BLACK LETTER OUTLINES

Contracts

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Capsule Summary

I. MUTUAL ASSENT—OFFER AND ACCEPTANCE

A. MUTUAL ASSENT

1. Objective Theory of Contracts

Mutual assent is ordinarily arrived at by an offer and acceptance. Under the objective theory, whether there is assent is determined by asking whether a reasonable person in the position of one party would believe that the words and conduct of the other party constituted assent. This is usually a question of fact for the trier of fact. However, if reasonable persons can reach only one reasonable conclusion, it is a question of law for the court.

2. Intending Legal Consequence

The parties needn't intend to be legally bound, but if the objective evidence makes it clear that they do not intend to be bound there is no contract.

3. Intent to Formalize Agreement

If the parties reach basic agreement on a transaction but agree that they will not be bound unless and until they sign a formal agreement, they will not be

bound until that time. If they intend the future writing to be merely a convenient memorial of their prior agreement, they are bound whether or not such a writing is executed. Intent is often a question of fact.

B. OFFER

1. What Constitutes an Offer?

An offer is a promise to do or to refrain from doing some specified thing in the future if the offeree will do something in exchange. To amount to an offer, the promise must justify the other party, as a reasonable person, to conclude that his or her assent is invited and will conclude the process of offer and acceptance. It is possible, but very unusual, to have a non-promissory offer.

2. What Is a Promise?

A promise is a manifestation of intent that gives an assurance (commitment) that a thing will or will not be done.

3. Offer Distinguished From Preliminary Negotiations

Preliminary negotiations are any communications prior to an operative offer. Expressions of opinion, statements of intention, hope or desire, inquiries or invitations to make offers, catalogs, circular letters, invitations to make bids, and price quotations are not offers. An advertisement for the sale of goods is ordinarily not an offer. In an auction sale, the bidder is deemed to be the offeror. The situation is more complex in an auction without reserve.

4. Distinction Between Offers to Unilateral and Bilateral Contracts

An offer to a unilateral contract asks for a performance; an offer looking to a bilateral contract invites a promise. The promise may be expressed in words or communicated by conduct. An offer to a unilateral contract may not be accepted by a promise. Conversely, an offer to a bilateral contract may not, except under an unimportant exception, be accepted by performance. The offeree does not become bound when starting to perform the act requested by an offer looking to a unilateral contract, but the offeror is bound by an option contract.

C. ACCEPTANCE

1. Relationship to Offer

The offer creates a power of acceptance. The acceptance creates a contract and terminates the power of revocation that the offeror ordinarily has. The acceptance must be a voluntary act.

2. Acceptance by Authorized Party

An offer may be accepted only by the person or persons to whom it is made. Thus, the offeree may not transfer (assign) the power of acceptance to another. But an irrevocable offer may be transferred if the transfer is consistent with the rules governing the assignment of contracts.

3. Knowledge of Offer

If an offer is to a unilateral contract, the offeree must know of the offer in order to accept. If the offer looks to a bilateral contract, the rule that the offeree must know of the offer may come into conflict with the objective theory of contracts. If so, the objective theory prevails.

4. Intent to Accept

For a unilateral contract to arise, the traditional rule is that the offeree must subjectively intend to accept. The offer need not, however, be the principal inducement for performing the act. The Restatement (Second) has substituted a more objective test; an intent to accept is presumed unless the offeree disclaims an intent to accept. An offeree to a bilateral contract can accept even if he or she has no subjective intent to accept; all that is required is an outward manifestation of intent to contract.

5. Necessity for Communication of Acceptance

To create a bilateral contract, the offeree's promise must be communicated to the offeror or the offeror's agent. However, the offeror may dispense with the need for communication by manifesting such an intent. At times, a reasonable attempt to communicate is sufficient. (See 11 below).

6. Necessity of Notice in Unilateral Contract

There are three views on the issue of whether the offeree must give notice of performance to the offeror. (1) Notice is not required unless requested by the

offer. (2) If the offeree has reason to know that the offeror has no adequate means of learning of performance with reasonable promptness and certitude, failure to exercise reasonable diligence in giving notice discharges the offeror from liability, unless the offeror otherwise learns of performance within a reasonable time or the offeror expressly or by implication indicates that notification is not necessary. (3) The third view is the same as the second view except that no contract is consummated unless and until notice of performance has been sent. The second view is the prevailing view and is the view of both the first and second restatements.

7. Acceptance of an Offer Looking to a Series of Contracts

If an offer looks to a series of contracts, a contract arises each time the offeree accepts. As to the future, the offer is revocable unless the offer is irrevocable. Whether an offer looks to one or a series of acceptances is a question to be determined under the reasonable person test. Care must be taken to distinguish an offer looking to a series of acceptances from an offer looking to one acceptance with a number of performances.

8. Acceptance by Silence

The general rule is that silence ordinarily does not give rise to an acceptance of an offer or a counteroffer. This rule does not apply: (1) Where the offeror has given the offeree reason to believe silence will act as an acceptance and the offeree intends by silence to accept; (2) Where the parties have mutually agreed that silence will operate as consent; (3) Where there is a course of dealing so that silence has come to mean assent; (4) Where the offeree accepts services with reasonable opportunity to reject them, and should reasonably understand that they are offered with expectation of payment. This illustrates a non-promissory offer.

9. Acceptance by Act of Dominion

At times, an offeree takes possession of offered goods but indicates that the offered terms are not acceptable. This conduct constitutes the tort of conversion—the wrongful act of dominion over the personal property of another. Because the conduct could have been rightful and referable to the offered terms, the offeror has the option to treat the conduct as rightful, suing on a contract theory and estopping the offeree from claiming to be a wrongdoer. There is some authority, however, to the effect that this option is not available if the offered terms are manifestly unreasonable.

10. Unsolicited Sending of Goods

An exception exists to the exercise-of-dominion rule under legislation providing that a person who receives unsolicited goods may treat them as a gift.

11. When Is an Acceptance in a Bilateral Contract Effective (Mailbox Rule)?

When the parties are at a distance from one another, is an acceptance effective when put out of the possession of the offeree or when it is received? This depends upon whether the method of acceptance is appropriate or not. If the medium of communication is reasonable, the acceptance will be effective when sent and *even if it is lost or delayed*. It is likely to be reasonable if it is the same medium used by the offeror (unless the offeror specified otherwise) or it is customary in similar transactions at the time and place the offer is received. However a communication will not be effective when sent if proper care has not been taken in transmitting it (e.g. incorrectly addressed). Under the Restatement (Second), even if an unreasonable means is used or care is not taken in transmission, the acceptance nonetheless will be effective when sent, provided it is received within the time a seasonably dispatched acceptance sent in a reasonable manner would normally have arrived.

12. Prescribed Method of Acceptance

If the offer prescribes an exclusive method of acceptance, no contract arises if the offeree utilizes another means of acceptance even if the acceptance comes to the attention of the offeror. This is a qualification of the rules stated above.

13. Parties in the Presence of One Another

Contrary to the rule for parties at a distance, when the parties are in the presence of one another, an acceptance is inoperative unless the offeror hears or is at fault in not hearing. Even if the offeror is at fault in not hearing, there is no contract if the offeree knows or has reason to know that the offeror has not heard.

14. Offeror's Power to Negate Mailbox Rule

An offeror may negate the mailbox rule by providing in the offer that the acceptance will be effective only when and if received.

15. Withdrawal of Acceptance

Even if the offeree is able to regain possession of the letter pursuant to postal regulations, the letter of acceptance is effective.

16. When Offeree Sends a Rejection First and Then an Acceptance

An acceptance dispatched after a rejection has been sent is not effective until received and then only if received prior to the rejection.

17. When Offeree Sends Acceptance First but Rejection Is Received Before Acceptance

The usual holding is that a contract is formed, but if the offeror relies on the rejection before receiving the acceptance, the offeree will be estopped from enforcing the agreement.

18. Risk of Mistake in Transmission by an Intermediary

The mistake discussed here is not made by a party or an agent, but by an intermediary; e.g. a telegraph company. Lost messages are governed by the mailbox rule and the present discussion has nothing to do with them. The topic has to do with a message that is received but is garbled or otherwise incorrectly transmitted. The majority view is that the message as transmitted is operative unless the other party knows or has reason to know of the mistake. The minority view is to the effect that there is no contract if the offer or acceptance is not the message authorized by the party.

D. TERMINATION OF REVOCABLE OFFERS

A revocable offer may be terminated in a variety of ways.

1. Lapse of Time

An offer is terminated after the lapse of time specified in the offer. Usually this time is measured from the time the offer is received. If no time is specified, the offer is open for a reasonable time.

a. Face to Face Offer

Where an offer is made in any situation where there are direct negotiations (e.g. face to face, telephone) the offer is deemed, in the absence of a manifestation of a contrary intention, to be open only while the parties are conversing.

b. Termination Upon Happening of a Particular Event

If the offeror stipulates that the offer shall terminate upon the happening of a certain event and the event occurs before acceptance, the power of acceptance is terminated.

c. Effect of a Late Acceptance

There are three views with respect to a late acceptance. (1) The late acceptance is an offer which in turn can be accepted only by a communicated acceptance. (2) The original offeror may treat the late acceptance as an acceptance by unilaterally waiving the lateness. (3) If the late acceptance is sent in what could plausibly be considered to be a reasonable time, the original offeror has a duty to so inform the offeree within a reasonable time. Failure to do so creates a contract by silence.

2. Death of Offeror

If the offeror dies between the making of the offer and the acceptance, the offer is terminated even if the offeree is unaware of the offeror's death. Under a minority view, death terminates the offer only if the offeror is aware of it.

3. Incapacity of Offeror

a. Adjudication of Incapacity

Where there is an adjudication of mental incapacity and the property of the offeror is placed under guardianship, any unaccepted offer made by the offeror is terminated. This is so, according to the majority view, even though the offeree is unaware of what has occurred.

b. Where There Is No Adjudication

If there is no adjudication of incompetency, the rule is that supervening mental incapacity in fact terminates the offer if the offeree is or should be aware of the incapacity.

4. Death or Incapacity of the Offeree

The death or adjudication of incapacity of the offeree terminates the offer.

5. Revocation

a. Direct Revocation

A communicated revocation terminates the offeree's power of acceptance and is effective when it is received except in a few states where

statutes provide that it is effective on dispatch. At common law, even if the offer says it is irrevocable, it is still revocable unless consideration or the equivalent is given for the promise of irrevocability.

b. Equal Publication

When an offer is made to a number of persons whose identity is unknown to the offeror (e.g. a reward offer in a newspaper), the offer can be revoked by giving equal publication of the revocation as was given to the offer. Even here, if the offeror knows of the identity of a person who is taking action on the offer, the offeror must communicate the revocation to that person.

c. Indirect Revocation

Indirect revocation occurs when the offeree acquires reliable information from a third party that the offeror has engaged in conduct that would indicate to a reasonable person that the offeror no longer wishes to make the offer. Information is reliable only if it comes from a reliable source and is in fact true.

d. Special Rules Relating to the Revocation of an Offer Looking to a Unilateral Contract

There are three views with respect to the revocation of an offer looking to a unilateral contract. (1) The traditional rule is that the offer can be revoked at any time until the moment of complete performance. (2) A bilateral contract is formed upon the beginning of performance. (3) The prevailing view is that once the offeree starts to perform, the offer becomes irrevocable. (An irrevocable offer is synonymous with an option contract). This rule requires the actual beginning or tender of performance and not merely preparation. Extensive preparation for performance might, however, trigger a finding of promissory estoppel.

