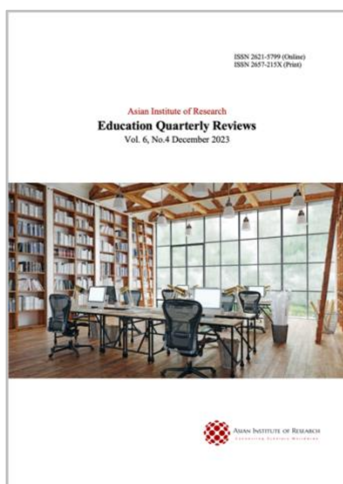

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A Teaching Note on Contracts

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Abstract
This article is the last of a series of teaching notes in the area of contract law and topics in the legal environment of business, designed to assist instructors- particularly "newly minted" professors- in preparing materials for use in their classrooms. This article summarizes the elements of a valid contract based on references to the classic cases decided in various jurisdictions in contract law, as well as citations to recently decided cases provided for further research and study and may serve as a template or overview of the important topics making up a business law or legal environment of business course.

Keywords: Contracts, Agreement, Consideration, Legal Capacity, Legality of Subject Matter, Remedies

1. Contracts Overview

A contract may best be defined as an enforceable promise. A contract may be oral, or it may be found in writing. Professor Samuel Williston, one of the great contract's teachers of the last century, noted: "A contract is a promise, or a set of promises, for breach of which the law gives a remedy, or the performance of which the law in some way recognizes a duty." A promise is an undertaking that something either will or will not happen in the future. The term "contract" may also used by both laymen and lawyers to refer to a specific document in which the terms of a specific agreement are written.

Every contract involves at least two parties: an **offeror**, the party who makes an offer, and an **offeree**, the party to whom the offer is made. The offeror promises to do or to refrain from doing something.

1.1. Elements of a Valid Contract

The following are the four basic elements of a valid contract:

1. An **agreement**, which consists of an offer and an acceptance. Whether by words or actions, or a combination of both, the parties must form or come to an agreement. A prerequisite to the formation of a contract is the mutual manifestation of assent (agreement) to the same terms. This is sometimes called the "meeting of the minds" or a "*consensus ad idem*" in Latin.

2. **Consideration**, which is defined as "something bargained for in return for a promise." Today, courts focus especially on the nature of a *bargain* between the parties in deciding if a particular promise will be enforced.
3. **Legal capacity** of the parties. Both the offeror and the offeree must have the capacity to enter into a contract. Contractual capacity involves issues such as age (so called *minors' contracts*) and mental state (e.g., persons suffering from senility or Alzheimer's disease), and may involve issues such as fraud, undue influence, or duress.
4. **Legal purpose**. A contract cannot be formed for an illegal or immoral purpose, cannot violate a statute, or be in violation of "public policy."

In addition, there are two "outside" factors that may make a contract unenforceable should one of the parties seek its enforcement in a court:

1. **The Statute of Frauds,** which requires that certain types of contracts must be in writing to be enforceable.
2. **The Statute of Limitations**, which prescribes the time period within which a party must sue for breach of contract or seek to enforce contractual rights.

1.2. Classifications of Contracts

1.2.1. Express Contract

An express contract is one in which the essential terms of the agreement are found in *words*, either *orally* or in *writing*. A brief word about oral contracts is appropriate. Strictly speaking, most contracts are *not required* to be in writing, unless the *Statute of Frauds* applies. However, attempting to enforce an oral contract provides certain proof problems for the litigants and for a court. Oral proof is often valuable and probative, and in many cases, may be the only proof available. However, if parties' oral testimony conflicts in the absence of written proof, a court may be required to decide a dispute on the basis of *credibility*, or believability of witnesses or the parties. The words of the humorist Will Rogers are quite appropriate: *"An oral contract is not worth the paper it's printed on!"*

1.2.2. Implied Contract (Implied in Fact)

An implied in fact contract is created by *conduct*, rather than words. An implied in fact contract exists where facts and circumstances indicate that a contract or an agreement has been entered into. The following four steps generally establish an implied in fact contract:

1. Plaintiff furnished some service, goods, or property to the defendant;
2. Plaintiff expected to be paid for the service, goods, or property;
3. Defendant knew or should have known that payment was expected; and
4. Defendant had the opportunity to reject the service, property, or goods and did not do so. [Case Reference (CR): *Day v. Caton* (1876); *Rhythm & Hues v. Nature's Law Care, Inc.* (2023)]

1.2.3. Implied in Law (Also Called Quasi-Contract)

An implied in law contract is not a contract created by the parties, but results from an obligation imposed on the parties in equity in order to "do justice" and to "avoid unjust enrichment." A quasi-contract may be imposed by the court where one person confers a benefit on another who retains the benefit, and under circumstances where it would be unjust not to require that person to pay for the benefit. Recovery is generally based on the reasonable value of the services received by the defendant — in some cases, not including the profit of the person conferring the benefit. This remedy is based on the concept of *quantum meruit*. [CR: *Lash v. Kreigh* (2023)]

1.3. Other Classifications

Bilateral and unilateral contracts: A contract is termed *unilateral* if the offer can be accepted by the performance of an act. A *bilateral* contract is one in which *both parties*, the offeror and the offeree, have made promises and are bound to fulfill obligations towards each other. For example, in a typical sales contract, the seller has promised to deliver goods, and the buyer has promised to pay the price. In a bilateral contract, each party is both the promisor and promisee, having made mutual promises.

Executed and executory contracts: A contract that has been fully performed by both the promisor and promisee is termed as an *executed* contract. A contract that has not yet been fully performed by either party is said to be *executory*. In some cases, a contract may be *partially executed* if a part of the contract has been performed.

1.4. Void. Voidable, and Unenforceable Contracts

A **void contract** is one that has no legal significance and results in the imposition of no legal obligation upon the part of either a promisor or promisee. A void contract generally cannot be enforced by a court. A contract to commit a crime or a tort (a civil wrong) or a contract that violates "public policy" is an example of a void contract. A **voidable contract** is a contract in which at least one of the parties has the power to elect to avoid his/her legal duty established in the contract by disaffirming the contract. In essence, one of the parties has the *option* or right to remove him/herself from the agreement with no negative legal consequences. If a party decides not to elect to remove him/herself from the contract, the contract will continue in force.

Examples of voidable contracts include agreements entered into by a minor, or a contract entered into as a result of fraud, mutual mistake, duress, or undue influence which is not disaffirmed by a party. [CR: *Shannon v. Smalls* (2022)]

An **unenforceable contract** arises when a court is legally constrained from enforcing a contract because of some *extrinsic* factor not connected with the elements of a valid contract discussed above. For example, an otherwise valid contract may not be enforced by the courts because of the operation of the Statute of Frauds or the Statute of Limitations. Whether or not a contract is unenforceable is usually determined at a very early stage of a case, as a "threshold question," through a motion for a summary judgment, or through a motion to dismiss a lawsuit filed by one of the parties. [CS: *Strickland v. Foulke Mgmt. Corp.* (2023)]

1.5. Unconscionable Contracts

Under the early common law, courts would regularly enforce contracts entered into by parties under a principle known as *freedom of contract* — even contracts that appeared to be one-sided, unfair, oppressive, burdensome, or which may have been deemed unconscionable. This principle was embodied in the concept of "*caveat emptor*," translated as "*let the buyer beware*."

The modern basis for unconscionability appears in the Uniform Commercial Code § 2-302, which attempted to change the relationship between the parties from "*caveat emptor*" to "*caveat venditor*," or let the seller beware! The purpose of the doctrine of unconscionability is twofold: "prevention of oppression (sometimes called substantive unconscionability) and unfair surprise (procedural unconscionability)." It should be noted that in fashioning § 2-302, the writers of the Uniform Commercial Code intentionally failed to provide a precise definition of the term "unconscionable" in the belief that to do so might be to limit and defeat the purposes of the rule.

Many legal scholars consider *Williams v. Walker-Thomas* (1965) as the seminal case in the area of unconscionability. Judge Skelly Wright added much to the understanding and development of this difficult concept and to interpreting the reaches of § 2-302. Generally, four major factors appear in cases that have dealt with the question of unconscionability, originating *Williams v. Walker-Thomas*:

1. The *absence of meaningful choice* (that is, a "take it or leave it" or "boilerplate" contract);

2. *Great inequality of bargaining power* (where there is only one or a very few sellers available in the marketplace causing a party to have no or limited bargaining power);
3. The inclusion of terms that would cause *unfair surprise, hardship, or oppression* (e.g., the inclusion of penalty clauses, forfeiture provisions, clauses which severely limit remedies, a “confession of judgment” clause); or
4. Circumstances where *race, literacy, language, ethnicity, economic circumstances, or education are significant factors in determining the nature of the bargain*, and the relationship between the parties.

In the case of *Jones v. Star Credit* (1969), the court extended the concept of unconscionability to the *price term* of the contract. However, in *Wille v. Southwestern Bell* (1976), the court refused to extend the concept of unconscionability to a contract entered into by a businessman with fourteen years of experience — indicating that unconscionability may not be available to all litigants. [CR: *Tadych v. Noble Ridge Constr., Inc*. (2022)]

2. The Agreement: Offer and Acceptance

An **offer** will be judged on the basis of three criteria:

1. There must evidence the *serious intent* on the part of the offeror to be bound by the terms of an offer;
2. The *terms of the offer must be definite or reasonably certain*; and
3. The offer must be *communicated* to the offeree.

