

## 第五章 违约及其救济措施

- 第一节、受损害方在另一方违约时的权利和义务
- 第二节、违约救济
- 第三节、预期违约

## 第一节 受损害方在另一方违约时的权利和义务

- 一、中止履行的权利
- 二、给违约方自行补救机会的义务
- 三、解除或终止合同的权利

# 第一节 受损害方在另一方违约时的权利和义务

- 一、中止履行的权利
- 中止履行是指合同一方在合同为其规定的履行期到来时暂时不履行该方的合同义务。

# Uniform Commercial Code

- § 2-609. Right To Adequate Assurance Of Performance
- (1) A contract for sale imposes an obligation on each party that the other's expectation of receiving due performance will not be impaired. If reasonable grounds for insecurity arise with respect to the performance of either party, the other may demand in a record adequate assurance of due performance and until the party receives the assurance may if commercially reasonable suspend any performance for which it has not already received the agreed return.
- .....

# Official Comment

- 2. Three measures have been adopted to meet the needs of commercial men in such situations.
- First, the aggrieved party is permitted to suspend his own performance and any preparation therefor, with excuse for any resulting necessary delay, until the situation has been clarified. "Suspend performance" under this section means to hold up performance pending the outcome of the demand, and includes also the holding up of any preparatory action. This is the same principle which governs the ancient law of stoppage and seller's lien, and also of excuse of a buyer from prepayment if the seller's actions manifest that he cannot or will not perform.

# Official Comment

- Secondly, the aggrieved party is given the right to require adequate assurance that the other party's performance will be duly forthcoming. This principle is reflected in the familiar clauses permitting the seller to curtail deliveries if the buyer's credit becomes impaired, which when held within the limits of reasonableness and good faith actually express no more than the fair business meaning of any commercial contract.

# Official Comment

- Third, and finally, this section provides the means by which the aggrieved party may treat the contract as broken if his reasonable grounds for insecurity are not cleared up within a reasonable time. This is the principle underlying the law of anticipatory breach, whether by way of defective part performance or by repudiation. The present section merges these three principles of law and commercial practice into a single theory of general application to all sales agreements looking to future performance.

## 第一节 受损害方在另一方违约时的权利和义务

- 二、给违约方自行补救机会的义务
- 在某些情况下，即使合同一方严重地违反了合同，法院依然会认为，受损害方在中止自己一方的履行或者解除合同之前，必须给违约方一个对其违约进行自行补救的机会，只要违约方有这样的要求。



# Uniform Commercial Code

- § 2-508. Cure By Seller Of Improper Tender Or Delivery; Replacement
- (1) If the buyer rejects goods or a tender of delivery under Section 2-601 or 2-612 or, except in a consumer contract, justifiably revokes acceptance under Section 2-608(1)(b) and the agreed time for performance has not expired, a seller that has performed in good faith, upon reasonable notice to the buyer and at the seller's own expense, may cure the breach of contract by making a conforming tender of delivery within the agreed time. The seller shall compensate the buyer for all of the buyer's reasonable expenses caused by the seller's breach of contract and subsequent cure.

# Uniform Commercial Code

- § 2-508. Cure By Seller Of Improper Tender Or Delivery; Replacement
- (2) If the buyer rejects goods or a tender of delivery under Section 2-601 or 2-612 or, except in a consumer contract, justifiably revokes acceptance under Section 2-608(1)(b) and the agreed time for performance has expired, a seller that has performed in good faith, upon reasonable notice to the buyer and at the seller's own expense, may cure the breach of contract, if the cure is appropriate and timely under the circumstances, by making a tender of conforming goods. The seller shall compensate the buyer for all of the buyer's reasonable expenses caused by the seller's breach of contract and subsequent cure.

