CONCISE CONTRACTS

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CONTENTS

PART ONE: OVERVIEW

The Right to Contract

"If a man improvidently bind himself up by a voluntary deed . . . this court will not loose the fetters."
Lord Nottingham, *Villers v. Beaumont* (1682)

I. THE STUDY OF CONTRACTS

A contract is defined as a set of promises for the breach of which the law gives a remedy; or for the performance of which the law recognizes a duty. It can also be seen as a legal relationship, consisting of the rights and duties of contracting parties. When parties exchange promises: and the promises are legally enforceable: a contract is formed. It is that simple, and that complex.

You already know contracts. You created one when you became a law student. In applying for admission, you offered to attend law school. Such an offer begins the formation of a contract. Your letter of acceptance completed the contract. The mutual contract terms are: You promise to pay tuition and attend classes; the school promises to provide a legal education.

You also know contracts from the events of daily business life. Any time you made a legitimate deal with another, you formed a contract.

The principles of contract law simply correspond to human relationships. These concepts are not arcane abstractions. After all, the purpose of contract law is to facilitate the formation of mutually beneficial agreements. To accomplish this goal, the law of contracts has developed a distinctive language. It must be learned as a law student and applied when you practice as an attorney. Its basics need to be understood by anyone in business.

Contract law is an essential part of any first year law school curriculum. The study of contracts is typically based upon an analysis of groundbreaking cases from Eng-

land and America. These real life disputes have generated the body of law, that defines and regulates the world of contracts. Law professors also engage students in the solution of hypothetical problems, in order to develop analytical skills. The ability to understand patterns of behavior is as crucial as a grasp of contract language. Ultimately, both skills are needed to understand and apply the essence of contracts.

II. CONSTITUTIONAL CONSIDERATIONS

The right to make contracts is fundamentally rooted in the U.S. constitution (Article I, § 10). Many state constitutions also provide parallel support for contract rights. The ability to freely contract is nothing less than the ability to organize one's own personal and business affairs. This is a strongly protected prerogative. Governments are not completely prohibited from regulating private agreements. However, they can do so only if there is a compelling public need, such as the necessity of preventing fraud. Even then, laws regulating contracts are only constitutional to the extent necessary to protect that public need. Short of those severe circumstances, private parties are free to contract as they wish.

III. THE COMMON LAW

The *common law* of contracts has been generated by accumulated court decisions. This body of law emerged when courts in the past were asked to make judgments about contract disputes. These judgments were not created from scratch, but were based on *precedent*: the decisions of previous courts in similar cases. These in turn recognized the business customs that were the product of centuries of commerce.

The common law has been organized into certain widespread legal principles, such as *offer and acceptance*, mentioned above. They primarily regulate the sale of real estate, services, and intangible property. In addition, these principles have been absorbed into the area of contracts

not controlled by the common law: the sale of goods regulated by the *Uniform Commercial Code*.

IV. THE RESTATEMENT

The common law of contracts is also organized into the Restatement of the Law Second - Contracts 2d. The Restatement is a treatise on contracts published by the American Law Institute (referred to here simply as *R2d*). While not itself a statute, it is frequently relied upon by courts and cited by them as authoritative. Its influence is pervasive, in part because it helps bring order to the somewhat inconsistent common law.

The Restatement came into being in response to the limitations of the common law process. It has developed into a set of uniform principles of liability, performance, and remedies for breach of contract. This helps to harmonize legal principles and business practices.

V. THE UNIFORM COMMERCIAL CODE

A special statute called the *Uniform Commercial Code* (referred to simply as *the UCC*), governs the sale of tangible goods. The UCC largely follows the common law, but extends its reach. It prevails over the common law when they conflict, which happens only occasionally. This outline supplies principles, which apply to both UCC and common law situations.

The UCC was drafted by the National Conference of Commissioners on Uniform State Laws and the American Law Institute, and has been adopted by all states. Article 2 of the UCC regulates the sale of goods, i.e. tangible, movable, personal property. Leases of goods are not covered. For a mixed sale of both goods and services, the UCC applies only if goods predominate.

When one or both contracting parties are a merchant, or a businessperson, the UCC provides other methods to facilitate commerce. For example, an agreement between merchants can be determined not only from the contract

language, but also from the previous course of dealings, usage of trade, or course of performance. This enhances the flow of commerce by allowing legal reliance on past experience between the parties, or in the field of business. For definitions, see the Glossary in section VIII.

VI. THE BURDEN OF PROOF

Contract disputes are a matter of civil law, as opposed to criminal. In most cases, the presumption, or the default setting if you will, is that agreements between consenting adults are valid. The level of proof needed to prove a point or a fact is usually a *preponderance of the evidence*, as opposed to *beyond a reasonable doubt*. This preponderance standard means that anyone with the burden of proof must produce evidence which is just a little more conclusive and credible. The weight of the evidence must slightly tip the scales of justice in their direction.

An even heavier burden is shouldered by anyone attempting to show that a contract is illegal, when it appears innocent according to its terms (*prima facie*). In that case, the presumption that the contract is legal can only be defeated by *clear and convincing* evidence. This test demands stronger proof than a preponderance, but less than proof beyond a reasonable doubt as in criminal cases. Clear and convincing evidence makes an assertion highly probable, and produces a firm conviction about the truth of that assertion.

The court, i.e. a judge, always conducts the interpretation of an unambiguous contract. This is also true when any ambiguity is explained away by un-contradicted external (*extrinsic*) evidence. In these cases, a jury has no job to do. On the other hand, when a contract is ambiguous, it is the responsibility of the jury to interpret the terms and resolve the ambiguities.

VII. SUMMARY

This summary presents a condensed overview of the birth, life span, and completion of a contract. Each section is expanded in the Detailed Outline, in the same order. They are presented roughly chronologically, like the order in which the different aspects of actual contracts are addressed.

Note: Specialized legal terms are italicized.

A. Contract Formation

1. Offer

Contract logic is the logic of human relationships. It mirrors the bargains we strike in ordinary daily life. The opening move to make (*form*) a contract is an *offer*. It has to be more than mere musing or a negotiating gambit. If a student says to a group of people at a party: "I'd love to sell my old sports car," that is not specific enough to be a contract offer: it is just an invitation to the party-goers to negotiate. The one making an offer is the *offeror*. A valid offer must show an immediate readiness (*manifest a present willingness*) to form a contract, as opposed to an intention to make a commitment in the future; the offer must have definite enough terms such as the names of the contracting parties; and it must be known to the *offeree(s)* to whom it is directed.

2. Acceptance

Once an offer is made, it can be accepted until it is withdrawn (*terminated*). Acceptance means that the party to whom the offer was directed consents to its terms and agrees to form the proposed contract. An offer can be terminated automatically, for example, if a time for expiration is included in the offer. If an offer is accepted before termination, the next issue is whether there is good *consideration*.

3. Consideration

Good consideration means that there has to be something of benefit for each party. If you say to a friend: "I'll sell you my old sports car," and the friend says: "I accept," that is not yet a contract because there is no consideration included for you, the seller. There has to be joint benefit (*mutuality*). If you say to a classmate: "I will sell you my sports car for $1000, and they say "It's a deal," there is mutual consideration and a contract has been formed.

B. Contract Interpretation

1. Express: Implied: Quasi

After forming a contract, many issues can arise over its interpretation. There are explicit, (*express*) contracts manifested by oral or written words; *implied* contracts, formed by the behavior of the contracting parties; and *quasi* contracts, created by law when necessary to avoid unjust enrichment. Here are examples of each:

Examples

A student says to a classmate: "I'll sell you my old sports car for $1000," and the classmate says: "I accept." They draw up and sign an agreement. That is an express contract.

A patron says to a waiter: "I want the spaghetti marinara." This is the acceptance of an implied contract offer. The patron's promise to pay the menu price is implied by his order.

A bleeding person rushes to a hospital and is treated. The patient's conduct creates a quasi contract. The patient must pay for the treatment, even though there is no formal contract.

2. Divisible: Entire

Some contracts are divisible into independent acts, each of which confers a separate benefit, and for which a separate payment is deserved. These are *divisible* contracts. In this

case, the completion (*performance*) of each separate act triggers the payment of consideration, as seen below:

Example

A student says to a classmate: "I'll make you dinner each Friday this winter, for $20 per meal," and the classmate says: "I accept." Payment is due after each meal, not in the spring.

Other contracts are entire, or non-divisible. In this case, only substantial completion (*substantial performance*) of the entire contract triggers the payment of consideration:

Example

A student says to a classmate: "I'll cater your graduation dinner on Friday for $200," and the classmate says: "I accept." Payment is due only after the entire meal, not after just one or two courses.

3. Bilateral: Unilateral

A *bilateral* contract is formed when two parties exchange mutually dependent promises, like: "I will sell you my old sports car on Friday if you will pay me $1000," and in return: "I will pay you the $1000 on Friday if you will sell the sports car to me." When the promises are exchanged, the contract is formed, even though the promises themselves are ultimately fulfilled later.

A *unilateral* contract is formed when one party offers to perform, and invites a performance, not a promise. The second party can only accept by performing.

Example

A student says to a friend: "I'll pay you $20 if you make me dinner this Friday." The student-offeror is not asking for a promise, but for a meal. The friend can ignore the offer, but can accept it only by actually making the dinner. Even if the friend says: "I promise to make the meal on Friday," there is still no contract until the food is served.

This bilateral-unilateral distinction is not true for transactions covered by the UCC. The UCC, designed to advance the cause of commerce, wants to facilitate contract formation. Accordingly, it allows acceptance by either performance or a return promise. This is feasible because merchants are more concerned about the efficient flow of business, rather than the formality of contract principles.

Example

A manufacturer sends an offer to purchase 1000 ball-bearings from a distributor. The distributor can accept either by shipping the bearings, or by promising to ship them within a reasonable time. Either action forms a binding contract.

4. The Parol Evidence Rule

This purpose of this rule of law is to prevent disputes over the meaning of certain contracts. The *parol evidence rule* is this: A final, complete, written contract cannot be changed by written evidence older than the contract; or by spoken (*oral*) evidence older or the same age as the contract. Oral evidence is spoken, unwritten evidence. If there is only a preliminary draft, or if the contract is ambiguous, the Rule does not apply. When the Rule does apply, the excluded evidence simply does not pertain to the contract at hand.

Example

A student says to a friend: "I'll sell you my old sports car for $1000," and the friend says: "I accept." They draw up and sign a complete, written contract. Later, the friend claims that the student had also agreed by phone to accept an old Ford as a trade-in. The trade-in is not part of the contract.

C. Defenses To Contract Formation

It sometimes happens that even after there has been an offer, an acceptance, and there is consideration, a party may not want a contract to be enforced. In those cases, the party may try to nullify a supposed contract by raising certain defenses. First, there are *formation defenses*. For example, a

contract cannot be formed by a person previously adjudicated by a court to be mentally unable to make or understand a contract. Any supposed contract made by him is void from the beginning. There are also *public policy defenses*, such as illegality.

Example

A homeowner says to a thug: "I'll pay you $500 to torch my house for the insurance." The thug agrees. There is no contract because the law won't enforce an illegal act.

Other defenses to contract formation include *enforcement defenses*, based on the *Statute of Frauds*. This Statute requires a written contract in circumstances where contracts are very valuable: such as the sale of land, or if contracts are easily but falsely assumed to exist, like promises made in consideration of marriage. The purpose of this special Statute is to avoid perjury and prevent dubious claims that people might otherwise be tempted to make. If any of these defenses are successful, the contract to which they apply becomes unenforceable, and the parties do not have to fulfill their promises.

D. Contract Conditions

Conditions modify the promises contained in a contract. Conditions must be either excused or satisfied. If a student contracts to "sell his sports car for $1000, as soon as I buy a new car," the new car purchase is a condition to the sale of the sports car. If the new car is bought, the condition has been satisfied, and the duty to sell the sports car has come due and must be immediately performed. Conditions can also be excused, for example, by *waiver*. A waiver is the voluntary relinquishment of a known right. Even if a contract states a certain deadline, the parties can mutually agree to extend it, thus waiving the original condition.

Other conditions are inserted by law. For example, when a prospective homeowner signs a contract to purchase a home, the purchase is often dependent on whether financing is obtained by the purchaser. The law implies the con-

dition of a good faith effort by the purchaser to obtain the financing. If the purchaser makes no effort, the *implied condition* is breached, and the purchaser may be liable to the seller for any resulting loss, or *damages*.

E. Discharge Or Performance Of Contracts

Once contract formation comes this far, there has been an offer, an acceptance in return, consideration given, and conditions have been satisfied or excused. Now the duties the contract contains must be either discharged or performed. There are several justifications provided by law which discharge parties contract duties. One example is *impossibility*. This occurs when no reasonable person could objectively be expected to any longer perform the contract. This can only be so because of an unforeseeable, intruding (*supervening*) event that occurred after the contract was formed.

Example

A student said to a friend: "I'll sell you my old sports car on Friday, for $1000," and the friend said: "I accept." They draw up and sign a complete, written contract. Unfortunately, the car was then stolen and was still missing on Friday. The duty to perform according to the contract was discharged.

Most contracts require merely substantial, not perfect performance, which meets the essential, if not the trifling demands of a contract. When perfect performance is required, it must be unequivocally spelled out as an express condition. If performance is insufficient, or defective, a *breach of contract* occurs. The law then provides various remedies to cure the injured party.

F. Remedies For Breach Of Contract

There are two kinds of remedies for breach of contract: *Legal* and *equitable*. The legal remedy is money damages. Through them, the law tries to restore any wronged parties to the position they would have been in, had the contract not been breached. The remedy attempts to give the

benefit of the bargain to the innocent party who was not in breach of the contract. The most common type of these is called *expectation damages*, or what the contracting party expected to receive as a benefit from the contract. Theses damages must be reasonably calculated and not speculative, i.e. dependent upon future developments that are purely contingent or conjectural.

Example

A student signed a contract to sell his old sports car for $1000. Later, the buyer refused to complete the sale. The student could sell the car elsewhere for only $500. The student's damages are the difference between the expected $1000 from the contract, and the $500 actually received. In addition, because the student made $500 less, he missed the chance to invest in Netscape stock and earn a $5000 profit. However, this is too speculative to count as damages, and the added $5000 will not be awarded to the student.

In contrast, equitable remedies are ordered by a court only when there is no adequate legal remedy. If you contract to buy a unique property, for example, no amount of money can substitute. Two types of equitable remedies are *injunctions* and *specific performance*. They are used by courts to make the parties to a contract fulfill their duties when money cannot repair the harm caused by a breach of the contract.

Example

An attorney signs a contract to purchase an historic house previously owned by the esteemed Professor Kingsfield. Later, the seller decides he could make a lot more selling the house elsewhere. The buyer can ask a court for an injunction to prevent the seller from transferring the house to anyone else, and for specific performance, ordering the seller to transfer the house to the buyer.

G. The Rights And Duties Of Non-Parties

Agreements made between contracting parties usually do not create rights and duties for other, third-parties. How-

ever, they can create rights in certain exceptional contracts. One type of non-party who can receive a benefit from a contract is a *third-party beneficiary*, in which a contract between two parties is for the benefit of a third. For example, if a son contracts with a landscaping service to have his mother's lawn mowed every week, mom is the intended third-party beneficiary. She stands in the shoes of her son, the *offeror*, and has an enforceable right to the benefits of the contract.

Only *intentional* beneficiaries have such enforceable rights. For example, if there were a service station, where the landscaper who cuts mom's lawn buys gasoline, it would also benefit from the contract. However, the service station has no enforceable rights because it is only an unintended (*incidental*) beneficiary, who is neither named in the contract, nor who the contracting parties intend to benefit.

Assignments are another means of creating third-party rights. Parties to a contract can often assign a right they have to another. An assignment transfers the benefit of a contract from the original contracting party to a non-party. Assignments can be prohibited in a contract or by statute. They can also be prohibited if they increase the burden or risks of the *obligor*, the one from whom the benefit is due.

Example

A student says to a friend: "I'll sell you my old sports car for $1000," and the friend says: "I accept." They draw up and sign a complete, written contract. The student (the assignor) then assigns the $1000 to her sister (the assignee) to pay a debt already owed to her. The buyer (the obligor) would then pay the $1000 directly to the sister. However, if the student had originally agreed to take a personal check from the buyer (the obligor), but the sister insisted upon a cashier's check, which would cost more, this would be an added burden upon the obligor, and would be invalid.

Delegations are a means of creating third-party duties. Parties to a contract can sometimes delegate a duty. A delega-

tion transfers the duty to perform a contract from the original contracting party to another, who assumes responsibility. Delegations can be prohibited in the contract or by statute. They can also be prohibited if they decrease the value to the *obligee,* the one to whom the duty is owed.

Example

A student says to a classmate: "I'll cater your graduation dinner on Friday for $200," and the friend says: "I accept," forming a contract. The student (the delegant) then delegates, for consideration, the catering job to a friend, (the delegate), who must perform the catering duty. The classmate can enforce the contract against either the student-delegant or the delegate-friend. However, if the friend was a less skilled chef than the original student, this would be an extra loss to the obligee, the graduate, and the delegation would be invalid.

PART TWO: DETAILED TREATISE

I. FORMATION

A. DEFINITION OF A CONTRACT

A contract is a set of voluntary, exchanged promises that the law will enforce. If a promise made in a contract is broken, there is a breach, for which the law provides remedies. The law intervenes because it recognizes the validity of the promises or duties imposed by the contract.

B. THE OFFER

1. Opening Gambit

An offer is the opening move made by an *offeror* to an *offeree* in order to form a contract. It shows that the offeror is ready right then to make a deal. This is also known as *manifesting a present willingness*. The offer must justifiably convince the offeree that consent to the bargain will form a contract. In other words, it leads the offeree to understand that the offeror wants to make an agreement on the terms offered.

2. Effect

A valid offer empowers and permits an offeree to accept it. The offeror is master of the offer, and can revoke it before acceptance, except in the case of *option contracts*, when an offeree has separately paid to make the offer irrevocable; or in the case of a *Merchant's Firm Offer* under the UCC.

3. Objective Intent

In determining whether an offer has been made, courts focus on the outward, objective expression (*manifestation of assent*) of the offeror. Subjective intent is not controlling. An offeror's real, but unexpressed, state of mind is usually immaterial.

Example

An employee was negotiating a renewal of his contract. The employer assured him that his contract would be renewed, but confidentially intended to terminate him. The employee sued after being laid off, and the court ruled that the objective expression of intent governed, and the employment contract was renewed.

Embry v. Hargardine, 105 S.W. 777 (Mo. App. 1907).

4. Reasonable Person Standard

In case of a dispute, an offer is interpreted to mean what a reasonable person, in the position of the offeree, would conclude it to mean. Courts consider what the offeree knows or should know about the intention of the offeror. The actual mental agreement of the parties is not required. Thus, there need be no actual meeting of minds.

Example

Jethro, after drinking too much, offers to sell Clem his new tractor in exchange for Clem's hunting cap. Clem, a sober farmhand, knows that Jethro is kidding. Jethro's statement is not a true offer to form a contract.

5. Three Requisites

An offer must constitute a commitment to make a deal, it must contain definite terms such as the names of the contracting parties, and it must be communicated to an identifiable offeree.

a. Offeror's Commitment

The offer must show a present willingness to do, or refrain from doing, some act which the offeror has a legal right to do, or has a good faith belief in having the right to do. The commitment must be a positive expression of intention to act or refrain from acting. This commitment can be manifested by language or circumstances.

