

**LexisNexis Capsule Summary  
Contracts**

**Chapter 1  
SOURCES AND DEFINITIONS OF CONTRACT LAW**

**§ 1.01 What is a Contract?**

A contract is formed in any transaction in which one or both parties make a legally enforceable promise. A promise is a commitment or undertaking that a given event will or will not occur in the future and may be express or implied from conduct or language and conduct. A promise is legally enforceable where it:

- was made as part of a bargain for valid consideration;
- reasonably induced the promisee to rely on the promise to his detriment; or
- is deemed enforceable by a statute despite the lack of consideration.

**§ 1.02 Types of Contracts**

Contract may be of the following types:

- 1) **Express** – an agreement manifested by words
- 2) **Implied-in-fact** – an agreement manifested by conduct
- 3) **Implied-in-law** ("quasi-contract") – not a true contract but an obligation imposed by a court despite the absence of a promise in order to avoid an injustice

**§ 1.03 Sources of Contract Law**

- 1) **Common Law** – in most jurisdictions, contract law is not codified, and thus the primary source of general contract law is caselaw.
- 2) **Restatement** – written by the American Law Institute to provide guidance to the bench and bar, the Restatement of Contracts (currently in the second edition) has no legal force but nevertheless provides highly persuasive authority.
- 3) **Uniform Commercial Code (UCC)** – created under the auspices of the American Law Institute and the National Conference of Commissioners on Uniform State Laws, has been adopted by every state except Louisiana. Proposed revisions to Article 2, governing contracts for the sale of goods, have been finalized and presented to the states for enactment.
- 4) **United Nations Convention on Contracts for the International Sale of Goods (CISG)** – ratified by many of the leading trading nations including the United States and China (but not the United Kingdom and Japan), it governs many transactions for the sale of goods between parties with places of business in different nations.
- 5) **UNIDROIT Principles of International Commercial Contracts** – non-binding authoritative text similar to the Restatement.
- 6) **Uniform Computer Transactions Act (UCITA)** – addresses issues arising out of computer licensing but has only been enacted in Virginia and Maryland.
- 7) **Uniform Electronic Transactions Act (UETA)** – adopted by most states, this act does not affect basic contract doctrine but governs the use of electronic communications. It applies to "transactions," defined as "the conduct of business, commercial or governmental affairs." Thus, it does not govern contracts such as those between family members or with non-profit institutions.
- 8) **Electronic Signatures in Global and National Commerce Act (E-Sign)** – this federal law allows states to preempt it by enacting the UETA.

## § 1.04 Contracts for the Sale of Goods

### [1] Application of UCC

Article 2 of the Uniform Commercial Code covers all transactions for the sale of goods other than securities (article 9) and leases (article 2A). It applies to any party; it is not limited to merchants although individual provisions may be.

### [2] "Goods" Defined

Under the UCC, a "good" is any *tangible thing* that is *moveable*. [\[UCC § 2-105\(1\)\]](#) In addition to manufactured products, "goods" include:

- growing crops or timber, unborn young of animals and other identified things attached to land (other than minerals or the like or structures), regardless of who severs them from the land provided that they can be removed without causing material harm to the land
- currency exchanged as a commodity (as opposed to the medium of payment for a good)
- minerals or the like or a structure or its materials to be removed from realty that are *to be severed by the seller*

The term "goods" does not encompass:

- intangible rights such as intellectual property
- investment securities
- money which is the medium of payment for goods
- minerals or the like or a structure or its materials to be removed from realty that are *to be severed by the buyer*

### [3] "Sale" Defined

[UCC § 2-106\(1\)](#) defines "sale" as the transfer of title for a price. Contracts that involve both goods and services must be evaluated to see which constitutes the primary purpose of the contract, with the secondary purpose being treated as incidental. If the primary function of the contract is to provide a service, the UCC does not apply, even if an incidental sale of goods occurs.

