

第四章 合同的内容与履行

- 一、口头证据规则与合同内容的确定
- 二、合同的解释
- 三、合同的补缺
- 四、合同的变更
- 五、履行义务因障碍或因情况变化而免除

第一节 口头证据规则与合同内容的确定

- 一、口头证据规则的含义
- 二、不可分割的书面协议与可分割的书面协议
- 三、平行协议规则
- 四、证明不存在有强制力的书面协议的证据
- 五、口头证据规则与合同的修改

第一节 口头证据规则与合同内容的确定

- 一、口头证据规则的含义
- （一）定义
- （二）《第二次合同法重述》规定

一、口头证据规则的含义

- (一) 定义
- 口头证据规则 (Parol Evidence Rule), 是指合同当事人订立了一个书面合同, 把他们之间的最终协议用书面形式表达出来后, 有关他们事先理解和协商合同内容的证据, 无论是口头还是其他形式的, 都不能出于更改或对抗这一书面文件的目的而被援用。

一、口头证据规则的含义

- (二) 《第二次合同法重述》规定
- § 213. Effect Of Integrated Agreement On Prior Agreements (Parol Evidence Rule)
- (1) A binding integrated agreement discharges prior agreements to the extent that it is inconsistent with them.
- (2) A binding completely integrated agreement discharges prior agreements to the extent that they are within its scope.
- (3) An integrated agreement that is not binding or that is voidable and avoided does not discharge a prior agreement. But an integrated agreement, even though not binding, may be effective to render inoperative a term which would have been part of the agreement if it had not been integrated.

Illustrations:

- 1. D Corporation regularly borrows money from C Bank. S, the principal stockholder in D, offers to guarantee payment if C will increase the amounts lent. There is a bank custom to make such loans only on adequate collateral supplied by the borrower, and C promises S to follow the custom. S then executes a written agreement with C guaranteeing payment of future loans to D "with or without security." If the written agreement is a binding integrated agreement, C's prior promise is discharged.

Illustrations:

- 2. In May A and B exchange properties and agree orally that A will make certain repairs on the property to be conveyed by A to B, the repairs to be finished by October 1. A and B then draw up and sign a memorandum of the repair agreement, specifying all the terms except that the memorandum is silent as to time of performance. If the memorandum is a binding completely integrated agreement, the agreement to finish by October 1 is discharged, and the repairs are to be finished within a reasonable time. The oral agreement as to October 1 may be relevant evidence as to what is a reasonable time.

Illustrations:

- 3. A and B enter into a contract that B will build a house on A's land for a price. Later they enter into an oral contract by which B promises to add a porch and A promises to pay an extra \$2,000. Still later they enter into an integrated agreement in which B promises to build according to the original plans and A promises to pay the extra \$2,000. The integrated agreement is not binding for lack of consideration, and the oral intermediate agreement is not discharged.

第一节 口头证据规则与合同内容的确定

二、不可分割的书面协议与可分割的书面协议

- 当事人双方订立的书面协议是一个不可分割的协议，还是一个可分割的协议，决定口头证据规则是否适用于某一个特定的案件。

二、不可分割的书面协议与可分割的书面协议

- 《第二次合同法重述》的规定
- § 209. Integrated Agreements
- (1) An integrated agreement is a writing or writings constituting a final expression of one or more terms of an agreement.
- (2) Whether there is an integrated agreement is to be determined by the court as a question preliminary to determination of a question of interpretation or to application of the parol evidence rule.
- (3) Where the parties reduce an agreement to a writing which in view of its completeness and specificity reasonably appears to be a complete agreement, it is taken to be an integrated agreement unless it is established by other evidence that the writing did not constitute a final expression.

Illustrations:

- 1. A and B enter into an oral contract, and prepare and sign a writing to incorporate its terms. Though the writing contains substantially all the orally agreed terms, they are not fully satisfied with it, and they agree to have it redrafted. There is no integrated agreement.