1) When Made or Written

People can make either spoken or written contracts. If the parties intend for an agreement to be valid only when written down, that governs. But if the writing simply memorializes a settled agreement, the agreement is a binding contract even if the parties don't adopt a writing — unless one is required under the Statute of Frauds. For definitions, see the Glossary in section VIII.

Several factors argue that a contract is complete before being written down: Indispensable terms were already reached; it was the type of contract often put in writing; it was not very detailed or unusual; or, either party prepared for performance. Comment c, R2d § 28.

2) Advertisements

Advertisements are usually not offers, but invitations for offers, because they are too indefinite. This normally includes quoting a price for a product without further elaboration. However, an advertisement that is definite, explicit, identifies the offeree, and leaves nothing open for negotiation, may be considered an offer.

Examples

A store advertised: "3 Black Lapin Stoles, Beautiful, Worth Up to $139, $1 First-Come First Served." The first customer to the store offered the $1, but the store refused to provide the stole. A court ruled that an enforceable contract existed for purchase of the stole.

A different store advertised: "Nationally famous suits. Normally at $250, today only $150." A customer who showed up, and offered $150, could not enforce a contract for purchase of a suit, in part because no quantity was mentioned.

Lefkowitz v. Great Minn., 86 N.W. 689 (Minn. 1957).

3) Auctions

There are two types of auctions, those *with reserve,* and those *without reserve*. Auctions with reserve may withdraw the auctioned goods at any time prior to completion of the sale. However, if an auctioneer drops the gavel, the last bid has been accepted and a contract is formed. UCC § 2-328.

In an auction explicitly billed as being *without reserve*, after calling for bids the auctioneer cannot then withdraw the goods, unless no bids are received within a reasonable time. In other words, the auction is an irrevocable offer to sell the goods to the highest bidder. UCC § 2-328(3).

4) Bid Solicitations

A party may desire to form a contract in the future and thus solicit bids from others. This constitutes an invitation for preliminary negotiations and is not an offer. An invitation from a general contractor to a series of subcontractors to bid to supply labor or material for a construction project is not an offer. The general contractor only accepts those offers if he or she gets the project.

5) Frolic and Banter

A party may literally appear to make an offer, but the conduct or circumstances surrounding the proposal indicate, to a reasonable person, that none was intended.

Example

A newspaper, in its joke column, offered $1,000 to anyone who would provide the published telephone number of Western Union. An enterprising reader attempted to collect. The court ruled that the paper never actually intended to offer the $1,000, the plaintiff was put to no disadvantage, and thus there was no valid contract.

Graves v. N. N.Y. Pub., 22 N.Y.S.2d 537 (Sup. Ct. 1940).

6) Mere Opinions

An offer must contain a commitment rather than merely express an opinion. The test is whether a reasonable person in the supposed offeree's position would conclude that the offeror was actually promising certain actions.

Example

A student says to a classmate: "I believe my old sports car is worth $1000." The classmate says: "I'll take it." There is no contract because the student expressed an opinion, not an offer with the requisite immediate commitment to make a deal.

7) Mere Intentions

A person announcing an intention to form a contract in the future is normally not considered to have made an offer. If a student informs his roommate that he intends to sell his sports car for $1000 someday soon, this is not yet an offer, because there is no present intention to contract.

8) Mere Predictions

A person expressing a hope for the future is not always making an offer. If a physician says to a patient: "After the operation, you should feel 20 years younger," it is probably not a promise to secure a specific result. However, if the prediction is more pivotal to the parties, it may constitute a contract.

Example

A surgeon told his young patient that after an operation on his scarred hand, it would be "100% perfect." It turned out to be hairy, because of the type of skin graft used. The patient sued, and the court ruled that the surgeon's statement was a promise to perform, constituting a valid contract.

Hawkins v. McGee, 84 N.H. 114 (1929).

b. Definite Terms

The basic terms of a contract offer usually must be definite enough, so that if the offer is accepted and the contract is formed, a court could provide a remedy in case of breach. If parties attempt to form a contract, but their agreement is too vague, their efforts are futile.

1) Indispensable Terms

Some aspects of a contract are so basic that if they are omitted from an agreement it often cannot be enforced as a contract. These include certain indispensable items:

- the parties;
- the things or service due;
- the price;
- the time for performance.

2) Supplied by the Common Law

Others aspects of a contract are secondary enough that if the parties fail to address them, a court may supply the terms. For common law contracts, there are only limited circumstances when this is done. These *gap-fillers* usually fall into three main categories.

a) Peripheral Terms

If a term is not central, for example the time of performance for a service like painting a house, a court may supply a reasonable time.

b) Inadvertently Forgotten

If the parties would have agreed to the term had they considered it, a court may supply it.

Example

Ray regularly washed Bert's car, and the fee was the same each month. Ray then washed the car again, though no fee was discussed. A court would assume that the customary fee was inadvertently forgotten, but should be paid.

c) Important Public Policy

When an important public policy is at stake, a court may supply a term. Preventing someone from gaining a windfall profit at the expense of another would be one such policy. Thus, when one party has already performed a contract, and it would be otherwise seriously unfair, a court will insert an omitted term. This is called the prevention of *unjust enrichment*.

Example

Ray contracts to paint Bert's house, and does, but no fee was stated in the contract. A court would insert a fair fee for Ray, rather than allow Bert a free paint job.

3) Supplied by the UCC

The UCC is even more tolerant of omitted terms than the common law. Thus, agreements for the sale of goods, which are covered by the UCC, can leave many terms to be specified later by the parties in good faith. They must be *commercially reasonable*. The parties must intend to make a contract and there must be a reasonably certain basis for the supplied terms. They must be rationally calculated, and not fanciful or speculative. UCC § 2-204(3).

Example

Vincent owns a paint store. Whistler orders 50 cans of paint, but no price is stated. Based on the UCC, a commercially reasonable price at the time of delivery can be inserted.

a) Quantity Omitted

In the sale of goods, the quantity must be supplied by the contract itself, except for output and requirement contracts. An output contract is an agreement to purchase a party's entire output of specified goods. A requirement contract is an agreement to supply or take all of a party's requirements for specified goods. UCC § 2-306(1).

b) Price Omitted

An unspecified price will be estimated as a reasonable price at the time of delivery in certain circumstances: If price is not mentioned in an intended contract; the price is to be set later, but is not; the price is to be set according to some external factor but is not; or, the buyer or seller is to set the price but does not. If the intended party does not set the price in good faith, the other party can cancel the contract or set the price itself.

c) Other Omitted Terms

The applicable usage of trade, course of dealing, or course of performance may be relied on to supply any omitted terms. When needed, UCC provisions supply a method to determine place and time for delivery and payment, passage of title, manner of identification, proposed delivery, i.e. *tender*, by seller, and risk of loss. For definitions, see section II, C, 3, and the Glossary in section VIII.

4) Supplied by Conduct

The parties' subsequent conduct can cure a lack of definite terms. Conduct that clarifies an unstated or indefinite material term renders it definite.

Example

A grocer makes an agreement with a fruit wholesaler to deliver "Ten bushels of apples per week for 26 weeks, at $10 per bushel." The contract fails to specify the type of apple. However, if the distributor delivers MacIntosh ap-

ples, and the grocer accepts them, the contract has been made definite and is then enforceable.

5) Range of Terms

An offer allowing a party to specify a range of choices may be definite enough to form a contract. For example, if an offer provides: "Buyer may purchase any horse on my ranch for $2000," a valid contract is formed, and is performed when the Buyer chooses a horse.

6) Real Estate Contracts

A real estate contract offer must contain a description of the property sufficient to identify the parcel and the price to be paid. A price to be agreed upon in the future is insufficient.

7) Employment Contracts

An employment contract offer must describe its duration, either by length, such as a year; or by project, such as to build a house. If no term is specified, the offer will be presumed to be at will, terminable whenever the employer decides.

c. Communication to Offeree

An offer must be communicated to the offeree, who must have actual knowledge of it. An offer is limited (*personal*) to an identified offeree, and cannot be accepted by, or assigned to, another.

Example

Ashley sends a fax to cousin Beth: "Beth, I will sell you my sapphire ring for $150." Beth's roommate Carol sees the fax, and responds: "Beth is not here, but I accept your offer and will buy the ring." There is no contract, because the offer was limited to Beth.

1) Bilateral Offers

A bilateral contract is formed when two or more parties exchange mutually dependent promises. A contract cannot be formed unless both parties are aware of an offer, because knowing consent of the exchange would otherwise be absent.

Example

A student says to a friend: "I will sell you my old sports car on Friday if you will pay me $1000." In response, the friend says: "I will pay you the $1000 on Friday for the sports car." The dual promises and benefits form a bilateral contract.

2) Unilateral Offers

A unilateral contract is formed when one party offers to perform and invites a performance, not a promise. The offeree can only accept by performing. However, an offeree must be aware of the offer and act because of it. So, communication to the offeree is still essential.

Example

A student says to a friend: "I'll pay you $20 if you make me dinner this Friday." The friend makes the meal on Friday, accepting the offer by his cooking, and completing the contract.

3) Not Crossing Offers

Even identical offers that cross in the mail do not form a contract, though the parties appear to agree. Because the parties were unaware of the other's offer, they couldn't have consented to it. The mutual, simultaneous agreement, which is basic to contracts, is missing.

• Divergent Minority Rule

A few jurisdictions do authorize contract formation after crossing offers, reasoning that the parties would have agreed to each other's offers given the chance. According-

ly, some courts want to give the contract a chance and will support it.

4) Public Offers and Rewards

Although a public offer does not identify a specific offeree, it is valid for anyone who performs the act requested while knowing of the offer.

Example

A student posts an announcement: "I will pay $100 for the person who returns my lost contract class notes." The student has a valid contract with anyone who returns the notes knowing of the reward.

However, in most states if someone returns the notes while unaware of the offer, the student need not pay. The reward is an offer to form a unilateral contract, which can only be accepted knowingly.

Also, if an enterprising classmate made copies of the notes, and tried to return them for multiple rewards, the student need not pay. It is unreasonable to assume that the student intended to allow multiple acceptances. However, in some circumstances, it is reasonable to expect multiple acceptances.

Example

A company advertised a reward to anyone who contracted influenza after using its medicine, the Carbolic Smoke Ball. Thousands of buyers subsequently got the flu and successfully claimed the reward.

Carlill v. Carbolic Smoke Ball Co., 1 Q.B. 256 (1893).

• Divergent Minority Rule

A few jurisdictions do authorize contract formation even when a party unknowingly responds to a public offer. These courts reason that because the desired benefit was bestowed upon the offeror, the actor should not be penalized for acting altruistically rather than in response to the offer.

Example

A student posts an announcement: "I will pay $100 for the person who returns my lost contract class notes." A fellow student finds the notes, and returns them out of empathy, knowing nothing of the reward. A valid contract has been formed, and the student-offeror owes the finder $100.

6. Termination of an Offer

An offer is only valid until it has been withdrawn (*terminated*). An offer otherwise remains open. Termination occurs because of the lapse of a specified time or other contract terms, occurrence of subsequent events, or the actions of the parties. Termination cancels the offer, although a new one can always be made.

a. Lapse of Time

An offer naturally terminates at the end of the time stated in the offer. Any effort to accept afterwards will be considered a counteroffer.

1) Clock Starts when Received

Unless stated otherwise, the clock starts running when the offeree receives the offer, or should have received it.

Examples

A contract offer dated March 1 states: "This offer will terminate in 5 days," and the offeree receives it in the mail on March 5. The offeree has until March 10th to accept.

A contract offer dated March 1 states: "This offer will terminate in 5 days." The offeree receives it in the mail on March 5, but it sits unopened on his desk until March 9th. The offeree must still accept by March 10th.

2) Reasonable Time Implied

If the duration of the offer is not stated, it will be deemed open for a reasonable time with consideration of the circumstances. UCC § 2-204.

3) Person to Person Negotiations

When parties are negotiating face to face, or by telephone, an offer may be made. The parties are free to stipulate on how long an offer remains open for acceptance. However, if no duration is specified, any offer terminates when the meeting or call ends, and cannot be accepted later.

b. Subsequent Events

An offer is automatically terminated by operation of law if either party dies or is incapacitated, the subject matter of the offer is destroyed, or a later change in a statute (*a supervening illegality*), makes the contract illegal.

1) Death or Incapacity

If either party to a contract dies or no longer has the mental capacity to legally contract, the offer is terminated, even if there is a good faith acceptance before the offeree learns of the offeror's death or incapacity. Mental capacity means the ability to understand the nature and effects of one's acts.

One exception: An option contract offer is irrevocable after consideration has been paid. See sections c-5 and c-6, below.

2) Destruction of Subject Matter

The destruction of a person or thing essential for performance of the proposed contract terminates the offer. The subject matter is the contracts central reason for being.

Example

A student says to a friend: "I'll sell you my old sports car on Friday, for $1000." Before the friend accepts, the car is stolen and totaled. The offer is terminated.

3) Supervening Illegality

If a contract becomes illegal after an offer is made, but before acceptance, the offer is terminated.

Example

A bank offers to lend a student $1000 at 12 percent interest. The next day Congress passes a consumer lending statute setting a usury ceiling of 11 percent. The offer is terminated.

c. Actions of the Parties

1) Direct Revocation

An offer is revoked by the offeror when the revocation is communicated to the offeree or the offeree's agent before acceptance. R2d § 42. An offer is also terminated when the offeree indirectly receives news of revocation from any reliable source.

2) Revocation by Publication

If a public offer has been made, for example in a newspaper, the revocation must be made in the same manner, or by the best means available to reach the same audience.

3) Revocation by Rejection

An offeree's rejection of the offer will normally terminate the offer. A rejection is effective when it has been properly communicated to the offeror or his or her agent.

4) Counteroffers and Confusing Responses

A counteroffer terminates an offer, unless the parties agree otherwise. A conditional acceptance with added terms is a rejection. However, a counter inquiry, a comment on the offer, or a grumbling acceptance do not terminate an offer. UCC § 2-207.

These interchanges are analogous to the *Battle of Forms* discussed in section C, 3, d, below.

Examples

A student says to a friend: "I'll sell you my old sports car on Friday for $1000." The friend says: "I will pay you $500." The counteroffer terminates the original offer.

A student says to a friend: "I'll sell you my old sports car on Friday for $1000." The friend says: "I will pay you $1000 if you have it painted first." The added terms terminate the original offer.

A student says to a friend: "I'll sell you my old sports car on Friday for $1000." The friend says: "Would you take $500?" The inquiry does not terminate the original offer, which is still open.

A student says to a friend: "I'll sell you my old sports car on Friday for $1000." The friend says: "That's a lot of money" The comment does not terminate the original offer, which is still open.

A student says to a friend: "I'll sell you my old sports car on Friday for $1000." The friend says: "Its highway robbery, but I'll take it" The grumbling acceptance does not terminate the original offer, but accepts it.

5) Irrevocable Explicit Option Contracts

Option contracts really consist of two separate agreements. First, there is an underlying potential contract. Then there is the option feature, which is a separate contract buying the right to accept the underlying contract for a limited period of time. If the offeree gives consideration for the offeror's promise to hold open the offer (for the underlying contract), the offer may not be terminated during the option period.

Example

Joseph offered to sell his landscaping business to Tom for $500,000. This was the underlying contract offer. Tom knew that it was a potentially lucrative opportunity, but he

wasn't yet ready to go into business. Needing time to consider the offer, Tom paid Joseph $1,000 for an option on the same terms, to be open for 30 days. This was the option contract. The offer to sell the business was then irrevocable for 30 days.

6) Irrevocable Equitable Option Contracts

If an offeror anticipates, or should have anticipated that the offeree would incur expenses by relying on the offer, and the offeree incurs those expenses, the offer is made temporarily irrevocable by law. The offeror cannot pull the rug out from under the offeree by withdrawing the offer before the offeree has a chance to accept. This is equitable and just only when the offeror knew the offeree would rely on the offer.

Example

A builder solicits bids from subcontractors for a construction project. The builder then relies on the bids of the subcontractors to determine the overall bid offered to the potential customer. The subcontractors' bids are option contracts, equitably irrevocable for a reasonable time.

7) Irrevocable Merchant's Firm Offer

The UCC provides that a written, signed offer by a merchant to buy or sell goods is irrevocable by law for the time stated or, if no time is stated, for a reasonable time up to three months. UCC § 2-205.

8) Irrevocable Offer for Unilateral Contract

A unilateral contract offer cannot be revoked for a reasonable time if the offeree has started performance of the requested act, though performance must be completed before the offeror is under a duty to perform. R2d § 45.

If the offeror hinders performance by the offeree, the offeree is deemed to have begun. An offeree must notify the offeror of performance if the offeror requests it or cannot tell if performance has begun.

Example

Mother offered to leave the family farm to her daughter if she and her husband left their home in Missouri, and moved to Maine to take care of Mother for the rest of her life. A few weeks after the move, Mother tried to revoke the offer and deed the house to her son. The daughter sued, and the court ruled that the offer was irrevocable since performance had begun.

Brackenberry v. Hodgkin, 116 Me. 399 (1917).

Mother offered to leave the family farm to her daughter if she and her husband left their home in Missouri, and moved to Maine to take care of Mother for the rest of her life. Mother refused to let the daughter and family in the house once they moved to Maine. A court would probably rule that the offer was irrevocable since the offeror, Mother, hindered performance.

7. Recovery for Preparation Expenses

An offer to form a unilateral contract asks only for an action in return. This may understandably cause an offeree to make preparations to perform in order to accept the offer. An offeree who makes such preparations would be penalized if the offeror then withdrew the offer before the offeree could begin performance. In that case, recovery for those expenses is possible, if the expenses were predictable (*foreseeable*). R2d § 87(2).

Example

Mother offered to leave the family farm to her daughter if she left their home in Missouri, and moved to Maine to take care of Mother. Then Mother telegraphed the daughter and told her the deal was off, but only after the daughter hired and paid movers to pack all her belongings. A court would probably rule that the daughter could recover the moving expenses she incurred in preparing to respond to her Mother's offer.

C. ACCEPTANCE OF AN OFFER

Acceptance is the procedure used by an offeree to agree to a contract offer. This *manifestation of agreement* must conform to the method required by the offer. The process of acceptance varies, depending on whether the contract was bilateral, unilateral, or covered by the UCC. Some acceptances must be in writing if required by the Statute of Frauds. For definitions, see the Glossary in section VIII.

If an offer is ambiguous as to whether it requires a return promise, as in a bilateral contract, or a return performance, as in a unilateral contract, most courts consider it to be bilateral.

1. Bilateral Contract Acceptance

When an offer requests a promise in return, it is a bilateral contract, and the offeree's return promise is required to accept the offer and form a contract. Acceptance can be either written or spoken.

a. Who can Accept

An offer is personal to an identified offeree, and cannot be assigned to another. Only the offeree may accept the offer, except in the case of option contracts.

Example

Ashley sends a fax to cousin Beth: "Beth, I will sell you my sapphire ring for $150." Carol, Beth's roommate, sees the fax, and responds: "Beth is not here, but I accept your offer and will buy the ring." There is no contract because the ability to accept (power of acceptance) was Beth's alone.

b. Acceptance Mirrors Offer

Under the common law, the *mirror image rule* requires a valid acceptance to be unqualified and not at variance with the terms of the offer. Any supposed acceptance that adds qualifications or conditions operates as a rejection and a counteroffer.

