https://legal-dictionary.thefreedictionary.com/contracts

Contracts

Agreements between two entities, creating an enforceable obligation to do, or to refrain from doing, a particular thing.

Nature and Contractual Obligation

The purpose of a contract is to establish the agreement that the parties have made and to fix their rights and duties in accordance with that agreement. The courts must enforce a valid contract as it is made, unless there are grounds that bar its enforcement.

Statutes prescribe and restrict the terms of a contract where the general public is affected. The terms of an insurance contract that protect a common carrier are controlled by statute in order to safeguard the public by guaranteeing that there will be financial resources available in the event of an accident.

The courts may not create a contract for the parties. When the parties have no express or implied agreement on the essential terms of a contract, there is no contract. Courts are only empowered to enforce contracts, not to write them, for the parties. A contract, in order to be enforceable, must be a valid. The function of the court is to enforce agreements only if they exist and not to create them through the imposition of such terms as the court considers reasonable.

It is the policy of the law to encourage the formation of contracts between competent parties for lawful objectives. As a general rule, contracts by competent persons, equitably made, are valid and enforceable. Parties to a contract are bound by the terms to which they have agreed, usually even if the contract appears to be improvident or a bad bargain, as long as it did not result from Fraud, duress, or Undue Influence.

The binding force of a contract is based on the fact that it evinces a meeting of minds of two parties in Good Faith. A contract, once formed, does not contemplate a right of a party to reject it. Contracts that were mutually entered into between parties with the capacity to contract are binding obligations and may not be set aside due to the caprice of one party or the other unless a statute provides to the contrary.

Types of Contracts

Contracts under Seal Traditionally, a contract was an enforceable legal document only if it was stamped with a seal. The seal represented that the parties intended the agreement to entail legal consequences. No legal benefit or detriment to any party was required, as the seal was a symbol of the solemn acceptance of the legal effect and consequences of the agreement. In the past, all contracts were required to be under seal in order to be valid, but the seal has lost some or all of its effect by statute in many jurisdictions. Recognition by the courts of informal contracts, such as implied contracts, has also diminished the importance and employment of formal contracts under seal.

Express Contracts In an express contract, the parties state the terms, either orally or in writing, at the time of its formation. There is a definite written or oral offer that is accepted by the offeree (i.e., the person to whom the offer is made) in a manner that explicitly demonstrates consent to its terms.

Implied Contracts Although contracts that are *implied in fact* and contracts *implied in law* are both called implied contracts, a true implied contract consists of obligations arising from a mutual agreement and intent to promise, which have not been expressed in words. It is misleading to label as an implied contract one that is implied in law because a contract implied in law lacks the requisites of a true contract. The term quasi-contract is a more accurate designation of contracts implied in law. Implied contracts are as binding as express contracts. An implied contract depends on substance for its existence; therefore, for an implied contract to arise, there must be some act or conduct of a party, in order for them to be bound.

A contract implied in fact is not expressed by the parties but, rather, suggested from facts and circumstances that indicate a mutual intention to contract. Circumstances exist that, according to the ordinary course of dealing and common understanding, demonstrate such an intent that is sufficient to support a finding of an implied contract. Contracts implied in fact do not arise contrary to either the law or the express declaration of the parties. Contracts implied in law (quasi-contracts) are distinguishable in that they are not predicated on the assent of the parties, but, rather, exist regardless of assent.

The implication of a mutual agreement must be a reasonable deduction from all of the circumstances and relations that contemplate parties when they enter into the contract or which are necessary to effectuate their intention. No implied promise will exist where the relations between the parties prevent the inference of a contract.

A contract will not be implied where it would result in inequity or harm. Where doubt and divergence exist in the minds of the parties, the court may not infer a contractual relation-ship. If, after an agreement expires, the parties continue to perform according to its terms, an implication arises that they have mutually assented to a new contract that contains the same provisions as the old agreement.

A contract implied in fact, which is inferred from the circumstances, is a true contract, whereas a contract implied in law is actually an obligation imposed by law and treated as a contract only for the purposes of a remedy. With respect to contracts implied in fact, the contract defines the duty; in the case of quasi-contracts, the duty defines and imposes the agreement upon the parties.

Executed and Executory Contracts An executed contract is one in which nothing remains to be done by either party. The phrase is, to a certain extent, a misnomer because the completion of performances by the parties signifies that a contract no longer exists. An executory contract is one in which some future act or obligation remains to be performed according to its terms.

Bilateral and Unilateral Contracts The exchange of mutual, reciprocal promises between entities that entails the performance of an act, or forbearance from the performance of an act, with respect to each party, is a Bilateral Contract. A bilateral

contract is sometimes called a two-sided contract because of the two promises that constitute it. The promise that one party makes constitutes sufficient consideration (see discussion below) for the promise made by the other.

A unilateral contract involves a promise that is made by only one party. The offeror (i.e., a person who makes a proposal) promises to do a certain thing if the offeree performs a requested act that he or she knows is the basis of a legally enforceable contract. The performance constitutes an acceptance of the offer, and the contract then becomes executed. Acceptance of the offer may be revoked, however, until the performance has been completed. This is a one-sided type of contract because only the offeror, who makes the promise, will be legally bound. The offeree may act as requested, or may refrain from acting, but may not be sued for failing to perform, or even for abandoning performance once it has begun, because he or she did not make any promises.

Unconscionable Contracts An Unconscionable contract is one that is unjust or unduly one-sided in favor of the party who has the superior bargaining power. The adjective *unconscionable* implies an affront to fairness and decency. An unconscionable contract is one that no mentally competent person would accept and that no fair and honest person would enter into. Courts find that unconscionable contracts usually result from the exploitation of consumers who are poorly educated, impoverished, and unable to shop around for the best price available in the competitive marketplace.

The majority of unconscionable contracts occur in consumer transactions. Contractual provisions that indicate gross one-sidedness in favor of the seller include limiting damages or the rights of the purchaser to seek court relief against the seller, or disclaiming a Warranty (i.e., a statement of fact concerning the nature or caliber of goods sold the seller, given in order to induce the sale, and relied upon by the purchaser).

Unconscionability is ascertained by examining the circumstances of the parties when the contract was made. This doctrine is applied only where it would be an affront to the integrity of the judicial system to enforce such a contract.

Adhesion Contracts Adhesion contracts are those that are drafted by the party who has the greater bargaining advantage, providing the weaker party with only the opportunity to adhere to (i.e., to accept) the contract or to reject it. (These types of contract are often described by the saying "Take it or leave it.") They are frequently employed because most businesses could not transact business if it were necessary to negotiate all of the terms of every contract. Not all adhesion contracts are unconscionable, as the terms of such contracts do not necessarily exploit the party who assents to the contract. Courts, however, often refuse to enforce contracts of adhesion on the grounds that a true meeting of the minds never existed, or that there was no acceptance of the offer because the purchaser actually had no choice in the bargain.

Aleatory Contracts An aleatory contract is a mutual agreement the effects of which are triggered by the occurrence of an uncertain event. In this type of contract, one or both parties assume risk. A fire insurance policy is a form of aleatory contract, as an insured will not receive the proceeds of the policy unless a fire occurs, an event that is uncertain to occur.

Void and Voidable Contracts Contracts can be either void or Voidable. A void contract imposes no legal rights or obligations upon the parties and is not enforceable by a court. It is, in effect, no contract at all.

