

Chapter 5

Performance of a Contract

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Performance of a contract

1 MEANING AND TYPES OF PERFORMANCE OF A CONTRACT

1.1 Meaning and types

A contract creates an obligation, which continues till the contract has been discharged by performance. Performance of the contract is one of the vital modes of discharge of the contract. The parties to a contract must either perform, or offer to perform their respective promises, unless such performance is dispensed with or excused under the provisions of Contract Act, or of any other law.

There are two types of performance, actual performance and attempted performance.

Actual performance [Section 37]

When the promisor has made the performance in accordance with the terms of the contract and it is accepted by the promisee it is called an actual performance.

Please See The Example 01: Actual performance

Attempted performance (tender) [Section 38]

When the promisor has made an offer of performance but the offer of performance of promisor is not accepted by the promisee it is called an attempted performance. Attempted performance is also known as tender.

Please See The Example 02: Attempted performance

1.2 Essentials of a valid tender / attempted performance

The essentials of a valid tender are as below:

Unconditional

Tender is said to be unconditional when it is made in accordance with the terms of the contract.

Please See The Example 03: Essential – Unconditional

Proper Time

Tender must be made at the stipulated time or during business hours. Tender of goods or money before the due date is also not a valid tender.

Please See The Example 04: Essential – Proper Time

Proper Place

Tender must be made at the stipulated place or at business place.

Please See The Example 05: Essential – Proper Place

Proper Person

It must be made to the promisee or his duly authorized agent. In case of several joint promisees, a tender made to one of them has the same legal consequences as tender to all of them.

Please See The Example 06: Essential – Proper Person

Reasonable Opportunity

Promisee must have reasonable opportunity for examining that the goods offered are the same as per the terms of the contract.

Please See The Example 07: Essential – Reasonable Opportunity

Whole Obligation

A valid tender is for the whole obligation. However, a minor deviation from the terms of the contract may not render the tender invalid.

Please See The Example 08: Essential – Whole Obligation

Fixed amount and legal tender

In case of tender of money the amount must be fixed and in legal tender.

Please See The Example 09: Essential – Fixed amount and legal tender

1.3 Effect of refusal

Effect of refusal to accept a valid tender of goods and services

Where the promisor offers to deliver the goods or services but the promisee refuses to accept, the

following rules apply:

- Goods or services need not be offered again.
- Promisor may sue the promisee for non-performance and claim damages.
- Promisor is discharged from his liability i.e. he is not liable for non-performance.

Please See The Example 10: Effect of refusal to accept a valid tender of goods and services

Effect of refusal to accept a valid tender of money

Where the promisor offers to pay the amount but the promisee refuses to accept the same, the

following rules apply:

- Promisor is not discharged from his liability to pay the amount

- Promisor will not be liable for interest from the date of a valid tender

Please See The Example 11: Effect of refusal to accept a valid tender of money

Effect of refusal to perform [Section 39]

When a party to a contract has refused to perform or disabled himself from performing his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his willingness in its continuance.

Please See The Example 12: Effect of refusal to perform

Please See The Example 13: Conditions of valid tender

Please See The Example 14: Tender and essentials of tender

2 PERSONS WHO CAN PERFORM AND DEMAND PERFORMANCE

2.1 Persons who can perform [Section 40 to 42]

Promisor

If a contract is of personal nature or it was agreed that promise will be performed by the promisor himself, then such promise must be performed by the promisor.

Please See The Example 15: Promisor

Promisor's agent

If the intention of parties is that the promise can either be performed by the promisor himself or any person employed by him then such contracts can be performed by the promisor himself or an agent employed by him.

Please See The Example 16: Promisor's agent

Legal representatives

Unless a contrary intention appears or the contract is of personal nature, on death of promisor, his legal representative can perform the contract.

Please See The Example 17: Legal representatives

Third party

With the consent of the promisee a contract can be performed by a third party. When a promisee accepts performance of the promise from a third person, he cannot afterwards enforce it against the promisor.

Please See The Example 18: Third party

Joint promisor

Unless a contrary intention appears, in case of several promisor the following persons must perform the promise:

- All the promisors jointly in case of all the promisors are alive
- Representatives of the deceased promisor jointly with the surviving promisor(s) in case of death of any of the joint promisors
- Representatives of all of them jointly in case of death of all joint promisors .

Please See The Example 19: Joint promisor

2.2 Persons who can demand performance [Section 40 to 42]

Promisee

Under a contract only a promisee can demand the performance of the promise.

Please See The Example 20: Promisee

Promisee's agent

If the intention of parties is that performance can be demanded from any person authorised by the promisee then performance can be demanded by promisee's agent.

Please See The Example 21: Promisee's agent

Legal representative

Unless a contrary intention appears from the contract or the contract is of a personal nature, on death of the promisee, his legal representative can demand performance.

