

UNIT 8

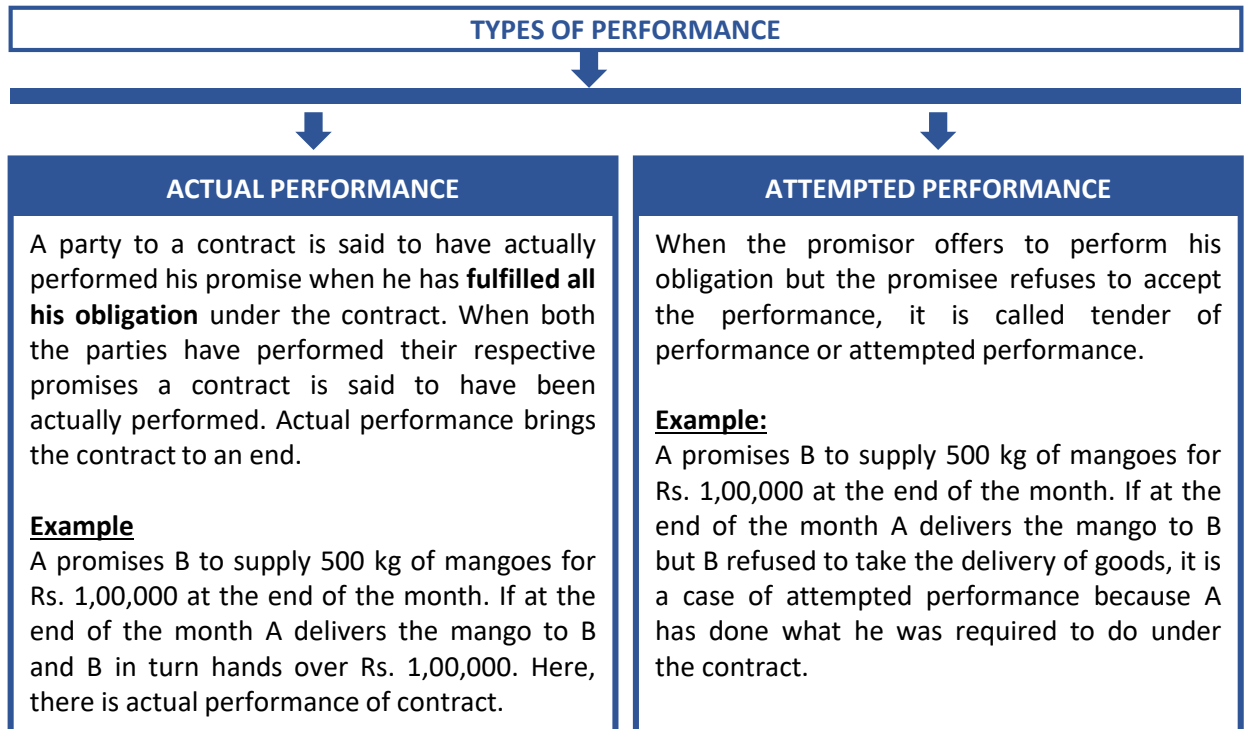
PERFORMANCE OF CONTRACT

MEANING OF PERFORMANCE OF CONTRACT

A contract being an agreement enforceable by law, creates a legal obligation, which subsists until discharged. Performance of contract means fulfilment of obligations by the parties.

Performance is the finest and the best way of discharging from or ending the contract. As per **section 521**, each party to a contract shall fulfil his/her liability under the contract.

TYPES OF PERFORMANCE



ATTEMPTED PERFORMANCE

ATTEMPTED PERFORMANCE / TENDER OF PERFORMANCE	
Effect of Tender	There are two effects of tender as under: <ol style="list-style-type: none"> 1. The promisor is not responsible for non performance. 2. The promisor does not lose his rights under the contract.
Tender of Goods or Services	Where the promisor offers to deliver the goods or services but the promisee refuses to accept the delivery, the effect shall be <ol style="list-style-type: none"> 1. Goods or services need not be offered again 2. Promisor may sue the Promisee for non performance 3. Promisor is discharged from his liability
Tender of Money	Where the promisor offers to pay the amount but the promisee refuses to accept the same, the effect shall be <ol style="list-style-type: none"> 1. Promisor is not discharged from his liability to pay the amount 2. Promisor will not be liable for interest from the date of valid tender.