A voidable contract is a legally enforceable agreement, but it may be treated as never having been binding on a party who was suffering from some legal disability or who was a victim of fraud at the time of its execution. The contract is not void unless or until the party chooses to treat it as such by opposing its enforcement. A voidable contract may be ratified either expressly or impliedly by the party who has the right to avoid it. An express ratification occurs when that party who has become legally competent to act declares that he or she accepts the terms and obligations of the contract. An implied ratification occurs when the party, by his or her conduct, manifests an intent to ratify a contract, such as by performing according to its terms. Ratification of a contract entails the same elements as formation of a new contract. There must be intent and complete knowledge of all material facts and circumstances. Oral Acknowledgment of a contract and a promise to perform constitute sufficient ratification. The party who was legally competent at the time that a voidable contract was signed may not, however, assert its voidable nature to escape the enforcement of its terms.

Which Law Governs

Although a general body of contract law exists, some aspects of it, such as construction (i.e., the process of ascertaining the proper explanation of equivocal terms), vary among the different jurisdictions. When courts must select the law to be applied with respect to a contract, they consider what the parties intended as to which law should govern; the place where the contract was entered into; and the place of performance of the contract. Many courts apply the modern doctrine of the "grouping of contracts" or the "center of gravity," in which the law of the jurisdiction that has the closest or most significant relationship with the matter in issue applies.

Courts generally apply the law that the parties expressly or impliedly intend to govern the contract, provided that it bears a reasonable relation to the transaction and the parties acted in good faith. Some jurisdictions follow the law of the place where the contract was performed, unless the intent of the parties is to the contrary. Where foreign law governs, contracts may be recognized and enforced under the doctrine of comity (i.e., the acknowledgment that one nation gives within its territory to the legislative, executive, or judicial acts of another nation).

Elements of a Contract

The requisites for formation of a legal contract are an offer, an acceptance, competent parties who have the legal capacity to contract, lawful subject matter, mutuality of agreement, consideration, mutuality of obligation, and, if required under the Statute of Frauds, a writing.

Offer An offer is a promise that is, by its terms, conditional upon an act, forbearance, or return promise being given in exchange for the promise or its performance. It is a demonstration of willingness to enter into a bargain, made so that another party is justified in understanding that his or her assent to the bargain is invited and will conclude it. Any offer must consist of a statement of present intent to enter a contract; a

definite proposal that is certain in its terms; and communication of the offer to the identified, prospective offeree. If any of these elements are missing, there is no offer to form the basis of a contract.

Preliminary negotiations, advertisements, invitations to bid Preliminary negotiations are clearly distinguished from offers because they contain no demonstration of present intent to form contractual relations. No contract is formed when prospective purchasers respond to such terms, as they are merely invitations or requests for an offer. Unless this interpretation is employed, any person in a position similar to a seller who advertises goods in any medium would be liable for numerous contracts when there is usually a limited quantity of merchandise for sale.An advertisement, price quotation, or catalogue is customarily viewed as only an invitation to a customer to make an offer and not as an offer itself. The courts reason that an establishment might not have sufficient stock to satisfy potential demand and that it would not be reasonable for a customer to expect to form a binding contract by responding to advertisements that are intended to make consumers aware of a product for sale. In addition, the courts have held that an advertisement is an offer for a unilateral contract that can be revoked at the will of the offeror, the business enterprise, prior to performance of its terms.

An exception exists, however, to the general rule on advertisements. When the quantity offered for sale is specified and contains words of promise, such as "first come, first served," courts enforce the contract where the store refuses to sell the product when the price is tendered. Where the offer is clear, definite, and explicit, and no matters remain open for negotiation, acceptance of it completes the contract. New conditions may not be imposed on the offer after it has been accepted by the performance of its terms.

An advertisement or request for bids for the sale of particular property or the erection or construction of a particular structure is merely an invitation for offers that cannot be accepted by any particular bid. A submitted bid is, however, an offer, which upon acceptance by the offeree becomes a valid contract.

Mistake in sending offer If an intermediary, such as a telegraph company, errs in the transmission of an offer, most courts hold that the party who selected that method of communication is bound by the terms of the erroneous message. The same rule applies to acceptances. In reaching this result, courts regard the telegraph company as the agent of the party who selected it. Other courts justify the rule on business convenience. A few courts rule that if there is an error in transmission, there is no contract, on the grounds that either the telegraph company is an Independent Contractor and not the sender's agent, or there has been no meeting of the minds of the parties. However, an offeree who knows, or should know, of the mistake in the transmission of an offer may not take advantage of the known mistake by accepting the offer; he or she will be bound by the original terms of the offer.

Termination of an offer An offer remains open until the expiration of its specified time period or, if there is no time limit, until a reasonable time has elapsed. A reasonable time is determined according to what a reasonable person would consider sufficient time to accept the offer.

The death or insanity of either party, before an acceptance is communicated, causes an offer to expire. If the offer has been accepted, the contract is binding, even if one of the

parties dies thereafter. The destruction of the subject matter of the contract; conditions that render the contract impossible to perform; or the supervening illegality of the proposed contract results in the termination of the offer.

When the offeror, either verbally or by conduct, clearly demonstrates that the offer is no longer open, the offer is considered revoked when learned by the offeree. Where an offer is made to the general public, it can be revoked by furnishing public notice of its termination in the same way in which the offer was publicized.

Irrevocable offers An option is a right that is purchased by a person in order to have an offer remain open at agreed-upon price and terms, for a specified time, during which it is irrevocable. It constitutes an exception to the general rule that an offer may be withdrawn prior to acceptance. The offeror may not withdraw this offer because that party is bound by the consideration given by the offeree. The offeree is free, however, to decide whether or not to accept the offer.

Most courts hold that an offer for a unilateral contract becomes irrevocable as soon as the offeree starts to perform the requested act, because that action serves as consideration to prevent revocation of the offer. Where it is doubtful whether the offer invites an act (as in the case of a unilateral contract) or a promise (as in the case of a bilateral contract), the presumption is in favor of a promise, and therefore a bilateral contract arises. If an offer to form a unilateral contract requires several acts, it is interpreted as inviting acceptance by completion of the initial act. Performance of the balance constitutes a condition to the offeror's duty of performance. Where such an offer invites only a single act, it includes by implication a subsidiary promise to keep the offer open if the offeree will commence performance. Some courts hold that an offer for a unilateral contract may be revoked at any time prior to completion of the act bargained for, even after the offeree has partially performed it.***Rejection of an offer*** An offer is rejected when the offeror is justified in understanding from the words or conduct of the offeree that he or she intends not to accept the offer, or to take it under further advisement. Rejection might come in the form of an express refusal to accept an offer by a counteroffer, which is a new proposal that rejects the offer by implication; or by a conditional acceptance that operates as a counteroffer. The offer may continue, however, if the offeree expressly states that the counteroffer shall not constitute a rejection of the offer.

If an offer is rejected, the party who made the original offer no longer has any liability for that offer. The party who rejected the offer may not subsequently, at his or her own option, convert the same offer into a contract by a subsequent acceptance. In such a case, the consent of the offeror must be obtained for a contract to be formed.

Acceptance Acceptance of an offer is an expression of assent to its terms. It must be made by the offeree in a manner requested or authorized by the offeror. An acceptance is valid only if the offeree knows of the offer; the offeree manifests an intention to accept; the acceptance is unequivocal and unconditional; and the acceptance is manifested according to the terms of the offer.

The determination of a valid acceptance is governed by whether a promise or an act by the offeree was the bargained-for response. Since the acceptance of a unilateral contract requires an act rather than a promise, it is unnecessary to furnish notice of intended

performance unless the offeror requested it. If, however, the offeree has reason to believe that the offeror will not learn of the acceptance with reasonable promptness, the duty of the offeror is discharged unless the offeree makes a reasonable attempt to give notice; the offeror learns of the performance; or the offer indicates that no notice is required.