Intention is measured by what is termed the "objective” or “reasonable man” test, which is showcased in the classic English common law case of *Carlill v. Carbolic Smoke Ball* (holding that an advertisement that appeared in the *Pall Mall Gazette* was an offer for a unilateral contract that could be accepted by anyone who performed its terms). The objective test states that an offer will be judged by the reasonable meaning of the words used — whether a "reasonable man would conclude that an offer had been made." Under the objective or reasonable man test, the subjective intention of the parties is ordinarily irrelevant. However, an offer that is made in obvious anger, jest, or as the result of excitement will not generally meet the requirement of a serious offer under the objective test. Likewise, an offer must be distinguished from mere statements of intention to be bound at a later date, preliminary negotiations or discussions, inquiries, or invitations (solicitations) to make an offer. [CR: *Lucy v Zehmer* (1954); *Sy-Lene of Wash., Inc. v. Starwood Urban Retail II* (2002)]

2.1. Media Offers and Advertisements

At common law, an advertisement, a circular or flier, or a radio or TV commercial was not considered as an offer; rather, these forms of communications were considered as statements of intention or a preliminary proposal inviting an offer. Although most advertisements and the like were treated as invitations to negotiate and not offers, this does not mean that an advertisement could never be considered as an offer, binding a seller to a contract.

In *Lefkowitz v. Great Minneapolis Surplus Store* (1957), the court was called on to decide whether a newspaper advertisement announcing a "special sale" in a department store should be construed as an offer, the acceptance of which by Mr. Lefkowitz would result in a binding contract. Take special note of the test enunciated in *Lefkowitz*: *the offer must be clear, definite, and explicit, and leave nothing open for negotiation.*

2.2. Indefiniteness

Definiteness requires that the terms of and offer must be clear so that the offeree is able to make a decision whether or not to reject or accept the offer. In addition, if the terms of an agreement are too indefinite, a court will not be able to enforce the contract or would be unable to determine the proper remedy for its breach.

The common law required that an agreement should ordinarily contain the following material terms: (1) identification of the parties; (2) identification of the subject matter of the agreement; (3) a quantity; (4) the consideration (price) to be paid; and (5) the time for performance.

2.3. Relaxation of Rules Relating to Indefiniteness: The "Reasonableness" Standard

Even under the common law, courts began to relax rigid standards relating to indefiniteness and would imply or insert *reasonable terms* in a contract wherever possible, especially where both parties had manifested a clear *intention* to enter into a contract.

Under UCC Section 2-204, for example, a contract will not fail for indefiniteness if the parties clearly intend to enter into a contract and if a "reasonably certain basis" exists for granting an appropriate remedy by a court.

Open price: If nothing is said as to price, or the price is left to be agreed by the parties and they fail to agree, or the price is to be fixed in terms of some agreed market or other standard as set or recorded by a third person or agency and is not so set or recorded by that third party or agency, "the price is a *reasonable price* at the time for delivery" [Section 2-305].

If no **place of delivery** is specified, then delivery is to occur at the *seller's place of business* [Section 2-308 (a)], thus obligating the buyer to pay for freight, insurance, and delivery charges.

If the **time for shipment or delivery** is not stated, then the time shall be a *reasonable time* after the contract is formed [Section 2-309].

If the **time for payment** is not specified, then payment is due at the time and place of delivery [Section 2-310 (a)] and no credit arrangements are implied. Payment of a reasonable charge for interest may be implied.

While these terms may be found in the UCC, and thus apply to contracts involving the sale of goods (defined as "movable and tangible" items), their application is equally important in many other types of contracts.

In addition, terms that are omitted or unclear may be supplied by *custom and usage of trade or by prior or contemporaneous dealings between the parties*, subject to the parol evidence which states that a party **cannot contradict** the terms of a written contract intended to be the final expression of the intentions of the parties. However, a party to a contract may attempt to introduce consistent additional terms which **"explain or supplement"** the terms of a written agreement.

2.4. Communication of the Offer

Under the third criterion, ***the offer must be communicated to the offeree*** so that the offeree knows the terms of the offer. An offer cannot be accepted by an offeree who is unaware of the offer or who has not become apprised of it.

2.5. Termination of an Offer

It should be recognized that an offer creates a power or right in the offeree to transform the offer into a binding contract through an acceptance. However, an offer will not remain in existence indefinitely. The offer can be terminated through the operation of law, actions of the parties, the occurrence of a stated condition, or by its own terms, normally through the lapse of a period of time stipulated in the contract.

2.6. Lapse of Time

Where the time specified in the contract for an acceptance has passed or an event or condition stipulated in the contract which would terminate an offer has occurred, the offer is terminated.

Should no time be specified in the offer itself, the offer will terminate at the end of a *reasonable time*, determined by such factors as the subject matter of the contract (an offer to buy or sell perishable goods would involve a relatively short period of time) and other relevant market and business conditions and circumstances. [CR: *Corcoran v. Lyle School District No. 406* (1978); *Barajas v. BCN Tech. Serv.* (2023)]

2.7. Operation of Law

An offer may also be terminated through *operation of law*. For example, *the destruction of the subject matter of the contract through no fault of the party* will terminate an offer.

The death or incompetency of the offeror or offeree in a personal service contract also terminates an offer. In a personal service contract, since the contract is considered personal to both the offeror and the offeree, an offer will be automatically terminated if the offeror or offeree dies, becomes incapacitated, or is ruled incompetent by a court of law. The death or incapacitation of a party in a personal service contract may also terminate a contract.

Where *a statute or court or administrative decision makes an offer illegal*, the offer will be terminated. These circumstances — destruction of the subject matter of the contract, death or incompetency of a contracting party, or the operation of a statute — are sometimes viewed under the doctrine of "*objective impossibility*" and may also be used as a defense to a claim of breach of contract or as an excuse for non-performance of a party where a contract has been made illegal by a statute or a court or administrative decision. [CR: *SVAP III Poway Crossings, LLC v. Fitness Internat., LLC* (2023)]

2.8. Action of the Parties

An offer may also be terminated by actions of the parties, such as:

Revocation of the Offer by the Offeror
Revocation is a withdrawal of the offer by the offeror before the offeree accepts the offer. A notice of revocation is not generally effective until it is received by the offeree or by the offeree's agent. Generally speaking, an offer made to the general public or to persons whose specific identity is unknown to the offeror (for example, an offer made in a newspaper advertisement or in a TV or radio ad), may be revoked only by using the same medium or at least by using "the best means of notice reasonably available under the circumstances" that would give equal publicity to the communication of the revocation as the communication of the original offer. Certain types of offers, called "firm offers," may not be revoked by the offeror under certain circumstances — one of these circumstances being where the offeree has paid consideration for an option or where the promise has been made in a "signed writing" under UCC § 2-204 (the "Firm Offer Rule"). [CR: *Amazon.Com Servs. LLC v. Paradigm Clinical Rsch., Inc.* (2022)]

An offer is also terminated if the offeree rejects it or if the offeree makes a counteroffer.

Rejection by the offeree terminates an offer. There may be a fine line between a rejection of an offer and an inquiry about trading on different terms than those contained in the original offer. Suppose that a party were to respond to a friend's offer to buy his antique car: "That seems a bit low; I'll just bet that you can do a lot better than that." Is this communication a rejection of his friend's offer or a mere inquiry which will not terminate (destroy) his friend's offer?

A ***counteroffer*** by the offeree also terminates the original offer. Generally, a counteroffer is a rejection of the original offer and the making of a new offer by the offeree which can then be accepted or rejected. Offers and counter offers often characterize the negotiations between parties.

2.9. The Acceptance

An acceptance is an unconditional assent by either words or conduct by an offeree that manifests agreement to the terms of the offer. The acceptance is usually made in the manner requested in the offer where the offeror has stipulated an express, authorized means of acceptance. Under the common law, the acceptance was required to be the "mirror image" of the offer or it was considered as a rejection and a counteroffer, resulting in what was termed as "the battle of the forms." The "mirror image rule" has been modified in UCC Section 2-207, termed the "different and additional terms" rule which is applicable to contracts for the sale of goods.

The acceptance must be unequivocal — that is, it may not impose or add new terms or conditions or tamper with the terms of the offer or a court might conclude that a rejection and a counteroffer has taken place. A unilateral contract can only be accepted by the offeree's performance of the required act or by a prompt promise to perform. A bilateral contract can be accepted by an offeree who promises to perform the act or the actual performance of the requested act.