### [4] "Merchant" Defined

A "merchant" is one "who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill particular to the practices or goods involved in the transaction" or who employs an agent or broker in such occupation. [\[UCC § 2-104\(1\)\]](#)

### [5] "Good Faith" Defined

Every contract for the sale of goods imposes an obligation of good faith dealing on all parties in its performance and enforcement. [\[UCC § 1-203\]](#) All parties, including non-merchants, are subject to [UCC § 1-201\(19\)](#) which defines "good faith" as "honesty in fact in the conduct or transaction concerned." Merchants are subject to an additional good faith standard, set forth in [UCC § 2-103\(1\)\(b\)](#), which requires "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade."

### [6] "Record" Defined

*The proposed revision of Article 2 reflects the contemporary use of electronic communications by substituting all prior references to "writing" with "record," defined in proposed UCC § 1-201(33a) as "either a writing or a retrievable information in a computer's memory, a computer disk, or the like."*

## PART I. CONTRACT FORMATION

### Chapter 2 OVERVIEW OF CONTRACT FORMATION

#### § 2.01 Mutual Assent

Contract formation requires mutual assent to the same terms by the parties, generally manifested by an offer and acceptance (see chapters 3 and 4). Current law favors an objective standard for determining a party's intent to be contractually bound. Thus, in general, communications are given the meaning that the recipient of the communication should have reasonably understood. Nevertheless subjective intent is relevant in determining whether the parties intended to be bound. Without such subjective intent, there is no contract.

#### § 2.02 Basis for Remedy

A validly formed contract must provide a basis for determining the existence of a breach and for giving an appropriate remedy [[Restatement § 33](#); [UCC § 2-204](#)]. Non-goods contracts, according to the Restatement, must include terms that are sufficiently definite and certain; goods contracts, on the other hand, do "not fail for indefiniteness even if one or more terms are left open if the parties intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy."

#### § 2.03 Contract Formation by Electronic Agents

*Proposed new UCC § 2-204(4) recognizes the legal effect of contract formed by electronic agents resulting from:*

*(1) the interaction of electronic agents of the parties, even in the absence of direct participation in such contract by the parties (i.e., the programming of such electronic agents suffices)*

*(2) the interaction of an individual with an electronic agent, e.g., a website, where the individual has the option of refusing or taking action or makes a statement that the individual has reason to know will:*

*(a) cause the electronic agent to complete the transaction; or*

*(b) indicate acceptance of an offer, regardless of other expressions or actions by the individual to which the electronic agent cannot react.*

#### § 2.04 Receipt of Electronic Communications

A number of communications relevant to contract formation – such as an offer, revocation of offer, or rejection of offer – are effective upon receipt by the person for whom the communication is intended. *In contracts for the sale of goods, any legally effective communication sent by electronic means has effect upon receipt by the intended recipient's electronic system, e.g., e-mailbox, even if he is unaware of such receipt. [proposed new UCC § 2-213]*

### Chapter 3 OFFER

#### § 3.01 What is an Offer?

##### [1] "Offer" Defined

An offer is a manifestation of an intent to be contractually bound upon acceptance by another party. An offer creates in the offeree the power to form a contract by an appropriate acceptance. [[Restatement § 24](#)]

##### [2] Communications that do not constitute offers

The following types of communications, which do not manifest an intent to be contractually bound, do not constitute offers:

- 1) **opinions** about future results, including professional opinions
- 2) statements of intention (including **letters of intent** which merely memorialize negotiations)
- 3) **invitations to submit a bid**
- 4) **price estimates** – However, where the estimate is deemed to be a factual misrepresentation because it was made by an expert, estoppel may be invoked if the offeree relied to his detriment on the estimate.
- 5) **advertisements, catalogs and mass mailings** – Courts have ruled that it is unreasonable for one to believe that the merchant intends to be bound with all whom receive or read such literature unless the power of acceptance is clearly limited to the first person(s) that fulfills the act for which the incentive is offered.
- 6) **auctions with reserve** – An auction is "with reserve" unless announced to the contrary. In an auction with reserve, the auctioneer solicits offers in the form of bids. However, if the auction is announced to be "without reserve," the auctioneer's request for bids or his statement that an item will go to the highest bidder will be deemed an offer.

