

# Chapter 6

## Discharge of a Contract & Remedies for Breach of Contract

## DISCHARGE OF A CONTRACT

- Meaning and modes of discharge of a contract
- Discharge by performance
- Discharge by agreement or by consent
- Discharge by operation of law
- Discharge by impossibility of performance
- Discharge by lapse of time
- Discharge by actual breach of contract
- Discharge by anticipatory breach of contract

## REMEDIES FOR BREACH OF A CONTRACT

- Meaning of remedy
- Remedies for breach
- Kinds of damages
- Rules regarding amount of damages
- Remoteness of damages

# Discharge of a contract and remedies for breach of contract

## 1 DISCHARGE OF A CONTRACT

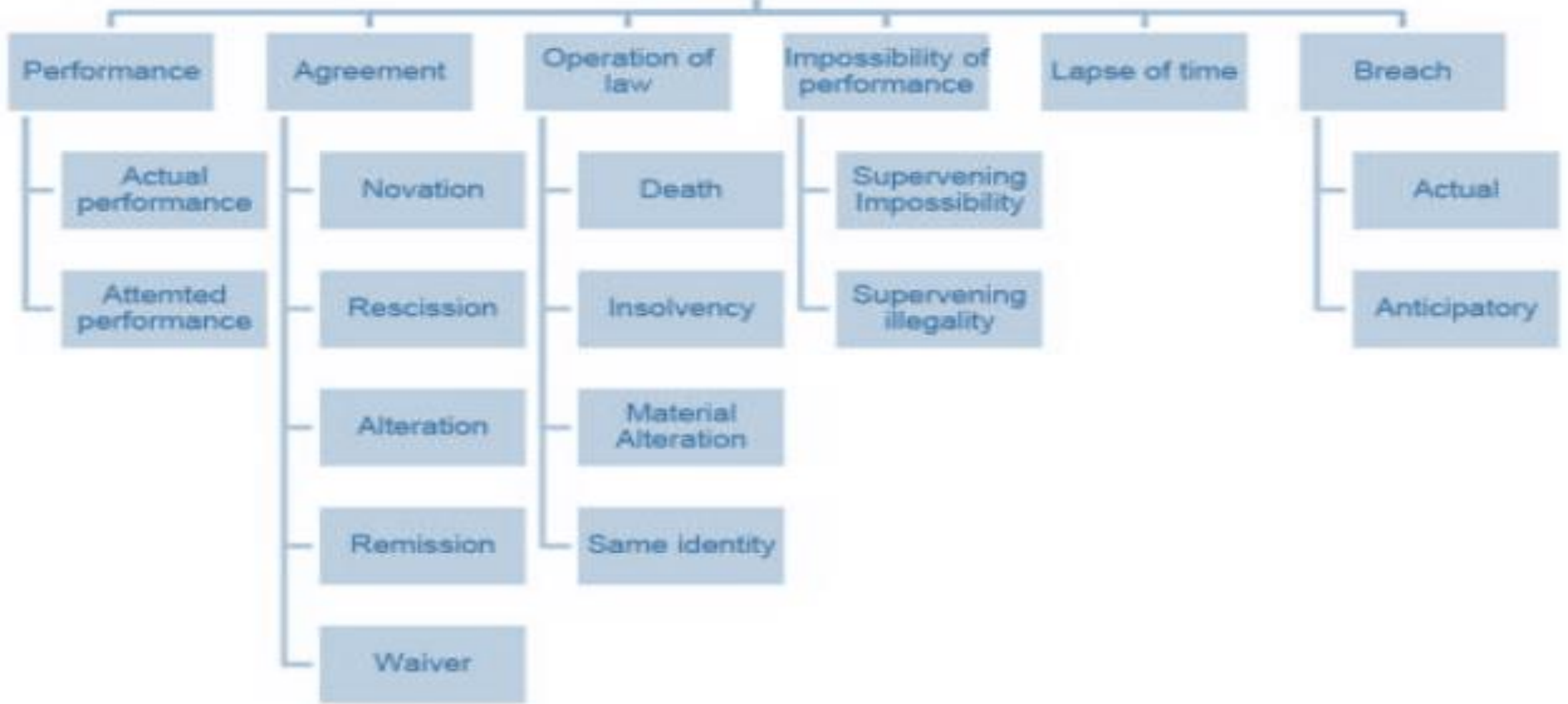
### 1.1 Meaning and modes of discharge of a contract

A contract is said to be discharged when contractual relations between the parties to a contract are terminated or comes to an end.

In other words, when the parties to a contract have either performed or are freed from the task of performing their respective obligations as arising from the contract.