Silence as Acceptance

Generally speaking, silence is not considered as acceptance of an offer even if the offeror has stated "your silence indicates your acceptance of this offer." There are, however, circumstances where an offeree's silence may constitute acceptance of an offer. Such situations arise where there is an affirmative "duty to speak" on the part of the offeree. A court might impose a duty to speak where ***a duty arises out of a contract itself*** (i.e., record or book club contracts frequently require that a member send back a card with a rejection of the month's selection, or the selection will be automatically shipped and an obligation to pay will arise). [CR: *Land v. IU Credit Union* (2022)]

A second circumstance where silence may amount to an acceptance occurs where ***prior dealings between the parties*** give the reasonable expectation of a reply. For example, a retailer has ordered goods from the manufacturer on numerous occasions and paid for them when they arrived. Out of convenience, the manufacturer then began to ship the goods on a recurring basis, simply sending the retailer a "confirmatory invoice," noting that the goods would be shipped on the eighth of each month. Whenever the retailer received a shipment of the goods from the manufacturer, he would simply sell them at retail and send a check to the manufacturer for the amount due. The manufacturer would only hear from the retailer if the retailer did not wish to place an order for that month. The last shipment of the goods is the subject of controversy as the retailer now refuses to pay for them, claiming that his "silence" on the matter cannot create a contract. Because of the prior dealings between the parties, the retailer's silence (failure to notify the manufacturer) will be construed as an acceptance of the manufacturer's offer to ship. The retailer will be bound by contract and must pay for the last shipment of the goods. [CR: *Fairstead Cap. Mgmt., LLC v. Blodgett* (2023)]

3. Consideration

Consideration may be defined as "something bargained for in return for a promise." Some promises have little or no legal significance because the element of bargain is missing. For example, if a person promises to make a gift to another person, a court would not generally impose an obligation to complete the gift because the bargain element is missing. Gifts are legally classified as *donative transactions* and are not enforceable as contractual promises — they are considered as gratuitous and not supported by consideration.

In a *bilateral* contract, the consideration for the promisor's promise is a *promise* made by the promisee. In a *unilateral* contract, the consideration for the promisor's promise is the *act* of the promisee. A *forbearance* on the part of the promisee (which is defined as the giving up of a valid legal right) may also provide consideration. Finally, consideration may be found in the *creation, modification, or destruction of a legal relationship*. (Example: I promise to pay you $500 if you will agree to release me from my apartment lease/revise my employment contract.) [CR: *Hamer v. Sidway* (1891); *Nicholson v. Moon Ridge Homeowners Ass'n* (2023)]

3.1. Moral Obligations and Past Consideration

A promise based on a moral obligation, a sense of honor, or love or affection is generally not enforceable. Likewise, a promise based on past consideration is not enforceable, since any supposed detriment had already been incurred.

3.2. The Rules of Consideration

There are two general rules that supply the basis for an understanding of consideration:

First, a court will not usually question the ***adequacy of consideration****;* that is, courts are not generally concerned if the transaction was a "good bargain" or a "bad bargain" in an *economic sense,* only that there in fact was a bargain! This rule has one major exception: where a bargain is made between parties within a fiduciary or confidential relationship, a court of equity may be concerned with the adequacy of the bargain and will carefully scrutinize such a bargain in order to assure that any consideration was adequate. Courts will also inquire if a contract was entered into under fraud, whether the contract was unconscionable, or whether the interest charge amounted to usury – charging more than the legal rate of interest.

The second general rule may be stated as follows: *Once parties enter into an agreement, they are bound by the terms agreed upon.* Any attempt to change the terms of the agreed-upon bargain, "hold out" or renegotiate a "better deal," pressure a party into change the contract terms (especially the compensation), or remove a party from a contract, will be met with a "consideration problem" found in the application of what is known as the *pre-existing duty rule*.

3.3. Pre-Existing Duty Rule

The pre-existing duty rule states: where a party does or promises to do what he or she is already legally bound to do or promises to refrain from doing or refrains from doing what he or she is not legally permitted to do, he or she has not incurred legally sufficient detriment. There is no consideration for the underlying promise. The pre-existing duty may arise in the context of a prior contract or may be imposed by a statute or law. [CR: *Gililland v. Sw. Or. Cmty. Coll. Dist.* (2022)]

3.4. Rescission

It is possible that the parties can *mutually agree to terminate an existing agreement* if the agreement is executory and has not yet been performed. The surrender of rights under the agreement by each party is the consideration for the mutual agreement of rescission.

3.5. Unforeseen Difficulties

During the performance of a contract, a party might encounter unforeseen and substantial problems or issues that could not have been anticipated at the time the contract was entered into. These problems must be of the type and character that are "entirely beyond the contemplation of the parties." However, unforeseen difficulties would ordinarily *not* include occurrences such as strikes, labor shortages, inclement weather, or an increase in the price of components or goods. These types of "difficulties" indeed should have been foreseen and provided for in a contract as risks ordinarily and normally found in an "arms-length" business relationship.

While a plea to a court on grounds of "unforeseen difficulties" might be successful on a first occasion, most courts find that such a plea would not be appropriate or successful on a subsequent occasion. However, in the face of a severe and unexpected increase in price, some courts have held that the contract has been "frustrated" and will permit an increase in the price or will permit a party to remove him/herself from a contract. [CR: *F.J.O. v. M.I.O.* (2022)]

3.6. Special Aspects of Consideration

3.6.1. Accord and Satisfaction

There may be a circumstance where a party to a contract has a dispute with a creditor that the debtor wishes to resolve by making a payment to resolve the dispute. In this case, a debtor may attempt to discharge the debt through an *accord and satisfaction*.

An accord and satisfaction is an attempt by a debtor to legally extinguish a debt by paying or tendering a lesser amount than that stipulated in the contract or that is demanded by a creditor. The *accord* is defined as the agreement whereby one of the parties undertakes to give or perform, and the other to accept, in satisfaction of a claim, something other than that which was originally promised or agreed upon. *Satisfaction* takes place when the accord is executed (often when a party agrees to accept the lesser amount in satisfaction of the debt). The creation of an accord and satisfactions will bar further attempts to collect on a debt. [CR: *A.G. King Tree Surgeons v. Deeb* (1976); *Constr. Consulting, Inc. v. Dist. Bd. of Trs.* (2022)]

3.6.2 Substitutes for Valuable Consideration

Some promises may be enforced without consideration, either on grounds of public policy or in the exercise of a court's equitable jurisdiction. These include:

1. A *composition of creditors' agreement* is an agreement between a potentially insolvent debtor and his/her creditors under which the creditors will accept either a specified amount or a percentage of the amount owed. Such an agreement is fully enforceable without consideration. These agreements frequently are substitutes for a filing of a petition in bankruptcy and are favored by courts. [CR: *Shanefelter v. Hood* (2023)]
2. The doctrine of *promissory estoppel*: This equitable doctrine may be applied where a promisor makes a promise, often involving a promise to make a gift. The parties are not bargaining for anything in a true commercial sense. [CR: *Hoffman v. Red Owl Stores, Inc.* (1965); *Pavelka v. Shadursky* (2023)]

Promissory estoppel is based on the *reliance* on the part of the promisee and is found in Section 90 of the Restatement of the Law of Contracts which states:

> "A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise."

One final point. In enforcing a promise based on promissory estoppel, a court may only enforce the promise to the extent of the *reasonable reliance damages* of the promisee.

4. Contractual Capacity

Contractual capacity is the third element of a valid contract. A contract entered into by a party who lacks the requisite capacity may be either void or voidable. If one of the parties to a contract has been adjudged incompetent or insane by a court after conducting a competency hearing, that contract will normally be judged "*void*" by the court. In other cases, a party may allege and will be required to prove that he or she lacked the ability to enter into a contract for one or more of the following reasons: the contract was entered into under the influence of drugs or alcohol; mental incompetence (perhaps the onset of senility or Alzheimer's disease); mental retardation; intoxication; the side effects of medication; temporary delirium deriving from physical injuries sustained in an accident; extreme confusion; etc.

Generally, unless there has been an adjudication of incompetency by a court, contractual capacity is *a question of fact* for a jury. In order to set aside a contract on grounds of lack of capacity, it is necessary to show that a party did not "understand the nature or consequences of the transaction" or that "by reason of mental illness or defect…

[a party] is unable to act in a reasonable manner in relation to the transaction and the other party has reason to know of this condition.” Thus, upon such a showing, a party may exercise its option to disaffirm or remove him or herself from a contract. The contract is *voidable*.

4.1. Minor’s Contracts

A minor is defined as any person who has not yet attained the required "age of majority" as determined by a given state. The age of majority (usually 18, but in some states the age may be 21) may or may not be the same age as the age for voting, getting married, or purchasing or consuming alcoholic beverages. Each state by statute determines its own "age of majority" for entering into a contract.

The word "minor" may be synonymous with the word "infant." In some states, if a minor becomes *emancipated* (that is, the minor is considered to be "on his own") that minor will be treated as an adult for the purposes of entering into a contract. Examples of minors who may be considered emancipated are those who are married, who are serving in the armed forces, who make significant incomes, or who live on their own. Emancipation is a question of fact for a jury.

An adult who enters into a contract with a minor has no right to terminate the contract. Only the minor enjoys the right to disaffirm the contract. If both parties to a contract are minors, then each of the parties will have the right to disaffirm the contract.

A contract entered into by a minor is an example of a *voidable* contract. There are three rules that generally apply to minors' contracts.

4.2. Majority Rule

A minor may, at any time prior to reaching his/her age of majority, and for a reasonable time thereafter (usually no more than 30 days), disaffirm a contract, return the consideration in his/her possession or under his/her custody control at the time of disaffirmance in whatever form it is currently in, and receive back his/her full consideration.

4.3. New York Rule

A minor may disaffirm the contract, but the minor is responsible in either quasi-contract or under a theory of restitution for the depreciation, wear and tear, damage, fair use, or reasonable rental value of the items under his/her care, custody, or control.

