

A **contract** is a legally enforceable agreement.

APPLICABLE LAW

The first question you must ask in the analysis of any contracts question is the applicable law. The answer will be either the Uniform Commercial Code (UCC) Article 2 or the common law (C/L).

- ◆ UCC - The UCC applies to contracts involving the sale of goods. § 2-102.
- ◆ C/L - The Common Law applies to all other contracts, for example service contracts.
- ◆ Mixed Contracts - Use the Bonebrake or predominant factor test, i.e., did the contract involve the sale of goods more or service?

CONTRACT FORMATION

- ◆ Mutual assent
Formation usually requires a bargain between the parties in which there is a manifestation of mutual assent to the exchange and consideration given (i.e., meeting of the minds)
 - Offer and acceptance
An **offer** is the manifestation of willingness to enter into a bargain, made in such a way as to justify the offeree's understanding that assent to the bargain is invited and will form a contract.
Acceptance of an offer is the offeree's manifestation of assent to the offeror's terms in a manner invited or required by the offer
 - Defenses to contracts including: **mistake** (the mistake must concern a basic assumption on which the contract was formed; the mistake must have a material effect on the agreed exchange of performances; the party adversely affected by the mistake must not have borne the risk of the mistake), **misunderstanding**, **misrepresentation**, **nondisclosure**, **confidential relationship**, **fraud**, **undue influence**, and **duress** (a party may avoid a contract on a showing that the other party's wrongful acts overcame the avoiding party's free will)
 - Problems of communication and "battle of the forms"
A reply to an offer for sale or purchase of goods which changes or adds to terms of the offer is an effective acceptance unless: (1) seller sends nonconforming goods and indicates this is being done as an accommodation to the buyer; (2) there is no express acceptance; (3) there are words of

acceptance, but they are expressly conditioned on the original offeror agreeing to accept the new or different term.

- Indefiniteness or absence of terms
At C/L courts were reluctant to supply terms. Under the UCC, courts determine whether, from the totality of circumstances there is a contract.
- ◆ Capacity to contract
Certain classes of persons lack or have limited contractual capacity. Contracts they form are **voidable** at their option. These contracts may be expressly or impliedly affirmed if the incapacity ends. The defense does not apply to contracts for necessities and to other contracts where public policy requires enforcement of the contract.
- ◆ Illegality, unconscionability, and public policy
Courts will not enforce certain transactions on public policy grounds, including illegality. An illegal contract is **void** if the illegality is found in the subject matter of the contract. A contract is **voidable** if the purpose of the contract is illegal.
- ◆ Implied-in-fact contract and quasi-contract
When the agreement is formed by virtue of conduct rather than expressed words, you have an implied contract, i.e., conduct may also indicate assent or agreement. In a quasi-contract, the law imposes an obligation because it appears just.
- ◆ "Pre-contract" obligations based on detrimental reliance
Promissory estoppel substitutes for consideration and is the basis for keeping the offer open (e.g., construction contracts).
- ◆ Express and implied warranties in sale-of-goods contracts
The whole purpose of the law of warranty is to determine what it is that the seller has in essence agreed to sell.

CONSIDERATION

Consideration is legal detriment for which each promisor has bargained.

- ◆ Bargain and exchange
The promise must be in exchange for the promisee's current exchange of a promise or performance. The performance offered in the exchange does not have to benefit either party, but the exchange is important.
- ◆ "Adequacy" of consideration: mutuality of obligation, implied promises, and disproportionate exchanges
As a general rule, courts will not look into the adequacy of consideration. That is, courts will not

attempt to determine if the promises or performances are of comparable value.

- ◆ Modern substitutes for bargain: "moral obligation," detrimental reliance, and statutory substitutes
If a promisee detrimentally, reasonably, and foreseeably relies on a promisor's promise, most courts will enforce that promise, even when consideration is absent.
- ◆ Modification of contracts: pre-existing duties
An act promised or performed as consideration must be something that the person furnishing it does not otherwise have a legal duty to do.
- ◆ Compromise and settlement of claims
There must be a change in the terms of the obligation for there to be consideration.

