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Discharge of Contract by Performance and Contingent Contract

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Abstract

The paper highlights a special mode of discharge of contract which is by performance. There are various ways of termination of a contract and one of the obvious ways is termination of a contract by its performance. The researcher in this paper answers as to how can one measure the standard of performance of the contract and the clauses that parties should put while drafting the contract. The paper also talks about the discharge of contract and its similarities and differences with a contingent contract.

Keywords: *Contract, discharge of contact, contingent contract, performance*

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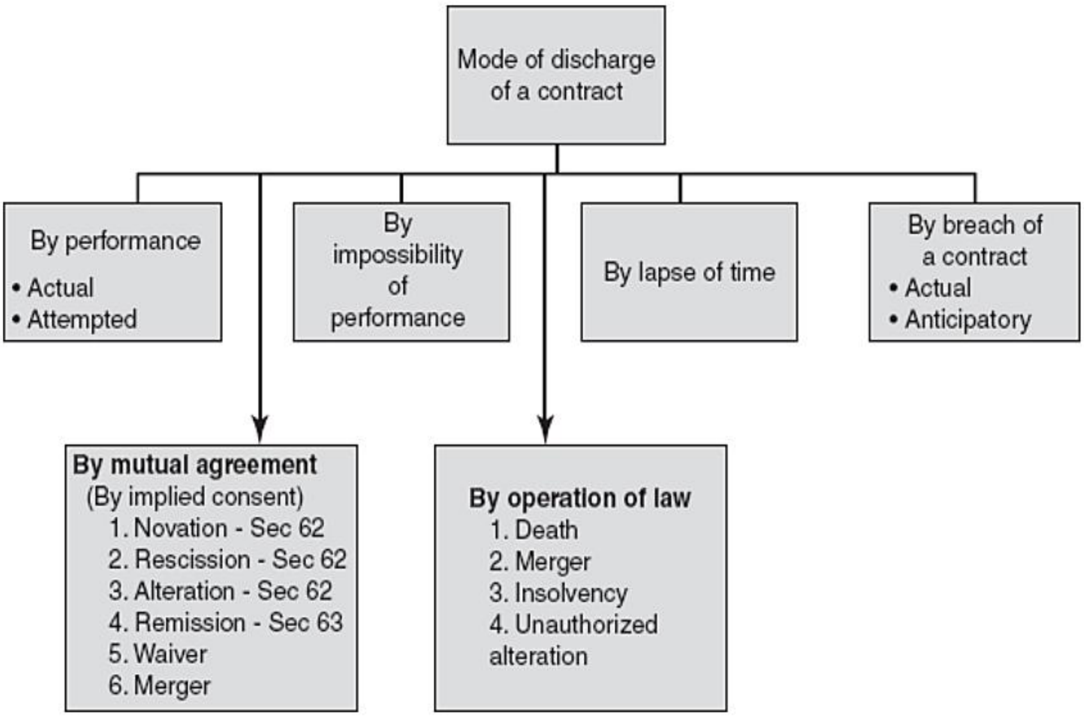
INTRODUCTION

A contract comes into existence when a valid agreement is constituted by both the parties with mutual consent to the terms of the contract for some considerable amount [1]. A contract is said to be a discharge of contract performance when the parties perform all the primary obligation both expressed and implied which are mentioned in the contract. This is when the contract is terminated. There are different situations when the contract is terminated and the most desirable situation is when a contract is terminated because if the contract is complied with and the purpose of the contract is achieved by both the parties it results to discharge of contract by performance. Other reason for the termination is due to, party's breach or default. There are six modes of such discharge which are mentioned as follows [2]:



In a contract, every party is bound to perform his part of the obligation and once the parties have made the due performance of the contract, their liability comes to an end and the contract comes to an end. In such a case the contract is said to be discharged by performance. Discharge by performance is when both the parties perform all the primary obligation both that is expressed as well as implied that is set out in a contract. The obligation is discharged only when the performance complies with the standard of performance required. If there is a failure to do so then it constitutes a breach.

Contingent Contract on other hand means conditional contract. The word contingent means 'subject to chance'. In order to estimate the chances of an uncertainty of an event to become certain, calculating the results if the event does not happen and then measuring the potentiality to deal with its consequences is a contingent contract [3]. Contingent contracts form a very important part of The Indian Contract Act, 1872; these contracts have certain elements which makes it different from another contract.

Research Question:

1. How does one measure the 'standard of performance' that must be complied with when it comes to discharging of contract by performance?
2. Are there any complexities to discharge a contingent contract considering its uncertain state of happening?
3. How is a discharge of contract by performance different in a contingent contract?

