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**LAW OF CONTRACT II**

**MEANING OF BREACH OF CONTRACT**

Among the most common causes for lawsuits in the U.S., breach of contract occurs in many ways. The law offers a variety of remedies for each such breach, designed to make the injured party whole. Court-ordered remedies for breach of contract cases are not meant to punish the breaching party, but to return the injured party to the position he would be in if the breach had not occurred.[[1]](#footnote-1)

A breach of contract is committed when a party without lawful excuse fails or refuses to perform what is due from him under the contract, or performs defectively or incapacitates himself from performing.[[2]](#footnote-2)

A breach of contract occurs where one party fails to fulfill or does not intend to fulfill his obligations under the contract. A breach of contract entitles the innocent party to sue for damages against the guilty party the breach occurs as a result of repudiation of contract obligation or a fundamental breach, the innocent party, may, in addition from further liability to perform his own part of the obligation.

The innocent party can make a choice as he is not bound to treat the contract as discharge where the injured party repudiates or in breach of fundamental terms. He may choose to sue for damages instead and keep the contract alive in certain circumstances.

The methods of breach can have a decisive effect on the right and liabilities of the innocent party. It is important to consider, where the contract is repudiated, or there is fundamental breach as some breaches entitle the innocent party to sue for damages, and more serious breaches entitles the innocent party, in addition to damages, to treat himself as discharged from the contract. Serious breaches are generally described as “repudiatory breaches” where the innocent party can make an election either to repudiate or affirm the contract.

In a deposit account, what constitutes a breach is the failure of a bank to pay money due to the deposit account on demand by the operator of the account. Thus in *Nigerian Merchant Bank Plc. V. Aiyedun investment Ltd. (1998) 2 NWLR (pt. 537) 221 CA*, the court held that such a breach will justify a claim for compensation. It does not matter if the compensation claimed is described as interest or damages. [[3]](#footnote-3)In *UBN Plc v. Jeric (Nig.) (o1998) 2 NWLR (pt. 536) 63.* [[4]](#footnote-4)it was held that in a contract on goods imported the respondent did not pay for the value of the goods and other expenses incurred by the appellant, the appellant did not breach any terms of its agreement by withholding on to the goods. The appellant has to option than to hold on to the goods and this cannot be a breach of contract.

It is important to bear in mind that contract law is not the same from country to country. Each country has its own independent, free standing law of contract. Therefore, it makes sense to examine the laws of the country to which the contract is governed before deciding how the law of contract (of that country) applies to any particular contractual relationship.

Among the most common causes for lawsuits in the U.S., breach of contract occurs in many ways. The law offers a variety of remedies for each such breach, designed to make the injured party whole. Court-ordered remedies for breach of contract cases are not meant to punish the breaching party, but to return the injured party to the position he would be in if the breach had not occurred.[[5]](#footnote-5)

Partial Breach

A partial breach, or failure to perform or provide some immaterial provision of the contract, may allow the aggrieved party to sue, though only for “actual damages.” For example:

A homeowner hires a contractor to put a pond in his backyard, showing the contractor the black liner her would like installed under the sand. The contractor instead installs a blue liner of the same design and thickness, which is totally hidden from view. The contractor may have breached the precise terms of the contract, but the homeowner cannot ask that the contractor be ordered to take out the pond and start over with the black liner.

The homeowner could ask that the contractor be ordered to refund the difference in price between the requested black liner and the installed blue liner. In this case, because the color of the liner has no affect on functionality, and the price was basically the same, the difference in value, or “actual damages,” is zero.

Material Breach of Contract

Failure of one party to perform his obligations under the contract in such a way that the value of the contract is destroyed, exposes that party to liability for breach of contract damages. For example, if the contractor in the above example had used thin plastic not intended for the rigors of maintaining a pond, which could not be expected to last as long as the pond liner, the homeowner might recover the actual cost to correct the material breach, which would include removing the pond and replacing the liner.

A material breach of contract may relieve the aggrieved party of his own obligations under the contract, and give him the right to sue for damages. Such a total breakdown of the material provisions of a contract may be referred to as a “fundamental” or “repudiatory” breach.