In bilateral contracts, the offer is effective when the offeree receives it. The offeree may accept it until the offeree receives notice of revocation from the offeror. Thereafter, an offer is revoked. Under the majority rule, which is known as the "mailbox rule," an acceptance is effective upon dispatch if the offeror explicitly authorizes that method of acceptance to be employed by the offeree, even if the acceptance is lost or destroyed in transit.

The majority rule is inapplicable, however, unless the acceptance is properly addressed and postage prepaid. It has no application to most option contracts, as acceptance of an option contract is effective only when received by the offeror.

If the acceptance mode used by the offeree is implicitly authorized by the offeror, such as the selection by the offeree of the same method used by the offeror, who neglected to designate a method of communication, an acceptance is effective upon dispatch if it is correctly addressed and the expense of its conveyance is prepaid. As with expressly authorized methods, the acceptance need not ever reach the offeror in order to form the contract.

In some jurisdictions, the use of a method not expressly or impliedly authorized by the offeror, even if more rapid in nature, results in a contract only upon receipt of the acceptance. In most jurisdictions, however, if the acceptance mode is inherently faster, it is deemed to be an impliedly authorized means, and acceptance is effective upon dispatch.

If the acceptance is transmitted by an expressly or impliedly authorized method to the wrong address, it is effective only upon receipt by the offeror. A wrong address is any address other than that implicitly authorized, even if the offeror were in a position to receive the acceptance at the substituted address.

An offeror who specifically states that there is no contract until the acceptance is received is entitled to insist upon the condition of receipt or upon any other provision concerning the manner and time of acceptance specified.

Rejection of the offer or revocation of conditional acceptance is effective upon receipt. A late or defective acceptance is treated as a counteroffer, which will not result in a contract unless the offeror accepts it. If offers cross in the mail, there will be no binding contract, as an offer may not be accepted if there is no knowledge of it.

As a general rule, an offer may be accepted only by the offeree or an authorized agent. If, however, the offer is contained in an option contract, it may be the subject of an assignment or transfer without the consent of the offeror, unless the option involves a purchase on credit or expressly prohibits an assignment.

In contracts that do not involve the sale of goods, acceptance must comply exactly with the requirements of the offer (this is known as the "mirror-image rule"), and must omit nothing from the promise or performance requested. An offer of a prize in a contest, for example, becomes a binding contract when a contestant successfully complies with the terms of the offer. If a response to an offer purports to accept it, but adds qualifications or conditions, then it is a counteroffer and not an acceptance.

Acceptance may be inferred from the offeree's acts, conduct, or silence; but as a general rule, silence, without more, can never constitute acceptance. The effect of silence accompanied by Ambiguity must be ascertained from all the circumstances in the case.

Prior dealings between the parties may create a duty to act. Silence or the failure to take some action under such circumstances might constitute acceptance. For example, if the parties have engaged in a series of business transactions involving the mailing of goods and payment by the recipient, the recipient will not be permitted to retain an article without paying for it within a reasonable time, due to their prior dealings. A recipient who does not intend to accept the goods is under a duty to inform the sender. Silence, where there is a duty to speak, prevents the offeree from rejecting an offer and the offeror from claiming that there is no acceptance. If ownership rights are exercised over an item, this might be deemed an acceptance.

Unsolicited goods At Common Law, the recipient of unsolicited goods in the mail was not required to accept or to return them, but if the goods were used, a contract and a concomitant obligation to pay for them were created. Today, in order to offer protection against unwanted solicitations, some state statutes have modified the common-law rule by providing that where unsolicited merchandise is received as part of an offer to sell, the goods are an out-right gift. The recipient may use the goods and is under no duty to return or pay for them unless he or she knows that they were sent by mistake.

Agreements to agree An "agreement to agree" is not a contract. This type of agreement is frequently employed in industries that require long-term contracts in order to ensure a constant source of supplies and outlet of production. Mutual manifestations of assent that are, in themselves, sufficient to form a binding contract are not deprived of operative effect by the mere fact that the parties agree to prepare a written reproduction of their agreement. In determining whether, on a given set of facts, there is merely an "agreement to agree" or a sufficiently binding contract, the courts apply certain rules. If the parties express their intention—either to be bound or not bound until a written document is prepared—then that intention controls. If they have not expressed their intention, but they exchange promises of a definite performance and agree upon all essential terms, then the parties have formed a contract even though the written document is never signed. If the expressions of intention are incomplete—as, for example, if a material term such as quantity has been left to further negotiation—the parties do not have a contract. The designation of the material term for further negotiation is interpreted as demonstrating the intention of the parties not to be bound until a complete agreement has been reached.

Competent Parties A natural person who agrees to a transaction has complete legal capacity to become liable for duties under the contract unless he or she is an infant, insane, or intoxicated.

Infants An infant is defined as a person under the age of 18 or 21, depending on the particular jurisdiction. A contract made by an infant is voidable but is valid and enforceable until or unless he or she disaffirms it. He or she may avoid the legal duty to perform the terms of the contract without any liability for breach of contract. Infants are treated in such a way because public policy deems it desirable to protect the immature and naive infant from liability for unfair contracts that he or she is too inexperienced to negotiate on equal terms with the other party.

Once an infant attains majority (i.e., the age at which a person is no longer legally considered an infant), he or she must choose either to disaffirm or avoid the contract, or to ratify or accept it. After reaching the age of majority, a person implicitly ratifies and becomes bound to perform the contract if he or she fails to disaffirm it within a reasonable time, which is determined by the circumstances of the particular case. A person who disaffirms a contract must return any benefits or consideration received under it that he or she still possesses. If such benefits have been squandered or destroyed, the person usually has no legal obligation to recompense the other party. The law imposes liability on the infant in certain cases, however. Although the contract of an infant or other person may be voidable, the person still may be liable in quasi-contract in order to prevent Unjust Enrichment for the reasonable value of goods or services furnished if they are necessaries that are reasonably required for the person's health, comfort, or education.

The majority of courts hold that an infant who willfully misrepresents his or her age may, nevertheless, exercise the power to avoid the contract. As a general rule, however, the infant must place the adult party in the status quo ante (i.e., his or her position prior to the contract). The jurisdictions are in disagreement in regard to whether an infant is liable in TORT (i.e., a civil wrong other than breach of contract) for willful misrepresentation of his or her age. This divergence arises from the rule that a tort action may not be maintained against an infant if it essentially entails the enforcement of a contract. Some courts regard the action for fraud that would be commenced against the infant as being based on the contract. Others rule that the tort is sufficiently independent of the contract so that the granting of relief would not involve indirect enforcement of the contract. The other party, however, is able to avoid a contract entered into on the basis of an infant's fraudulent Misrepresentation with respect to age or other material facts because he or she is the innocent victim of the infant's fraud.

Mental incapacity When a party does not comprehend the nature and consequences of the contract when it is formed, he or she is regarded as having mental incapacity. A distinction must be drawn between those persons who have been adjudicated incompetent by a court and have had a guardian appointed, and those mentally incompetent persons who have not been so adjudicated. A person who has been declared incompetent in a court proceeding lacks the legal capacity to enter into a contract with another. Such a person is unable to consent to the contract, as the court has determined that he or she does not understand the obligations and effects of the contract. A contract made by such a person is void and without any legal effect. Neither party may be legally compelled to perform or comply with the terms of the contract. If there has been no adjudication of insanity, a contract made by a mentally incapacitated individual is voidable by him or her.

