-export business in the Pailin area. After the contract is made, the parties might decide that they do not wish to perform their contract because of security concerns. In that situation, the parties could agree to rescind their original contract. If they did, the duties in the original contract would be discharged. Neither party could enforce the contract,

although the parties would probably be able to get restitution of anything they had given to the other party under the contract.

It appears that a mutual rescission may be express or implied. For instance, in the Pailin example above, the parties made an express agreement to rescind their contract. However, a court might also find that such parties have impliedly rescinded contracts in certain circumstances. This might occur if the actions of the parties show clearly that they do not intend to perform the contract. For instance, if the parties in the Pailin example simply never took any actions to perform or enforce their contract for a substantial amount of time, a court might say that they had impliedly rescinded the contract.

Another situation where courts might imply a mutual rescission is where the parties actually modify their old contract or make a new one that changes the obligations the parties have under the old contract, but does not actually say it is mutually rescinding the old contract. In that situation, some courts may say that the parties have made an implied rescission, and may treat the old contract duties as discharged. This was already discussed in Chapter 3, Section 3.7a, and will be discussed again in the Sections below on substitute contracts (Section 9.7c) and accord and satisfaction (Section 9.7d).

***** ADDITIONAL REFERENCE:** Chapter 3 (“Consideration”), Section 3.7a contains further discussion of modifications of contracts and mutual rescission.

There are two important limits on the ability of parties to mutually rescind their contracts. First, since a mutual rescission is a new contract, common law jurisdictions generally require consideration in order for such a rescission to be enforceable. If neither party has completely performed his duties under the contract, then there should be no consideration problem, since the consideration on each side is that each party gives up his right to the performance of the other party. But where one party has completely performed, there is no consideration from the other party--since that party has already received full performance, he is not really giving up anything in the rescission! In other words, there is no legal detriment to the party who has already received complete performance under the contract. So in these situations, common law jurisdictions generally say that mutual rescissions are not valid unless there is some new consideration, or unless some exception such as promissory estoppel (detrimental reliance) applies. If both parties have fully performed, then there would appear to be no need for a mutual rescission--the parties can simply make a new contract, if they wish.

A second limit is that a mutual rescission cannot affect the rights of third parties if those rights are “vested.” This complex subject cannot be described in detail here. Basically, contracts sometimes affect more than two parties, often because one of the goals of the contract is to provide some benefit to a third party--a “third party beneficiary.” In that situation, the two parties who actually make the contract cannot agree to rescind their contract

if that rescission would affect the “vested” rights of the third party beneficiary. Vested basically means the present property of the holder of the right. For example, if a party owned a car, the party’s right of ownership would be a vested right. A mutual rescission cannot harm that kind of a right. The rights of third party beneficiaries are discussed in detail in Chapter 11 (“Third Party Rights and Duties”), Section 11.5.

For example, suppose Tan and Cheng agreed that Tan would pay Cheng a certain amount of money to build a house for Sopheap. Sopheap would probably be an intended third party beneficiary who would actually have the right to enforce that contract! The time when Sopheap’s right to enforce might actually vest--so that no one could change it--varies in different jurisdictions. But the main idea here is that once Sopheap’s right vests, Tan and Cheng cannot mutually rescind the contract without Sopheap’s agreement.

*** **ADDITIONAL REFERENCE:** Chapter 11 (“Third Party Rights and Duties”), Section 11.5 discusses third party beneficiaries in more detail.

One way in which mutual rescissions are often not limited is with respect to writing requirements. It appears that many jurisdictions say that a mutual rescission does not generally have to be in writing--even if the original contract was required to be written! And it appears that many jurisdictions do not require such mutual rescissions to be written even if the original contract says it can be modified only by another writing. For example, suppose that two parties signed a residential lease for more than one year, in a jurisdiction where that kind of contract was required to be written to be enforceable. Many jurisdictions would say that those parties could mutually rescind that contract orally. However, laws in some jurisdictions have different rules. For example, the Uniform Commercial Code in the United States says that, where a signed sale of goods contract says that only a signed writing can modify or rescind it, that contract cannot generally be modified or rescinded in any other way. In addition, it appears that many jurisdictions say that an oral mutual rescission is not enforceable if it would cause a transfer of title to land.

*** **ADDITIONAL REFERENCE:** Chapter 6 (“Formality”) contains further discussion of situations where the laws of many jurisdictions say contracts must be written.

The general effect of a mutual rescission is that the contract is canceled, and that the parties have no obligation to perform it. This means that parties generally have no contract duties to perform. However, parties still generally have the right to restitution of any benefits they have provided to the other party under the contract, if they can show unjust enrichment, under the doctrine of quasi-contract. In this way, mutual rescission appears to be similar to unilateral rescission.

Of course, as with unilateral rescission, parties must be careful that they do not give up the right to enforce the contract by mutual rescission

unless they really intend to do so! The reason is that restitution may not be as good a remedy as enforcement of the contract in some situations. Laws in some jurisdictions do say that parties who mutually rescind contracts still have the right to ask a court for a remedy under the contract. For example, the Uniform Commercial Code in the United States says that parties to sale of goods contracts still have that right in the case of a mutual rescission or a unilateral rescission. But in general, it appears that parties do not have that right. So they must think carefully before they agree to rescind their contracts. The effect of unilateral rescission was already explained in Section 9.6b, which discussed discharge by breach.

For example, suppose Naro agrees to harvest Sonneath's rice crop for a certain price per hectare. If the parties mutually rescind the contract after Naro has harvested half the crop, many jurisdictions say that Naro has no right to be paid under the contract for his work! Of course, Naro can ask a court for restitution of the reasonable value of what he has done for Sonneath. But that may not be as much money as what Naro would have received under the contract itself.

CASE STUDY 218

FACTS On November 1, Kien agrees to buy a car from the Speedy Car Company for a certain price. The car is scheduled to be delivered on December 1. Unfortunately, on November 25, Kien loses her job. So she goes to the Speedy Car Company and asks if the Company will agree to rescind the car sale contract. The Company agrees to rescind, hoping that Kien will come back and buy a car when she finds a new job.

Several months pass, and the Company is unable to sell the car. It decides to ask a court to force Kien to obey the original contract. Kien says all the duties under that contract are discharged.

QUESTION OF LAW Are all the duties under the original car sale contract discharged?

DECISION Yes. The duties under the original contract are discharged because Kien and the Company made a new contract to mutually rescind the old one.

When the parties to a contract agree to mutually rescind that contract, the contract is canceled and all the duties under the original contract are discharged. In this case, Kien and the Speedy Car Company made a contract for Kien to buy a car from the Company. However, after Kien lost her job, she asked the Company if it would agree to rescind the contract. The parties agreed that the contract would be rescinded. That means that all the duties under the old agreement were discharged. So the Company can no longer enforce the old agreement against Kien.

It would appear that a mutual rescission could also have additional consideration on one or both sides. For example, suppose the Speedy Car Company in Case Study 218 would not agree to the mutual rescission unless Kien also agreed to pay \$50. In that case, the terms of the rescission would be that the Company would agree to give up its rights under the contract in exchange for Kien's agreement to give up her rights under the contract and to pay \$50 to the Company.

9.7b A Release May Discharge Contract Duties

Sometimes a party who has already fully performed may wish to give up his right to receive the performance of the other party to a contract. This cannot generally be done with a mutual rescission in common law jurisdictions, because there would be no consideration, as discussed in Section 9.7a. However, it might be done with a signed document called a release.

***** DEFINITION:** A **release** is a document signed by a party in which that party discharges a duty that is owed to him.

A release is not an agreement. It is a document signed by one party. A release may discharge contract duties that are not yet due for performance, or duties that are due and have not been performed. In contract situations, it would seem that releases are most often used when the duty of only one party to the contract remains to be performed--including the situation where one party expressly gives up his right to sue another party for breach of the contract. But releases are not used only in contract situations. For example, a party may also use a release to give up his right to pursue different kinds of legal claims he may have against another party, such as tort claims.

It appears that many jurisdictions require that a release be a writing signed by the party discharging the duty in order to be valid. So there appear to be two important requirements for releases to be valid in many jurisdictions:

- (1) the release must be in writing;
- and (2) the release must be signed by the party discharging the duty owed to him.

The other rules about releases vary in different jurisdictions. Some common law jurisdictions say that a release must have consideration to be valid. So the party whose duty was being discharged by the release would have to agree to some new legal detriment (often a payment of money) in order for the release to be valid. In that situation, it would seem that the release would be merely one part of a contract between the parties. Other common law jurisdictions appear to say that consideration is not required for a release, or at least that it is not required for particular kinds of contracts, such as sale of goods contracts. That would mean one party could discharge the contract

duties of another party even if the party whose duties were being discharged agreed to nothing in exchange for the release.

For example, suppose Sem borrowed 10,000 riels from his cousin Man. If Sem had difficulty repaying 7,000 riels of this money, he might ask Man to sign a release discharging Sem's duty to repay the rest of the money. Man might agree to this simply in order to be nice to his cousin, or because it would be too much trouble to bring a lawsuit against him. In that situation, there would be no consideration, because Man has agreed to give up his right to receive the rest of the money, but Sem has agreed to nothing new. However, that would still be a valid release in some common law jurisdictions, as long as the release was written and signed by Man. Other common law jurisdictions might require that there be some new consideration for the release to be valid. For instance, the release might be valid in those jurisdictions if Sem agreed to buy Man a large bowl of noodle soup in exchange for the release. The following Case Study contains another example of a release.

CASE STUDY 219

FACTS Oung's Sewing Company, a new business, agreed to buy 100 square meters of a certain material from the Soft Silk Company. The contract said that Oung would pay the full price of the silk within 30 days after the silk was delivered. The Silk Company delivered all the material according to the contract.

However, 30 days passed, and the Silk Company received no payment. The Company asked Oung to pay, but Oung said that she did not have all the money yet, since her clothes were not selling as quickly as she hoped they would. Oung begged the president of the Silk Company to have faith in her, and not to require that she pay for all the silk right away.