HYPOTHESIS

As per the first research question, the standard of performance can be measured by a quality standard that has to comply which is mentioned in the contract. This makes the parties easier to comply with such standards but the standard of performance is not one of the key aspects in a contract, that is, some contracts may not be mentioned the required standards that have to be complied with. In other words, the measure of a standard is not one of the key aspects that must be mentioned in the contract in order to make it enforceable. Thus, there are times that parties may not agree upon the standards required or expected by the parties but at the time of enforcement and discharge of contract, the quality of the product may become a big issue. The measure of such standards may be done as per the consideration amount as well as the 'reasonable' expectation by the buyer.

The second research question is with respect to compliance with the contingent contract as there is an uncertainty of the happening of the event. The complexity lies in the uncertainty of even because the binding of the contract does not come into effect until and unless the uncertain event happens. There are also chances that the parties may opt out of it before the event occurs as the contract has not come to effect. Thus, it is a very interesting area of contract where there is conditional implementation. The research question points out to the fact of implementation and discharge of such contingent contracts. One of the major areas that are included under contingent contract is insurance contracts where the question is if the uncertain event does not take place then what will bind the contract between the insurance companies as well as its customers? A contract of insurance is generally under the nature of a contract of indemnity but life insurance, personal accident and sickness or contract of contingency insurance is a part of contingent contract [4].

The third research question is with respect to the performance of a contingent contract and how much is the difference between any other contract and contingent contract as a contingent contract only comes into existence when the uncertain event occurs.

RESEARCH METHODOLOGY

The researcher has used an empirical method of research as well as an analytical research method. The researcher analyzed the contact between various multinational companies where there has been a contract between the vendor and the purchaser. The reason is to determine the practical aspect of discharge of contract. The researcher wants to observe the difference in the situation where a standard of a product has been mentioned in the contract as well as the absence of such clause. Besides this, the researcher also wants to analyze the various provisions relating to a discharge of contract by performance and applicability of such clauses in the contract. Besides analytical research method is used observe various provisions as well as precedents on the working and rules regarding the performance of a contingent contract.

For the present research, various tools of data collection are through primary and secondary sources. Primary sources include case laws, contracts, legislation and statutes. Secondary sources for this research includes various authors, articles in journal, magazines, newspaper and websites.

LIMITATION

This paper only deals with discharge of a contract by a performance which is by two different means that is, actual as well as attempted. Then the latter part of the paper deals with the contingent contract, which is a contract that depends on the uncertainty of the event and the difference between the discharge by performance in a contract and discharge of contingent contract.

DISCHARGE OF CONTRACT BY PERFORMANCE

A contract is said to be discharged by performance when both the parties perform all primary obligations that are both expressed or implied that is mentioned in the contract. The obligation is considered performed only if the performance complies with the standard of performance required. The general rule is as such that the parties must perform precisely all the terms of the contract in order to discharge their obligation. There are two types of performance of a contract that is actually as well as attempted performance.

1. **Actual Performance [5] -** It means that the said contract shall be discharged by actual performance when the parties to the contract perform their promises as per the terms of the contract. In other words, if the promisor to a contract has fulfilled his obligation as per the clauses of the contract the promise is said to be actually performed. Actual performance of the contract discharges the contract and the liability of the promisor ceases to exist. For instance, if A agrees to deliver 10 bags of sugar at B's house and B promises to pay the price for delivery. A delivers the sugar on the due date and B makes the payment. This discharges the contract by performance by both A and B. Actual performance is again subdivided into two types-
   a. *Substantial Performance*: This is the situation in which the work that is agreed upon is nearly over. The court then orders stating that the money shall be paid, but there has to be the deduction of an amount that is needed to correct a minor existing defect. Substantial performance is applicable only if the contract is not an entire contract and is severable. The reason behind creating the doctrine of substantial performance is to avoid the possibility of one party evading his liability by claiming that the contract has not been completely performed. This substantial performance is a question of fact that must be ascertained both the cases.
   b. *Partial Performance*: This is a condition where one of the parties has performed the contract partially and the other side has shown willingness to accept the part performed. These situations may occur when there is a shortfall on a delivery of goods or where a service is not fully carried out.

The difference between partial and substantial performance is that partial performance must be accepted by the other party who is at the receiving end of the partial performance has a genuine choice either to accept or reject it. Whereas, substantial performance is legally enforceable against the other party.