Many contract principles that apply to minors also apply to insane persons. There is an obligation to recompense the injured party where a voidable contract is avoided, and to pay for necessaries based upon quasi-contract for the reasonable value of the goods or services. The incompetent, a guardian, or a Personal Representative after death may avoid the contract. The incompetent may ratify a voidable contract only if they recover the capacity to contract. The right to avoid the contract belongs to the incompetent; the other party may not avoid the contractual obligation. A contract that is ordinarily voidable may not be set aside when it is inherently fair to both parties and has been executed to such an extent that the other party cannot be restored to the position that they occupied prior to the contract.

Intoxicated persons A contract made by an intoxicated person is voidable. When a person is inebriated at the time of entering into a contract with another and subsequently becomes sober and either promises to perform the contract or fails to disaffirm it within a reasonable time after becoming sober, then that person has ratified his or her voidable contract and is legally bound to perform.

Subject Matter Any undertaking may be the subject of a contract, provided that it is not proscribed by law. When a contract is formed in restraint of trade, courts will not enforce it, because it imposes an illegal and unreasonable burden on commerce by hindering competition. Contracts that provide for the commission of a crime or any illegal objective are also void.

Future rights and liabilities—performing or refraining from some designated act, or assuming particular risks or obligations—may constitute the basis of a contract. An idea that never assumes concrete form at the time of disclosure, such as a concept for a short story, even though new and unusual, may not, however, be the subject of a contract.

A person may not legally contract concerning a right that he or she does not have. A seller of a home who does not possess clear title to the property may not promise to convey it without encumbrances. Neither may a seller promise that property will not be appropriated by Eminent Domain, which is an inherent power of government that is not subject to restrictions imposed by individuals.

Mutual Agreement There must be an agreement between the parties, or mutual assent, for a contract to be formed. In order for an agreement to exist, the parties must have a common intention or a meeting of minds on the terms of the contract and must subscribe to the same bargain. Aside from certain statutory exceptions pertaining to the sale of goods, as prescribed by Article 2 of the Uniform Commercial Code (UCC), if any of the proposed terms is not settled, or if no method of settlement is provided, then there is no agreement. The parties may settle one term at a time, but their contract becomes complete only when they assent to the final term. An agreement is binding if the parties concur with respect to the essential terms and intend the agreement to be binding, even though all of the details are not definitely fixed. The quantity of goods are usually essential terms of the contract that must be agreed upon if the contract is to be enforced. Exceptions to the rule requiring the terms of an agreement to be definite and certain are contained in article 2 of the UCC, which permits the courts to imply reasonably the missing terms if the essential terms unambiguously demonstrate the mutual agreement of the parties.

Consideration Consideration is a legal detriment that is suffered by the promisee and that is requested by the promisor in exchange for his or her promise. A valid contract requires some exchange of consideration. As a general rule, in a bilateral contract, one promise is valid consideration for the other. In a unilateral contract, the agreed performance by the offeree furnishes the necessary consideration and also operates as an acceptance of the offer.

Consideration may consist of a promise; an act other than a promise; a forbearance from suing on a claim that is the subject of an honest and reasonable dispute; or the creation, modification, or destruction of a legal relationship. It signifies that the promisee will relinquish some legal right in the present, or that he or she will restrict his or her legal freedom of action in the future as an inducement for the promise of the other party. It is not substantially concerned with the benefit that accrues to the promisor.

Love and affection are not permissible forms of consideration. A promise to make a gift contains no consideration because it does not entail a legal benefit received by the promisor or a legal detriment suffered by the promisee. Because a promise to give a gift is freely made by the promisor, who is not subject to any legal duty to do so, the promise is not enforceable unless there is Promissory Estoppel. Promissory estoppel is a doctrine by which a court enforces a promise that the promisor reasonably expects will induce action or forbearance on the part of a promisee, who justifiably relied on the promise and suffered a substantial detriment as a result. Where a court enforces a promise by applying this doctrine, promissory estoppel serves as a substitute for the required consideration.

At common law, courts refused to inquire into the adequacy or fairness of a bargain, finding that the payment of some price constituted legally sufficient consideration. If one is seeking to prove mistake, misrepresentation, fraud, or duress—or to assert a similar defense—the inadequacy of the price paid for the promise might represent significant evidence for such defenses, but the law does not require adequacy of consideration in order to find an enforceable contract.

Mutuality of Obligation Where promises constitute the consideration in a bilateral contract, they must be mutually binding. This concept is known as mutuality of obligation. If one party's promise does not actually bind him or hers to some performance or forbearance, it is an illusory promise, and there is no enforceable contract.

Where the contract provides one party with the right to cancel, there might be no consideration because of lack of mutuality of obligation. If there is an absolute and unlimited right to cancel the obligation, the promise by the party with the right of cancellation is illusory, and the lack of consideration means that there is no contract. If the power to cancel the contract is restricted in any manner, the contract is usually considered to be binding. Performance of a void promise in a defective bilateral contract may render the other promise legally binding, however. For example, in virtually all states, an oral contract to transfer title to land is not merely unenforceable, it is absolutely void. (See discussion of the statute of frauds, below.) A seller who orally promises to transfer land to a purchaser, for which the purchaser orally promises a designated sum, may sue the purchaser for the price if the purchaser receives title to the

land from the seller. The purchaser is not relieved of his or her promise to pay, because of the performance of the void oral promise by the seller.

A promise to perform an act that one is legally bound to do does not qualify as consideration for another promise.

Past consideration consists of actions that occurred prior to the making of the contractual promise, without any purpose of inducing a promise in exchange. It is not valid, because it is not furnished as the bargained-for exchange of the present promise. There are exceptions to this rule, such as a present promise to pay a debt that has been discharged in Bankruptcy, which constitutes valid consideration because it renews a former promise to pay a debt that was supported by consideration.

Most states do not recognize moral obligation as consideration, as there is no acceptable method of setting the parameters of moral duty. Some courts will enforce a moral obligation where there has been a benefit conferred on the promisor.

Statute of Frauds The statute of frauds was enacted by the English Parliament in 1677 and has since been the law in both England and in the United States in varying forms. It requires that certain types of contracts be in writing. The principal characteristic of various state laws modeled after the original statute is the provision that no suit or action shall be maintained on a contract unless there is a note or memorandum of its subject matter, terms and conditions, and the identity of the parties, signed by the party to be charged or obligated under it or an authorized agent. The purpose of the statute is to prevent the proof of a nonexistent agreement through fraud or perjury in actions for breach of an alleged contract.

Reality of Consent

The parties must mutually assent to the proposed objectives and terms of a contract in order for it to be enforceable. The manifestation of the common intent of the parties is discerned from their conduct or verbal exchanges.

What one party secretly intended is irrelevant if his or her conduct appears to demonstrate agreement. In a few limited cases, however, where there is no stated expression of the parties' intent, their subjective intentions may establish an enforceable contract if both believe in the same terms of the contract.

There will be no binding contract without the real consent of the parties. Apparent consent may be vitiated because of mistake, fraud, innocent misrepresentation, duress, or undue influence, all of which are defenses to the enforcement of the contract.

Mutual Mistake When there is a mutual Mistake of Fact with respect to the subject of the contract, the subjective intention of the parties is evaluated by the courts to determine whether there had been, in fact, a meeting of the minds of the parties.

If the mutual mistake significantly changed the subject matter of the contract, a court will refuse to enforce the contract. If, however, the difference in the subject matter of the contract concerned some incidental quality that has no (or negligible) effect on the

value of the contract, the contract is binding, even though the mistake altered or removed what had been the incentive to one or both parties to enter the contract.

