CHAPTER EIGHT
DISCHARGE OF CONTRACT

Non-performance results in discharge of the contract, that is, the cancellation of its effects. Discharge, like rescission, applies to contracts for mutual consideration. When one of the parties does not fulfil his obligations, the other may request that he do so or that the contract be discharged. In any case, he has the right to damages.

The requirements for discharge are the following.

a) Performance on the part of the complainant. So A, the purchaser of a television, cannot seek discharge of the sale contract on the grounds of non-delivery if he has not yet paid the purchase price. In a contract for mutual consideration, either party may refuse to perform his or her obligations if the other party does not perform his or hers, or offer to do so concurrently. This rule bears the tag: “There is no need to perform for one who has not performed”.

b) Non-performance by the party against whom discharge is sought. As stated above, non-performance can mean outright failure to perform or doing so tardily; such is the case where A must return a deposited item but the item is destroyed or he has sold it on, or he returns it after the stipulated date because he has been away. It is not non-performance if the responsible party shows a serious intention to carry out his obligations. Neither can the contract be discharged if the non-performance is not serious, that is, it does not cause appreciable harm to the interests of the other party.

c) The request for discharge. If the creditor would still rather the contract be performed than discharged, he will ask the debtor to perform it, but he cannot do this once a request for discharge has been made. He can, however, request discharge
after having requested performance. Once a request for discharge has been made, the debtor cannot then belatedly decide to avoid it by performing the obligation.

Thus far we have assumed it is a party who will seek discharge from the court. When pronounced by a judge, discharge is **judicial**, but there are also cases where it is not necessary to go to court to bring about a discharge. In some situations the contract can be discharged automatically. There are three of these, namely, **express cancellation clause**, **time of the essence** and **invitation to perform**.

A contract can expressly stipulate that it will be discharged if a specified obligation is not performed in the prescribed manner. In such cases discharge comes into effect when the affected party declares to the other his intention of invoking the cancellation clause. The party invoking the cancellation clause is exercising a power. Case law may not consider cancellation clauses oppressive.

**Time limits** have already been examined. Time is not always of the essence, that is, a term of the contract that must be complied with exactly in order for the other party’s interest to be satisfied. Time sometimes has no bearing on the transaction, and a stipulated time may be merely indicative of a due date for performance, non-compliance with which does not necessarily amount to non-performance. A creditor is often lenient with a late-paying debtor. Time limits are thus of the essence when the parties themselves so stipulate in the contract, or where the nature or subject matter of the contract implicitly make it so.

To avoid a party not performing his obligations until after the agreed time limit has expired, the other party may request in writing that he perform them within the appropriate time, at the same time giving notice that if the request is not met, the contract will be treated as discharged without further notice. The time limit thus set is known as a **caution** and it is designed to set out the
parties’ positions clearly relating to execution of the contract. It places the dilatory party on notice that the other is no longer prepared to tolerate delay and that if the obligation is not performed within the time the contract will be treated as discharged without further ado. A caution is a unilateral declaration, for which no form is prescribed. It is sufficient that the declaree has effective notice of it. The time limit set by the caution is not normally less than 15 days in civil law systems. The parties may, however, agree a longer or shorter period, or usage can be followed. It is clear that the stipulated time limit is of the essence. A clearly stated limit is also a sine qua non of the caution; it is not acceptable to use an expression like “within the shortest time possible”.

Discharge, like rescission and avoidance, has retrospective effect. It only affects the parties, and so the retroactivity pertains only to the obligations. There is no undoing of effects already produced by severable or continuing contracts, because prestations already performed as part of these types of contract cannot be annulled.

We have already considered supervening impossibility in the definition of non-performance. The codes consider supervening impossibility as one of the causes of discharge because if one of the prestations cannot be performed, the other party should not be forced to perform his or, if he has already performed it, suffer the loss of an advantage that the dealing would have conferred. In contracts for mutual consideration the party released by supervening impossibility of the prestation cannot require the counter-prestation and must refund whatever he has already received.

A contract does not always have a limited duration and immediate effects. In severable or continuing contracts or those where execution is deferred, it may be that with the passage of time one of the prestations may become so onerous as to make it unconscionable to expect the party to have to fulfil it. In such cases
it is expedient to allow that party, the opportunity of release from it by seeking discharge. Discharge is not available in this way if the burden is within the normal range of contractual vicissitudes, nor if the contract is in itself aleatory. There would be no reason in this event to protect the party in question.