Payments are made on a different basis from that for substantial performance: It is made on quantum meruite, which literally means as much as is deserved. If a part of work is done then only part payment will be made. In case of substantial performance, the party that has performed can recover the amount appropriate to what has been done under the contract provided that the contract is not an entire contract. The price often payable in such circumstances and the sum deducted represents the cost of repairing defective workmanship.

2. **Attempted Performance:** This is a situation where the performance has become due and this is sometimes sufficient if the promisor offers to perform his obligation in the contract. This offer is known as attempted performance or a tender performance. The tender is an offer of performance that complies with the terms of the contract. If the goods are tended by the seller but refused by the buyer, then the seller is discharged from further liability, but the goods should be with the contract as per the quantity and quality and he may sue the buyer in case of the breach of contract if he believes so. The idea behind that is when a person offers to perform; he is ready, willing as well as capable to perform. A tender of performance may operate as a substitute for actual performance and can affect a complete discharge [6].

STANDARD OF PERFORMANCE [7]

Although the standard of performance is mentioned in the contract there are times when such measures are not mentioned. Although the general rule is that the performance obligation is strict obligation is the obligation as to description, fitness for purpose and satisfaction of quality. In this case, only microscopic deviations are allowed and if the de minimis rule does not apply then it would constitute a breach. The parties to a contract must either perform their respective promises unless such performance is dispensed with.

As mentioned before 'tender of performance' is if the promisee does not accept the offer then the promisor will not be responsible for any non-performance and the promisor will sue the promise for breach of contract. A tender of performance is equivalent to performance. This performance has to be then accepted by the promisee if the promisor does not accept the offer, then the promisor will not be responsible for any non-performance. It entitled him to sue the promisee for the breach of contract.

The following conditions have to be complied with, that is,
Firstly, the tender must be unconditional. A tender has to be conditional when it is not as per the terms of the contract.

Secondly, a tender must be made at a proper place as well as time under such circumstances that the person to whom it is made may have a reasonable opportunity of ascertaining that the person by whom it is made is able and willing there and then to do the whole of what he is bound by his promise to do.

Thirdly, the tender must be made in such a way that the other party has an opportunity to determine whether the person who is making the tender is able and willing to do his obligations under the contract.

The standard of performance is not mentioned as an element of the contract specifically but it certainly mentions that contract has to be fulfilled. The contract may or may not mention the standard but an only de minimis standard of deviation is allowed but such measurement is difficult to identify unless the contract mentions the accepted deviation.

Reflection of Standard of Contract in Practical World

The researcher has come across a Sale Contract between a seller and a buyer [8], which mentions the following in its contract:

Goods	(SPEC)	Quantity(TON)	Unit Price	CIF Qingdao	Marks
Blanket	1.5*2m	826TON	$3030.3/TON	$2500000.00	The blanket should be first-class quality according to the production standard.
Total		826TON		$2500000.00	

Following was mentioned as the condition for an expectation of reasonable tolerance:

CONDITION OF GOODS: The goods should be first-class quality according to the production standard, that is, reasonable tolerance in quality, weight, measurements, designs and colour is allowed. The expectation for this reasonable tolerance is 3% more or less in a container and for the blanket size/weight.

This contract was very clear as to the acceptability of the product by the buyer and their expectation. The table clearly mentions the specified length, quantity as well as the price of the contract. This makes “de minmis" identification easier. But in case of absence of such clauses, there is difficulty in ascertaining the reasonability of standards in such cases. For instance, in the following clause mentioned in a Contract for Interior Designing and Development [9], the contract only mentioned the following as the standard of the products that were installed in the building:

Handover of site
1. All Warranty Certificates as received from Original Manufactures (in original) shall be submitted along with on receipt of the Final Bill on reciept of Final Amount from Client. The date of Warranty starts from the date of purchase of the respective material(s).
2. Interior Developer will provide warrenty for all items where direct workmanship from Interior Developer is involved. For all items directly purchased from manufactures, warranty conditions of the manufacturer will apply. However, considering the merit of the work done, Interior Developer will be responsible for all rectifications.
3. However after Supply & Installation, and an starting the utilization of the fit-out and premises if rectification is required due to any damage(s) caused by the usage from client’s end, the Interior Designer shall not be held responsible & the amount for rectification shall be charged separately. As per actual a prior approval of the cost shall be approved and paid by the client in advance.

The above clause fails to mention the standard that is acceptable to the buyer and thus to determine the standard for performance is difficult when it comes to the practicality of implementation of the agreement. In this case, the buyer was not satisfied with the quality of seller’s supplies as they mentioned that the quality is very poor, but the standard could not be measured in this case as there was no other clause mentioning the quality of the supplies except there was only a warranty clause for the products that applied to this.

