

PERFORMANCE AND BREACH

By now, you have surely mastered the rules of contract formation. But why do parties go through the formation ritual? In the most abstract sense, parties negotiate and enter contracts because they want the other side to perform their contractual promises. Contract law allows the parties to put the state power behind their desire — and expectation — of performance. As the Restatement puts it, “a contract is a promise or a set of promises for the breach of which the law gives a remedy.” Restatement (Second) of Contracts § 1.

Indeed, a breach of the contract is what allows a party to seek legal remedies. This part of your journey into contract law focuses on the concept of breach. The Restatement states that “when performance of a duty under a contract is due any non-performance is a breach.” Restatement (Second) of Contracts § 235(2). This means that in order to identify a breach, we must know what the parties’ duties are and when they are due. In some cases, this is a rather trivial task. If Anne tells Bob: “If you pay me \$100 now, I will deliver my bike to you no later than Monday morning,” and Bob responds with, “I accept,” and pays \$100, the duty and its time of performance are simple to figure out. Anne has a duty to deliver her bike to Bob, and her performance is due no later than Monday morning. If Anne does not deliver her bike by Monday morning, she is in breach of the contract with Bob.

In other cases — and those are the cases where your services as a lawyer are likely to be needed — the nature of the duty and the time of performance will be less clear. For example, if the parties’ promises are vague, then understanding the scope of their duties might require interpretation. Other parts in this book, and in particular those on interpretation and gap-filling, will help you figure out the parties’ duties.

One of the main focuses of this part, however, is on *when* performances become due. Indeed, even if we fully understand what a party promised to do, we still need to know when that party must do what it promised. While at its core that is also just a question of interpretation and gap filling, it is so central to so many contracts (and to the job of contract drafters and litigators) that most contract books, including this one, devote a separate chapter for its exploration.

Conditions are the main tool that contract law uses to determine the timing of performance. Most contractual obligations, especially in complex contracts (the type of contracts that lawyers typically deal with), are conditioned, meaning that they only become due upon the occurrence of an event. That event can be an action that the other party will take (for example, “Charlie promises to paint the house after Daniela makes the down payment”), or an

occurrence external to the parties (“Ellen promises to lend Frank an umbrella if and when it rains”). Conditions can be explicit or implicit and, as we shall see, can interact with the parties’ promises in multiple ways. They are both ubiquitous and highly litigated.

Conditions, by their nature, delay a party’s performance and, in some cases, prevent it from ever becoming due, thus bringing the contract performance to a halt. Later in this part, we will discuss two important types of such conditions. The first of those has to do with the implications of a breach. Any breach entitles the breached-against party to sue and be granted the judicial remedies for breach (such as expectation damages and specific performance). But those remedies, discussed in a separate part of the book, are not the only possible consequences of a breach. On top of those judicial remedies, the breached-against party might be entitled to use self-help to minimize its potential exposure and harm from the breach. In particular, the law recognizes conditions that allow that party to temporarily or permanently stop performing its own obligations.

Finally, conditions are also one of the main ways for contract law to account for changes in circumstances during performance. In some cases, due to extreme changes in circumstances, contract law excuses performance. In other words, it is a condition for the performance that none of those excuses exist.