CONDITIONS, PERFORMANCE, AND BREACH

Introduction

- Relationship of Conditions to Offer and Acceptance
  - Conditions relate to the timing of performances and at what point (if ever) a party is obligated to perform or may stop performing
- Condition Defined
  - An act or event other than a lapse of time, that, unless excused, must occur before a duty to perform a contractual promise arises (condition precedent) or that discharges a duty of performance that has already arisen (condition subsequent).

The Time Classification

- Conditions precedent, concurrent or subsequent
- Conditions Precedent - an event which must take place before a party to a contract must perform or do their part. Example: if the ship makes it to port, the buyer agrees to pay for the freight on the ship and unload it.
- Concurrent Conditions - a condition which should occur or be performed simultaneously with another condition, the performance by each party separately operating as a condition precedent. This is a condition that is mutually dependent on another, arising when the parties to a contract agree to exchange performances simultaneously.

The Time Classification (Cont.)

- Conditions Subsequent - a condition that if performed or existing will excuse performance by another. The term is used in contract law to excuse a party from performing upon the nonoccurrence or existence of the condition. It refers to a future event, upon the happening of which the obligation becomes no longer binding upon the other party if that party chooses to apply that condition.

Classification of Conditions Based on How they Arise

- Express Condition - a condition that is clearly stated in the language of the contract. In legalese, a condition defines a particular circumstance that either creates or removes an obligation for one or more of the contracting parties. Therefore, an express condition spells out under what circumstances a particular obligation might be affected.

- Implied-In-Fact Conditions - a circumstance that either creates or removes a contractual obligation (condition) that is not explicitly stated in an agreement. An implied-in-fact condition may be inferred from the actions of the parties, a reasonable expectation or the nature of the transaction. Therefore, an implied-in-fact condition may be subject to interpretation.

Express Conditions

- Express Conditions and Promises Compared
- Unless and until a condition has occurred, there is no breach of agreement for failure to perform.
- In unilateral agreement, no obligation to pay unless (condition) and until performance is rendered.

Conditions Compared to Time References

- "Contractor to pay as money is received from owner."
  - Some courts hold that receipt from owner is a condition to obligation to pay.
  - Modern trend - Language deals with timing only, not condition, implication that money will be received by Contractor in a reasonable time and, absent receipt by Contractor, will still be paid in a reasonable time.
- "When able"
  - Majority rule - Conditional language
  - Minority Rule - Reasonable time

Constructive and Implied-in-Fact Conditions

- Courts prefer to find Constructive Conditions to Implied-in-Fact Conditions.
- Implied-in-fact conditions are treated as Express Conditions (Strict compliance).
- Constructive Conditions need be only substantially performed.
- Modern trend - Court will find Implied-in-Fact Condition only in situations calling for a party's cooperation.

Constructive Conditions and Related Topics

- Constructive condition:
  - A condition that, though not expressly stated in the terms of the contract, is imposed after-the-fact by the court. A constructive condition is intended to bring about justice and is imposed when a literal interpretation of the contract would create an injustice.

Order of Performance in a Bilateral Contract - When the Duty to Perform Arises (Absent contractual provision to the contrary)

- Historical Rule: Performances under a contract were independent of each other; if one party failed to perform, the other party still had to perform and sue for breach.

- Modern Rule: Performance by one party is a "constructive condition" for the performance of the other party; thus, if one party refuses to perform, the other party does not have to perform either.

Order of Performance: (important because the first to perform must perform in order for the second to perform to have a duty to do so)

- If there is a services contract in exchange for money, it is presumed that the services are to be performed first.
- If there is a performance that takes a long time and one that takes a short time, it is presumed that the one that takes a long time is performed first.
- If the contract calls for the simultaneous exchange of goods (or goods for money), each party must be "ready, willing and able" to complete the transaction in order for the other party's duty to apply.

Material Breach and Substantial Performance

- Material Breach
- Restatement 2d § 241 Circumstances Significant in Determining Whether a Failure Is Material
- In determining whether a failure to render or to offer performance is material, the following circumstances are significant:
  - (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected;
  - (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;

Restatement 2d § 241 Circumstances Significant in Determining Whether a Failure Is Material (Cont.)

- (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;
- (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;
- (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

Substantial Performance

- If a good faith attempt is made to perform the requirements of the agreement, even if it does not precisely meet the terms of the agreement or statutory requirements, the performance will still be considered complete if the essential purpose is accomplished. However, this is subject to claim of damages for shortfall. A defendant when sued for non performance cannot avoid paying damages by showing he substantially performed or came near to performing the requirements of the contract.

Substantial Performance Satisfies a Constructive Condition, but not an Express Condition:

- Restatement 2d Section 237, Comment d:
  - The considerations in determining whether performance is substantial are those listed in § 241 for determining whether a failure is material. See Comment b to § 241. If, however, the parties have made an event a condition of their agreement, there is no mitigating standard of materiality or substantiality applicable to the non-occurrence of that event. If, therefore, the agreement makes full performance a condition, substantial performance is not sufficient and if relief is to be had under the contract, it must be through excuse of the non-occurrence of the condition to avoid forfeiture.

Sales of Goods—The Perfect Tender Rule - Exception to the Rule of Substantial Performance

- Under Article 2 of the Uniform Commercial Code, when dealing with the sale of goods, the perfect tender rule states that a buyer is permitted to reject goods shipped or delivered to it from a seller if the seller's tender of the goods is in some way not perfect, be it in quality or quantity.

UCC § 2-601. Buyer's Rights on Improper Delivery.

- Subject to the provisions of this Article on breach in installment contracts (Section 2-612) and unless otherwise agreed under the sections on contractual limitations of remedy (Sections 2-718 and 2-719), if the goods or the tender of delivery fail in any respect to conform to the contract, the buyer may

  - (a) reject the whole; or
  - (b) accept the whole; or
  - (c) accept any commercial unit or units and reject the rest.

Cure

- UCC § 2-508. Cure by Seller of Improper Tender or Delivery; Replacement.
  - (1) Where any tender or delivery by the seller is rejected because non-conforming and the time for performance has not yet expired, the seller may seasonably notify the buyer of his intention to cure and may then within the contract time make a conforming delivery.
  - (2) Where the buyer rejects a non-conforming tender which the seller had reasonable grounds to believe would be acceptable with or without money allowance the seller may if he seasonably notifies the buyer have a further reasonable time to substitute a conforming tender.

Rejection and Acceptance of Goods

- Under the UCC, rejection must be in good faith.
- Acceptance terminates right of rejection.
- Rejection must be made within a "reasonable time after the delivery or tender".
- Buyer must state all defects discoverable by reasonable inspection .

Acceptance

1. Failing to make effective rejection
2. Express acceptance
3. Doing “any act inconsistent with the seller's ownership; but if such act is wrongful as against the seller it is an acceptance only if ratified by him.” UCC Section 2-606(1)

- Quasi-Contractual and Statutory Relief

- A defaulting plaintiff who has not substantially performed may not usually get contractual damages, but maybe entitled to restitution on a quasi contract theory