The UCC is more tolerant of mismatched offers and acceptances, and attempts to reconcile them. It prefers to allow a contract to be formed, rather than conclude that a mismatch is a rejection. See *The Battle of Forms*, section C, 3, d, below.

Examples

A homeowner sent a contract offer to a house painter, offering to pay $2000 to have the exterior of his house painted. The painter wrote back, agreeing to most of the terms, except that he wanted $2500. Under the common law, the painter's letter is not an acceptance of the original offer, but a rejection and counteroffer.

A hardware store owner sent a contract offer to a distributor, offering to pay $1000 for five step ladders. The distributor wrote back saying that he would ship his entire stock of three ladders, for $600. Under the UCC, unless the hardware store owner objects, that forms a contract on the new terms.

c. Objective Commitment

An acceptance is judged by the same standard as an offer. The test is whether a reasonable person would objectively interpret the words or actions of the offeree as a manifestation of present willingness to accept the offer and enter into a contract.

d. Method of Acceptance

The offeror is master of the offer and can specify the time, place, or manner of acceptance. If the offer does not specify the manner of acceptance, an offeree may accept in any reasonable manner that communicates the acceptance to the offeror. R2d § 30(2). To be reasonable, the method of acceptance must be as fast and dependable as the way the offer was presented.

e. Time of Acceptance and the Mailbox Rule

Two common acceptance issues are: First, when is an acceptance or a rejection effective? Second, what happens when an offeree changes his or her mind? The *mailbox rule* regulates the winner between conflicting acceptances and rejections, and is based upon when they have been dispatched to the U.S. Postal Service.

1) Acceptances are Effective when Dispatched

If an acceptance is properly addressed and stamped, the acceptance will be effective upon dispatch, regardless of whether it ever reaches the offeror.

Example

A person signed a contract to make a purchase, and sent it to the seller. The seller signed it, and mailed it back to the purchaser. The seller then had a change of heart, and called the purchaser to revoke the acceptance. Although the attempted revocation by phone reached the purchaser first, once the signed contract was in the mail, the seller had accepted the offer and could not revoke it.

Morrison v. Thoelke, 155 So. 2d 889 (Fla. App. 1963).

a) Option Contract Exception

The mailbox rule does not apply if the offer is for an option contract. When the option has already been bought, actual receipt of acceptance of the related contract is required.

b) Offer's Terms Exception

The mailbox rule does not apply if an offer clearly states otherwise.

2) Rejections are Effective when Received

If a rejection is sent, it is effective only when it is received by the offeror.

a) Rejection, then Acceptance

If the offeree first sends a rejection and then an acceptance, whichever the offeror receives first, wins. The acceptance, if received second, then serves as a counteroffer.

b) Acceptance, then Rejection, with Reliance

A contract is created upon dispatch when an offeree first sends an acceptance, and then sends a rejection, unless the offeror receives the rejection first and acts in reliance on it. This is necessary because otherwise the offeror would be penalized for understandably relying on the rejection.

f. Acceptance by Conduct

An offer can be accepted by conduct, which implies a return promise, as sought by the offer. It creates a contract as valid as a written one.

1) Performance

If the offeree begins to perform the act requested by the offeror, this implies a promise to complete the performance, and constitutes acceptance.

Example

Ford Motor Co. sent a purchase offer to Allied Steel to buy machinery. Allied, instead of sending back a written acceptance to Ford, directly started to ship the machinery. The shipment constituted an acceptance, and a valid contract was formed.

Allied Steel v. Ford Motor Co., 277 F.2d 907 (6th Cir. 1960).

2) Act Required by the Offer

A unilateral contract requests the performance of an act. A bilateral contract requests a promise to act in the future. A bilateral contract offer can also request an act, not as performance, but to show acceptance.

Example

A music studio owner made an offer to a singer: "Our studio will record and mix your next CD for $1000. This offer can only be accepted by meeting me for lunch on Friday at the Blue Note Cafe." If the singer shows, a contract is formed.

3) Silence

An offer cannot transform the absence of a reply into an acceptance. In other words, an offeror cannot construe silence as consent. However, parties are free to agree beforehand that silence will serve as acceptance. Silence can also be acceptance when the parties' previous *course of dealing* makes it reasonable to require the offeree to give notice of rejection of the offer. R2d § 69(1)(c).

Examples

A student received an unsolicited book from a book club. An accompanying letter stated that if the recipient did not send a written refusal to the book club within ten days, the book would be considered accepted and payment would be required. The student can dispose of the book as desired, and need not pay anything. The student's silence does not form a contract because he did not induce the offer.

Another student received an unsolicited book from a book club. The student sent in payment, but signed no other agreement. Books continued to arrive every month, and the student paid for them. One month, the student stopped paying, but still received several more books. Eventually the club stopped sending books and demanded payment. The student claimed that he could keep the free books without paying, since he never requested them. However, the previous course of dealing between the parties makes it reasonable to construe the student's later silence as acceptance. A contract was formed, and he will have to pay for all the books.

4) Accepting Benefits

In most states, acceptance of benefits of unsolicited goods creates an implied contract promise to pay for them.

Example

Two men contracted to buy a compressor used for cooling. Later they attempted to rescind the agreement after the compressor had been repossessed, claiming the equipment was defective. However, they had used the equipment for a year, moved it, and connected it to an air conditioner. The court ruled that such acts constituted an exercise of dominion consistent with ownership. The buyers were deemed to have accepted the goods and were precluded from asserting rescission.

F. W. Lang Co. v. Fleet, 165 A.2d 258 (Pa. Super. 1960).

g. Joint Offers

An offer made jointly to two or more persons must be unanimously accepted to form a contract.

h. Divisible Contracts

Accepting an offer for a divisible series of contracts is different from the all-or-nothing pattern of an ordinary contract. When a contract requires more than one acceptance, this allows the offeror to revoke the offer for the unperformed segments of the contract, even after one segment in the series has been accepted, and fully performed.

Example

A supplier made an offer to a farmer: "Our firm will provide you with whatever fertilizer you need for the next 12 months, if our inventory is adequate." The farmer later purchased, paid for, and picked up fertilizer on several occasions. In other words, some segments of the series of contracts were fully performed. However, the supplier can still revoke the offer for the remaining segments in the series of contracts.

2. Unilateral Contract Acceptance

An offer to form a unilateral contract can be accepted only by performance of the act requested in the offer. Normally, the offeree need not give the offeror notice of an intention to accept.

• **Divergent Notice Distinction**: If the offeror has no adequate means of learning of the performance, the offeror is not bound to perform unless: The offeree uses reasonable diligence to notify the offeror; the offeror learns of performance within a reasonable time; or, the offer indicates that notification is unnecessary. R2d § 54.

3. Acceptance Under the UCC

The UCC attempts to create a contract whenever possible. Thus, it has liberalized the means by which an offeree may accept an offer. Unless the offer expressly limits the manner of acceptance, an offeree may accept in any reasonable manner. UCC § 2-206.

a. Acceptance by Promise

An offeree may accept an offer for the shipment of goods by a promise to ship them. UCC § 2-206.

b. Acceptance by Conforming Shipment

An offeree may accept an offer for the shipment of goods by shipping them. An offeree who ships must notify, within a reasonable time, any offeror who is unaware of the shipment, or the offer will terminate. UCC § 2-206.

c. Acceptance by Nonconforming Shipment

An offeree may accept by shipping nonconforming goods, simultaneously accepting the offer, and breaching the contract. Nonconforming goods are those that do not precisely meet the specifications of the original offer.

The buyer can accept the goods if they suit his or her purposes, reject them if unsuitable, or sue for cover or market value. See *Remedies for Breach*, in section VI, A, 6, b, below.

However, the offeree can ship nonconforming goods, and notify the offeror that the shipment is being offered only as an accommodation to the buyer. The seller's shipment is then a counteroffer. The buyer is free to accept the goods without forming a contract under the terms of the original offer. UCC § 2-206.

d. The Battle of Forms

In commercial transactions, the UCC addresses the business reality that there are often several inconsistent documents exchanged in creating a sales contract. One party starts by sending an offer to another. The second party might accept the offer, but add a new term. The first party might accept the new term, or add another. There may be several iterations. The significance of these mismatched forms depends on whether the parties are merchants or not. The rules are different for professional business people. UCC § 2-207.

1) One Party is a Merchant

If one party is a non-merchant, any proposed additional or different terms are only proposals for modifying the contract, which can be accepted or rejected separately. The original terms of the offer still govern.

Example

A student mails an order to Cozy Home Co., for a home repair manual. Cozy sends an acceptance, which also says that the student must sign up for woodworking classes. The added term in Cozy's acceptance is only a proposal. There is still a contract, even if the student ignores the classes.

2) Both parties are Merchants

Any proposed additional or different terms automatically become part of the contract, unless one of three exceptions is triggered, in which case the terms of the original offer govern:

a) The offer expressly limits acceptance to its terms.

b) New terms alter the offer and would result in material surprise or hardship if incorporated.

c) The offeror rejects the new terms. UCC § 2-107(2).

Example

A store ordered carpet from its distributor. This was a contract offer. The distributor accepted the offer, using its own pre-printed acknowledgment form. The form required that any disputes over the contract be submitted to arbitration. The court ruled that the form might alter the agreement and be a material hardship to the store. If so, it would be a rejection of the original offer. The case was returned to the lower court for further consideration.

Dorton v. Collins, 453 F.2d 1161 (6th Cir. 1972).

e. True Counteroffers

If acceptance is expressly made conditional on the offeror's consent to additional or different terms, it is a counteroffer and there is no contract formed. UCC § 2-207. Typical language used in express conditions include "but only if," or "on the condition that," or "provided that."

Example

A store ordered carpet from a distributor. The distributor's response agreed to ship the carpet, but specified that it was only "on the condition that any disputes over the contract are submitted to arbitration." The letter is a counteroffer, rejecting the original offer, and proposing another.

f. Secondary Suggested Terms

A definite and seasonable expression of acceptance is valid, even if it contains additional or different terms, so long as they are not a condition to acceptance. A contract is still formed. UCC § 2-207.

Example

Ethel offers to sell Jill her bicycle for $120. Jill responds, "I will buy the bicycle. Please deliver it on Saturday." There is a contract. The delivery term is not essential.

D. CONSIDERATION

Consideration is the influence, which induces a party to enter into a contract. It is a right or benefit accruing to one party, or a loss or responsibility shouldered by the other. Contracts must contain such a benefit for all parties in order to be valid. This mutual consideration is required in addition to the parties' reciprocal promises. Otherwise any agreement is really a gratuitous promise. There may be many distinct promises in a contract. The contract is valid as long as even one promise is supported by consideration.

1. Three Tests for Valid Consideration

- the promisor must offer to suffer legal detriment;
- the promise must be made in exchange for a current promise;
- the promise must be obligatory, not discretionary or illusory.

a. Legal Detriment

The one making the promise (the *promisor*) must offer to suffer legal detriment. This means doing something the promisor does not already have a legal obligation to do, or refraining from doing something the promisor has a good faith belief in having the right to do.

Example

An uncle offered to pay his nephew $5,000 if the nephew refrained from smoking, drinking and gambling until 21. The nephew complied, having a good faith, though erroneous, belief that smoking, drinking and gambling were legal before age 21. The nephew's good faith forbearance, though mistaken, was valid consideration.

1) Non-Economic

A legal detriment can be non-economic. The benefit sought can be entirely subjective and less tangible.

Example

An uncle offered to pay his nephew $5,000 if the nephew refrained from smoking, drinking and gambling until 21. Smoking, drinking, and gambling were legal before age 21. The nephew complied, and his forbearance was valid consideration.

Hamer v. Sidway, 27 N.E. 256 (N.Y. 1891).

2) Adequacy

Regardless of how economically inadequate detriment is, it will usually support a promise. Courts usually decline to relieve a party from a contract's terms simply because of making a bad bargain, unless the court finds the bargain unconscionable.

An unconscionable contract is one only a coerced or deluded person would make, and which no honest and fair person would accept, because the terms are excessively extreme and one-sided.

3) Nominal Consideration

Contracts often recite nominal or token consideration such as "in consideration of $1.00 paid." A court may conclude that consideration has not been paid, or that the parties intended a gift rather than a contract.

Example

A father signed a contract transferring all his household furniture to his daughter, in return for one dollar. The daughter did not take possession of the furniture. After the father's death, the daughter was unable to enforce the contract to receive the furniture. The court ruled that the supposed transfer was no more than a failed gift.

4) The Pre-Existing Duty Rule

If a party is currently, legally obligated to do something, or is prohibited from doing it, he or she has a *pre-existing duty*. If he or she then promises to do or hold back from doing the same thing, he or she has not incurred any new detriment. The same is true if he or she then actually does or holds back from doing the thing. Accordingly, the promise or act is not good consideration. R2d § 73. However, there are two common law exceptions to the rule, and the UCC has abolished it entirely for the sale of goods. UCC § 2-209.

Example

A homeowner contracted with a house painter to have his house painted for $2000. The painter later decided he wanted $2500, and the homeowner agreed. After the job was done, the painter could not recover the extra $500 from the second agreement. Since the painter already had a pre-existing duty to paint the house, his second agreement to paint it lacked any new consideration.

a) Accord and Satisfaction Exception

Accord and satisfaction is a procedure for resolving contract disputes through compromise. One party offers a compromise to fulfill (*discharge*) an existing debt or duty. The new, compromise agreement is called the accord. The satisfaction is the actual performance of the agreement, which discharges both the old and new obligations.

Example

A union official retired with a pension. In negotiating the disputed pension rate, the union and the official agreed to

base it on his after-tax annual salary of $25,000 (that is the accord). The official received payments for two years (that is the satisfaction). The official then sued, claiming the pension should have been based on his pre-tax salary of $41,000, which would have increased the pension. The court held that the plaintiff's acceptance of the pension payments constituted an accord and satisfaction of the disputed obligation, and prevented (estopped) him from seeking an increase.

Cohen v. Sabin, 307 A.2d 845 (Pa. 1973).

b) Minority Rule Benefits Exception

Some jurisdictions will enforce a promise, even though there is no legal detriment to a promisee, if it confers a benefit on another party. These courts reason that they must choose between a party with a pre-existing duty, and a party who is willing to bargain and pay for an already required act. These courts conclude that the benefit of the act desired by the second party is sufficient consideration.

Example

Jake agreed to landscape Dorothy's yard by May 1st. Dorothy's neighbor, Ms. Gulch, planning a wedding in her yard on May 8th, offered Jake an additional $100 to ensure completion on time, and he accepted. Though Jake's second promise had no added legal detriment, Ms. Gulch was benefited and must pay the $100.

b. Exchange Of Current Performance

The promise must be made in exchange for the promisee's current exchange of a promise or performance. The key principle is that the promise is for the present, not the future. R2d § 71.

1) Past Performance Usually Invalid

The promisor must request and induce the promisee's forthcoming, or current detriment in exchange for the promise. There has to be an exchange of current promises

to do something in the future, or refrain from something. This is called a *bargained for exchange*.

If a promisor makes a promise in return for something already done (*past performance*), there is usually no consideration, and no contract; however, there are a few exceptions.

Example

The boss asked his secretary to work late. The secretary stayed. As a result, the boss promised to pay the secretary a bonus. The boss's promise is unenforceable, because the secretary already performed the work and thus the promise does not induce him to bargain to do anything in exchange.

a) Revived Debt Exception

When a debt is no longer legally enforceable, for example because of bankruptcy, if the debtor promises to repay all or part of the debt, the new promise to pay is enforceable on the new terms.

b) Reaffirmed Contract Exception

A party may form a contract, which he or she has the power to void. For example, a contract with an infant (anyone under 18) can usually be voided by the infant. After age 18, the party can ratify the contract. If he or she reaffirms a promise that he or she has the power to void, the subsequent promise to perform is enforceable without added consideration.

c) Induced Past Performance Exception

If a person performs an act at the request of another with an expectation of payment, courts may enforce a later promise to pay proportionate to the benefit received. R2d § 86(2)(b).

Example

The boss asked his secretary to work late one evening. Because the secretary knew that the boss always paid

secretaries who stay late an extra $100, he stayed and finished the project. The next morning, the boss promised to pay him $100 because he stayed late the night before. The boss's promise is enforceable, because the secretary was induced to perform by the expected bonus.

2) Moral Consideration Invalid

If a promisor makes a promise because of feeling a moral obligation, the promise does not induce a current exchange of performance from the promisee and lacks consideration.

Example

Joe tells his brother Tom, "Since you named your son after me, I promise to leave you my yacht." This promise is unenforceable for lack of consideration.

3) Gratuitous Promises for Gifts

A promise to make a gift is unenforceable because it is unsupported by consideration and the promisee suffers no legal detriment. A conditional gift also lacks consideration if there was no bargain between the parties, even if the promisee suffers a detriment.

Example

A man asked his widowed sister-in-law to move across the state with her kids and stay with him. She gave up her home and moved. He kicked her out a few years later. The court ruled there was no consideration.

Kirksey v. Kirksey, 8 Ala. 131 (1845).

When an agreement is both a gift and a negotiated business transaction, there can still be valid consideration and contract formation. The bargain simply has to be induced at least partially by the benefits of the deal, as opposed to being completely motivated by the altruism of gift-giving.

Example

Joni agrees to sell her old sports car to her good friend, Carla, for $1500 rather than the $2500 she would ask from a stranger. The generous, or gift-giving aspect of the sale does not invalidate the consideration, and there is a still a valid contract.

c. Obligatory, not Illusory

A promise must be binding and obligatory in order to be considered adequate consideration. The power to revoke the contract cannot be reserved by one party. If the promisor has complete discretion on whether to perform, the promise is illusory and unenforceable, because it is no promise at all.

Example

A creditor said to a debtor: "I'll refrain from collecting on your debt until I need the money, if you promise to purchase my old sports car from me." The creditor made no commitment. The promise and the contract are illusory.

1) Mutuality

In bilateral contracts, a promise constitutes consideration for the return promise only if both parties are bound to perform. Without mutuality of obligation, the contract is void. In unilateral contracts, since acceptance occurs only upon performance of an act, the act is the consideration.

2) Alternative Performances

If a promisor reserves a number of alternative performances, they constitute consideration only if each one involves legal detriment to the promisor, or if the choice among alternatives rests with a third party, not under the promisor's control. R2d § 77(b). There can't be an escape hatch for the promisor.

Example

The hiring partner of a law firm says to an attorney: "If Netscape retains the firm, we will either hire you next

month, or we will put you on a list for further consideration. The second promise bears no cost or detriment for the firm, and is not good consideration. There is no contract.

3) Conditioned Promises

A conditional promise can constitute valid consideration, but only if the condition is entirely outside of the promisor's control.

Examples

The hiring partner of a law firm says to an attorney: "We will hire you if we get Netscape as a client next month." If Netscape retains the firm, the consideration and contract are valid.

The hiring partner of a law firm says to an attorney: "We will hire you if we decide to expand the firm next month." Since the decision to expand is controlled by the firm, it made no binding commitment. There is no consideration and no contract.

4) Satisfied Promisor

If a party agrees to perform only if satisfied with the goods or services bargained for, that party has a good faith obligation to accept the goods or services, if actually satisfied. This constitutes good consideration.

5) Implied Promises

An apparently illusory promise may be rendered sufficient consideration if a court finds an implied promise to use one's best efforts to perform. The promise is a sufficient legal detriment, rendering the contract binding. An agreement giving an exclusive right to sell goods imposes, by law, an obligation to use best efforts. UCC § 2-306(2).