### § 3.02 When is the Offer Effective?

#### [1] Receipt of offer

An offer is not valid until *received* by the offeree or his agent. [\[Restatement § 68\]](#)

#### [2] Duration of offer

If the offer has a **stated time** within which the acceptance must be made, any attempted acceptance after the expiration of that time will fail and will merely constitute a counter-offer by the offeree. If **no specific time** is stated within which the offeree must accept, it is assumed that the offeror intended to keep the offer open for a reasonable period of time, to be determined based on the nature of the proposed contract, trade usage, prior dealings and other circumstances of which the offeree knows or should know.

Generally, the time for accepting an offer begins to run from the time it is received by the offeree. If there was a delay in delivery of the offer of which the offeree is aware, the usual inference is that the time runs from the date on which the offeree would have received the offer under ordinary circumstances.

Generally, courts hold that in **telephonic or face-to-face communications** in which an offer is made, the offer lapses when the conversation terminates in the absence of a clear indication that the offer remains open beyond the conversation.

### § 3.03 Revocation

With limited exceptions (see [2] below), an offer is generally revocable at any time prior to acceptance.

#### [1] Communication of revocation

An offer may be revoked by any words that communicate to the offeree that the offeror no longer intends to be bound. An offer is also revoked by action that is inconsistent with the intent to be bound once the offeree learns of such inconsistent action.

#### [2] Offers that may not be revoked

An offer is irrevocable where:

- 1) there is an option contract in which the **offeree gave consideration for an irrevocable** offer for some period of time;

- 2) the offeree relied to his detriment upon an **implied or express promise by the offeror not to revoke** if such detrimental reliance was foreseeable by the offeror;
- 3) the offeree **relied to his detriment upon the offer itself** if the such detrimental reliance was reasonably foreseeable by the offeror [[Restatement § 87\(2\)](#)]
- 4) in the case of a unilateral contract, the **offeree began performance** of the promised act to any extent [[Restatement § 45](#)] – Upon commencement of performance, the offeror must give the offeree the amount of time specified in the offer (or, in the absence of a specified time, a reasonable time) in which to complete the bargained-for promise. However, the offeree's mere preparation to perform does not preclude the offeror from revoking.
- 5) in goods contracts, a merchant indicates in a signed writing that an offer to buy or sell goods will be held open for the stated time or a reasonable time if no time is specified, not to exceed three months, if no consideration is given [[UCC § 2-205](#)]

### **[3] Effective time of revocation**

A revocation is effective upon receipt by the offeree. However, a few jurisdictions (e.g., California, Montana, South Dakota, North Dakota) provide by statute that revocations are to be treated similar to acceptances; thus, courts might interpret these statutes to make a revocation of an offer effective when sent by the offeror.

### **§ 3.04 Termination of the Offer**

An offeree's power to accept an offer is terminated by:

- the death or insanity of the offeror, even without notice to the offeree of such occurrence
- death or insanity of the offeree, unless an offer is irrevocable, such as in the case of an option contract
- death or destruction of a person or thing essential to performance
- the offeree's rejection of the offer, which cannot be reinstated by the offeree's subsequent attempted acceptance.
- the offeree's counter-offer, which impliedly manifests a rejection of the offer
- revocation of the offer
- expiration of the offer

## **Chapter 4 ACCEPTANCE**

### **§ 4.01 Manner of Acceptance**

#### **[1] Traditional Approach**

Traditionally, the nature of the contract dictated whether the offer could be accepted by a return promise or by actual performance of the promised act.

#### **[a] Acceptance by Performance; Unilateral Contracts**

In a unilateral contract, the offer empowers the offeree to only accept by complete performance of the promise. The offeree's failure to perform does not constitute a breach since no contract is formed until the offeree renders full performance.

#### **[b] Acceptance by Return Promise; Bilateral Contracts**

In a bilateral contract, the offers empower the offeree to only accept by return promise. Bilateral contracts are formed upon the giving of the promise to perform an obligation in the future, and failure to fulfill such promise results in breach.