Illustrations:

- 2. A orally agrees to employ B on certain terms. B immediately writes and A receives a letter beginning, "Confirming our oral arrangement this morning," and fully stating the contract as he understands it. A makes no reply but with knowledge of B's understanding accepts services from B under the contract. The letter is a completely integrated agreement. Even though the letter is not in all respects accurate, it operates as an offer of substituted terms, and A's acquiescence manifests assent to those terms.

Illustrations:

- 3. A sells and delivers a hotel to B. Later A takes possession of the hotel furniture, and B sues to recover it. B claims the furniture under an oral agreement; A proves an apparently complete written agreement for the sale of the real property, and objects to consideration of the oral agreement. In the absence of contrary evidence, the writing is taken to be an integration; whether it is a complete integration is decided on the basis of all relevant evidence. If the oral agreement contradicts the writing, or if the writing is a complete integration, evidence of the oral agreement is excluded; otherwise the trier of fact is to decide whether the oral agreement was made.

第一节 口头证据规则与合同内容的确定

- 三、平行协议规则
- （一）含义
- （二）《第二次合同法重述》的规定

三、平行协议规则

- (一) 含义
- 一项书面协议是完全地不可分割的这一事实并不排斥当事人证明，在这一协议之外还存在着一个完全独立的由同样的当事人签订的协议。根据这个规则，在一个完全地不可分割的协议之外，还可以存在一个与前一协议平行的不相抵触的附属性的协议。

三、平行协议规则

- (二) 《第二次合同法重述》规定
- § 216. Consistent Additional Terms
- (1) Evidence of a consistent additional term is admissible to supplement an integrated agreement unless the court finds that the agreement was completely integrated.
- (2) An agreement is not completely integrated if the writing omits a consistent additional agreed term which is
 - (a) agreed to for separate consideration, or
 - (b) such a term as in the circumstances might naturally be omitted from the writing.

Illustrations:

- 1. A owes B two debts, and sends a check for an amount less than the amount of either. In the absence of any contrary manifestation of intention by either party, the rule of law would be that the check is applied to the debt which first matured. An agreement that the other debt is to be paid is not inconsistent with the check.

Illustrations:

- 2. A and B in an integrated writing promise to sell and buy a specific automobile. As part of the transaction they orally agree that B may keep the automobile in A's garage for one year, paying \$15 a month. The oral agreement is not within the scope of the integration and is not superseded.

Illustrations:

- 3. A owes B \$1,000. They agree orally that A will sell B Blackacre for \$3,000 and that the \$1,000 will be credited against the price, and then sign a written agreement, complete on its face, which does not mention the \$1,000 debt or the credit. The written agreement is not completely integrated, and the oral agreement for a credit is admissible in evidence to supplement the written agreement.

第一节 口头证据规则与合同内容的确定

- 四、证明不存在有强制力的书面协议的证据
- （一）证明书面协议不存在的证据
- （二）证明书面协议生效的先决条件的证据
- （三）证明书面协议缺乏对价的证据
- （四）证明书面协议可撤销的证据
- （五）证明书面协议违反公共政策的证据

第一节 口头证据规则与合同内容的确定

- 五、口头证据规则与合同的修改
- （一）一般规则
- （二）合同中的禁止口头修改条款的效力

五、口头证据规则与合同的修改

- （一）一般规则
- 口头证据规则并不阻止当事人向法院出示当事人在书面合同订立之后对该合同进行修改的证据。

五、口头证据规则与合同的修改

- （二）合同中的禁止口头修改条款的效力
- 1、定义
- 2、效力

五、口头证据规则与合同的修改

- (二) 合同中的禁止口头修改条款的效力
- 1、定义
- 合同双方在订立合同时在其中加入一个特别条款，规定对该合同的任何口头修改都是无效的。这种条款被称为“禁止口头修改条款”（no-oral-modification clause）。