Example

Lucy contracted to market her clothing line exclusively through Mr. Wood, for a 50-50 share of the profits. Later she resold the rights, arguing that there was no consideration and no contract, because Wood had no duty to sell

anything specific. The court ruled in favor of Wood, finding there was a promise implied by him to try in good faith to sell the clothes. The implied promise was sufficient consideration to make the contract binding.

Wood v. Lucy, Lady Duff Gordon, 222 N.Y. 88 (1917).

6) Restricted Cancellation

An absolute right to cancel an agreement is an illusory promise. But if the right is restricted, the promise may still constitute good consideration, with language such as: "Seller may terminate only upon 30 days' notice."

Examples

A painter contracts with a supplier to purchase 10 gallons of paint every month. The agreement states that the painter may cancel the arrangement at any time. Because the painter made no binding commitment, there is no consideration and no contract.

A painter contracts with a supplier to purchase 10 gallons of paint every month. The agreement states that the painter may cancel the arrangement only after 30 days notice. There is good consideration and a contract.

7) Unenforceable by Law

The fact that a rule of law renders a promise voidable or unenforceable does not prevent it from being consideration. This can be important, if the contract later becomes enforceable through performance or conduct of the parties.

Example

Buyer orally promised to purchase $600 worth of paint from Seller. The Statute of Frauds rendered Buyer's promise and the contract unenforceable. The promise still constitutes consideration. If the seller delivered the paint, and the buyer accepted it, the parties' conduct would make the contract enforceable.

8) Requirements and Output Contracts

Contracts made to purchase all of one's requirements or to sell all of one's output are not illusory. Each party must, in good faith, tender or demand any amount of goods not unreasonably disproportionate to any estimate or comparable output or requirements. UCC § 2-306.

Examples

A builder contracts with a distributor to purchase all the lumber she needs that year for home building. Even though a specific amount is not stated, it is a valid requirements contract.

A saw mill contracts with a home builder to provide all the lumber it can produce this year. Even though a specific amount is not stated, it is a valid output contract. However, if the saw mill decided to increase output by ten times over the previous year, the amount would be disproportionate and the contract invalid.

2. Consideration Substitutes

Certain promises are at least partially enforceable, even without an exchange of true consideration. There are several substitutes for consideration, used when justice and custom require it.

a. Common Law Substitutes

1) Promissory Estoppel

The principle of promissory estoppel is applied where there has been a promise, which the promisor should reasonably expect to induce action or forbearance on the part of the promisee, and which did induce such action or forbearance. Such a promise is binding if injustice can be avoided only by enforcement of the promise. This is true even if both consideration and consent are absent.

Example

Mrs. Feinberg worked for Pfeiffer Co. for 37 years. The company told her they would give her a pension of $200 a month if she retired, which she did. The company later cut the pension to $100 per month, and she sued. Even though the pension was a gratuitous gift, the court held that she detrimentally, reasonably, and foreseeably relied on it, and it was enforceable.

Feinberg v. Pfeiffer, 322 S.W.2d 163 (Mo. App. 1959).

2) Minority Rule: Option Contracts

Some courts do not require consideration for formation of an option contract, holding that the contract is binding if it is in writing, is signed by the offeror, recites a supposed consideration for making the offer, and proposes a fair exchange within a reasonable time. R2d § 87(1).

3) Archaic: Contracts under Seal

Historically, in common law, a contract made under seal, i.e., an impression formed in melted wax on parchment, did not require consideration to be enforceable after delivery of the sealed instrument.

b. UCC Substitutes

1) Merchants' Firm Orders

A written offer by a merchant to buy or sell goods, that gives assurance that it will be held open, is not revocable for lack of consideration, during the time stated or, if no time is stated, for a reasonable time, not to exceed three months.

2) Contract Modifications

If contracting parties, in good faith, modify a contract for the sale of goods, no added consideration is needed. The UCC has essentially abolished the pre-existing duty rule in these cases. UCC § 2-209.

3) **Waiver**

If contracting parties, in good faith, waive aspects of a contract for the sale of goods, no added consideration is needed. UCC § 2-209.

II. INTERPRETATION

Contracts must be interpreted because different legal principles sometimes control different types of contracts. The intent of the contracting parties is the most important factor in categorizing a contract, but if a contract is unclear the law often intervenes. The quest is to determine what the meaning of the contract really is.

Interpretation of an unambiguous contract is always done by a court. On the other hand, when a contract is ambiguous, it is the responsibility of the jury to resolve any ambiguities. One limitation on evidence, which can be used to resolve contract disputes, is the parol evidence rule, discussed below. This limits the contract to its terms and tries to exclude other extraneous evidence.

A. TYPES OF CONTRACTS

1. Express Contract

An express contract can be either a written or an oral agreement. It is the actual agreement of the parties, or the terms of which are openly uttered or declared at the time of making it, being stated in distinct and explicit language, either orally or in writing.

Example

A student says to a classmate: "I'll sell you my old sports car for $1000," and the classmate says: "I accept." They draw up and sign an agreement. That is an express contract.

2. Implied Contract

An implied contract is one in which the terms of the agreement are not clearly stated, but may be inferred from the parties' conduct. If one or both parties accept the benefits of the other's performance without objection, a contract is implied. Under the UCC, contracts may also be

established from the course of dealing, trade usage, or course of performance. UCC § 1-205(1).

Example

A patron says to a waiter: "I want the spaghetti marinara." This is the acceptance of an implied contract offer. The patron's promise to pay the menu price is implied.

3. Quasi Contracts

This is a type of contract created by law when necessary to avoid unjust enrichment. It is designed to compensate a party for the reasonable value of services or costs of performance when there is no actual contract.

Example

A bleeding person rushes to a hospital and is treated. The patient's conduct creates a quasi contract. The patient must pay for the treatment, even though there is no formal contract.

4. Divisible or Entire

Some contracts are divisible into independent acts, each of which confers a separate benefit, and for which a separate payment is deserved. These are divisible contracts. In these cases, performance of each separate act triggers the payment of consideration.

Example

A student says to a classmate: "I'll make you dinner each Friday this winter, for $20 per meal," and the classmate says: "I accept." Payment is due after each meal, not in the spring.

Other contracts are entire, or non-divisible. In this case, only substantial completion or performance of the entire contract triggers the payment of consideration.

Example

A student says to a classmate: "I'll cater your graduation dinner on Friday for $200," and the classmate says: "I ac-

cept." Payment is due only after the entire meal, not after one course.

5. Bilateral Contracts

A bilateral contract is formed when two parties exchange mutually dependent promises. When the promises are exchanged, the contract is formed, even though the promises are fulfilled later.

6. Unilateral Contracts

A unilateral contract is formed when one party offers to perform and requests a return performance, not a promise. The second party can only accept by performing. The offeror must make it clear that the contract is formed only upon the offeree's performance. In case of doubt, courts will presume that an offer invites only a promise, as in the formation of a bilateral contract.

Example

A student says to a friend: "I'll pay you $20 if you make me dinner this Friday." The student-offeror is not asking for a promise, but for a meal. The friend can ignore the offer, but can accept it only by actually making the dinner. Even if the friend says "I promise to make the meal on Friday," there is still no contract until the food is served. A contract is formed by the start of performance, so that once the friend is cooking, the student cannot withdraw the offer.

7. UCC

The distinction between bilateral and unilateral contracts is not true for transactions covered by the UCC. The UCC, designed to advance the cause of commerce, wants to encourage contracts. Accordingly, it allows acceptance by either performance or a return promise, unless the parties specify otherwise. UCC § 2-206(b).

B. THE PAROL EVIDENCE RULE

The Rule is used when one party to a contract wants to introduce some evidence, which is not found in the final, written contract already in existence, and the other party opposes the introduction. The parol evidence rule prohibits the parties to a written contract from introducing prior, written evidence to modify it. In addition, neither party can introduce prior or present oral evidence.

The Rule only applies when there is a final, complete, and written contract. If there is only a preliminary draft, or if the contract is ambiguous, the Rule does not apply.

There are competing considerations, which are reconciled by the Rule. On the one hand, it is important to reveal the accurate outline of a contract. On the other hand, the law seeks to avoid spurious claims and untruths. The Rule is used because disputes can be thorny if the parties disagree on what terms are included in a contract. In order to avoid the temptation for oral perjury, and avoid unjustified claims, the law excludes certain types of extraneous evidence by this method.

Example

A student says to a friend: "I'll sell you my old sports car for $1000," and the friend says: "I accept." They draw up and sign a complete, written contract. Later, the friend claims that the student had also agreed by phone to accept an old Ford as a trade-in. The trade-in is not part of the contract.

1. Final Contract

Parol evidence is admissible to show that no final contract exists. The Rule does not apply until a final contract is formed.

2. Totally Integrated Writing

If a written contract includes all essential terms, the document is totally integrated. In this case, a court will not ad-

mit evidence of prior or contemporaneous agreements or negotiations, which would contradict the writing or add another term to it.

a. Integration Clause and Complete

If the writing contains a clause stating that the agreement is the parties' final and complete agreement, known as a *merger or integration clause*, the writing is totally integrated, unless the document is clearly incomplete. Parol evidence is inadmissible.

A TYPICAL INTEGRATION CLAUSE:

This Agreement supersedes all prior agreements between the Parties, it being their intention that this Agreement shall constitute the complete settlement of all their rights and interests of any kind.

Example

A buyer orally agreed to purchase the seller's boat. Seller also owns a trailer. The parties written agreement did not mention the trailer. The buyer has other evidence that the seller agreed to "throw in" the trailer to induce the purchase. If the writing contained an integration clause and was otherwise complete, evidence of the seller's promise to include the trailer as part of the sale would be prohibited.

b. Partially Integrated

If there is no integration clause, and additional terms that are normally needed are usually left out in similar circumstances, the writing is considered a partial integration. Parol evidence is not admissible to contradict a term in the writing, but is admissible to prove the existence of omitted, consistent, additional terms.

c. Integration Clause but Incomplete

If there is a merger or integration clause, but the writing is clearly incomplete, it is not a final document. Parol evidence is admissible.

3. UCC and Parol Evidence

Under UCC § 2A-202(a), a party may explain or supplement, but not contradict, even a totally integrated writing by offering evidence of:

a. Course of Dealing

The sequence of previous conduct between the parties in a particular transaction that is regarded as a common basis of understanding for interpreting the parties' expressions.

b. Usage of Trade

A regular practice or method of dealing used in the parties' business that gives rise to an expectation that the parties will observe it with respect to the transaction in question.

c. Course of Performance

The manner in which the parties have conducted themselves in performing the particular contract at hand.

4. Parol Evidence Rule Inapplicable

a. Clarifying Ambiguity

The parol evidence rule does not apply when a party wants to clarify ambiguous terms. Traditionally, only terms with a special meaning due to custom or usage could be varied, but not the plain meaning of ordinary words. More recently, parties are allowed to introduce parol evidence showing that they had attached a special meaning to any word. Ambiguous terms are normally construed against the drafter. UCC § 2-202.

b. Later Oral or Written Negotiations

The rule does not prevent admission of evidence of later written or oral negotiations made after a writing has been signed, in order to contradict it.

c. Separate Contracts

Parol evidence is admissible to prove a collateral contract distinct from and independent of the written agreement, which will not vary or contradict its terms.

d. Contract Avoidance

When a party seeks to avoid a contract, the parol evidence rule does not apply. For example, a court will admit evidence of fraud, duress, mistake, illegality, incapacity, or misrepresentation.

e. Conditions Precedent

If the parties orally agreed that no contract would be formed until a particular event occurred, but the writing does not make mention of it, a party can offer proof of the condition.

f. Failure of Consideration

The parol evidence rule will not prevent a party from showing absence of consideration. A party may contradict the writing's recital of consideration with extrinsic evidence.

III. DEFENSES

Even if it appears that a valid contract has been formed, if a party has a *defense* to formation or enforcement, no duties or rights are operative. Defenses serve many important public policies, such as the avoidance of fraud or excessively unfair contracts, and the protection of parties without the mental ability to understand the nature of the agreements they are making.

There are formation, public policy, and enforcement defenses. *Formation defenses* include missing elements, mistake, non-existence of subject matter, incapacity, fraud and misrepresentation and undue influence. *Public policy defenses* include illegality and unconscionability. The *enforcement defense* is based on of the Statute of Frauds. This requires tangible evidence to prove that a contract was made.

It is important to understand the type of defense being advanced because the consequences vary, creating void contracts which are not contracts at all; voidable contracts, which are valid but can be revoked; and unenforceable contracts that are valid but cannot be enforced unless there are further developments.

A. TYPES OF INVALID CONTRACTS

1. Void Contract

A void contract is one that could not be formed because of a fatal legal impediment. It is an agreement that is not a contract at all. Neither party is bound and neither may bring an action against the other for breach. It is void from the beginning, or *ab initio.*

Example

A firm signs a written employment contract with an attorney. The attorney has been previously adjudicated to lack mental capacity, and the firm is unaware of that fact. Mental capacity is the ability to understand the nature and ex-

tent of a contract. The employment contract is void, as though it never existed.

2. Voidable Contract

A voidable contract is one that was originally valid, but which a party has the optional power to revoke or nullify. One example is certain agreements made by an adult with a minor who has the option of backing out of the deal. However, until the contract is voided, it is valid.

3. Unenforceable Contract

An unenforceable contract is one which is potentially valid, but which cannot be enforced because it has a defect. Based on the defect, one party has a defense to enforcement. But the defect can be remedied. Although such a contract cannot be immediately enforced, it has a continuing, latent validity. Parties may later act to cure the defect and render such a contract enforceable.

Example

Jim agrees to sell Gordie $750 worth of bird feeders. The contract is unenforceable at that point because under the Statute of Frauds it must be in writing. However, if Gordie then delivers a written purchase order and Jim ships the feeders, such performance cures the defect in the contract and it becomes enforceable.

B. FORMATION DEFENSES

1. Missing Essential Element

If an agreement lacks one essential element, it is not a contract at all. The absence of a valid offer, acceptance, or consideration makes an agreement non-contractual. Although this is perspicuous, it is often missed on exams, perhaps because it seems too obvious. Always ask this question first: Is it a contract?

2. Mistake Defenses

A mistake affects the formation of a contract if it relates to a material fact. Material means necessary to the contract, not secondary, and having an effect upon the parties. Mistakes may be unilateral, mutual, or due to latent ambiguities. These are some of the most confusing contract issues.

a. Unilateral Mistake

With a unilateral mistake, a contract is formed but cannot be enforced if the other party is aware of the mistake, or should have been, at the time the contract was made.

Examples

The general contractor Patton invited bids from sub-contractors for a new building. Franklin inadvertently submitted a bid, which was only 10 percent of its true cost. Patton was a veteran contractor, and accepted the bid (which is a contract offer). Patton knew that the materials alone exceeded Franklin's bid, and other bids were 10 times higher. Franklin can withdraw his bid, because Patton knew or should have known that the bid was in error. There is no contract.

Bradley invited bids from sub-contractors for a new building. Franklin inadvertently submitted a bid, which was only 50 percent of its true cost. Bradley was new to the business, and accepted the bid (which is a contract offer). Bradley had no way of knowing how low the bid was. Franklin's bid was an offer, which formed a valid contract; his mistake is not grounds for revoking (rescinding) the contract.

• **Divergent Minority Rule:** Some courts allow a mistaken party to void a contract if enforcement would be oppressive to the mistaken party and would not be a substantial hardship to the knowledgeable party.

Example

Patton invited bids from sub-contractors for a new building. Franklin submitted a bid, which was only 10% of its value, due to an error in calculation. Patton was new to

the business, and had no way of knowing how low the bid was. Some courts would still allow Franklin to withdraw his bid because it would be too oppressive to him, and Patton would ultimately have to pay only what the job was worth.

b. Mutual Mistake

If both parties to a contract make a false, affirmative, common assumption about a material issue, no contract is formed because there is no meeting of minds.

1) Mistake in Quality

Many mistakes relate to the quality of the thing for which the contract was made. The mistake must create so severe an imbalance that it would be unfair to carry it out. Comment c, R2d § 152.

Example

Two experienced farmers contracted for the sale of a cow, Rose the 2nd of Aberlone, which both judged to be unable to breed. The contract price of $80 was based on that assumption. Rose turned out to be pregnant, and worth about $800. Because both parties had made the same material mistake, there was no contract.

Sherwood v. Walker, 33 N.W. 919 (Mich. 1887).

2) Non-Existence of Subject Matter

If the subject matter of the contract does not exist, the parties cannot be held to a contract for its sale. If someone inherits a manuscript, and contracts to sell the copyright to a publisher, only to later discover that the manuscript is in the public realm, both parties were mistaken as to the existence of a copyright, and there is no contract.

3) Not Conscious Uncertainty

Mutual mistake must amount to more than a *conscious uncertainty*, A mistake regarding the value of the subject matter of a contract will not justify rescission if the parties

assumed the risk of being wrong. In other words, if the parties don't know, don't investigate, and don't care, neither can later claim the defense of mutual mistake. If the parties choose to be ignorant, the law will not intervene to revoke a contract.

Example

A rock hound took a small, unassuming stone to a jeweler, who thought it might be a topaz, and paid a buck for it. Neither party knew that it was actually a $700 diamond. Because the parties were mutually unconcerned about the nature of the stone prior to the sale, the court ruled that the contract was valid.

Wood v. Boynton, 25 N.W. 42 (Wisc. 1885).

4) UCC Warranty Exception

If both buyer and seller are mistaken as to the nature or quality of goods, which are less valuable than assumed, the buyer may bring an action against the seller for breach of warranty and rescission of the contract. UCC § 2-714(2).

Example

A jeweler contracted to buy flawless diamonds from a distributor. The distributor delivered diamonds, not knowing they were inconspicuously flawed. When the jeweler inspected the diamonds and realized the mistake, he could rescind the sale. Alternatively, he could sue for money damages to recover the difference in value between the flawless and flawed diamonds.

c. Latent Ambiguities

If parties have made an agreement, but have subjectively attached different meanings to the terms, those terms are latently ambiguous and no contract is formed.

1) If Neither Party Knows

If neither party knew of an ambiguity, i.e. of the different meaning attached by the other at the time the agreement was made, no contract is formed.

Example

A buyer agreed to buy cotton from a seller, to be transported from India on the ship Peerless. The parties later discovered that there were two ships named Peerless. The buyer meant the one scheduled to dock in September while the seller meant the one scheduled to dock in December. Since neither party was aware of the understanding of the other, no contract was formed.

Raffles v. Wichelhaus, 159 Eng. Rep. 375 (1864).

2) If One Party Knows

If one of the contracting parties knew or should have known the different meaning attached by the other party, a contract is formed and the meaning attached by the innocent party prevails.

Example

George contracts to buy Ringo's guitar. Unknown to George, Ringo has two guitars, a valuable Fender, and an inexpensive copy. Ringo intends to part with the copy but knows that George thinks he is getting the Fender. The contract is valid, but George's interpretation prevails.

3) If Both Parties Know

If both parties knew of a different meaning attached by the other at the time the agreement was made, no contract is formed.

Example

A buyer agreed to buy cotton from a seller, to be transported on the ship Peerless. There were two ships called Peerless. The buyer meant the one scheduled to dock in September; the seller meant the one scheduled to dock in

December. Both parties knew that the other intended a different ship. No contract was formed.