6. Death or Destruction

Death or destruction of a person or thing essential for the performance of the offered contract terminates the offer.

7. Supervening Illegality

If, between the making of the offer and the acceptance, a change of law or regulations renders the proposed contract illegal, the offer is terminated.

8. Rejection or Counter–Offer

a. Common Law

An offeree's power of acceptance is terminated by a rejection or a counter-offer unless the offeror or the offeree manifests a contrary intention.

b. Nature of a Rejection or Counter–Offer

A rejection is a statement by the offeree that he or she does not wish to accept the offer. A rejection is effective when it is received. A counter-offer is a response to the offer that adds qualifications or conditions. A counter-offer acts as a rejection even if the qualification or condition relates to a trivial matter (ribbon matching, or mirror-image, rule). A counter-offer, in turn, can be accepted.

c. Counter–Offer Distinguished From Other Communications

A counter-offer must be distinguished from a counter-inquiry, a comment upon the terms, a request for a modification of the offer, an acceptance coupled with a request for a modification of the contract, a grumbling assent that falls short of dissent, an acceptance plus a separate offer, and a future acceptance. If an acceptance contains a term that is not expressly stated in the offer but is implied therein there is an acceptance and not a counter-offer.

d. UCC § 2–207

This section is designed to negate the mirror image rule in cases involving the sale of goods. Under the UCC a definite and seasonable expression of acceptance . . . operates as an acceptance even though it states terms additional to or different from those offered, . . . unless acceptance is expressly made conditional on assent to the additional or different terms. Despite the apparent simplicity of this section, it has created quicksand-like divisions of authority.

e. Additional Terms

If there is an effective acceptance under UCC § 2–207(1), under UCC § 2–207(2) additional terms in the acceptance are treated as proposals for addition to the contract. If the parties are both merchants, the additional

terms become part of the contract unless (1) the offer expressly limits acceptance to the terms of the offer; (2) the additional terms would materially alter the contract; or (3) the offeror notifies the offeree in advance or within a reasonable time that he or she objects to the additional terms. If the either party is a non-merchant, the additional terms are discarded.

f. Different Terms

The UCC does not state a specific rule for different terms so it is difficult to know how they should be treated. A different term is one that clashes with a term of the offer. The emerging trend is to hold that different terms knock each other out.

g. Conduct of Parties

Even though a contract is not formed by the communications of the parties, a contract may arise by the conduct of the parties under subsection 3 of UCC § 2–207. In such a case, the terms of the contract are those upon which the parties agree plus terms incorporated under other UCC provisions.

E. IRREVOCABLE OFFERS—OPTION CONTRACTS

1. What Makes an Offer Irrevocable?

An offer can be made irrevocable (1) by consideration; (2) by statute; (3) under one of the special rules relating to the revocation of a unilateral contract (see above); (4) under the doctrine of promissory estoppel (see below); and (5) by virtue of a sealed instrument.

2. Statute

Article 2 of the CC empowers an offeror to create an irrevocable offer without consideration. The requisites are: (1) a signed writing; (2) language assuring that the offer will be held open; (3) the offeror must be a merchant; (4) the period of irrevocability may not exceed three months; and (5) if the language of irrevocability appears on the offeree's form it must be separately signed by the offeror.

3. Terms Are Synonymous

For the most part, the terms irrevocable offer and option contract are synonymous. An option contract is an offer that is also binds the offer to a contract that the offer cannot be revoked.

4. Termination of Irrevocable Offers

Irrevocable offers *are* terminated by: (1) lapse of time; (2) death or destruction of a person or thing essential for the performance of the offered contract; or (3) supervening legal prohibition. They are *not* terminated by: (1) revocation, (2) death or supervening incapacity of the offeror or the offeree, or (3) rejection.

5. When Is the Acceptance of an Irrevocable Offer Effective?

Contrary to the mailbox rule employed for acceptances of revocable offers, an acceptance of an irrevocable offer is effective when received.

F. UCC § 2–206

1. Introduction

This section de-emphasizes the common law distinction between a unilateral and a bilateral contract. It also has made changes in the mailbox rule, the rule that is referred to as the unilateral contract trick and the rules on the effect of part performance.

2. Distinction Between a Unilateral and Bilateral Contract

In classic contract law, except in unusual cases, the offer looked either to a unilateral or a bilateral contract. If the offer was unclear as to the manner in which it should be accepted, it was presumed that the offer invited a promise. UCC § 2–206 has substituted for this common-law presumption the notion that in the vast majority of cases the offeror is indifferent as to the manner of acceptance. This approach is illustrated in subsection (1)(b) which states: an order or other offer to buy goods for prompt or current shipment shall be construed as inviting acceptance by a prompt promise to ship or by prompt or current shipment of the goods. The offeror, however, still has to power to clearly insist upon a particular manner of acceptance.

3. The Mailbox Rule

The mailbox rule used to state that the acceptance of an offer to a bilateral contract (e.g., by a letter) is effective when it is put out of the possession of the offeree provided it is sent in an *authorized* manner. The UCC substitutes the words by any manner reasonable in the circumstances for the word authorized. The concept of reasonableness is intended to be more flexible

than the concept of an authorized means of transmission. This provision of the UCC has become general law, finding its way into the Restatement (Second) and the case law.

4. Beginning of Performance

Under UCC § 2–206, where the beginning of performance is a reasonable mode of acceptance, the offeree is bound when the offeree starts to perform, provided that the beginning of performance unambiguously expresses the offeree's intention to engage himself. Even though the offeree is bound, the offeror is not bound to perform unless notice of beginning performance is given within a reasonable time. If timely notice is not given, the offeror, even though not bound to perform, may waive the lack of notice and hold the offeree to the contract. The basic notion is that the offeror is not bound unless notified, but the offeree is bound on beginning performance.

5. Restatement (Second)

The Restatement (Second), follows the lead of UCC § 2–206 with some variations. Section 2–206 relates only to contracts for the sale of goods. The Restatement (Second) relates to all types of contracts.

G. INDEFINITENESS

1. Common Law

a. Introduction

Even though the parties have gone through a process of offer and acceptance so that there is mutual assent, the agreement is void if the content of their agreement is unduly uncertain.

b. Rule

The offer must be so definite as to its *material* terms or require such definite terms in the acceptance that the promises and the performances to be rendered by each party are *reasonably* certain.

c. What Are Material Terms?

Material terms include subject matter, price, payment terms, quantity, quality, duration, and the work to be done. Given the infinite variety of

contracts, it is obvious that no precise definition can be stated. Indefiniteness as to an immaterial term is not fatal.

d. Reasonable Certainty

To be reasonably certain, a term need not be set forth with optimal specificity. It is enough that the agreement is sufficiently explicit so that the court can perceive the parties' respective obligations. What is reasonably certain depends on subject matter, the purposes and relationship of the parties, and the circumstances under which the agreement was made.

e. Types of Indefiniteness Problems

(1) Where the parties have purported to agree upon a material term but have left it indefinite (not reasonably certain) there is no room for implication and the agreement is void.

(2) Where the parties are *silent* as to a material term or discuss it but do not purport to agree upon it, it is possible that the indefiniteness can be cured through the use of a gap-filler or from external sources including standard terms, usage, course of dealing and, according to some cases, by evidence of subjective intention. A gap-filler is a term supplied by the court because it thinks that the parties would have agreed upon this term if it had been brought to their attention, or because it is a term which comports with community standards of fairness.

(3) Where the parties *agree to agree* as to a material term, under the traditional rule, the agreement is fatally indefinite and the gap-filling mechanism, discussed above, may not be used. Some of the more modern cases (even without relying on the UCC and the Restatement (Second), discussed below), have abandoned this rule and some have held that there is a duty to negotiate in good faith even though there is no such provision in the agreement. The UCC and the Restatement (Second) are generally in accord with the modern view on questions of agreement to agree.

(4) Indefiniteness may be cured by the subsequent conduct or agreement of the parties.

2. Uniform Commercial Code

a. Introduction

The provisions of the Uniform Commercial Code relating to indefiniteness are of two types. There is a very important general provision and there are provisions relating to specific problems which can be generally categorized under the heading of gap-fillers.

b. Specific Gap–Fillers

The Code has specific provisions that supply reasonable terms in various circumstances. These include price, time for delivery, place of delivery, shipment, payment, duration of contract, and specification of assortment.

c. General Provision

Even if one or more terms are left open, a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy. (UCC § 2–204(3)). The test is not certainty as to what the parties were to do nor as to the exact amount of damages due to the plaintiff. Rather, commercial standards on the issue of indefiniteness are to be applied.

d. Discussion of General Provision

This provision is designed to prevent, where it is at all possible, a contracting party who is dissatisfied with the bargain from taking refuge in the doctrine of indefiniteness to wriggle out of a contract. This section is designed to change the traditional common law approaches. Thus, a gap-filler would be available even though the parties purported to agree upon a term or made an agreement to agree with respect to it. But the section goes beyond gap-fillers and permits a court to use any reasonably certain basis for giving an appropriate remedy.

e. Questions of Fact and Law

Whether the parties intended to contract is a question of fact. Whether there is a reasonably certain basis for giving an appropriate remedy is a question of law.

3. Restatement (Second)

a. Compared to UCC

The Restatement is in general accord with the Uniform Commercial Code, but Article 2 of the UCC applies only to a contract for the sale of

goods. (Sometimes it is applied to other types of contracts by analogy.) The Restatement (Second) applies to all types of contracts.

b. Trend

The trend is toward the rules of the UCC and the Restatement (Second).

■ II. CONSIDERATION AND ITS EQUIVALENTS

A. INTRODUCTION

1. What Promises Should Be Enforced

Gratuitous promises—promises not supported by consideration—are not enforced, but such promises may be enforced under the doctrine of promissory estoppel or under certain statutes. In addition, in certain instances a moral obligation may make a promise enforceable. A delivered sealed instrument is enforceable without consideration but this rule has been changed in most states by statutes including the UCC.

B. CONSIDERATION

1. In General

For a promise to be supported by consideration (and therefore be enforceable), two elements must concur. (a) The promisee must suffer legal detriment—that is do or promise to do what the promisee is not legally obligated to do, or refrain from doing or promise to refrain from doing what the promisee is legally privileged to do. (b) The detriment must be bargained for.