五、口头证据规则与合同的修改

- （二）合同中的禁止口头修改条款的效力
- 2、效力
- 传统普通法认为无效。
- 现代制定法修正该普通法的原则。

UCC § 2-209. Modification; Rescission And Waiver

- (1) An agreement modifying a contract within this Article needs no consideration to be binding.
- (2) An agreement in a signed record which excludes modification or rescission except by a signed record may not be otherwise modified or rescinded, but except as between merchants such a requirement in a form supplied by the merchant must be separately signed by the other party.
- (3) The requirements of Section 2-201 must be satisfied if the contract as modified is within its provisions.
- (4) Although an attempt at modification or rescission does not satisfy the requirements of subsection (2) or (3), it may operate as a waiver.
- (5) A party that has made a waiver affecting an executory portion of a contract may retract the waiver by reasonable notification received by the other party that strict performance will be required of any term waived, unless the retraction would be unjust in view of a material change of position in reliance on the waiver.

第二节 合同的解释

- 一、概说
- 二、依当事人的真实意图解释合同
- 三、依合理标准解释合同
- 四、合同的法律解释
- 五、合同的解释与口头证据规则
- 六、交易过程、惯例和履行过程的作用

第二节 合同的解释

- 一、概说
- （一）含义
- （二）种类

第二节 合同的解释

- 一、概说
- （一）含义
- 合同的解释指法官对合同中的词语的含义加以确定从而决定其法律上的效果的过程。

第二节 合同的解释

- 一、概说
- （二）种类
- 1、interpretation
- 2、construction

第二节 合同的解释

- (二) 种类
- 3、两者的区别
- 前者是由法院对当事人赋予合同语言的含义进行确定的过程，即所谓的意图解释；后者指严格按照书面合同的字面含义解释文件，或者按照法律规定的含义解释文件，即所谓的书面的和法律上的解释。
- 前者旨在依据当事人的意图解释，后者则是法官赋予合同的语言一定的涵义。

第二节 合同的解释

- 二、依当事人的真实意图解释合同
- （一）依双方的真实意图解释合同
- （二）依一方的真实意图解释合同
- （三）因重大误解而宣布合同关系不存在
- （四）让一方就合意的存在负举证责任
- （五）主观合意理论的局限性

二、依当事人的真实意图解释合同

- (一) 依双方的真实意图解释合同
- 《第二次合同法重述》
- § 201. Whose Meaning Prevails
- **(1) Where the parties have attached the same meaning to a promise or agreement or a term thereof, it is interpreted in accordance with that meaning.**

二、依当事人的真实意图解释合同

- (二) 依一方的真实意图解释合同
- 《第二次合同法重述》
- § 201. Whose Meaning Prevails
- **(2) Where the parties have attached different meanings to a promise or agreement or a term thereof, it is interpreted in accordance with the meaning attached by one of them if at the time the agreement was made**
- **(a) that party did not know of any different meaning attached by the other, and the other knew the meaning attached by the first party; or**
- **(b) that party had no reason to know of any different meaning attached by the other, and the other had reason to know the meaning attached by the first party.**

二、依当事人的真实意图解释合同

- (三) 因重大误解而宣布合同关系不存在
- 《第二次合同法重述》
- § 20. Effect Of Misunderstanding
- **(1) There is no manifestation of mutual assent to an exchange if the parties attach materially different meanings to their manifestations and**
- **(a) neither party knows or has reason to know the meaning attached by the other; or**
- **(b) each party knows or each party has reason to know the meaning attached by the other.**
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二、依当事人的真实意图解释合同

- （四）让一方就合意的存在负举证责任
- 如果合同双方都不知道，也没有理由知道另一方对合同中的某一词语与自己不同理解，双方的误解又不属于重大误解，因而没有理由认为合同没有成立。
- 美国法院在司法实践中采用的处理方法是：让有义务举证的一方就对方已经同意了自己一方对合同词语的理解提供证据。