The chart below shows the various ways in which a contract is said to be discharged:

Modes of discharge



## 1.2 Discharge by performance

Performance of a contract is one of the most common ways of discharging a contract. A contract can be discharged by performance in any of the following ways:

### Actual performance [Section 37]

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

**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 / tender.

Effect of tender is that the contract is deemed to be performed. Promisor is discharged from his liability of non-performance. His rights against the promisee are unaffected.

**Please See The Example 02: Attempted performance**

## 1.3 Discharge by agreement or by consent

The rights and obligations created by an agreement can be discharged without being performed through formation of another agreement between the parties due to which the rights and obligations in the original agreement comes to an end. A contract can be discharged by mutual agreement in any of the following ways:

### Novation [Section 62]

Novation means the substitution of a new contract for an old one. The new agreement extinguishes the rights and obligations that were in effect under the old agreement.

A novation ordinarily arises when a new individual assumes an obligation to pay that was incurred by the original party to the contract. In the case of a novation, the original debtor is totally released from the obligation, which is transferred to someone else. The nature of the transaction is dependent upon the agreement between the parties. A novation also takes place when the original parties continue their obligation to one another, but a new agreement is substituted for the old one.

**Please See The Example 03: Novation**

## Rescission [Section 62]

Rescission is the cancellation of a contract by mutual agreement of parties.

**Please See The Example 04: Rescission**

## Alteration [Section 62]

Alteration means a variation made in the language or terms of a contract with mutual agreement. When this occurs the original contract is discharged and a new contract is created. The parties in alteration remain same.

**Please See The Example 05: Alteration**



## Remission [Section 63]

Remission means accepting a less amount than the initial amount agreed.

**Please See The Example 06: Remission**

## Waiver

Waiver is a unilateral act of one person that results in the surrender of a legal right. Thus, it amounts to releasing a person of certain legal obligation under a contract.

**Please See The Example 07: Waiver**

## Promisee's refusal / neglect [Section 67]

If any promisee neglects or refuses to afford the promisor reasonable facilities for the performance of his promise, the promisor is excused by such neglect or refusal as to any non-performance caused.

**Please See The Example 08: Promisee's refusal / neglect**

### 1.4 Discharge by operation of law

A contract may be discharged by operation of law in any of the following cases:

#### Death

On the death of the promisor a contract involving the personal skill or ability is discharged. In other contracts, the rights and liabilities of the deceased person pass on to his legal representatives.

**Please See The Example 09: Death**

## Insolvency

When a person's debts exceeds his assets, he is adjudged insolvent and his property stands vested in the Official Receiver or Official Assignee appointed by the court. Such person cannot enter into contracts relating to his property, and cannot sue or be sued. Therefore, on declaration of a person as an insolvent, the person is discharged from his liabilities incurred prior to his adjudication.

**Please See The Example 10: Insolvency**

## Material alteration

A contract is discharged if the terms of the contract are materially altered without getting prior consent of parties. A material alteration is one which changes following in a significant manner legal identity of the contract, or character of the contract or rights and liabilities of the parties to the contract.

An alteration which is not material or which is made after getting prior consent does not affect the validity of the contract.

**Please See The Example 11: Material alteration**

## Same identity

When the promisor becomes the promisee, the other parties are discharged e.g. negotiation back in case of negotiable instrument i.e. creditor to himself becomes a debtor of the same loan.

**Please See The Example 12: Same identity**

## 1.5 Discharge by impossibility of performance

When a contract is valid at the time of formation and becomes impossible to perform subsequently it is called effected by supervening impossibility.

## Effects of supervening impossibility [Section 56]

The effects of supervening impossibility are as follows:

- A contract becomes void when an act becomes impossible after the formation of the contract.
- A contract becomes void when an act becomes unlawful by reason of some event beyond the control of promisor.
- A promisor is liable to compensate the promisee for any loss which arose due to nonperformance of promisor when the promisor hides the impossibility of performance.
- A person is bound to restore any benefit received or compensated under a contract when such agreement or contract becomes void.

**Please See The Example 13: Effects of supervening impossibility**

## Grounds of supervening impossibility

A contract is discharged by supervening impossibility in the following cases:

<b>Destruction of subject matter</b>	If the subject matter of the contract is destroyed after the formation of the contract without any fault of either party then a contract is said to be discharged.
<b>Death or personal incapacity</b>	If a contract is of personal nature then on the death / incapacity / illness of a person a contract is said to be discharged. This rule is also called doctrine of frustration.
<b>Declaration of war</b>	At the time of declaration of war the contracts with alien enemies are either suspended or declared as void.
<b>Particular state of things ceases to exist or occur</b>	The contract is discharged if that particular state of thing which forms the basis of a contract ceases to exist or occur.

