高级法律英语选读

民商法学

毕玉谦　编注
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图书在版编目（CIP）数据

民商法学：英汉对照/毕玉谦编. -北京：外文出版社，2000
（高级法律英语选读）
ISBN 7-119-02705-0
Ⅰ.民… Ⅱ.毕… Ⅲ.①英语-对照读物，民法-英、汉 ②英语-对照读物，商法-英、汉 Ⅳ.H319.4：D
中国版本图书馆 CIP 数据核字（2000）第 66695 号

外文出版社网址：
http://www.flp.com.cn
外文出版社电子信箱：
info@flp.com.cn
sales@flp.com.cn

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出版发行　外文出版社
社　　址　北京市百万庄大街 24 号　　**邮政编码**　100037
电　　话　（010）68996075/68995883（编辑部）
（010）68329514/68327211（推广发行部）
印　　刷　三河市三佳印刷装订有限公司
经　　销　新华书店/外文书店
开　　本　大 32 开（203×140 毫米）　　**字　　数**　130 千字
印　　数　0001—5000 册　　**印　　张**　7
版　　次　2000 年第 1 版第 1 次印刷
装　　别　平装
书　　号　ISBN 7-119-02705-0/H·997(外)
定　　价　11.00 元

出版前言

近年来，各高等院校的法学院系竞相重视法律英语的教学，以期培养法学专业的学生阅读法学原著的能力。与之相应，已有各种版本的法律英语教材面世。其特点是集理论法学与各部门法学于一书，为不同部门法专业的读者学习各种专业词汇和知识提供了方便之道。

我社出版的这套“高级法律英语选读”丛书，分法理学、宪法与行政法学、刑法学、民商法学、国际法学五种。其专业特点显而易见。丛书选材既体现法学发展的历史轨迹，又注意吸收当代法学研究的最新成果；既有理论探讨，又有实证分析。在此基础上，各个专业内容相互交融，既自成体系，又浑然一体。选材时，尽可能涵盖本专业各方面的内容，以扩大读者的专业词汇和知识面。非但如此，书中所选内容，多是各专业的精品，因而具有较高的学术价值，是各专业研究生及相关专业研究者不可多得的参考资料。由于英文学术原作大都篇幅宏巨，在选编时，囿于篇幅所限，不得不忍痛割爱，仅择其精华。是故，可能会给读者留下内容不完整的印象，是为遗憾之事，亦敬请读者原谅。

这套读物的问世，端赖各位编著者鼎力相助，戚渊博士参与了创意、选材、组织的全过程，在此表示感谢。

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UNIT 1

The Ways in Which a Contract May Be Discharged

解除合同的方式

J. E. Smyth
D. A. Soberman
A. J. Easson

1 To discharge a contract means "to cancel the obligation of a contract; to make an agreement or contract null and inoperative". We shall consider four ways in which the discharge of a contract may occur: by performance, agreement, frustration[①], and operation of law[②].

2 Performance is the type of discharge expected when parties make their agreement. A contract is at an end when the parties have performed their respective obligations satisfactorily. For a contract to be fully discharged, performance must have been completed by both parties and not merely by one of them. A bilateral contract[③], formed by the offer of a promise for a promise, goes through three stages: first, when neither party has performed its promise: second, when one but not the other party has performed; and third, when both parties have performed. Only at the final stage is the contract discharged by perform-

ance. In a unilateral contract[4], formed by the offer of a promise for an act, the first stage never exists and the second takes place in the very formation of the contract; the last stage is still necessary for discharge by performance.

3 Performance may take several forms, depending on the contract. It may be services rendered, goods delivered, a cash payment made, or any combination of these.

4 Occasionally a party attempts to perform, but the other party refuses to accept the performance. An attempt to perform is called a tender of performance[5], whether accepted or rejected by the other party.

5 If a seller properly tenders delivery of the goods and the buyer refuses to accept them, the seller is under no obligation to attempt delivery again and may immediately sue for breach of contract.

6 A debtor who makes an unsuccessful but reasonable attempt to pay will be free from further liability for interest on the amount owing and generally will not have to pay court costs if he is later sued for the debt. To be sure of this result, he should offer the money in the form of legal tender. Legal tender consists of Bank of Canada notes (or "bills" as we call them) and coins to the following limits: silver coin to $10, nickel coin to $5, and coppers to 25¢. A creditor is legally within its rights in refusing to accept payment in silver of a debt of, say, $100; it may also refuse any negotiable instrument, including even a cheque certified by a bank. In practice payment is normally made in a form that is not legal tender, and the majority of business debts are now settled by cheque. Only when there is a risk of dispute does a legally correct tender of payment become important. The debtor will then make a formal legal tender of cash to the creditor to avoid any later claim that he was unwilling or unable to meet his obligations.