UNIT 8

PERFORMANCE OF CONTRACT

ESSENTIAL OF VALID TENDER

ESSENTIALS OF VALID TENDER

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Unconditional	<p>Tender must be unconditional. Tender is said to be unconditional when it is made in accordance with the terms of contract.</p> <p>Example A, a debtor, offers to pay B, the creditor, the amount due to him if B sells some goods to him. It is a conditional tender and therefore is not a valid tender.</p>
Proper Time	It must be at proper time. i.e. at the stipulated time (if there is an agreement as to time) or during the business hours (if there is no agreement as to the time). Tender of goods or money before the due date is also not a valid tender.
Proper Place	It must be at proper place, i.e. at the stipulated place (if there is an agreement as to time) or at promisee's business place (if there is business) or at promisee's residence (if there is no business place)
Reasonable Opportunity to Promisee	When a tender of goods is made by the promisor, a reasonable opportunity must be given to the promisee to inspect the goods to enable him to see whether the quality of is as per the contract.
For Whole obligation	<p>Tender must be for the whole obligation and not for a part of the whole obligation. However a minor deviation from the terms of the contract may not render the tender invalid.</p> <p>Example Delivery of 100.10 tons of Rice in a contract of 100 tons of rice is a valid tender but delivery of 120 tons or 80 tons or in instalment is invalid tender.</p>
To Proper Person	<p>Tender must be made to the promisee or his duly authorised 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.</p> <p>Example Ram contracted with Shyam to deliver 100 KGs of goods to him on 1st April 2021. Ram offered the goods to Hari, the shop next to of Shyam. It is not a valid performance. Thus Ram is not discharged from his obligations.</p>
Of Exact amount and in Legal Tender	In case of tender of money, it must be of exact amount and in legal tender.

RECIPROCAL COMPLIANCE OF CONTRACT

Sometimes, a contract may consist of two promises, one being the consideration of the other. These are called reciprocal promises.

In case a contract has been concluded with a provision requiring both parties to simultaneously fulfil their respective promises, and in case one party substantially shows a conduct or intention of not fulfilling his/her promise, the other party shall not be required to fulfil his/her promise.

UNIT 8

PERFORMANCE OF CONTRACT

Example

A shopkeeper agrees to sell a computer to the buyer (customer) for Rs. 50,000. However, the customer refuses to pay money. Here, the shopkeeper is not required to fulfil his/her promise.

PERFORMANCE OF RECIPROCAL PROMISE WITH PRIORITY ORDER

Performance of reciprocal performances with priority order	<p>In case the order of priority relating to fulfilment of any promise has been specified in the contract itself, it shall be fulfilled accordingly, and in case no such order of priority has been specified, the party who is required to do so first according to the nature of the contract shall fulfil it.</p> <p>Example A promises to pay B a commission of Rs. 5,000 if B finds a house suitable for his residence. For B to demand payment from A, first he has to find a house suitable for A's residence.</p>
Effect of a party preventing another from performing a dependent promise	<p>In case one promise can't be fulfilled without fulfilling another promise under any contract containing reciprocal promises, the party, which can't execute the contract because of the failure of the others party fulfil its promise, may recover the loss or damage caused by the failure of the other party to execute the contract.</p> <p>Example A construction company (A) agrees to construct a building for customer (B) as per the agreement concluded between them but later, the customer (B) refuses to pay the bills of the construction. Here, the promise to construct the building may not be fulfilled by A due to subsequent default of B and A may recover any losses or damages caused by the failure of the other party B to the contract.</p>
Effect of a party preventing another from performing simultaneous promises	<p>In case a contract containing simultaneous performance of reciprocal promises, in case any party obstructs the other party from executing the contract, the party which becomes unable to execute the contract may:</p> <ul style="list-style-type: none"> • cancel the contract and • recover any loss or damage suffered by him/her from the cancellation of the contract in that manner. [Section 522 (4)]

PERSON WHO MAY DEMAND THE PERFORMANCE OF CONTRACT

Promisee	Promisee can only demand the performance of the promise under contract
Legal representative	In case of death of the promisee, his legal representative can demand performance unless contract is of personal nature.
Third party	A third party can also demand performance in some exceptional cases like beneficiary of trust.
Joint Promisees	<p>In case of several promisees, unless a contrary intention appears, the performance of contract can be demanded by</p> <ol style="list-style-type: none"> a. In case all the promisee are alive – all the promisees jointly b. In case of death of any of joint promisees – Representative of deceased promisee jointly with the surviving promisee. c. In case of death of all joint promisee – Representative of all of them jointly.