**Please See The Example 14: Destruction of subject matter**

**Please See The Example 15: Death or personal incapacity (doctrine of frustration)**

**Please See The Example 16: Declaration of War**

**Please See The Example 17: Particular state of things cease to exist or occur**

## Not an excuse of supervening impossibility

Impossibility of performance is, as a rule, not an excuse from performance. It means that a person should perform his promise if he has promised to do so unless the performance becomes absolutely impossible.

A contract is not discharged by the supervening impossibility in the following cases:

<b>Difficulty of performance</b>	If the performance of a contract becomes difficult, more costly or less beneficial than that agreed at the time of its formation, a contract will not be discharged.
<b>Commercial impossibility</b>	When the contract becomes commercially unviable or non-profitable it is not said to be discharged.



<b>Default of a third party</b>	On default of a third party, on whose work the promisor is relying, a contract is not said to be discharged.
<b>Strikes, lockouts and civil disturbances</b>	Unless otherwise agreed by the parties to the contract, a contract is not discharged on the grounds of strikes, lockouts and civil disturbances.
<b>Partial impossibility</b>	A contract is not discharged simply on the grounds of partial impossibility of some of the objects of the contract.

**Please See The Example 18: Difficulty of performance**

**Please See The Example 19: Commercial impossibility**

**Please See The Example 20: Default of a third party**

**Please See The Example 21: Strikes, lockouts and civil disturbances**

**Please See The Example 22: Partial impossibility**

# Supervening illegality /Change of law

If the performance of the contract becomes unlawful due to a change in the law after the formation of the contract then the contract is said to be discharged.

**Please See The Example 23: Supervening illegality /Change of law**

## 1.6 Discharge by lapse of time

A contract may be discharged by lapse of time.

### Limitation period

If a contract is not performed within the period of limitation then it is discharged as the parties cannot legally enforce their rights. After the expiry of the limitation period, the debt becomes time barred and hence cannot be recovered through court of law.

**Please See The Example 24: Limitation period**

## 1.7 Discharge by actual breach of contract [Section 38]

If a party refuses or fails to perform his part of the contract then the contract is said to be discharged due to breach. Actual breach of contract occurs when a party to a contract refuses or fails to perform his part of the contract at the time fixed for performance. Actual breach of contract occurs in the following two ways:

### Due date of performance

If any party to a contract refuses or fails to perform his part of the contract at the time fixed for performance, it is called an actual breach of contract on due date of performance.

**Please See The Example 25: Due date of performance**

## Course of performance

If any party has performed a part of the contract and then refuses or fails to perform the remaining part of the contract, it is called an actual breach of contract during the course of performance.

**Please See The Example 26: Course of performance**

## Consequences of actual breach

The consequences of actual breach depend upon whether the time was the essence of the contract or not. The consequences in both the cases have been covered in previous chapter.

## 1.8 Discharge by anticipatory breach of contract [Section 39]

Anticipatory breach of contract occurs when before the performance is due, the party acts in such a way that the contract may not be performed. A party may intend not to perform the contract in the following two ways:

### Refusal to perform promise

When a party to a contract has expressly refused to perform his promise.

**Please See The Example 27: Refusal to perform promise**

### Disabled to perform promise

When a party to a contract has disabled himself from performing his promise in its entirety.

**Please See The Example 28: Disabled to perform promise**

## Options to the aggrieved party

In case of anticipatory breach, the aggrieved party has the following two options:

Options to the aggrieved party	Calculation of damages
Rescind the contract and claim damages for breach of contract without waiting until the due date for performance or	Damages will be equal to the difference between the price prevailing on the date of breach and the contract price. [Section 73]
Treat the contract as operative and wait till the due date for performance and claim damages if the promise still remains unperformed	Damages will be equal to the difference between the price prevailing on the due date of performance and the contract price.

## Consequences of treating contract as operative

If the aggrieved party treats the contract as operative and waits till the due date for performance, the consequences of anticipatory breach will be as follows:

- The promisor may perform his promise on or before the due date of performance and the promisee will be bound to accept the performance.
  
- The promisor may take advantage of the discharge by supervening impossibility arising between the date of breach and the due date of the performance and in such a case, the promisee shall lose his right to sue for damages.