Unilateral Mistake Ordinarily, a unilateral mistake (i.e., an error made by one party) affords no basis for avoiding a contract, but a contract that contains a typographical error may be corrected. A contract may be avoided if the error in value in what is to be exchanged is substantial, or if the mistake is caused by or known to the other party. Unilateral mistakes frequently occur where a contractor submits an erroneous bid for a Public Contract. Where such a bid is accepted, the contractor will be permitted to avoid the contract only if the agreement has not been executed or if the other party can be placed in the position that they occupied prior to the contract. If the mistake is obvious, the contract will not be enforced, but if it is inconsequential, the contract will be upheld. The mistake must consist of a clerical error or a mistake in computation, as an error in judgment will not permit a contractor to avoid a contract.

Mistake of Law When a party who has full knowledge of the facts reaches an erroneous conclusion as to their legal effect, such a MIS-TAKE OF LAW will not invalidate a contract or affect its enforceability.

Illiteracy Illiteracy neither excuses a party from the duty of learning the contents of a written contract nor prevents the mutual agreement of the parties. An illiterate person is capable of giving real consent to a contract; the person has a duty to ask someone to read the contract to him or her and to explain it, if necessary. Illiteracy can, however, serve as a basis for invalidating a contract when considered in relation to other factors, such as fraud or overreaching. If the person whom the illiterate designates to read or explain the contract misrepresents it and acts in collusion with the other party to the contract, the contract may be set aside.

Fraud Fraud prevents mutual agreement to a contract because one party intentionally deceives another as to the nature and the consequences of a contract. It is the willful misrepresentation or concealment of a material fact of a contract, and it is designed to persuade another to enter into that contract. If a special relation-ship exists, such as that of attorney and client, nondisclosure of a material fact is fraud. Many courts have held that mere silence concerning a material fact did not constitute fraud, but the emerging trend is to find a duty to disclose and, therefore, deliberate concealment of a material fact gives rise to an action for fraud.

A contract that is based on fraud is void or voidable, because fraud prevents a meeting of the minds of the parties. If the fraud is in the factum, (i.e., during the execution of the contract) so that the party would not have signed the document if he or she understood its nature, then the contract is void ab initio (i.e., from its inception). The signatory is not bound if a different contract is substituted for the one that he or she had intended to execute. If, however, a party negligently chooses to sign the contract without reading it, then no fraud exists and the contract is enforceable. If the fraud is in the inducement, by which a party is falsely persuaded to sign a contract, the terms of which he or she knows and understands, then the contract is not void but is voidable by the innocent party, as that party executes what is intended to be executed. If, however, due to fraud, a contract fails to express the agreement that the parties intended it to express, then the defrauded party may seek a decree of reformation, by which the court will rewrite a written agreement to conform with the Original Intent of the parties.

Misrepresentation without Fraud A contract may be invalidated if it was based on any innocent misrepresentation pertaining to a material matter on which one party justifiably relied.

Duress Duress is a wrongful act or threat by one party that compels another party to perform some act, such as the signing of a contract, which he or she would not have done voluntarily. As a result, there is no true meeting of minds of the parties and, therefore, there is no legally enforceable contract. Blackmail, threats of physical violence, or threats to institute legal proceedings in an abusive manner can constitute duress. The consensus of most jurisdictions is that the threat to commence legal proceedings, which otherwise might be justifiable, becomes wrongful when done with the corrupt intent to coerce a transaction that bears no relation to the subject of such proceedings and is grossly unjust to the victim.

A contract that is induced by duress is either void or voidable. If the duress consists of one party taking the other's hand as a mechanical instrument by which to sign his or her name to a contract, then the contract is void *ab initio* for lack of any intent on the victim's part to perform the act. The result is the same if the victim is compelled to sign a contract at gunpoint without any knowledge of its contents. These are highly unusual situations. In most cases involving duress, the contract is voidable, and the person who was subjected to the duress may ask the court to declare the contract unenforceable.

Undue Influence Undue influence is unlawful control exercised by one person over another in order to substitute the first person's will for that of the other. It generally occurs in two types of situations. In the first, a person takes advantage of the psychological weakness of another, in order to influence that person to agree to a contract to which, under normal circumstances, he or she would not otherwise consent. The second situation entails undue influence based on a fiduciary relationship that exists between the parties. This occurs where one party occupies a position of trust and confidence in relation to the other, as in familial or professional-client relationships. The question of whether the assent of each party to the contract is real or induced by factors that inhibit the exercise of free choice determines the existence of undue influence. Mere legitimate persuasion and suggestion that do not destroy free will are not considered undue influence and have no effect on the legality of a contract.

Assignments

An assignment of a contract is the transfer to another person of the rights of performance under it. Contracts were not assignable at early common law, but today most contracts are assignable unless the nature of the contract or its provisions demonstrates that the parties intend to make it personal to them and therefore incapable of assignment to others.

Joint and Several Contracts

Joint and several contracts always entail multiple promises for the same performance. Two or more parties to a contract who promise to the same promisee that they will give the same performance are regarded as binding themselves jointly, severally, or jointly and severally.

Promises impose *several liability* only when promisors singly promise to pay or to act. If the three promisors singly promise to pay the party $500, it is as though there are three discrete and individual contracts, except that the promisee is to receive a total of only $500. The three promisors do not promise as a unit, but each individually assumes to pay the entire sum.

Joint liability ensues only when promisors make one promise as a unit. If three promisors promise to pay $500, then the three will owe the debt as a unit, not individually. The party may enforce the contract only against one promisor or against any number of joint promisors. The promisee is entitled, however, to only one award of the amount due.

Promises impose joint and several liability when the promisors promise both as a unit and individually to pay or perform according to the terms of the contract.

If a promisor who is jointly or jointly and severally liable on a contract performs or pays the promisee in full, then the other promisors are thereby discharged from their obligations on the contract to the promisee, as he or she may only collect the amount due to him or her. The promisor who performed, however, has a right to contribution from the co-promisors—that is, the right to receive from the other co-promisors their proportionate share of the debt. The general rule is that a co-obligor who has paid in excess of his or her proportionate share is entitled to contribution, unless there is a particular agreement to the contrary.

Joint and several promises can exist if a promisor promises to pay two promisees a certain sum of money. The promisees are joint and several promisees or obligees, and the promisor has the duty to pay. Both promisees are entitled to performance of the promise jointly and separately, even though there is only one promise made to two people. Any one of the joint obligees in a contract has the power to discharge the promisor from the obligation. If the promisor pays one promisee, this payment operates as a discharge of the promisor's liability under the contract. The promisee who has not been paid may not compel the promisor to pay him or her, as the promisor has been discharged by the payment to the other promisee. The unpaid promisee may seek contribution from the promisee who has been paid, however.

Third-Party Beneficiaries

There are only two principal parties, the offeror and the offeree, to an ordinary contract. The terms of the contract bind one or both parties to render performance to the other in consideration of receiving, or having received, the other's performance. Contracts sometimes specify that the benefits accruing to one party will be conferred upon a third party. The effect of a third-party contract is to provide, to a party who has not assented to it, a legal right to enforce the contract.