4.4. Third Rule

A minor may only disaffirm a contract if he/she can return the consideration in its exact original form. This third rule will especially apply to so-called "layaway" contracts, or where goods remain with the seller until they have been fully paid for.

In all cases, no particular form of language or conduct is required to effectuate a disaffirmance as long as the minor makes his/her intention clear. [CR: *Harvey v. Hatfield* (1959); *Taylor Morrison of Tex. v. Skufca* (2023)]

4.5. The Necessaries Doctrine

It is now well settled that a minor is liable for the reasonable value of necessaries furnished him/ her under the theory of quasi-contract. While there is no one universally accepted definition of a necessary, necessaries generally include those items furnished to a minor for his/her “life, health, or safety.” A list of necessaries include such items as food, clothing, shelter, medical, and educational expenses.

Two special aspects of the necessaries doctrine must be considered. First, there has been a tendency by courts to expand the category of items that would be considered as necessaries. For example, the purchase of life or health insurance, automobiles, sporting goods, audio equipment, or a college loan may be considered as necessaries if these items are used in connection with one of the traditional categories under "life, health, or safety" for a minor. Second, a court will often look to both the value of the item in question and the station or status in life of the minor to determine if a contract is for necessaries. Thus, a $25 cloth coat may be a necessary item for all minors; but a $5,000 mink jacket would only be considered as a necessary for someone of unusual means.

Finally, most courts will apply the New York rule to contracts where a minor has been furnished a *personal service* (i.e., dance or karate lessons; babysitting jobs; employment assistance), on the theory that the minor cannot return the service already rendered to him or her. [CR: *Gastonia Personnel Corp. v. Rogers* (1970); *Apollo Medflight, LLC v. Nelson* (2023)]

4.6. Ratification

Ratification is an act or an expression in words by which a minor, after having reached his or her age of majority, indicates an intention to be bound by the contract entered into during minority. An effective ratification cannot take place prior to the attainment of majority by the minor.

Ratification may be *express*, that is, a minor may give actual notice that he or she will be bound to the contract. The notice may come in the form of a letter, a telegram, or a phone call. Ratification may also be *implied* from conduct, such as making a payment on account after reaching the age of majority, retaining, or continuing to use property after attaining majority. Ratification might also result from a minor literally "doing nothing" after reaching his/her age of majority, although courts remain divided on the issue of silence and its effect on the issue of ratification. [CR: *In re Express Delivery Enter. LLC* (2023)]

4.7. A Minor's Misinterpretation of Age

Suppose that in asking a minor about his/her age, the minor lies (misrepresents) and states that he/she is over the age of majority and is no longer a minor. According to the majority rule, a minor may still disaffirm the contract, even though he/she has misrepresented his/her age. There are several other rules that jurisdictions may follow. These include:

- If a minor misrepresents, he/she may not disaffirm. This represents a minority view on the matter.
- If a minor misrepresents, he/she will be prohibited (*estopped*) from using minority as a defense. This view affords practically no protection at all to the minor who has misrepresented his or her age, unless he/she can return the consideration in its exact original form.
- Some courts will permit a minor who has misrepresented his/her age to disaffirm but will then allow the minor to be sued in tort for fraud, resulting in an effective "set-off" of any amount of disaffirmance.

5. Genuineness and Reality of Assent

Questions relating to the genuineness of assent are usually raised *after* a contract has been entered into, either as a defense to a breach of contract or in an attempt by a party to rescind a contract, whereby a party asserts that some problem existed at the formation of a contract that may have precluded genuine assent.

5.1. Mistake

There may be a case where one or both of the parties to a contract claim that a mistake has been made in the formation of an agreement which would preclude the existence of a true "meeting of the minds" between the parties. It may also be alleged that the words of a contract do not convey the real intention of the parties.

There are two types of mistakes. A *unilateral* mistake is a mistake made by *one party* in a contract; a *bilateral* or *mutual* mistake is made by *both parties* in the contract. A mistake may be made as to facts or may be made as to the subject matter of the contract, a matter of judgment as to the value of an item, or the quality of an item. Generally speaking, only a mistake as to a matter of fact, and not a mistake in judgment — sometimes called “buyers’ or sellers’ remorse” — will permit a party to rescind a contract on the ground of a mistake.

A frequently cited example of a *unilateral mistake* involves a bid made by a contractor, sometimes caused by a computational or mathematical error or a misunderstanding of the terms found in the invitation to bid. In general, a unilateral mistake does not afford a party any right to rescind the contract in these circumstances unless the other party knows or has reason to know that a mistake has been made; unless enforcement of the contract against a party would be oppressive; or unless enforcement might result in an unconscionable result and rescission of the contract would impose no substantial hardship on the innocent party.

Under a modern view, however, exceptions to the general rule have been recognized. Many courts will not apply the unilateral mistake rule generally when the other party to the contract knows or should have known that a mistake was made, or where the mistake was the result of an inadvertent computational or mathematical error, and not as a result of gross negligence. Thus, the “blundering party” will be permitted to seek to reform or rewrite the contract, seek its rescission, or to assert a defense against enforcement of the contract. Remember, however, that the mistake must be palpable; that is, the mistake must be known or obvious to the party receiving the bid.

Where both parties to a contract share a common assumption about an important fact upon which they have based their bargain and that assumption turns out to be false, the bargain may be avoided on the basis of a *mutual mistake*. The classic case of a mutual mistake of fact involved a ship named "Peerless" that was scheduled to leave Bombay with a shipment of Surat cotton goods. [CR: *Raffles v. Wichelhaus* (1864); *Hardy v. Wiggins* (2023)]

5.2. Duress

Duress involves a claim of the use of coercive force or a threat of force against a party to a contract. Duress may be used either as a defense to an action for breach of contract or as grounds for rescission of a contract. In determining duress, a court will evaluate the *nature of the threat* against a party to a contract. Two types of duress were recognized under the common law: *simple duress*, also called economic duress or “duress of goods,” and *actionable* duress.

Generally, a threat to file a civil suit where there are "good grounds" for the suit (e.g., where a breach has actually occurred or where a required or timely payment has not been made), would *not* constitute actionable duress and would be classified as simple or economic duress.

Actionable duress, on the other hand, includes a threat of physical violence or force (*"I'm going to make you an offer you can't refuse"*); a threat to initiate a criminal suit or a threat of arrest, criminal prosecution or criminal imprisonment; wrongful seizing or withholding of property, or wrongful threats to seize or to withhold goods or land; or “other wrongful acts” that are in some way *improper, illegal, immoral, or unconscionable*.

Economic duress will not generally be found where one of the parties is in desperate need of the subject matter of the contract or is being economically pressured into “making a deal,” and the other party takes advantage of that need or desire in order to drive a very hard, even one-sided bargain.

However, an abusive or oppressive threat to deploy pressure has been recognized by some courts as constituting economic duress if the parties were truly “mismatched” and the victim's willpower was "overmatched" depending on the circumstances of a case, [CR: *Set Envtl., Inc. v. Power Cartage, Inc.* (2022)]

5.3. Undue Influence

Closely related to the concept of duress is that of undue influence. The defense of undue influence originated in a court of equity as a ground for setting aside a transaction that was imposed by a dominant party over a subservient party. Undue influence involves the deployment of over-persuasive bargaining tactics designed to overcome the will of a party. There are two broad classes of undue influence. In the first instance, Section 497 of the Restatement notes that undue influence may occur where one party uses a dominant psychological position in an unfair manner to induce the subservient party to consent to an agreement to which he or she would not otherwise have consented. In the second instance, a party uses a position of trust and confidence to unfairly persuade the other party to enter into a transaction. The party being taken advantage of does not exercise free will in entering into a contract. Many allegations of undue influence arise after the death of the person alleged to have been unduly influenced where relatives or potential beneficiaries of the deceased seek to set aside a will or an *inter vivos* (living) transfer or gift of property.

Generally speaking, two conditions must be present in order to prove undue influence:

- *Susceptibility,* that is, the person allegedly being influenced must be open to the influence caused by conditions such as old age, infirmity, mental or physically weakness, handicap, psychological dependency, etc.; and
- *Opportunity,* that is, a special relationship of trust and confidence exists between the parties. This relationship may encompass a number of traditional or non-traditional fiduciary or confidential relationships: attorney-client, parent-child, trustee-beneficiary, guardian-ward, administrator-legatee, husband-wife, physician-patient, nurse-patient, pastor-parishioner, or even a good friend-aged or confused individual.

The following elements, found in *Odorizzi v. Bloomfield School District* (1966) are common circumstances leading to a finding of undue influence:

1. Discussing the bargain at an unusual or inappropriate time;
2. Consummation of the transaction at an unusual place;
3. Insistence that the transaction be concluded at once, with extreme emphasis on the risks or disadvantages of delay;
4. The use of multiple persuaders;
5. The absence of any independent third party advice;
6. Statements discouraging a weaker party from consulting an independent advisor.

Once the prima facie elements of *susceptibility and opportunity* are shown, the burden of proof is then shifted to the dominant party to prove, by clear and convincing proof, that:

1. There was no abuse of confidence;
2. The transaction was done in "good faith";
3. The gift or will was made in a manner that was free, independent, and voluntary.

