**Chapter 14: The Effect of Breach**

Breach may sometimes become a method of discharge. Not every breach may discharge a contract and breach does not discharge a contract automatically (as does frustration or completed performance); only when the party that suffered the breach elects to treat it will the contract be discharged.

If the breach is of minor term, the contract is still binding on both parties; if the breach is of a fundamental term, the party committing the breach is still bound, but the injured party may elect to discharge the contract and free itself, or to affirm the contract so that it continues to bind both parties.

**Minor Breach** – a breach of a non-essential term of a contract or of an essential term in a minor respect  
**Major Breach** – a breach of the whole contract or of an essential term so that the purpose of the contract is defeated

Ex. “A” delivers 9,995 products out of 10,000 promised would be a minor breach of a major term and would not entitle B to reject the shipment. If A had delivered only 5000 products, it would be a major breach and B could elect to reject them.

**Condition** – an *essential* term of a contract  
**Warranty** – a *non-essential* term of a contract

A party to a contract may break it:  
 - by expressly repudiating its liabilities  
 - by acting in a way that makes its promise impossible to perform  
 - by either failing to perform at all or tendering an actual performance that falls short of its promise

**Express Repudiation** – a declaration by one of the contracting parties to the other that it does not intend to perform as promised  
- the promise is entitled to treat the contract as being immediately at an end, to find another party to perform, and to sue for whatever damages it sustains in delay and higher costs because the original contract will not be performed

**Anticipatory Breach** – a breach that occurs in advance of the time agreed for performance of a contract

Major breach amounting to repudiation may also occur after performance has begun, and it will free the aggrieved party from further obligations.

One Party Renders Performance Impossible  
- only a willful or negligent act of the promisor constitutes a breach of contract – it doesn’t include an act that is an involuntary response to forces beyond its control  
- a deliberate or negligent act that makes performance impossible amounts to repudiations: the promisor may not have said so in words, but it is implied by their conduct – a form of the self-induced frustration from the previous chapter  
- along with express repudiation, conduct that makes performance impossible may take place before or during performance

**Failure of Performance**  
- unlike the other two types of breach, failure of performance usually becomes apparent only when the time for performance arrives or during performance, and the degree of failure may vary  
- the problem created by failure to perform usually occurs when the party accused of the breach is required to perform its part first

The doctrine of **substantial performance** states that a promisor is entitled to enforce a contract when it has substantially performed, even though its performance doesn’t company in some minor way with the requirements of the contract.

**When the Right to Treat the Contract as Discharged Is Lost**Even when an aggrieved party would normally have the right to treat its obligations as discharged by a serious breach, there are two situations that it will be entitled only to damages:

a) the aggrieved party has decided to proceed with the contract and accept benefits under it despite the breach  
b) the aggrieved party may have received the benefit of the contract and not learned of the breach until performance was complete

**Exemption Clause** – a clause in a contract that exempts a party from liability

In business, a party that runs a significant risk of harm to the other party through some failure in the course of performing the contract must plan to cover its potential liability. When striking a bargain, there are several alternatives:

a) The party may obtain insurance against the risk and raise its price accordingly  
b) It may “self-insure” by charging a higher fee and build up a reserve fund to pay any claim that arises later from harm to a customer  
c) It may include an **exemption clause** in the contract, in effect excluding itself from any liability for the risk and transferring the risk of harm to its customer

Exemption clauses are attractive and widely used because:  
a) they permit a supplier of goods and services to keep its prices low, since the supplier need not increase them to protect itself against the risk of liability to its customer  
b) if the supplier is sued for damages despite the exemption clause, it will be completely disclaim liability and so seek to avoid the difficult question of the extent of its liability for the harm done  
c) if the supplier is in the position of using a standard form contract, it will typically have a distinct advantage over its customer; a customer may gladly accept a lower price without fully realizing the implications of an exemption clause

Courts have taken the view that exemption clauses should be very strictly construed *against* the party that draws them because they permit parties to evade legal responsibility ordinarily placed on suppliers of goods and services.

**Drawing Party** – the contracting party that prepared the agreement and/or the particular clause

If one day after an express guarantee expires and a piece of machinery breaks down for the first time, the supplier is not liable. The burden is on the **drawing party** to prove the actual cause of the loss is covered by the clause.

**Fundamental Breach** – a breach that is so significant that it deprives the innocent party of most (if not all) of the benefit of the contract  
  
A breach of contract may even become criminal if a party breaks the contract with the knowledge that the action will endanger human life, cause bodily harm etc.