UNIT 8

PERFORMANCE OF CONTRACT

PERSON WHO MAY PERFORM THE CONTRACT

Promisor	<p>If it appears from the nature of the case that it was the intention of the parties to any contract that any promise contained in it must be performed by the promisor himself, such promise must be performed by the promisor.</p> <p>Action personalis moritur cum persona means a personal action dies with the person.</p> <p>Example X promises to marry Y. X must perform this promise personally.</p>
Promisor's Agent	<p>If it was not the intention of the parties that the promise must be performed by the promisor himself, such contract can be performed by the promisor himself or any competent person employed by him.</p> <p>Example A promises to pay B a sum of money. A may perform this promise either by personally paying the money to B or by causing it to be paid to B by another, and if A dies before the time appointed for payment, his representative must perform the promise or employ some proper person to do so.</p>
Legal Representative	<p>In case of death of promisor, his legal representative can perform the contract unless a contrary intention appears or the contract is of personal nature.</p> <p>However, heir shall bear the liability to the extent covered by the property received by him.</p>
Joint Promisor	<p>In case of several promisors, unless a contrary intention appears, the performance of contract can be made by</p> <ol style="list-style-type: none"> In case all the promisor are alive – all the promisors jointly In case of death of any of joint promisors – Representative of deceased promisor jointly with the surviving promisee. In case of death of all joint promisors – Representative of all of them jointly. <p>In case of a joint promise, the liabilities of the promisors are joint and several. i.e. in the absence of any contrary provisions in the contract, promisee may compel anyone or more of such joint promisors to perform the whole promise.</p> <p>As per MCCA, in case two or more persons have jointly signed a contract with any other party, all or any of the persons jointly signing the contract must fulfil or arrange for the fulfilment of the obligation under the contract, except when otherwise provided for in the contract.</p> <p>Liability of defaulting joint promisor If any joint promisor doesn't fulfil his promise (defaults) and the other joint promisor fulfils their liability, then the promisor fulfilling the promise can proportionately recover compensation or loss from the defaulting joint promisors.</p> <p>In case any person has fulfilled his obligation the person so fulfilling the obligations may recover compensation or loss on a proportionate basis from the other persons jointly signing the contract.</p>

UNIT 8

PERFORMANCE OF CONTRACT

Joint Promisor**Effect of absolving a defaulting joint promisor**

In case any party absolves any person belonging to the other party from the obligations of his share, the other persons shall not be free from the remaining obligations of the contract.

DEVOLUTION OF RIGHTS AND LIABILITIES OF CONTRACT

Devolution means transferring or passing over of one's rights and liabilities to another person. In case party to a contract dies or loses his/her senses, the rights accruing from the contract shall devolve on the heir to his/her property, and the heir shall also bear liability to the extent covered by the property received by him/her. [Section 528 (1)]

However, the following shall not devolve on such heir:

- Rights and liabilities acquired on the basis of personal skills and
- Rights and liabilities acquired on the basis of qualification

ASSIGNMENT OF CONTRACT

Assignment of a contract means transfer of contractual rights and liability to a third party. Except when the contract must be executed by the promisor, he may have it executed by:

- his agent or
- a person appointed by him or
- any other person on his behalf.

However, no party to a contract may transfer the obligations under the contract to any other person without the consent of the other party. [Section 529 (1)]

The following conditions shall be fulfilled so as to transfer rights or liability of contract:

- a) **Writing:** Unless otherwise provided for in contract, the transfer shall be in writing,
- b) **Unconditional:** The transfer shall be unconditional,
- c) **Not restricted:** There shall be no restriction by law or contract to transfer right or liabilities,
- d) **Notice:** In case the right or liabilities have been transferred, the notice thereof shall be provided to the party along with the time.

SUCCESSION

The transfer of rights and liabilities of a deceased person to his legal representative is called as succession.

TIME AND PROCEDURE OF PERFORMANCE OF CONTRACT

- I. In case the time and procedure of performing contract has been mentioned in the contract it must be performed within the specified time and according to the specified procedure.
- II. In case no time or procedure for performing the work has been specified in the contract, but the work can be performed only at specific time or according to any specific procedure depending upon the nature of work, the contract shall be deemed to have been concluded if the work has been performed at that time and according to that procedure.
- III. Except in the circumstances mentioned in (ii) above, in case the time and procedure of performing the contract has not been mentioned in the contract, the contract shall be performed within a reasonable time by adopting a reasonable procedure.