The usual remedy in equity was cancellation of any instrument procured by undue influence, avoidance of the transaction, and what a court of equity would term, “restoration of the status quo ante.” [CR: *Estate of Paxton v. Owen* (2022)]

5.4. Misrepresentation and Fraud

The existence of fraud or misrepresentation affects the issue of the genuineness of a party's consent or assent to the contract. In cases involving fraud or misrepresentation, the defrauded party alleges that he/she has been deprived of the “benefit of his/her bargain” and the existence of fraud will be sufficient to permit a disaffirmance of the contract.

There are three types of fraud found under the common law. *Fraud in the execution* has the effect of preventing a party from realizing that a contract has been entered into. It is a "real" or universal defense rendering a contract void. A second type of fraud occurs in the circumstance *when an oral contract has been reduced to a writing*. Here, the alleged victim of fraud relies that the oral agreement will be reduced faithfully to the written expression of their agreement. Acting on the assurance that this has been done faithfully, the victim signs the writing without reading it. Depending on the jurisdiction, the innocent party may be permitted to assert the personal defense of fraud, ignoring the fact that the fraud could have been uncovered had the victim taken the step to read the document before signing it.

The third type of fraud, *fraud in the inducement*, or *contract fraud*, occurs where consent to a bargain is induced by lies, misstatements, or half-truths. Fraud in the inducement is a personal defense, which renders the contract voidable at the option of the innocent party.

The basic distinction between fraud and misrepresentation lies in the presence or absence of *scienter*, which is defined as the *intent to deceive.* Scienter arises either from the knowledge of falsity by a party or the reckless disregard of the truth of a statement. Sometimes the term "innocent misrepresentation" may be used to describe the situation where a party has committed a misrepresentation but has not done so with "scienter" or intent. The misrepresentation is "innocent" only in the sense that it was not done with scienter or intent. It is still actionable.

If a court finds that either fraud or misrepresentation was committed, the innocent party may be permitted to rescind the contract and may be restored to the original, pre-contract condition. Alternatively, the innocent party may enforce the contract and seek compensatory damages for the difference between the value of the item as promised in the contract and the value of the item received by the innocent party. In addition, in some circumstances, an innocent party may seek punitive damages to punish the party who committed fraud for their bad behavior. Depending on the jurisdiction, if an innocent misrepresentation has occurred, the innocent party can rescind the contract, but may not be able to seek damages for the innocent misrepresentation.

Four elements are necessary to prove contract fraud. Contract fraud involves: 1) a false representation or statement of a material fact; 2) *scienter*; 3) justifiable reliance; and 4) damages.

A material fact is defined as any fact that is important in inducing a party to enter into a contract. According to Section 470(2) of the Restatement, materiality exists whenever "the misrepresentation would be likely to affect the conduct of a reasonable man." There are four special aspects or rules concerning this first element of proving fraud.

5.5. Misrepresentation of Fact

Relief may be granted for misrepresentation of fact, and not for erroneous statements of opinion. However, the distinction between fact and opinion is sometimes unclear. Statements or representations of a future fact, a prediction, or a statement of an opinion are generally not actionable as fraud. It is recognized that a seller may be permitted to employ a certain amount of "*sales puffing*" or "*trade talk*" without incurring liability for fraud. However, a statement of opinion given by an expert (a disinterested professional) to an unsophisticated purchaser may give rise to a cause of action for fraud. This opinion may become one of fact depending on the circumstances of the case. [CR: *Vokes v. Arthur Murray, Inc.* (1968); *John v. Elefante* (2022)]

5.6. Statements of Quality, Value, or Commendations

Statements of quality or value or commendations, using such adjectival phrases as "good," "adequate," "great," "successful," "the best," "the finest quality," etc., are generally not actionable. However, there may be circumstances where such statements may be actionable, as where the parties are not "acting on equal footing" or where one party has superior knowledge about the true facts of a situation. In such a case, a court may find that

the “opinion line has crossed into the law of fact.” [CR: *Sellers v. Looper* (1972); *DLC Labs v. Res. Label Group* (2023)]

5.7. Concealment

Concealment occurs where a party, through conduct, conceals the true nature of a situation. Actions such as turning back the odometer of a car, adding oil to the crankcase of a car where the oil would have otherwise run out and the engine would have seized, painting over cracks in the ceiling or wall, and gluing together pieces of a set of china all amount to active concealment. This is often termed the "half-truths" rule since a party to a contract will often disguise the true and complete nature of a transaction.

5.8. Misrepresentation of Law

Under the common law and in the absence of a fiduciary relationship, a statement made by a person concerning a matter of law was not actionable as fraud because of a rule that "everyone was presumed to know the law." The rule established was that a statement of the law governing a given set of facts is merely the expression of opinion. No person ought to rely on such an opinion without further research.

The case of *Puckett Paving v. Carrier Leasing* (1976) exemplifies the common law rule concerning statements as to a matter of law. However, the court stated that a different result might have been obtained had there been a fiduciary relationship (a special relationship of trust and confidence) between the parties.

As times changed, a new rule has developed. Today, most courts would hold that a professional who gives an opinion as to a matter of law in a professional setting, would be responsible for the truth of the statement made. Professionals such as professional lessors, architects, financial planners, real estate brokers, tax professionals — those professions which require a greater or more substantial knowledge of the law than possessed by a layperson — would fall within the rule of law found in the case of *Yorke v. Taylor* (1969). [CR: *Prometheus Innovation Corp. v. Huntington Learning Ctrs., Inc.* (2022)]

5.9. Scienter

The second element of a cause of action for fraud is that of *scienter* — either knowledge of falsity or reckless disregard of the truth. Scienter requires an intent to deceive or a "guilty mind." Without proof of scienter, a plaintiff will only be able to prove misrepresentation and will not be eligible to receive punitive damages.

In most cases, scienter will be found in the *words* or *actions* of a party. An important question arises: When might *silence* constitute the basis of an action for fraud? Under the common law, in a typical “*arms-length*” contract negotiation, neither party had the positive duty to come forward with facts and disclose them to the opposite party. Because the parties were operating "at arm’s length," no “duty to speak” existed. Parties were expected to take steps to protect their own interests.

This common law rule has been supplanted in many cases by decisions that have established a "duty to speak." Some of the circumstances establishing a “duty to speak” include:

a. In the sale of a home or other real property, the seller must disclose material "latent defects," that is, any defect that would not be readily discovered upon an inspection and which is known by the seller. The application of this rule depends on state law.

b. If a serious defect or serious potential problem is known to the seller (i.e., a crack in the engine block that might cause a serious steering problem), but could not reasonably be discovered by the buyer, some courts may impose a "duty to speak."

c. Where a *fiduciary relationship* exists. A fiduciary relationship is a special relationship of “trust and confidence” between parties. Examples of a fiduciary relationship include lawyers and their clients,

partners in a partnership, a broker and a client, directors of a corporation and their shareholders, and a guardian and his or her ward.

d. To correct a prior statement which, although true when made, has now become false or untrue due to a change in facts or circumstances. [CR: *Bergeron v. Dupont* (1976); *Evolve Growth Initiatives, LLC v. Equilibrium Health Sols. LLC* (2023)]

5.10. Justifiable Reliance

The third element of proving fraud is that of "justifiable reliance"; that is, the party claiming that he/she has been defrauded must prove reasonable or justifiable reliance upon the misrepresentation in entering into the contract. The question of reliance is a question of fact. The plaintiff need not prove that the false statement was the sole factor in entering into the contract; rather, that it was an *important element* in inducing him/her to enter into a contract.

It is recognized that a certain amount of "sales puffing" or "trade talk" may be expected in a sales contract. The common law noted that it was the duty of every person "to take notice of obvious facts and to investigate the truth of representations." Thus, if a statement was obviously or patently false, a plaintiff could not say that he/she justifiably relied upon it. Ironically, sometimes the more outrageous a statement, the less likely an action for fraud could be maintained; although, it must also be recognized that "the law will afford relief even to the simple and credulous who have been duped by art and falsehood." This is ordinarily an issue for the jury to decide.

Similarly, if a party knows the truth of a statement, he/she may not later claim justifiable reliance. Is there a requirement of investigation or inspection of goods or property by a purchaser? Generally, yes, especially if an inspection or investigation would not require the services of an expert, the expenditure of considerable time or money, or any special training or expertise. However, if a defect is *latent* (not readily seen) or hidden, the buyer would be justified in relying on statements or representations of the seller, and no inspection would be required. [CR: *Arwood v. Arwood* (2022)]

5.11. Damages

Finally, the innocent party must suffer some pecuniary or monetary injury or damage as a result of the fraud or misrepresentation. If the plaintiff is attempting to rescind or cancel the contract, the court will not require proof of monetary damages. However, if the plaintiff is seeking damages in the form of money, proof of an injury is required.

6. Writing and Form of a Contract

6.1. The Statute of Frauds

The Statute of Frauds is based on the subject matter of the contract. If the subject matter of the contract *falls within* one of the categories under the Statute, the ability to collect monetary damages, enforce the contract, or to seek specific performance is conditioned on proof that a signed writing exists. In general, four types of business contracts "*fall within*" the Statute of Frauds, and are thus required to be in writing:

1. Contracts involving the sale of land, an interest in land (an easement, mortgage, or life estate) or a lease of real property which extends for more than a certain period of time (usually one year);
2. Contracts that by their terms cannot be performed within one year of their formation;
3. The promise to answer for the debt, miscarriage, or default of another (so-called secondary or collateral promises);
4. Under the Uniform Commercial Code, contracts for the sale of goods for the cumulative purchase price of $500.00 or more.