Please See The Example 22: Legal representative

Third party

A third party can also demand the performance of the contract in some exceptional cases like beneficiary in case of trust or the person for whose benefit the provision is made in family arrangements.

Please See The Example 23: Third party

Joint promisees

In case of several promisees, unless a contrary intention appears, the performance can be demanded by the following persons:

- All the promises jointly in case all the promisees are alive
- Representatives of deceased promisee jointly with the surviving promisees in case of death of any of joint promisees
- Representatives of all of them jointly in case of death of all joint promisees

Please See The Example 24: Joint promisees

2.3 Rules regarding the performance of joint promise [Section 43 to 45]

The rules regarding the performance of joint promises are as follows:

Joint and several liability of joint promisors

When two or more persons make a joint promise, the promisee may, in the absence of express agreement to the contrary, compel anyone or more of such joint promisors to perform the whole of the promise.

Please See The Example 25: Joint and several liability of joint promisors

Right to claim contribution

Each of two or more joint promisors may compel every other joint promisor to contribute equally with himself to the performance of the promise, unless a contrary intention appears from the contract.

Please See The Example 26: Right to claim contribution

Sharing of loss in contribution

If anyone of two or more joint promisors makes default in such contribution, the remaining joint promisors must bear the loss arising from such default in equal shares.

Please See The Example 27: Sharing of loss in contribution

Release of one joint promisor

Where two or more persons have made a joint promise, a release of one of such joint promisors by the promisee, does not discharge the other joint promisor or joint promisors; neither does it free the joint promisor so released from responsibility to the other joint promisor or joint promisors.

Please See The Example 28: Release of one joint promisor

Devolution of joint rights [Section 45]

When a person has made a promise to two or more persons jointly, then, unless a contrary intention appears from the contract, the right to claim performance rests, as between him and them, with them during their joint lives, and, after the death of any of them, with the representative of such deceased person jointly, with the survivor or survivors and after the death of the last survivor, with the representatives of all jointly.

Please See The Example 29: Devolution of joint rights

Please See The Example 30: Joint promisor and promisee

Please See The Example 31: Devolution of liabilities

Please See The Example 32: Performance of joint promise

3 TIME, PLACE AND ORDER OF PERFORMANCE

3.1 Time and place of performance [Section 46 to 50]

The various rules regarding the time and place of performance are given below:

Prescribed or sanctioned by the promisee

Where the time, manner and/or place are prescribed by the promisee, the performance of the contract must be at the specified time, manner and place.

Please See The Example 33: Prescribed or sanctioned by the promisee

Not prescribed by promisee

When time is not prescribed by the promisee, the contract must be performed within a reasonable time, on a working day and within the usual hours of business. The question “what is a reasonable time” is, in each particular case, a question of fact.

When place is not prescribed by the promisee, the contract must be performed at proper place e.g. at warehouse or shop, and not at a public meeting. The question “what is a proper time and place” is, in each particular case a question of fact. Generally, the promisor must ask the promisee where he would like the contract to be performed, and to perform it at such place.

Please See The Example 34: Not prescribed by promisee

3.2 Effects of failure to perform within the stipulated time [Section 55]

Time is essence of a contract means that it is necessary for the parties to a contract to perform their respective promises within the specified time.

When is the time the essence of the contract?

In the following cases, time is considered to be the essence of contract:

- Where the parties have expressly agreed to treat the time as the essence of the contract; or
- Where the nature and the intention of parties were such that the performance within a limited time was necessary.

Even where a time is specified for the performance of a certain promise, 'time may not be of the essence of the contract' and above factors should be considered.

Please See The Example 35: When is the time the essence of the contract?

Consequences where time is essence

In case the performance is not made within time fixed and time is essence:

- The contract (or so much of it as remains unperformed) becomes voidable at the option of the promisee. He may rescind the contract and sue for the breach caused by non-performance.

- In case delayed performance is accepted, the promisee is not entitled to claim compensation for any loss caused by delay, unless the promisee gives notice to the promisor of his intention to claim compensation.

Please See The Example 36: Consequences where time is essence

Consequences where time is not essence

In case the performance is not made within time fixed and time is not essence:

- The contract is not voidable at the option of promisee unless the delay in performance is also beyond reasonable time.

- In case delayed performance is accepted, the promisee is not entitled to claim compensation for any loss caused by delay, unless the promisee gives notice to the promisor of his intention to claim compensation.

Please See The Example 37: Consequences where time is not essence

Please See The Example 38: Effects of failure to perform within the stipulated time

3.3 Reciprocal promises [Section 2(f)]

Promises which form the consideration or part of the consideration for each other are called 'reciprocal promises'.

Please See The Example 9: Meaning of reciprocal promises

The reciprocal promises have following types:

Mutual and independent

When the promises are to be performed by each party independently, without waiting for the other party to perform is called Mutual and independent.