A *creditor beneficiary* is a nonparty to a contract who receives the benefit when a promise is made to satisfy a legal duty. For example, suppose that a debtor owed a creditor $500. The debtor lends $500 to a third person, who promises to use the money to pay the debtor's debt. The third person is the promisor, who makes the promise to be enforced. The debtor is the promisee, to whom the promise is made. The contract is between the debtor and the third person, the promisor, and the consideration for the

promise is the $500 loan that the promisor received from the debtor. The creditor is the third-party beneficiary. If the promisor refuses to pay the creditor $500, then the creditor may sue the promisor and prevail. Although the creditor is not a party to their contract, both the debtor and the promisor intend that the creditor should be the beneficiary of the contract and have enforceable rights against the promisor, since he or she is to pay the creditor. The debtor or the creditor may sue to enforce the promisor's promise to pay. The creditor's right to enforce the contract between the debtor and the promisor is effective only when he or she learns of, and assents to, the contract. The creditor may also sue the debtor for the $500, as the debtor had a legal duty to pay this loan. The debtor then may sue the promisor for breach of contract for refusing to pay the creditor.

A *donee beneficiary* of the contract is a non-party who benefits from a promise that is made for the purpose of making a gift to him or her. A donor wishes to give a donee $200 as an anniversary present. The donor plans to sell a television set for $200 to a purchaser, who promises to pay the donee the $200 directly. The donee is a donee beneficiary of the purchaser's promise to pay the money and may enforce this claim against the purchaser. The donee has no claim against the donor, the promisee, as the donor has no legal duty to the donee but is merely giving the donee a gift. However, the donor will be able to sue the purchaser for refusal to pay the donee, because it would be a breach of the terms of their contract of sale.

The difference between a creditor beneficiary and a donee beneficiary becomes significant when the parties to a contract attempt to alter the rights of the third-party beneficiary. The promisor and the promisee have no right or power to alter the accrued rights of the donee beneficiary without consent unless this power was expressly reserved in the contract, regardless of whether the donee knows about the contract. A donee beneficiary's rights become effective when the contract is made for his or her benefit, regardless of whether he or she knows about the contract. In contrast, a creditor beneficiary's rights vest only when the creditor beneficiary learns of, and assents to, the contract.

Conditions and Promises of Performance

The duty of performance under many contracts is contingent upon the occurrence of a designated condition or promise. A condition is an act or event, other than a lapse of time, that affects a duty to render a promised performance that is specified in a contract. A condition may be viewed as a qualification placed upon a promise. A promise or duty is absolute or unconditional when it does not depend on any external events. Nothing but a lapse of time is necessary to make its performance due. When the time for performance of an unconditional promise arrives, immediate performance is due. A dependent or conditional promise is not effective until the occurrence of some external event that the parties have specified. An implied condition is one that the parties should have reasonably comprehended to be part of the contract because of its presence by implication.

Types of Conditions Conditions precedent, conditions concurrent, and conditions subsequent are types of conditions that are commonly found in contracts. A condition precedent is an event that must exist as a fact before the promisor incurs any liability pursuant to it. For example, suppose that an employer informs an employee that if the

employee successfully completes an accounting course, he or she will receive $500. The completion of the course must exist as a fact before the employer will be liable to the employee; when that fact occurs, the employer becomes liable.

A condition concurrent must exist as a fact when both parties to a contract are to perform simultaneously. Neither party has a duty to perform until the other has performed or has tendered performance. Practically speaking, however, the party who wants to complete the transaction must perform in order to establish the duty of performance by the other party. The performances are concurrently contingent upon each other. Concurrent conditions are usually found in contracts for the sale of goods and in contracts for the conveyance of land.

A condition subsequent is one that, when it exists, ends the duty of performance or payment under the contract. For example, suppose that an insurance contract provides that suit against it for a loss covered by the policy must be commenced within one year of the insured's loss. If the destruction of the insured's building by fire is a risk that the policy covers, then the insured must file suit against the insurer within the time specified, or the condition subsequent will end the duty of the company pursuant to the policy.

Substantial Performance The failure to comply strictly with the terms of a condition will not prevent recovery if there has been substantial performance of the contractual obligation. Courts created this doctrine in order to prevent forfeitures and to ensure justice. Where recovery is permitted for substantial performance, it is offset by damages for injuries caused by failure to render complete performance. Courts determine whether there has been a breach or a substantial performance of a contract by evaluating the purpose to be served; the excuse for deviation from the letter of the contract; and the cruelty of enforced adherence to the contract. If the deviation from the contract were accidental and resulted in only a trivial difference between what was required by the contract and what was performed, the plaintiff will receive only nominal damages.

Satisfactory Performance A contract may be contingent upon the satisfaction of a person's opinion, taste, or fancy. Most courts apply a good-faith test in determining whether rejection of a performance was reasonable. If a rejection is made in bad faith, the court will enforce the contract.

If satisfaction can be measured with reference to the commercial value or caliber of the subject matter of the contract, the performance must be proved to be deficient in these respects and the dissatisfaction must be proven to be sufficiently reasonable and well-founded to justify non-enforcement of the contract. The test is: What would satisfy a reasonable person? The condition of satisfaction need not be met when the expression of dissatisfaction is made in bad faith and not related to the quality or commercial value of the subject of the contract.

Divisible Contracts The entire performance of a contract can be a condition to the other party's duty to perform. If the contract is legally divisible, the performance of a divisible portion can fulfill the condition precedent to the other party's corresponding divisible performance. A contract is divisible when the performance of each party is divided into two or more parts; each party owes the other a corresponding number of performances; and the performance of each part by one party is the agreed exchange for a

corresponding part by the other party. If it is divisible, the contract, for certain purposes, is treated as though it were a number of contracts, as in employment contracts and leases. If an employer hires a prospective employee for one year at a weekly salary, the contract is divisible. Each week's performance is a constructive or implied condition precedent to the employee's right to a week's salary. The right to the salary is not contingent on performance of the obligation to work for one year. In most contracts of employment, the courts allow recovery to the employee for the number of weeks or months of service rendered, on the theory that such contract is divisible. The same is true for a lease of real property or an apartment. If the lease is breached before the entire term has expired, the tenant is liable for the remaining rent as each month occurs, but is not liable prior to that time. In effect, the court treats the lease as a contract for each month, with rent due on the first of each month. In a divisible contract, the performance of a separate unit that is treated as a separate contract entitles the performing party to immediate payment, whereas in an entire contract, the party who is first to perform must render full performance in order to be entitled to performance from the other party.

Breach of Conditions Compliance with a condition can be excused under certain circumstances. As a general rule, if the facts would excuse compliance with a condition, they will also excuse performance of a promise. An excuse for nonperformance of a condition can exist in many forms, such as a waiver (the intentional relinquishment of a known right) of performance of the condition.

If an unintentional failure to perform a condition would result in a Forfeiture, a court may excuse compliance in order to prevent injustice. The duty of performance by the other party arises just as though the condition has been fulfilled if compliance with a condition is excused.

Discharge of Contracts

The duties under a contract are discharged when there is a legally binding termination of such duty by a Voluntary Act of the parties or by operation of law. Among the ways to discharge a contractual duty are impossibility or impracticability to perform personal services because of death or illness; or impossibility caused by the other party.

The two most significant methods of voluntary discharge are Accord and Satisfaction and novation. An accord is an agreement to accept some performance other than that which was previously owed under a prior contract. Satisfaction is the performance of the terms of that accord. Both elements must occur in order for there to be discharge by these means.

A novation involves the substitution of a new party while discharging one of the original parties to a contract by agreement of all three parties. A new contract is created with the same terms as the original one, but the parties are different.

Contractual liability may be voluntarily discharged by the agreement of the parties, by estoppel, and by the cancellation, intentional destruction, or surrender of a contract under seal with intent to discharge the duty.

The discharge of a contractual duty may also occur by operation of law through illegality, merger, statutory release, such as a discharge in bankruptcy, and objective

impossibility. Merger takes place when one contract is extinguished because it is absorbed into another.