The Statute of Frauds requires that the writing must evidence the agreement of the parties. Unless a specific format for the writing is required, for example, the form of a deed, the writing may be in any form. It may be a receipt, a telegram, a letter, an exchange of correspondence, the records of a business, an acknowledgment, a memorandum, or even a letter that purports to repudiate a contract. For contracts involving the sale, interest, or lease of land, the writing must contain the legal description of the property — often the lot and block number.

6.2. The Part Performance Exception

There is a major exception to the application of the Statute of Frauds relating to the sale of land. The "part performance" exception may be applicable when an oral contract for the sale of land has been partially performed. If the court finds sufficient part performance, an oral contract will suffice, and the court may grant specific performance of the oral contract. Courts are especially prone to find part performance where the parties cannot be returned to the *status quo* because of the substantial actions undertaken by a party claiming that a contract or agreement existed for the sale of the real property. [CR: *Lauron Industries v. Holman* (1972); *616 Inc. v. Mae Props., LLC* (2023)]

The three examples of proof of part performance are: (1) where the buyer pays a part of the purchase price and has taken *actual and exclusive possession* of the property; (2) where the buyer has made *permanent, valuable, and substantial improvements* to the property with the consent of the seller; and (3) where the buyer has given consideration to the seller in a greater amount than that usually paid by a lessee under the terms of a lease. Whatever proof is offered under the theory of part performance must point “unmistakably and exclusively” to the existence of the oral agreement. [CR: *Miller v. McCamish* (1971)]

6.3. Performance Beyond One Year

The Statute of Frauds as originally found in the common law of England provided that a writing was required for “an agreement that is not to be performed within the space of one year from the making thereof.” Probably no section of the Statute of Frauds is least favored by courts and has been subject to more interpretation. In order for a particular contract to fall within the Statute of Frauds, the performance of the contract must be *objectively impossible* to perform within a year from the date of the formation of the contract. The issue is one of *possibility*, not probability or likelihood that the promise can be performed within a year.

A contract entered into for an *indefinite* period of time by definition falls outside the Statute of Frauds and is not required to be in writing.

6.4. Promises to Answer for the Debt of Another

A “promise to answer for the debt, miscarriage, or default of another” is an example of a secondary or collateral promise and must ordinarily be found in writing. A contract or promise of guaranty or *suretyship* is such a promise. A secondary promise may also be called a "triggered promise," since its performance only comes into existence or is “triggered” by the failure of the primary party to pay or perform.

The "main purpose" doctrine exception (also called the “leading object rule”) applies to certain types of secondary or collateral promises. The main purpose doctrine exception provides that while the promise to answer for the debt of another generally must be in writing under the Statute of Frauds, where the secondary promisor has "some purpose of his own" (generally to secure some personal monetary or pecuniary gain or some personal benefit), the Statute of Frauds does not apply, and no writing will be required. [CR: *Howard, Weil, Labouisse v, Abercrombie* (1976); *Kuker Marino Winiarsky & Bittens, LLP v. NuevoModern, LLC* (2023)]

6.5. Contracts for the Sale of Goods - UCC § 2-201

The Statute of Frauds under the Uniform Commercial Code generally applies to a contract for the sale of goods for the purchase price is $500.00 or more. This is a cumulative requirement, that is, the "sale" is a total purchase

concept. Even though no one item may meet the $500.00 requirement, if the total or *cumulative* purchase meets or exceeds $500.00, the entire transaction falls within the Statute of Frauds and must be found in a writing. [CR: *Nazari v. La Handymann* (2022)]

Having met these threshold requirements, the Statute then requires:

a. *Some writing* sufficient to show an agreement (i.e., "that a contract for sale has been made between the parties");
b. *Signed by the party against whom enforcement is sought* ("the party to be charged") or by his/her authored agent or broker.

Under the UCC, a writing is not insufficient because it omits or incorrectly states a term agreed upon, but the contract is not enforceable beyond the *quantity* of goods shown in such writing. The UCC is much more lenient on the question of the sufficiency of the writing than was the common law, which required all of the "important terms" of a contract to be contained in the writing (i.e., price, quantity, parties, time for performance, etc.). Under the UCC, there are only three "definite and invariable" requirements as to the writing. First, it must evidence an *intention* to enter into a contract; second, it must be "*signed*," which includes any authentication that identifies the party to be charged; and third, it must specify a *quantity*.

The UCC requires either a written contract or some form of a written memorandum, However, the emphasis under the UCC is clearly on "*some writing*" — that is, a confirmation, sales slip, check, note, order slip, telegram, letter, etc. The signature or "signing" is not required to be at the end of a document and can be placed anywhere on the writing. A signature can consist of a stamped name, a symbol, or a party's initials, if a party so intends.

The UCC requires that a quantity be stated, and even the quantity need not be stated "accurately," so long as the writing reflects the intention of the parties. However, the contract is not enforceable beyond the quantity stated in the contract.

6.6. Exceptions under the U.C.C.

There are three main exceptions to the UCC Statute of Frauds provision. An oral contract will be enforceable to the extent that a seller accepts payment or to the extent that a buyer accepts delivery of the goods contracted for ("*goods paid for/accepted*" also called the "*partial performance*" doctrine.)

Where goods are to be *specially manufactured* or custom made for a buyer and are of the type not "ordinarily sold in the regular course of the seller's business," if the seller has either begun their manufacture or incurred obligations for their manufacture, no writing is required. [CR: *Challenge Mfg. Co., LLC v. Metokote Corp.* (2022)]

Finally, if the defendant in his pleadings, testimony or otherwise has *admitted* that a contract for sale was made, the Statute of Frauds will not apply.

The UCC also provides for a *substitute* for the writing and signature requirements of the Statute of Frauds termed the "*memorandum substitute*." When merchants have concluded an oral contract, it is common for one party to send to the other a letter of confirmation, a purchase order, or perhaps a printed form of the contract for their review and perhaps "counter-signature."

However, *between merchants* (that is, if *both* parties are merchants), a contract for the sale of goods is enforceable without the "signature of the party to be charged" if a party to the contract within a reasonable time of the making of the oral agreement sends a written confirmation containing the essential terms of an oral contract to the other party, and the party receiving the communication or memorandum has "reason to know" its contents and does not provide written notice of objection to the confirmatory memorandum within 10 days.

Note that the *memorandum substitute* is the proper method to provide protection to a merchant whenever an oral contract or order is made for goods over $500.00. It would also be wise to send the memorandum by registered or certified mail in order to later prove that the other party "had reason to know its contents" or the notification of objection as well. [CR: *AA Supplies of St. Thomas v. Sugar Bay Club & Resort Corp.* (2019)]

6.7. Interpretations of Contracts

Whenever parties to a contract cannot agree on the terms of their agreement and go to court to litigate the issue, the court will apply certain basic principles of *construction and interpretation* to the agreement in order to determine and then give the proper effect to the *intention* of the parties. Generally speaking, courts will give a reasonable meaning to the words used in a contract. In applying this principle, courts will utilize the "plain meaning rule," that is, if a writing appears to be plain and unambiguous on its face, its meaning must be determined from the "four corners" of the instrument itself without resort to extrinsic evidence. In pursuit of "plain meeting," courts will use an objective standard, the expressed intention of the parties, rather than any secret or hidden intention in interpreting a contract. In doing so, courts will read and interpret a contract in its entirety so as to give effect to all of its parts.

Certain problems may arise which may result in intervention and interpretation by the courts:

- When a contract is partly written and partly printed, the written part will prevail if there should be a conflict. If an amount is expressed in conflicting words and figures, the words will prevail. For example: "three thousand dollars" ($300) - the correct sum will be three thousand dollars.
- Usage of trade and customs of a community can be used to explain the meaning of unclear or ambiguous language found in a contract. This is especially true under the UCC.
- Actions of parties occurring after executing a contract but prior to a controversy may be used by a court to demonstrate the intentions of the parties to an agreement.
- Language in a contract that is either unclear or ambiguous will be interpreted most strongly against the party who prepared the contract or the party who caused the confusion. An example exists in a provision of an insurance contract, which may be capable of more than one interpretation. Such ambiguity will be construed against the insurance company that prepared the contract.

6.8. The Parol (Oral) Evidence Rule

When a contract is reduced to a writing, it is logical to assume that the written contract contains all the terms agreed to by the parties. The *parol evidence* rule states that oral testimony is generally not admissible to vary the terms of a written contract when such oral testimony relates to statements made prior to the signing of the contract or to statements made at the same time [contemporaneous] the contract was made, if the parties intended the "four corner" of the agreement as the final expression of their agreement. There are several important exceptions to the parol evidence rule:

a. Where the words in a contract are ambiguous, that is, where words are capable of more than one meaning, oral or parol evidence may be offered to *explain the ambiguity* in the contract.

b. When a written contract is obviously incomplete (as where a detail is omitted or a blank is not filled in), oral or parol testimony is admissible to supply the missing term.

c. The failure of a condition precedent. If parties to a written contract orally agree that a contract will not be effective unless or until a certain event or condition takes place, the court will permit oral testimony to show that the condition precedent was or was not fulfilled. In this case, the party offering the oral proof is not trying to vary the terms of the written agreement; rather, the introduction of the oral proof is offered to show that the agreement never came into existence or that the agreement did come into existence.

d. Changes, modifications, or additions to a contract are not covered by the parol evidence rule, since the parol evidence rule only applies to provisions made before or at the time of the signing of the

written agreement. Note, however, that other provisions, such as the Statute of Frauds requiring a writing or rules concerning consideration might apply to keep oral proof from being introduced.