2. Legal Benefit to Promisor

The rule above is stated in terms of legal detriment incurred by the promisee. Often, however, it is phrased in terms of either legal detriment to the promisee or legal benefit to the promisor. Because the result is invariably the same, the discussion here will be in terms of legal detriment.

3. Must Detriment Be Suffered by Promisee?

Although the rule is stated in terms of a legal detriment suffered by the promisee, it is nonetheless well settled that it does not matter from whom or to whom the detriment moves so long as it is bargained for and given in exchange for the promise.

4. Detriment Must Induce Promise

The promisor must have manifested an offering state of mind rather than a gift making state of mind. If the promisor manifests a gift making state of mind, any detriment has not induced the promise. Therefore, a promise to make a gift is not enforceable. Note that the promisor need only exchange the promise in part for the detriment to be suffered.

5. Past Consideration

Past consideration is not consideration because one does not make an exchange for something that has already occurred.

6. Motive

A promisor's motive in making a promise is not related to the question of detriment, but the motive of the promisor in making the promise is relevant on the issue of exchange.

7. Adequacy of Detriment

Any detriment no matter how small or how economically inadequate will support a promise provided that the detriment is in fact bargained for. But economic inadequacy may constitute some circumstantial evidence of fraud, duress, overreaching, undue influence, mistake or that the detriment was not in fact bargained for. Adequacy of the detriment may also be considered under the doctrine of unconscionability.

8. Sham Consideration

Where an instrument falsely recites that a consideration has been given, the consideration is *sham*. The majority view is that such a recital does not make a promise enforceable. There is a contrary view that relates only to option contracts and credit guaranties.

9. Nominal (Token) Consideration

Where the parties actually exchange or promise to exchange a peppercorn or small sum for the promise because they have learned that a gratuitous

problem is not enforceable, the issue is whether *nominal* or *token* consideration will bind the promise. They have attempted to make the promise enforceable by cloaking a gratuitous promise with the form of a bargain. One view is that the promise should not be enforced because the alleged bargain is a pretense. There is also a contrary view. The overwhelming majority of the cases involve option contracts in which the use of nominal (token) consideration has generally been upheld. Where the promise is basically a promise to make a gift, it is unlikely to be upheld.

10. Invalid Claims

There are a number of views on the issue of whether the surrender of or forbearance to assert an invalid claim is detriment. (1) The earliest and now obsolete view is that the surrender of an invalid claim does not constitute detriment. (2) The surrender of the invalid claim serves as detriment if the claimant has asserted it in good faith and a reasonable person would believe that the claim was well founded. (3) Still other courts have held that the only requirement is good faith. (4) The new Restatement takes the position that either good faith or objective uncertainty as to the validity of the claim is sufficient. *Caveat*: This discussion only considers whether the surrender of an invalid claim constitutes detriment. If it does, one must still confront the question of whether this is what is bargained for. For example, in a particular case is the promisor bargaining for the surrender of an invalid claim or the surrender of a worthless piece of paper? This presents a factual question.

C. THE PRE–EXISTING DUTY RULE

1. Pre–Existing Duty and Promises

A party who does or promises to do only what the party is legally obligated to do is not suffering a legal detriment because the party is not surrendering a legal right. The problem arises in three types of fact patterns. First, the rule applies even if the duty is imposed by law rather than by contract. Second, where the parties to a contract modify an existing agreement and one party does not suffer new detriment, usually the modification is not enforced, but there are cases that, on a wide variety of theories, have enforced such a modification. For example, The Restatement (Second) upholds such a modification if it is fair and equitable in view of circumstances not anticipated when the contract is made. Third, where an outsider promises to compensate a party bound by a contract to perform a pre-existing duty under a contract,

there are two views. (a) The promise is not enforceable; (b) the promise is enforceable because there is less likelihood of coercion in the three party cases.

2. Pre–Existing Duty and Accord and Satisfaction—Foakes v. Beer

The rule of Foakes v. Beer is that part payment by the debtor of an amount here and now undisputedly due is not detriment to support a promise by the creditor to discharge the entire amount. The rule of Foakes v. Beer is another application of the pre-existing duty rule; the debtor, in making the part payment, is only performing part of a legal obligation. This rule is followed by the majority of jurisdictions with some exceptions in particular fact patterns. A minority of jurisdictions have rejected the rule completely. The rule does not apply if there is a detriment, in addition to the part payment, that is in fact bargained for.

a. Liquidated and Unliquidated Claims

The rule of Foakes v. Beer applies only to liquidated claims; that is, claims that are undisputed as to their existence and where the amount due has been agreed upon or can be precisely determined. If there is a dispute as to liability or to the amount due or some other question, the claim is unliquidated even if a party's assertion is incorrect, provided that the assertion is made in good faith and, according to some jurisdictions, if it is reasonably asserted (see Invalid Claims, supra).

b. Analyzing an Accord and Satisfaction

When a question of accord and satisfaction is presented, the analysis should be divided into three parts. (1) Have the parties gone through a process of offer and acceptance? The rule relating to an offer of accord is that the offeror must make it clear that the offeror seeks a total discharge, otherwise any payment made and accepted will be treated as a part payment. (2) Has the accord been carried out? (3) Is there consideration to support the accord and satisfaction?

3. UCC Inroads on Pre–Existing Duty Rule

a. UCC § 2–209(1)

Under subsection 1, a modification of a contract is binding without consideration even if it is oral, but in two instances a writing is required.

A writing is required under subsection 3 if the contract as modified is within the Statute of Frauds provision of the UCC (discussed below). The second situation where a writing is required is under subsection 2.

b. UCC § 2–209(2)

At common law, if a contract provides that it cannot be modified or rescinded except in writing, an oral modification is nonetheless binding. Under this subsection such a provision will be honored. A modification (or rescission) will be enforced (except as stated below) only if the modifying agreement is in a signed writing. If the form containing the provision is prepared by a merchant, a non-merchant will be bound by it only if this provision is separately signed.

c. UCC § 2–209(4) & (5)

If a signed writing is required under the provisions of subsections 2 and 3, and the modifying agreement is not in a signed writing, it may nevertheless be enforced if there has been performance under the modifying agreement. Subsection 5 provides that, despite performance, a party as to the unperformed part may reinstate the original agreement unless to do so would be unjust in view of a material change of position as a result of reliance upon the modification.

d. Bad Faith and Duress

UCC § 2–209 also changes the common law rule with respect to duress. The traditional common law rule is that a threat to breach a contract does not constitute duress (see below). But under this provision of the UCC the extortion of a modification without a legitimate commercial reason is ineffective as a violation of the good faith provisions of the Code. Conversely, a modification based upon a legitimate commercial reason does not constitute duress unless undue coercion is applied. Nor, under this provision, can a mere technical consideration support a modification extracted in bad faith.

e. Release (UCC § 1–107)

The pre-existing duty concept, together with the weakening of the power of the sealed instrument, led to the rule that a release of a duty is ordinarily ineffectual without consideration. Section 1–107 of the UCC provides, however, that any claim of right arising out of an alleged

breach can be discharged in whole or in part by a written waiver or renunciation signed and delivered by the aggrieved party. Under this section, a written signed and delivered release will be effective to discharge an alleged breach in whole or in part even though the release is not supported by consideration. Section 1–306 of the revision is in accord, but does not require delivery.

D. SPECIAL PROBLEMS IN BILATERAL CONTRACTS

1. Is One Promise Consideration for the Other?

A promise in a bilateral contract is consideration for the counter-promise only if the performance that is promised would be consideration.

2. Mutuality of Obligation

a. Introduction

The doctrine of mutuality of obligation is commonly, but inaccurately, expressed in the phrase that in a bilateral contract both parties must be bound or neither is bound. The doctrine is, however, really one of mutuality of consideration. The point is that if B's promise is not consideration B may not enforce A's promise. Conversely A may not enforce B's promise even though A's promised performance is consideration.

b. Unilateral Contracts

The doctrine of mutuality does not apply to unilateral contracts.

c. Voidable and Unenforceable Promises

The doctrine of mutuality does not apply to a voidable or unenforceable promise because a voidable or unenforceable promise is consideration for a counter-promise.

d. Illusory Promises

An illusory promise is an expression cloaked in promissory terms but which, upon closer examination, reveals that the promisor has made no commitment. The modern decisional tendency is against finding a

promise to be illusory and in general against defeating agreements on the technical ground of lack of mutuality. One method of circumventing the illusory promise problem is by interpolating into an agreement that otherwise seems illusory the requirement of good faith and/or reasonableness.

e. Right to Terminate in Contract

If a party reserves the right to terminate the arrangement by giving notice at any time or without giving notice at all, the older cases held that the party was not suffering detriment. The later cases lean to the view that there is detriment in giving notice. When the provision is for termination without notice, these cases ignore the provision by a process of interpretation and require reasonable notice. UCC § 2–309(3) has a provision that bears on this problem. It states, "Termination of a contract by one party except on the happening of an agreed event requires that reasonable notification be received by the other party and an agreement dispensing with notification is invalid if its operation would be unconscionable."

f. Conditional Promises

If a condition is attached to a promise, it does not render a promise illusory if the condition is outside the control of the party who makes it, or if it relates to an event that is outside of the promisor's unfettered discretion. At times an illusory promise problem is avoided by treating the express language of condition as carrying with it an implied promise to use reasonable efforts to bring about the happening of the condition.

g. Aleatory Promises

A promise is aleatory if it is conditional on the happening of a fortuitous event, or an event supposed by the parties to be fortuitous. An aleatory promise is not illusory, because the condition is based upon an event outside of the control of either party.

h. Consideration Supplied by Implied Promise

At times, a party has made what amounts to an illusory promise, but the entire fact pattern shows that a commercially serious transaction is contemplated. In such a case a court may infer a promise (e.g. to use reasonable efforts) to eliminate the illusory promise problem. Some-

times, the promise inferred is called an implied promise. At other times, it is referred to as a constructive promise. Whichever label is attached the result is the same.

i. UCC § 2–306(2)

This section provides: a lawful agreement by either the seller or the buyer for exclusive dealing in the kind of goods concerned imposes unless otherwise agreed an obligation by the seller to use best efforts to supply the goods and by the buyer to promote their sale. While this section is about more than consideration, it imposes the kind of obligation that courts have sometimes inferred. See h above.

j. Agreement Allowing Party to Supply Material Term

If a bilateral agreement permits a party to supply a material term, the promise at common law sometimes was deemed to be illusory and, therefore, the bilateral agreement void under the mutuality doctrine. The UCC, with its insistence on good faith, changes the common law rule relating to the right of a party to supply a term.

k. Void Contract Is Not Always a Nullity

Although a wholly executory void contract is a nullity, if there is performance under a void bilateral contract, the case should be treated as if an offer looking to a unilateral contract or a series of unilateral contracts was made. If this cannot be done, a quasi-contractual action for reasonable value may be available.

E. REQUIREMENTS AND OUTPUT CONTRACTS

1. Introduction

The quantity term may be measured by the requirements of the buyer (requirements contract), or by the output of the seller (output contract). Since the rules are basically the same in the two situations, as a matter of convenience, emphasis will be on the topic of requirements contracts.

