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§ 18:1 Construction's formidable task: Determining breach and assessing its materiality as basis for contract termination for cause

Ever since mankind first accepted the idea that the mutual exchange of promises could create an enforceable legal commitment,[1] in the forefront of every contract dispute has been one or more of these fundamental issues:[2] (1) whether enforceable obligations were assumed under the exchanged promises; (2) whether the promises of one or both parties were inexcusably breached;

[Section 18:1]

[1]See Holmes, Jr., 2 Select Essays in Anglo-American Legal History 718 (1908) ("Out of the giving of hostages, familiar in Caesar's time, grew the guaranty of another's obligation, and if this was to furnish the governing analogy, every promise purporting to be seriously made would bind.").

[2]See generally Restatement Second, Contracts §§ 237-248.

(3) whether any unexcused breach justified an award of damages; and (4) whether any uncured unexcused breach had impaired so materially the prospect of future satisfactory performance as to warrant, in addition to an award of damages, the termination of the contract.[3]

A valid finding of breach[4] is the crucial prerequisite to the granting of any breach of contract remedy.[5] A valid finding of "material breach"—[6] sometimes called a "default"—[7] is the paramount prerequisite to contract termination and to a performance bond sur-

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[3] See Andersen, A New Look at Material Breach In the Law of Contracts, 21 U.C. Davis L. Rev. 1073, 1077 (Summer 1988):

> The idea of material breach is connected with an important and well known concept in contract law—constructive conditions of exchange. Constructive conditions provide a basis for the victim of a breach to withhold its own, remaining performance and to be discharged of all further obligations under the contract. Applying constructive conditions to all breaches often would entail unnecessarily harsh consequences for the party in breach. The purpose of the material breach doctrine is to mitigate that harshness. The doctrine holds, therefore, that a discharge is not available in response to any breach, but only to a material one.
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> Any breach of contract by nonperformance gives rise to a cause of action for damages. A damages award is intended to compensate for the injury that the missing or imperfect performance causes. Damages are subject to long-established limitations on recovery such as those based on the foreseeability of the injury caused by the breach and the certainty with which the extent of the injury can be determined. The damages remedy, however, often is insufficient to protect the victim's interests. The party in breach may be insolvent or likely to disappear before judgment is collected. The victim's dissatisfaction with damages will be particularly strong if the breach occurs before the victim has performed under the contract. If the only permissible response to the breach were to perform and seek damages for breach, the victim would be required to expend resources for the benefit of the party in breach, who might not later make good the injury caused. Moreover, if the breach occurred before the party committing it had finished performing, the victim might fear that future breaches also would occur if the contract continued in effect.

[4] See Restatement Second, Contracts § 236 cmt. a (1981) ("A Breach may be one of non-performance (§ 235(2)), or by repudiation (§ 253), or by both (§ 243). . . . If the court chooses to ignore a trifling departure (comment a to § 235), there is no breach and no claim arises.").

[5] See §§ 19:1, 19:14 to 19:34.

[6] A material breach also has been referred to in the context of construction contracts and suretyship as a "default." See L & A Contracting Co. v. Southern Concrete Services, Inc., 17 F.3d 106, 110 (5th Cir. 1994) ("Although the terms 'breach' and 'default' are sometimes used interchangeably, their meanings are distinct in construction suretyship law. Not every breach of a construction contract constitutes a default sufficient to require the surety to step in and remedy it. To constitute a legal default, there must be a (1) material breach or series of breaches and (2) of such magnitude that the obligee is justified in terminating the contract."); Siegfried Constr., Inc. v. Gulf Ins. Co., 203 F.3d 822 (4th Cir. 2000) (noting that "a building contractor defaults in the performance of his contract if he furnishes defective materials or workmanship," citing Clevert

ety's obligation to perform.[8] With little guidance from treatises on contract law, or the Restatements of Contracts, the task of sorting out "material" from "immaterial" breaches[9] in the context of

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v. Jeff W. Soden, Inc., 241 Va. 108, 400 S.E.2d 181, 183 (1991), and that a "material breach deprives the party of an expected benefit and 'goes to the root of the contract,' " citing RW Power Partners, L.P. v. Virginia Elec. and Power Co., 899 F. Supp. 1490, 1496 (E.D. Va. 1995) (there is a mismatched pair here); Massachusetts Mun. Wholesale Elec. Co. v. Town of Danvers, 411 Mass. 39, 577 N.E.2d 283 (1991) (discusses the meaning of "default"). See also the Federal "Termination for Default" Clause, F.A.R. § 52.249-10, 48 C.F.R. § 52.249-10. See also §§ 18:2 to 18:21.