## **[2] Modern Approach**

Under the modern approach, an offer invites acceptance *by any means reasonable* under the circumstances, unless otherwise indicated by language or circumstances. [[UCC § 2-206](#); [Restatement § 30\(2\)](#)] This approach reflects the fact that many offers do not specify whether acceptance is to be by full performance or promise. A contract may be formed even if an offer clearly indicates that acceptance is to be by promise if:

- 1) the offeree begins to perform, in lieu of making the required promise; and
- 2) the offeror learns of the commencement of performance and acquiesces to such manner of acceptance.

## **[3] Acts Inconsistent with Offeror's Ownership or Receipt of Benefits**

The common law holds that one who receives goods with knowledge or reason to know that they are being offered for a price is bound by the terms of the offer if he exercises dominion or control over such goods or engages in any other act inconsistent with the offeror's ownership. If the act wrongs the offeror, it is deemed a valid acceptance only if ratified by the offeror. Similarly, one who receives benefits from services that he knows or has reason to know are being offered with the expectation of compensation, and where he has a reasonable opportunity to reject them, is liable for the reasonable value or stated value of such services. [[Restatement § 69](#)]

## **[4] Acceptance by silence**

Silence may not constitute an acceptance except where:

- based on **prior dealings** between the parties, it is reasonable that the offeree should notify the offeror if he does not intend to accept; or
- "where the offeror has stated or given the offeree reason to understand that assent may be manifested by silence or inaction, and the offeree in remaining silent and inactive intends to accept the offer."

[[Restatement § 69](#)]

## **§ 4.02 Medium of Acceptance**

Unless the offeror indicates otherwise, the offeree may use any medium that is reasonable under the circumstances [[UCC § 2-206\(1\)\(a\)](#)] or, in non-goods contracts, the same medium as was used to communicate the offer or any other medium "customary in similar transactions at the time and place the offer is received." [[Restatement § 65](#)]

## **§ 4.03 Notice of Acceptance**

The offeror is entitled to notice of the acceptance. Thus, even if the offeree effectively accepts an offer and a contract is formed, failure by the offeree to *notify* the offeror of the acceptance within a reasonable time may preclude the offeror from enforcing the contract. [[Restatement § 54](#) and [§ 56](#)]

### **[1] Notice of Acceptance by Performance**

Under common law, where an offer invites acceptance by performance, no notice is required to make the acceptance effective, unless the offeror so specifies. However, if the offeree has reason to know that the offeror has no adequate means of learning of the performance with reasonable promptness and certainty, the offeror's contractual duty will be discharged unless:

- the offeree exercises reasonable diligence to notify the offeror of acceptance; or
- the offeror learns of the performance within a reasonable time; or
- the offer indicates that notification of the acceptance is not necessary.

[[Restatement § 54](#)]

In transactions for the sale of goods, where commencement of performance is a reasonable mode of acceptance, if the offeror is not notified of acceptance within a reasonable time, he may treat the offer as having lapsed prior to acceptance. [[UCC § 2-206\(2\)](#)]

### **[2] Notice of Acceptance by Return Promise**

Where the offeree accepts by promise, the offeree must exercise reasonable diligence to notify the offeror of the acceptance or ensure that the offeror seasonably receives the acceptance. [[Restatement § 56](#)]

### **§ 4.04 When an Acceptance Becomes Effective**

An acceptance becomes effective according to the following rules:

- 1) The offeror may specify when the acceptance will be effective.
- 2) Absent such specification, an *acceptance is effective when sent*, if sent by reasonable means, e.g., by an authorized medium and with proper postage and correct address.
- 3) If an acceptance is sent by means that are not appropriate or reasonable under the circumstances or if it is improperly dispatched, the acceptance will be effective upon receipt. [[Restatement § 66](#)] However, if the acceptance is seasonably but improperly dispatched, it will still be deemed effective when sent if it is received within the time in which a properly dispatched acceptance would have been received. [[Restatement § 67](#)]
- 4) In the case of option contracts, an acceptance is not operative until received by the offeror. [[Restatement § 63\(b\)](#)]
- 5) In transactions governed by the CISG, the acceptance becomes effective when it reaches the offeror.