3. Incapacity

Certain classes of persons lack the ordinary capacity to make contracts. Contracts they form are void or voidable, although they can be reaffirmed after the incapacity ends.

a. Infants

Persons under the age of majority, usually 18, are termed *infants*. Any contract made by them is voidable by them or their guardian.

1) Third Parties

An infant's right to void a contract is sometimes effective even against a third party. If an infant sold his or her house, and the buyer sold it to another, the infant could still disaffirm the sale and regain title.

2) UCC

However, under the UCC, if an infant sells goods to a buyer, who then sells them to another who pays for them while unaware of the problem with the earlier sale, the last buyer is *a good faith purchaser for value*. The infant may not recover the goods. UCC § 2-403.

b. Mental Incompetence

1) Adjudicated Incompetent

If a person is adjudicated to lack the mental capacity to understand the nature and consequences of a contract, any contract made by that person is *void* from the beginning. It does not matter whether the other parties had actual knowledge or notice of the incapacity.

2) Mental Illness, Intoxication or Senility

If a person who has not been adjudicated incompetent, but does not understand the nature and consequences of entering into a contract, due to mental incapacity, the contract is *voidable*. Mental illnesses, intoxication, and senility can create this mental incapacity. However, afflicted persons can void contracts only when the other party knew or should have known of the incapacity. The person or the person's legal representative may disaffirm a contract made under these conditions.

c. Necessities

The defense does not apply to contracts for necessities of living, such as food. In addition, contracts made for insurance, banking, student loans, and military enlistments are still enforceable by special statutes.

d. Reaffirmation

After reaching the age of majority, or recovering from mental infirmity, a party may affirm the obligations of a voidable contract. Such affirmance may be expressed by conduct or by failure to make a disaffirmance within a reasonable time. No further consideration is needed.

Examples

A 17 year old contracted to purchase a car from a used car dealer. After he turned 18, he knew he wanted to keep the car, and so he signed a contract reaffirming his original obligation. The new contract is valid and binding.

A 17 year old contracted to purchase a car from a used car dealer. He kept the car until he was 20, and then attempted to void the contract. His failure to act sooner made the contract valid and binding.

4. Fraud and Misrepresentation

When a party has fraudulently induced another to enter into a contract, it is voidable. If the fraud goes to the heart of the contract, the contract is void from the beginning.

a. Fraud in the Inducement

Fraud in the inducement is fraudulently inducing another to enter into a contract by misrepresenting the subject matter of the contract. This is fraud which somewhat diminishes the value of the bargain, although it does not completely destroy it. It renders a contract voidable by the deceived party; it does not negate the existence of a contract.

Example

Tyler sold his title search company to Bennett. Tyler disclosed that he was being investigated for fraudulently laundering money from his clients, but asserted that he was innocent of all charges. In fact, after selling Bennett the business, Tyler pled guilty to bank fraud. In ensuing litigation, Bennett was awarded damages, based in part upon Bennett's claim that Tyler's deceit was fraud in the inducement, diminishing the value of the business purchased.

Tyler v. Bennett, 449 S.E.2d 666 (Ga. Ct. App. 1994).

b. Fraud in Factum

Fraud in the factum, or execution, is fraud of such a nature that the deceived party neither knew nor should have known of the character or basic terms of the transaction. This is fraud, which is so severe that the innocent party was prevented from understanding the basic nature of the bargain. It renders a contract void from the beginning. R2d § 163.

Example

An officer of a mining company signed an agreement presented to him by the union. The officer was told the agreement did not contain an obligation to contribute to a

union pension fund, when it actual did. Additionally, the union said that the agreement only covered work to be performed for four days, when it actually covered three years. The court initially ruled that proof of these claims would constitute fraud in the execution, making the agreement void.

Local 25 v. Klassic, 913 F. Supp. 541 (E.D.Mich. 1996).

c. Innocent misrepresentation

If the deceiving party innocently misrepresented a fact, the party seeking to avoid the contract must show that the misrepresentation was material, i.e. likely to affect the conduct of a reasonable person, and that the deceived party relied on it.

Example

The sellers of a bakery made misrepresentations as to the zoning of the business location. However, they made the misrepresentations in good faith, since they had been given erroneous information by the city. Unless the buyers can prove that the zoning was material, and that they relied on it, they cannot rescind the contract for sale.

d. Intentional misrepresentation

If the misrepresentation was intentional, actual reliance is all that is necessary and the fact misrepresented need not have been material.

Example

The buyers of a bakery claimed that the sellers made misrepresentations as to the zoning of the business. The sellers made the misrepresentations intentionally, having been previously informed by the city as to the proper zoning. If the buyers can merely prove that they relied on the zoning, they can rescind the contract.

5. Duress

A contract that is induced by a wrongful act and causes the other party to make decisions, not of their own free

will, is voidable by the aggrieved party. A person's free will is judged under a subjective standard, i.e. was the will of the particular person overcome, not whether a reasonable person's will would have been overcome. Taking advantage of another's economic needs is not normally considered duress.

6. Undue Influence

A contract induced by a person in a fiduciary or psychological relationship with a party, when the controlling person occupies a position of trust and confidence, is voidable by the subservient party.

Example

A single and pregnant woman sought refuge in a maternity home. She was convinced by the home to give up her child for adoption right after birth. When she sued to regain custody, the court ruled that the special relationship of the home, and its improper persuasion, constituted undue influence, and justified annulment of the adoption.

Methodist v. N.A.B., 451 S.W.2d 539 (Tex. App. 1970).

C. PUBLIC POLICY DEFENSES

1. Illegality

a. Void or Voidable

An illegal contract is void if the subject matter of the contract is illegal. It does not legally exist. A contract is voidable if the purpose of the contract is illegal. It can be revoked, but only if actions are taken. If an initially legal contract is rendered illegal by a new statute, the performances are discharged under the doctrine of impossibility. No party to an illegal contract may enforce it, even if one party's consideration, promise, or performance is legal.

b. Illegal Subject

If the very subject of the contract is illegal, such as contracts for gambling, usurious interest, bribery, or contracts to induce breach of fiduciary obligations, the contract is void from the beginning.

c. Illegal Purpose

If a contract itself is legal, such as renting a car to another, but the purpose of the contract is illegal, such as using the rental car to rob a bank, the contract is voidable by the innocent party.

2. Unconscionability

An unconscionable contract or clause in a contract is one that is grossly unfair to one of the parties, usually because of stronger bargaining powers of the other party. It is one only a coerced or deluded person would make, and no honest minded person would accept because the terms are excessively extreme and one-sided.

a. Common Law and UCC

If a contract is completely or partially unconscionable at the time it was made, it is unenforceable as a whole or in part. This defense applies both to common law contracts, and those under the UCC. UCC § 2-302.

b. Question for Court

Unconscionability is a mixed question of law and fact decided not by a jury, but by a court. It will consider the setting, the purpose, and effect of the contract in determining whether it is unconscionable. The court can reform or void the contract, or remove (*sever*) an offending clause.

c. Procedural Test

Unconscionability can exist because of the circumstances existing at the time the contract was formed. If one side

had too unfair an advantage, because of the superior bargaining position of the other party, a court may choose not to enforce it because the disadvantaged party had no meaningful choice.

d. Substantive Test

Unconscionability can exist because of the terms of the contract. If terms are unreasonably favorable to one party, a court may choose not to enforce them.

Example

Ms. Williams purchased numerous household appliances from a store over a period of four years. The credit purchases were cross-collateralized. This gave the store the right to repossess everything, when even one item was not paid for on time. This included repossessing items fully paid for years earlier. The court ruled that the cross-collateralization clause was unconscionable.

Williams v. Walker, 350 F.2d 445 (D.C. Cir. 1965).

D. ENFORCEMENT DEFENSE

1. Principle of Statute of Frauds

The Statute of Frauds is a special statute requiring that some tangible evidence, such as a writing or performance, is needed to make certain contracts enforceable. Spoken words, or oral evidence, are insufficient. The Statute does not apply to all contracts, just those that are very valuable, or those that might be easily misconstrued. The contracts covered include those for the sale of more than $500 of goods; contracts for the sale of land; contracts which cannot be performed within a year; contracts to guaranty the debt of another; and contracts made in anticipation of, i.e. consideration of, marriage.

2. Tangible Evidence

The tangible evidence that is required to prove that a contract covered by the Statute of Frauds was made can take several forms.

a. Writing

The Statute is satisfied by a writing that states, with reasonable certainty, the parties, the subject matter, the terms & conditions, and is signed by the party against whom the contract is enforced.

Example

An employee of the Arden Company sued for breach of his employment contract, claiming that he did not receive the proper salary. The contract had been for two years. There were signed payroll cards, an unsigned management memo about the contract, but no overall written contract. The court ruled that the cards, viewed together with the memo, were sufficient tangible evidence of the contract.

Crabtree v. Elizabeth Arden, 110 N.E.2d 551 (N.Y. 1953).

b. Performance

The Statute can be satisfied by full or part performance. However, a contract is enforceable only to the extent of the performance rendered.

Example

The buyer of a boat gave the seller a check for 50 percent as a down payment, but later stopped payment and refused to consummate the purchase. There was no other written contract. The seller sued. The court ruled that the check constituted part performance, and satisfied the Statute of Frauds, making the contract enforceable.

Cohn v. Fischer, 287 A.2d 222 (N.J. Super. Ct. 1972).

c. Promissory Estoppel

When detrimental reliance on the existence of a contract is both reasonable and foreseeable, and if manifest injustice would otherwise result, a contract can be enforced even though it does not otherwise meet the requirements of the Statute. *Detrimental reliance* occurs where a party relied on the promise of another in a reasonable way, and in a way where they would be harmed if the promise were not fulfilled.

Example

A pilot quit his job, moved from California to Alaska, and went to work for Alaska Airlines, based only on an oral agreement. The pilot and the airlines later planned to execute a written contract based upon that oral agreement, but did not before the pilot was fired. The court ruled that the employee's right to recover was not barred by the Statute of Frauds.

Alaska Airlines v. Stephenson, 217 F.2d 295 (9th Cir. 1954).

3. Types of Contracts Covered

a. Real Estate

The Statute applies to any promise to purchase, sell, mortgage, or transfer any interest in real property, including estates, leases, and easements. Licenses, leases, and easements for one year or less are excluded. A change of possession, partial or full payment, or completed improvements satisfy the Statute.

1) Crops, Timber and Minerals

The sale of crops is not an interest in land, and need not be in writing. Under the UCC, a timber sale contract must be in writing only if title to the timber passes before the trees are cut. The sale of minerals (or gas and oil) must be in writing only if the buyer removes them from the property.

2) Agent's Authority

Usually, a writing signed by the buyer's agent is enforceable against the buyer, even though the agent's authority is orally granted. A few states follow the *equal dignity rule*: If an agent's act must be in writing, the agency agreement must also be.

b. Sale of $500 in Goods

A contract, as drafted or modified, for the sale of goods for $500 or more, is not enforceable unless in writing and signed by the party sought to be charged. UCC § 2-201. The writing must also include an accurate statement of the quantity of the goods. Other tangible evidence may be used to prove the existence of a contract in certain cases:

1) Merchant's Confirming Memo

In a contract between merchants, if one receives a signed, written confirmation within a reasonable time, the Statute is satisfied, if the receiving merchant had reason to know of the memo's contents and does not object within 10 days.

2) Specially Manufactured Goods

If goods are specially manufactured for the buyer, are not suitable for sale to others, are in the ordinary course of the seller's business, and the seller has begun or committed to manufacturing them, the contract need not be in writing.

3) Judicial Admission

A writing is not required if the party against whom enforcement is sought admits, in a judicial context, that a contract was formed.

c. Leases for $1000

A contract for the lease of goods for $1000 or more is not enforceable unless it is written and signed by the party against whom enforcement is sought. UCC § 2A-201.

d. Not Performable in a Year

If a contract, by its own terms, cannot be fully performed within one year from formation of the contract, the Statute applies.

If there is any way that the contract could have been completely performed within a year, the Statute will not apply, even if the performance, in fact, lasts longer than a year. For example, if a company orally offers lifetime employment to a potential employee who accepts, the Statute does not apply because the employee could have died right after beginning work, fully performing the contract.

If contract performance will last longer than a year, but the parties reserve the right to terminate sooner, the right to terminate is not the same as a complete performance and the Statute still applies.

Example

The plaintiff in a lawsuit claimed that the defendant had an oral contract to provide financial assistance indefinitely. The plaintiff had the ability to terminate the agreement upon a breach by the defendant. The court ruled that the contract was covered by the Statute as not being performable within one year because a breach and termination cannot be equated with performance.

Strasser v. Prudential, 630 N.Y.S.2d 80 (N.Y. App. 1995).

e. Suretyship

A promise made to pay the debt of another is covered by the Statute. The surety's promise must be collateral or secondary. If the main purpose of the guarantee is to fur-

ther the promisor's own interests, the Statute does not apply.

Examples

Junior wants to buy a new van, to be a courier for the family business. The dealer won't sell the van to Junior unless his dad guaranties payment. Dad does, because he needs a courier. Because dad's main purpose is to advance his own business interests, the Statute does not apply.

Junior wants to buy a new van, to enjoy the summer following graduation. The dealer won't sell the van to Junior unless his dad guaranties payment. Dad does, because he feels that's what fathers are for. Because dad's main purpose is not to advance his own interests, the Statute applies.

f. In Consideration of Marriage

Contracts made in consideration of marriage, other than the parties' mutual promise to marry, must be in writing. This includes promises made by the couple, as well as other interested parties.

Example

A mother is convinced that her daughter should marry a certain suitor. To encourage the daughter, the mother promises to hire the bride for the family business if she marries the suitor. The promise must be in writing.

IV. CONDITIONS

When a contract has been formed, the parties have promised to do something. Frequently, those promises are qualified or made contingent upon the occurrence of some other circumstances, which might or might not occur. A qualifying circumstance is called a *condition*. For example, if someone contracts to buy a sports car for $1000 as soon as they receive their next paycheck, one *condition precedent* is that the paycheck arrives. This means a condition that precedes the obligation. Until the paycheck arrives, the obligation to sell the car does not arise. Thus, contracting parties' promises to perform may have no immediate consequences due to conditions in the contract.

A promise for which there is no condition precedent must automatically be performed. For example, if someone contracts to simply buy a sports car for $1000, the obligation to buy is immediate.

Conditions must be either satisfied or excused before the duty to perform arises. A condition is excused when the condition need no longer occur before performance of the duty becomes due. The non-occurrence of a condition may be excused on a variety of grounds, such as a subsequent promise. These are discussed below.

On the other hand, the conditions themselves create no rights or duties. They are simply *promise modifiers*. Whether a provision is an obligation or a condition can be very important.

Example

An insurer and a homeowner enter into a contract that provides: "Insurer will reimburse the owner for any losses resulting from fire. The owner will not store any flammable materials on his property." The home burns to the ground. It turns out that the owner had stored gasoline in his garage, though that did not contribute to the fire.

If the flammable materials provision is interpreted as an obligation, the owner breached the contract, but the insurer can only recover minimal, nominal damages. The insurer must still reimburse the owner for the fire damage. However, if the flammable material provision is viewed as a *condition precedent*, its violation means that the insurer's obligation never came due, and the owner would get no reimbursement.

A. DISTINGUISHING CONDITIONS & PROMISE

Courts use the standard rules of contract interpretation in deciding whether a contract provision is a promise or a condition. Included are the following:

1. Parties' Intent

The intent of the parties is given priority. The parties are free to designate a term as a condition if they so wish. R2d 226(a).

2. Wording

No particular form of words is necessary, although the words "if," "on the condition that," or "provided that," when qualifying a promise, often indicate a condition. For example, in the contract offer "I will sell you my old sports car provided that I get the job I just applied for," getting the job is a condition precedent for the promise to sell the sports car. R2d 226.

3. Bilateral Contracts

Courts disfavor interpretations that completely discharge a duty. Thus, in an ambiguous bilateral contract, a court will likely find that a provision creates a promise rather than a condition, especially if the condition is within the obligee's control. R2d 227. The law abhors a complete forfeiture of rights by either party.

Example

An insurer and a homeowner made a contract that provided: "Insurer will reimburse the owner for any losses resulting from fire. The owner will not store any flammable materials on his property." The home burned to the ground. It turns out that the owner had stored gasoline in his garage, though that did not contribute to the fire. If there is litigation, a court will conclude that the flammable materials provision was a promise, not a condition precedent. Otherwise, the insurance company will have no duty to perform, i.e. pay for the fire damage.

4. Unilateral Contracts

If a unilateral contract is proposed, a court will usually find that an ambiguous provision is a condition rather than a promise, since the offeree never makes a promise to perform in a unilateral contract.

Example

A homeowner offered to pay a landscaper $400 to mow his lawn before 5 p.m. on Friday, when the homeowner was having a party. The landscaper did the job on Saturday morning. If the 5 p.m. term was a promise, then the homeowner would still have to pay, although the landscaper would be in breach of contract and liable for minimal, i.e. nominal, damages. If the 5 p.m. term was a condition precedent, then there is no contract, and the homeowner's duty does not arise.

5. Satisfaction Required

In cases involving personal taste, a contract is often dependent on, i.e. conditioned on, satisfaction guaranteed. This might appear to allow a complete escape from the contract by the one who must be satisfied. If that were really so, there would be no contract, because that person would have made no commitment. For example, if a contract said: "The buyer agrees to purchase $500 worth of apples, unless he changes his mind," there would be no contract, because the promise to buy is illusory.

Contract law solves these issues by applying a good faith subjective test when one party's duty is conditioned upon the other's subjective satisfaction, such as in art or personal taste. This means in practice that one party must be satisfied, but it must be reasonable and honest satisfaction, not just an excuse to get out of a contract because of buyer's remorse. R2d 228.

If a contract provides that the promisor's performance is conditioned not upon the promisor's approval, but rather on that of a third party (for example, an architect or engineer), the promisor need not perform if the third party is not satisfied under the same good faith subjective standard as for a contracting party directly.

Examples

A person contracted with a painter to paint his portrait for $1000, and told the painter beforehand that he was very picky, and must be satisfied or he would not pay. The finished portrait was unrecognizable and the subject would not pay. The subject was not in breach of the contract, and need not pay the painter. The subject's expression of dissatisfaction was made in good faith.

A homeowner offers to pay a landscaper $400 to mow his lawn, and tells the landscaper beforehand that he is very picky, and must be satisfied. The landscaper does a good job, and meets the standard of quality for the profession. However the homeowner would not pay, because he had just watched the Master's golf tournament on TV, and wants his lawn to look like the putting greens at Augusta. The homeowner is in breach, and is liable to the landscaper for damages. The homeowner's sense of satisfaction is unreasonable and made in bad faith.

B. TYPES OF CONDITIONS

1. Conditions Precedent

These are events, other than a lapse of time, which must occur before a duty to perform arises. In any dispute, a plaintiff would have the burden of proving the existence and satisfaction of conditions precedent.

Example

A buyer contracted to buy a new car. The contract was contingent upon the buyer obtaining financing within 30 days. The financing was a condition precedent to the promise to buy. If the financing is obtained, the buyer must go through with the purchase.

2. Concurrent Conditions

These exist if the parties are to exchange performances at the same time. Neither party must perform unless the other has offered (*tendered*) performance. If one party fails to tender performance, the other party is excused from doing so. In any dispute, a plaintiff would have the burden of proving the existence and satisfaction of concurrent conditions.