It is also settled that the parol evidence rule does not prevent a party from using contemporaneous or prior negotiations or expressions to indicate that the writing was never intended to be a final expression of their agreement. [CR: *Worsham v. Worsham* (2022)]

7. Legality of Subject Matter

Generally speaking, a contract which involves the performance of an act in violation of a statute or which is against public policy is not enforceable by a court of law. Such a contract is void or is a nullity. Likewise, should the subject matter of a contract involve criminal activity or the commission of a tort or a civil wrong, the contract is also void and unenforceable.

When only a part of a contract is deemed illegal, and the illegal provision or portion does not involve serious moral turpitude, the illegal portion of the agreement may be disregarded, and the legal part of the contract may be enforced. The contract is said to be *divisible or severable*. However, if the entire contract is so completely integrated that the parts cannot be separated, the entire agreement may be void and unenforceable.

7.1. An Agreement Contrary to Public Policy

Public policy is an important rationale used to strike down or refuse to enforce a contract or a clause of a contract on grounds of immorality, unconscionability, economic policy, unprofessional conduct, and other criteria. At the outset, it must be recognized that "public policy" is a very vague area of the law. Even though a contract or an agreement does not violate a formal statute or law, a contract may still be unenforceable if it violates public policy. Public policy is determined by assessing the policies underlying a statute, court and administrative decisions, and public attitudes and perceptions about the nature of law and society. It is essentially a "legal value judgment" concerning the nature and type of contractual relationships a society will recognize and enforce. [CR: *Laos v. Soble* (1972); *Davis v. Flight Fit N Fun* (2022)]

7.2. Licensing Statutes

Every state has adopted certain vocational and professional licensing statutes that regulate the professional and business conduct of certain groups or individuals in society.

A *regulatory license* regulates the standards of conduct of certain professionals. In order to procure a regulatory-type license, certain baseline qualifications must be met. Qualifications may include possessing special skills, special knowledge, special training, or meeting a minimum educational level. In addition, the party seeking a regulatory license may be required to demonstrate that he/she has passed a professional certification or licensure examination.

A *revenue license* is often no more than an occupational tax. The purpose of revenue license is to raise the revenue necessary to monitor the underlying activity by a regulatory authority. Any applicant will generally be granted a revenue license upon the payment of the proper fee. A revenue license is also called a ministerial license. In deciding whether a particular license is regulatory or revenue in nature, it is important to assess the legislative intent and legislative history of the underlying statute.

If a court concludes that a regulatory license is required, a party seeking enforcement of any underlying contract must prove that the proper license was in force *at the time the contract came into existence*. Failure to possess a regulatory license at the time any consideration is furnished prevents a court from enforcing an agreement concerning that professional activity or conduct. Where the purpose of the licensing statute is merely to raise revenue, an underlying contract may still be enforced, even though the required license had not been obtained. The

individual, however, may be required to procure the proper license before any judgment is entered by the court. [CR: *Markus & Nocka v. Julian Goodrich Architects* (1969); *Agl Brentwood v. Cbre, Inc.* (2023)]

7.3. Covenants (Promises) Not to Compete

A covenant not to compete may be found in two general types of business contracts:

1. A promise made by the seller of a business to a buyer wherein the seller agrees not to open or be involved in a similar business in a specified geographic area for a specified period of time;
2. A clause which is part of an employment contract which restricts an employee from discussing or divulging so-called "trade secrets" (special or limited insider information) or which restricts or completely forbids the employee from engaging in competition with the former employer or from going to work with a competitor when an employment contract is terminated.

Many American courts do not favor such covenants and consider them to be in "restraint of trade." However, a covenant not to compete is enforceable if it is reasonable and properly drawn covenants are enforceable and provide important protections in business relationships. Under a strict common law interpretation, if a covenant "failed" in any respect (i.e., the court concluded that a covenant was unreasonable as to either time or area), the court could not enforce any part of the covenant.

In an employment situation, the covenant must be a part of a larger contract of employment, supported by consideration, or it may be termed as a “naked covenant” and will be denied enforcement by a court. A covenant not to compete in a contract of employment will be closely scrutinized by courts and will be strictly construed when enforcement is sought. The burden of proof is placed on the party seeking to enforce the covenant. Some of the criteria used by the courts in determining whether such a clause in a contract of employment will be enforced are:

1. Is the restraint reasonable and no greater than necessary to protect the legitimate business interests of the employer in such areas as protection of trade secrets or other confidential information?
2. Is the restraint unreasonable in terms of time or area?
3. Would the employee's work for a competitor irreparably injure or harm the employer's business or threaten such irreparable injury (especially with regard to an intangible such as "good will")?
4. Is the employment of a unique, extraordinary, or unusual type?

A promise made by the seller of a business will be enforced if it is reasonable in terms of both time and area. When the area is too broad or extensive or the time is too long for the reasonable protection for the buyer, a covenant not to compete may not be enforced by a court.

In certain jurisdictions, an agreement by a person to refrain from engaging in his/her trade or profession may be viewed as being illegal and contrary to public policy because it is “inimical to the interests of society in a free and competitive market and to the interests of the person restrained in earning a livelihood.”

In certain jurisdictions, courts are reluctant to enforce a covenant where the public will be denied a necessary or essential service such as the services of a medical professional. In this case, the court might prefer to award monetary damages for the breach of the covenant instead of issuing an injunction or a restraining order against the employee.

In recent years, several courts have become more proactive concerning restrictive covenants. Several courts now follow the *"blue pencil" rule*, which permits the court to "strike out" any unreasonable provisions from an agreement and modify the time or area to provide reasonable protection to the parties. The “blue pencil” rule has its origins in the doctrine of severability as applied to illegal contracts.

For example, a court might re-write (reform) a provision of a contract in order to make a provision reasonable (i.e., twenty-five miles is unreasonable for a restaurant — ten miles is reasonable; five years is unreasonable for a barber—six months would be considered reasonable), although the “blue pencil” rule would put the court in a position of actually writing a contract for the parties, subjecting them to an agreement they had not actually made.

It should be noted that in a few states (most notably, California), an employer cannot restrict a regular employee, not in possession of any specialized information or "trade secrets,” from engaging in employment, holding that such restrictions are void and a violation of public policy as a matter of law. [CR: *Frederick v. P.B.M.* (1976); *Intertek Testing Servs. NA v. Eastman* (2023)]

7.4. Usury

Usury involves a contract or agreement that carries an excessive and illegal rate of interest. Most states regulate the rate of interest that can be assessed by a specific statute. Such statutes typically provide for a "legal rate" where no rate has been stated in a contract, and a maximum rate that is the most that can be legally charged under law under all circumstances.

If a court determines that an agreement is usurious, a number of remedies are available. A majority of states today will deny recovery of any and all interest on usurious loans. Some states require the forfeiture of both principal and interest; other states permit the borrower to recover double or triple the interest previously paid. Still other states may permit the charging of a "legal rate" where the interest rate charged “inadvertently” surpassed the legal rate. [CR: *Shannon v. Smalls* (2022)]

7.5. Exculpatory Clauses

An exculpatory clause is a provision of a contract that relieves a party of liability for its own negligence. Exculpatory clauses will be strictly construed against the party writing them.

At common law, courts would enforce exculpatory clauses on the ground of "freedom of contract," especially where a contract was entered into by two private parties, and no gross negligence, fraud, willful injury, or violation of a law was involved. Later, courts modified their views and began to refuse to enforce an exculpatory clause in an employment relationship, so that an employer would be liable to employees for its negligence, despite the existence of an exculpatory clause releasing the employer from liability.

However, where there is a public interest involved, an exculpatory clause may be held to be *void* and against *public policy*. A public interest is established where one of the parties is a public institution — one owned or operated by the government or some subsidiary or branch of the government, i.e., a public hospital, a public school, or a municipally owned parking facility — unless the institution is protected under the doctrine of “sovereign immunity.”

In recent years, some courts have significantly narrowed the number of parties or institutions who may exculpate themselves from liability and have created a new category, termed a "quasi-public" institution, *which cannot exculpate itself from liability based on its own negligence*. A quasi-public institution may be defined as a private party or business entity that:

1. Deals with a large number of people;
2. Solicits the public business;
3. Deals in a necessary and/or vital service (i.e., transportation, education, banking, etc.). [CR: *Hy-Grade Oil v. New Jersey Bank* (1975); *Estate of Blakely v. Stetson Univ.* (2022)]

8. Remedies for Breach of Contract

A *breach of contract* occurs when a promisor fails, without any legal excuse or cause, to perform any of the obligations, undertakings, or promises stipulated in the contract. In such a case, the non-breaching party, also called the aggrieved party, is entitled to seek a *remedy* against the breaching party. In most cases, this involves a suit for money damages.