The events which make a prestation more onerous must therefore be abnormal, unforeseeable and out of the ordinary, such that the parties could not have been expected to take them into account when concluding the contract. Unforeseeability is not restricted to the existence of the phenomenon, but can also apply to its size and quantity. They must be such as to transform the original aspect of the contract: its balance, not in an objective proportion between the respective prestations, but the balance subjectively assigned to it by the parties. The economics of the deal must, in other words, be completely upset. For example, if A concludes a contract with B to transport a consignment of crude oil via the Suez Canal the price is based on a short journey. The burden becomes excessive if B is not able to use the Canal because it is closed owing to a war and has to go all the way round the Cape. In traditional terms, it is said that the original situation contemplated by the parties has ceased to exist and there is an implied clause *rebus sic stantibus* “providing and to the extent that conditions remain as they are”.

**Effects of Discharge of Contract**

Discharge of a contract is retrospective as regards the parties and does not affect rights acquired by third parties. The retrospective effect of discharge therefore applies only to obligations. In contracts where execution is immediate and those for reciprocal consideration discharge has a twofold effect: it releases the parties from prestations that have not yet been performed only from the moment that discharge is pronounced; and it entails an obligation to refund anything acquired since the contract was concluded. All consequences of the execution in whole or part of the contract are
to be extinguished. For continuing and severable contracts, on the other hand, discharge does not disturb the effect of prestations that have already been performed.

The party who has sought discharge can protect his right by registering the request for discharge. If this is done third parties cannot rely on the validity of anything acquired from the other party because they have notice of contentious proceedings involving the original parties.

If the debtor is at fault, he can also be held liable in damages for the other party’s loss. This aspect of the matter needs to be interpreted broadly. An action for discharge is subject to the ordinary limitation period.

**Rescission of Contract**

“Rescission”, “discharge”, and **dissolution** are popularly supposed to be synonymous, but in technical use, rescission and discharge refer to two situations that are different from **dissolution** because they entail the cancellation of all effects of the contract and of the parties’ legal obligations. These two outcomes – rescission and discharge – also differ considerably from each other, however. The former applies where a contract was concluded in a state of need or danger, the latter where the creditor’s interest has not been realised, be that through the debtor’s non-performance, supervening impossibility or supervening unconscionability.

Rescission is a **remedy obtainable through a court action**, which protects one party from being exploited by the other, where there is no equivalence of prestations. The parties are free to contract on whatever terms they see fit, and that cannot include bargains that are dramatically unfavourable for one or other party; the law does normally concern itself with this and intervenes by allowing rescission for the weak party.
There are two situations in which the question of rescission can arise differently:

1. **Contracts concluded in a state of danger.** Any contract by which one party has undertaken obligations on iniquitous terms by reason of his or her need, known to the other party, to save himself or others from a present danger of serious personal harm can be rescinded at the request of the person who has undertaken such obligations. The conditions in which this rule applies are circumscribed by specific requirements. The state of necessity may have come about through imprudence, by the victim’s own fault, through error such as attempting a difficult leap on a mountaineering expedition, or through natural disasters such as flooding or the results of war or guerilla activity, etc. The danger must be present – if it was future, the intervention of the court would not be justified – and the harm “serious”.

2. **Actions for rescission where there is gross disparity of prestation.** If there is a gross disparity between the prestations due from the respective parties and this has been procured as a result of one party abusing the other’s state of necessity for unfair gain, the exploited party may seek rescission of the contract. In this case too, the availability of rescission is subject to detailed rules. One of the parties must be in a state of need. “Need” here must be distinguished from the necessity that applies in the previous case, because the contract here could also have been entered into not out of immediate necessity. An example is where A wishes to acquire some money to enable him to move abroad. He sells off his house to B, who knowing of A’s haste, has made him a very low offer. A could equally have obtained the money by taking out a loan or by some other means, so the contract was not concluded out of strict necessity. Nor does a state of need mean a state of poverty. It should be understood as a situation
of economic difficulty which impinges psychologically on the person concerned to the extent of making him less astute in the conduct of his affairs and so susceptible to accepting unfavourable offers. And the situation must have been exploited by the other party. Exploitation of a situation is more than merely knowing it exists: **there must be an intention to derive undue advantage from it.**

As can be seen from the above, different rules apply to the two situations of necessity and danger. In the former case, profiting from an abuse is not a prerequisite for rescission, but the other party must have been aware of the situation. In the latter case there needs also to be an undue disparity of prestation.

The action is subject to a short limitation period: it must be brought within a year or three years in Somali Code after the contract is concluded. The party against whom the action is brought may avoid rescission by offering to modify the contract in a way sufficient to render it equitable (with the market value of the prestation serving as a guide). **A rescindable contract cannot be confirmed.** Rescission has retrospective effect, but only as regards the parties’ reciprocal obligations, and does not prejudice rights acquired by third parties.

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