2. Validity

Under the UCC it is clear that these contracts are binding.

3. How Much Is a Requirements Buyer Entitled to?

Under the UCC the buyer under a requirements contract is entitled to good faith needs with two exceptions. (1) If there is a stated estimate, the buyer is not entitled to any quantity disproportionately greater than the estimate. (2) If there is no estimate or maximum or minimum stated in the contract, the buyer may demand only any normal or otherwise comparable prior requirements.

4. May a Requirements Buyer Diminish or Terminate Requirements?

Under the UCC, the buyer may go out of business or change methods of doing business in good faith. This is so even if the reductions are highly disproportionate to normal prior requirements or stated estimates.

F. MUST ALL OF THE CONSIDERATION BE VALID?

1. Rule

The general rule is that all of the purported considerations need not be valid.

2. Conjunctive Promises

The rule stated above applies to conjunctive promises, e.g., a debtor promises to pay a past due debt and to perform additional services. The debtor's promise provides consideration for a counter-promise.

G. ALTERNATIVE PROMISES

1. Where the Choice of Alternatives Is in the Promisor

In this case, each alternative must be detrimental unless, according to the Restatement (Second), there is a substantial possibility that events may eliminate the alternative that is not detrimental before the promisor exercises a choice.

2. Where the Choice of Alternatives Is in the Promisee

If the choice of alternatives is in the promisee, the alternative promises supply consideration for a counter-promise if any of the alternative promises is detrimental.

H. MORAL OBLIGATION

1. Introduction

Where a promisor makes a promise because of an antecedent moral or legal obligation, it is clear that the promise is not enforceable under the doctrine of consideration because of the rule that past consideration is not consideration.

2. Rule

In most instances, a promise made in recognition of a prior moral or legal obligation is not enforceable.

3. Major Exceptions

a. Promise To Pay Fixed Amount for Services Previously Requested Where No Price Fixed

If services were rendered with the expectation on both sides that they would be paid for, and the parties agree on a fixed price, there is consideration for the new agreement. Beyond that most courts enforce a promise by a party to pay a fixed amount even though it is not accepted by the other party. Under a minority view, the promise is enforced only to the extent that it is not greatly disproportionate to the value of the services.

b. Promise To Pay When Services Not Requested

Under the majority view, a promise to pay for services not requested is not enforceable. The Restatement (Second), however, states that the promise is enforceable to the extent necessary to prevent injustice if the promisee has conferred a material benefit on the promisor.

c. Promises to Pay Debts Discharged by the Statute of Limitations

A promise to pay all or part of any antecedent contractual or quasi-contractual obligation for the payment of money causes the statute of limitations to run anew. An acknowledgment is ordinarily deemed the equivalent of a promise, as is a voluntary part payment of principal or interest. In most states, the promise or the acknowledgment must be in writing. The action is limited by the terms of the new promise.

d. Promises to Perform a Voidable Duty

A promise to perform a voidable duty is enforceable despite the absence of consideration, as long as the new promise does not suffer from an infirmity that would in turn make it voidable. This rule does not generally apply to void contracts.

I. PROMISSORY ESTOPPEL

1. Introduction

The doctrine of promissory estoppel was created as a separate and specific doctrine in the Twentieth Century. Prior to that, the doctrine was employed, although not so labeled, in a limited number of cases. These included (1) family promises; (2) a promise to make a gift of land; (3) gratuitous agencies and bailments; (4) charitable subscriptions; and (5) marriage settlements. There were specific rules for each category.

2. Restatement, First

Under the formulation of the First Restatement, the elements required for the doctrine to operate are: (1) A promise is required. (2) The promise must be one which the promisor should reasonably anticipate will lead the promisee to act or forbear. The same thought could be expressed by saying that the promisee must justifiably rely on the promise. (3) The reliance must be of a substantial character. (4) The promise will be enforced only if injustice can be avoided by the enforcement of the promise. (5) Although not stated, the notion is that the promise will be enforced as made or not at all.

3. Restatement (Second)

The Restatement (Second) has made four important changes in the formulation of the doctrine. (1) In the text it has eliminated the requirement that the reliance be definite and substantial. However, a comment indicates that these are still factors to be considered except as indicated below. (2) It added a new sentence permitting flexibility of remedy. Thus the promise need not be enforced as made but may be enforced to the extent of reasonable reliance. (3) It provides for the contingency of reliance by a third party. (4) It contains a provision that a charitable subscription or a marriage settlement is binding without proof that the promise induced action or forbearance.

4. Present Approach to Gift Promises

Although initially the courts for the most part used promissory estoppel as a substitute for consideration in the types of cases mentioned in the introduc-

tion, with the impetus given to the doctrine by the two Restatements, it is fair to say that the present tendency is to use promissory estoppel in just about any case where the necessary elements are present.

5. Doctrine Has Been Used in Business Context

The doctrine has been used in some cases: (1) to make an offer irrevocable; (2) to enforce a promise that is part of an otherwise unenforceable defective contract; and (3) to enforce a promise made during the course of preliminary negotiations.

■ III. LEGAL CAPACITY

A. INFANTS

1. Who Is an Infant?

A person remains an infant until the first moment of the day preceding his or her 18th birthday and remains an infant despite emancipation and despite marriage.

2. Is Infant's Promise Void or Voidable?

A contract made by an infant is voidable at the option of the infant. However, the infant may not disaffirm certain contracts because public policy or a statute so provides or because the infant has done something or promised to do something which the law would compel even in the absence of contract (e.g. support his out-of-wedlock child).

3. Tort Liability

An infant may avoid a contract, but is liable for torts. At times, it is difficult to distinguish tort liability from contractual liability, such as in the area of fraud and warranty.

4. Avoidance and Ratification

a. Avoidance

The infant may avoid (disaffirm) the contract at any time prior to ratification. The avoidance may be made during the period of infancy

and once made is irrevocable. In the case of real property, however, the majority rule is that the infant's promise may be avoided only after majority.

b. Ratification

The infant may ratify (affirm) the contract after reaching majority. This may take place in three ways: (a) express ratification, (b) conduct manifesting an intent to ratify (retention and enjoyment of benefits and services), and (c) failure to disaffirm within a reasonable time after majority.

c. Ignorance of Law and Fact

A ratification is ineffective if the former infant is unaware of the facts upon which the ratification depends. There is a split of authority as to whether the infant must know that the law gives a power of avoidance.

5. Effect of Misrepresentation of Age

According to the majority view, infants may disaffirm even if they misrepresented their ages. The authorities are about evenly split on the question of whether infants are liable in tort for misrepresenting their ages.

6. Infants and Subsequent Purchasers for Value

If a minor disaffirms a conveyance of real property, the land may be reclaimed from a subsequent good faith purchaser for value without notice. The rule is different in the case of a sale of goods and a sale of securities.

7. Restitution After Disaffirmance

a. Infant as Defendant

Upon disaffirmance, the infant is liable for the return (or the value) of any tangible benefits the infant has received and still has.

b. Infant as Plaintiff

If upon disaffirmance an infant sues for the return of the consideration the infant has supplied, under the now prevailing view the infant's recovery is offset by the value of use and depreciation of any property

obtained from defendant. The more traditional view is that only property the infant still has need be returned.

c. Necessaries
An infant is liable in quasi-contract for the reasonable value of necessaries the infant has received.

B. MENTAL INCOMPETENTS

1. Tests of Mental Incompetency
Where there is no prior adjudication of incompetence, the great majority of the cases utilize the test of whether the party was able to understand the nature, purpose, and consequences of the act at the time of the transaction. The more modern view adopts *in addition* the test of whether by reason of mental illness or defect a person is unable to act in a reasonable manner in relation to the transaction, and the other party has reason to know of this condition. Under either test, the promise of the incompetent is voidable. If, however, the party had been adjudicated as incompetent prior to the transaction and a guardian had been appointed, the transaction is void.

2. Restrictions on Power of Avoidance
The promise of an unadjudicated incompetent that is still executory is voidable; but executed transactions are not voidable (contrary to infancy cases) unless the incompetent can restore the other party to the status quo ante. If the incompetence was obvious, however, the incompetent must make restitution only to the extent that tangible benefits remain.

3. Necessaries
As in the case of infants, incompetents are liable for the reasonable value of necessaries furnished them.

■ IV. PROPER FORM, WRITING, AND INTERPRETATION

A. PAROL EVIDENCE RULE

1. Rule
A total integration (a writing that the parties intend to be final and complete) cannot be contradicted or supplemented. A partial integration (a writing that

the parties intend to be final but not complete) cannot be contradicted but may be supplemented by consistent additional terms.

2. Focus of Rule

If applicable, the rule excludes prior written or oral agreements entered into by the parties and contemporaneous oral agreements, but contemporaneous writings are normally held to be part of the integration.

3. How to Determine Finality

Any relevant evidence is admissible on the question of finality. There are not many disputes about finality. The basic question is did both parties assent to the written terms.

4. How to Determine Completeness

There are many disputes about completeness and a wide variety of views as to how completeness should be determined. These include: (1) The Four Corner's Rule; (2) The Collateral Contract Concept; (3) Williston's Rules; (4) Corbin's View; (5) The UCC (§ 2–202) Approach; and (6) That of the Restatement (Second).

5. Subsequent Agreement

The parol evidence rule never excludes subsequent agreements.

6. Rule of Substantive Law or Procedure?

The rule has both a procedural and a substantive aspect. It is procedural because it excludes evidence; it is substantive because it determines the terms of the contract.

7. Is the Offered Term Contradictory or Consistent?

Under the modern view, to be contradictory the offered term must contradict an express term of the integration. It is not enough that it may contradict an implied or inferred term.

8. Undercutting the Integration

The parol evidence rule is not applicable unless there is a contract. Thus, the rule permits evidence offered to show that the agreement is void or voidable.

For example, a party may show sham, illegality, mistake, duress, or the existence of a condition precedent to the formation of the contract.

B. INTERPRETATION

1. What Is Interpretation?

Interpretation is the ascertainment of the meaning of a communication or a document. In interpreting, there are two fundamental questions: (1) Whose meaning is to be given to the communication—in technical language, what standard of interpretation is to be used? (2) What evidence may be taken into account?

2. Variety of Views

As in the case of the parol evidence rule there are a wide variety of views on these two questions. These include (1) The Plain Meaning Rule; (2) Williston's Rules; (3) Corbin's View; (4) The UCC Rule.

3. Rules of Construction

A rule of construction is an aid in interpreting contracts. For example, specific terms are given greater weight than general terms.

4. Course of Dealing

A course of dealing is based upon a sequence of *previous* conduct between the parties.

Under the UCC, this as well as the evidence discussed in 5 and 6 below may always be shown unless negated by the contract.

5. Course of Performance

A course of performance relates to conduct after the agreement in the performance of the agreement.