Interestingly, prior to 1854, there were almost no rules of contract damages. Assessment of damages was generally left to the discretion of the jury. In 1854, the important case of *Hadley v. Baxendale* (1854) was decided. The court laid down two important rules, applicable generally to the area of contract damages. First, the aggrieved party may recover those damages "as may fairly and reasonably be considered… arising naturally, i.e., according to the usual course of things, from such breach of contract itself." Second, the aggrieved party may recover damages "such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it." Under the first rule, for example, cover or resale damages under UCC § 2-712 or UCC § 2-706 naturally and obviously flow from the breach. Under the second rule, "special" or "consequential" damages (described below) may be deemed to be within the contemplation of the parties, but only under well-defined "special circumstances." [CR: *Hadley v. Baxendale* (1854); *Mil-Spec. Indus. Corp. v. Expansion Indus., LLC* (2022)]

8.1. Compensatory Damages

Damages that are awarded to compensate the non-breaching party for the loss of the bargain are called *compensatory damages*. Compensatory damages are also known as "general damages" or "benefit of the bargain" damages. For a breach of contract, "the law of damages seeks to place the aggrieved party in the same economic position he would have had if the contract had been [fully] performed." In a contract for the sale of goods, at least two possibilities exist. If the seller commits a breach and fails to deliver the goods called for in the contract, one measure of damages is the difference between the contract price and the market price of the goods at the time of the breach. [CR: *8 Enters. v. Green Leaf Lotus, LLC* (2022)]

In other cases, the buyer may avail him/herself of the remedy of "cover"; that is, the buyer may go into the marketplace and make "in good faith and without any unreasonable delay any reasonable purchase or a contract to purchase goods in substitution" for those due from the seller. The buyer may then recover from the seller the difference between the cost of cover and the contract price, plus any incidental or consequential damages, less any expenses saved. The remedy of cover is found in UCC § 2-712 and is the preferred action for an aggrieved buyer under the Code.

Under UCC § 2-706, a seller may elect to resell the goods which a buyer has wrongfully rejected them or where the buyer has refused to take delivery. Here, the seller may recover the difference between the resale price and the contract price (together with any incidental damages under UCC § 2-710, but less any expenses saved). All elements of the resale must be reasonable, and in some cases, notice of the resale must be given to the breaching party.

8.2. Incidental Damages

Incidental damages [UCC § 2-715] are any reasonable expenses incurred in effecting cover (i.e., transportation charges, freight charges, phone calls, etc.) or expenses incurred in the resale of the goods [UCC § 2-710].

8.3. Consequential Damages

Consequential damages are caused by special circumstances where damage, loss, or injury does not flow directly and immediately from the act of the breaching party, but from some of the consequences or results of such an act. In order for a court to award consequential damages (often in the form of lost profits), the breaching party must

know that “special circumstances” will cause the non-breaching party to suffer an additional loss. In practical terms, the non-breaching party may have to give the breaching party "notice" of the special circumstances.

A second type of special or consequential damages occurs in cases where a defective product causes personal injury. Compensation for personal injury would be an example of consequential damages. [CR: *Covington v. State Farm Fire & Cas. Co.* (2021)]

8.4. Punitive Damages

Punitive damages are also called *exemplary* damages. Punitive damages are designed to punish a "guilty" party for intentional, malicious, willful, or wanton wrongdoing and to make an example of the breaching party. The purpose of awarding punitive damages is to deter the wrongdoer from similar conduct in the future, as well as to deter others from engaging in similar conduct. Generally, punitive damages will not be awarded in cases of simple breach of contract, except for a category of cases involving contract fraud, due to the presence of "*scienter*," or the intent to deceive. The court may add an additional amount (in some cases, three times the actual damages, called *treble damages*) in order to punish the breaching party for this wrongful conduct.

The United States Supreme Court entered the debate concerning punitive damages in 1996 and held in *BMW of North America, Inc. v. Gore* (1996) that under the Due Process Clause of the Fourteenth Amendment the amount of punitive damages awarded by a jury cannot be “grossly excessive” and must bear some reasonable relationship to the actual damages sustained. There have also been attempts by several state legislatures to limit or even abolish punitive damages in a wide variety of tort cases. [CR: *Romo v. Shirley* (2022)]

8.5. Nominal Damages

Where a party has suffered no true or provable damage, a court may choose to award only nominal damages for breach.

8.6. Liquidated Damages

While parties are not generally empowered to provide for penalties in the event of a breach of contract, a contract may specify an exact dollar amount or a formula for calculating damages that are to be paid in the case of a default or a breach. Such a clause is called a *liquidated damage* clause. Under the common law, a court would enforce a liquidated damage clause if two criteria were met:

1. The amount set as liquidated damages in the contract a reasonable estimate of the probable loss; and
2. The parties must intend to provide for damages rather than a penalty. [CR: *Seymour v. Hovnanian* (2022)]

8.7. Attorneys’ Fees

In the United States (as opposed to Great Britain, which has adopted a modified “*loser pays*” view), an award of damages will not ordinarily include reimbursement of the successful party’s attorney’s fees. Attorney’s fees should be viewed in light of the prior discussion of consequential damages. However, it has become common practice for commercial and residential leases, commercial paper, and contracts for sale of real estate to contain a clause providing for the award of “reasonable attorney’s fees” in case of default. A majority of courts uphold such agreements, permitting recovery of an amount in excess of the damages that would accrue, provided that the amount demanded for the attorneys’ fees is reasonable. [CR: *McDermott Brandon Props. v. Wheeler* (2023)]

8.8. The Remedy of Specific Performance

The remedy of specific performance is an extraordinary remedy developed in courts of equity to provide relief when the legal remedy of damages was inadequate to put the non-breaching party in as good a position had the contract had been fully performed. The remedy of specific performance is most appropriate when the non-breaching party is not seeking monetary damages; rather, the non-breaching party desires performance of the promises in the contract and asks the court to issue a decree ordering a party affirmatively to carry out contractual duties (called a *mandamus* action).

In the case of a contract for the sale of goods, monetary damages will normally be deemed adequate, since substitute goods may be readily available in the marketplace through the remedy of cover. However, under the common law, if the goods were *unique*, a court of equity may issue a decree of specific performance. Such "unique" items included antiques, objects of art, racehorses, stock in a closely held corporation, and, by definition, all land.

Courts are very reluctant to grant specific performance in personal service contracts because public policy considerations discourage what would amount to involuntary servitude. In addition, as a practical matter, courts do not generally desire to monitor a continuing personal service contract to assure that it is carried out. [CR: *Tower City Grain v. Richman* (1975); *Diener v. Brown* (2023)]

Tower City Grain provides a discussion of specific performance under the UCC. Although the UCC liberalizes the availability of the remedy of specific performance by adding the phrase under "proper circumstances," such relief remains the extraordinary rather than the ordinary remedy. In order to show the existence of "proper circumstances," there must first be a showing of the unavailability of the good in the market.

One case in which the court expressed a view that specific performance would be appropriate is *Campbell Soup Co. v. Wentz* (1948). However, note that the court ultimately refused to issue the decree for specific performance because it ruled that the underlying contract was unconscionable. Campbell Soup's petition for an injunction and for specific performance was denied by both the trial court and the Court of Appeals. The appellate court recognized that if the contract had not been unconscionable, specific performance would have been available to the company. The unique nature of the product involved meant that there was no adequate legal remedy. However, since specific performance is an equitable remedy, the petitioner must come to court "with clean hands." It has often been said: *"He who seeks equity must do equity."*

8.9. The Requirment of Mitigation

In a situation where a breach of contract has occurred, the non-breaching party may be required to lessen or mitigate damages. A party who has suffered a wrong by a breach may not unreasonably sit by and allow damages to accumulate or worsen. The law will not permit the aggrieved party to recover from the breaching party those damages that he "should have foreseen and could have avoided by reasonable effort without undue risk, expense, or humiliation." [Restatement, Contracts § 336(1)].

Application of the principle of mitigation requires reasonable efforts by the non-breaching party to mitigate or lessen damages. However, the wronged party is not required to mitigate damages if the cost of mitigation would involve unreasonable expense or if the suggested performance is not of the same type or character as that found in the original contract. [CR: *Parker v. Twentieth Century Fox* (1970); *Busch v. Gorbachevskiy* (2023)

There is a split of authority in real estate leasing cases, although a modern view would indicate that the lessor must at least attempt to mitigate damages in case of a breach by a lessee.

In case of an alleged breach of an employment contract, the burden of proof is on an employer who has improperly terminated an employee to prove the existence of an alternate job and to prove that the employee could have been hired — that is, that the employee had failed to mitigate his or her damages by failing to accept suitable employment.

9. Concluding Comments

A thorough knowledge of the core principles of contract law is an essential tool for the businessman in order to understand the implications of this important area of law. This article outlines the main elements of a contract including: the agreement (offer and acceptance); consideration; legal capacity of the parties; and legal subject matter. In addition, the article discusses the implications of the Statute of Limitations and the Statute of Frauds, as well as outlining the various remedies available for a breach of contract. The article has cited several of the classic or traditional cases explaining these various elements, as well as providing updated case references for further study and analysis from twenty-two jurisdictions.

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