## 第一节 受损害方在另一方违约时的权利和义务

- 三、解除或终止合同的权利
- （一）解除合同与终止合同异同
- （二）法院考虑的各种因素

# 第一节 受损害方在另一方违约时的权利和义务

- 三、解除或终止合同的权利
- （一）解除与终止合同异同
- 两者均有使合同各方不必继续履行合同义务的效果。
- 合同的解除使原来订立的合同不复存在，双方在经济上应恢复到合同订立之前的状态；合同的终止使合同自终止之日不再约束合同双方，但各方在终止日之前，从合同的履行中获得的利益却依然为各方保留。

# 第一节 受损害方在另一方违约时的权利和义务

- 三、解除或终止合同的权利
- （二）法院考虑的各种因素
- 1、违约方的拖延将在多大程度上剥夺受损害方有权期望从该交易中获得的利益；
- 2、允许受损害方马上解除合同会给违约方造成多大的损失。

## 第二节 违约救济

- 一、违约救济的历史演变

# 一、违约救济的历史演变

- 在英美法上，违约救济的历史主要是损害赔偿和实际履行这两种救济手段发展演变的历史。
- 损害赔偿是典型的普通法上的救济方法，实际履行是衡平法上的救济方法。
- 普通法上救济成为法院通常采用的救济手段，衡平法的救济只是在特殊情况下才采用的救济手段。

## 第二节 违约救济

- 二、确定救济手段的基本政策



## 二、确定救济手段的基本政策

- 采用任何一种救济手段均应避免对违约方施加惩罚的结果。

## 第二节 违约救济

- 三、损害赔偿

## 三、损害赔偿

- （一）恢复受损害方的经济地位
- 违约损害赔偿的基本原则是，因违约而蒙受损害的一方应当在经济上恢复到合同得到正常履行时他本应处的地位。

## 三、损害赔偿

- （二）应限于违约方有理由预见到的违约的后果
- 这一规则是“恢复受损害方经济地位”规则的重要限制，渊源于1854年英国法院审理的著名的哈德利诉巴克森戴尔案。

# Restatement (Second) of Contracts

- § 351. Unforeseeability And Related Limitations On Damages
- (1) Damages are not recoverable for loss that the party in breach did not have reason to foresee as a probable result of the breach when the contract was made.
- (2) Loss may be foreseeable as a probable result of a breach because it follows from the breach
  - (a) in the ordinary course of events, or
  - (b) as a result of special circumstances, beyond the ordinary course of events, that the party in breach had reason to know.
- (3) A court may limit damages for foreseeable loss by excluding recovery for loss of profits, by allowing recovery only for loss incurred in reliance, or otherwise if it concludes that in the circumstances justice so requires in order to avoid disproportionate compensation.

## Comment:

### *a. Requirement of foreseeability.*

- **Illustrations:**

- 1. A, a carrier, contracts with B, a miller, to carry B's broken crankshaft to its manufacturer for repair. B tells A when they make the contract that the crankshaft is part of B's milling machine and that it must be sent at once, but not that the mill is stopped because B has no replacement. Because A delays in carrying the crankshaft, B loses profit during an additional period while the mill is stopped because of the delay. A is not liable for B's loss of profit. That loss was not foreseeable by A as a probable result of the breach at the time the contract was made because A did not know that the broken crankshaft was necessary for the operation of the mill.

## Comment:

### *b. "General" and "special" damages.*

- **Illustrations:**

- 2. A and B make a written contract under which A is to recondition by a stated date a used machine owned by B so that it will be suitable for sale by B to C. A knows when they make the contract that B has contracted to sell the machine to C but knows nothing of the terms of B's contract with C. Because A delays in returning the machine to B, B is unable to sell it to C and loses the profit that he would have made on that sale. B's loss of reasonable profit was foreseeable by A as a probable result of the breach at the time the contract was made.

## **Comment:** *c. Litigation or settlement caused by breach.*

- **Illustrations:**
- 3. A contracts to supply B with machinery for unloading cargo. A, in breach of contract, furnishes defective machinery, and C, an employee of B, is injured. C sues B and gets a judgment, which B pays. The amount of the judgment and B's reasonable expenditures in defending the action were foreseeable by A at the time the contract was made as a probable result of the breach.



## **Comment:** *d. Unavailability of substitute.*

- **Illustration:**
- 4. A contracts with B, a farmer, to lease B a machine to be used harvesting B's crop, delivery to be made on July 30. A knows when he makes the contract that B's crop will be ready on that date and that B cannot obtain another machine elsewhere. Because A delays delivery until August 10, B's crop is damaged and he loses profit. B's loss of profit was foreseeable by A at the time the contract was made as a probable result of the breach.