See also U.S. ex rel. Greenmoor, Inc. v. Travelers Cas. and Sur. Co. of America, 2009 WL 4730233 (W.D. Pa. 2009) (citing treatise and opining "Although any contractual default may be considered a breach, it is only when the breach constitutes a material failure that the non-breaching party is discharged from all further obligations under the contract and is free to terminate the contract.").

[7]See Wells Benz, Inc. v. U.S. for Use of Mercury Elec. Co., 333 F.2d 89, 92 (9th Cir. 1964) ("[a] building contract may not be repudiated or unilaterally terminated by one party simply because the other is in default"). See also the Federal Termination for Default Clause, F.A.R. § 52.249-10, 48 C.F.R. § 52.249-10. See also § 12:36. In suretyship, a "legal default requires a material breach or series of material breaches such that the obligee is justified in terminating the contract." See Elm Haven Const. Ltd. Partnership v. Neri Const., LLC, 281 F. Supp. 2d 406 (D. Conn. 2003), judgment aff'd, 376 F.3d 96 (2d Cir. 2004) (holding that a performance bond's surety's liability was not triggered by a series of obligee's letters that failed clearly and unequivocally to declare the principal to be in default and to terminate the bonded contract, and opining that "many breaches might occur throughout the life of a construction contract—many of which do not constitute a default under a performance bond"). This decision was affirmed by the Elm Haven Const. Ltd. Partnership v. Neri Const. LLC, 376 F.3d 96 (2d Cir. 2004). See also John A. Russell Corp. v. Fine Line Drywall, Inc., 2008 WL 501273 (D. Vt. 2008) (construing "default" to mean a material breach justifying termination).

See also §§ 12:37 to 12:44.

[8]See §§ 12:36 to 12:44. See Miller v. Mills Const., Inc., 352 F.3d 1166 (8th Cir. 2003) ("A material breach of contract allows the aggrieved party to cancel the contract and recover damages for the breach. However, if the breach is not material, the aggrieved party may not cancel the contract but may recover damages for the nonmaterial breach.").

See also Lumbermens Mut. Cas. v. U.S., 90 Fed. Cl. 558 (2009), rev'd on other grounds, 654 F.3d 1305 (Fed. Cir. 2011) (ruling that the government materially breached a contract by negligently overpaying the contractor and not enforcing provisions of the bonded contract so as to impair the surety's collateral).

See also U.S. ex rel. Thyssenkrupp Safway, Inc. v. Tessa Structures, LLC, 2011 WL 1627311 (E.D. Va. 2011) (enunciating the general principle that a contract could be terminated only for a material breach).

[9]The traditional rubric of the law labeled an immaterial breach as a "partial breach" and a "material breach" as a total breach. See 11 Williston on

complex construction disputes has been left to the initial agreement[10] and subsequent perceptions[11] of the parties, and ultimately to the not always unerring judgments of judges, juries, and other deciders of fact.[12]

Any unexcused breach "great or small" may be remedied by damages,[13] but only an unexcused breach of materiality and significance—a breach that reasonably endangers future perfor-

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Contracts (3d ed.) § 1292; Restatement Second, Contracts §§ 236, 243 and 253; 4 Corbin on Contracts § 946 ("The terms 'total breach' and 'partial breach' can render useful service, even though actual usage is not altogether consistent, if it is recognized that such a variation exists and that they do not in themselves determine the result that a court should reach."). The *Bruner & O'Connor on Construction Law* treatise prefers the terms "material" breach and "inmaterial" breach, because the clear trend in judicial decisions has been to favor use of such terms.