Anticipatory Breach of Contract

Anticipatory breach, also known as “anticipatory repudiation,” occurs when one party to a contract stops acting in accordance with the contract, leading the other party to believe he has no intention of fulfilling his part of the agreement. In this case, the breaching party may give such an impression by his actions, or failure to act, such as failing to produce an ordered item, refusing to accept payment, or somehow making it obvious that he cannot or will not fulfill the terms of the contract. An anticipatory breach of contract enables the non-breaching party to end the contract and sue for breach of contract damages without waiting for the actual breach to occur.

Specific Performance

In certain cases, an aggrieved party may not be made whole through the award of monetary damages. He may instead request the court to order “specific performance” of the terms of the contract. Specific performance may be any court-ordered action, forcing the breaching party to perform or provide exactly what was agreed to in the contract. Specific performance is most often ordered in a contract involving something for which a value is difficult to determine, such as land or an unusual or rare item of personal property.

Courts in the United States are virtually inundated with breach of contract cases. Small and large, the decisions in such cases shape the way American’s do business every day for example in the case of ***Revelations Perfume and Cosmetics Inc. v. Prince Rogers Nelson***In 2008, the Revelations Perfume and Cosmetics company sued the famous musician “Prince” and his music label, seeking $100,000 in damages for reneging on an agreement to help market their perfumes. [[6]](#footnote-6)The flamboyant pop star had promised to personally promote the company’s new perfume named after his 2006 album “3121,” and to allow his name and likeness to be used in the perfume’s packaging. Prince then refused to grant interviews related to the project, and refused to provide a current photograph for a press release.[[7]](#footnote-7)

In its breach of contract complaint, Revelations asked the court to award more than $3 million in lost profits, as well as punitive damages. The judge found no evidence, however, that the pop star acted with malicious intent, and ordered him to pay nearly $4 million for the cosmetics company’s out-of-pocket expenses. Revelations’ request for punitive and loss-of-profits damages was denied. In the famous case of ***Macy’s v. Martha Stewart Living***

Macy’s department stores filed a breach of contract complaint against Martha Stewart Living Omnimedia for making an agreement with J.C. Penney for the creation of Martha Steward retail stores within them retain stores beginning February 2013. Prior to the deal, J.C. Penney had purchased a minority stake in Steward’s company for $38.5 million. The mini-retail stores were to carry Martha Stewart home goods, however Macy’s argued they had been granted an exclusive right to make and sell certain Martha Steward Living products in an agreement signed in 2006.

Macy’s asked the court to grand a preliminary injunction to stop Steward from breaching the contract while the court considered the matter. Twelve years later, in June 2014, a New York judge ruled that J.C. Penney had indeed stepped over Macy’s contract with the domestic diva in its attempt to sell products bearing her name. While the J.C. Penney contract has been nullified, monetary breach of contract damages was not immediately decided, and may be limited to the legal fees and costs of the lawsuit, as the judge decided the case did not warrant punitive damages.

REMEDIES FOR BREACH:

In law, there is a distinction between criminal and civil quagmires; for instance, in the cause of justice dispensation, the judge or body of judges gives out judgement to an accused/ guilty person. In criminal cases, such judgements range from mere fines to death as the case may be. Conversely, since civil cases dwells on relations between persons or states, the judgement is mostly aimed at providing necessary condolences, remedies, and employing all manner of pacifying mechanisms to the aggrieved party. In contract, it is expedient to decipher that the court has an **objective** nature; hence, it is aimed at upholding a bargain rather than setting aside a case. The court is interested in marinating transactions rather than hurriedly setting aside a case.

However, there are exceptions as there certain cases where continuation can simply not be- breach of contract for example. Once a contract has been breached, the other party has the right to discharge and redeem himself from whatsoever performance to be done and can also seek an action of damages.

On this note, this writer shall enumerate the various remedies for breach of contract.

In contract law, a “remedy” is a court-ordered resolution to one party’s breach of contract. A breach of contract occurs when one party to a contract has not fulfilled his or her obligation under the agreement. The non-breaching party is also known as the “injured” party, and the purpose of remedies is to place the injured party in the position they would have otherwise been in had the contract been performed as it was agreed upon. **There are a variety of remedies available for a contract breach; there are a variety of remedies available for a contract breach**. The appropriate compensation or remedy depends upon the circumstances. The non-breaching party will need to demonstrate that the other party failed to perform in order to be entitled to any type of remedy.