There are two types of impossibility of performance that discharge the duty of performance under a contract. *Subjective impossibility* is due to the inability of the individual promisor to perform, such as by illness or death. *Objective impossibility* means that no one can render the performance. The destruction of the subject matter of the contract, the frustration of its purpose, or supervening impossibility after the contract is formed are types of objective impossibility. "Impracticability" because of extreme and unreasonable difficulty, expense, injury, or loss involved is considered part of impossibility.

Breach of Contract

An unjustifiable failure to perform all or some part of a contractual duty constitutes a breach of contract. It ensues when a party who has a duty of immediate performance fails to perform, or when one party hinders or prevents the performance of the other party.

A total, major, material, or substantial breach of contract constitutes a failure to perform properly a material part of the contract. A partial or minor breach of contract is merely a slight deviation from the bargained-for performance. A breach may occur by Anticipatory Repudiation, whereby the promisor, without justification and before committing a breach, makes an affirmative statement to the promisee, indicating that he or she will not or cannot perform the contractual duties.

The differences in the types of breach are significant in ascertaining the kinds of remedies and damages available to the aggrieved party.

Remedies

Damages, reformation, Rescission, restitution, and Specific Performance are the basic remedies available for breach of contract.

Damages The term *damages* signifies a sum of money awarded as a compensation for injury caused by a breach of contract. The type of breach governs the extent of the damages to be awarded.

Failure to perform The measure of damages in breach-of-contract cases is the sum that would be necessary to recompense the injured party for the amount of losses incurred through breach of contract. The injured party should be placed in the position that he or she would have occupied if the contract had been performed, and they are entitled to receive the *benefit of the bargain*, the net gain that would have accrued to them under the contract. The injured party is not, however, to be put in a better position than he or she would have occupied had performance taken place.

Damages for anticipatory repudiation are ordinarily assessed as of the scheduled performance dates that are fixed by the breached contract. The measure of damages for the breach of an installment contract is determined at the time each installment is due.

When the parties have included a Liquidated Damages clause in a contract, it generally will be enforced. Such clause is a prior agreement by the parties as to the measure of damages upon breach. Additional damages may not be claimed.

Partial performance When the defendant has failed to complete performance of an agreement according to its terms, the plaintiff may recover such damages as will compensate him or her to the same extent as though the contract had been completely performed. The customary measure of damages is the reasonable expense of completion. Completion refers to a fulfillment of the same work, if possible, which does not involve unreasonable economic waste. The injured party is not automatically entitled to recover the difference between the contract price and the amount it would cost to have the work completed when a contract is breached after partial performance; he or she will be entitled to recover that amount only if completion is actually accomplished at a greater cost.

A provision in a building contract that allows the owner, in the event of a default by the contractor, to complete the job and to deduct the expenses from the contract price does not preclude the owner's recovering damages also where the contractor intentionally leaves the work undone. A plaintiff may also recover the monetary value of materials that are lost through a breach of contract.

A plaintiff contractor who subsequently performs the work upon breach of a contract will ordinarily recover the reasonable value of the labor and materials that he or she has furnished, with the contract price used as a guideline. The award may not properly exceed the benefit that the owner received in the properly completed work, and it will be reduced by the amount of damages that the owner incurs as a result of the contractor's failure to complete performance of the contractual obligation. If the value of the work performed exceeds the contract price, the contractor will not receive the excess.

Where a contract for the performance of services exists with payment to be made in installments, and the obligation to pay for each installment constitutes an independent promise, the individual who is entitled to payment may recover only the installments that are due when the suit is brought.

Defective performance Damages for defective performance of a contractual agreement are measured by calculating the difference in value between what is actually tendered and what is required as performance under the agreement. If the performance tendered is either of no value or unsuitable for the purpose that the contract contemplated, the proper measure of damages is the sum that is necessary to repair the defect. If a defect can be easily remedied through repairs, the measure of damages is the price of the repairs performed.

Generally, the total contract price may not be recovered for substantial performance. If the plaintiff furnished materials for items that were manufactured for the plaintiff in such a manner as to be rendered worthless, the proper measure of damages ordinarily has been held to be the discrepancy between the contract price and the market price of such items if they had been manufactured according to the contract terms.

When a building or construction contract is defectively performed, the proper measure of damages is the difference between the value of the property with the defective work, and its value had there been strict compliance with the contract. Where the contractor deliberately deviates from the contractual agreement, but there has been no substantial performance, damages are determined by the actual expense of reconstructing the building according to the terms of the contract.

Delay in performance The loss precipitated by the wrongful delay of the performance of a contract is calculated by fixing the rental or use of the property or interest as a result of the loss incurred through increased material and labor expenses, as distinguished from what the value would have been had the contract been performed on time.

Reformation Reformation is an equitable remedy that is applied when the written agreement does not correspond to the contract that was actually formed by the parties, as a result of fraud or mutual mistake in drafting the original document. Quasi-contractual relief for the reasonable value of services rendered is also available, although it applies only when there is no enforceable contract.

Rescission Rescission terminates the contract, and the parties are restored to the position of never having entered into the contract in the first place.

Restitution Restitution is a remedy that is designed to restore the injured party to the position that they occupied prior to the formation of the contract.

Specific Performance Specific performance is an equitable remedy by which a contracting party is required to execute, as nearly as practicable, a promised performance when monetary damages would be inadequate to compensate for the breach. A contract to sell land is specifically enforceable because land is considered to be unique and not compensable by money. In addition, property that has sentimental value, as well as antique, heirloom, or one-of-a-kind articles, are viewed as unique, and therefore it would be impossible to estimate damages. A personal-service contract or an employment contract, however, cannot be specifically enforced because the Thirteenth Amendment to the U.S. Constitution prohibits Slavery. If, however, the contract proscribes a person from performing some act, breach of that negative covenant may be specifically enforced.

Parol Evidence Rule

Tentative terms discussed in preliminary negotiations are subsumed by the provisions of the contract executed by the parties. The Parol Evidence rule governs the admissibility of evidence other than the actual agreement when a dispute arises over a written contract. When parties memorialize their agreements in writing, all prior oral and written agreements, and all contemporaneous oral agreements, merge in the writing, which is also known as an integration. The written contract may not be modified, altered, or varied by parol or oral evidence, provided that it has been legally executed by a person who intends for it to represent the final and complete expression of his or her understanding of the contract. This is not the case, however, where there has been some mistake or fraud in the drafting of the document.

The parol evidence rule effectuates the presumed intention of the parties; achieves certainty and finality as to the rights and duties of the contracting parties; and prevents fraudulent and perjured claims. It has no application to subsequent oral contracts that modify or discharge the written contract, however.

Ambiguity

Ambiguity in the terms of a contract exists when the court cannot, after applying the rules or tools of interpretation, give a meaning to the language used in an agreement or document. The plain-meaning rule is often applied judicially to ascertain whether a contract is ambiguous. If the contract appears to the trial judge to be clear and unequivocal on its face, then there is no need for parol evidence. However, when a writing is ambiguous, parol evidence is admissable only to elucidate, not to vary, the instrument as written.

Courts have used other rules to resolve ambiguous terms. Where neither party knows, or has reason to know, of the ambiguity, or where both parties know or have reason to know of it, the ambiguous term is given the meaning that each party intended it to convey. As a practical matter, this means that if the parties give the equivocal expression the same meaning, then a contract is formed; but if they give it a different meaning, then there is no contract, at least if the ambiguity pertains to a material term, as there is no meeting of their minds. Where one party knows, or has reason to know, of the ambiguity, and the other does not, it conveys the meaning given to it by the latter—which means, in essence, that there is a contract predicated upon the meaning of the party who is without fault.