The president of the Silk Company knew Oung was hard-working and an excellent seamstress. The president also knew that if Oung's new business was a success, the Company would be able to sell her a lot more silk. So the president decided that she would help Oung get her new business started. The president signed a document stating that all Oung's duties under the contract were discharged, and sent it to Oung. Oung thanked the president many times and vowed to work twice as hard to make her business a success, but she could not believe this meant she did not have to pay for the silk.

QUESTION OF LAW Are Oung's duties under this contract discharged?

DECISION Yes, in many jurisdictions. The duties under this contract would be discharged in many jurisdictions because the president of the Silk Company made a valid release discharging Oung's duty to pay for the silk.

The duties of a party to a contract may be discharged where the party to whom the duties are owed signs a document called a release stating that those

duties are discharged. Some common law jurisdictions require consideration in order for a release to be valid, but others do not.

In this case, the president of the Silk Company decided to help Oung get her new sewing business started by not requiring her to pay for the shipment of silk, as she normally would have had to pay under the contract between the parties. To do this, the president signed a release. The effect of this signed document in many jurisdictions would be to discharge Oung's duties to pay for the silk--even though there was no consideration to support the president's promise. Some common law jurisdictions would require consideration. In those jurisdictions, Oung would have had to agree to do something in order for the release to be valid.

Releases may seem similar to mutual rescissions, since both basically end contracts. But actually the two ideas are different in several important ways. First, a release must generally be a signed writing, whereas a mutual rescission can generally be oral. Second, a release is basically a statement by one party, whereas a mutual rescission is always a new contract between the parties. Third, a release sometimes does not need consideration to be valid in common law jurisdictions, but a mutual rescission generally does.

9.7c A Substitute Contract May Discharge Contract Duties

Sometimes the parties to a contract simply wish to end their contract and make a new agreement that substitutes a different duty of performance for the duty owed under the original contract. One way they can do this is by making a substitute contract.

A substitute contract is basically a new, different contract between the parties that immediately discharges the old contract between the parties. A substitute contract occurs where the evidence shows that the intention of the parties was to create a new contract and immediately discharge the duties under the old contract. If such a new contract does not immediately discharge the duties under the old contract, then it is an accord, which will be discussed in Section 9.7d, below.

In general, substitute contracts seem to happen where one party has fully performed under an existing contract and the other party has not. In particular, substitute contracts seem most common where one party owes the other party money under the existing contract.

Of course, in some cases it can be hard to tell whether the parties intended a substitute agreement or an accord. When parties do not state their intentions so clearly, there are a few general guidelines many courts use to help them decide this difficult issue. One guideline is that, where parties make a new agreement about an existing contract under which money is owed, and the amount of a debt that remains to be performed is not disputed, courts generally assume that the parties' new agreement is an accord.

But where the amount of the debt that remains to be performed is disputed between the parties, then courts generally assume the parties intended a substitute contract. Another rule that some jurisdictions seem to apply is that the more formal the new agreement is, the more likely it is to be a substitute contract. This is further discussed in Section 9.7d, which examines accord and satisfaction.

An important effect of a substitute agreement is that it immediately discharges the duties in the old contract. That means that as soon as the substitute contract takes effect, the old contract is discharged. So if one party fails to perform the substitute agreement, the other party may ask a court to enforce that substitute agreement-but not the old agreement. The reason is that all the duties under the old agreement have been discharged.

For instance, in the loan example in Section 9.7b, where Sem borrowed 10,000 riels from his cousin Man, Sem had trouble repaying the last 7,000 riels. Suppose that, instead of Man signing a release, the parties made a new agreement. Under the new agreement, Man agreed to cancel immediately the 7,000 riels outstanding debt, and Sem agreed to loan Man his bicycle for some period of time. In that situation, there would be a substitute agreement, because the parties would have agreed to immediately discharge Sem's duty to pay under the old agreement, and replace the old agreement with a new agreement. The new agreement is that Man agrees to cancel the 7,000 riels debt that Sem owes him, and in exchange Sem agrees to loan Man a bicycle for a certain amount of time. If Sem fails to loan Man the bicycle as required by the substitute agreement, Man can ask a court for a remedy for that breach. But Man cannot ask a court to enforce the old agreement requiring Sem to repay the outstanding debt of 7,000 riels, because the duties under that contract were immediately discharged when the substitute agreement took effect. This kind of agreement was also discussed in Chapter 3 ("Consideration"), Section 3.6a, which explained some exceptions to the general rule that part payment of a debt is not consideration in common law jurisdictions.

A substitute contract might also be considered a modification of the old contract. For this reason, some common law jurisdictions require that there be some new consideration on each side in order for it to be valid. The new consideration might be that each party agrees to do something that is at least slightly different--even if it is not necessarily more difficult than what the party had previously agreed to do! Of course, laws in some jurisdictions say that no consideration is required for modifications of any contracts, or for modifications of sale of goods contracts, or for modifications of contracts in which one party has had substantial unforeseen difficulties. This was discussed in Chapter 3, Section 3.7.

A substitute contract must generally be written if the original contract was required to be written. This is because, as discussed above,

the substitute contract really is a kind of modified agreement, and many of the general rules about contracts apply.

CASE STUDY 220

FACTS Lak and Phanna made an agreement under which Lak borrowed \$2,000 from Phanna in order to improve the irrigation systems on Lak's farm. Under the contract, Lak was required to repay the money in one year at 10% interest, for a total repayment of \$2,200.

However, six months after Lak received the money, he realized that it would really take longer than he thought to make all the improvements he needed. He also realized that it would be better if he was not required to repay the money he had borrowed for two years, instead of one year. So Lak talked to Phanna about the contract. Together, the parties agreed to a new contract, under which the old contract would be discharged immediately, Lak would repay the money in two years instead of one year, and the repayment would be \$2,500, instead of \$2,200.

Six months after the parties made the new agreement, Lak is surprised when Phanna asks for the \$2,200 under the original loan contract! Phanna says he can still enforce the old contract if he wants, and that he needs the money now. Lak says he will not be able to repay the money until the next year.

QUESTION OF LAW Can Phanna still enforce the original loan agreement?

DECISION No. Phanna cannot enforce the original loan agreement because all the duties under that contract were discharged by the substitute contract the parties made.

When parties to a contract make a substitute contract, the duties under the original contract are discharged immediately. A substitute contract occurs where the evidence shows that the intention of the parties was to create a new contract and immediately discharge the duties under the old contract.

In this case, Phanna and Lak made a loan agreement under which Phanna loaned Lak \$2,000, to be repaid in the amount of \$2,200 in one year. But six months later, the parties made a new contract that said that the original debt was canceled, and that Lak would instead pay Phanna \$2,500 two years from the date of the old agreement. This was a substitute agreement, because it is clear that the parties intended to discharge immediately the duties under the old contract and substitute the new one. So in this case, where Lak's duty to pay under the old contract was immediately discharged, Phanna cannot enforce the old agreement. He can enforce only the new agreement.

*** **ADDITIONAL REFERENCE:** Chapter 3 (“Consideration”), Section 3.6a explains some exceptions to the general rule that part payment of a debt is not consideration in common law jurisdictions, and Section 3.7 discusses the general common law requirement of consideration for contract modifications; and Chapter 6 (“Formality”), Section 6.5 discusses the general rule that if the law required an original contract to be written to be enforceable, a modification of that contract must be written to be enforceable.

9.7d An Accord and Satisfaction May Discharge Contract Duties

An “accord” occurs where the parties to a contract make a new contract that substitutes a different duty for a duty owed under the original contract but that does not immediately discharge the duty under the original contract. Instead of immediately discharging the old duty, an accord merely suspends the old duty until the new one is fully performed. The complete performance of the new duty is called a “satisfaction.” Only when there is a “satisfaction” is the old duty discharged.

*** **DEFINITION:** An **accord and satisfaction** occurs where the parties to an existing contract make a new contract that substitutes a different duty for a duty owed under the old contract (the “accord”), and then that new duty is actually performed as required by the new contract (the “satisfaction”).

So the “accord” is the new contract the parties make, and the “satisfaction” is the actual performance of the duty described in the accord. Of course, since parties do not always perform their contract duties, not every “accord” is followed by a “satisfaction!”

Although accords are similar to substitute contracts, the big difference between an accord and a substitute contract is that a substitute contract discharges the duties under the old contract immediately, whereas an accord merely suspends those duties until there is a satisfaction. If the satisfaction does not occur--because a party has failed to perform his new duties--then the innocent party has two choices. Specifically, that party may ask for a remedy for the other party’s breach of:

- (1) the old agreement;
- OR (2) the new, accord agreement.

It appears that, like substitute contracts, accords generally change the duty of only one of the parties to the contract, and that they tend to occur where the party whose duty will change owes the other party some amount of money. Of course, as with substitute contracts, it also appears possible that an accord could change the duties of both parties.

For example, in Case Study 220, Phanna loaned Lak \$2,000, and Lak agreed to repay \$2,200 in one year. But the parties later changed their contract, and agreed that Lak would repay \$2,500 in two years,

instead of \$2,200 in one year. Because the parties agreed that the old contract would be immediately discharged, the new contract in Case Study 220 was a substitute contract. However, if the parties in Case Study 220 had not agreed that the old contract would be immediately discharged, but that the old contract duty would merely be suspended, then the new agreement would have been an accord. The accord would have suspended Lak's duty to perform under the old contract--his duty to pay \$2,200 in one year. But that duty would not have been discharged until Lak actually performed the terms of the new contract, by paying \$2,500 in two years. That would be the satisfaction. If Lak failed to pay \$2,500 in two years, then Phanna would have the choice of asking a court for a remedy for Lak's failure to perform the original contract (by paying \$2,200 in one year), or his failure to perform the accord (by paying \$2,500 in two years).

Some common law jurisdictions say that an accord--like a substitute contract--must generally have new consideration on both sides to be valid. But as with substitute contracts, it appears that it is enough that the new consideration be of a different type--even if that type is not necessarily as valuable as the old consideration! For instance, in the example above where Sem agreed to loan Man the bicycle to substitute for the remaining amount due under their loan contract, the loan of the bicycle would be new consideration, even if it did not appear to be as valuable as the 7,000 riels still due under the old contract.