二、依当事人的真实意图解释合同

- （五）主观合意理论的局限性

第二节 合同的解释

- 三、依合理标准解释合同
- （一）适用合理标准的一般原则
- （二）依合理标准解释合同的具体规则

三、依合理标准解释合同

- （一）适用合理标准的一般原则
- 依合理标准解释合同指在考察各种具体情况的基础上对合同中有争议的词语作出一种恰如其分的解释。

三、依合理标准解释合同

- （二）依合理标准解释合同的具体规则
- 1、列举事项对其他事项的排除与包容
- 2、相抵触的内容的肯定与否定
- 3、讨价还价应导致公平交易

第二节 合同的解释

- 四、合同的法律解释
- （一）对提出者应作不利的解释
- （二）合同解释应符合公共利益
- （三）标准化合同的解释

四、合同的法律解释

- 《第二次合同法重述》
- § 211. Standardized Agreements
-
- **(2) Such a writing is interpreted wherever reasonable as treating alike all those similarly situated, without regard to their knowledge or understanding of the standard terms of the writing.**
- **(3) Where the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement.**

Illustrations:

- 1. A pays ten cents and checks a parcel in a parcel room in a bus terminal, and receives a parcel check three inches long and two and one-half inches wide. The check bears an identifying number and the word "contract," both conspicuous, and contractual terms in fine print, but A does not read it or know of the terms until later. The terms are not part of the checking agreement.

Illustrations:

- 2. A, an insurance company, issues an insurance policy to B covering injuries "by accidental means." A clause in the policy excludes "disability or other loss resulting from or contributed to by any disease or ailment." B believes himself to be in good health, but has a latent Parkinson's disease. Later an accidental blow activates the disease into a disabling condition. B is covered by the policy without regard to his knowledge or understanding of the quoted language at the time of contracting.

Illustrations:

- 3. A sends to B an invitation to bid on ship repairs. Annexed to the invitation are contract terms, including a promise by B to save A harmless from certain claims. B's bid has printed at the top, in print which cannot be read without a magnifying glass, a clause negating liability for personal injuries beyond that imposed by law. A accepts the bid. The clause in the bid is ineffective to negate B's obligation to save A harmless.

Illustrations:

- 4. A sells an electric generator to B by a written contract incorporating typewritten specifications and printed standard terms. The specifications include "1136 kilowatts," and the standard terms disclaim any warranties not set forth in the documents. The disclaimer does not impair A's warranty that the generator will produce 1136 kilowatts.

第二节 合同的解释

- 五、合同的解释与口头证据规则
- 所有法院都认为，为了解释合同的需要，当事人可以向法院出示有关合同订立之前当事人双方协商情况的证据；口头证据规则并不阻止当事人出示这样的证据，即使该合同是一个不可分割的协议，只要合同的语言本身是“模棱两可的”或“含糊不清的”。

第二节 合同的解释

- 六、交易过程、惯例和履行过程的作用
- （一）交易过程
- （二）行业惯例
- （三）明确表达的合同条款与交易过程和行业惯例的关系
- （四）履约过程

六、交易过程、惯例和履行过程的作用

(一) 交易过程

《第二次合同法重述》

§ 223. Course Of Dealing

- **(1) A course of dealing is a sequence of previous conduct between the parties to an agreement which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.**
- **(2)**

Illustrations:

- 1. A, a sugar company, enters into a written agreement with B, a grower of sugar beets, by which B agrees to raise and deliver and A to purchase specified quantities of beets during the coming season. No price is fixed. The agreement is on a standard form used for B and many other growers in prior years. A's practice is to pay all growers uniformly on a formula based on A's "net return" according to A's established accounting system. Unless otherwise agreed, the established pattern of pricing is part of the agreement.