6. Usage of Trade

A usage of the trade is any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question.

7. Relationship Between Parol Evidence Rule and Interpretation
Again there are various views. For example, Corbin takes the position that the parol evidence rule does not apply to a question of interpretation. Williston, however, in general, follows the notion that an integrated writing may not be contradicted under the guise of interpretation.

C. STATUTE OF FRAUDS

Major Classes of Cases Covered by Writing Requirements. These include: (1) a promise to answer for the debt, default or miscarriage of another; (2) a contract to transfer an interest in real property or an actual transfer of real property; (3) a promise which by its terms is not to be performed within one year from the making thereof; (4) a promise in consideration of marriage; and (5) contracts for the sale of goods (UCC).

1. Suretyship Agreements

a. Where There Is No Prior Obligation Owing From the Third Party (TP) to the Creditor (C) to Which D's Promise Relates

Here, D stands for Defendant—the party who has allegedly made a promise for to answer for the liability of another, here, TP. The promise of D is original (not within this subsection of the Statute so that it is not a defense) unless (1) there is a principal-surety relationship between TP and D and C knows that; (2) the promise is *not* joint; and (3) the main purpose rule does *not* apply. If all of these elements are present, D's promise is collateral (the Statute of Frauds is a defense).

b. Cases Where There Is a Prior Obligation Owing From TP to C to Which D's Promise Relates

Here, the promise is collateral (the Statute is a defense). Exceptions: (1) where there is a novation; (2) where D's promise is made to TP; (3) where the main purpose rule applies.

(1) Main Purpose Rule
Where the promisor (D) has for an object a benefit which D did not enjoy before the promise, which benefit accrues immediately to D, D's promise is original (enforceable) whether or not TP was obligated at the time of the promise, and even though the effect of the promise is to answer for the debt, default or miscarriage of another.

(2) Promise of Del Credere Agent
An oral promise of a del credere agent is enforceable (original). D is a del credere agent if D receives possession of C's goods for sale upon commission and guarantees to C that those to whom sales are made (TP) will perform.

(3) Promise of Assignor
The oral promise of an assignor to the assignee guaranteeing performance by the obligor is original (enforceable).

(4) Promise to Buy a Claim
If TP owes C $100 and C assigns this right to payment to D and D promises to pay a price for the assignment, D's promise is enforceable because D's promise is a promise to buy a claim and not a promise to answer for the debt, default or miscarriage of another.

(5) Promise by Executor or Administrator
The Statute applies only where the executor or administrator promises to pay out of *his or her own* pocket a debt of the deceased. Thus, this provision is merely a particular application of the Suretyship Statute of Frauds.

2. Real Property

a. In General
A conveyance of land or of an estate in land, or a promise to transfer an interest in land, or a promise to pay for an interest in land are all required to be evidenced by a writing.

b. Interest in Land
This includes the creation, transfer or assignment of a lease (except for a lease of short duration). It also includes an easement, rent and, according to the majority rule, a restriction on land. Also covered are equitable interests in lands such as an assignment of a right to purchase land. An option to buy realty is also included. But the Statute does not apply to an interest in land that arises by operation of law.

c. Liens
A promise to give a mortgage or other lien as security is within the Statute. However, an assignment of a mortgage is not within the Statute;

it is connected to the debt it secures. The debt (a chose-in-action) is regarded as the core of the rights transferred.

d. Products of the Soil—Timber—Unborn Animals

Products of the soil such as timber and annual crops obtained through labor or borne on perennial trunks (e.g. apples) are not interests in land. These products as well as unborn animals are goods.

e. Other Things Attached to Land

A contract for the sale of minerals or a building attached to land is the sale of an interest in land if they are to be severed by the buyer but not if they are to be severed by the seller.

f. Contracts Indirectly Relating to Land

Contracts that indirectly relate to land are not within this section of the Statute. For example, a contract to build a building is not within this section of the Statute of Frauds.

g. Performance

If the *vendor* of the property conveys to the vendee, an oral promise by the vendee to pay is enforceable. Payment by the *vendee* does not make the promise of the vendor enforceable unless there is other conduct that is unequivocally referable to the agreement, for example, taking possession of the land and making improvements.

3. Contracts Not Performable Within a Year

a. In General

The Statute applies only to a promise which *by its terms* does not admit of *performance* within one year from the *making* thereof. If, by its terms, performance is possible within one year, however unlikely or improbable that may be, the promise is not within this section of the Statute of Frauds.

b. Promises of Uncertain Duration

Promises of uncertain duration are not within the one year provision.

c. Contracts for Alternative Performances

Where a contracting party promises one of two or more alternative performances, the promises as a unit are not within the one-year section if any of the alternatives can be performed within one year from the time of the making thereof. It does not matter which party has the right to name the alternative.

d. Agreement With Option to Terminate

If a contract calls for a performance of more than a year, but one or both of the parties has an option to terminate within a year, the majority view is that the Statute applies because termination is not performance. The minority view is contrary on the theory that alternative promises exist: (a) performance for more than one year or (b) performance within a year. The same two views exist in the case of a contract for less than a year where one or both parties have an option to extend or renew it beyond a year.

e. Effect of Performance Under One–Year Section

Under the majority view, full performance by one party makes the promise of the other party enforceable. A minority of jurisdictions restrict the performing party to a quasi-contractual remedy. Part performance does not generally permit a party to enforce the contract.

f. Measuring the Year

If A contracts to work for B for one year, the work to begin more than one day after making the agreement, the contract is within the one-year section. If the work is to begin the very next day, however, the contract is not within the Statute on the theory that the law disregards fractions of a day.

g. Restatement of Contract at Beginning of Performance

A subsequent restatement of the terms of the contract starts the one year period running again if the manifestation of mutual assent would be sufficient in the absence of prior agreement.

h. Unilateral Contracts

There is substantial authority that unilateral contracts do not fall within this subsection of the Statute of Frauds because full performance by one

party in any event takes the case out of the one year provision of the Statute of Frauds. In jurisdictions where this is not true, it must be noted that a contract does not arise until there has been performance. Therefore the year should be measured from that time.

i. Scope of One–Year Section

The one-year section applies to all contracts no matter what the subject matter except for a short term lease and the sale of goods. However, it does not prevent specific performance of a land contract under the rules governing specific performance set forth below.

j. Is a Promise or a Contract Within the One–Year Section?

Where any of the promises on either side of a bilateral contract (except for alternative promises) cannot be performed within a year from the formation of the contract, the entire contract is within the Statute. This means that none of the promises in the contract may be enforced in the absence of a sufficient memorandum, or performance, or the application of the doctrine of estoppel (see below).

4. Contracts in Consideration of Marriage

a. Consideration of Marriage

The Statute applies to any agreement made in consideration of marriage except mutual promises to marry. It applies to marriage settlements and prenuptial agreements even if the promise is made by a third party.

b. Not in Consideration of Marriage

If the promise is made in contemplation, but not in consideration, of marriage, this subsection of the Statute does not apply. The same is true if the marriage is merely an incident of the contract and not an end to be attained.

c. Performance

A marriage ceremony does not take the case out of the Statute of Frauds, but additional performance may be sufficient to make the contract enforceable.

5. Contracts for the Sale of Goods (UCC § 2–201)

a. Rule

A contract for the sale of goods for a price of $500 or more is within the Statute.

b. Exceptions

(1) A contract for the sale of goods to be manufactured is not within the Statute if [t]he goods are to be specially manufactured for the buyer and are not suitable for sale to others in the ordinary course of the seller's business and the seller, before notice of repudiation is received and under circumstances which reasonably indicate that the goods are for the buyer and the seller has made either a substantial beginning or commitments for their procurement. The seller need not be the manufacturer.

(2) A contract is enforceable if the party against whom enforcement is sought admits that a contract for sale was made, but the contract is not enforceable beyond the quantity of goods admitted.

(3) No writing is necessary as to items which have been received and accepted.

(4) The writing requirement is also eliminated with respect to goods for which payment has been made and accepted.

c. What Is Covered?

This section relates to a contract to sell or a sale of goods. It does not apply to choses in action.

6. Sufficiency of Memorandum

a. Introduction

If the contract is within the Statute, a sufficient writing is required. The writing need not be formal or integrated. A note or a memorandum is sufficient.

b. Contents of Writing

The writing should (1) indicate that a contract has been made or that the signer made an offer; (2) state with reasonable certainty (a) the identity of the contracting parties, (b) the subject matter, and (c) the essential terms in contrast to details or particulars; and (3) be signed by the party to be charged.

c. What Is a Signature?

A signature is any mark, written, stamped or engraved, which is placed with intent to assent to and adopt (authenticate) the writing as one's own.

d. Who Is the Party to Be Charged?
The party to be charged is the one against whom the claim is being made.

e. Agency
A memorandum is sufficient if it is signed by an authorized agent of the party to be charged. The authority of the agent need not be expressed in writing, except in many jurisdictions under the real property provision.

f. Oral Evidence Offered by Defendant to Defeat Claim
The party sued may show that the memorandum does not reflect the true agreement and thus defeat the claim except to the extent that the parol evidence rule excludes such evidence.

g. Oral Evidence Offered by Plaintiff
Evidence of an *essential* term orally agreed to is not admissible on behalf of the party seeking to contradict or supplement the writing and this is true whether or not the writing is an integration.

h. Interpretation
Oral evidence is admissible in aid of interpretation unless it is excluded under the rules of interpretation set forth above.

i. Consideration
If the plaintiff has fully performed, the plaintiff's consideration need not be stated in the writing. Any essential promise that is executory must be stated.

j. Form
The memorandum may be in any form.

k. Time
It may be made at any time.

l. Purpose
It need not be prepared with the purpose of satisfying the Statute except in the case of a contract in consideration of marriage.

m. Delivery
It need not be delivered.

n. More Than One Writing
If the essential terms are in two writings, and only one is signed by the party to be charged, the Statute is satisfied if the unsigned document is physically attached to the signed document at the time it is signed or if one of the documents by its terms expressly refers to the other, or if the documents by internal evidence refer to the same subject matter or transaction. Extrinsic evidence is admissible to help show the connection between the documents and the assent of the party to be charged.

7. Memorandum Provision of the UCC

a. Contents of Memorandum
Under the UCC, there are only three requirements: (1) the writing must evidence a contract for the sale of goods; (2) it must be signed by the party to be charged; and (3) it must specify a quantity.

b. Written Confirmation Between Merchants
If a merchant sends a signed memorandum to another merchant in confirmation of the agreement, and if the memorandum is sufficient against the sender, it is also sufficient against the receiver provided it is received and the party receiving it has reason to know of its contents, and fails to give notice of objection to its contents within 10 days after it is received.

c. Auction Sales
The auctioneer is authorized to sign a memorandum on behalf of both parties for a limited period of time after the sale.