In addition, an accord may occur where a party agrees to accept less than that party claims is due under the old contract, as long as there is a good faith dispute about the amount due. Consideration exists here because the creditor is agreeing to give up his right to pursue his legal claim to the extra money. For example, if Man and Sem had a good faith dispute about how much Sem really owed--perhaps because the debt was old--Man could make an accord to accept less than he originally claimed was due, and the original debt would be discharged when the new amount was paid. This was already discussed in Chapter 3 ("Consideration"), Section 3.6a.

As noted above, the big difference between accords and substitute contracts is that substitute contracts discharge duties under the old contract right away, and accords do not. When the parties' new contract actually says whether the parties intend this to happen or not, it is easy to tell which kind of agreement the new contract is. However, sometimes parties do not state their intentions so clearly. When that happens, it can be difficult to know which kind of new contract the parties made! There are a few general guidelines many courts use to help them decide this difficult issue when the new contract does not clearly show the intentions of the parties. Two of these general guidelines are explained below.

The first guideline is that, where the amount of the debt that remains to be performed is not disputed, courts generally assume that the parties' new agreement is an accord. But where the amount of the debt that remains

to be performed is disputed between the parties, then courts generally assume the parties intended a substitute contract. The reason for this rule is that, where there is no dispute about the amount due, the creditor party is less likely to want to give up the option to ask for a remedy under the original contract. So the creditor is more likely to intend an accord, which gives him that option. But where there is a genuine dispute about the amount due, the creditor is more likely to be willing to give up his right to ask for a remedy under the old contract, in order to get the certainty of at least one clear promise--the new promise in the substitute agreement. Of course, it is possible for parties to create a substitute contract where the amount is not disputed, and it is possible for parties to create an accord where the amount is disputed, as noted above.

A second rule that some jurisdictions seem to apply is that the more formal the new agreement is, the more likely it is to be a substitute contract. The reason for this rule appears to be that courts do not assume that parties are giving up their rights under the original agreement unless it is clear that they are really creating a full new agreement to take its place. More formal agreements are more likely to show that this is what the parties intended.

Illustration: Comparison: Accords and Substitute Contracts		
	<u>ACCORD</u>	<u>SUBSTITUTE CONTRACT</u>
1. What is it?	A new contract that substitutes a different duty for one owed under an old contract between the same parties	A new contract that substitutes a different duty for one owed under an old contract between the same parties
2. What is the legal effect?	<u>Suspends</u> duty under original contract until <u>satisfaction</u> occurs	<u>Discharges</u> duty under original contract <u>immediately</u>
3. When is it most likely to occur?	Where amount of debt is <u>not disputed</u>	Where amount of debt <u>is disputed</u>
4. What are the key differences?	(a) Does <u>not discharge</u> original duty immediately (b) Likely where amount of debt <u>not disputed</u>	(a) <u>Discharges</u> original duty immediately (b) Likely where amount of debt <u>is disputed</u>

CASE STUDY 221

FACTS Chhom, who caught fish on the Tonle Sap for a living, owed Kimtong 100,000 riels under a loan contract. But Chhom was having trouble finding the money to repay Kimtong. Chhom asked Kimtong if he would accept a certain quantity of fish instead of the 100,000 riels.

Chhom promised to provide all the fish within the next week. Kimtong agreed to this arrangement.

Kimtong returned a week later to get the fish from Chhom. But Chhom said he had no fish. Kimtong said he was sorry, but that he would have to ask Chhom for the 100,000 riels, or else ask a court to help him get it. Chhom said he would try to give Kimtong some fish soon, but that his duty to pay Kimtong the 100,000 riels was already discharged.

QUESTION OF LAW Was Chhom's duty to pay Kimtong 100,000 riels discharged by the new agreement the parties made about the fish?

DECISION No. The new contract the parties made was an accord, so Kimtong still has the option to ask for a remedy under the new contract (for the fish) or the old contract (for the 100,000 riels).

An accord exists where the parties to a contract make a new contract that substitutes a new duty for a duty owed under the old contract, but does not immediately discharge the duty owed under the old contract. Where there is no dispute about the amount due, and no evidence the parties intended a substitute agreement, courts generally assume the parties have made an accord.

In this case, Chhom and Kimtong agreed that Kimtong would accept a certain amount of fish instead of the 100,000 riels that Chhom owed him under their original contract. Here, the amount due was not disputed, and there is no other evidence that the parties intended a substitute contract. So the parties' new agreement was an accord. That means that Chhom's duty to pay the 100,000 riels under the old contract was not discharged. When Chhom failed to provide satisfaction of the accord--by failing to provide the fish he had promised--Kimtong had two options: he could ask a court for a remedy either for Chhom's failure to repay the 100,000 riels, or for Chhom's failure to provide the fish.

***** ADDITIONAL REFERENCE:** Chapter 3 ("Consideration"), Section 3.6a explained some exceptions to the general rule that part payment of a debt is not consideration in common law jurisdictions, and Section 3.7 explained the general common law requirement of consideration for contract modifications and the exceptions to that rule.

9.7e A Novation May Discharge Contract Duties

In some cases, the two parties to a contract agree with a new party that the new party will substitute for one of the current parties to the contract, and that all the duties under the original contract will be immediately discharged. This is a novation.

***** DEFINITION:** A **novation** is generally defined as an agreement to substitute a new party for one of the parties to an existing contract, and to immediately discharge the duties under the original contract.

The duties created under the new contract are often the same duties as under the old contract--with different parties. However, it appears that the new duties need not be the same as the old ones for a novation to exist. In any event, the result of a novation is that the duties in the original contract between two parties are discharged, and that a new contract between one of the original parties and a new party is formed.

Many jurisdictions say there are four requirements for a valid novation to occur:

- (1) a previous contract;
 - (2) an agreement among the parties to that contract and a new party;
 - (3) an intention by those parties to immediately discharge the duties under the previous contract;
- and (4) an enforceable new contract between the new party and one of the parties to the previous contract.

Consider the following Case Study.

***** CASE STUDY 222**

FACTS Sineam, the manager of a pharmacy, had an employment agreement with Sereyvuth. Sereyvuth had agreed to work as a clerk at the pharmacy for six months. However, one week before Sereyvuth's job was to start, Sereyvuth got an opportunity to study overseas. Sereyvuth and his friend Leang went to see Sineam, and asked if Leang could take Sereyvuth's place in the pharmacy contract. The three parties agreed that Leang would take Sereyvuth's place as a clerk at the pharmacy, and that the duties under the old contract would be discharged immediately.

However, a few days later, Sineam changed her mind. She decided that she would rather have Sereyvuth as her clerk than Leang, and she told Sereyvuth that he would be required to honor his original contract. Sereyvuth asked the court for help.

QUESTION OF LAW Can Sineam enforce her original contract with Sereyvuth?

DECISION No. Sineam cannot enforce her original contract with Sereyvuth because Sineam, Sereyvuth and Leang made a novation, under which Leang took Sereyvuth's place as the pharmacy clerk, and the duties under the original contract with Sereyvuth were immediately discharged.

A novation occurs where the parties to a contract agree to substitute a new party for one of the parties to an existing contract, thus forming a new contract. Specifically, many jurisdictions say there are four requirements for a novation: (1) an existing contract; (2) an agreement among the parties to that contract and a new party; (3) an intention to immediately discharge the duties under the original contract; and (4) an enforceable new contract.

In this case, Sineam and Sereyvuth had a contract under which Sereyvuth was supposed to work for Sineam as a clerk for six months. But later Sineam, Sereyvuth and Leang all agreed that Leang would substitute for Sereyvuth as the clerk, and that the duties under the original contract would be immediately discharged. This was a novation, because the parties to an existing contract (Sineam and Sereyvuth) agreed with a new party (Leang) that Leang would take Sereyvuth's place as the pharmacy clerk--creating an enforceable new contract--and that the duties under the original contract between Sineam and Sereyvuth would be immediately discharged. Because the duties under the original contract were immediately discharged, Sineam cannot enforce that original contract against Sereyvuth.

As noted above, it appears that the duties under the new contract need not be the same as under the old contract in order for a valid novation to occur. For example, in Case Study 222, it appears the parties could have agreed that Leang would work for a longer period, or that Leang would perform a different job, and that would have created a valid novation.

A novation is similar to--but not the same as--other legal events involving a new party which are called assignment of rights and delegation of duties. These complex subjects cannot be fully explained here. But very generally, an assignment of rights occurs when a party to an existing contract transfers his rights under the contract to a third party. A delegation of duties occurs where a party to a contract transfers his duties under the contract to a new party. Either one or both of these two kinds of transfers can occur with regard to a particular contract. There are limits on these transfers, but unlike novations, they do not require the agreement of the other party to the original contract. Also unlike novations, they do not immediately discharge the duties under the original contract. So if a party delegates his duties to a new party, and the new party fails to perform, the other party to the original contract can still enforce the original contract against the delegating party. The duties under the original contract are not discharged. Assignment of rights and delegation of duties are discussed in more detail in Chapter 11 ("Third Party Rights and Duties"), Sections 11.3 and 11.4.

For example, in the Case Study 222 situation, Sereyvuth might have been able to assign his rights and delegate his duties under the contract to Leang without Sineam's agreement. But even if Sereyvuth could do that, the original contract would still be enforceable against Sereyvuth if Leang failed to perform the duties in it correctly.

*** **ADDITIONAL REFERENCE:** Chapter 11 ("Third Party Rights and Duties"), Section 11.3 discusses assignment of rights, and Section 11.4 discusses delegation of duties.

9.7f An Account Stated May Discharge Contract Duties

Parties often have more than one transaction together. In many cases, one party does not perform his duties at the time of each transaction. In other words, one party becomes a creditor of the other party with respect to the contracts. In that situation, the parties sometimes make an enforceable agreement about the correct amount owed by the debtor to the creditor because of the prior transactions. This kind of agreement can save the creditor the task of having to prove to a court the amounts of all the individual transactions. And it can save both parties the trouble and uncertainty of a dispute about the correct amount. Such an agreement is called an "account stated."

*** **DEFINITION:** An **account stated** is an agreement between a creditor and a debtor that a particular sum is the correct amount the debtor owes to the creditor.