Thus, one can determine from the current statute that the standard of performance may not be specifically mentioned in the contract like the time and place of performance that is specifically mentioned in the contract. Although as per The Indian Contract Act, 1872 both the parties must comply with the terms of the contract and perform their part which would lead to discharge. It can be deciphered that the standard of performance is not a mandatory clause that has to be mentioned in the contract, but such clauses make the implementation of the contract and the attaining the purpose of the contract is easier.

CONTINGENT CONTRACT

Contingent means something that is dependent on something else. “Contingent contract” [10] is a contract to do or not to do something, in case of a certain event, collateral to such contract does or does not happen. Therefore, the contingent contract is the one which is uncertain in nature.

The defenses available to the non-breaching party depends upon the terms broken because breach of certain kinds of terms constitute repudiator breaches, giving rise to the option to the party not breaching to accept the breach as terminating the contract, or to affirm [11]. There are three basic terms of this [12]:

a. Conditions;
b. Warranties; and
c. Innominate (or intermediate) terms.

A ‘condition’ is a stipulation of something which must be fulfilled before further action takes place or the results are achieved [13]. A contingent contract comes under condition. Conditions precedent and subsequent, which are sometimes collectively called ‘contingent conditions' impose a negative obligation to impose absolutely that the condition does or does not materialize.

There are different rules for the enforcement of the contingent contract. Contracts contingent are on an event happening as well as not happening. Contracts contingent on the future conduct of a living person. It is a happening of a specific event within a fixed time or not on fixed time [14]. Agreements contingent on an impossible event is the rule governing the enforcement of various types of contingent contract.

A conditions precedent is a stipulation of a state of affair which must be achieved before any contractual liability, or any other contractual liability will be incurred [15]. In few cases, the parties agree that a contract shall come into existence between them when there is an occurrence of some uncertain event, but it remains free to withdraw from that agreement until that event occurs [16]. Therefore, the main contractual obligation is not enforceable until and unless the condition is satisfied which is uncertain, but the contract is contractually bound and the parties cannot withdraw from this agreement. In this situation, the parties may be under the obligation not to impend the event of the contract [17]. At times there may be an obligation to use reasonable effort to cause the event upon which the condition is based and any failure to use effort will amount to a breach [18].

A transfer pendent lite is not ipso facto void. It is voidable at the instance of the decree-holder and it will affect the vendee only as far as his rights are contradictory with the rights declared by the verdict. The compromise decree gives the defendant is not inconsistent with the vendee's rights since what compromise the decree gives the defendant is not a vested right to the property but a contingent one.

A contingent contract may be mistaken with a wagering contract but the biggest difference between them is that wagering contract is illegal and void [19]. A wagering contract is a promise to give money or money that is worth upon the determination or ascertainment of an uncertain event [20]. In these cases, occurrence or non-occurrence of the event is not of much interest, where the sole condition depends upon the determination of the event [21]. It depends on one party winning and the other party losing on the happening of the event. Whereas in case of contingent contract sole purpose is the happening of the event and winning or losing or any monetary involvement is not considered [22].

INSURANCE AND CONTINGENT CONTRACT [23]

Under Section 31 of the Contract Act, a contract of insurance is a contingent contract and this is also a law in England where it is termed ‘conditional contract’. Life insurance in a wider sense comprises of any contract in which one party agrees to pay a particular sum upon the happening of a particular event contingent upon the duration of the human life in consideration of the payment of a smaller sum or certain equivalent periodical payments by another party. Contract of insurance, as mentioned before is a contact of indemnity but various insurance that is related to the contract of insurance comes under the wide scope of the contingent contract. The concept of insurance in India which is followed is that there must be an actual loss that has to be proved. The assured customer can claim the reimbursement of loss that he has suffered and it shall not exceed the amount that is stipulated in the contract of insurance which signifies the outer limit of the insurance company’s liability. The amount mentioned in the policy does not signify that the insurance company guarantees payment of the said amount regardless of the actual loss that is suffered by the insurer.

BREACH AND DAMAGES [24]

The question of damages arises only when there is a subsisting contract. A contingent contract will fall through on account of the failure of the contingent resulting in the contract becoming impossible of performance. A conditional subsequent is a stipulation of the state of affair which would lead to the cause existing contractual obligation to terminate. For instance, the contract should be terminated

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when the price of goods in question reaches the stated amount. Therefore, these contingent contracts are different from the promissory conditions, under which one party undertakes a certain result which can be achieved, and guarantees that is undertaken by its promise. Breach is caused by failure to achieve the promised results.