The most common claim is that for **Damages**. Award of damages is the most common remedy for breach of contract as one party seeks compensation for financial losses as a result of breach of contract. The party who is injured by the breach of contract is entitled to the benefit (consideration) of the agreement they entered, or the net gain they would’ve accrued had it not been for the breach.  This type of remedy is known as “**compensatory damages**.” [[8]](#footnote-8)

During the court case, the injured party becomes the plaintiff. In the instance of a total breach, the plaintiff may recover damages in an amount that’s equal to the sum or value they would have received had the contract been fully performed by the defendant.  Sometimes, this includes lost profits from a business operation.

If the breach is only partial and the defendant carried out a majority of the contract, the plaintiff may seek damages in an amount equal to the cost of hiring someone else to complete the performance. If the portion of the uncompleted performance is quite small in terms of cost, however, the court may only award damages in an amount that’s equal to the difference between the diminished value of the agreement as completed and the full value as stated in the contract.

On the fourth going, another form of damages is **Punitive damages**. This damage, known as **exemplary damages**, are awarded to punish or make an example of the wrongdoing of a party that acted wilfully, maliciously or fraudulently. Punitive damages are awarded in addition to compensatory damages.  However, punitive damages are rarely awarded in breach of contract cases. Punitive damages are most often used in tort cases in which personal harm was a result of the wrongdoing and actual damages are minimal.

The underlying basis for the common law remedy of damages was laid down by Parke, B., in ***Robinson v. Harman[[9]](#footnote-9)***, where he stated that in common law, where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed. This was the origin of monetary damages, upon which criticisms were rendered prior to its harshness.

This led to the modification of this precedent by Alderson, B., in ***Hadley v. Baxendale[[10]](#footnote-10)*** where it was held that “ where two parties have made a contract which one of them has broken the damages which the other party ought to receive in respect of such a breach of contract should be such as may fairly and reasonable be considered as either arising naturally or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it...the damages resulting from the breach of such a contract which they would reasonably contemplate would be the amount of injury which would ordinarily follow from a breach of contract, he, at the most could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by an special circumstances, from such a breach of contract.”

In the above rule in ***Hadley v. Baxendale***, the first branch deals with normal damage that occurs in the usual course of things and the second with the normal damage that occurs in the usual course of things and the second deals with abnormal damage that arises because of special or exceptional circumstances.

The party who breached the contract can be held responsible for the losses caused by the breach.  Both general or expectation damages and consequential damages can result from a breach of a contract.  General or expectation damages refer to the loss directly caused by the breach. Consequential damages refer to losses that occurred because of the breach but that were an indirect cause.  For example, if you contracted and paid for a machine to be delivered and it never came, the general losses would include the value of the money you paid for the machine. The consequential losses could include the loss of business caused by the fact you did not have the machine you needed to do your work[[11]](#footnote-11).

Furthermore, another available remedy for breach of contract is **Specific performance.**In some cases, the appropriate remedy for a breach of contract is to correct the breach by forcing the breaching party to complete the terms of the agreement. Specific performance is an appropriate remedy in situations where monetary damages could not possibly make the non-breaching party whole for the losses. For example, if there was a contract created for a buyer to purchase a very rare piece of art, the buyer could not simply find the art elsewhere. The only remedy that would help the buyer in this circumstance is for the court to require the sale to go through so the buyer got the unique one-of-a-kind painting that he contracted for. Specific performance is a remedy for breach of contract in which the court forces the breaching party to perform the services or deliver the goods the promised goods per the contract.  Specific Performance is only available when money damages are inadequate to compensate the plaintiff for a breach.  This remedy is typically used when the goods or services are so unique that no other remedy could suffice.