Illustrations:

- 2. A, a manufacturer, sends a price quotation on goods to B, a dealer, together with printed "conditions of sale." B then sends orders to A; and A fills them. B takes advantage of discount terms of the quotation not referred to in B's orders. Unless otherwise agreed, the "conditions of sale" are part of each contract.

六、交易过程、惯例和履行过程的作用

- (二) 行业惯例
- 《第二次合同法重述》
- § 222. Usage Of Trade
- **(1) A usage of trade is a usage having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to a particular agreement. It may include a system of rules regularly observed even though particular rules are changed from time to time.**
- **(2)**

Illustrations:

- 1. A contracts to sell B 10,000 shingles. By usage of the lumber trade, in which both are engaged, two packs of a certain size constitute 1,000, though not containing that exact number. Unless otherwise agreed, 1,000 in the contract means two packs.

Illustrations:

- 2. A contracts to employ B for 20 days. In the kind of work to which the employment relates, in the place where both reside and the work is to be performed, a day's work is eight hours. Unless otherwise agreed, B's employment is for 20 eight-hour days.

六、交易过程、惯例和履行过程的作用

- (三) 明确表达的合同条款与交易过程和行业惯例的关系
- UCC § 1-303. Course Of Performance, Course Of Dealing, And Usage Of Trade
- (e) Except as otherwise provided in subsection (f), the express terms of an agreement and any applicable course of performance, course of dealing, or usage of trade must be construed whenever reasonable as consistent with each other. If such a construction is unreasonable:
 - (1) express terms prevail over course of performance, course of dealing, and usage of trade;
 - (2) course of performance prevails over course of dealing and usage of trade; and
 - (3) course of dealing prevails over usage of trade.

六、交易过程、惯例和履行过程的作用

- (四) 履约过程
- UCC § 1-303. Course Of Performance, Course Of Dealing, And Usage Of Trade
- (a) A "course of performance" is a sequence of conduct between the parties to a particular transaction that exists if:
- (1) the agreement of the parties with respect to the transaction involves repeated occasions for performance by a party; and
- (2) the other party, with knowledge of the nature of the performance and opportunity for objection to it, accepts the performance or acquiesces in it without objection.

第三节 合同的补缺

- 一、合同内容缺漏的出现及其原因
- 二、合同补缺的基本步骤
- 三、依共同的默示意图补缺
- 四、依推定意图补缺
- 五、依法律的规定补缺

第三节 合同的补缺

- 一、合同内容缺漏的出现及其原因
- （一）合同内容缺漏的出现
- （二）合同内容缺漏的出现的的原因

一、合同内容缺漏的出现及其原因

- （一）合同内容缺漏的出现
- 合同内容的缺漏指合同没有就当事人争议的事项作出明示的规定，因而依合同的明示条款无法确定涉及这一争议双方的权利和义务。

一、合同内容缺漏的出现及其原因

- （二）合同内容缺漏的出现的原因
- 1、当事人在订立合同时没有预见。
- 2、当事人仅就某些事项达成了协议，有意地将其他事项留给法院去补充。

第三节 合同的补缺

二、合同补缺的基本步骤

- 1、依当事人默示地表达地真实意图补缺。
- 2、依法院推定的当事人应当具有的意图补缺。
- 3、依法律的规定补缺。

第三节 合同的补缺

- 三、依共同的默示意图补缺
- 法院在确定当事人双方共同具有的真实默示意图时应当考虑全部的背景情况，包括合同本身的规定和语言、在口头证据规则允许的范围内双方协商的过程、履约过程、交易过程和行业惯例等。

第三节 合同的补缺

- 四、依推定意图补缺
- （一）依履约过程、交易过程或行业惯例补缺
- （二）依“善意义务”补缺
- 1、 概说
- 2、 产量合同与需求合同
- 3、 “最大努力义务”或“合理努力义务”
- 4、 合同终止权
- （三）依信托义务补缺