Example

A student contracted with a friend to sell his sports car for $1000. The student's readiness to part with the car is a concurrent condition, along with the friend's readiness to part with the $1000. If only one tenders performance, the other is in breach.

3. Conditions Subsequent

These are events that operate to discharge a duty to perform after the duty has arisen. In any dispute, the party attempting to avoid the contract duty would have the burden of proving that the *condition subsequent* justified forfeiture of the duty to perform.

Example

A student has an insurance policy guarding against theft. The policy requires that notice of any theft must be given within ten days for the loss to be covered. If a thief steals the student's computer, unless the condition subsequent requiring notice is satisfied or excused, the insurance company's duty to pay will be discharged. The company would have the burden of proving the lack of notice and the existence of the condition.

4. Express Conditions

If the parties expressly agree that an event must occur, or not occur, before a duty to perform arises, the condition is an simple or express condition. It usually will be preceded by words such as "on the condition that," "only if," or "provided that." A party must comply strictly with an express provision before the other party's duty arises.

5. Constructive Conditions

If the occurrence of an event is within the control of one of the parties, there is always an implied condition, or a promise to use reasonable, good faith efforts to cause the condition to occur, such as when financing must be obtained before a purchase can occur.

If parties fail to state or make clear the order in which their respective promises are to be performed, a court will supply the order based on the doctrine of constructive condition, implied by law:

a. If One Performance Precedes Another

The first party's performance is a condition to the second party's.

b. If One Performance Takes Longer

The longer performance by one party is a condition to the shorter performance by the other party.

c. If Both Performances are Simultaneous

Both Performances are then conditioned upon each other.

C. EXCUSING CONDITIONS

Even if a condition that modifies some contract promise has not yet occurred, a party's duty to perform arises if the condition is *excused*. The condition is then removed (*severed*)

from the contract. The duty, which was previously conditioned or qualified, then becomes due.

Conditions may be excused by voluntary methods, such as waiver or estoppel. Conditions may also be excused by punitive principles, such as hindrance or *anticipatory repudiation*.

1. Voluntary Excuses

a. Waiver

Waiver is the express renunciation of a known right. If a party makes it clear by words or conduct that a condition need not occur before performing, the condition is waived, and it disappears.

b. Estoppel

If a party suggested an intention to waive a condition, or if a party suggested indifference to a condition, by words or conduct, and if the other party changed position in reasonable reliance on the suggested waiver of the condition, then the first party may be estopped from requiring occurrence of the condition before performance.

Examples

A buyer accepted a shipment of goods from a seller, even though it did not match the original specifications: it was nonconforming. The seller could have later sold the goods to another dealer, but relied upon the buyer's acceptance. The buyer may not revoke his acceptance later.

A buyer accepted a shipment of goods from a seller, even though it did not match the original specifications: it was nonconforming. The buyer's acceptance was made under the belief that the nonconformity would be later cured. If the nonconformity was not cured, the buyer may then revoke his acceptance. UCC § 2-607.

2. Punitive Excuses

a. Prevention or Hindrance

If one party's performance is a condition precedent to the second party's performance, and the second party engages in wrongful conduct that prevents the first party from performing, the condition is excused and the second party is required to perform. Wrongful conduct may include passive non-cooperation as well as an overt act.

Example

A real estate sales contract is conditioned on the buyer obtaining financing. There is an implied promise that the buyer will make a good faith effort to obtain it. If the buyer intentionally avoids obtaining financing, thus making it impossible for the seller to perform, the buyer is estopped from enforcing the financing condition. He must go through with the purchase anyway.

b. Anticipatory Repudiation

Anticipatory repudiation is an assertion or unequivocal forecast by a party to a contract that he or she will not perform a future obligation required by the contract when it is due. This occurs when a party to an incomplete (*executory*) contract manifests a definite and unequivocal intent not to render the performance due by the contract when the time arrives.

1) Effect

A repudiated duty becomes immediately due and a present breach of contract occurs. This excuses nonperformance by the other party. In such a case the other party may treat the contract as ended. A repudiation may be retracted until a lawsuit or detrimental reliance occurs.

2) Forms of Repudiation

A party can repudiate a contract by an overt declaration or expression of intent, or through conduct, when the party manifests a *prospective inability to perform* when required.

Examples

A supplier of construction materials contracted to sell lumber to a homebuilder for the next several years. The supplier's lumber costs rose precipitously, and it notified the builder that in the future, it wouldn't supply lumber at the original price. This was an overt declaration of anticipatory repudiation. The builder need not wait until the next order; it could immediately declare the supplier in breach and sue for damages.

A supplier of construction materials contracted to sell lumber to a homebuilder for a current project. But before actually supplying the lumber, the supplier sold his entire stock to another builder, and decided to go on an extended cruise. This constituted anticipatory repudiation through conduct, by showing a prospective inability to perform. The builder need not wait until the next order; it could immediately declare the supplier in breach and sue for damages.

3) Ambiguity

The repudiating statement or conduct must be unambiguous. Statements of doubt or ambiguous conduct regarding a party's inability or unwillingness to perform are insufficient. However, if a party has made an ambiguous statement about whether performance will occur, the other party may demand *adequate assurances of performance* in writing. Failure to give adequate assurances within a reasonable time, not longer than 30 days under the UCC, will be a repudiation.

4) Common Law Responses

A party may respond to an anticipatory repudiation in several ways under a common law contract:

a) Bring suit immediately for total breach of contract.

b) Ignore the repudiation and insist on performance.

c) Suspend performance and sue after actual failure to perform.

d) Simply treat the obligee's own duties as being discharged.

5) UCC Responses

A party may respond to an anticipatory repudiation in several ways under a UCC contract, if the loss of performance substantially impairs the value of the contract. UCC § 2-610.

a) Wait, but only for a commercially reasonable time.

b) Resort to any remedy, even after first declaring forbearance.

c) Suspend performance of the contract.

D. SATISFYING CONDITIONS

Finally, conditions that are not excused must be satisfied in order to trigger the applicable party's duty to perform. Depending upon the type of condition, they may be satisfied by complete (*perfect*) satisfaction, *substantial* satisfaction, or through *division*.

1. Perfect Satisfaction

If the parties have expressly stated a condition in the contract, the condition must be completely satisfied to cause the duties to be performable. The condition must occur exactly as the parties contemplated.

Example

A homeowner contracted with a landscaper to have his lawn mowed for $400. The homeowner tells the landscap-

er that the grass must be no longer than one-half inch tall for an upcoming game of miniature golf. The landscaper does the job, but the cut grass is two inches tall. The landscaper violated an express condition, so the homeowner need not pay.

Also, in a single delivery of goods under the UCC, the *Perfect Tender Rule* requires the seller to deliver conforming goods, at the agreed time, with the correct method of tender. Failure in the tender of delivery relieves the buyer of performance, except that the seller must be given a commercially reasonable opportunity to cure any defects.

2. Substantial Satisfaction

Frequently, contract conditions aren't spelled out in great detail. When conditions are only implied, or expressed vaguely, *substantial compliance* with them is sufficient. Substantial compliance means compliance with all the essential requirements of a condition, where any deviations are trifling, and where the benefit of the contract is not materially diminished. Substantial compliance is the legal equivalent of full performance or compliance.

Example

A homeowner contracted with a landscaper to have his lawn mowed for $400. There is no further discussion between them. The landscaper does the job, and meets the standard of quality for the profession. The job is not perfect. However, the landscaper has substantially complied, and the homeowner must pay the landscaper.

3. Satisfaction by Division

Some contracts are divisible into independent acts, each of which confers a separate benefit, and for which a separate, reciprocal duty is owed. For purposes of excusing constructive conditions, these divisible contract are treated as a series of separate contracts. This is done in order to avoid forfeiture of all the contracts, which would be too severe a result.

Example

A student contracts with a classmate to make him dinner each Friday during the winter, for $20 per meal. Since the contract is divisible into separate units, making each meal is considered a constructive condition to each equivalent payment. Payment is due after each meal, not in the spring. The completion of all the meals is not necessary as a condition precedent to the student's duty to pay.

V. DISCHARGE & PERFORMANCE

Once a contract has been formed, properly interpreted, and all conditions have been excused or satisfied, the parties stand on the threshold of fulfilling the purpose of the contract. This they must then do, unless some event or change in circumstances arises after formation of the contract and *discharges* the duty to perform. Thus, discharge or *performance* of duties are the choices confronting the contracting parties at this point in the unfolding of a contract.

There are four legal theories which discharge otherwise valid contractual duties: *Impossibility, impracticability, frustration of purpose,* and *conditions subsequent*. These theories are used by the law to intervene and discharge contract duties when injustice would otherwise result.

There are also four types of new agreements that have the same effect: *Modification, rescission, accord and satisfaction,* and *novation*. These are really new contracts, with the same fundamental requirements of any contract, requiring offer, acceptance, and consideration.

A. LEGAL THEORIES OF DISCHARGE

1. Impossibility

If events occur that make it impossible for any reasonable person to perform a contract, those duties may be discharged. The doctrine only applies to unforeseeable events that occur after formation of the contract, when the parties did not allocate or assume the risk for the events (*a supervening impossibility*). The impossibility must be objective. The test is: "The thing cannot be done," not "I cannot do it." Comment e, R2d § 261.

a. Destruction of Subject Matter

The subject matter of a contract is the contract's reason for being, its *raison d'être*. When the subject matter of a contract, or the means by which it would be performed, is de-

stroyed through no fault of the promisor, his or her contractual duties are discharged. The subject matter must be referred to in the contract or the parties must have understood it was included.

Example

A singer contracted to perform in a certain auditorium, which burned down before the concert. The auditorium was ruled the basis of the performance, so the contract was discharged.

Taylor v. Caldwell, 122 Eng. Rep. 309 (K.B. 1863).

• **Distinctive Rule for Real Property**: In contracts for real property, most courts apply the doctrine of *equitable conversion*, and allocate the risk of loss to the prospective purchaser, though legal title has not yet been transferred. The doctrine provides that, once parties have entered into a binding and enforceable land sale contract, the purchaser's interest is said to be real property and seller's retained interest is characterized as personal property. The rights of the parties are evaluated as if the conveyance had been made.

b. UCC Casualty Rules

In contracts for the sale of goods, if the contract is impossible to perform because of destruction of the subject matter, the risk of loss is allocated by the UCC, unless otherwise stated in the contract. UCC § 2-501.

A seller retains responsibility for goods until the risk of loss passes to the buyer. Thus, a contract for identified goods is voided if the goods are totally destroyed through no fault of either party, before the risk of loss passes to the buyer. UCC § 2-613(a). The rules regulating when the risk of loss passes from the seller to the buyer are stated next.

1) The Contract Controls

Under the UCC, the risk of loss is initially contractual rather than dependent upon who has title to the goods, like

in common law. The parties may allocate risk as they wish. The risk is the owner-seller's, until an agreement or event occurs to shift the risk to the buyer. UCC § 2-509. If there is no explicit allocation of risk, then other UCC principles govern.

2) No Destination Specified

If a contract requires the seller to ship goods by common carrier and does not require a particular destination, the risk of loss passes to the buyer when the seller has made a reasonable contract for delivery and delivered the goods to the carrier. UCC § 2-509

3) Destination Specified

If a contract requires the seller to deliver the goods at a particular destination (F.O.B.), the risk of loss only passes to the buyer when the goods are tendered to the buyer at that destination.

4) Direct Dealing

When merchants are dealing directly, the risk of loss is assumed by the buyer when the goods are physically delivered. For non-merchants, the risk of loss is assumed by the buyer when the goods are offered, i.e. at tender of delivery. UCC § 2-509(c).

5) Bailments

If goods are to be picked up by the buyer by a bailee, such as a warehouser, the risk of loss passes to the buyer upon receipt of title, or upon the bailee's acknowledgment of the buyer's right to possession.

6) Seller's Breach

A seller who breaches retains the risk of loss, if the tender or delivery is so defective as to give the buyer a right to reject the goods. The risk of loss will then pass to the buyer

only if the seller cures the breach or the buyer accepts the goods.

Example

A toy maker contracted to buy $1000 worth of model train parts. The manufacturer mistakenly sent $1000 of toy truck parts to his usual shipper, but they were stolen en route. The buyer would have been liable if the shipment was conforming, but since the tender was defective, the loss was retained by the seller.

7) Buyer's Breach

A buyer, who breaches a contract before the risk of loss has passed to him or her, then bears the risk of loss for a commercially reasonable time, if the goods are identified and conforming. Since the buyer should have accepted the goods, he or she becomes liable for their destruction until an alternate sale can be arranged.

c. Destruction of Agreed or Sole Source

If contracting parties specify a certain source for the subject matter of the contract, or in fact there is only one, destruction of that source renders performance impossible. UCC § 2-615(a).

Example

A woodworker contracted to panel the office of a customer with rare Brazilian rosewood. Before work could begin, civil war broke out in Brazil, and the few remaining stands of rosewood were destroyed. The woodworker's duty under the contract was excused by the doctrine of impossibility.

d. Death or Incapacity of Performer

If a contract specifically calls for a particular performer, such as in a personal services contract, and the performer dies or becomes incapacitated, the parties are discharged from performing the contract.

e. Supervening Illegality

If a contract is legal at the time it is formed, but the parties' performances are later rendered illegal by a change in a statute, the contract duties are accordingly discharged.

Example

A well digger contracts to dig a well for an urban house. Before beginning, the city passes an ordinance preventing the digging of wells. The supervening illegality discharges the digger's duties under the contract.

f. Temporary Impossibility

If performance is only temporarily impossible, that duty is not discharged, but merely suspended until the impossibility ends.

2. Impracticability

Contract duties can be discharged by an unforeseen occurrence that the parties assumed would not occur, if it creates an unanticipated and unreasonable difficulty.

The reverse is equally true: Contract duties can be discharged by an unforeseen non-occurrence that the parties assumed would occur, if it creates an unanticipated and unreasonable difficulty.

Under the UCC, the duties of a seller will be discharged if performance has been made impracticable, judged from a commercial perspective. UCC § 2-615.

Example

A bridge builder contracted with a gravel quarry for a supply at a fixed price, for all the gravel needed for a bridge project, known as a requirements contract. Subsequently, the quarry unexpectedly flooded, making the gravel ten times as expensive to recover. The builder was excused from further performance.

Mineral Park v. Howard, 172 Cal. 289 (1916).

3. Frustration

When a supervening event occurs that totally or substantially frustrates the principal purpose for a contract, performance will be discharged. The purpose must be a mutual assumption; the event must be unanticipated; it must occur through no fault of the frustrated party. Under the UCC, frustration of purpose by a seller is judged more strictly, analogous to the principles of impossibility, discussed above. The seller must show that the sale cannot be made by anyone, not merely that the seller cannot make it.

Example

A tenant contracted to lease premises for ten years, for a supermarket. While the tenant was making improvements and installing equipment, and before the supermarket opened, the city gave notice that it would take over the property for a school. The tenant sued to rescind the lease. The court ruled that since the tenant never used the premises, there was frustration of purpose, and the tenant was entitled to recover the security deposit and rent paid.

2814 Food. v. Hub Bar Building Corp., 297 N.Y.S.2d 762 (Sup. 1969).

4. Conditions Subsequent

If the parties have expressly stated a condition subsequent in their contract, failure to excuse or satisfy the condition will discharge the duties under the contract.

Example

A student has an insurance policy guarding against theft. The policy requires that notice of any theft must be given within ten days for the loss to be covered. If a thief steals the student's computer, unless the condition subsequent requiring notice is satisfied by the student or excused by the insurer, the insurance company's duty to pay will be discharged.

B. DISCHARGE BY NEW AGREEMENT

1. Modification

a. Definition

Modification occurs when the parties to an unfulfilled (*executory*) contract modify it, and change a duty of performance already due from one or more parties.

b. Effect

Circumstances that seem to warrant application of the pre-existing duty rule, discussed above, would appear to make the modifications invalid. However, under both the common law and the UCC, the parties to an existing contract can make a new agreement that discharges the original duties and imposes new ones.

c. Common Law Contracts

For contracts covered by the common law, a new agreement must be a complete, enforceable contract, with offer, acceptance, and consideration, to be effective . It must be in writing if the original contract had to be. The modification discharges those original terms that are covered by the modification and imposes new obligations. If there are remaining terms outside the scope of a new agreement, they still must be performed.

Example

A toy maker contracted to have his showroom painted within a month for $300. The painter later said that he could not meet the schedule. The painter proposed a new agreement, with the painting to be done for $400. The toy maker agreed and the painting was completed. Under the common law, the new agreement was invalid, since the painter provided no consideration. The painter could not collect the extra $100.

d. UCC Contracts

The rule is different for contracts covered by the UCC. If the parties, in good faith, agree to modify a contract for the sale or lease of goods, no additional consideration is needed. In these cases, the UCC has basically abolished the pre-existing duty rule. The modification must still be in writing if the original contract had to be. UCC §§ 2-209, 2A-208.

Example

A toy maker contracted to buy $400 worth of model trains, to be delivered within a month. The manufacturer was unable to meet the production schedule, and proposed a new agreement, with the trains to be delivered a month later for the same price. The toy maker agreed. Under the UCC, the new agreement is valid, even though there was no new consideration for the toy maker. The original duties were discharged.

2. Rescission

The parties may agree to rescind, cancel, or release their contractual duties under the original contract. If the rescission is enforceable, the original duties are discharged. This surrender of mutual rights is adequate consideration to make the rescission binding.

3. Accord and Satisfaction

Accord and satisfaction is a procedure for resolving contract disputes through compromise. One party offers a compromise to fulfill (*discharge*) an existing debt or duty. The new, compromise agreement is called the accord. The satisfaction is the actual performance of the agreement, which discharges both the old and new obligations. An agreement to compromise a bona fide dispute over money owed has good consideration, which is normally required with this procedure.

Examples

A creditor claimed that a debtor owed him $5,000. The debtor sincerely claimed that he owed only $3,500. The debtor offered to pay the creditor $3,500 to discharge the entire debt. The creditor agreed (that is the accord). The creditor accepted the debtor's payment of $3,500 (that is the satisfaction). The creditor was precluded from recovering the other $1,500.

A creditor claimed that a debtor owed him $5,000. The debtor did not dispute the validity of that debt. The debtor offered to pay the creditor $3,500 as full payment of the debt. The creditor agreed, and took the $3,500 payment. Because there was no genuine dispute over the validity of the debt, the creditor's later promise was not supported by consideration. The creditor was not precluded from recovering the other $1,500.

• Divergent Rule for Checks

If a debtor writes on the check to a creditor: "Payment In Full," and if there is a genuine dispute, cashing the check operates as an accord and satisfaction. Under the UCC, a creditor may reserve the right to collect further, while still accepting the check, by endorsing it "under protest," or "without prejudice." UCC § 1-207.

4. Novation

A novation is an agreement substituting a new party and/or performance for the original ones in a contract. It discharges the original parties and/or performance. The novation must be a complete, valid contract in its own right.

C. PERFORMANCE

If there are no reasons for discharge, the party is obligated to fulfill the contract duties by complete performance, substantial performance, or the doctrine of divisibility.

1. Complete Performance

If the parties have expressly stated a specific duty in the contract, it must be completely performed to avoid a breach of contract. The performance must occur exactly as the parties contemplated. If the parties have stated certain standards or requirements in the contract, they must be met.

