

# DISCHARGE AND PERFORMANCE

- **Discharge:** The termination of a party's obligations arising under a contract. Discharge occurs either when:
  - (1) both parties have **fully performed** their contractual obligations; or
  - (2) events, conduct of the parties, or operation of law **release** a party from its obligation to perform.
  
- A party's obligations to perform under a contract may be either **absolute** or **conditioned** on the occurrence or nonoccurrence of some event.

# CONDITIONAL PERFORMANCE

- **Condition:** A contractual qualification, provision, or clause which creates, suspends, or terminates the obligations of one or both parties to the contract, depending on the occurrence or nonoccurrence of some event.
- Courts recognize and enforce both *express* and *implied* conditions.
- **Condition Precedent:** A condition that must be satisfied **before** a party's contractual obligation to perform becomes absolute (*e.g.*, Bob promises to hire Terry as a driver *as soon as* Terry gets his driver's license).
- **Condition Subsequent:** A condition the occurrence or nonoccurrence of which will **terminate** a party's absolute obligation to perform (*e.g.*, Mary agrees to let Sue stay in Mary's spare room *for as long as* Sue remains unmarried).
- **Concurrent Conditions:** Mutually dependent conditions that must occur or be performed **at the same time** in order to give rise to any absolute obligation to perform (*e.g.*, Nikki offers to pay Tina \$100 *in exchange for* Tina's class ring).

# CONTRACTUAL PERFORMANCE

- **Discharge by Performance:** A contract terminates when both parties **perform or tender performance** of the acts they have promised.
  
- **Tender:** An unconditional offer to perform an obligation by a person who is ready, willing, and able to do so.
  
- **Complete vs. Substantial Performance:** When a party fails to completely perform her contractual duties, the question arises whether the performance affords the other party *substantially the same benefits* as those promised. If so, then the first party is said to have *substantially performed*.
  - If a party substantially performs, **the contract remains in force** and the other party must still perform its duties – although it may be entitled to recover damages for the substantially performing party’s failure to perform fully.
  - If a party fails to substantially perform, the other party’s remaining contractual obligations, if any, are **discharged**.
  
- **Time for Performance:** If no time is stated in the contract, performance is due within a *reasonable time*.

# SATISFACTION CONTRACTS

- Some contracts require one party to perform to the satisfaction of the other. When a contract so provides, courts will apply one of two tests depending on the circumstances:
  - **Subjective Satisfaction:** When the purpose of the performance is to satisfy personal taste, aesthetics, and the like (*e.g.*, painting a portrait of a customer's beloved), the court will ask whether **the party to be satisfied** was, in good faith, satisfied or dissatisfied with the performance.
  - **Objective Satisfaction:** When the purpose of the performance is to serve some function (*e.g.*, roofing a warehouse to keep out the elements), the court will ask whether a **reasonable person** would be satisfied or dissatisfied with the performance.
- **Satisfying a Third Party:** Some contracts require that the performance satisfy some non-party (*e.g.*, an art critic, an architect, an independent lab). Courts tend toward the ***objective satisfaction*** standard in these cases, but some have applied the ***subjective satisfaction*** test when the third party's expertise goes to the same factors that would lead a court to apply the subjective test if a party's satisfaction was at stake.

## BREACH AND REPUDIATION

- **Material Breach:** A party's **failure**, without legal excuse, to **substantially perform** her contractual obligations.
  - If a party's breach is non-material, the non-breaching party's duty to perform may be **suspended** until the breach is remedied, or "cured." However, a non-material breach will not **excuse** performance by the non-breaching party. Only a **material** breach will excuse the non-breaching party from its contractual obligations.
  - If **time** is not "of the essence," failure to perform by the time specified in the contract is not a material breach.
- **Anticipatory Repudiation:** A statement or action by a party to a contract indicating that she will not or cannot perform a contractual obligation due to be performed in the future.
  - A repudiation **excuses** the non-repudiating party from performing under the contract.
  - However, until the non-repudiating party treats the repudiation as a material breach, the repudiating party can **retract** her repudiation and **restore** the parties' contractual rights and obligations.

## DISCHARGE BY AGREEMENT

- **Rescission:** The process by which the parties cancel a contract and return one another to their pre-contract status.
  
- **Novation:** Substituting a new contract for the old one, replacing one or more of the original parties, thereby terminating the original parties' rights and duties under the old contract. Novation requires
  - (1) a **valid, prior agreement**, for which
  - (2) all parties agree to **substitute** a new contract;
  - (3) **discharge** of the prior obligation; and
  - (4) a **valid, new agreement**.
  
- **Substituted Agreement:** The same parties that contracted with one another substitute a new contract for their old one, thereby terminating their rights and duties under the old contract (*e.g.*, a settlement agreement) in favor of those in the new agreement.
  
- **Accord and Satisfaction:** An agreement between the parties to a different performance than originally agreed. Until both parties perform the terms of the accord, their rights and duties under the original agreement are merely suspended.

## DISCHARGE BY OPERATION OF LAW

- **Material Alteration:** If one or more material terms of a contract are altered, an innocent party (*i.e.*, one who neither altered nor consented to the alteration of the contract) may be discharged from its contractual obligations.
  
- **Statutes of Limitations:** A plaintiff suing for breach of contract must file suit within the time permitted by applicable law. Failure to do so does not technically discharge the parties, but it prevents the wronged party from seeking judicial remedies.
  - **Example:** A plaintiff alleging breach of a contract governed by Article 2 of the Uniform Commercial Code must generally file suit within four years of the date of the breach, regardless of the injured party's knowledge of the breach.
  
- **Bankruptcy:** A discharge in bankruptcy, afforded to a debtor after its liquidation or reorganization plan is approved, bars subsequent enforcement against the debtor of any contracts that pre-date the discharge.
  - Unlike promises to pay or partial payment of a debt barred by limitations, promises to pay or partial payment of a debt following discharge does not revive the debt.

# IMPOSSIBILITY, IMPRACTICABILITY, AND FRUSTRATION OF PURPOSE

- **Impossibility/Impracticability:** A party may be excused when performance becomes either impossible or impracticable through no fault of either party. For example:
  - (1) a party obliged to perform personal services **dies or becomes incapacitated** prior to performance;
  - (2) **the subject matter** of the contract is **destroyed** prior to performance;
  - (3) an unforeseen change in applicable law makes performance **illegal**; and
  - (4) unforeseen changes in market conditions make performance **commercially impracticable**.
- **Frustration of Purpose:** Supervening circumstances make it impossible for both parties to achieve their purpose for entering into the contract.
- **Temporary vs. Permanent:** A change in circumstances that makes performance temporarily impossible or impracticable, or that temporarily frustrates a party's contractual purpose, will **suspend**, but not excuse, performance.