第三节 合同的补缺

- 五、 依法律的规定补缺

第四节 合同的变更

- 一、依协议修改合同
- 二、通过和解减轻或免除合同义务
- 三、弃权

第四节 合同的变更

- 一、依协议修改合同
- （一）对价制度的影响
- （二）口头证据规则的影响
- （三）欺诈行为法的影响

一、依协议修改合同

- （一）对价制度的影响
- 根据对价的原理和原则，合同一方依合同对另一方承担的义务作为一种既存义务，不能成为另一方新的诺言的对价。
- 两种例外情况

一、依协议修改合同

- 《第二次合同法重述》 § 89. Modification Of Executory Contract
- **A promise modifying a duty under a contract not fully performed on either side is binding**
- **(a) if the modification is fair and equitable in view of circumstances not anticipated by the parties when the contract was made; or**
- **(b) to the extent provided by statute; or**
- **(c) to the extent that justice requires enforcement in view of material change of position in reliance on the promise.**

Illustrations:

- 1. By a written contract A agrees to excavate a cellar for B for a stated price. Solid rock is unexpectedly encountered and A so notifies B. A and B then orally agree that A will remove the rock at a unit price which is reasonable but nine times that used in computing the original price, and A completes the job. B is bound to pay the increased amount.

Illustrations:

- 2. A defaults in payment of a premium on a life insurance policy issued by B, an insurance company. Pursuant to the terms of the policy, B notifies A of the lapse of the policy and undertakes to continue the insurance until a specified future date, but by mistake specifies a date two months later than the insured would be entitled to under the policy. On inquiry by A two years later, B repeats the mistake, offering A an option to take a cash payment. A fails to do so, and dies one month before the specified date. B is bound to pay the insurance.

一、依协议修改合同

- 《统一商法典》
- § 2-209. Modification; Rescission And Waiver
- (1) An agreement modifying a contract within this Article needs no consideration to be binding.
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Official Comment

- 2. Subsection (1) provides that an agreement modifying a sales contract needs no consideration to be binding.
- However, modifications made thereunder must meet the test of good faith imposed by this Act. The effective use of bad faith to escape performance on the original contract terms is barred, and the extortion of a "modification" without legitimate commercial reason is ineffective as a violation of the duty of good faith. Nor can a mere technical consideration support a modification made in bad faith.

一、依协议修改合同

(二) 口头证据规则的影响
见上文本章第一节所述

一、依协议修改合同

- （三）欺诈行为法的影响
- 合同双方达成的修改原合同的协议受不受欺诈行为法的支配，取决于该修改协议本身受不受欺诈行为法支配。

第四节 合同的变更

- 二、通过和解减轻或免除合同义务
 - （一）对对价的要求
 - （二）合同的更新与待履行的和解协议
 - （三）其他有对价支持的减轻或免除债务的方式
 - （四）无对价支持地减轻或免除债务的方式

Illustrations:

- 1. A owes B \$1,000. B promises A that he will discharge the debt immediately if C will promise B to pay B \$1,000. C so promises. There is a novation under which B's and C's promises are consideration for each other and A is discharged.

Illustrations:

- 2. A owes B \$1,000 and B owes C \$1,000. A promises B and C that he will assume B's debt to C if B promises to discharge A's debt to B and if C promises to discharge B's debt to C and accept A as his debtor. B and C so promise. There is a novation under which A's promise and B's and C's promises are consideration for each other, and A's debt to B and B's debt to C are discharged.

第四节 合同的变更

- 三、弃权
- （一）弃权的概念
- （二）重新恢复放弃的条件
- （三）债务人在条件发生期过后的选择
- （四）对弃权的限制

Illustrations :

- 1. A employs B to build a house, promising to pay therefor \$10,000 on the production of a certificate from A's architect, C, stating that the work has been satisfactorily completed. B builds the house but the work is defective in certain trivial particulars. C refuses to give B a certificate. A says to B, "My architect rightfully refuses to give you a certificate but the defects are not serious; I will pay you the full price which I promised." A is bound to do so, and has no power to restore the requirement of the condition.