Also, in a single delivery of goods under the UCC, the Perfect Tender Rule requires the seller to deliver conforming goods, at the agreed time, with the correct method of tender. Failure in the tender of delivery relieves the buyer of performance, except that the seller must be given a commercially reasonable opportunity, even after the time for performance, to cure any defects.

If a party is ready, willing, and able to perform and tenders performance at the time it is due, the party's duty is discharged.

2. Substantial Performance

Substantial performance means performance with all the essential requirements of a contract, where any deviations are trifling and the benefit of the contract is not materially diminished. Substantial performance is the legal equivalent of full performance. In the absence of exact standards expressed in the contract, substantial performance is sufficient to fulfill contractual duties. The substantial performance doctrine is the standard used for most contracts.

3. Divisibility

Some contracts are divisible into independent acts, each of which confers a separate benefit, and for which a separate, reciprocal duty is owed. For purposes of evaluating performance, these divisible contract are treated as a series of separate contracts, analyzed duty by duty. R2d § 240. A party who performs a unit of a divisible contract may recover the agreed-upon equivalent for that part performance.

With an installment contract under the UCC, a buyer may reject a nonconforming installment only if the nonconformity substantially impairs the value of that installment and cannot be cured by the seller.

VI. REMEDIES FOR BREACH

After all conditions have been satisfied or excused, unless there is a discharge of a contract duty, a party must finally perform that duty. Failure to do so excuses the other party's duty, and creates a breach of contract. The law then provides remedies to the innocent party, primarily in the form of money (*damages*), but also in the form of equitable relief, used when money cannot cure the loss created by the breach of contract.

The guiding principle of contract damages is to recreate the expected contract benefit to the aggrieved party. Thus, damages are said to place the injured party in the position he or she would have occupied had the contract been performed.

When there is no enforceable contract, or if damages cannot be adequately calculated, and the aggrieved party has changed position for the worse due to the wrongdoer's words or conduct, the injured party is entitled to compensation for the losses incurred in reliance upon the other party. Finally, when the aggrieved party has conferred a benefit upon the wrongdoer, the former is entitled to the return of the benefit conferred.

Damages include the loss of expected contract benefits (*expectation damages*); *liquidated damages*, predicted beforehand as an element of the original contract; and *compensatory damages*, for losses suffered in relying upon the expected contract obligations that were breached.

Equitable relief includes *rescission and restitution*, cancellation of the contract and refund of any benefits conferred; *reformation*, used when a written contract is inaccurate and should be amended; and *specific performance*, available when the damages remedy at law (money) is inadequate, such as when dealing with a unique piece of art or property.

A. MONEY DAMAGES

The award of money damages is the most common method of compensating an innocent party when they are harmed by a party's failure to perform. The purpose of the remedy is to place innocent parties in the position they would have been in, had the contract not been breached. However, the remedy must be rational, not extravagant.

Example

A building contract required Reading pipe for all the plumbing. The builder used some Cohoes pipe. The homeowner wanted the Cohoes pipe replaced, and sued. There was no difference in quality between the two brands and no difference in the value of the house. The court refused to order the pipe replacement, and awarded only nominal damages, finding that the cost of repair was in excess of any actual damages and would result in economic waste.

Jacob and Youngs v. Kent, 129 N.E. 889 (N.Y. 1921).

1. Expectation Damages

Expectation damages are the primary means of compensating an innocent party for the benefit of the bargain, which was lost by the breach. The damages must be certain, not speculative.

Example

A surgeon told a young patient that after an operation on his scarred hand, it would be "100% perfect." It turned out to be hairy, because of the type of skin graft used. The patient sued, and the court calculated damages as the difference between the value of the expected, perfect hand, compared with the value of the hairy hand.

Hawkins v. McGee, 84 N.H. 114 (1929).

2. Liquidated Damages

Liquidated damages are those agreed upon in the original contract. They must be reasonable, and not really punishment, i.e. a penalty, in disguise. They are permitted only when the potential damages would be difficult to calculate. If the contract contains a valid liquidated damages clause, and there is a breach of contract, actual damages need not be proven. A liquidated damages clause does not prohibit other available remedies.

3. Compensatory Damages

Damages frequently take the form of compensatory damages, also known as reliance or consequential damages. These are damages not from the contract bargain itself, but from reliance on the contract performance. They must be reasonably foreseeable, either a natural or probable result of the breach, or within the contemplation of the contracting parties.

Examples

A plastic surgeon operated twice upon a patient, promising to improve her appearance. The patient unfortunately looked worse. The court awarded reliance damages for the patient's diminished appearance, the costs of the surgeries, and the pain and suffering experienced during them. The court refused to award expectation damages, for the difference in value between the patient's appearance before and after the operations.

Sullivan v. O'Connor 296 N.E.2d 183 (Mass. 1973).

Hadley contracted with Baxendale, a common carrier, to deliver a broken mill shaft to a foundry for repair. Because Baxendale took too long, Hadley had to close down his mill. He sued for lost profits. Because the shut down of the mill was not a reasonably foreseeable result of Baxendale's breach, damages for lost profits were rejected.

Hadley v. Baxendale, 156 Eng. Rep. 145 (1854).

4. Mitigation of Damages

The innocent party must always minimize (*mitigate*) damages caused by a breach. If an innocent party has a opportunity to mitigate, but does not, damages will be lessened by the amount that could have been saved. The innocent party must not let usable resources go to waste. They must obtain replacement goods to keep damages down, and wronged employees and employers must seek alternate employment.

5. Punitive Damages

Punitive damages are not usually awarded for breach of contract. However, if the breach is malicious or intentionally harmful and therefore similar to a tort, courts occasionally allow these damages.

6. Sale of Goods

a. Seller's Damages

If a buyer breaches a contract, the seller has a choice of remedies:

1) Commercial Resale

If a buyer breaches a contract, the seller can recover the difference at the time of breach between the contract price and the commercially reasonable resale value of the subject matter of the contract. The seller must notify the buyer unless the goods are perishable.

2) Market Price

If a buyer breaches a contract, the seller can recover the difference at the time of breach between the contract price and the market price of the subject matter of the contract.

3) Lost Profits

If a buyer breaches a contract, even if the goods are sold elsewhere, the seller can recover the profits lost because of the reduced sale volume. UCC § 2-708.

Example

A high-volume, discount store contracts to sell a computer to a customer, but the customer later refuses to complete the purchase. The store can sue the customer for the profits lost from the unfinished sale.

b. Buyer's Damages

If a seller breaches a contract, the buyer has a choice of remedies:

1) Cover

If a seller breaches a contract, the buyer can recover the difference between the contract price and the price that must be paid to purchase replacement property without unreasonable delay.

2) Market Price

If a seller breaches a contract, the buyer can recover the difference at the time of breach between the contract price and the market price of the subject matter of the contract.

7. Quasi Contract

To avoid an undeserved windfall, when a benefit has been given, or a cost incurred, the law creates quasi-contracts. These are created by law to prevent unjust enrichment when there is no ordinary contract or one is voided. The preferred recovery for a quasi-contract is the value of the benefit conferred. If the performer has not conferred any benefit, but has incurred costs in preparing to perform, in reliance upon a potential contract, the performer may recover the costs.

Examples

Barney asked Andy to construct a fountain for him. They wrote nothing down, did not discuss price, and no valid contract was formed. Andy began work, but then Barney changed his mind and told Andy to stop. Andy can recover the actual value of the partially constructed fountain, which is the benefit conferred upon Barney.

Barney asked Andy to construct a fountain for him. They wrote nothing down, did not discuss price, and no valid contract was formed. In preparation, Andy brought in a team of masons and purchased materials. But before Andy could begin, Barney changed his mind. Andy's workers and materials did not benefit Barney, but they were a cost incurred by Andy in preparing to perform, which he can recover.

B. EQUITABLE REMEDIES

Equitable remedies are only available when the legal remedies are inadequate, when there has been no unreasonable delay (*laches*), the party asking for the remedy is innocent of misbehavior (*clean hands*), and there is no undue hardship imposed by the remedy.

1. Rescission

Rescission cancels all the obligations of a void or voidable contract, in a similar manner as the annulment of a marriage. Rescission is often used if there was incapacity or mistake during formation of a contract, or it was induced by fraud, duress, or undue influence.

2. Restitution

Restitution attempts to return to an innocent party some benefit conferred upon a wrongdoer. When it would be unjust to retain the benefit, the wrongdoer is returned to the condition he or she was in before the contract.

3. Reformation

A written contract may be reformed when, due to fraud or mistake, the writing does not accurately describe the actual agreement of the parties. A classic example is the correction of typos.

4. Specific Performance

Specific performance requires a party to produce the same effect as if a contract had been completed, or refrain from acts inconsistent with the contract. It is a method of enforcing a unique performance that cannot be substituted for by money.

Specific performance will be ordered only if it is feasible and fair to do so. The innocent party must tender performance, and the court must have mutual jurisdiction. Courts will not grant a remedy when they have to supervise compliance.

a. Real Estate

All real estate contracts for the purchase of land are unique and thus specifically enforceable.

b. Sale of Goods

Goods may be unique, and their sale specifically enforceable. Obvious cases are goods that are one of a kind, such as art or an heirloom.

c. Personal Service Contracts

Contracts for personal service generally cannot be delegated, involving persons such as athletes and entertainers. Courts will not specifically order a service performed, but they will grant injunctions prohibiting the person from entering into competing arrangements.

3. UCC Remedies

a. Sale of Special Goods

A buyer can force the sale of special goods, even if not unique, when it would be unreasonably burdensome to obtain comparable goods. UCC § 2-716(1).

b. Action for the Price

A seller can bring an *action for the price* when a buyer who failed to pay has accepted goods, the risk of loss has passed to him, or unaccepted goods cannot be reasonably resold. This method is really a forced sale of the goods. UCC § 2-709.

VII. NON-PARTY RIGHTS & DUTIES

People who are not parties to a contract normally have no rights or duties resulting from the contract. However, contracts can create *third-party beneficiaries*, *assignees*, and *delegates*. These non-parties receive rights from, or have obligations to, one of the contracting parties. They stand in the shoes of the original contractor.

With a third-party beneficiary, one of the contracting parties is bargaining for the benefit of another. In the case of an assignment, one of the parties is transferring a right, such as the receipt of money. In the case of delegation, one of them is transferring an obligation, such as to perform a service. Each element must be analyzed separately.

Occasionally, non-party rights are excluded from the first year law school curriculum. The time demands imposed in learning basic contract principles may leave few classes available to tackle third-party beneficiaries, assignments, and delegations. In light of the role of these issues in law school, only an outline of non-party rights and duties are presented here. However, the basic principles are covered.

Example

Johnny contracts to have Santos mow his mom's lawn for $100. Santos, who wants to settle a $100 debt to his own bank, arranges to have the $100 paid directly to it. Also, since Santos becomes too busy with business, he later delegates the mowing to another competent lawnmower. Mom is a third-party beneficiary of the contract; Santos is the promisor, because he made a promise for mom's benefit; Johnny is the promisee, who received a promise from Santos, in order to benefit mom; the $100 was assigned to the bank, which becomes an assignee; the mowing was delegated to the other landscaper, who becomes a delegate.

A. THIRD-PARTY BENEFICIARIES

1. Vesting

When the third-party's claims and rights and duties have been irreversibly established, they are said to have *vested*. A beneficiary's rights vest when he or she materially changes position in reliance on the promised benefit, sues on the contract, or manifests consent.

• Once rights vest, the original parties can no longer modify or eliminate them.

• At vesting, the accumulated rights and duties have accrued to the original contracting parties and then flow on to the non-parties. After vesting, any new claims and rights that arise between the contracting parties and/or others remain their own.

• Once rights have vested, they can be enforced by intended beneficiaries.

2. Intended Beneficiaries

These rights are only enforceable by intended beneficiaries. They must be identified in the contract, the original contracting parties must have purposely benefited them, and conferring the benefit must fulfill the original contracting party's duty.

3. Incidental Beneficiaries

Incidental beneficiaries are third parties who unintentionally or inadvertently benefit from a contract, in contrast to intended beneficiaries. They have no enforceable rights.

Example

Johnny contracts to have Santos mow his mom's lawn for $100. Santos buys his landscaping supplies at a nearby nursery. Though the nursery would benefit from the contract, it is merely an incidental beneficiary with no enforceable rights.

4. Creditor Beneficiaries

A creditor beneficiary receives a benefit to satisfy an existing obligation. This kind of beneficiary may sue either the promisor or the promisee.

Example

Johnny contracts with Santos to mow his lawn for $100. Santos, who wants to settle a $100 debt to his bank, includes a provision to pay the $100 directly to it. The bank can sue Santos, the promisee, or Johnny, the promisor.

The parties have several simultaneous relationships, which can make the issue of who is promisor and promisee confusing. To the bank, Johnny is the promisor, because he promised to pay to the bank the debt first owed to Santos. Santos is the promisee, because he received Johnny's promise to pay the bank.

5. Donee Beneficiaries

A donee beneficiary receives a benefit as a gift. A donee beneficiary may sue only the promisor, since the promisee owes nothing to the beneficiary, unless the promisee induces the donee beneficiary to rely on the promise reasonably, foreseeably, and detrimentally.

Example

Johnny contracts to have Santos mow his mom's lawn for $100. Mom can sue Santos, the promisor (he made the promise to mow the lawn), but not Johnny, the promisee, who was only making a gift, not paying an enforceable debt.

6. Enforcement Summary

a. Beneficiaries

The beneficiary can enforce the promise against the promisor, as it existed at the moment of vesting.

b. The Promisee

The promisee can enforce the promise against the promisor if the beneficiary doesn't.

c. Creditor Beneficiary

A creditor beneficiary can sue the promisor, and still sue the promisee on the original obligation that was to be satisfied by the third-party assignment of performance.

d. Promisor's Defenses

Generally, the promisor may raise any defense against the third-party beneficiary's claims that might have been raised against the promisee because the beneficiary stands in the shoes of the promisee.

7. Special Contracts

a. Government Contracts

If a governmental entity enters into a contract with a private company to provide services for the public, an ordinary citizen will usually not be considered an intended beneficiary.

b. Suretyship Bonds

Contractors often assure the completion of work. If a contractor obtains a suretyship bond to assure the owner of the contractor's performance, the promise between the contractor and the bonding company creates an intended beneficiary: the owner.

c. Mortgage Assumptions

When parties buy property, they are transferees because title is transferred to them. If a transferee also assumes an existing mortgage, the lender may foreclose and hold the transferee personally liable. The lender is considered a third-party beneficiary of the mortgage assumption and

may enforce its rights against the transferee, or against the transferor (the original owner).

B. ASSIGNMENTS OF RIGHTS

If a party transfers an existing right, it is an assignment. Appointment of another to perform one's duties is a delegation. Assignment of an entire contract is both an assignment of rights and a delegation of duties.

Example

A contractor was building an office tower. He and his bank agreed that, in exchange for the bank's lending the contractor $1,000,000, the contractor would have the owner of the tower pay all profits directly to the bank. There has been an assignment of the contractor's rights.

1. Definitions

a. Obligor

The person who has the obligation to perform under the original contract.

b. Assignor-Obligee

The person who was originally entitled to receive the obligor's performance, and who then assigns it away.

c. Assignee

The person who is now entitled to performance as a result of the assignment.

d. Assignment

An assignment is an irrevocable, immediate transfer of all or part of an assignor's rights under a contract. A promise to transfer rights in the future is not an assignment.

2. Prohibited Assignments

a. Express Terms

Contract prohibition can remove the privilege, but not the right to assign. In other words, a party can always assign a benefit whose assignment is prohibited in the contract, but may then be simultaneously liable for breach of the contract.

Under the UCC, assigning a contract right is always valid. UCC § 2-210.

b. Illegal

Some assignments are prohibited by applicable statutes, such as statutes that prohibit the assignment of wages.

c. Increased Burden or Risk

Assignments that would materially increase a burden or risk in the obligor's duty are prohibited. Typically, this occurs in output and requirements contracts when the assignment makes them unreasonably disproportionate from the original terms. UCC §§ 2-210(5); 2-609(4).

Example

An insurance company insures a warehouse that an asbestos manufacturer owns. The policy covers loss due to fire. If the asbestos company sells the warehouse to the Greasy Rag Company, he may not assign his rights under the insurance policy without the insurer's consent.

3. Procedure

The assignor assigns to the assignee the benefit of the performance owed by the obligor, as stated in the contract. A valid assignment must include a description of the right assigned, words of present, not future, transfer, and a writing, if required. There is an implied warranty of assignability and enforceability. After the assignment has vested, the obligor cannot change the contract terms. As-

signments usually need to be in writing for the sale of goods over $500, the lease of goods, interests in real property, wages, or security interests.

4. Gratuitous Assignments

A gratuitous assignment is automatically revoked by the death or bankruptcy of the assignor, a new assignment of the same right, or upon notice of termination. However, it can be enforced like an ordinary assignment if an assignee reasonably, foreseeably, and detrimentally relied on the assignment; or if the assignee has a document symbolizing the assignment, such as a stock certificate.

5. Multiple Assignments

a. Revocable

If an assignment is revocable, it is automatically revoked by any subsequent assignment of the same right. The newer assignment is then valid until revoked, made irrevocable, or performed.

b. Irrevocable

If multiple irrevocable assignments are made, the first in time prevails, unless the new assignee paid for the assignment, had a judgment against the obligor, received a symbolic document representing the assignment, or made a new contract with the obligor (*a novation*).

C. DELEGATION OF DUTIES

As a counterpart to the right of a contracting party to assign a right, a party can often transfer an obligation to perform a duty. The original party, whose duty it is to render a performance, may transfer this duty to a third person after the contract has been formed. This is referred to as a *delegation of duties*. However, the party delegating still remains liable under the original contract.

Example

A farmer contracts to deliver golden delicious apples to a grocer every week. The farmer then contracts with a fruit distributor to make the deliveries in his stead. The quality of the apples is the same. The farmer has successfully delegated his duties to the distributor. The grocer will receive the performance due him from the distributor.

1. Definitions

a. Obligee

The party to the original contract entitled to receive the performance that is being delegated. Their permission is sometimes required before the delegation is permitted.

b. Delegant (or Delegator)

The party to the original contract who owes a performance and who then delegates it to a third person. After the delegation, the new delegate has the duty to perform, but this original contracting party remains liable for the performance.

c. Delegate

The third party to whom the delegator delegates the duty. This person was not a party to the original contract, but agrees to shoulder the contract duty received from the delegant.

2. Rules of Delegation

a. Power to Delegate

An obligee must accept performance by a delegate if the contract duty is delegable. It is self-evident that he or she need not accept delegation of a non-delegable duty.

b. Guarantee

Even after an effective delegation, the delegant remains liable as a surety to the obligee under the original contract. The delegant owes a warranty of performance to the original obligee,.

c. Consideration

The delegate is not liable for performance of the delegated duties unless the delegation is for consideration. If the delegation was for consideration, both the obligee and the delegant can then enforce performance against the delegate.

3. Prohibited Delegations

a. Express Terms

Both the right and the privilege to delegate can be completely prohibited in a contract. In this case, any supposed delegation by one party is completely null and void.

b. Illegal

Some delegations are prohibited by applicable statutes, such as one that prohibits lawyers from delegating their work to non-lawyers. Any such supposed delegation is completely null and void.

c. Decreased Value

Delegations that would materially decrease the value of the obligee's rights are prohibited. Typically, this occurs in unique personal services contracts.