**Please See The Example 29: Consequences of treating contract as operative**

**Please See The Example 30: Anticipatory breach of contract**

**Please See The Example 31: Discharge of a contract by mutual agreement**

**Please See The Example 32: Contract to do act afterwards becoming impossible or unlawful**

**Please See The Example 33: Discharge by supervening impossibility**

**Please See The Example 34: Circumstances not covered by supervening impossibility**

**Please See The Example 35: Effect of alteration of contract**

**Please See The Example 36: Contract to do act afterwards becoming impossible or unlawful**

# 2 REMEDIES FOR BREACH OF CONTRACT

## 2.1 Meaning of remedy

A remedy can be defined as a manner in which a right is enforced or satisfied by a court when some harm or injury, recognized by society as a wrongful act, is inflicted upon an individual.

Remedies can be categorized into the following types:

### Common law remedies

Damages and action for the price are more frequently sought remedies for breach of contract, since they arise as of a right. The object of such a remedy is not to punish the party at fault but to compensate the aggrieved party (pecuniary loss) as far as money can do so.



## Equitable remedies

Equitable remedies are the court ordered action that directs parties to do something (specific performance) or not to do something (injunction). In other words, equitable remedies are only appropriate in specialised circumstances e.g. where monetary damages would be inadequate compensation for the breach of an agreement.

## Quantum meruit claim

Quantum meruit claim is categorized as a claim in quasi contract. Quantum meruit is likely to be sought where one party has already performed part of his obligations and the other party then repudiates the contract. When the aggrieved party elects to treat the contract as terminated, he may claim a reasonable amount for the work done.

## 2.2 Remedies for breach

Parties to a lawful contract are bound to perform their respective obligations. But when one of the parties refuses to perform his obligations he is said to have committed a breach of the contract.

The various remedies available to an aggrieved party are as follows:

### 1. Rescission of contract [Section 39 and 75]

Rescission is the putting an end to a contract. Rescission means a right not to perform your obligation. In such a case, the aggrieved party is discharged from all the obligations under the contract and is entitled to claim compensation for the damage which he has sustained because of the non-performance of the contract.

The court may also grant rescission where the contract is voidable at the option of the aggrieved party. In some cases, rescission may not be possible, for example, when parties cannot be restored to their original position or where the third party has acquired rights in good faith.

**Please See The Example 37: Rescission of Contract**

**Please See The Example 38: Rescission of contract not possible**

## 2. Restitution

It means return of the benefit received by one party to the contract from the other under a void contract or a contract that has been rescinded. When a contract becomes void it needs not to be performed by either party.

**Please See The Example 39: Restitution**

## 3. Damages [Section 73]

Damages are monetary compensation allowed for loss suffered by the aggrieved party due to breach of a contract. The object of awarding damages is not to punish the party at fault but to compensate the aggrieved party (pecuniary loss) as far as money can do so.

**Please See The Example 40: Damages**

## 4. Action for price

Action for price is also a monetary compensation and is applicable when one party has performed his part of contract and now wants to recover the price of goods/services delivered or provided.

**Please See The Example 41: Action for price**

## 5. Specific performance

Suit for specific performance is an equitable doctrine that compels a party to execute the agreement according to its terms where monetary damages would be inadequate compensation for the breach of an agreement.

Specific performance is a discretionary remedy, which is allowed only in a limited number of cases some of them are listed below:

- Monetary compensation is not adequate
- Actual damage cannot be ascertained due to non-performance
- It is probable that compensation in money on non-performance cannot be obtained
- There is a contract for the sale of rare commodities
- There is a contract for the sale of land / building / apartment / houses

**Please See The Example 42 & 43: Specific performance**

Following are the cases where suit for specific performance is not maintainable where:

- Monetary compensation are considered as an adequate remedy
- Contract is of personal nature, e.g. contract of services
- Court cannot supervise the performance of the contract e.g. construction of building
- One of the parties is a minor
- Contract is inequitable to either party

**Please See The Example 44,45 & 46: Specific performance not maintainable**

## 6. Injunction

Suit for injunction is also an equitable remedy demanding court's stay order. Injunction means an order of the court which abstains from wrong doing. Where a party to a contract does something which he promised not to do, the court may issue an order prohibiting him from doing so.

Thus, injunction is a preventive relief. It is particularly appropriate in case of anticipatory breach of contract where damages would not be an adequate relief.

**Please See The Example 47: Injunction**

## 7. Quantum meruit

The term Quantum Meruit means “as much as earned or deserved.” In case of breach of contract the application or non-application of the term quantum meruit varies depending upon the terms of the contract. Further, the divisibility or indivisibility of performance of the contract may also be taken into account.

The aim of such an award is based on an implied agreement to pay for what has been done. Quantum Meruit is likely to be sought where one party has already performed part of his obligations and the other party then repudiates the contract. Provided the injured elects to treat the contract as terminated, he may claim a reasonable amount for the work done.