A decree of specific performances is one by which the court directs the defendant to perform the contract which he has made in accordance with its terms. It is a relief in equity and is one of the earliest examples of the maxim that equity acts *in personam.* In most contracts such as land conveying, antique sale, among others, special performance remains the most suitable remedy for a breach. Hence, Kay, L.J., declared specific performance in the case of ***Ryan v. Mutual Tontine Association[[12]](#footnote-12)*** to be the following:

“This remedy by specific performance was invented, and has been cautiously applied, in order to meet the ordinary remedy by action in damages is not an adequate compensation for breach of contract. The jurisdiction to compel specific performance has always been treated as discretionary, and confined within well-known rules.”

However, it is important to note that the remedy of specific performance is a discretionary one and the plaintiff is not entitled to it as a matter of right. This discretion is one exercised judiciously by the courts. In all cases, the courts will consider if the granting of the decree will be just and equitable under all circumstances of the case. It will therefore not be granted where it will be impossible to carry out, or where it will create hardship. In such cases, only damages will be awarded.

Moving on, yet another remedy available for breach of contract is **Injunction**. An injunction is an order or decree by which one party to an action is required to do or refrain from doing a particular thing. Injunctions are either restrictive or mandatory.[[13]](#footnote-13) An injunction is another way by which a court can order specific performance. Where a party to a contract undertakes not to do something, a court order prohibiting him from doing that thing is a **negative** way of enforcing the contract.

In ***Warner Bros. Pictures Inc. v. Nelson****,* a film actress signed an undertaking with the plaintiffs, her employers, not to act for any other organisation. An injunction was issued to restrain her from committing a breach of this stipulation when she attempted to enter the employment of a third party.

In addition, in **African Songs Ltd. v. Sunday Adeniyi[[14]](#footnote-14)**, a musician who undertook to perform and record solely for the plaintiff company, was restrained for the remaining period of the contract from recording for himself or for any other company.

Conversely, where the injunction is mandatory, it is restorative in its effect and not merely preventive. It directs the defendant to undo what he has already done in breach of contract. This is why in the ***African Songs*** case, the plaintiff, part from seeking an injunction to restrain the defendant from performing or recording music for anyone else, also sought an injunction to restrain the distribution of gramophone records already containing music recorded by the defendant in breach of contract, and an order that they should be withdrawn from the public. Dosunmu, J., relying on ***Holt v. Holt***, held on this point that since these had already been distributed all over the country, nothing could be done about it.

Furthermore, another remedy is **Rescission.**Rescission allows the non-breaching party to essentially be released from performance obligations. Recession is a remedy for a breach of contract because it makes clear that the party is relieved of his duties due to the failure of the other party to perform. Rescission is a remedy used to terminate a contract when parties entered into a contract by way of fraud, undue influence, coercion, or mistake. In the case of rescission, the contractual obligations of both parties are therefore terminated, and the contract will no longer exist.

1. Treitel 2007. [↑](#footnote-ref-1)
2. NOUN contract law. [↑](#footnote-ref-2)
3. See *Nigerian Merchant Bank Plc. V. Aiyedun investment Ltd.* [↑](#footnote-ref-3)
4. [↑](#footnote-ref-4)
5. [www.gulisanolaw.com](http://www.gulisanolaw.com) [↑](#footnote-ref-5)
6. See ***Revelations Perfume and Cosmetics Inc. v. Prince Rogers Nelson***In [↑](#footnote-ref-6)
7. See ***Macy’s v. Martha Stewart Living*** [↑](#footnote-ref-7)
8. https://www.oflaherty-law.com/learn-about-law/ [↑](#footnote-ref-8)
9. (1848) 1 Ex. 850 at p. 855; [1843-60] All E.R. 383 at p. 385 [↑](#footnote-ref-9)
10. (1854) 9 Ex. 341; [1843-60] All E.R. 461 at p. 465. [↑](#footnote-ref-10)
11. https://www.bc-llp.com/what-are-the-remedies-available-for-a-contract-breach/ [↑](#footnote-ref-11)
12. [1893] 1 Ch. 116 at p. 126. [↑](#footnote-ref-12)
13. Osborn Law Dictionary (5th ed.), p. 169. [↑](#footnote-ref-13)
14. (unreported) High Court of Lagos State, Dosunmu, J., Suit No. LD/1300/74 delivered on February 14, 1975. Casebook, p. 361. [↑](#footnote-ref-14)