Example

A student says to a friend: "I'll sell you my old sports car for $1000," and the friend says: "I accept." They draw up and sign a complete, written contract. The student attempts to assign the $1000 to her sister to pay a debt already owed. However, the student had originally agreed to

take a personal check from the buyer, but the sister insisted upon a cashier's check that would cost more. This is an added burden upon the obligor; the delegation was invalid.

VIII. GLOSSARY

Entries are adopted from
***Black's Law Dictionary* (6th ed., 1996)**

Acceptance: Compliance by offeree with terms and conditions of offer constitute an "acceptance." The offeree's notification or expression to the offeror that he or she agrees to be bound by the terms of the offeror's proposal. A contract is thereby created. . . . UCC § 2-606 provides three ways a buyer can accept goods: (1) by signifying to the seller that the goods are conforming or that he will accept them in spite of their nonconformity, (2) by failing to make an effective rejection, and (3) by doing an act inconsistent with the seller's ownership.

Accord and Satisfaction: A method of discharging a claim whereby the parties agree to give and accept something in settlement of the claim and perform the agreement, the "accord" being the agreement and the "satisfaction" its execution or performance, and it is a new contract substituted for an old contract which is thereby discharged, or for an obligation or cause of action which is settled, and must have all of the elements of a valid contract.

Ambiguity: Language in contract is "ambiguous" when it is reasonably capable of being understood in more than one sense. . . . Test for determining whether a contract is "ambiguous" is whether reasonable persons would find the contract subject to more than one interpretation.

Anticipatory Repudiation or Breach of Contract: The assertion by a party to a contract that he or she will not perform a future obligation as required by the contract. Such occurs when a party to an executory contract manifests a definite and unequivocal intent prior to time fixed in contract that it will not render its performance under the contract when that time arrives, and in such a case the other party may treat the contract as ended.

Assignment: A transfer or making over to another of the whole of any property, real or personal, in possession or in action, or of any estate or right, including a contract.

Bilateral Contract: A contract in which both the contracting parties are bound to fulfill obligations reciprocally towards each other; as a contract of sale, where one becomes bound to deliver the thing sold, and the other to pay the price of it. A contract executory on both sides, and one which includes both rights and duties on each side. Contract formed by the exchange of promises in which the promise of one party is consideration supporting the promise of the other.

Capacity: Legal qualification (i.e. legal age), competency, power or fitness. Mental ability to understand the nature and effects of one's acts. Capacity to sue. The legal ability of a particular individual or entity to sue in, or to be brought into, the courts of a forum.

Compensatory Damages: Compensatory or expectation, or expectancy damages are such as will compensate the injured party for the injury sustained, and nothing more; such as will simply make good or replace the loss caused by the wrong or injury. Damages awarded to a person as compensation, indemnity, or restitution for harm sustained by him. The rationale behind compensatory damages is to restore the injured party to the position he or she was in prior to the injury.

Concurrent Conditions: Those which are mutually dependent and are to be performed at the same time or simultaneously.

Condition Precedent: One that is to be performed before the agreement becomes effective, and which calls for the happening of some event or the performance of some act after the terms of the contract have been arrested on, before the contract shall be binding on the parties; for example under disability insurance contract, insured is re-

quired to submit proof of disability before insurer is required to pay.

Condition Subsequent: Any condition which divests liability which has already attached on the failure to fulfill the condition as applied in contracts, a provision giving one party the right to divest himself of liability and obligation to perform further if the other party fails to meet condition, for example, submit dispute to arbitration.

Condition: A clause in a contract or agreement which has for its object to suspend, rescind, or modify the principal obligation . . . . A qualification, restriction, or limitation modifying or destroying the original act with which it is connected; an event, fact, or the like that is necessary to the occurrence of some other, though not its cause; a prerequisite; a stipulation.

Consequential Damages: Such damage, loss or injury as does not flow directly and immediately from the act of the party, but only from some of the consequences or results of such act. . . . Consequential damages resulting from a seller's breach of contract include any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented . . . . UCC § 2-715(2).

Consideration: The inducement to a contract. The cause, motive, price, or impelling influence which induces a contracting party to enter into a contract. The reason or material cause of a contract. Some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other.

Contract: An agreement between two or more persons which creates an obligation to do or not to do a particular thing. As defined in Restatement, Second, Contracts § 3: "A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of

which the law in some way recognizes as a duty." A legal relationship consisting of the rights and duties of the contracting parties; a promise or set of promises constituting an agreement between the parties that gives each a legal duty to the other and also the right to seek a remedy for the breach of those duties. Its essentials are competent parties, subject matter, a legal consideration, mutuality of agreement, and mutuality of obligation.

Course of Dealing: A sequence of previous acts and conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct. UCC § 1-205(1).

Course of Performance: The understandings of performance which develop by conduct without objection between two parties during the performance of an executory contract.

Cover: The right of a buyer, after breach by a seller, to purchase goods in open market in substitution for those due from the seller if such purchase is made in good faith and without unreasonable delay. The buyer may then recover as damages the difference between the cost of cover and the contract price plus any incidental and consequential damages but less expenses saved in consequence of the seller's breach. UCC § 2-712(1, 2).

Creditor Beneficiary: A third person to whom performance of promise comes in satisfaction of legal duty. A creditor who has rights in a contract made by the debtor and a third person, where the terms of the contract obligate the third person to pay the debt owed to the creditor. The creditor beneficiary can enforce the debt against either party.

Delegation: The change of one debtor for another, when he who is indebted substitutes a third person who obligates himself in his stead . though the creditor still retains his rights against the original debtor.

Discharge: In contract law, discharge occurs either when the parties have performed their obligations in the contract, or when events, the conduct of the parties, or the operation of law releases the parties from performing.

Divisible Contract: Where a contract consists of many parts, which may be considered as parts of one whole, the contract is entire. When the parts may be considered as so many distinct contracts, entered into at one time, and expressed in the same instrument, but not thereby made one contract, the contract is a separable or divisible contract. But, if the consideration of the contract is single and entire, the contract must be held to be entire, although the subject of the contract may consist of several distinct and wholly independent items.

Donee Beneficiary: A person not a party to a contract but to whom the benefits of a contract flow as a direct result of an intention to make a gift to that person. In a third party contract, the person who takes the benefit of the contract though there is no privity between him and the contracting parties.

Expectancy Damages: As awarded in actions for nonperformance of contract, such damages are calculable by subtracting the injured party's actual dollar position as a result of the breach from that party's projected dollar position had performance occurred. The goal is to ascertain the dollar amount necessary to ensure that the aggrieved party's position after the award will be the same-to the extent money can achieve the identity-as if the other party had performed.

Express Contract: An express contract is an actual agreement of the parties, the terms of which are openly uttered or declared at the time of making it, being stated in distinct and explicit language, either orally or in writing.

Firm Offer: As defined by UCC is an offer by a merchant to buy or sell goods in a signed writing which by its terms give assurance that it will be held open. Such is not

revocable for lack of consideration during the time stated or if no time is stated for a reasonable time, but in no event may such period of irrevocability exceed three months; but any such term of assurance on a form supplied by the offeree must be separately signed by the offeror. UCC § 2- 205.

Foreseeability: The ability to see or know in advance; for example the reasonable anticipation that harm or injury is a likely result from certain acts or omissions. . . . That which is objectively reasonable to expect, not merely what might conceivably occur.

Fraud in the Factum: Misrepresentation as to the nature of a writing that a person signs with neither knowledge nor reasonable opportunity to obtain knowledge of its character or essential terms.

Fraud in the Inducement: Fraud connected with underlying transaction and not with the nature of the contract or document signed. Misrepresentation as to the terms, quality or other aspects of a contractual relation, venture or other transaction that leads a person to agree to enter into the transaction with a false impression or understanding of the risks, duties or obligations she has undertaken.

Frustration: This doctrine provides, generally, that where existence of a specific thing is, either by terms of contract or in contemplation of parties, necessary for performance of a promise in the contract, duty to perform promise is discharged if thing is no longer in existence at time for performance.

Implied Contract: An implied contract is one not created or evidenced by the explicit agreement of the parties, but inferred by the law, as a matter of reason and justice from their acts or conduct, the circumstances surrounding the transaction making it a reasonable, or even a necessary, assumption that a contract existed between them by tacit understanding.

Impossibility: A doctrine under which a party to a contract is relieved of his or her duty to perform when performance has become impossible or totally impracticable (through no fault of the party). As a defense to nonperformance, such arises when performance is not possible because of, for example, destruction of subject of contract or death of person necessary for performance or where act contracted for has become illegal, and one basic part of the doctrine is that the impossibility of performance must be objective rather than merely subjective.

Impracticability: A broadened interpretation of the doctrine of impossibility which holds that a party to a contract for the sale of goods will be relieved of his or her duty to perform when the premise (for example, existence of certain goods) on which the contract was based no longer exists due to unforeseeable events. UCC § 2-615.

Incapacity: Want of legal, physical, or intellectual capacity; want of power or ability to take or dispose; want of legal ability to act. Inefficiency; incompetency; lack of adequate power.

Incidental Beneficiary: Since there will often be many people indirectly or even directly benefited by any given contractual performance, the term "incidental beneficiary" is used to describe those persons who would benefit by the performance but who were not intended by the parties to be benefited and who thus cannot enforce the contract.

Liquidated Damages: Liquidated damages is the sum which party to contract agrees to pay if he breaks some promise and, which having been arrived at by good faith effort to estimate actual damage that will probably ensue from breach, is recoverable as agreed damages if breach occurs. . . . Such are those damages which are reasonably ascertainable at time of breach, measurable by fixed or established external standard, or by standard apparent from documents upon which plaintiffs based their claim.

Mailbox Rule: In contract law, unless otherwise agreed or provided by law, acceptance of offer is effective when deposited in mail if properly addressed.

Material: Important; more or less necessary; having influence or effect; going to the merits; having to do with matter, as distinguished from form. Representation relating to matter which is so substantial and important as to influence party to whom made is "material."

Mental Capacity: The ability to understand the nature and effect of the act in which a person is engaged and the business he or she is transacting. . . . Such a measure of intelligence, understanding, memory, and judgment relative to the particular transaction (for example making of will or entering into contract) as will enable the person to understand the nature, terms, and effect of his or her act.

Misrepresentation: An intentional false statement respecting a matter of fact, made by one of the parties to a contract, which is material to the contract and influential in producing it. A "misrepresentation," which justifies the rescission of a contract, is a false statement of a substantive fact, or any conduct which leads to a belief of a substantive fact material to proper understanding of the matter in hand, made with intent to deceive or mislead.

Mitigation of Damages: Doctrine of "mitigation of damages," sometimes called doctrine of avoidable consequences, imposes on party injured by breach of contract or tort duty to exercise reasonable diligence and ordinary care in attempting to minimize his damages, or avoid aggravating the injury, after breach or injury has been inflicted and care and diligence required of him is the same as that which would be used by man of ordinary prudence under like circumstances.

Mutual Mistake: Mutual mistake with regard to contract, justifying reformation, exists where there has been a meeting of the minds of the parties and an agreement ac-

tually entered into but the agreement in its written form does not express what was really intended by the parties.

Novation: A type of substituted contract that has the effect of adding a party, either as obligor or obligee, who was not a party to the original duty. Substitution of a new contract, debt, or obligation for an existing one, between the same or different parties. . . . The requisites of a novation are a previous valid obligation, an agreement of all the parties to a new contract, the extinguishment of the old obligation, and the validity of the new one.

Offer: A proposal to do a thing or pay an amount, usually accompanied by an expected acceptance, counter-offer, return promise or act. A manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it.

Option: Contract made for consideration to keep an offer open for prescribed period. A right, which acts as a continuing offer, given for consideration, to purchase or lease property at an agreed upon price and terms, within a specified time.

Output Contract: A contract in which one party agrees to sell his entire output and the other agrees to buy it; it is not illusory, though it may be indefinite. Such agreements are governed by UCC § 2-306.

Parol Evidence Rule: This evidence rule seeks to preserve integrity of written agreements by refusing to permit contracting parties to attempt to alter import of their contract through use of contemporaneous oral declarations. . . . Under this rule when the parties to a contract embody their agreement in writing and intend the writing to be the final expression of their agreement, the terms of the writing may not be varied or contradicted by evidence of any prior written or oral agreement in the absence of fraud, duress, or mutual mistake. . . . Also, as regards sales of goods, such written agreement may be explained or sup-

plemented by course of dealing or usage of trade or by course of conduct, and by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement. UCC § 2-202.

Performance: The fulfillment or accomplishment of a promise, contract, or other obligation according to its terms, relieving such person of all further obligation or liability thereunder.

Promissory Estoppel: That which arises when there is a promise which promisor should reasonably expect to induce action or forbearance of a definite and substantial character on part of promisee, and which does induce such action or forbearance, and such promise is binding if injustice can be avoided only by enforcement of that promise. . . . Elements of a "promissory estoppel" are a promise clear and unambiguous in its terms, reliance by the party to whom the promise is made, with that reliance being both reasonable and foreseeable, and injury to the party asserting the estoppel as a result of his reliance.

Quasi Contract: Legal fiction invented by common law courts to permit recovery by contractual remedy in cases where, in fact, there is no contract, but where circumstances are such that justice warrants a recovery as though there had been a promise. It is not based on intention or consent of the parties, but is founded on considerations of justice and equity, and on doctrine of unjust enrichment.

Reformation: A court-ordered correction of a written instrument to cause it to reflect the true intentions of the parties. Equitable remedy used to reframe written contracts to reflect accurately real agreement between contracting parties when, either through mutual mistake or unilateral mistake coupled with actual or equitable fraud by other party, the writing does not embody contract as actually made.

Repudiation: Repudiation of contract is in nature of anticipatory breach before performance is due, but does not operate as anticipatory breach unless promisee elects to treat repudiation as breach, and brings suit for damages. Such repudiation is but act or declaration in advance of any actual breach and consists usually of absolute and unequivocal declaration or act amounting to declaration on part of promisor to promisee that he will not make performance on future day at which contract calls for performance.

Requirements Contract: A contract in which one party agrees to purchase his total requirements from the other party and hence it is binding and not illusory.

Rescission: To abrogate, annul, avoid, or cancel a contract; particularly, nullifying a contract by the act of a party. The right of rescission is the right to cancel (rescind) a contract upon the occurrence of certain kinds of default by the other contracting party. To declare a contract void in its inception and to put an end to it as though it never were.

Restitution: An equitable remedy under which a person is restored to his or her original position prior to loss or injury, or placed in the position he or she would have been, had the breach not occurred.

Revocation: In contract law, the withdrawal by the offeree of an offer that had been valid until withdrawn. . . . In contract law, the withdrawal of an offer by an offeror; unless the offer is irrevocable, it can be revoked at any time prior to acceptance without liability.

Specific Performance: The remedy of requiring exact performance of a contract in the specific form in which it was made, or according to the precise terms agreed upon. The actual accomplishment of a contract by a party bound to fulfill it. The doctrine of specific performance is that, where money damages would be an inadequate compensation for the breach of an agreement, the con-

tractor or vendor will be compelled to perform specifically what he has agreed to do; for example ordered to execute a specific conveyance of land.

Statute of Frauds: Its chief characteristic is the provision that no suit or action shall be maintained on certain classes of contracts or engagements unless there shall be a note or memorandum thereof in writing signed by the party to be charged or by his authorized agent (for example, contracts for the sale of goods priced at $500 or more; contracts for the sale of land; contracts which cannot, by their terms, be performed within a year; and contracts to guaranty the debt of another). . . . UCC § 2-201 provides that a contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker.

Substantial Performance: A doctrine in commercial reasonableness which recognizes that the rendering of a performance which does not exactly meet the terms of the agreement (slight deviation) will be looked upon as fulfillment of the obligation, less the damages which result from any deviation from the promised performance.

Suretyship: The relationship among three parties whereby one person (the surety) guarantees payment of a debtor's debt owed to a creditor or acts as a co-debtor. Generally speaking, the relation which exists where one person has undertaken an obligation and another person is also under an obligation or other duty to the obligee, who is entitled to but one performance, and as between the two who are bound, one rather than the other should perform.

Termination: With respect to a lease or contract, term refers to an ending, usually before the end of the anticipated term of the lease or contract, which termination may be by mutual agreement or may be by exercise of one party of one of his remedies due to the default of the other party.

Third-Party Beneficiary: One for whose benefit a promise is made in a contract but who is not a party to the contract. . . . A prime requisite to the status of "third party beneficiary" under a contract is that the parties to the contract must have intended to benefit the third party, who must be something more than a mere incidental beneficiary.

Unconscionability in Common Law: A doctrine under which courts may deny enforcement of unfair or oppressive contracts because of procedural abuses arising out of the contract formation, or because of substantive abuses relating to terms of the contract, such as terms which violate reasonable expectations of parties or which involve gross disparities in price; either abuse can be the basis for a finding of unconscionability. . . . Basic test of "unconscionability" of contract is whether under circumstances existing at time of making of contract and in light of general commercial background and commercial needs of particular trade or case, clauses involved are so one-sided as to oppress or unfairly surprise party. . . . Unconscionability is generally recognized to include an absence of meaningful choice on the part of one of the parties, to a contract together with contract terms which are unreasonably favorable to the other party.

Unconscionability in Restatement of Contracts: If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result. R2d § 208.

Unconscionability in Uniform Commercial Code: (1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any

unconscionable result. (2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination. U.C.C. § 2-302.

Unconscionable: A contract, or a clause in a contract, that is so grossly unfair to one of the parties because of stronger bargaining powers of the other party; usually held to be void as against public policy. An unconscionable bargain or contract is one which no man in his senses, not under delusion, would make, on the one hand, and which no fair and honest man would accept, on the other.

Undue Influence: Persuasion, pressure, or influence short of actual force, but stronger than mere advice, that so overpowers the dominated party's free will or judgment that he or she cannot act intelligently and voluntarily, but acts, instead, subject to the will or purposes of the dominating party.

Unenforceable Contract: An unenforceable contract is one for the breach of which neither the remedy of damages nor the remedy of specific performance is available, but which is recognized in some other way as creating a duty of performance, though there has been no ratification.

Uniform Commercial Code: One of the Uniform Laws drafted by the National Conference of Commissioners on Uniform State Laws and the American Law Institute governing commercial transactions (including sales and leasing of goods, transfer of funds, commercial paper, bank deposits and collections, letters of credit, bulk transfers, warehouse receipts, bills of lading, investment securities, and secured transactions). The UCC has been adopted in whole or substantially by all states.

Unilateral Contract: A unilateral contract is one in which one party makes an express engagement or undertakes a performance, without receiving in return any ex-

press engagement or promise of performance from the other.

Unilateral Mistake: A mistake or misunderstanding as to the terms or effect of a contract, made or entertained by one of the parties to it but not by the other.

Void Contract: A contract that does not exist at law; a contract having no legal force or binding effect.

Voidable Contract: A contract that is valid, but which may be legally voided at the option of one of the parties. One which is void as to wrongdoer but not void as to wronged party, unless he elects to so treat it.

Waiver: The intentional or voluntary relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right, or when one dispenses with the performance of something he is entitled to exact or when one in possession of any right, whether conferred by law or by contract, with full knowledge of the material facts, does or forbears to do something the doing of which or the failure of forbearance to do which is inconsistent with the right, or his intention to rely upon it.

IX. INDEX WITH CASES CITED

This book was written as a condensed and readily accessible reference for the use of law students, lawyers, and people in business.

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