[10]Under the principle of "freedom to contract," events constituting material breach may be contractually defined by the parties, who may agree upon which types of breaches are sufficiently material to justify termination for cause, and who may even agree to permit termination without cause. See McGee Const. Co. v. Neshobe Development, Inc., 156 Vt. 550, 594 A.2d 415, 417 (1991) ("contracting parties can define what will constitute a material breach of their contract"); Massachusetts Mun. Wholesale Elec. Co. v. Town of Danvers, 411 Mass. 39, 577 N.E.2d 283 (1991) (any common meaning of default may be altered by express or implied agreement of the parties). See also Spotsylvania County School Bd. v. Seaboard Sur. Co., 243 Va. 202, 415 S.E.2d 120, 125, 73 Ed. Law Rep. 561 (1992) (it was reversible error to instruct the jury that the owner was required to prove that the contractor materially breached the contract in order to be entitled to terminate the contract, where the contract permitted termination merely upon a substantial violation of contract provisions, thus imposing a more onerous burden of proof on the owner). See also Krygoski Const. Co., Inc. v. U.S., 94 F.3d 1537, 41 Cont. Cas. Fed. (CCH) ¶ 76985 (Fed. Cir. 1996); and Linan-Faye Const. Co., Inc. v. Housing Authority of City of Camden, 847 F. Supp. 1191 (D.N.J. 1994), judgment rev'd on other grounds, 49 F.3d 915 (3d Cir. 1995) (enforcing termination "for convenience" clause). See also Desco Vitro Glaze of Schenectady, Inc. v. Mechanical Const. Corp., 159 A.D.2d 760, 552 N.Y.S.2d 185 (3d Dep't 1990) (enforcing termination "at will" clause).

[11]During performance each party must decide if a breach by the other party is sufficiently material to warrant termination. Contract termination for cause is a "self help" remedy that is invoked by a party without prior judicial sanction.

[12]Expected variation in the quality of the decisional products of the legal process is a fact of law and of life. Cases sometimes are decided much as they were in some courts over a century ago. See James, The Will to Believe (1896) (Part VIII), in Varieties of Religious Experience (1902):

> Law courts, indeed, have to decide on the best evidence attainable at the moment, because a judge's duty is to make the law as well as to ascertain it, and (as a learned judge once said to me) few cases are worth spending much time over: the great thing is to have them decided on *any* principle, and got out of the way.

[13]See 11 Williston on Contracts (3d ed.) § 1290 ("As a contract consists of a

mance of executory contract obligations so as to go "to the heart of the contract"[14] and "defeat the very object of the contract"[15] —justifies invocation of the ultimate "self-help" remedy of termination "for cause."[16] Termination for cause is recognized as

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binding promise or set of promises, a breach of contract is a failure, without legal excuse, to perform any promise which forms the whole or part of a contract. It is immaterial for this purpose whether the failure in performance is great or small, or whether any damage of a substantial nature has been caused. Any breach of contract gives rise to a right of action; and at common law, no judicial expression of the rights of the parties could be obtained until there had been a breach."). 4 Corbin on Contracts § 948 ("The first rule to be stated is that any breach that has occurred, be it large or small, 'partial' or 'total', an action can be maintained and the law will give an appropriate remedy."):

> Sometimes, when a dispute arises during the course of performance of a contract both parties stop performing, and each claims that it is justified in terminating the contract because of the other's breach. The builder that has not received a progress payment may suspend and later terminate on the ground of nonpayment. The owner that has failed to pay may contend that the nonpayment was not a breach because the builder had already committed a material breach by failing to follow the specifications, and the owner may terminate on that ground. . . .[leading] a court to impose liability on the party that committed the first material breach. See also Sagebrush Development, Inc. v. Moehrke, 604 P.2d 198, 203 (Wyo. 1979) (nonmaterial breaches on each side warrant computation of damages based on each individual breach).

[14]See Gulick v. A. Robert Strawn & Associates, Inc., 477 P.2d 489, 492 (Colo. App. 1970) (defining a material breach as one that "goes to the heart of the contract").

[15]See Wells Benz, Inc. v. U.S. for Use of Mercury Elec. Co., 333 F.2d 89, 92 (9th Cir. 1964) (permitting termination "only if the other's breach is so gross that the very object of the contract is defeated"). See also Miller v. Mills Const., Inc., 352 F.3d 1166 (8th Cir. 2003) ("under South Dakota law, a material breach is one that would defeat the very object of the contract"); McCoy v. Gibson, 863 So. 2d 978 (Miss. Ct. App. 2003) (holding that a "material breach is a failure to perform a substantial part of the contract or one or more of its essential terms or conditions, or if there is such a breach as substantially defeats its purpose"); Charter Environmental, Inc. v. Shaw Environmental, Inc., 2009 WL 2982772 (D. Mass. 2009) (citing treatise for the proposition that "a material breach is one that reasonably endangers future performance of executory contract obligations so as to go to the heart of the contract and defeat the very object of the contract").

See also U.S. ex rel. Thyssenkrupp Safway, Inc. v. Tessa Structures, LLC, 2011 WL 1627311 (E.D. Va. 2011) (defining a material breach as one that was so fundamental as to defeat an essential purpose of the contract, and ruling that no material breach occurred that would justify termination of the contract for cause).