## **Comment:** *e. Breach of contract to lend money.*

- **Illustrations:**

- 5. A contracts to lend B \$100,000 for one year at eight percent interest for the stated purpose of buying a specific lot of goods for resale. B can resell the goods at a \$20,000 profit. A delays in making the loan, and although B can borrow money on the market at ten percent interest, he is unable to do so in time and loses the opportunity to buy the goods. Unless A had reason to foresee at the time that he made the contract that such a delay in making the loan would probably cause B to lose the opportunity, B can only recover damages based on two percent of the amount of the loan.

## **Comment:** *f. Other limitations on damages.*

- **Illustrations:**

- 6. A, a retail hardware dealer, contracts to sell B an inexpensive lighting attachment, which, as A knows, B needs in order to use his tractor at night on his farm. A is delayed in obtaining the attachment and, since no substitute is available, B is unable to use the tractor at night during the delay. In an action by B against A for breach of contract, the court may, after taking into consideration such factors as the absence of an elaborate written contract and the extreme disproportion between B's loss of profits during the delay and the price of the attachment, exclude recovery for loss of profits.

## 三、损害赔偿

- （三）主观臆测的损失不能获得赔偿
- 涉及损害赔偿的范围，英美法院在审判实践中发展出了两个专门术语——期待权益和依赖权益。
- 根据美国法院的判决，在考虑确认受损害方可获得的期待权益时，应特别防止损失计算的主观臆测性。

## 三、损害赔偿

- （四）期待权益不能证明时依赖权益可获得赔偿
- 如前所述，受损害方所主张的损失额在计算上必须具有合理的确定性。在特定的案件当中，如果受损害方无法按这样的标准证明违约所造成的他本来可以获得的期待权益的价值是多少，他可以放弃对期待权益的赔偿要求，而只要求就违约给他造成的依赖利益的损失的赔偿。

# Restatement (Second) of Contracts

- § 349. Damages Based On Reliance Interest
- **As an alternative to the measure of damages stated in § 347, the injured party has a right to damages based on his reliance interest, including expenditures made in preparation for performance or in performance, less any loss that the party in breach can prove with reasonable certainty the injured party would have suffered had the contract been performed.**

## ***Comment:***

### ***a. Reliance interest where profit uncertain.***

- Illustrations:
- 1. A contracts with B to stage a series of performances in B's theater, each to have 50 per cent of the gross receipts. After A has spent \$20,000 in getting ready for the performances, B rents the theater to others and repudiates the contract, and A stages the performance at another theater. A's expenditures in preparation for performance of the contract with B are worth \$8,000 to him in connection with staging the performances at the other theater. If neither party proves with reasonable certainty what profit or loss A would have made if the contract had been performed, A can recover as damages the \$12,000 balance of his expenditures in preparation for performance.

## 第二节 违约救济

- 三、损害赔偿
- （五）不应允许通过违约而获利
- （六）受损害方有义务减轻损失
- （七）赔偿不应导致经济上的浪费
- （八）受损害方本来就不能履约时不得要求赔偿



## 三、损害赔偿

- （五）不应允许通过违约而获利
- 如果合同一方认为，履行一个已经签订的合同对自己来说在经济上是不合算的，因此，该方宁愿违约而支付损害赔偿金也不愿履行自己已经承担的合同义务，法院在确定损害赔偿的范围时就可能作出更有利于受损害方而不利于违约方的处置。

# Restatement (Second) of Contracts

- § 352. Uncertainty As A Limitation On Damages
- **Damages are not recoverable for loss beyond an amount that the evidence permits to be established with reasonable certainty.**

## Comment:

- *a. Requirement of certainty.*
- .....
- Doubts are generally resolved against the party in breach. A party who has, by his breach, forced the injured party to seek compensation in damages should not be allowed to profit from his breach where it is established that a significant loss has occurred. ....

## 三、损害赔偿

- （六）受损害方有义务减轻损失
- 一方违约后，另一方负有减轻损失的义务，否则，他无权就本来可以避免的损失要求得到赔偿。

## (六) 受损害方有义务减轻损失

- Restatement (Second) of Contracts
- § 350. Avoidability As A Limitation On Damages
- (1) Except as stated in Subsection (2), damages are not recoverable for loss that the injured party could have avoided without undue risk, burden or humiliation.
- (2) The injured party is not precluded from recovery by the rule stated in Subsection (1) to the extent that he has made reasonable but unsuccessful efforts to avoid loss.