UNIT 8

PERFORMANCE OF CONTRACT

PLACE FOR PERFORMING THE CONTRACT

- I. In case any specific place has been specified in the contract for performing the work mentioned in the contract, the work must be performed at the same place.
- II. In case any party has to hand over or deliver goods to the other party under the contract, and the place where they are to be handed over or delivered has not been specified in the contract, the contract shall be deemed to have been concluded with a provision to hand over or deliver the goods at the place where those goods are stored.
- III. In case no specific place for performing the work has been specified in the contract, but the work can be performed only in a specific place, or in case the work needs to be performed only in a specific place according to the general practice and custom or the nature of the work, the contract shall be deemed to have been concluded if the work has been performed at that place itself.
- IV. In circumstances other than those mentioned in Sub-section (ii) and (iii), in case the place for performing the work mentioned in the contract is not mentioned in the contract, the party performing the work according to the contract must inform the other party to specify a reasonable place for performing the work, and the other party must specify a reasonable place to perform the work.

DELAY IN PERFORMANCE OF CONTRACT

1. In case any contract with the condition to perform at any specific time has not been performed on the time or within the said time, it shall be held that the performance of the contract has been delayed.
2. In case the contract under sub-section (1) is not performed, and could have been performed after the afore stated time, a party of contract shall grant reasonable time to the other party and notify to perform the contract.
3. In case the notice has been served under sub-section (2), the other party shall perform contract accordingly and he/she shall bear compensation for loss/ damage caused by delayed performance of contract.
4. In case the contract is not performed according to sub-section (3), the informing party as such may cancel the contract

WHEN TIME IS AN ESSENCE OF CONTRACT

Time is an essence of a contract means that the time is so important that if the requirement is not met, the promisor will be held to have breached the contract and rescission by the promisee will be justified.

As per Section 526 of MCCA, time is an essence of a contract if:

- the contract is not performed within any particular day, time or period, and
- due to such non-performance, nature of contract, intention shown by the party at the time of entering contract, purpose or objective of contract could not be achieved.

UNIT 8

PERFORMANCE OF CONTRACT

PERFORMANCE OF CONTRACT NOT NEEDED

Generally, contracts are made for performance of the work. However, work under a contract need not be performed in any of the following circumstances:

- a. In case one party to the contract absolves the other party from fulfilling the liabilities according to the contract;
- b. In case a voidable contract is made void by the party concerned;
- c. In case one cannot execute the contract due to its violation by the other party;
- d. In case it becomes unnecessary to perform the work mentioned in the contract under any provision of this Act;
- e. In case the contract could not have been executed due to fundamental changes in the circumstances.

IMPOSSIBILITY OF PERFORMANCE

A contract will be void due to impossibility of its performance. The impossibility of performance may be:

- a. Initial impossibility
- b. Supervening impossibility

The impossibility which existed at the time of forming of contract is known as **initial impossibility**. While the impossibility which was not present at the time of forming of contract but which arose subsequently are known as **supervening impossibility**.

EFFECT OF INITIAL IMPOSSIBILITY

CASE	EFFECT
I. Where both the promisor and promisee know about the initial impossibility	Such agreement is void ab initio. <u>Example</u> X undertakes to put life into the dead wife of Y. This agreement is void.
II. Where both the promisor and promisee do not know about the initial impossibility.	Such agreement is void on the ground of mutual mistake. <u>Example</u> X agreed to sell his horse to Y. Unknown to both the parties, the horse was dead at the time of making the agreement. This agreement is void.
III. Where the promisor alone knows about the initial impossibility	Such promisor must compensate for any loss which such promise sustains through the non performance of the promise. <u>Example</u> A contracts to marry B, being already married to C, and being forbidden by the law to which he is subject to practise polygamy. A must make compensation to B for the loss caused to her by the non performance of his promise.