8. Other Problems Under Statute of Frauds

a. Purpose of Statute
The statute is designed to prevent perjury and to promote deliberation and seriousness.

b. Effect of Noncompliance

Under the majority view, failure to comply with the statute renders the contract unenforceable. The minority view regards the contract as void. Under the majority rule, the oral promises are valid but they may not be sued upon at law.

c. Promissory Estoppel

Many recent cases allow recovery despite the Statute of Frauds when the plaintiff injuriously relied on an oral promise. The phrase that is often used is unconscionable injury.

d. Estoppel in Pais

If a party falsely represents that a memorandum of the contract has been signed and the other party injuriously relies on the representation, the party so representing will be estopped from relying upon the Statute of Frauds.

e. Effect of Some Promises Within and Others Outside Statute

The general rule, subject to limited exceptions, is that where one or more of the promises in a contract are within the Statute and others are not, no part of the contract is enforceable.

f. Rescission of Contract Within Statute

The parties may orally rescind a written executory contract within the Statute. They cannot orally rescind a transfer of property.

9. Modification of a Contract Within the Statute

a. If the new agreement is not within the Statute of Frauds, it is not only enforceable without a writing but also serves to discharge the prior agreement.

b. If the new agreement is within the Statute and is not evidenced by a sufficient writing, the former written contract remains enforceable unless the new agreement is enforced because of waiver or estoppel.

10. Relationship of Various Subsections

A promise may contravene one or more of the subsections of the Statute of Frauds and not the others. If it falls within even one subsection, a writing is

required unless the case is taken out of the Statute under the theory of performance or estoppel. For example, a contract for the sale of real property that by its terms cannot be performed within one year must satisfy both the one-year and real property provisions. However, the UCC Statute of Frauds stands alone. If the UCC is satisfied no other provision applies.

■ V. CONDITIONS, PERFORMANCE, AND BREACH

A. CONDITIONS DEFINED

A condition is an act or event, other than a lapse of time which, unless the condition is excused, must occur before a performance under a contract becomes due, or which discharges a duty of immediate performance.

1. Classifications of Conditions

Conditions are either precedent, concurrent, or subsequent to the time when the other party's duty of performance becomes absolute. Any of these conditions can be created by agreement (express and implied-in-fact conditions) or imposed by the court (constructive condition).

2. Conditions Versus Promises

Failure of a condition imposes no liability on any party. A breach of promise creates a duty to pay damages. Note, however, that the same act may be both a condition and a promised event. In other words, a party may have promised that the event would occur and have conditioned his or her rights on the occurrence of the event. If the event does not occur, there is both a breach of promise and a failure of condition.

B. CONDITIONS, SUBSTANTIAL PERFORMANCE, MATERIAL AND BREACH

1. Performance of Express and Constructive Conditions

Express conditions must be fully performed. Constructive conditions are satisfied by substantial performance. If a party has substantially performed, any breach is immaterial. A party who has materially breached cannot have rendered substantial performance.

2. Measuring the Materiality of Breach

The following factors help determine materiality: willfulness, the degree of harm, curability of the breach by a monetary allowance, hardship on the breaching party, and the type of transaction. The same and similar factors are used to determine the substantiality of the performance. There are times when a breach is immaterial but substantial performance has not been rendered, e.g., a delay in conveying land may be immaterial, but substantial performance has not been rendered.

3. Effect of Delay

A reasonable delay is not a material breach unless the contract expressly makes time of the essence, or the contract is for the sale of goods or the payment of a debt and there is a day or period certain for performance.

4. Effect of a Condition of Satisfaction

Where the contract expressly conditions performance upon the satisfaction or certification of a third person (e.g., an architect), the condition is treated as any other condition. If it is conditioned on the satisfaction of a contracting party, the same rule is applied if the performance is designed to gratify the taste or fancy of the party. However, if the performance is a matter of mechanical fitness, utility or marketability, the condition of satisfaction of a *party* is fulfilled if the performance is objectively satisfactory even if the party is not personally satisfied. In all cases, an expression of dissatisfaction must be made in good faith.

C. RECOVERY DESPITE MATERIAL BREACH

1. Divisibility

A contract is divisible if the performances of each party are divided into two or more parts and the performance of each part by one party is the agreed exchange for a corresponding part by the other party. If a divisible portion is substantially performed, recovery may be had for that portion despite a material breach of the overall contract.

2. Independent Promises

A promise is unconditional (independent) if it is unqualified or if nothing but a lapse of time is necessary to make the promise presently enforceable. The promisee may enforce an independent promise without rendering substantial performance.

3. Quasi–Contractual Recovery

Although the orthodox and still prevailing view is that a party who has materially breached may not recover from the other party in contract or quasi contract, the modern trend permits such recovery in quasi contract for benefits conferred in excess of damages caused by the breach.

4. Statutory Relief

A number of statutes permit recovery despite a material breach. Laborers, mechanics, and clerical workers must be paid their wages despite the non-fulfillment of agreed conditions. The UCC has a formula that permits a buyer in default to get partial restitution of a down payment.

D. EXCUSE OF CONDITIONS

1. Prevention

A condition is excused by prevention, hindrance, or failure to cooperate, provided the conduct is wrongful. When a condition is excused, recovery is permitted despite the non-occurrence of the condition.

2. Estoppel, Waiver, and Election

A waiver is often defined as an intentional relinquishment of a known right. It is important to know that this definition is nonsense. Conditions, not rights, can be waived. Waivers are often unintentional. Not all waivers, however defined, are effective.

a. Waiver Before Failure of Condition

(1) A waiver of a condition that constitutes a material part of an agreed exchange is ineffective in the absence of consideration, its equivalent, or an estoppel.

(2) A waiver of a condition that is not a material part of the agreed exchange is effective but it may be reinstated by notice prior to any material change of position by the other party.

(3) An effective waiver disables the party from canceling the contract but does not discharge the waiving party's right to damages.

b. Waiver After Failure of Condition

A waiver after an express or constructive condition has failed is an election. An election may take place by conduct or by promise. No

consideration is needed for an election and, according to the majority rule, an election once made cannot be withdrawn.

3. Excuse of Conditions Involving Forfeitures

A condition may be excused if it involves an extreme forfeiture, its occurrence is not a material part of the agreed exchange, and if one of the foundations for equitable jurisdiction exists.

4. Excuse of Condition Because of Impossibility

Impossibility excuses a condition, if the condition is not a material part of the agreed exchange and if a forfeiture would otherwise occur.

E. PROSPECTIVE UNWILLINGNESS AND INABILITY TO PERFORM: REPUDIATION

1. Repudiation

A repudiation is a material breach whether or not performance is due now or in the future. A party's unjustified statement positively indicating an inability or unwillingness to substantially perform is a repudiation. A voluntary act that renders one's own performance impossible or apparently impossible is another kind of repudiation.

2. Prospective Failure of Condition

If a party repudiates or appears unwilling or unable to perform, the other party may possibly (1) continue performance; (2) suspend or withhold performance; (3) change position or cancel the contract. Which of the responses is permissible depends upon the degree of the prospective failure of condition.

3. Retraction

A repudiation may be retracted and a prospective unwillingness or inability to perform can be cured unless the aggrieved party has canceled or materially changed position or otherwise indicated the contract is canceled.

4. Urging Retraction

Rights are not prejudiced by the mere fact the aggrieved party has urged the other party to retract a repudiation.

5. Effect of Impossibility on a Prior Repudiation

Subsequent impossibility will discharge an anticipatory breach and partial impossibility will limit damages for the breach.

6. Failure to Give Assurances as a Repudiation

Under the UCC, a party who has reasonable grounds for insecurity may suspend performance and demand adequate assurance of the other's performance. Failure to give adequate assurance within a reasonable time, not exceeding 30 days, operates as a repudiation. The Restatement (Second) is in substantial accord.

7. Insolvency

When a seller discovers that a buyer is insolvent the seller may: (a) refuse delivery except for cash, including payment for all goods previously delivered under the same contract; (b) stop delivery of goods in transit; (c) reclaim goods delivered on credit to a party while insolvent, provided that demand for their reclamation is made within ten days of receipt by the buyer; (d) reclaim goods delivered on credit to a party while insolvent irrespective of the ten day period, if the buyer has made a representation of solvency to the particular seller within three months before delivery.

8. Repudiation of a Debt

There is one important exception to the general rule that a repudiation operates as a total breach. No action lies for repudiation of a unilateral obligation to pay a sum of money at a fixed time or times in the future.

9. Repudiation and Right to Elect

As a general rule, the aggrieved party may elect to continue the obligations of the contract despite a material breach. Where, however, there is a repudiation, anticipatory or otherwise, the aggrieved party usually cannot elect to continue the contract. Except in the rare case where continuation of performance would minimize damages, the aggrieved party has no right to continue performance after a repudiation.

F. PERFORMANCE OF THE SALES CONTRACT

1. Obligations of the Seller

The seller must make a tender conforming in every respect to the contract. If the tender is not perfect, the buyer may reject the whole, accept the whole, or

accept any commercial unit or units and reject the rest. This drastic rule is eroded by the following qualifications.

a. Unless Otherwise Agreed
The contract may expressly limit the perfect tender rule or the rule may tacitly be limited by a trade usage, course of dealing or course of performance.

b. Cure Within the Contract Time
If a non-conforming tender is made and the time for performance has not yet expired, the seller may seasonably notify the buyer of an intention to cure and may within the contract time make a conforming tender.

c. Cure After the Contract Period
When the buyer rejects a non-conforming tender that the seller had reasonable grounds to believe would be acceptable with or without a money allowance, the seller may, upon reasonable notification to the buyer, have a further reasonable time to substitute a conforming tender.

d. Acceptance
Once the goods have been accepted, rejection is no longer possible, although revocation of acceptance may be an available alternative. An acceptance may be express, or result from a failure to reject or to demand cure before a reasonable time to inspect the goods has passed.

e. Revocation of Acceptance
The buyer may revoke acceptance of a lot or commercial unit whose non-conformity substantially impairs its value to the buyer, provided (a) acceptance was on the reasonable assumption that seller would cure and has not seasonably cured; or (b) acceptance was reasonably induced by the difficulty of discovery or by the seller's assurances. Revocation must be made within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in the condition of the goods that is not caused by their own defects. Note that the rule is one of substantial performance.

f. Installment Contracts
The perfect tender rule does not apply to installment contracts. An installment can be rejected only if its value to the buyer is substantially

impaired. The buyer may cancel the contract only if the non-conformity substantially impairs the value of the contract to the buyer.

g. Improper Shipment
The perfect tender rule does not apply to breach of the duty of proper shipment. Failure to give prompt notice of shipment or to make a reasonable contract (in a shipment contract) with the carrier is grounds for rejection only if material delay or loss ensues.