Contracts for the Sale of Goods

The nature of a transaction determines the type of contract law that applies. General contract law described above applies to such transactions as service agreements and sales of real property. Contracts for the sale of goods, however, are governed by Article 2 of the UCC, which has been adopted, at least in part, in every state. The UCC defines "goods" as all things that are movable at the time of the sale.

The drafters of the UCC adhered to a more liberal view of contracts, so some of its provisions differ significantly from those that are found in general contract law. A contract for the sale of goods may be made in any manner that is sufficient to show agreement, and courts may consider the conduct of the parties when making this determination. An offer to sell goods may be made in any manner that invites acceptance. Courts also may consider the Course of Performance between the parties when determining whether a contract for the sale of goods exists.

The UCC provides for, and recognizes, certain warranties that relate to the goods being sold. For example, an affirmation of fact or a promise made by the seller to the buyer creates an express warranty. Sales also create implied warranties, such as the implied warranties of merchantability and fitness for a particular purpose. Remedies and other damages for breach of a sale-of-goods contract are also governed by the UCC. In addition to monetary damages, buyers and sellers may take several actions when the other party breaches a sales contract. For example, a seller who has been injured by a breach of contract may withhold delivery of the goods; resell the goods that are subject

to the contract; or recover monetary damages. A buyer may seek to "cover" by making a good-faith purchase of substitute goods from a different seller, and then may recover from the original seller any difference between the substitute contract and the original contract.

Further readings

Collins, Hugh. 1999. *Regulating Contracts.* New York: Oxford Univ. Press.

DiMatteo, Larry A. 1998. *Contract Theory: The Evolution of Contractual Intent.* East Lansing: Michigan State Univ. Press.

Hare, J. I. Clark. 2003. *The Law of Contracts.* Clark, N.J.: Lawbook Exchange.

Marsh, P.D.V. 2001. *Contract Negotiation Handbook.* Burlington, Vt: Gower.

Contracts

Christopher C. Langdell, 1871

The 1871 publication of *A Selection of Cases on the Law of Contracts* by Christopher Columbus Langdell revolutionized legal education. The book, which consisted of a collection of mostly English judicial opinions, was meant to assist the professor in developing within the student a scientific approach to the law. Langdell chose the cases for the fundamental principles they contained. Students were expected to dispense with the idea that they were attending a vocational school. Instead, they were to apply the principles they learned in the scientific search for truth. In his preface Langdell said that he sought to "select, classify, and arrange all cases which had contributed in any important degree to the growth, development, or establishment of any of its essential doctrines."

Contracts

PREFACE

I entered upon the duties of my present position, a year and a half ago, with a settled conviction that law could only be taught or learned effectively by means of cases in some form. I had entertained such an opinion ever since I knew anything of the nature of law or legal study; but it was chiefly through my experience as a learner that it was formed, as well as subsequently strengthened and confirmed. Of teaching indeed, as a business, I was entirely without experience; nor had I given much consideration to that subject, except so far as proper methods of teaching are involved in proper methods of study.

Now, however, I was called upon to consider directly the subject of teaching, not theoretically but practically, in connection with a large school with its more or less complicated organization, its daily routine, and daily duties. I was expected to take a

large class of pupils, meet them regularly from day to day, and give them systematic instruction in such branches of law as had been assigned to me. To accomplish this successfully, it was necessary, first, that the efforts of the pupils should go hand in hand with mine, that is, that they should study with direct reference to my instruction; secondly, that the study thus required of them should be of the kind from which they might reap the greatest and most lasting benefit; thirdly, that the instruction should be of such a character that the pupils might at least derive a greater advantage from attending it than from devoting the same time to private study. How could this threefold object be accomplished? Only one mode occurred to me which seemed to hold out any reasonable prospect of success; and that was, to make a series of cases, carefully selected from the books of reports, the subject alike of study and instruction. But here I was met by what seemed at first to be an insuperable practical difficulty, namely, the want of books; for though it might be practicable, in case of private pupils having free access to a complete library, to refer them directly to the books of reports, such a course was quite out of the question with a large class, all of whom would want the same books at the same time. Nor would such a course be without great drawbacks and inconveniences, even in the case of a single pupil. As he would always have to go where the books were, and could only have access to them there during certain prescribed hours, it would be impossible for him to economize his time or work to the best advantage; and he would be liable to be constantly haunted by the apprehension that he was spending time, labor, and money in studying cases which would be inaccessible to him in after life.

It was with a view to removing these obstacles, that I was first led to inquire into the feasibility of preparing and publishing such a selection of cases as would be adapted to my purpose as a teacher. The most important element in that inquiry was the great and rapidly increasing number of reported cases in every department of law. In view of this fact, was there any satisfactory principle upon which such a selection could be made? It seemed to me that there was. Law, considered as a science, consists of certain principles or doctrines. To have such a mastery of these as to be able to apply them with constant facility and certainly to the ever-tangled skein of human affairs, is what constitutes a true lawyer; and hence to acquire that mastery should be the business of every earnest student of law. Each of these doctrines has arrived at its present state by slow degrees; in other words, it is a growth, extending in many cases through centuries. This growth is to be traced in the main through a series of cases; and much the shortest and best, if not the only way of mastering the doctrine effectually is by studying the cases in which it is embodied. But the cases which are useful and necessary for this purpose at the present day bear an exceedingly small proportion to all that have been reported. The vast majority are useless and worse than useless for any purpose of systematic study. Moreover, the number of fundamental legal doctrines is much less than is commonly supposed; the many different guises in which the same doctrine is constantly making its appearance, and the great extent to which legal treatises are a repetition of each other, being the cause of much misapprehension. If these doctrines could be so classified and arranged that each should be found in its proper place, and nowhere else, they would cease to be formidable from their number. It seemed to me, therefore, to be possible to take such a branch of the law as Contracts, for example, and, without exceeding comparatively moderate limits, to select, classify, and arrange all the cases which had contributed in any important degree to the growth, development, or establishment of any of its essential doctrines; and that such a work could not fail to be of material service to all who desire to study that branch of law systematically and in its original sources.

References in classic literature ?

Morrel went also to the notary, who confirmed the news that the contract was to be signed that evening.

"It is impossible," said Maximilian, "that the signing of a contract should occupy so long a time without unexpected interruptions.

This was more terrible than the first; the same nervous movements were repeated, and the mouth contracted and turned purple."

Franz arrived to sign the contract just as my dear grandmother was dying."

View in context

Additional Insured status is a common, though often elusive, concept in many real estate contracts.

Unravelling myths surrounding additional insured coverage

John McCain of Arizona, the vice chairman of the Senate Armed Services Committee, recently proposed limiting the Pentagon to fixed-price contracts for weapon programs.

Making the contract type fit the program

The proposed regulations do not distinguish between secured and unsecured annuity contracts, or between annuity contracts issued by an insurance company and those issued by a taxpayer other than an insurance company.

Service issues prop. regs. on exchanges for annuities

If enacted, the legislation would create a new class of contracts, known as "monopoly contracts," which would be defined as any contract with a single contractor that exceeds $10 million.

New Congress may have contractors in its sights

The proposed regulations do not distinguish between secured and unsecured annuity contracts, or between contracts issued by insurance companies and those issued by other taxpayers.

Private annuities: proposed regulations would negate income tax benefits

The coal mine was burdened by two contracts mandating that it supply a fixed minimum amount of coal.

Like-kind exchanges of real property

NTSP negotiated both risk-sharing contracts and non-risk-sharing contracts.

Anti-trust implications of independent practice associations

More results ►