## Illustrations:

- 1. A contracts to build a bridge for B for \$100,000. B repudiates the contract shortly after A has begun work on the bridge, telling A that he no longer has need for it. A nevertheless spends an additional \$10,000 in continuing to perform. A's damages for breach of contract do not include the \$10,000.

## 三、损害赔偿

- （七）赔偿不应导致经济上的浪费
- 违约的受害方有权要求从违约方获得赔偿从而在经济上恢复到合同得到正常履行时他本应处在的地位。
- 然而，如果法官发现，奉行上述原则将导致经济上的浪费，法官就会采用变通的办法以避免这种浪费的发生。

### 三、损害赔偿

- (八) 受损害方本来就不能履约时不得要求赔偿
- 详见 Restatement (Second) of Contracts  
§ 254



## 三、损害赔偿

- （九）违约方的期待权益与赔偿金之间的差额不能过于悬殊
- 根据《第二次合同法重述》第351（3）条，法院应避免使受损害方得到“不相称的损害赔偿金”。（**disproportionate compensation.**）

## Illustrations:

- 1. A, a private trucker, contracts with B to deliver to B's factory a machine that has just been repaired and without which B's factory, as A knows, cannot reopen. Delivery is delayed because A's truck breaks down. In an action by B against A for breach of contract the court may, after taking into consideration such factors as the absence of an elaborate written contract and the extreme disproportion between B's loss of profits during the delay and the price of the trucker's services, exclude recovery for loss of profits.

## 三、损害赔偿

- （十）违约没有引起实际的损害时只能给予名义上的赔偿
- 违约没有引起实际损害或者受损害方主张的损失额缺乏足够的确定性因而不能被法院接受，该方只能得到名义上的损害赔偿，其数额由法官依其裁量权确定，通常是6美分或者1美元。

## 三、损害赔偿

- （十一）精神上的损害的赔偿应受到限制
- 在合同之诉中，法院对违约所致的精神损害通常并不考虑给予赔偿。
- 然而，当这种损害明显地存在以致法院认为违约方在订立合同时可以预料到违约可以导致这种损害时，法院就可能准许违约的受损害方获得此种损害赔偿。

## 三、损害赔偿

- （十二） 损害赔偿金不得重复计算

## 三、损害赔偿

- （十三）应综合考虑各种因素
- 在实践中，违约损害赔偿范围的确定，往往是综合考察案件的各种具体情况和综合运用各种有关的原则和规则的结果。

## 第二节 违约救济

- 四、实际履行

## 第二节 违约救济

- 四、实际履行
- （一）赔偿额的计算是否具有确定性
- （二）替代的履行是否具有可行性
- （三）违约方是否有偿付能力
- （四）对实际履行的监督是否会发生困难



## 第二节 违约救济

- 四、实际履行
- （五）违约方的服务是否具有个人性质
- （六）受损害方能否提供对应的履行
- （七）其他限制

# Uniform Commercial Code

- § 2-716. Specific Performance; Buyer's Right To Replevin
- (1) Specific performance may be decreed if the goods are unique or in other proper circumstances. In a contract other than a consumer contract, specific performance may be decreed if the parties have agreed to that remedy. However, even if the parties agree to specific performance, specific performance may not be decreed if the breaching party's sole remaining contractual obligation is the payment of money.
- (2) The decree for specific performance may include such terms and conditions as to payment of the price, damages, or other relief as the court may deem just.
- .....

# Official Comment

- **3. Subsection (1) provides that a court may decree specific performance if the parties have agreed to that remedy. The parties' agreement to specific performance can be enforced even if legal remedies are entirely adequate. Even in a commercial contract, the third sentence of subsection (1) prevents the aggrieved party from obtaining specific performance if the only obligation of the party in breach is the payment of money. Whether a buyer is obligated to pay the price is determined by Section 2-709, not by this section.**
- **Nothing in this section constrains the court's exercise of its equitable discretion to decide whether to enter a decree for specific performance or to determine the conditions or terms of the decree. This section assumes that the decree for specific performance is conditioned on a tender of full performance by the party that seeks the remedy.**