### **§ 4.05 Late Acceptance**

A number of approaches are applied to communications that are intended as an acceptance but sent after the offer expires:

- 1) the communication may qualify as a counter-offer;
- 2) the offeror may waive the lateness and honor the acceptance;
- 3) if the acceptance is nevertheless sent within a reasonable time, albeit after the offer's stated expiration, the acceptance is valid and results in the formation of a contract if the offeror does not reject it within a reasonable time;
- 4) in transactions governed by the CISG, if the acceptance is late because of a delay in transmission that is apparent from the circumstances, a contract is formed unless the offeror informs the offeree that the acceptance is too late.

### **§ 4.06 Terms of Acceptance**

#### **[1] Non-goods Contracts**

Under the "**mirror image**" rule, applied in common law transactions, an acceptance must conform to the terms set forth in the offer. No contract is formed if the acceptance contains terms that are different from or additional to those set forth in the offer. Such communication merely constitutes a counter-offer. The formation of a contract is generally precluded even if the discrepancy is trivial, although courts are now increasingly giving effect to an acceptance if the additional or different terms relate to an immaterial detail.

A contract is formed if the offeree unequivocally accepts the offeror's terms, despite a simultaneous suggestion of alternative terms. Such circumstances merely represent an attempt to modify the terms of an already formed contract based on the original terms, as long as the acceptance is not contingent on the offeror accepting the proposed changes.

## **[2] Contracts for the sale of goods**

The UCC rejects the mirror image rule. It give effect to a definite and reasonable expression of acceptance even though it contains additional or different terms from those offered, unless the offeree expressly makes the acceptance conditional on the offeror's assent to the different or additional terms. [\[UCC § 2-207\]](#)

### **[a] Additional Terms**

In contracts where **at least one party is a non-merchant**, if the offeree unambiguously accepts but states additional terms, the terms are construed as mere proposals for modification and the terms of the existing contract are those set forth in the offer.

Where **both parties are merchants**, the additional terms become part of the contract unless:

- the offer expressly limits acceptance to the terms of the offer;
- they materially alter it; or
- notification of objection to them has already been given or is given within a reasonable time after notice of them is received. [\[UCC § 2-207\(2\)\]](#)

*Proposed revised § 2-207 eliminates the distinction between transactions where both parties are not merchants and those where both parties are merchants. Regardless of the nature of the parties, terms in a contract under the UCC are those that:*

- 1) *appear in the records of both parties;*
- 2) *are agreed to by both parties, whether or not contained in a record; and*
- 3) *are supplied by the UCC by default or gap filler provision.*

### **[b] Different Terms**

[Section 2-207](#) is silent regarding the treatment of different terms but some authorities suggest that they require the offeror's assent, regardless of the merchant-status of the parties.

### **[c] Electronic Agents**

*Where an offer is communicated by an electronic program and the offeree has reason to know that he is dealing with an electronic agent not programmed to respond to additional terms or queries, any additional or different terms stated in the acceptance are ineffective. [proposed UCC § 2-211(4)]*

### **[d] Requirements and Output Contracts**

A requirement contract is one in which the term of quantity to be delivered is measured by the needs of the buyer. In such contracts, the buyer is not permitted to buy from a third-party supplier; the seller must deliver the required amount of product to the buyer but any excess produced may be sold to third parties.

An output contract measures the contract quantity by the output of the seller. The seller is not permitted to sell any of its products to a third party; the buyer must purchase all of the seller's output but may purchase from third party suppliers any excess it needs beyond the seller's output.