The effect of an account stated in many jurisdictions is to discharge immediately the duties from the transactions that the account stated summarizes. So the account stated creates a new, generally larger duty, and most jurisdictions seem to say that it discharges all the prior duties that it includes. Although the account stated discharges the prior duties, it appears that a party may still make a claim that the account stated was the result of a mistake. An account stated generally need not be written unless the prior agreements were required to be written.

*** **ADDITIONAL REFERENCE:** Chapter 7 ("Other Contract Formation Problems"), Section 7.3 explained when agreements may be invalid because of mistake.

An account stated may be express or implied. Sometimes the parties to some contracts negotiate with each other about the correct total amount owed, and the amount on which they finally agree--expressly--is the account stated. It appears that the most common way for an account stated to be implied is where a creditor gives or sends a debtor a statement summarizing the total amount due under some prior transactions. If the debtor holds the statement and fails to object within a reasonable time to the amount in the statement, a court will say that the debtor has impliedly agreed that the stated amount is accurate. In that situation, the creditor may ask a court for a remedy using the account stated as his evidence, and he need not prove facts about all the prior transactions summarized in the account stated.

CASE STUDY 223

FACTS Naty sold vegetables at the market. Every day, Naty sold onions and tomatoes to Karn, a wealthy merchant. And every day, Karn said that she would pay for the vegetables the next day.

After some time had passed, Naty handed Karn a statement that listed all the vegetables Naty had sold Karn over many days, along with the prices of all the vegetables and a total amount due. Naty also kept a copy of the statement for herself. Karn merely smiled and went away.

A few weeks later, Naty saw Karn at the market again. Karn tried to avoid Naty, but Naty approached her and asked for the money. Karn said: "Who can remember what I might have bought so long ago? Go away!" Naty asked the court for help.

QUESTION OF LAW Can Naty use the statement she gave Karn at the market to get a court to order Karn to pay her the amount on the statement?

DECISION Yes. Naty can use the statement to get a court to order Karn to pay that amount, unless Karn can prove it was the result of mistake, because the statement Naty gave Karn was an account stated, to which Karn agreed by failing to object within a reasonable time.

An account stated is an agreement between a creditor and a debtor that a particular stated sum is the correct amount the debtor owes to the creditor. Such an agreement generally discharges the duties due under the prior transactions it summarizes. An account stated may be created expressly or impliedly.

In this case, Naty gave Karn a written list of the vegetables Karn had bought from Naty over many days, and the total amount due. Karn went away for several weeks, and never objected to the amount in the statement. This was an implied agreement to the amount in the account stated, and it discharged the duties under the prior transactions between Naty and Karn. Therefore, Naty can use this account stated to prove the amount Karn owes her, and she need not prove the amount of each particular sale.

Of course, if Karn can prove the amount in the document is a mistake, then she will have to pay only the correct amount. But it might be difficult to prove such a mistake, because as Karn herself said, "Who can remember what I might have bought so long ago?"

9.8 The Operation of Law May Discharge Contract Duties

Contract duties may also be discharged by operation of law, even if they are not discharged by performance or some related action, or by a later agreement or statement of the parties. In other words, sometimes

the law itself says that the duties in a contract are discharged, regardless of the actions of the parties themselves. This Section will discuss five ways that contract duties may be discharged in this way:

- (1) impossibility or impracticability of performance of the contract (Section 9.8a);
 - (2) frustration of the purpose of the contract (Section 9.8b);
 - (3) bankruptcy of one of the parties (Section 9.8c);
 - (4) a final court judgment or arbitration award about the contract (Section 9.8d);
- and (5) the passing of the time set by a statute of limitations (Section 9.8e).

9.8a Impossibility or Impracticability of Performance May Discharge Contract Duties

After a contract is formed, something may occur that makes the performance of the contract impossible or highly impracticable. Many jurisdictions say such an event will discharge the duties in the contract if:

- (1) performance really is impossible or highly impracticable;
- (2) neither party caused the event; and
- (3) neither party assumed the risk of the event.

These requirements will be discussed in more detail below.

The general effects of impossibility or impracticability are that the duties under the contract are discharged and the contract is ended. Of course, parties may be able to recover restitution of benefits they have provided under the contract.

For example, suppose Rim made a contract to teach French to Samon every day for two months for a certain fee. If Rim died right after the contract was made, it would obviously be impossible for Rim to perform the contract duties. In that case, the duties under the contract would be discharged, and the contract would be ended.

In the past, it appears that courts did not allow a party's duties to be discharged unless performance of those duties was actually impossible. In other words, the duties of that party would not be discharged by events that occurred after the contract was made--no matter how difficult or dangerous those events made the performance of the contract--unless the events made that performance impossible. An example of a truly impossible performance would be the situation above involving Rim and the French lessons. And it appears that some jurisdictions still follow this strict rule.

However, many other jurisdictions now say that duties may also be discharged if events cause performance of contract duties to be highly impracticable, even if that performance is not actually impossible. For instance, in the French lessons example above, suppose Rim did not die, but did lose the use of his voice and could not move from his bed. In that case, it might still be possible for Rim to give French lessons. Rim could give the lessons in writing, from his bed. But because of Rim's unexpected disability, it would probably be highly impracticable for him to perform. So courts might say that the duties of the parties were discharged. However, the category of events that are impracticable is limited. This is because courts are usually reluctant to say contract duties are discharged unless they really are impossible or extremely difficult to perform. In any case, for ease of use, and because performances that are "impossible" are also "impracticable," this text will generally use the term "impracticable" to include both kinds of problems with contract performance.

(1) Basic Requirements and Effects of Impracticability

As noted above, not all events that make performance of contract duties difficult will actually cause those duties to be discharged. This is true even in jurisdictions that say duties may be discharged because of impracticability, rather than only because of actual impossibility.

This Section will discuss the requirements for duties to be discharged in jurisdictions that say duties may be discharged because of impossibility or impracticability. Specifically, many of these jurisdictions say that three basic requirements must be met for contract duties to be discharged in this way:

- (1) an event occurs that makes performance impracticable;
- (2) the party claiming impracticability did not cause the event;
- AND (3) the party claiming impracticability did not assume the risk of the event occurring.

Each of these requirements will be discussed below.

(1) An event must make performance of a contract impracticable in order for that event to discharge duties under the contract. The most obvious requirement is that some event occur that makes performance of the contract impracticable. Some of the most important types of situations where this may occur are where the performance becomes illegal, where a person necessary for the contract to be performed dies or becomes incapacitated, or where the specific subject matter of the contract is destroyed. These situations will be discussed in more detail below.

The most important part of this requirement is that the performance actually be impracticable. Obviously this standard will be met where the performance is impossible--since everything that is impossible

is also impracticable! However, if performance is not actually impossible, it must be extremely difficult in order to qualify as “impracticable.” It is not enough that performance merely becomes more difficult than the parties expected, or that a party must find a way to perform that differs from the way he expected to use. In addition, it is not enough that the performance becomes more expensive. As noted above, many jurisdictions say that the increased cost or difficulty of performing the contract must be extreme in order to be considered impracticable. However, an increased cost that is so severe that it clearly involves an unreasonable economic waste might make a performance impracticable.

For instance, in the above French lesson example, suppose a change in a land use law forced the teacher Rim to live in a new location across town that was much farther away from where he had planned to give lessons to Samon under the contract. This might make it more expensive or difficult for Rim to travel to the lessons. But it would probably not make the performance legally impracticable.

However, if Rim was forced by a civil war to move to a new home several hundred kilometers away--so that the only way he could give the lessons would be by telephone, or traveling all the way back and forth to the lessons each day through intense fighting--then it would be extremely difficult, expensive, and/or dangerous for Rim to perform the contract. That would probably be enough to be impracticability.

Some authorities say that the impracticability must be “objective,” meaning that the performance would be impracticable for any person to do. These authorities say it is not enough that performance merely be impracticable for the particular party to the contract. If other people could perform the contract, but the particular party involved in the contract cannot, that would be “subjective” impracticability. Many courts would say that would not be sufficient to meet this first requirement. Following this rule, many courts say that events such as a party losing all his money or a party losing all his employees (perhaps because of a labor strike) would be only “subjective” impracticability, and so such events would not be sufficient for the party’s duties to be discharged.

However, this objective/subjective rule does not always seem to work well. For example, although courts say that being unable to perform because of a loss of money or employees is not impracticability, most courts also say that the death or incapacity of parties to personal service contracts--such as Rim in the first French lesson example above--is impracticability and will discharge duties. This would seem to violate the objective/subjective rule. The reason is that the problem in the first Rim example above was that the particular party Rim could not perform because he died--not that no one in the world was able to teach French to Samon!

It may be that a better way to analyze these situations would be not to discuss objective or subjective impracticability, but simply to ask whether a party claiming impracticability assumed the risk of the problem, as will be discussed below. Under that analysis, it may be that parties assume the risk that they will lose their own money or lose their own employees, but do not assume the risk of their own death or physical incapacity. But even this analysis is not perfect. Perhaps courts simply consider it more fair to hold a party responsible for losing money or employees than for losing the party's own life or health.

It is also important to remember that the impracticability must be caused by an event that occurs after the contract is made. If the event causing the impracticability occurs before a contract is formed, the result depends on rules discussed earlier in this text.

If an event occurring before the contract is formed actually makes the performance of the proposed contract impossible, then it would seem that there could be no valid contract, generally because the parties made a bilateral mistake. Many jurisdictions also say that, if an offer has been made but not accepted at the time of an event makes performance impossible, then the offer will automatically terminate, at least in some situations. For example, this would be the case if an event caused the death or incapacity of a person necessary to perform the contract, caused the performance of the contract to become illegal, or destroyed the specific subject matter of the offer. These rules were already discussed in Chapter 2 ("Real Agreement (Offer and Acceptance)"), Sections 2.6c-e; Chapter 5 ("Legality"), Section 5.5a; and Chapter 7 ("Other Contract Formation Problems"), Section 7.3a.