7 If a creditor is foolish enough to refuse a legal tender of payment, any subsequent action to recover the money will be at the creditor's own expense. On the other hand, the debtor is not discharged of her debt by having had her tender of payment refused. She will still have to pay it, but no interest will accrue after the date of tender. If the debtor tenders payment in a reasonable fashion (though not strictly speaking in the form of legal tender), a court may, at its discretion, award the costs of any subsequent litigation against the creditor.

8 There is a legal maxim that the debtor must seek out her creditor. She is not excused from tendering payment because her creditor is slow or diffident about asking for it: the onus is on the debtor to find and pay her creditor.

9 A contract may be discharged prematurely because the parties agree between themselves not to perform it. A waiver is an agreement not to proceed with the performance of a contract already in existence. If neither party has performed fully at the time both agree to call off the bargain, there will automatically be consideration for the waiver of each party; each still has rights and obligations outstanding, and a promise by one party to waive its rights is sufficient consideration for its release from obligations by the other.

10 On the other hand, if one party has already fully performed its part, but the other has not, it receives no consideration for its waiver of the other party's duty to perform. To be enforceable, its promise to release the other party should be under seal.

11 Of course, neither party can impose a waiver on the other. A party who fails to perform without securing a waiver of the other commits a breach of the contract. As we shall see in the following chapter, the consequences of breach are quite different from discharge by agreement.

12 At the time the parties draw up their contract, one of them may foresee the possibility of some event affecting its ability or willingness to perform. If the other party is agreeable, they may include an express term to allow for this eventuality. Alternatively, there may be a similar term implied by trade usage or by the surrounding circumstances of the agreement. The term may be a condition precedent, a condition subsequent, or an option to terminate.

13 Some have argued that a contract never even comes into existence when there is a condition precedent, and that to be capable of discharge a contract must first have existed. Yet in a real sense a contract is formed from the time of the offer⑥ and the acceptance⑦, even though a condition precedent is not resolved until later. A contract subject to a condition precedent does have a binding force from the outset, and the parties are not free to withdraw from their promises unless and until the condition precedent becomes impossible to fulfil. The arrangement is therefore much more than an outstanding offer that can be revoked prior to acceptance. Accordingly, if immediately after B received A Co. Ltd.'s acceptance he changed his mind and took a position with a different company, he would be in breach of contract.

14 A contract may contain a series of conditions precedent; for example, an owner stipulates that as work progresses in a construction project it must be approved at specified stages by a designated architect or engineer. If after the work at any stage is completed, the architect or engineer expresses dissatisfaction with the quality of performance, the obligation to pay for that stage and for further work under the contract ceases. The approval of the architect or engineer is a condition precedent to payment for the preceding stage and for continuing with all remaining stages. When a party agrees to do work on these terms, it exposes itself to the judgment and reasonableness of the architect or en-

gineer. Unless it can show that there has been fraud or collusion between the architect or engineer and the party for which it is to do the work, it is subject to the verdict reached; and it cannot claim a breach of contract if the work is brought to an end prematurely because the architect or engineer, acting in good faith, refuses to approve what has been done.

15 A promisor is in an even more difficult position if it gives the right to approve or disapprove of performance to the promisee itself rather than to a third party such as an engineer or architect. The promisee's opinion of what is satisfactory is far more likely to be prejudiced in its own favour. The courts have held that a promisee given such a power can withhold approval and avoid liability under the contract. It does not matter that the promisee's judgment is unreasonable, or that the judge or jury believe that in the circumstances they themselves would have approved of the performance. So long as they find that the promisee is honestly dissatisfied, the promisor has no rights against it.

16 The English common law originally held a party responsible in every instance for a failure to perform his promise—even when the failure had not been his fault. Of course, a party could avoid such consequences, if he foresaw them, by insisting at the time of agreement upon an express term absolving him from liability under stated circumstances. In fact, the argument for holding a party responsible was that he could have provided for the event in the contract but did not do so. Obviously, as a practical matter it is not possible to foresee all eventualities. In any event, the economic cost of administrative time and legal advice involved in adding extensive lists of exemptions that would excuse performance only in rare circumstances would normally exceed the benefits of such a procedure.