THIRD-PARTY BENEFICIARY CONTRACTS

- ◆ Intended beneficiaries
Only intended beneficiaries have enforceable rights under a contract.
- ◆ Incidental beneficiaries
An incidental beneficiary was not consciously considered by the parties and is a third-party who has no enforceable rights under the contract.
- ◆ Impairment or extinguishment of third-party rights by contract modification or mutual rescission
A third party who is an intended beneficiary may, once rights have legally **vested**, enforce those rights under the contract and the parties to the contract can no longer modify or destroy them
- ◆ Enforcement by the promisee
The promisee has a right of action against the promisor if performance is not rendered to the intended beneficiary.

ASSIGNMENT OF RIGHTS AND DELEGATION OF DUTIES

An **assignment** is a transfer of a right, while a **delegation** is a transaction whereby someone having an obligation gets someone else to perform it.

STATUTE OF FRAUDS

The Statute of Frauds provides that certain contracts are enforceable only if they are evidenced by a written memorandum. A writing is required because the contracts are either valuable or because the parties could easily imagine a contract was formed, when none was intended. For example, contracts in consideration of **marriage**, contracts to **pay the debt** of another, **real estate** contracts, contracts not fully **performable within one year**, contracts for the sale of **goods for \$500 or more**.

PAROL EVIDENCE AND INTERPRETATION

When a contract is in writing, and the parties intend that writing to be a complete and final expression of the rights and duties they have undertaken, the Parol Evidence Rule excludes any evidence (oral or written) of statements made by either of the parties prior to or contemporaneous with the signing of the contract which vary or contradict the writing.

CONDITIONS

- ◆ Express – created by express words
- ◆ Constructive
 - Conditions of exchange: excuse or suspension by material breach
 - Immaterial breach and substantial performance
 - Independent covenants
 - Constructive conditions of non-prevention, non-hindrance, and affirmative cooperation
- ◆ Obligations of good faith and fair dealing in performance and enforcement of contracts
- ◆ Suspension or excuse of conditions by waiver, election, or estoppel
- ◆ Prospective inability to perform: effect on other party

REMEDIES

- ◆ Total and partial breach of contract
- ◆ Anticipatory repudiation – applicable when a promisor repudiates her promise before the time for performance.
- ◆ Election of substantive rights and remedies
- ◆ Specific performance – A court order requiring performance of the promised act, under penalty of contempt for noncompliance, is available if the damages remedy at law is deemed inadequate. For example, injunction against breach; declaratory judgment
- ◆ Rescission and reformation – Rescission (i.e., cancellation) of the contract may be available to restore a person in a void or voidable contract to the position the person was in before contracting.
- ◆ Measure of damages in major types of contract and breach – position damages. If reasonably foreseeable and provable with sufficient certainty, money damages are available to put the nonbreaching party in as good a position as performance of the duty would have done.
- ◆ Consequential damages: causation, certainty, and foreseeability

- ◆ Liquidated damages and penalties – Courts will not enforce penalty clauses. In order to be a valid liquidated damages clause, the measure of damages must either have been arrived at through a free bargaining process or it must represent a reasonable approximation of the actual damages.
- ◆ Restitutionary and reliance recoveries
- ◆ Remedial rights of defaulting parties
- ◆ Avoidable consequences and mitigation of damages

IMPOSSIBILITY OF PERFORMANCE AND FRUSTRATION OF PURPOSE

Impossibility of performance occurs when the promisor has promised to do something that becomes objectively impossible without her fault. Frustration of purpose occurs when the value of the performance to be obtained by the promisor becomes useless to her due to an unforeseen change in circumstances.

DISCHARGE OF CONTRACTUAL DUTIES

A contractual duty may be discharged by full performance or may be discharged in a variety of ways without full performance. For example, rescission, renunciation, accord and satisfaction, account stated, release, arbitration and award.