If an event occurring before the contract is formed makes the performance impracticable but not impossible, and the parties are aware of this fact--if there is no mistake--then it would appear that a valid contract could still be formed. In that situation, it would seem that the party whose performance had become more difficult might have agreed to accept that difficulty, and that the contract might be enforceable. Presumably the party would not be able to avoid the agreement on the basis of mistake, since he was aware of the situation before he made the agreement.

However, suppose one or both parties were not aware of the impracticability at the time they made their agreement. Then the party or parties who did not know probably would have a claim that the contract was invalid on the basis of mistake, as discussed in Chapter 7, Section 7.3. If one party did not know about the problem but the other party did know, then the party who did not know might also be able to avoid the agreement on the basis of misrepresentation, as discussed in Chapter 7, Section 7.4.

***** ADDITIONAL REFERENCE:** Chapter 2 ("Real Agreement (Offer and Acceptance)"), Sections 2.6c-e discussed ways offers terminate when the proposed contract becomes impossible; Chapter 5 ("Legality"), Section 5.5a

discussed how illegality can prevent agreements from being valid, or terminate existing offers; and Chapter 7 (“Other Contract Formation Problems”), Section 7.3 explained when agreements may be invalid due to mistake, and Section 7.4 explained when agreements may be invalid due to misrepresentation.

(2) The party claiming impracticability must not have caused the event that caused the performance to be impracticable. This second requirement appears to be designed to prevent parties from escaping contracts merely because they no longer wish to perform them, or simply because of their own carelessness. It may also be that the law feels that parties generally assume the risk that their own actions will cause a contract performance to become impracticable.

For example, suppose a party makes a contract to sell his car, but before the time for performance the party negligently destroys the car in a crash. The party’s duties under the contract will probably not be discharged because of impracticability. Of course, the contract can no longer be performed. But it would appear that the other party to the contract would be able to ask a court for a remedy for the negligent party’s failure to perform (provide the car).

(3) The party claiming impracticability must not have assumed the risk of the event which causes the impracticability. This requirement basically means that a party’s duties will not be discharged because of impracticability where either the contract or the law says that the party assumed the risk of the kind of event that caused the impracticability. This analysis is somewhat comparable to the assumption of risk analysis many courts use in determining whether a party has assumed the risk of a mistake, as explained in Chapter 7, Section 7.3a.

In general, parties may agree to assume certain risks in their contracts. This can occur either expressly, or impliedly, where a contract lists other risks the parties will not assume, but fails to include the event that has actually occurred. For instance, in the French lesson contract above, the parties could expressly agree that Rim would assume the risk that he would be forced to live hundreds of kilometers away. If Rim assumed that risk, his duties under the contract would not be discharged on the basis of impracticability.

In addition, the law says that parties assume certain risks in certain situations. This is a very difficult topic, and authorities do not seem to provide clear and consistent rules about it. Perhaps the most important risk that the law generally says all parties assume is the risk that market prices and expenses will change substantially. For example, in the French lesson contract, the law would say that Rim assumes the risk that prices for such lessons will go up substantially--thus making the contract unfavorable to him. And Samon assumes the risk that the prices for such lessons will go down substantially--thus making the contract unfavorable to him.

However, it appears that many jurisdictions say that parties do not generally assume the risk that performance of the contract will become extremely difficult. It appears that such jurisdictions feel such extreme changes may result from unexpected events such as disasters which the parties assumed would not occur, such as war, embargoes, or crop failures. Obviously, it might not always be easy to tell the difference between this kind of change and the price changes described above. Perhaps one rule to help decide whether a party assumed a risk would be to say that the more extreme and unexpected an event is, the less likely a party assumed the risk that it would occur.

The law also says parties assume other risks in certain situations. For example, as discussed above, it appears that parties generally do not assume the risk that they will become unable to perform a personal services contract because of their own death or incapacity. But it seems that parties generally do assume the risk that they will become unable to perform because they lose their money or their employees.

In addition, parties who agree to buy or work on a specific subject matter generally do not assume the risk that that specific subject matter will be destroyed. This rule generally applies to sale of goods contracts, before the risk of loss has passed. It also seems to apply to many contracts to do construction work. However, it appears that a builder who makes a contract to build a whole building generally does assume the risk that the building will be destroyed before he finishes it! This will be further discussed below.

*** ***ADDITIONAL REFERENCE:*** Chapter 7 (“Other Contract Formation Problems”), Section 7.3 explained the situations when many jurisdictions say that parties assume the risk of mistakes in their contracts.

The general effect of impracticability is that the duty of the performance that has become impracticable is immediately discharged. Some authorities appear to say that the impracticability discharges the entire contract (including all duties). Even if not all the duties were automatically discharged, if the impracticable performance was a condition precedent or concurrent to the duty of the other party--as in a sale of goods contract--then the duty of the other party would not become due. If the impracticable performance is not a condition, then it would appear that the duty of the other party may technically become due, but that a court will not find that other party is liable for any failure to perform the duty. If duties are discharged by impracticability, parties may still be able to recover restitution of any benefits they have given to the other party under such contracts. Impossibility as an excuse of conditions was already discussed in Section 9.4j, above.

Sometimes impracticability is only temporary, and performance will become practicable again after some period of time. In that situation, the temporary impracticability suspends--but does not discharge-- the duty of performance. However, the duty will still be discharged if

the temporary impracticability causes a great hardship to one or both of the parties. This kind of hardship might occur either because one or both parties must wait too long to see if the duty will revive, or because the duty will be much more difficult for the party to perform after the impracticability ends.

For instance, in the French lesson example, if Rim's inability to teach was only temporary, his duty might have been merely suspended until it could be performed. But if the delay would have caused Rim or Samon great hardship, then the duty would probably have been discharged.

(2) Some Important Situations Where Impracticability May Occur

Impracticability may occur in a variety of situations. Several of the more common types of these situations are discussed below.

(1) Illegality -- One of the most important types of impracticability occurs where, after a contract is made, the performance of the contract becomes illegal. This is sometimes called "supervening illegality." This type of situation was already discussed above.

The effect of this kind of illegality is that the duties under the agreement are discharged. In addition, it would appear that restitution might be available to the parties in this situation. Although the general rule is that parties to illegal agreements cannot even get restitution, it would seem that unjust enrichment would be likely in many cases where an agreement became illegal after it was formed. It would not seem that contract parties should take a loss because they failed to predict that the government would decide their contract was illegal after they made it! The effects of illegality on proposed contracts before the contracts are actually formed were discussed in Chapter 2 ("Real Agreement (Offer and Acceptance)"), Section 2.6e, and Chapter 5 ("Legality"), Section 5.5a.

For example, in Case Study 67, an offer from a logging company called Nagalogs to a wood buyer called Dee Mak automatically terminated when it became illegal to perform the contract because of a new law passed by the National Assembly. If Dee Mak had accepted the offer before the new law was passed, then a valid contract would have been formed. But the effect of the new law would have been to discharge the duties under that agreement, and neither party could have enforced the agreement.

***** ADDITIONAL REFERENCE:** Chapter 2 ("Real Agreement (Offer and Acceptance)"), Section 2.6e discussed how offers terminate when the proposed contract becomes illegal; and Chapter 5 ("Legality"), Section 5.5a discussed how illegality can prevent agreements from being valid.

(2) Death or Incapacity of a Person Necessary for the Performance of a Contract -- If a party or other person who is necessary for the performance

of a contract dies or becomes incapacitated after the contract is formed, then the duties under the contract will be discharged. This type of situation was already discussed above, and in Chapter 2 ("Real Agreement (Offer and Acceptance)"), Section 2.6c.

However, in this situation, the legal analysis is somewhat different before a contract is formed and after a contract is formed. Before a contract is formed, the law is most concerned with whether a real and knowing agreement can occur, and whether the parties have capacity. If one of the parties is dead, a real agreement cannot occur. Parties who are dead or adjudicated incompetent lack capacity. In addition, if a necessary party dies or becomes physically unable to perform for other reasons, then the proposed contract might be invalid because of mistake. An event like that would also terminate an offer, in many jurisdictions. These ideas were discussed in Chapter 2 ("Real Agreement (Offer and Acceptance)"), Section 2.6c; Chapter 4 ("Capacity"), Sections 4.2 and 4.5; and Chapter 7 ("Other Contract Formation Problems"), Section 7.3.

***** ADDITIONAL REFERENCE:** Chapter 2 ("Real Agreement (Offer and Acceptance)"), Section 2.6e discusses how offers can terminate when a party or person necessary to the proposed contract dies or is adjudicated incompetent; Chapter 4 ("Capacity"), Sections 4.2 and 4.5 discuss the capacity of parties who are dead or adjudicated incompetent; and Chapter 7 ("Other Contract Formation Problems"), Section 7.3 discusses agreements that are invalid because of mistake.

After a contract is formed, the important issue is whether it is impracticable to perform it. A contract performance may become impracticable because of the death or physical or mental incapacity of one of the parties, or of a third party who is necessary to the performance. This is most likely to occur in personal service contracts, where services may be "unique," rather than other types of contracts, such as sale of goods contracts.

For instance, in the French lessons example above, the death or incapacity of either the teacher Rim or the student Samon would discharge the duties under the contract. Both of those parties were necessary to the performance of the contract, which was a personal service contract involving unique services (teaching). In the same way, if Samon had hired Rim to teach French to Samon's daughter, and the daughter had died, the duties under the contract would have been discharged, because the daughter was also necessary to the contract.

However, it is also possible that even a party will not be necessary to the performance of a contract if the duties under the contract could be delegated (transferred) to someone else. For example, if Rim's contract was merely to sell Samon some French books, Rim's death might not discharge the duties under the contract, because those duties might easily be delegated to someone else. In addition, if the French contract merely said that Rim would supply

a French teacher for Samon from a group of several teachers Rim employed, it would appear that the duties under the contract would not be discharged, because the contract could still be performed by one of the other teachers. It seems that such duties could be delegated by the legal successor of the incapacitated or deceased party, such as his guardian or the executor of his estate. Delegation of duties was briefly discussed in Section 9.7e above, which explained novations, and it will be further discussed in Chapter 11 ("Third Party Rights and Duties"), Section 11.4.