**Please See The Example 48: Quantum Meruit**



## 2.3 Kinds of damages

Following are the different kinds of damages:

### 1. Ordinary Damages [Section 73]

Ordinary damages are those which arise naturally in the usual course of things from the breach itself. These damages can be recovered if the following two conditions are fulfilled:

- The aggrieved party must suffer by breach of contract, and
- The damage must be a direct consequence of the breach of contract

**Please See The Example 49: Ordinary Damages**

## 2. Special damages [Section 73]

Special damages can be recovered for the loss which the parties:

- Knew about
- At the time they made the contract
- As likely to result from such breach of contract

Special damages are due to special losses which are in the reasonable contemplation of the parties at the time of formation of contract. Subsequent knowledge of the special circumstances will not create any special liability on the guilty party.

**Please See The Example 50 & 51: Special Damages**

### 3. Exemplary (vindictive) damages

Exemplary (vindictive) damages are those which are awarded with a view to punish the wrong doer and not primarily with an idea of awarding compensation to the injured party. The court may award these damages in case of:

- a breach of promise to marry, where damages shall be calculated on the basis of mental injury sustained by the aggrieved party.
  
- wrongful dishonour of a cheque by a banker. In case of wrongful dishonour of a cheque, the rule is smaller the amount of the cheque, larger will be the amount of damages awarded. A trader may recover such damages as wrongful dishonour of cheque shall adversely affect his goodwill but a non-trader whose cheque is wrongfully dishonoured will have to prove the loss of goodwill before claiming such damages.

**Please See The Example 52 & 53: Exemplary (vindictive) damages**

## 4. Nominal damages

Nominal damages are awarded where the injured party has sustained damage of a short but not of a substantial nature to be reckoned.

- Where the breach is technical and injured party has no intention of performing his part of the contract
  
- Where the injured party has not suffered any actual damage or fails to prove that he has
  
- Where damage is due to the fault of the injured party

**Please See The Example 54: Nominal Damages**

## 5. Damages for inconvenience and uneasiness

If a party has suffered physical inconvenience and discomfort due to breach of contract, that party can recover the damages for such inconvenience and discomfort.

**Please See The Example 55: Damages for inconvenience and uneasiness**

## 6. Liquidated damages vs. Penalty clause [Section 74]

When the parties to a contract at the time of formation of contract, specify a sum which will become payable by the party responsible for breach, such specified sum is called Liquidated Damages.

This amount represents a genuine attempt to work out what the loss would be in the event of such a breach.

If a contract states that a particular sum is to be paid on breach of the contract and that sum is not the genuine pre-estimate of the loss that would be suffered in the event of breach or that the sum is disproportionate to the actual loss likely to result due to breach this is penalty clause. The court can decrease but not increase the penalty stipulation.

The liquidated damages clause is enforceable. On the contrary, the enforceability of penalty clause is at the discretion of the court.

**Please See The Example 56,57,58,59 & 60: Liquidated damages vs. Penalty clause**

## Stipulation for Interest [Section 74]

Two parties may agree to give a specific rate of interest in case of breach of contract.

**Please See The Example 61 & 62 : Stipulation for Interest**

## Forfeiture of Security Deposit (or Earnest Money) [Section 74]

A clause in a contract which provides for forfeiture of security deposit in the event of failure to perform is in the nature of a penalty. In such cases, the court may award reasonable compensation only but in case where contract is made with the government, in case of breach the government can forfeit the whole amount of the deposit as security.

**Please See The Example 63: Forfeiture of Security Deposit (or Earnest Money)**

## 2.4 Rules regarding amount of damages

- The object of awarding damages is not to punish the party at fault
- The injured party is to be placed in the same position as money can do if the contract had been performed
- The aggrieved party can recover actual loss suffered by him arising naturally.
- The fact that damages are difficult to assess does not prevent the injured party from recovering.
- Where no real loss arises nominal damages are awarded.
- If the parties fix any amount as damages in case of breach of contract then the court will allow only reasonable amount.
- It is the duty of the injured party to minimise the damage suffered.

**Please See The Example 64: Rules regarding amount of damages**



## 2.5 Remoteness of damages

There are some losses which clearly result from the defendant's breach of contract but are considered too remote from the breach for it to be fair to expect the defendant to compensate the claimant for them.

**Please See The Example 65: Remoteness of damages**

**Please See The Example 66: Compensation for loss caused by breach of contract**

**Please See The Example 67: Right to rescind a contract**

**Please See The Example 68: Principles of determining compensation**

**Please See The Example 69: Rules relating to award of damages**

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