Please See The Example 40: Mutual and independent

Mutual and dependent

When the performance of one party depends on the prior performance of the other party it is called Mutual and dependent.

Please See The Example 41: Mutual and dependent

Mutual and concurrent

When the promises are to be performed simultaneously i.e. at the same time it is called Mutual and concurrent.

Please See The Example 42: Mutual and concurrent

Simultaneous performance [Section 51]

When a contract consists of reciprocal promises to be simultaneously performed, the promisor need not perform his promise unless the promisee is ready and willing to perform his reciprocal promise.

Please See The Example 43: Simultaneous performance

Order of performance [Section 52]

Where the order in which reciprocal promises are to be performed is expressly fixed by the contract, they must be performed in that order, and where the order is not expressly fixed by the contract, they must be performed in the order which the nature of the transaction requires.

Please See The Example 44: Order of performance

Preventing the performance [Section 53]

When a contract contains reciprocal promises, and one party to the contract prevents the other from performing his promise, the contract becomes voidable at the option of the party so prevented; and he is entitled to compensation from the other party for any loss which he may sustain in consequence of the non-performance of the contract.

Please See The Example 45: Preventing the performance

Non-performance in case of mutual and dependent reciprocal promises [Section 54]

Where the performance of one party depends on the prior performance of the other party and the party who is liable to perform first, fails to perform it, then such party cannot claim the performance from the other party and must make compensation to the other party for any loss which the other party may sustain by the non-performance of the contract.

Please See The Example 6: Non-performance in case of mutual and dependent reciprocal promises

Promise to do legal and illegal things [Section 57]

Where persons reciprocally promise, firstly, to do certain things which are legal, and, secondly, under specified circumstances, to do certain other things which are illegal, the first set of promises is a contract, but the second is a void agreement

Please See The Example 47: Promise to do legal and illegal things

Please See The Example 48: Rules regarding performance of reciprocal promises

Please See The Example 49: Reciprocal promises

4 ASSIGNMENT OF CONTRACTS AND APPROPRIATION OF PAYMENTS

4.1 Assignment of contracts

Assignment of a contract means transfer of contractual rights and liabilities to a third party. Assignment of a contract may take place in the following ways:

Assignment by act of parties

Assignment by act of parties takes place when the parties to a contract themselves make the assignment. Such an assignment is subject to the following rules:

- If it is a contractual obligation/right involving personal skill or ability then it cannot be assigned.

- If the contract expressly or impliedly provides that the contract shall be performed by the promisor only, then such obligation cannot be assigned

If the contract does not expressly or impliedly provides that the contract shall be performed by the promisor only, then the promisor or his representative may employ a competent person to perform such obligation but even then the promisor remains liable to the promisee for proper performance.

By Novation the promisor may transfer his liability to a third party with the consent of the promisee and the transferee.

Actionable claims i.e. claim to any debt or to any beneficial interest in movable property can always be assigned by an instrument in writing. Notice of such assignment is also required to be given to the debtor.

Please See The Example 50: Assignment by act of parties

Assignment by operation of law

Assignment by operation of law takes place when the law intervenes. Such assignment takes place in the following cases:

- In case of death of any party the rights and obligation (other than those of personal nature) of the deceased party pass on to his legal representatives.

- In case of insolvency of any party the rights and obligations (other than those of personal nature) of the insolvent party pass on to the Official Receiver or Assignee.

Please See The Example 51: Assignment by operation of law

Please See The Example 52: Assignment of contract

4.2 Appropriation of payment

Appropriation of payment means allocation of payment to a particular debt. The various rules regarding appropriation of payments are given below:

Debt to be discharged is indicated [Section 59]

Where a debtor, owing several distinct debts to one person, makes a payment to him with either express or implied intimation that the payment is to be applied to the discharge of some particular debt, the payment, if accepted, must be applied accordingly.

Please See The Example 53: Debt to be discharged is indicated

Debt to be discharged is not indicated [Section 60]

When debt to be discharge is not indicated, the creditor has option to apply the payment to any lawful debt due from the debtor even if it is a time barred debt but he cannot apply the payment to a disputed debt.

Please See The Example 54: Debt to be discharged is not indicated

Neither party makes an appropriation [Section 61]

The payment shall be applied in discharge of the debts in order of time whether or not they are time barred. In other words, all payments shall be applied towards the payment of first debt till it gets extinguished. Similarly, all subsequent payments applied towards second debt till it gets fully paid and so on and so forth. If the debts are of equal standing, the payment shall be applied in discharge of each, proportionately.

Please See The Example 55: Neither party makes an appropriation

When principal and interest both are due

If principal amount and mark-up both are due, then mark-up is settled first and then principal amount is settled.

Please See The Example 56: When principal and interest both are due

Please See The Example 57: Appropriation of payments

Please See The Example 58: Appropriation

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