***** ADDITIONAL REFERENCE:** Chapter 11 ("Third Party Rights and Duties"), Section 11.4 discusses delegation of duties.

(3) Destruction of a Contract's Specific Subject Matter -- When the specific subject matter of a contract is destroyed after the contract is formed, the duties under the contract may be discharged. Like the first two situations described above, this type of situation was already discussed earlier in this Section. In addition, the effects of destruction of a specific subject matter before a contract is formed were discussed in Chapter 2 ("Real Agreement (Offer and Acceptance)"), Section 2.6d, and in Chapter 7 ("Other Contract Formation Problems"), Section 7.3a.

For example, suppose a group of students make a contract with a large hotel to rent a particular room with an excellent view of the river in order to have a graduation party. If the hotel burns down after the contract is formed, but before the party is scheduled to occur, the duties of the parties under the contract will be discharged. In that situation, the specific subject matter of the contract--the room in the hotel--has been destroyed.

However, as noted in Chapters 2 and 7, these rules apply only if the contract was about a specific subject matter. For example, if the contract describes a specific building, a specific car, or identified goods such as a particular cow or a particular painting, then the destruction of those items may discharge the duties under the contract. But if a contract is simply for the sale of 10 kilos of potatoes, or 100 tons of rubber, the duties will generally not be discharged, because those are not specific subject matters. And this is true even if the seller was thinking about a particular group of goods when he made the contract.

Another limit on this rule is that impracticability will not discharge contract duties where the risk of loss of the subject matter has passed from the seller to the buyer. The most common situations where this limit is applied are sale of land contracts and sale of goods contracts. Although sale of goods contracts will be briefly discussed below, these subjects can be very complex, and the rules about them vary in different jurisdictions. So it is important to check the local law that relates to these types of contracts.

In general, it appears that the duties of the parties under a contract for the sale of particular goods will be discharged if the goods are destroyed

before the risk of loss passes from the seller to the buyer. Some jurisdictions have special rules that govern when the risk of loss of goods actually passes in all contracts for the sale of goods (including where the goods have been specifically identified).

For example, under the Uniform Commercial Code in the United States, it appears that whether the duties in a sale of goods contract will be discharged by the destruction of the goods depends on whether the risk of loss of the goods has passed from the seller to the buyer. It appears that these rules basically say that the risk of loss does not pass until the goods reach a certain point in their journey from the seller to the buyer. Depending on the contract, that point may be when the buyer gets the goods at the seller's address, when the seller gives them to a carrier (such as a delivery company or messenger), or when the carrier actually delivers the goods to the buyer. Before those points in time, it would appear that the risk of loss has not passed to the buyer. In those situations, if the goods destroyed were specifically identified, then the contract duties could be discharged because of impracticability. If the goods were not specifically identified, the duties would not be discharged, and the seller would have to find different goods to provide to the buyer. But after the risk of loss has passed to the buyer, the duties under the contract will not be discharged, and the buyer must pay for the goods even if they are destroyed.

These rules also apply in special ways in construction contracts. First, the general rule appears to be that the duties of a builder who makes a contract to construct a building will not be discharged if the building is destroyed before he is finished. The main reason for this rule appears to be that courts feel the builder assumes the risk of this destruction--or perhaps that some courts feel that the unfinished building was not yet a "specific" subject matter. This can be a harsh rule, especially since the builder may have trouble even getting restitution, since he might be unable to show that he gave any benefit to the owner of the land--who has received only a destroyed building! On the other hand, where a party agrees to repair an existing building, it appears that most courts say the duties of the repairing party will be discharged if the building is destroyed. It may be that courts believe the repairing party does not assume this risk--or that the existing building is a "specific" subject matter.

***** ADDITIONAL REFERENCE:** Chapter 2 ("Real Agreement (Offer and Acceptance)", Section 2.6d, and Chapter 7 ("Other Contract Formation Problems"), Section 7.3a discuss the effects of destruction of the specific subject matter before a contract is formed.

(4) Natural and Human Disasters -- Sometimes events that might be described as "disasters" cause the performance of contracts to become impracticable, often by making the performance of the contracts extremely difficult or expensive. Potential examples include crop failures, earthquakes, floods, wars, and trade embargoes.

Many jurisdictions say that these events will discharge the duties under the contracts if they meet the three requirements discussed above. Sometimes these kinds of events will actually destroy the specific subject matter of a contract. Other times they may make the subject matter impracticable to find or supply, or make the means of performing the contract impracticable. It appears that some courts may allow the duties under a contract to be discharged by these kinds of events even if it is not so clear that there really was a “specific” subject matter. One way to explain this result would be to say that parties do not always assume the risk that such a subject matter will be destroyed or become inaccessible, if the events that cause the problem are extreme and unexpected enough. Compare the two Case Studies below.

CASE STUDY 224

FACTS Nareth, who fishes in the Tonle Sap, makes a contract to supply a certain quantity of a valuable fish called the blue-tailed redbfish to the Special Fish Company for the next two years. All the fish will come from the Tonle Sap, since that is the only place they are known to exist.

Unfortunately, after Nareth has supplied the redbfish to the Company for a few months, the fish suddenly disappear. Environmental experts say the problem is that a new dam project has caused many of the fishing stocks to change--or even disappear! Now no one knows where the blue-tailed redbfish are, or if they will ever return. Nareth tells the Fish Company that he cannot complete performance of the contract. But the Company says it will ask a court to enforce the contract.

QUESTION OF LAW Will a court enforce this contract?

DECISION Probably not. This contract has probably become impracticable because of the environmental changes caused by the construction of the new dam, so a court would probably say that the duties under the contract have been discharged.

Duties under a contract may be discharged on the basis of impracticability where an event causes performance of the contract to be impracticable, the event is not the fault of the party claiming impracticability, and the party claiming impracticability has not assumed the risk of the event occurring.

In this case, Nareth agreed to supply the Special Fish Company with a special kind of fish--the blue-tailed redbfish--from the Tonle Sap. Unfortunately, soon after Nareth started to catch the fish and perform the contract, all the fish disappeared because of the construction of a big new dam project. Now no one knows where the fish are, or if they will ever return. In this situation, catching the redbfish has become impracticable. It may or may not be possible to find the fish, but it would clearly be extremely difficult. In addition, Nareth did not cause the problem. Finally, it is unlikely that Nareth

assumed the risk of this kind of extreme, unexpected environmental problem in making his contract to catch and sell the redfish. Therefore, the remaining duties under this contract will probably be discharged, and the Special Fish Company will be unable to enforce the contract with respect to any further supplies of the fish.

CASE STUDY 225

FACTS A farmer named Kheng makes a contract to sell 10 tons of his next rice crop to the Rice Supply Company. However, not long after the contract is made, there is a terrible drought. Kheng's crop and almost all of the other rice crops in the area fail.

Kheng tells the Rice Company that he is unable to supply any rice. But the Company says it will enforce the contract.

QUESTION OF LAW Can the Rice Company enforce this contract against Kheng?

DECISION Perhaps not, at least in some jurisdictions. This contract may have become impracticable because of the rice crop failure caused by the severe drought, and courts in some jurisdictions might say that the duties under the contract have been discharged.

Duties under a contract may be discharged on the basis of impracticability where an event causes performance of the contract to be impracticable, the event is not the fault of the party claiming impracticability, and the party claiming impracticability has not assumed the risk of the event occurring.

In this case, a drought caused Kheng's rice crop to fail, and prevented him from performing the parties' rice supply contract as he had intended. First, it appears that some jurisdictions might find that this contract was impracticable. This seems to be the case even though Kheng's inability to supply may be "subjective" in the sense that he cannot supply the rice, but it would obviously be possible for someone, somewhere to supply it. Of course, it might also be argued that the parties actually made their contract about a "specific" subject matter, because they both knew that the rice was to come from Kheng's rice fields. It may also be that such jurisdictions simply say that a rice grower like Kheng does not assume the risk of extreme and unexpected crop failures like this. Second, Kheng did not cause the crop failure. Finally, as noted above, it appears that some jurisdictions would say that Kheng did not assume the risk of a crop failure like this. Therefore, some jurisdictions might find that the duties under this contract are discharged, and that the Rice Company cannot enforce the contract.

Some courts and authorities might not agree with the result in Case Study 225. These authorities might say that the contract was not

really impracticable, since Kheng could have bought rice on the market to perform the contract, although that rice might have been more expensive. It might also be argued that farmers should be considered to assume the risk of droughts and crop failures, and that such events are not really unexpected. What do you think?

***** WHY IS THIS IMPORTANT?** Why do courts in some jurisdictions say that duties may be discharged by impracticability, even if it is not actually impossible to perform a contract?

It appears that the law is trying to balance competing interests in this difficult area. In general, the law wants to enforce contracts and to require that parties perform their contracts. That is why the law says that duties will not be discharged merely because they have become more difficult or expensive. It could also be said that the law says parties generally “assume the risk” that their performances will become more difficult or expensive.

On the other hand, some jurisdictions now also say that if performance has become extremely difficult--and a party did not assume the risk that that would happen--then the duties under the contract may be discharged because of “impracticability.” It appears that the law in some jurisdictions wants to give courts a little more flexibility to allow parties to escape contracts because of unforeseen events that change the performance of contracts severely, such as wars, embargoes, or crop failures like the one in Case Study 225.

However, even in jurisdictions that apply this kind of rule, it appears that courts have been very reluctant to allow parties to escape contracts on the basis of impracticability. This is especially true where the events could have been foreseen--such as if the parties knew that a war might occur when they made the contract--or where the unexpected events make the performance of a contract more expensive, but not extremely so. Most courts appear to say that parties assumed the risk that those kinds of events would occur.

In general, the problem of when duties should be discharged because of impracticability is an example of one of the more basic problems in contract law. Courts generally want to enforce contracts as they are written, so that parties can rely on their contracts and the economy can work efficiently. On the other hand, courts want to avoid the unfairness and economic waste which might result if parties were required to perform duties that had become impossible--or almost impossible. The analysis of when parties “assume the risk” of an event is one way to try to solve this problem.

9.8b Frustration of Purpose May Discharge Contract Duties

In certain cases, events may occur after a contract is formed that make performance of the contract useless or valueless to one of the parties--even though the performance is not impossible or impracticable! In other words, although the contract can be performed, the main purpose of the contract

has been destroyed. In this situation, the duties to the contract may be discharged because of a “frustration of purpose.”