2. Obligation of the Buyer

a. Payment
Absent an agreement to the contrary, receipt of the goods and tender of payment are concurrent conditions. Thus, even in a shipment contract (where the seller delivers the goods by placing them on board a carrier) payment is not due until the goods are received at their destination.

b. Proper Tender of Payment
Unless credit has been extended, the buyer must tender the entire amount. Tender need not be legal tender unless the seller demands it and grants the buyer sufficient additional time to procure cash.

c. Acceptance of Conforming Goods
Failure to accept conforming goods or wrongful revocation of acceptance constitutes a breach. Unless otherwise agreed, however, the buyer's duty to accept and pay for tendered goods is subject to a right to inspect them at any reasonable time and manner.

d. Reasonable Care
If the buyer properly rejects (or revokes acceptance of) goods in the buyer's possession, a duty is imposed to refrain from any acts of ownership over the goods, and to hold them with reasonable care at the seller's disposition for a time sufficient to permit a seller to remove them. A merchant buyer has additional responsibilities.

G. WARRANTIES IN THE SALES CONTRACT

1. Express Warranties
An express warranty is an affirmation of fact or promise with respect to the quality or future performance of goods that becomes part of the basis of the

bargain. The affirmation may be in words or by sample or model. An affirmation merely of the value of the goods or merely of the seller's opinion of the goods is not a warranty.

2. Implied Warranties

a. Merchantability

If a seller is a merchant with respect to the kinds of goods contracted for, unless effectively disclaimed, there is an implied warranty that the goods be such as pass in the trade under the contract description and are fit for the ordinary purposes for which such goods are used.

b. Fitness for Particular Purpose

If the seller has reason to know that the buyer wants the goods for a particular purpose and knows that the buyer is relying on the seller's skill and judgment, unless effectively disclaimed, there is an implied warranty that the goods shall be fit for that purpose.

c. Free and Clear Title

Unless effectively disclaimed, a seller impliedly warrants that the title conveyed is good, transfer is rightful, and the goods are free from any security interest or lien of which the buyer was unaware at the time of contracting. Note that this warranty applies also to nonmerchant sellers.

d. Infringement

A merchant who regularly deals in the kind of goods in question warrants, unless effectively disclaimed, that no patent or trademark is being infringed, but if the buyer furnishes the specifications, the buyer must hold the seller harmless against any third party claim if infringement arises out of the use of the specifications.

3. Disclaimer of Warranties

a. Express Warranties

If a contract contains express warranties as defined above, as well as a provision that states no express warranties are made, an attempt must be made to reconcile the two provisions. If consistency cannot be attained, the disclaimer is inoperative.

b. Implied Warranties

All implied warranties, except free and clear title, are disclaimed by language such as "as is". If other language is employed, the warranty of merchantability is the most difficult to exclude. If the exclusion is written, the language of exclusion must use the word "merchantability" and must be conspicuous. The warranty of fitness can be excluded only in writing and only if the exclusion is conspicuous.

c. Implied Warranty of Free and Clear Title

This warranty can be excluded only by specific language or circumstances that give the buyer reason to know that the seller does not claim title or is only purporting to sell such right as the seller has.

d. Limitation on Remedies

Even if there is no disclaimer, remedies for breach of warranty may be limited pursuant to the provisions of UCC §§ 2–718 and 2–719.

■ VI. DEFENSES

A. IMPRACTICABILITY

1. Impracticability is Not Necessarily a Defense

The general rule is that the promisor must perform or pay damages for failure to perform no matter how burdensome performance has become even if unforeseen changes have created the burden.

2. When Impracticability Is a Defense

When a performance becomes impracticable because of an event, the non-occurrence of which was a basic assumption on which the contract was made, the duty is discharged, unless the language or situation points to a contrary result.

3. What Assumptions Are Basic

There are certain understood risks assumed by the parties. These include market shifts, interruption of supplies (unless caused by war, embargo, or the

like), and financial capability. Where, however, the difficulty in performing is caused by certain supervening events, it is sometimes held that a basic assumption is violated. These events include (1) destruction of the subject matter or of the tangible means of performance; (2) death or illness of a person essential for performance; (3) supervening illegality or prevention by law; (4) reasonable apprehension of danger to life, health or property.

4. Temporary and Partial Impracticability

When the impracticability is temporary or partial, the general notion is that the promisor is obligated to perform to the extent practicable unless the burden of performance would be substantially increased. However, the promisee may reject any delayed or partial performance if the tendered performance is less than substantial.

a. Temporary Impracticability Under the UCC

If the seller expects to be late in tendering delivery and if the lateness is excusable because of impracticability, the seller must timely notify the buyer of the expected delay. The buyer may then cancel any non-installment contract. The buyer may cancel any installment delivery or installment contract under the criteria for cancellation discussed in connection with exceptions to the perfect tender rule. On the other hand, the buyer may within a reasonable time, not exceeding 30 days, agree to accept the delayed delivery or deliveries.

b. Partial Impossibility Under the UCC

Allocation is the key concept when the seller, on grounds of impracticability, can deliver only part of the promised goods. The seller must seasonably notify the buyer of the shortfall, and inform the buyer of the estimated quota allocated. The buyer has a reasonable time, not exceeding 30 days, to accept the allocation. If the buyer does not accept, the seller's duties are discharged. If the contract is an installment contract, the buyer's right to cancel are subject to the criteria for canceling installment contracts discussed in connection with exceptions to the perfect tender rule.

5. Impracticability of Means of Delivery or Payment

a. Delivery

The UCC provision that deals with unavailability of an agreed type of carrier, docking facility, or manner of delivery focuses on the use of

commercially reasonable substitutes. Although delivery modalities may be of serious concern, they are not usually at the core of the bargain. Consequently, if available, a commercially reasonable substitute must be employed and accepted.

b. Payment

If the agreed manner of payment becomes unavailable, the seller's obligation to deliver is discharged but, if a commercially reasonable substitute manner of payment is available, the buyer has the option to use the substitute, thereby reinstating the seller's duty to deliver.

c. Payment After Delivery

If the agreed manner of payment fails because of governmental regulations after the goods are delivered, the buyer may pay in the manner provided in the regulation. Even if this is not a commercially reasonable equivalent, the buyer is discharged unless the regulation is discriminatory, oppressive or predatory.

B. FRUSTRATION

1. In General

Where the object of one of the parties is the basis upon which both parties contract, the duties of performance are constructively conditioned upon the attainment of the object. Performance is practicable, but the performance one party contracted for has become valueless (or nearly so).

2. Elements

There must be: (1) an event that frustrates the purpose of one of the parties and the non-occurrence of this event must be the basis on which both parties entered into the contract; (2) the frustration must be total or nearly total; (3) the party who asserts the defense must not, expressly or impliedly, have assumed the risk of this occurrence nor be guilty of contributory fault.

3. Restitution After Discharge for Impracticability or Frustration

When a contract is discharged for impracticability or frustration, the executory duties are at an end. Compensation for part performance is available in the restitutionary action of quasi contract.

C. RISK OF CASUALTY LOSS

1. Perspective

When goods or real property are in the process of being sold or are under lease or bailment, the question frequently is, which of the parties must bear the risk of damage or destruction of the subject matter? For example, if Vendor and Purchaser enter into a contract for the purchase and sale of real property, which party should bear the loss caused by a fire that occurs after the contract was entered into and before closing of title?

2. Real Property

The majority rule places the risk of loss on the purchaser. This result is based on the theory of equitable conversion; once the contract is made, the purchaser is regarded by a court of equity as the owner. The minority view places the risk of loss on the seller until title closes. A third view, embodied in the Uniform Vendor and Purchaser Risk Act, enacted in about ten states, places the risk of loss upon a purchaser only if the purchaser is in possession or has legal title.

3. Leases

The orthodox common law rule placed the risk of loss on the lessee. Today, this view seems to have been largely abandoned in favor of the concepts of constructive eviction and implied warranties.

4. Sale of Goods

a. Effect of Risk of Loss

Assume goods have been damaged without fault of either party. If the risk of loss had shifted to the buyer, the buyer must pay the price. If the risk of loss is on the seller, the seller will be liable for breach of contract unless the breach is cured by tender of replacement conforming goods. In two limited situations the seller may have the risk of loss (seller won't be paid) but will not be liable for damages. These are situations (1) where impracticability can be invoked; and (2) where the contract expressly provides, No Arrival No Sale. (UCC § 2–324).

b. Shipment Versus Destination Contracts (Where Carrier Is Contemplated)

Most risk of loss cases involve injury to goods in transit. The Code seeks to provide clear and certain rules that usually work in tandem with

normal insurance practices in commerce. Merchants have long thought in terms of contracts whereby the seller is responsible for shipping the goods—getting them aboard a common carrier in the seller's city, as opposed to the much less usual destination contract whereby the seller undertakes the responsibility of getting the goods to the buyer's city or plant. Under a shipment contract, the risk of loss passes to the buyer when the goods are delivered to the carrier, even if the seller reserves a security interest in the goods. Under a destination contract, risk of loss shifts when the goods are duly tendered to the buyer at destination.

c. Distinguishing Shipment From Destination Contracts

If the contract is unclear whether it is a shipment or destination contract, it is a shipment contract. It is not a destination contract unless it explicitly so provides. There are certain terms, entrenched in commercial usage, which are frequently used to indicate the parties' intent. These are: F.O.B., F.A.S., C.I.F., and Ex-ship.

d. Delivery by Seller's Own Truck or on Seller's Premises

Where a carrier is not used, as where the seller transports the goods in the seller's own vehicle or the buyer is to pick up the goods, the seller is in control of the goods and is likely to carry insurance on them. If the seller is a *merchant,* risk of loss shifts only if and when the buyer takes possession of the goods. If the seller is a *nonmerchant*, the risk shifts when the seller tenders delivery.

e. Goods Held by a Bailee

At times goods in the hands of a bailee, such as a warehouseman, are sold with no expectation of a prompt transfer of possession. Risk of loss passes to the buyer in either of three eventualities. First, if the buyer receives a negotiable document of title that covers the goods; second, if the bailee acknowledges the buyer's ownership; third, if the seller gives the buyer a non-negotiable document of title or a written direction to the bailee, risk of loss passes after the buyer has had a reasonable time to present the document or direction to the bailee. If the buyer presents the document or direction to the bailee, risk of loss does not shift if the bailee refuses to honor it.

f. The Effect of Seller's Breach on Risk of Loss

The rules on risk of loss are suddenly made murky if it can be proved that the seller is in breach by tendering non-conforming goods. If the

non-conformity is such that the buyer may reject (under the perfect tender rule or the installment contract rules), the risk of loss remains on the seller until the tender is cured or the buyer accepts the non-conforming goods. If the buyer revokes acceptance of the goods the seller is liable for any casualty to the goods to the extent that the buyer's insurance coverage is inadequate. The buyer, however, must have revoked prior to the casualty for this rule to apply.

g. The Effect of the Buyer's Breach on Risk of Loss

If the buyer breaches prior to the shift of the risk of loss, the breach will itself shift the risk to the buyer provided that (a) the goods are conforming; (b) they have been identified to the contract; and (c) the loss occurs within a commercially reasonable time from the breach. However, the risk of loss passes to the buyer only to the extent that the seller's insurance is inadequate to cover the loss.