17 As the next section will explain, the courts now excuse persons

for failure to perform their contracts in a wide variety of circumstances where they are not at fault. Nevertheless, courts remain reluctant to excuse performance in some types of contracts; historically, they have regarded these kinds of contracts as inviolable regardless of the reason for which they could not be performed. Tenants' covenants in commercial leases to keep the property in repair and to pay rent are promises of this kind, with the result that tenants have found themselves liable for damages caused by fire, storms, and enemy action, and liable for rent for the duration of the lease when the property was no longer of use to them. However, in extreme cases where the whole point of the contract has disappeared, courts have become more willing to yield:

> I adopt the reasoning of Lord Simon in Cricklewood v. Leighton's ... and accept his conclusion that there is no binding authority in England precluding the application of the doctrine of frustration to contracts involving a lease of land. I believe the situation to be the same in Ontario.

18 It still remains open to a party to express his promise in such an absolute and unconditional way as to rule out any reservation for his benefit and thus forgo the defence of frustration.

19 Several of the provinces have enacted legislation to overrule the common law and provide that the doctrine of frustration applies to tenancy agreements for residential premises. The legislation does not, however, extend the doctrine to leases of commercial premises.

20 The Bankruptcy Act operates to discharge a bankrupt debtor from contractual liabilities after the processes of bankruptcy have been completed. The debtor is discharged, however, only if he qualifies for a certificate stating that the bankruptcy was caused by misfortune and without any misconduct on his part.

21 A debt or other contractual obligation that has been neglected by a creditor for a long time becomes statute barred, that is, the creditor loses the right to bring an action on it. Each province has a Limitations Act setting out the time at which a creditor loses its remedy. The Limitations Act "bars" (rather than completely discharges) a right of action if the promisee fails to assert it within the time specified. In so doing, it gives effect to the legal principle that the public interest requires a definite end to the opportunity for litigation. The effect of the statute is really to banish the right of action from the courts rather than to pass a death sentence upon it. The distinction is important because a claim may be rehabilitated and made enforceable by certain conduct of the promisor.

(*Selected from Law and Business Administration in Canada*)

New Words and Expressions

1 discharge 解除；清偿（债务）；履行（义务）
cancel 取消；作废
null 无效的
inoperative 不生效的；不起作用的
frustration 合同落空；合同不同履行
2 bilateral 双边的；有两面的；双边的
unilateral 单方面的；单边的
6 tender 提供；给予；交付
7 accrue（利息等）自然积累而成
award 判给
8 maxim 格言；准则；原则
onus 责任；义务；负担
9 prematurely 过早地；早熟地
waiver 弃权；自动放弃；放弃
bargain 订约；契约；合同
outstanding 未偿付；未履行；有待完成
10 enforceable 使…具有强制性
under seal 盖上印章
11 option 选择；选择权；买卖的特权
condition precedent 先决条件
condition subsequent 后续条件；解约条件
13 revoke 撤销；撤回；废除；宣告无效
14 stipulate 规定；保证
architect 建筑师

expose 暴露；显露
fraud 诈欺；欺骗；欺诈行为
collusion 串通；共谋；勾结
15 promisor 契约者；立约人
promisee 受约人的；承诺人
withhold 拒给；不给
16 absolve 解除
eventuality 可能性；不测的事；可能发生的事
exemption 解除；免除
17 tenant 承租人；房客
covenant 订立合同；契约；立约
preclude 预先排除；排除
frustration 挫折；受挫
lease 租借权；租借；租约；租赁物
18 reservation 附加条款；保留权益
forgo 放弃；作罢；放弃
19 overrule 驳回；否决
tenancy 租赁；租佃
premise 前提
20 certificate 书刊登记证；证书；证明书
21 statute 成文法；法令；条例
bar 隔绝；禁止
assert 主张；断言；声称
banish 驱逐；流放；消除
rehabilitate 恢复；使（身体）康复

Notes

① frustration：因合同落空（或称意外受挫）而解除合同。合同落空是指，由于某一事件的发生，法律规定可以免除当事人履行合同义务的责任。一般认为该种事件应为：其一，是合同缔约后发生的；其二，任何一方当事人都不承担对该事件的责任；其三，法律认为该事件有免于合同履行的正当理由。