Frustration of purpose is a limited doctrine. Many jurisdictions say that contract duties will be discharged on this basis only where all four of the following requirements are met:

- (1) both parties understood the main purpose of the contract at the time the contract was made;
- (2) some event has made the contract performance almost or totally valueless to one of the parties;
- (3) the party claiming frustration of purpose did not cause the event;
- AND (4) the event was unexpected and the parties assumed it would not occur.

If all of these requirements are met, the duties under the contract are discharged. Of course, as with impracticability, parties may generally be able to get restitution of benefits they have given to the other party under the contract.

CASE STUDY 226

FACTS Every year, there is a large public celebration of the birthday of the King. The celebration includes parades, ceremonies, and various other entertainment. Most of the events can be observed from the houses on a certain street.

One year, the owner of one of these houses, who is named Yon, decides to rent the roof of his house to Sok for the day of the celebration. Both parties understand that the purpose of the contract is so Sok will have a good view of the King's birthday celebration.

Unfortunately, the day before the King's birthday, the celebrations are moved to a different location! This location is many kilometers from Yon's house, and there is no way to see the festivities from Yon's house anymore. Sok says he will not perform the contract. Yon asks a court for help.

QUESTION OF LAW Will the court order Sok to obey this contract?

DECISION No. The duties under this contract will be discharged because the purpose of the contract--to watch the King's birthday celebrations--has been frustrated.

Contract duties will be discharged because of frustration of purpose where: (1) both parties understood the main purpose of the contract at the time the contract was made; (2) some event has made the contract performance totally valueless or almost totally valueless to one of the parties;

(3) the party claiming frustration of purpose did not cause the event; and (4) the event was unexpected and the parties assumed it would not occur.

In this case, Sok made a contract to rent the roof of Yon's house for one day in order to watch the King's birthday celebrations. Unfortunately, after the contract was made, the celebrations were moved to a different site far away. In this situation, both parties understood the main purpose of the contract: for Sok to watch the birthday celebrations. But the move of the celebrations made the contract completely valueless to Sok, because he had no other reason to rent Yon's roof. Sok did not cause the event to be moved. And the move was clearly unexpected--the celebration had been held in the same place for years, and if the parties had thought it would be moved, they never would have made their contract. Therefore, all the requirements for frustration of purpose are met, and the contract duties will be discharged. Sok will not be required to obey the contract.

Courts rarely find that duties are discharged because of frustration of purpose. Courts are especially reluctant to use the doctrine when an unexpected event means that a party will not be able to earn as much money on a contract, but the event does not really frustrate the purpose of the whole contract.

For example, suppose a party makes a long-term contract to lease a gasoline station on a small road that is scheduled to be built into a major highway. If the plans to make the road larger are canceled after the gasoline contract is made, the duties of the party who leased the gasoline station will probably not be discharged because of frustration of purpose. In that situation, the contract is not really valueless, since the party can still sell gasoline at the station. In fact, what has been frustrated is the party's plans to make a lot of money, rather than the main purpose of the contract (to sell gasoline). This kind of situation is sometimes called "commercial frustration." It is usually not considered to be frustration of purpose.

One example of situation where a kind of "commercial" frustration might discharge duties would be where party makes a contract to lobby a government for approval of a certain project, but immediately after the contract is formed the government decides it will not pursue or actually outlaws that kind of project. In that situation, a party might be able to meet the four requirements above for frustration of purpose.

9.8c Bankruptcy Proceedings May Discharge Contract Duties

When the debts of a person become too much for that person to pay, laws in many jurisdictions provide that the person may begin bankruptcy proceedings in court, and seek protection from his creditors. Bankruptcy is complex, and it cannot be fully explained here. In general, bankruptcy laws are intended to resolve a debtor's obligations in a fair way, and give the debtor a chance to make a new financial start. In many cases,

one result of bankruptcy proceedings is that not all creditors are paid the full amount that was owed to them. The rules about bankruptcy vary in different jurisdictions, so it is important to check the local law.

Obviously, many of the affairs that bankruptcy proceedings resolve are contracts. When the liability of a person under a particular contract is resolved in bankruptcy proceedings, the duties under that contract are generally discharged, and the only duties that remain are any that are created in the bankruptcy proceeding. Of course, as discussed in Chapter 3 (“Consideration”), Section 3.8b, many jurisdictions say it is possible for a bankrupt person to renew his duty to pay at a later time, if he voluntarily agrees to repay the debt and the bankruptcy court approves. In addition, contracts are not automatically discharged merely because a person begins bankruptcy proceedings. The result depends on what happens in those proceedings.

For example, suppose Tha has many debts that he cannot resolve. One of these debts is the remaining balance of a loan Tha received some time ago from a money lender named Sothy. This balance is 100,000 riels. Finally, after trying every other way he can to pay his debts, Tha decides to file for bankruptcy protection. In the bankruptcy proceedings, it is decided that Sothy will be able to receive only 50,000 riels of the amount owed to him. This means that Tha’s old debt will be discharged, and Sothy will no longer be able to enforce it.

*** **ADDITIONAL REFERENCE:** Chapter 3 (“Consideration”), Section 3.8b discusses bankruptcy proceedings, and how parties may renew debts that have been discharged in bankruptcy.

9.8d A Final Court Judgment or Arbitration Award about the Contract May Discharge Contract Duties

Courts and arbitrators often resolve disputes about the performance of contracts. Usually these disputes occur when one or both parties claim that there has been a breach of the contract. When a contract dispute is resolved by a final judgment of a court or a proper award of an arbitrator, the duties under the original contract are generally discharged.

Of course, if the court judgment or arbitration award says that a party must pay money or perform some other act, the party still has the legal duty to perform that act. Parties must obey valid court judgments and arbitration awards. But the duties under the original contract are discharged, and neither party to the contract will be able to enforce the original contract, or to bring another lawsuit about that contract. In this situation, courts often say that the duties under the original contract are “merged” into the judgment or award.

CASE STUDY 227

FACTS Atra and Chea made a contract under which Chea was to sell Atra two flat bed crane trucks. Atra needed the trucks for some work she planned to do. But Chea never delivered the trucks according to the contract.

So Atra asked a court for a remedy. The court found that Chea had breached the contract by failing to deliver the trucks. The court issued a judgment that said Chea had to pay Atra damages to compensate her for money she had lost because she did not receive the trucks according to the contract.

However, Chea did not pay the money required by the court judgment. So Atra brought another lawsuit about the contract! But Chea said the duties under that contract were discharged.

QUESTION OF LAW Are the duties under the original contract discharged?

DECISION Yes. The duties under the original contract were discharged when the court issued its judgment about that contract. Atra will have to ask the court to enforce the court judgment, not the original contract.

When courts issue judgments to resolve contract disputes, those judgments generally result in the discharge of the duties under the original contract, since those duties are “merged” into the court judgment. In this case, Chea breached his contract with Atra, and Atra obtained a judgment that said Chea had to pay her damages for that breach. The effect of the judgment was to discharge the duties under the original contract, and merge them into the court judgment. Therefore, Atra can no longer enforce the original contract. She will have to ask the court to enforce the court judgment.

*** **ADDITIONAL REFERENCE:** Chapter 10 (“Remedies”) contains further discussion of what courts may do when there is a contract dispute.

9.8e The Passing of the Time Set by a Statute of Limitations May Discharge Contract Duties, or at Least Bar a Lawsuit about the Contract Duties

Statutes of limitations are statutes that say how much time a party has, after a certain type of legal claim arises, to make that claim in court. Under these statutes, if a party who is harmed by a contract breach waits too long to try to enforce the contract, that contract will no longer be enforceable by the party. Statutes of limitations were already introduced in Chapter 3 (“Consideration”), Section 3.8d.

It appears that many jurisdictions say that the passing of the time set by a statute of limitations does not actually discharge the duties

under the contract, but that it bars the judicial remedy. In other words, the duties of the parties are not discharged, but provided the issue is properly raised in court, the court will not enforce the contract! As a practical matter, this means that a party must tell the court about the statute of limitations problem--raise it as a defense in court--or else that defense is waived. If the defense is waived, then the court case can proceed despite the statute of limitations.

On the other hand, it appears that some jurisdictions say that the expiration of the time set by the statute of limitations actually discharges the contract duties. That would mean that there would be nothing left for a court to enforce.

For example, in Case Study 101, Samen and Sorit made a contract for the sale of a generator. Sorit delivered the generator, and Samen failed to pay for it. However, Sorit waited too long to bring a lawsuit about this breach. The statute of limitations said that parties had only five years to bring such a lawsuit, but Sorit failed to bring a lawsuit within six years. Many jurisdictions would say that the effect of Sorit's failure to bring the lawsuit within five years was not that Samen's duty to pay for the generator was discharged, but that if Samen properly raised the statute of limitations problem in court, the court would not enforce the contract. However, some jurisdictions would say that Samen's duties were actually discharged by the passing of the time set by the statute of limitations.

One aspect of statutes of limitations was already discussed in Chapter 3, Section 3.8d. This is the rule in common law jurisdictions that a new promise to perform a contract duty that is no longer enforceable because of the statute of limitations generally needs no consideration to be binding.

***** ADDITIONAL REFERENCE:** Chapter 3 ("Consideration"), Section 3.8d contains further discussion of the effects of statutes of limitations on contract disputes.

9.9 Performance of Contracts in the Cambodian Legal Tradition and the Civil Law Tradition

The approaches of current Cambodian law and the civil law tradition to contract performance appear to produce practical effects that are generally compatible with those of the approach discussed in this Chapter. These legal traditions do not always use the same terminology as that used in this Chapter. So it is important to check the law that applies to any particular contract.

*** CAMBODIAN LAW PERSPECTIVE: The current Contract Law of Cambodia (Decree #38D (1988)) contains several provisions relevant to the discussion of contract performance in this Chapter. These are discussed below.

One important difference is that Decree #38D does not appear to contain provisions that specifically discuss "conditions," although there are some rules about specific types of contracts that may achieve effects that are similar to the effects of conditions.