5. Risk of Loss and Impracticability

The mere fact that the particular goods the seller intends to deliver are destroyed does not give the seller the defense of impracticability. The seller must offer replacement goods or be liable, although under appropriate circumstances the seller may be excused for any unavoidable delay under the doctrine of temporary impracticability. Under the provisions of UCC § 2–613, however, if the contract dealt with identified goods (e.g., particular pieces of furniture rather than particular types), the seller is excused if the goods are totally destroyed, without the seller's fault, prior to the risk being shifted to the buyer. If the loss is partial, the buyer has the option to reject the goods or accept them with an allowance.

6. Two Special Situations: Sale on Approval and Sale or Return

a. Sale on Approval

In a "sale of approval", the goods are sent to the buyer for the buyer's use with the understanding that the buyer may return the goods if they do not meet the standard of satisfaction. (See the material on conditions of satisfaction, supra). The risk of loss remains with the seller until the buyer accepts the goods. Failure to notify the seller of a rejection within a reasonable time is an acceptance. The expense of return is also thrust on the seller.

b. Sale or Return

In a "sale or return" (consignment) sale, the goods are sent to the buyer primarily for resale. Although the buyer may return conforming goods, the risk of loss passes to the buyer under the ordinary rules that govern the shifting of risk of loss. The risk remains with the buyer until the goods are returned to the seller at the buyer's expense.

7. The Omnipotence of the Contract

All the rules governing risk of loss are gap fillers based in large part on the probable intention of the parties. The parties are perfectly at liberty, subject to the rule of conscionability, to provide for the allocation of risk of loss in any way they wish.

D. ILLEGALITY

1. In General

A bargain is illegal if either its formation or its performance is criminal, tortious, or contrary to public policy. The difficult cases are those where the illegality is somewhat remote from the agreement. Remoteness will be illustrated by four kinds of situations: bribery, license violations, depositary cases, and instances where one party has knowledge of the illegal purpose of the other.

2. Bribery Cases

An agreement is illegal if it calls for the payment of a bribe, is procured by a bribe or is performed by bribery.

3. Licensing Cases

If a license is designed to control the skill or moral quality of persons engaged in a trade or profession, an agreement to practice that trade or profession by an unlicensed person is illegal. If the license is solely a revenue raising measure, the agreement is not illegal. If the license is required for other purposes, the courts will decide on a case by case basis.

4. Depositaries

A depositary of the fruits of a crime may not refuse to return the money or goods deposited, unless the depositary is a party to the illegal transaction.

5. Knowledge of Illegal Purpose

Knowledge by the seller of goods or services of the illegal purpose of the buyer taints the contract with illegality only if the intended purpose involves serious moral turpitude or if the seller does something to further the illegal purpose of the other. Some states, however, make criminal facilitation a crime. Under such a statute knowledge of the illegal purpose would make the contract criminally illegal.

6. Effect of Illegal Executory Agreements

An illegal executory bargain is void so that neither party to the agreement can enforce it.

7. Exceptions

a. If a party is justifiably ignorant of the facts creating the illegality and the other is not, the ignorant party may recover damages for breach.

b. If the illegality is minor and the party who is ignorant of the illegality justifiably relies upon an assumed special knowledge of the requirements of law by the other party, the contract may be enforced in an action for damages by the innocent party.

c. Certain statutes, enacted to protect a certain class, make only one party the wrongdoer. Contracts in violation of such statutes are enforceable by the protected party.

d. If an illegal provision does not involve serious moral turpitude and if the parties would have entered into the contract irrespective of the offending provision, the illegal portion of the agreement is disregarded and the balance of the agreement is enforceable. The illegal provision must not be central to the party's agreement.

e. If an agreement can be interpreted so that either a legal or illegal meaning can be attributed to it, the interpretation giving the agreement a legal meaning will be preferred. An illegal contract can also be reformed to make it legal.

8. Illegal Bargains Executed in Whole or in Part

Where there has been performance under an illegal bargain, the court will not aid either party and will leave the parties where it finds them.

9. Exceptions

a. Reprise

The exceptions under Illegal Executory Agreements also apply to actions for restitution.

b. Divisibility

If a performance is illegal, but other performances are legal, recovery may be had for the legal performances provided that the illegal performance does not involve serious moral turpitude. Divisibility is not used in this context in the same sense as it is used in the chapter on performance. Divisibility is not determined according to fixed rules but by the judicial instinct for justice.

c. Not in Pari Delicto

A party who has performed under an illegal bargain is entitled to a quasi-contractual recovery if this party is not guilty of serious moral turpitude and, although blameworthy, is not equally as guilty as the other party to the illegal bargain.

d. Locus Poenitentiae (Place for Repentance)

Even if a plaintiff is in pari delicto and therefore as blameworthy or more blameworthy than the defendant, the plaintiff is entitled to avoid the bargain and obtain restitution if the attempted avoidance is in time to prevent the attainment of the illegal purpose for which the bargain was made, unless the mere making of the bargain involves serious moral turpitude. The plaintiff is generally not permitted to withdraw if any part of the illegal performance is consummated. Repentance comes too late if it comes only after the other party to the bargain has breached the illegal agreement or after attainment of the unlawful purpose is seen to be impossible.

10. Change of Law

a. Legalization of the Activity

If a contract is illegal when made and subsequently becomes legal because the law is changed, the change does not validate the contract except where the repealing statute so provides.

b. Supervening Illegality

If a contract is lawful when made, but the performance is outlawed prior to full performance, the case is governed by the doctrine of impracticability of performance.

c. Supervening Illegality of an Offer

If a lawful offer is made, but the making or performance of the proposed contract is subsequently outlawed, the power of acceptance is terminated.

11. Change of Facts

Where the bargain is illegal and a change of facts removes the cause of the illegality, the contract remains illegal. However, the parties, with full knowledge of the facts may subsequently ratify the agreement.

E. DISCHARGE OF CONTRACTUAL DUTIES

1. Perspective

Many methods of discharging a contractual duty are discussed elsewhere; for example, non-fulfillment of a condition, anticipatory repudiation, impossibility of performance, disaffirmance for lack of capacity, etc. In this chapter several kinds of consensual discharge will be discussed.

2. Mutual Rescission

Within limits, parties to a contract are free to end the obligations of the contract by agreement. The limits are imposed by the doctrine of consideration. One must distinguish three situations: (1) the rescission occurs before any performance; (2) the rescission occurs after part performance by one or both parties; (3) the rescission occurs after full performance by one party. In the first two situations, consideration is found in the surrender of rights under the original agreement by each party. In the third situation the rescission is void for want of consideration.

3. Implied Rescission

While rescissions are ordinarily expressed in words, they can be implied from conduct. Some courts call an implied rescission an abandonment.

4. Cancellation Versus Rescission

In the face of a material breach the injured party may properly cancel the contract. In canceling, this party may inartfully use an expression such as "I rescind". According to UCC § 2–720, which restates the sounder common law cases, unless the contrary intention clearly appears, expressions of cancellation or 'rescission' of the contract or the like shall not be construed as a renunciation or discharge of any claim for damages for an antecedent breach.

5. Executory Bilateral Accord

An agreement, either express or implied, to render in the future a stipulated performance that will be accepted in satisfaction or discharge of a present claim is known as an executory accord. At common law, executory accords were unenforceable. Today, the executory accord is a binding contract. Prior to performance or breach, the existing claim is suspended. Upon performance, there is an accord and satisfaction that discharges the claim. If, however, the debtor breaches, the prior obligation revives and the creditor has the option of enforcing the original claim or the executory accord. If the creditor breaches, the debtor may ordinarily obtain specific performance of the accord. New York requires executory accords to be in writing.

6. Unilateral Accord

An offer by a creditor or claimant to accept a performance in satisfaction of a credit or claim is known as a unilateral accord. At early common law, the offeror could, with impunity, refuse the tender of performance. Under modern law, the debtor may, upon refusal of the tender, sue for damages for breach of the accord, or, in a proper case, for specific performance. New York requires that the offer be in writing.

7. Accord and Satisfaction

An accord and satisfaction is formed either by (1) performance of an executory bilateral accord or by acceptance of an offer to a unilateral accord, or (2) creation of a substituted contract.

8. Substituted Contract

A substituted contract resembles an executory bilateral accord. The distinction is that the claimant or creditor agrees that the claim or credit is immediately discharged in exchange for the promise of a future performance.

The prior claim or credit is merged into the substituted contract. Consequently, in the event of its breach, it alone determines the rights of the parties. There would be no right to enforce the prior claim, unless the new agreement is void, voidable, or unenforceable.

9. Novation

A contract is a novation if it does three things: (a) discharges immediately a previous contractual duty or a duty to make compensation; (b) creates a new contractual duty; and (c) includes as a party one who neither owed the previous duty nor was entitled to its performance. It is necessary to distinguish a three party executory accord from a novation. A novation is a substituted contract that operates immediately to discharge an obligation. If the discharge is to take place upon performance, the tripartite agreement is merely an executory accord.

10. Account Stated

An account stated arises where there have been transactions between debtor and creditor resulting in the creation of matured debts and the parties by agreement compute a balance that the debtor promises to pay and the creditor promises to accept in full payment of the items of the account.

11. Release

A release is a writing manifesting an intention to discharge another from an existing or asserted duty. A release supported by consideration discharges the duty. At common law, a release without consideration, under seal, also effectively discharged a duty. Today, the effectiveness of a release, without consideration, is largely dependent upon local statutes. UCC § 1–107 provides that: Any claim or right arising out of an alleged breach can be discharged in whole or part without consideration by written waiver or renunciation signed and delivered by the aggrieved party. Section 1–306 of the revision is to the same effect but delivery is not required.

12. Covenant Not to Sue

A covenant not to sue is a promise not to sue, supported by consideration, either permanently, or for a limited period of time. A release is an executed transaction, while a covenant not to sue is executory. The latter is sometimes used to circumvent the common law rule that the release of one joint obligor releases all of them.

13. Acquisition by the Debtor of the Correlative Right

Acquisition by the debtor of the correlative right in the same capacity in which the debtor owes the duty discharges it.

14. Alteration

A fraudulent alteration of a written contract, by one who asserts a right under it, extinguishes the right and discharges the other party's obligation. The aggrieved party may forgive the alteration, thus reinstating the contract according to its original tenor. A holder in due course of an instrument altered by a prior holder may enforce it according to its original tenor.

15. Performance—To Which Debt Should Payment Be Applied?

Where a person owes several debts to a creditor, payments are to be applied in the following sequence:

(a) in the manner manifested by the debtor, unless the manifestation violates a duty to a third person such as a surety; but

(b) if the debtor manifests no intention, the payment may be applied at the discretion of the creditor, provided it is not applied to a disputed, unmatured, or illegal claim and also provided it is not applied so as to violate a duty of the debtor to a third person of which the creditor is aware, and is not applied as to cause a forfeiture; but

(c) if the creditor manifests no intent on receipt of payment, the law will allocate payment in the manner deemed most equitable.