[16]See Wells Benz, Inc. v. U.S. for Use of Mercury Elec. Co., 333 F.2d 89, 92 (9th Cir. 1964) ("[C]onsistent with the rule governing contracts generally, a building contract may not be repudiated or unilaterally terminated by one party simply because the other is in default; rather, the party may treat his own obligation at an end only if the other's breach is so gross that the very object of the contract is defeated . . ."); Sumrall Church of Lord Jesus Christ v. Johnson,

a "species of forfeiture"[17] and "drastic adjustment of the contracting relationship" and as requiring "strict accountability in [the use of] this sanction."[18] An unexcused breach immaterial to future performance and compensable by money damages does not justify

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757 So. 2d 311 (Miss. Ct. App. 2000) (holding that since shoddy work had been corrected by the owner, the owner was not entitled to terminate, cancel, or rescind the contract). See also L.L. Lewis Const., L.L.C. v. Adrian, 142 S.W.3d 255, 260 (Mo. Ct. App. W.D. 2004):

> In Missouri, strict compliance with the terms of a construction contract is not required and substantial compliance must be accepted. A building is substantially complete so as to entitle the contractor to the full contract price when it has reached the state of its construction so that it can be put to the use for which it was intended. Moreover, a party's performance under a contract is substantial even though comparatively minor items remain to be furnished or performed to conform to the plans and specifications of the completed building. If a breach is not material, the non-breaching party may not cancel the contract but must pursue other remedies.

See also Jay Dee/Mole Joint Venture v. Mayor and City Council of Baltimore, 725 F. Supp. 2d 513 (D. Md. 2010) (citing treatise, and opining: "Under Maryland law, a breach is material if it affects the purpose of the contract in an important or vital way. Additionally . . . it is literally 'hornbook law' that where a contract itself is clear in making a certain event a material breach of that contract, a court will ordinarily respect that contractual provision."); U.S. ex rel. Greenmoor, Inc. v. Travelers Cas. and Sur. Co. of America, 2009 WL 4730233 (W.D. Pa. 2009) (citing treatise, and opining: "[I]t is only when the breach constitutes a material failure that non-breaching party is discharged from all further obligations under the contract and is free to terminate the contract.").

[17]See Decker & Co. v. West, 76 F.3d 1573, 1580, 40 Cont. Cas. Fed. (CCH) P 76887 (Fed. Cir. 1996) ("a default termination—a species of forfeiture—is a remedy to which the Government should not likely resort"); J. D. Hedin Const. Co. v. U. S., 187 Ct. Cl. 45, 408 F.2d 424, 431 (1969) ("[d]efault termination is a drastic sanction which should be imposed (or sustained) only for good grounds and on solid evidence"); Abcon Assoc., Inc. v. U.S., 49 Fed. Cl. 678 (2001), aff'd, 52 Fed. Appx. 510 (Fed. Cir. 2002) (same); Becho, Inc. v. U.S., 47 Fed. Cl. 595, 600 (2000) (noting the rule enumerated in *Hedin* now to be well settled.). See also Restatement Second, Contracts §§ 227 and 229 (excusing "disproportionate forfeiture" unless the "non-performed condition was a material part of the agreed exchange").

[18]See Clay Bernard Systems Intern., Ltd. v. U.S., 22 Cl. Ct. 804, 810, 37 Cont. Cas. Fed. (CCH) ¶ 76067, 1991 WL 50606 (1991) ("Termination for Default . . . is a drastic adjustment of the contractual relationship and the Government is held to strict accountability in using this sanction.").

See also Martin Const., Inc. v. U.S., 102 Fed. Cl. 562, 573 (2011) ("The Federal Circuit has held that a termination for default is a drastic sanction, which should be imposed (or sustained) only for good grounds and on solid evidence. The Government bears the burden of proof to show that the contractor was in default at the time of termination. If the Government establishes that the contractor was in default, then the contractor must show that its default was excusable. The contractor can demonstrate that the default was excusable by showing that improper Government actions were the primary or controlling cause of the default.").

repudiation of the bargain.[19]

To distinguish the material from the immaterial breach, courts have defined the "material breach" as any breach that materially impairs the interest of the nonbreaching party in the future performance of a contract.[20] Over the centuries, this right of the nonbreaching party to relief for such material impairment has been labeled variously as the right of termination,[21] rescission,[22] cancellation,[23] forfeiture,[24] discharge,[25] voidance,[26] annulment,[27]

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[19]See Calamari & Perillo, Contracts § 11-18(a) (3d Ed. 1987):

> [W]here a party fails to perform a promise, it is important to determine if the breach is material. If the breach is material, the aggrieved party may cancel the contract. He may sue also for a total breach if he can show that he would have been ready, willing, and able to perform but for the breach. However, he also has the option of continuing with the contract and suing for a partial breach. If the breach is immaterial, the aggrieved party may not cancel the contract but he may sue for partial breach.