Illustrations :

- 2. A, an insurance company, insures B's house against loss by fire. The insurance policy provides that unless suit is brought on the policy within twelve months after a loss, no recovery can be had. An insured loss occurs and A tells B that it is unnecessary to bring suit within that time. Unless B has so changed his position that it would be unjust to restore the time limitation, A can do so by giving B notice. Thereafter B has a reasonable time to bring suit. In the absence of special circumstances, the reasonable time will expire twelve months after the notice is received.

第五节 履行义务因障碍或因情况变化而免除

- 一、因另一方不履约而免责
- 二、因履行不能而免责
- 三、因目的落空而免责
- 四、履行不能与目的落空的后果

第五节 履行义务因障碍或因情况变化而免除

- 一、因另一方不履约而免责
- （一）“推定的交换条件”理论
- （二）对流条件
- （三）履约次序的确定
- （四）避免没收的各种手段

第五节 履行义务因障碍或因情况变化而免除

- 一、因另一方不履约而免责
- （一）“推定的交换条件”理论（constructive conditions of exchange）
- 根据这种理论，法院可以依当事人明显的意图和交换的实质推定，一个双诺合同的一方的履行以另外一方的履行为条件，或双方的履行为条件。当一方的履行以另一方的履行为条件时，后者的不履行可以成为前者不履行的免责理由。

第五节 履行义务因障碍或因情况变化而免除

- 一、因另一方不履约而免责
- （二）对流条件（concurrent conditions）
- 当合同双方有义务在同一时间履行其义务时，双方的履行构成对流条件。推定的交换条件理论适用于存在对流条件的情况。

第五节 履行义务因障碍或因情况变化而免除

- 一、因另一方不履约而免责
- （三）履约次序的确定
- 1、只要双方达成的协议允许对应的履行是同一时间作出的，双方应当在同一时间履行；
- 2、如果一方的履行是工作，另一方的履行是付款，工作是付款的先决条件。

Illustrations:

- 1. A promises to sell land to B, delivery of the deed to be on July 1. B promises to pay A \$50,000, payment to be made on July 1. Delivery of the deed and payment of the price are due simultaneously.

Illustrations:

- 2. A promises to sell land to B, delivery of the deed to be four years from the following July 1. B promises to pay A \$50,000 in installments of \$10,000 on each July 1 for five years. Delivery of the deed and payment of the last installment are due simultaneously.

Illustrations:

- 3. A contracts to do the concrete work on a building being constructed by B for \$10 a cubic yard. In the absence of language or circumstances indicating the contrary, payment by B is not due until A has finished the concrete work.

第五节 履行义务因障碍或因情况变化而免除

- 一、因另一方不履约而免责
- （四）避免没收的各种手段
- 1、仅要求“实质性履约”
- 2、将合同分解
- 3、允许违约方恢复原状

第五节 履行义务因障碍或因情况变化而免除

- 二、因履行不能而免责
- （一）履行不能作为免责理由的演变
- （二）履行不能理论的新发展

第五节 履行义务因障碍或因情况变化而免除

- 二、因履行不能而免责
- （一）履行不能作为免责理由的演变
- 1、普通法规定
- 2、三种例外

第五节 履行义务因障碍或因情况变化而免除

- 二、因履行不能而免责
- （二）履行不能理论的新发展
- 1、《统一商法典》
- 2、《第二次合同法重述》

Uniform Commercial Code

- § 2-615. Excuse By Failure Of Presupposed Conditions
- Except to the extent that a seller may have assumed a greater obligation and subject to Section 2-614:
- (a) Delay in performance or nonperformance in whole or in part by a seller that complies with paragraphs (b) and (c) is not a breach of the seller's duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the nonoccurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.
-

Restatement (Second) of Contracts

- § 261. Discharge By Supervening Impracticability
- **Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.**

Illustrations:

- 1. On June 1, A agrees to sell and B to buy goods to be delivered in October at a designated port. The port is subsequently closed by quarantine regulations during the entire month of October, no commercially reasonable substitute performance is available (see Uniform Commercial Code § 2-614(1)), and A fails to deliver the goods. A's duty to deliver the goods is discharged, and A is not liable to B for breach of contract.