General Provisions about Performance

Decree #38D contains a number of general provisions about how parties are to perform contracts, and a few about what happens if the parties fail to perform properly. As noted earlier, Article 30 states that each party to a contract is a "debtor" regarding the duties to be performed by him, and a "creditor" regarding the rights that he is to receive. Article 29 provides that parties shall carry out their contract obligations "in a timely and proper fashion especially with regard to quality, quantity, place and duration prescribed." These would appear to be terms that Decree #38 regards as important in the performance of a contract. In addition, Article 32 says that, unless the contract states otherwise, it shall be executed at the residence of the debtor. And Article 33 provides that, if there is no specific duration of time within which to execute the contract (presumably in the contract itself or the law), then the debtor can perform at any time and the creditor can request payment at any time.

Failure to Perform

Article 31 describes the options of creditors when the debtor fails to perform according to the contract. First, Article 31 states that the creditor party shall not be compelled to accept an object other than that to which he is entitled, even if the value of the object tendered is equal to or higher than the object the contract specifies. This might be roughly comparable to some of the rules about proper tender described in this Chapter, and it might be particularly comparable to a "perfect tender" rule.

Article 31 also provides that the creditor party shall not be compelled to accept part performance of the contract, but appears to give the People's Court discretion "with regard for the spirit of goodwill and the financial situation of the debtor party" to extend the time for execution of the contract and to suspend the creditor's legal action. The law notes that this is a "special case," and requires that the court exercise great care in these situations and clearly state its reasons for any such decision. Article 31 probably gives the court more discretion to suspend the duties of debtors than courts in most free market jurisdictions have.

In addition, Article 24 provides that the debtor party to the contract shall satisfy his obligations by payment from his personal and real properties available now and in the future. This may mean that, if a party fails to perform his duties under the contract, a court may order that his obligations be satisfied from the above properties.

Honesty and Good Faith

Article 2 provides that parties to a contract shall collaborate in an atmosphere of “good conscience,” and that contracts shall be executed “according to the principles of social ethics especially so as to abolish the exploitation of one party by another.” In addition, Article 22 states that contracts shall be performed “honestly and in accordance with the purposes agreed upon by the parties.” These provisions may describe a contract duty comparable to the duty of good faith and fair dealing described in this Chapter.

How Duties May End

Decree #38D contains several provisions related to how duties may end. First, Articles 25-28 describe the statute of limitations with respect to contracts. Article 25 provides that obligations resulting from a contract will have expired if the creditor party fails to sue for performance within five years of the date defined in the contract, or if there is no such date, the date the parties made the contract. Article 26 provides that the limitation period will be postponed if the debtor has been absent from his residence and the absence has been “certified by the local authorities according to the law,” and that the limitation period will also be postponed by a complaint by the creditor. Article 27 provides that the debtor or guarantor may assert the statute of limitations in court, but that if that does not occur, then the court “shall do it instead.” Article 28 states that a debtor or guarantor who performs under the contract after the limitations period has expired cannot make a “claim for the amount of money or value given” on the grounds that the limitation period has expired.

In addition, Article 3 of Decree #38D provides that, for contracts to be valid, the subject matter of the contract must be “possible to perform” and “lawful.” It would appear that if the subject matter of a contract became impossible or unlawful after a contract was formed, then the contract would cease to be enforceable, as described in this Chapter.

Article 16 of the Labor Law (1997) appears to prohibit contracts in which a person agrees to work in order pay off a debt. This provision would seem to forbid substitute contracts and accords that involve a debtor in a loan contract agreeing to work for the creditor in order to pay the debt. This Article appears to limit the freedom of contract in order to protect debtors.

Performance of Particular Types of Contracts

Chapter 2 of Decree #38D regulates the performance of specific types of contracts in some detail. The provisions in Chapter 2 contain a number of provisions which may be roughly comparable to some of the provisions discussed in this Chapter relating to conditions, breach, impossibility, rescission, and other matters related to performance.

For example, Articles 34-55 govern sales contracts. Article 38 provides that, in sales contracts, the seller will be liable for damage occurring until the time of delivery, and that the sale may be “canceled” if the item is lost or substantially damaged prior to delivery “or when the vendor cannot find a substitute.” If the sale is canceled, Article 38 appears to say that the seller must pay damages to the purchaser resulting from the loss of the object or any damages resulting from the fault of the seller. These rules may be roughly comparable to the rules discussed above relating to impossibility.

Article 47 provides that if the seller dies, his duties pass to his heirs. This would seem to be like the rule discussed above that duties may not be discharged because of the death of a party who is not really necessary to the performance of the contract, which might be the case in a sales contract.

Article 53 provides that the seller may keep possession of the sale item up until the purchaser delivers payment. This rule might be comparable to the rule discussed above involving concurrent conditions in sale of goods contracts.

Articles 54 and 55 discuss rescission of sale of goods contracts. Article 54 provides that the seller may rescind the contract if the buyer has failed to make full payment by the due date. Article 55 describes how the parties are to be returned to the positions they would have occupied if the contract had not been made, including the payment of interest. These rules seem comparable to the rules about rescission discussed above, though the remedy in Article 55 seems closer to reliance than restitution.

***** CIVIL LAW PERSPECTIVE:** The practical effects of the civil law approach to contract performance appear to be generally comparable to the effects of the approach discussed in this Chapter. However, civil law jurisdictions do not use all of the same terminology as in the discussion above. And of course, the exact rules about contract performance differ from one jurisdiction to another, so it is always important to check the relevant local law.

Civil law jurisdictions appear to have very detailed statutes governing the performance of contracts in many different situations. For example, in Germany, the law defines the rights and duties of the parties with respect to performance of contracts in a variety of situations. It appears that some authorities group these many detailed provisions into three categories: impossibility, delay in performance, and “positive breach,” which appears to refer to a defective performance that is not delayed, such as providing non-conforming goods. In each of these situations, the parties have different rights in different circumstances. France also has many detailed statutes governing contract performance. For example, there appear to be more than 10 different statutes regulating the sale of goods.

Conditions exist in at least some civil law jurisdictions. For example, French contract law contains a number of provisions about conditions.

It seems that such conditions may be either precedent or subsequent, and that the Civil Code provides various rules about how they work. For example, if a condition is impossible to fulfill, illegal or immoral, then it is “void.”

In addition, as discussed in Chapter 7 (“Other Contract Formation Problems”), civil law jurisdictions say that all contracts contain a duty which is comparable to the duty of good faith and fair dealing discussed in this Chapter. This duty applies to the performance of contracts. For example, the laws of France and Germany impose this duty.

Many civil law jurisdictions appear to limit the use of the doctrine of impossibility to situations where performance of the contract really is impossible, rather than merely impracticable. For example, it seems that impossibility is a very limited doctrine in France. It also appears that French law requires that performance actually be impossible, as well as “unforeseeable” and “irresistible,” in order for contract duties to be discharged. There does seem to be an exception for contracts involving personal performance. However, it appears that German law does generally allow performance to be excused for reasons comparable to what was described as impracticability in this Chapter.

As noted above, it appears that civil law jurisdictions have detailed statutes governing performance of different types of contracts. One important example is the sale of goods. As noted above, French law has many different statutes regarding this type of contract. Germany also has special rules about sale of goods contracts. For example, in Germany, when a seller makes a non-conforming tender, it seems that a buyer may reject the goods or make a price adjustment for the non-conformity.

9.10 Questions for Review

CHAPTER 9 – QUESTIONS FOR REVIEW

1. What is a discharge of duties?
2. What are the differences between promises and conditions?
3. Why should parties consider putting conditions in their contracts?
4. What are the differences among conditions precedent, subsequent and concurrent?
5. What are the differences among conditions that are express, implied-in-fact and implied-in-law?
6. What is a forfeiture?

7. Describe three types of situations where implied-in-law conditions may exist.
8. In general, what will cause conditions to occur?
9. When can complete performance fulfill a condition?
10. When can substantial performance fulfill a condition?
11. What is a breach of a contract?
12. How can courts determine if substantial performance has occurred?
13. What is an anticipatory repudiation?
14. What is prospective inability or unwillingness to perform?
15. How can the failure or occurrence of one condition excuse another condition?
16. How can rejection of a tender of performance excuse a condition?
17. How can prevention or hindrance excuse a condition?
18. What is a waiver and how can it excuse conditions?
19. What are some differences between waiver before a condition is to occur and waiver after a condition fails to occur?
20. What is estoppel and how can it excuse conditions?
21. How can impossibility excuse conditions?
22. How does severability affect conditions?
23. What are some limits on conditions of approval by parties to a contract?
24. What are some limits on conditions of approval by non-parties?
25. Describe a special problem that may occur in the performance of construction contracts.
26. Give examples of special rules about waiver in sale of goods contracts.
27. Describe some of the rules explained in this Chapter about tender of goods in single lot contracts.
28. Describe some of the rules explained in this Chapter about tender of goods in installment contracts.

29. Give examples of how the duty of good faith and fair dealing may affect contract performance.
30. What is the effect of complete performance on contract duties?
31. How can a breach discharge contract duties?
32. How can an anticipatory repudiation discharge contract duties?
33. How can a rejection of a tender discharge contract duties?
34. How can the occurrence of a condition subsequent discharge contract duties?
35. How can avoidance of a voidable contract discharge contract duties?
36. What is mutual rescission and how can it discharge contract duties?
37. What is a release and how can it discharge contract duties?
38. What is a substitute contract and how can it discharge contract duties?
39. What is an accord and satisfaction and how can it discharge contract duties?
40. What is a novation and how can it discharge contract duties?
41. What is an account stated and how can it discharge contract duties?
42. How can impossibility or impracticability discharge contract duties?
43. What are some important situations where impracticability may discharge contract duties?
44. How can frustration of purpose discharge contract duties?
45. How can bankruptcy proceedings discharge contract duties?
46. How can a court judgment or arbitration award discharge contract duties?
47. How can the passage of the time set by a statute of limitations discharge contract duties?
48. How does the Cambodian legal approach to contract performance compare to the approach discussed in this Chapter?
49. How does the civil law approach to contract performance compare to the one discussed in this Chapter?