See also Daystar Const. Management, Inc. v. Mitchell, 2006 WL 2053649 (Del. Super. Ct. 2006) ("[A] slight breach by one party, while giving rise to an action for damages, will not necessarily terminate the obligations of the injured party to perform under the contract.").

[20]See Andersen, A New Look at Material Breach in the Law of Contracts, 21 U.C. Davis L. Rev. 1073 (1988). See also 11 Williston on Contracts (3d ed.) §§ 1290 to 1323, and Restatement, Contracts §§ 275 and 276, in which Professor Williston makes a valiant effort to address "what constitutes a breach of contract" by identifying circumstances deemed relevant to determining the materiality of a breach. This approach was carried over into Restatement Second, Contracts §§ 241 and 242.

Charter Environmental, Inc. v. Shaw Environmental, Inc., 2009 WL 2982772 (D. Mass. 2009) (citing treatise for the proposition that "a material breach is one that reasonably endangers future performance of executory contract obligations so as to go to the heart of the contract and defeat the very object of the contract").

[21]See McClain v. Kimbrough Const. Co., Inc., 806 S.W.2d 194 (Tenn. Ct. App. 1990) (contractor breached subcontract by "unilaterally terminating" it); Miller v. City of Broken Arrow, Okl., 660 F.2d 450 (10th Cir. 1981) (city terminated contractor for failure to proceed); CJP Contractors, Inc. v. U.S., 45 Fed. Cl. 343 (1999) (contractor terminated for default under federal termination for default clause).

[22]See Harris v. Desisto, 932 S.W.2d 435, 444 (Mo. Ct. App. W.D. 1996) ("having found there was a breach, the issue then becomes whether the record supports a finding of a breach relating to a vital provision of the agreement which would support rescission"); Vermont Marble Co. v. Baltimore Contractors, Inc., 520 F. Supp. 922, 923, 29 Cont. Cas. Fed. (CCH) ¶ 81786 (D.D.C. 1981) (subcontractor " abandoned the project asserting its right to rescind by reason of undue delays").

[23]See Pacific Coast Engineering Co. v. Merritt-Chapman & Scott Corp., 411 F.2d 889 (9th Cir. 1969) (contract cancelled). "Cancellation" is a term most frequently used in connection with the sale of goods. See Uniform Commercial Code § 2-106(4). The term occasionally finds its way into construction cases.

abandonment, or dissolution,[28] terms which have little practical significance in the analysis of the issue of materiality,[29] and which

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[24]See U.S. v. Freel, 186 U.S. 309, 310, 22 S. Ct. 875, 46 L. Ed. 1177 (1902) (the Secretary of the Navy "declared the said contract forfeited").

[25]See Franklin Pavkov Const. Co. v. Ultra Roof, Inc., 51 F. Supp. 2d 204, 215, 5 Wage & Hour Cas. 2d (BNA) 846, 139 Lab. Cas. (CCH) ¶ 33939 (N.D. N.Y. 1999) (holding that the contractor's failure to pay "constituted a material breach, thereby discharging [the subcontractor] of its duty to further perform").

[26]See U.S. v. California Bridge & Construction Co., 53 Ct. Cl. 620, 245 U.S. 337, 340, 38 S. Ct. 91, 62 L. Ed. 332 (1917) ("The contract contained a provision giving to the government the option to declare it void."); String v. Steven Development Corp., 269 Md. 569, 307 A.2d 713 (1973) (purchaser "declared the contract null and void").

[27]See U.S. v. O'Brien, 220 U.S. 321, 31 S. Ct. 406, 55 L. Ed. 481 (1911) (government annulled contract); United States v. California Bridge & Constr. Co., 245 U.S. 337, 343 (1917) ("After the contract with the Bridge Co. was annulled, the government entered into a contract with another contractor . . ."); U.S. v. McMullen, 222 U.S. 460, 470, 32 S. Ct. 128, 56 L. Ed. 269 (1912) (the government had the right to annul the contract).