RULES REGARDING PERFORMANCE OF CONTINGENT CONTRACT [25]

There are few complications when it comes to contingent contract as the happening or not happening of the event is uncertain in the cases:

First, it may bar the formation of the contract, in which case, it is a condition precedent to the formation of the contract. When parties indulge in a contract on an understanding that some other person shall be a party to it, the contract is void if the person does not join the agreement. Until and unless the contingency occurs no contract comes into existence. Thus, first the happening or non-happening has to occur and then the contract comes into existence.

Secondly, one of the parties may assume an immediate unilateral obligation subjected to a consideration. In this, the fulfilment of the condition depends upon the will of the option holder. The other party cannot withdraw and it may also depend on the discretion of the parties.

Thirdly the parties may indulge in an immediately binding contract, and either operation of contracts depends on the happening of the specific events. Conditional precedent is the condition which is collateral to the performance of the contract. In other words, in the case of happening of the event then the performance can be demanded. It has to be different from the condition subsequent namely, a condition which has to be satisfied after the formation of the contract. A place where a valid contract arises is liable to be defeated on the episode of some subsequent condition; it will not amount to any contingent contract.

Fourthly, a contract for the sale of unspecified share in property basing it on the future partition happen is not considered to be a contingent contract. The sale deed to be executed on such actual partition of the property which has been held not to be a contingent contract and therefore, is capable of specific enforcement.

Fifthly, a contract has already emerged between the parties or a subsequent contract has already immersed, but its performance cannot be demanded unless the contemplated event happens or does not happen [26]. Such a contract has to be distinguished from a proposal which does not result in a contract unless the condition is first fulfilled. For instance, if there is a contract to buy a disputed land made with a party and to become effective if he wins the case, is a contingent contract, its recital being wholly dependent upon the outcome of a lawsuit.

Sixthly, where the happening and the non-happening of the contingency depends on the will of the party then the contract will have fewer contingents. In the contract, the performance depends upon the promise’s intervention which is the contingent contract, though his intervention is completely exclusive within his control.

Finally, if there are agreements for occurring of impossible events then such agreement is void. A contingent contract is happening of a certain event that may be happening or not happening but if such an event is an event that is impossible to happen, it is void. This also considers the knowledge of the party or unawareness of it about the impossibility of the event to the parties to the agreement, at the time the contract is made.

DISCHARGE OF CONTRACT BY PERFORMANCE AND CONTINGENT CONTRACT THE ANALYSIS

The discharge of contract by performance is the situation in which the contract is already formed and there is certainty of the event. An agreement that is subjected to contract is not a contract at all. The parties agree that they will not be bound by the contract until and unless a formal contract is executed, which takes place only at the will of the parties. Contingent contract depends on the uncertainty of the event, that is, contingent contract suspends the performance till the happening of the uncertain event.

In case of discharge of contract by performance, the contract is already in existence once the parties sign it. Whereas, the contingent contract comes into existence only when the event happens or does not happen, as agreed upon by the parties. Discharge of contract by performance is time specified as well as place-specific whereas contingent contract may not include such clauses. After entering into the contract, in case of discharge of contract by performance, the parties have to abide by the clauses and discharge of contract is done only when both the parties have performed its obligations as per the contract. In case of a contingent contract, the parties have a chance to withdraw from the contract before the happening of the event. In contingent contract, the main contractual obligation is not enforceable until and unless the condition is satisfied which is an unsure happening of the event.

CONCLUSION

As already known, the standard of performance is measured by the clauses in the contract. Although the situation is not comprehensible in a practical scenario when such clauses are absent from the contract. There are buyers or entrepreneurs who may miss out on the clause about the quality of the supplied goods. There is a general rule where performance obligation is a strict obligation as to description, fitness for purpose and satisfaction of quality. The only microscopic deviation is allowed and this is the de minimis rule does not apply, then that would constitute a breach. Concluding the “de minimis" standard may also be difficult to decipher but considered to be the minimum deviation that can be allowed, anything other than that will lead to a breach. The ‘de minimis’ can be decided as per the consideration fee as well as the reasonable expectation according to the case.

A contingent contract may be not being difficult to implement once the contract comes into existence when the uncertain event occurs. It does not work the same as another contract. The contract only comes into existence when the uncertain event happens and then the contract is binding. As mentioned before, discharge of contract by performance is very different from a contingent contract. As in case of any other discharge of contract, the successful completion of an event is the essence of a contract while the case is very different in a contingent contract where contingent contract comes into existence only after the happening of the uncertain event.

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