UNIT 8

PERFORMANCE OF CONTRACT

DOCTRINE OF FRUSTRATION OF CONTRACT

Meaning	If a contract cannot be performed due to unanticipated changed circumstances (fundamental change of circumstances), the parties to the contract are discharged from their duties and the contract is considered terminated. This is also known as the Doctrine of Frustration of contract.
Cases where fundamental changes in the circumstances prevailing at the time of signing of contract are deemed to have occurred [Section 531 (2)]	<p>Fundamental changes shall be deemed to have occurred in the situation prevailing at the time of signing the contract in any of the following circumstances:</p> <ol style="list-style-type: none"> In case the contract becomes illegal and, therefore, must not be executed. In case it becomes impossible to execute the contract due to emergency of such situations as war, floods, landslides, fire, earthquakes and volcanic eruptions which are beyond the control of human beings. In case anything essential for executing the contract is destroyed or damaged, or no longer exists or cannot be obtained. In case the contract has been signed with a provision to provide services on the basis of personal efficiency, skills or talents and the person providing such services dies or loses his senses or becomes incapable of performing the contract because of physical mental disability. <p>Example</p> <ul style="list-style-type: none"> X agreed to sell his crop of wheat. The entire crop was destroyed by fire though no fault of the party. The contract is discharged on the ground of destruction of subject matter. X agreed to sell his land to Y. After the formation of the contract, the government issued a notification and acquired the land. The contract was discharged on the ground of change of law. X agreed to sing on a specified day. X fell seriously ill and could not perform on that day. The contract was discharged on the ground on personal incapacity. X contracts to take in cargo for Y at a foreign port. X's government afterwards declares war against the country in which the port is situated. The contract becomes void when the war is declared. X contracts with Y to deliver his crop of vegetables. Due to flood his entire land was wiped out. Here X is discharged from the liability as it became impossible to perform the contract on account of natural calamities.
Cases where fundamental changes in the circumstances prevailing at the time of signing of contract are deemed not to have occurred	<p>However, fundamental changes shall not be deemed to have occurred in the situation prevailing at the time of signing the contract in any of the following circumstances:</p> <ol style="list-style-type: none"> Difficulty of performance: Fundamental changes shall not be deemed to have occurred if it becomes difficult to perform the contract. Commercial impossibility: Fundamental changes shall not be deemed to have occurred if very low profit or loss is expected. Default of a third party: In case any party to a contract is dependent upon any third party which is not a party to the contract for performing the contract, if the third party commits a mistake or becomes unfit, then fundamental changes shall not be deemed to have occurred. In the events of strikes or lock-outs.

UNIT 8

PERFORMANCE OF CONTRACT

DOCTRINE OF FRUSTRATION OF CONTRACT

		<p>e. Additional taxes: Fundamental changes shall not be deemed to have occurred if it becomes necessary to pay additional taxes, fees or other revenue.</p> <p>f. Partial impossibility: Fundamental changes shall not be deemed to have occurred if the contract has been signed with several objectives, and only some of them cannot be fulfilled.</p> <p>Example</p> <ul style="list-style-type: none"> • X agreed to supply coal within a specified time. He failed to supply in time because of government's restriction on the transportation of coal from collieries. Here X will not be discharged because the coal was available in the open market from where X could have obtained it. • X, a furniture manufacturer agreed to supply certain furniture to Y at an agreed rate. Afterwards, there was a sharp increase in the rates of the timber and rates of wages. Since it was no longer profitable to supply at the agreed rate, X did not supply. X will not be discharged on the ground of commercial impossibility. • X entered into a contract with Y for the sale of goods to be manufactured by Z, a manufacturer of those goods. Z did not manufacture those goods. X will not be discharged and will be liable to Y for damages. • X agreed to supply to Y certain goods to be imported from Algeria. The goods could not be imported due to riots in that country. It was held that this was no excuse for non performance of the contract. • X agreed to let a boat to H for i) viewing the naval review at the coronation of king and ii) to cruise round the fleet. Due to the illness of the king, the naval review was cancelled but the fleet was assembled and the boat could have been used to cruise round the fleet. It was held that the contract was not discharged.
Effect of Fundamental Change in circumstances	of in	<p>In case it becomes impossible to execute a contract because of fundamental changes in the situation the action in the following matters shall be taken as follows:</p> <ol style="list-style-type: none"> 1. If the amount is paid by one party to the other in consideration of the contract before such a change in the situation occurs: It shall be refunded to the other party 2. If payment is to be made or due from one party to the other in consideration of the contract: It shall not be made after such a change in the situation 3. If any party has performed any work or paid any amount before such a change in the situation: Such work or amount shall be calculated and the amount to be paid to each other should be determined, and reasonable expenses incurred by one party in consideration of the contract may be recovered from the other party.

UNIT 8

PERFORMANCE OF CONTRACT

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| | <p>4. If the situation of fundamental changes in the situation at the time of the contract comes to end: If the situation of fundamental changes in the situation at the time of the contract comes to end.</p> <p>5. The parties to a contract shall provide facilities needed for executing the contract from their respective sides. If the contract cannot be executed due to failure of providing such facilities: The party failing to execute the contract in that manner shall not be held responsible</p> |
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SUSPENSION/ ALTERATION OR NOVATION OF CONTRACT

During performance of a contract, in case the parties to a contract agree, they may,

- change all or any of the portions of the work to be performed under the contract or
- amend all or any of the portions of the work to be performed under the contract or
- extend the time-limit for performing any work under the contract, or
- suspend the contract by not making it obligatory to perform any work to be performed under the contract for some time,
- replace the work mentioned in the contract by another work, or
- replace the original contract by signing a new contract

In case any change or amendment is made in the contract, a new contract shall be deemed to have been signed, and the contract shall become effective accordingly discharging the old contract.