Illustrations:

- 2. Several months after the nationalization of the Suez Canal, during the international crisis resulting from its seizure, A contracts to carry a cargo of B's wheat on A's ship from Galveston, Texas to Bandar Shapur, Iran for a flat rate. The contract does not specify the route, but the voyage would normally be through the Straits of Gibraltar and the Suez Canal, a distance of 10,000 miles. A month later, and several days after the ship has left Galveston, the Suez Canal is closed by an outbreak of hostilities, so that the only route to Bandar Shapur is the longer 13,000 mile voyage around the Cape of Good Hope. A refuses to complete the voyage unless B pays additional compensation. A's duty to carry B's cargo is not discharged, and A is liable to B for breach of contract.

Illustrations:

- 3. A, a general contractor, is bidding on a construction contract with B which gives B the right to disapprove the choice of subcontractors. A makes a contract with C, a subcontractor, under which, if B awards A the contract, A will obtain B's approval of C and C will do the excavation for A. A is awarded the contract by B, but B disapproves A's choice of C, and A has the excavation work done by another subcontractor. A's duty to have C do the excavation is not discharged, and A is liable to C for breach of contract.

Illustrations:

- 4. A contracts to repair B's building. The contract contains a valid provision requiring A to pay liquidated damages if he fails to make any of the repairs. S is surety for A's performance. Before A is able to begin, B's building is destroyed by fire. Neither A's nor S's duty is one to render an alternative performance. A's duty to repair the building is discharged, and A is not liable to B for liquidated damages or otherwise for breach of contract. S's duty as surety for A is also discharged, and S is not liable to B for breach of contract.

第五节 履行义务因障碍或因情况变化而免除

- 三、因目的落空而免责
- （一）理论的诞生和发展
- （二）构成要件
- （三）有关房屋租赁合同案例

第五节 履行义务因障碍或因情况变化而免除

- 三、因目的落空而免责
- （一）理论的诞生和发展
- 1、渊源于1903年英国克雷尔诉亨利案。
- 2、得到两次《合同法重述》的采纳，但是没有为《统一商法典》采纳。

第五节 履行义务因障碍或因情况变化而免除

- 三、因目的落空而免责
- （二）构成要件
- 1、该时间使其订立合同的主要目的实质性地落空了。
- 2、该事件的不发生是合同赖以订立的基本假定。
- 3、该落空不是因请求免责的一方的过错发生的。
- 4、该方没有在法律强加的义务之外承担额外的义务。

Illustrations:

- 1. A and B make a contract under which B is to pay A \$1,000 and is to have the use of A's window on January 10 to view a parade that has been scheduled for that day. Because of the illness of an important official, the parade is cancelled. B refuses to use the window or pay the \$1,000. B's duty to pay \$1,000 is discharged, and B is not liable to A for breach of contract.

Illustration:

- 2. A leases a gasoline station to B. A change in traffic regulations so reduces B's business that he is unable to operate the station except at a substantial loss. B refuses to make further payments of rent. If B can still operate the station, even though at such a loss, his principal purpose of operating a gasoline station is not substantially frustrated. B's duty to pay rent is not discharged, and B is liable to A for breach of contract. The result would be the same if substantial loss were caused instead by a government regulation rationing gasoline or a termination of the franchise under which B obtained gasoline.

第五节 履行义务因障碍或因情况变化而免除

- 四、履行不能与目的落空的后果
- （一）一般原则
- （二）预期的不履行的后果
- （三）暂时的履行不能或目的落空
- （四）部分的履行不能
- （五）恢复原状