② operation of law：合同的法定解除，是指在合同成立以后，没有履行或没有完全履行之前，当事人一方行使法定的解除权而使合同效力归于消灭的情形。它的主要特点在于，由法律在一定情况下赋于当事人享有解除合同的权利。

③ bilateral contract：双务合同，指双方当事人相互承担义务的合同。凡是双方当事人相互享有权利，同时又相互负有义务的合同，就叫双务合同。例如买卖合同，出卖人有按照约定的数量、质量将物品交付给买受人的义务，同时也享有要求买受人交付价款的权利；买受人有按照约定的数额给付价款的义务，同时也享有要求出卖人给付约定的物品的权利。

④ unilateral contract：单务合同，指单方面承担义务的合同。凡是双方当事

人中，一方只享有权利而不承担任何义务，他方只承担义务而不享受任何权利的合同，就叫单务合同。例如，赠与合同，赠送人只承担交付赠品的义务，而不享受任何权利；受赠人则只享有取得赠送人交付赠品的权利，而不承担任何义务。

⑤ a tender of performance：准备履行合同（或称提供给付），即指一方当事人用来约束不履行合同的对方当事人，使其负违约责任所采用的一种手段。

⑥ offer：要约，指当事人一方向另一方提出的关于订立合同的建议，即订约建议。一方称为要约人，另一方称为受要约人。要约包括要约人向受要约人表示签订合同的愿望和明确提出合同的主要条款。

⑦ acceptance：承诺，指当事人一方对另一方提出的要约表示完全同意，即接受订约的建议。承诺是签订合同的重要步骤，可以用口头或电话等方式，也可以用书信或电报等方式。承诺必须在要约人所指定的期限内作出方为有效。如是口头而无期限的，则应立即承诺方为有效；如是书面而无期限的，则应在合理的时间内承诺方为有效。

Questions

1. For what reasons might a creditor refuse payment?
2. What problem may arise for a party who receives the benefit of a waiver of a contract already performed by the other side?
3. May a contract be frustrated even though the promisor might still be able to perform it?
4. On what aspect may bankruptcy bring about the discharge of contract?
5. What do you consider about the acceptance of the four ways to discharge a contract in China's contract Law?

UNIT 2

Limited Liability[①] and the Theory of the Firm

有限责任及公司原理

Frank H. Easterbrook
Daniel R. Fischel

1 People can conduct economic activity in many forms. Those who perceive entrepreneurial opportunities must decide whether to organize a sole proprietorship[②], general or limited partnership[③], business trust, close or publicly held corporation[④]. Debt investors in all of these ventures possess limited liability. Equity investors in publicly held corporations, limited partnerships, and business trusts do too. Limited liability for equity investors has long been explained as a benefit bestowed on investors by the state. It is much more accurately analyzed as a logical consequence of the differences among the forms for conducting economic activity.[⑤]

2 Publicly held corporations typically dominate other organizational forms when the technology of production requires firms to combine both the specialized skills of multiple agents and large amounts of capital. The publicly held corporation facilitates the division of labor. The dis-

tinct functions of managerial skills and the provision of capital (and the bearing of risk) may be separated and assigned to different people—workers who lack capital, and owners of funds who lack specialized production skills. Those who invest capital can bear additional risk, because each investor is free to participate in many ventures. The holder of a diversified portfolio of investments is more willing to bear the risk that a small fraction of his investments will not pan out.[6]

3 Of course this separation of functions is not costless. The separation of investment and management requires firms to create devices by which these participants monitor each other and guarantee their own performance. Neither group will be perfectly trustworthy. Moreover, managers who do not obtain the full benefits of their own performance do not have the best incentives to work efficiently. The costs of the separation of investment and management (agency costs) may be substantial. Nonetheless, we know from the survival of large corporations that the costs generated by agency relations are outweighed by the gains from separation and specialization of function.[7] Limited liability reduces the costs of this separation and specialization.

4 First, limited liability decreases the need to monitor. All investors risk losing wealth because of the actions of agents. They could monitor these agents more closely. The more risk they bear, the more they will monitor. But beyond a point more monitoring is not worth the cost. Moreover, specialized risk bearing implies that many investors will have diversified holdings. Only a small portion of their wealth will be invested in any one firm. These diversified investors have neither the expertise nor the incentive to monitor the actions of specialized agents. Limited liability makes diversification and passivity a more rational strategy and so potentially reduces the cost of operating the corporation.[8]

5 Of course, rational shareholders understand the risk that the