[28]See Huguet v. Musso Partnership, 509 So. 2d 91, 92 (La. Ct. App. 1st Cir. 1987), writ denied, 512 So. 2d 462 (La. 1987) ("The law is clear that a building contract may not be dissolved after substantial performance has been rendered.").

[29]All of these terms address the legal rights and consequences flowing from a breach sufficiently material to vitiate the contract. See Roehm v. Horst, 178 U.S. 1, 19-20, 20 S. Ct. 780, 44 L. Ed. 953 (1900). "Repudiation" results from the express refusal to perform. "Abandonment" from a refusal implied from the contractor leaving the job for an unreasonable period or the owner either suspending the work for an unreasonable period or significantly altering the scope of the contract. "Termination," "rescission," "cancellation," "avoidance," "annulment" and "discharge" describe the right, process, and legal effect of the vitiation of the contract. Whatever label is utilized, they all result at the same practical end point without assisting an analysis of materiality. There of course are differences in legal theory between claims affirming the contract and claims disavowing the contract, and in their respective measures of recovery for breach of contract and for quantum meruit for equitable rescission, which in some jurisdictions still require an election of remedies. See Harris v. Desisto, 932 S.W.2d 435, 442 (Mo. Ct. App. W.D. 1996). The general rule is that courts will not split hairs over the mere language under which the right of termination is exercised where intent otherwise is clear. See U.S. v. O'Brien, 220 U.S. 321, 328, 31 S. Ct. 406, 55 L. Ed. 481 (1911), in which Justice Oliver Wendell Holmes observed:

> The ill-chosen word "annul" in the contract, repeated in the notice to the contractors and in the complaint, cannot be taken literally in any of them. It means "refuse to perform further," not "rescind" or "avoid." For, if the contract were made naught by the government's election and notice, all rights under it would be at an end, whereas it provides in terms that rights shall arise upon annulment, which, but for this provision in the contract, the government would not have.

See also U.S. v. McMullen, 222 U.S. 460, 471, 32 S. Ct. 128, 56 L. Ed. 269 (1912), in which Justice Holmes similarly noted:

henceforth will be referred to collectively as "termination."

§ 18:2 Determining construction contract "breach" and "material breach"

Construction, even on a normal and seemingly routine project, is an extraordinarily complex process—rarely proceeding as planned[1] in strict conformance with the requirements of the contract documents; subject to a "range of reasonably expected adverse conditions"[2] requiring skillful coordination of numerous tradesmen; subject to changes invoked under agreements of the parties or due to conditions beyond the control of the parties;[3] usually involving substantial expense; and little understood by laypersons. More often than not, stress-free construction is a fairy tale.[4] Enforcement of contract rights and assessment of

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The next argument that seems to us to need a word is on the effect of the election of the United States to annul the contract as it was said. The infelicity of the word 'annul' has been averted to and its meaning explained heretofore. If notice had been given before the final breach and abandonment, it would have meant simply that the United States would proceed no further with the contractor under the contract, not that it rescinded or avoided it. At the time when notice was given, it was merely a ceremony to mark the point of default as a preliminary to employing someone else. The obligations of the contract, so far as applicable to a case of default, remained in full force. The United States had a right to get someone else to complete the work and to charge the defendants with the reasonable difference in cost. Indeed, this right was expressly stipulated in the specifications, if, during the progress of the work, a board should recommend that the contract be "annulled" on the ground that it would not be completed in time. (Citations omitted.),

[Section 18:2]

[1]See Constr. Planning & Scheduling 4 (1997) ("Construction rarely proceeds as planned. There are always unexpected events and conditions that occur during construction and impact the contractor's ability to complete the project as planned.").

[2]See Bat Masonry Co., Inc. v. Pike-Paschen Joint Venture III, 842 F. Supp. 174, 182 (D. Md. 1993) ("[T]here is a range of reasonably expected adverse conditions in the performance of a construction contract within which there is no breach."). See also §§ 15:102 to 15:119.

[3]See §§ 4:1, 4:2.

[4]See Erlich v. Menezes, 21 Cal. 4th 543, 87 Cal. Rptr. 2d 886, 896, 981 P.2d 978 (1999), in which the Supreme Court of California gave vent to this common perception:

> The [owners] may have hoped to build their dream home and live happily ever after, but there is a reason that tagline belongs only in fairy tales. Building a house may turn out to be a stress-free project; it is much more likely to be the stuff of urban legends—the cause of bankruptcy, marital dissolution, hypertension, and fleeting fantasies ranging from homicide to suicide.