## 第二节 违约救济

- 五、禁令

## 第二节 违约救济

- 五、禁令
- （一）禁止违约方违背其明示的诺言
- （二）禁止违约方违背其默示的诺言

## 第二节 违约救济

- 六、恢复原状

## 第二节 违约救济

- 六、恢复原状
- 恢复原状作为一种救济手段既可以单独地采用也可以与其他的救济手段共同采用，其中的返还权益既可以由受损害方单独地主张，也可以与其他权益一同主张。

## 第二节 违约救济

- 七、合同的重写



## 第二节 违约救济

- 七、合同的重写
- （一）重写合同的含义
- （二）因错误而重写合同
- （三）因欺诈而重写合同
- （四）口头证据规则的适用
- （五）法院的裁量权

## 七、合同的重写

- （一）重写合同的含义
- 合同的重写（reformation）指当事人在书面合同中错误地表达了他们的意思，因而法院可以应一方的请求重新书写合同，从而使其正确地表达双方的意思。

## 七、合同的重写

- (二) 因错误而重写合同
- 1、如果错误是就对意思的表述而发生的，则当事人的请求仅限于重写合同；如果错误是就构成双方交易基础的事实的认识而发生的，当事人可以请求撤销合同。
- 2、重写合同作为对错误的补救手段仅限于当事人双方在订立书面合同之前曾达成过协议的情况。

## 七、合同的重写

- （三）因欺诈而重写合同
- 重写合同可成为适当的救济方法的另一种情况是，一方对书面合同的内容和后果的认识发生了错误，而这样的错误是由另一方欺诈性的不正确说明所引起的。

## 七、合同的重写

- （四）口头证据规则的适用
- 在当事人一方试图以书面合同订立之前双方协商的情况为证据证明错误或欺诈的存在从而请求重写合同时，口头证据规则并不排斥这种证据。

## 七、合同的重写

- （五）法院的裁量权
- 重写合同是衡平法上的救济方法。这一性质决定了，这种救济方法与普通法上的救济方法相比，只是一种例外的起补充作用的救济方法。
- 大量的案例表明，法院在以错误或欺诈的存在为由重写合同时持一种审慎的态度。

## 第三节 预期违约

- 一、预期违约的概念
- 二、预期违约的构成条件
- 三、相对方可采取的救济措施

## 第三节 预期违约

- 一、预期违约的概念
- 预期违约指合同一方在合同规定的履行时间到来之前毁弃合同。
- 采纳预期违约制度的目的是：使受损害方提前获得法律上的救济，防止其蒙受本来可以避免的损失。



## 第三节 预期违约

- 二、预期违约的构成条件
- （一）“声明”构成预期违约的条件
- （二）其他事实构成预期违约的条件

## 二、预期违约的构成条件

- （一）“声明”构成预期违约的条件
- 将不履行合同义务的声明，必须是明确的和不附条件的才能构成对合同的毁弃。

## 二、预期违约的构成条件

- （二）其他事实构成预期违约的条件
- 合同一方的行为以及其履约能力上的明显瑕疵，同样会起到与语言构成的毁弃合同同样的作用。

# Uniform Commercial Code

- § 2-610. Anticipatory Repudiation
- (1) If either party repudiates the contract with respect to a performance not yet due the loss of which will substantially impair the value of the contract to the other, the aggrieved party may:
  - (a) for a commercially reasonable time await performance by the repudiating party; or
  - (b) resort to any remedy for breach (Section 2-703 or Section 2-711), even if the aggrieved party has notified the repudiating party that it would await the latter's performance and has urged retraction; and
  - (c) in either case suspend performance or proceed in accordance with the provisions of this Article on the seller's right to identify goods to the contract notwithstanding breach or to salvage unfinished goods (Section 2-704).

# Uniform Commercial Code

- § 2-610. Anticipatory Repudiation
- (2) Repudiation includes language that a reasonable person would interpret to mean that the other party will not or cannot make a performance still due under the contract or voluntary, affirmative conduct that would appear to a reasonable person to make a future performance by the other party impossible.

## 第三节 预期违约

- 三、相对方可采取的救济措施
- （一）解除合同权的获得
- （二）解除合同后可获得的其他救济
- （三）减轻损失的义务
- （四）坚持合同效力的后果