## **[3] CISG**

In transactions governed by the CISG, a trivial variation of terms in an acceptance from those set forth in the offer does not prevent the formation of a contract unless the offeror objects. [CISG art. 19]

## **[4] UNIDROIT**

A contract is formed with agreed terms and any standard terms that are not knocked out due to inconsistency. However, if one party objects to the knocking out of any of its standard terms, no contract is formed. [UNIDROIT art. 2.11]

## [5] UCITA

Applying a similar approach to the common law "last shot" rule, the UCITA provides that where a purchaser offers to license software, if an acceptance by the software licensor contains materially different terms, and the software is delivered to the offeror, the terms of the acceptance govern. [UCITA § 204(b)]

### § 4.07 Rejection of Offer

A rejection of an offer by the offeree is effective when received by the offeror. If an offeree dispatches more than one response to an offer, regardless of whether the rejection is sent before or after the acceptance, if the rejection is received later than when the acceptance was dispatched, a contract is formed since an acceptance is effective upon dispatch but a rejection is effective upon receipt. Nevertheless, estoppel may operate to bar enforcement of such a contract where the offeror receives the rejection before the acceptance, and acts in reliance on such rejection.

### § 4.08 Acceptance of Terms on Packaging and in Shrinkwrap and Clickwrap

Standard terms presented on or within product packaging present special problems with respect to contract formation.

#### [1] Shrinkwrapped Warranties

Cases are divided on whether a purchaser is bound by an arbitration clause contained in a limited warranty that is packed within the product box and shrinkwrapped at the factory where the purchaser is unaware of such clause. *Compare Hill v. Gateway 2000*, [105 F.3d 1147](#) (7<sup>th</sup> Cir. 1997) (arbitration clause upheld) *with Klocek v. Gateway*, [104 F. Supp. 2d 1332](#) (D. Kan. 2000) (arbitration clause not binding on the purchaser).

Similarly, when a shrinkwrap package containing a software program contains a printed warning to the effect that unwrapping the package constitutes consent to the terms of the license contained therein, jurisdictions are split as to the binding effect of such license terms on the purchaser. *Compare ProCD v. Zeidenberg*, [86 F.3d 1447](#) (7<sup>th</sup> Cir. 1996) (license terms upheld) *with Novell v. Network Trade Ctr.*, [25 F. Supp. 2d 1218](#) (D. Utah 1997) (terms not upheld). Under the UCITA, enacted only in Maryland and Virginia, such software license terms are binding on the licensee.

#### [2] Box-Top Licenses

At least one court has held that if a purchaser is unaware of license terms printed on the box because the transaction was conducted over the telephone, with no mention by the seller's representative of the license terms, such terms were not binding on the purchaser. *Step-Saver Data Systems v. Wyse Technologies*, [939 F.2d 91](#) (3<sup>rd</sup> Cir. 1991). Reversing the trial court finding that a box-top license was intended as the final expression of the parties' agreement, the court noted that "[w]hen a disclaimer is not expressed until after the contract is formed, [UCC § 2-207](#) governs the interpretation of the contract, and, between merchants, such disclaimers, to the extent they materially alter the parties' agreement, are not incorporated into the parties agreement."

#### [3] Clickwrap

Where software is downloaded from the internet, with the licensee being required to click on the "I agree" button indicating agreement to the licensor's terms, such conduct is deemed to be a binding acceptance of the licensor's offer. *E.g., Specht v. Netscape*, [306 F.3d 17](#) (2<sup>nd</sup> Cir. 2002).

*Proposed revised UCC § 2-204 adds new subsection (4)(b), recognizing the validity of acceptances in click-through transactions.* (see text at § 2.03 *supra*)

## PART II. ISSUES OF ENFORCEABILITY

### Chapter 5 CONSIDERATION

#### § 5.01 Elements of Consideration

With some exceptions (see § 5.03), a promise must be supported by consideration in order to be enforceable. Consideration requires a bargained exchange in which each party incurs a legal detriment.

##### [1] Bargained exchange

Consideration is a bargained-for performance or return promise which is given by the promisee in exchange for the promisor's promise. Consideration need not be furnished by or to the parties themselves as long as it is part of the bargained exchange.

Even if the promisor's promise induced performance or a return promise by the promisee, if such inducement was not sought by the promisor, there is no bargained exchange. In such circumstances, the promise is merely an unenforceable gift.

##### [2] Legal Detriment

A legal detriment exists where the party:

- engages in an act that the party was not previously obligated – whether statutorily or contractually – to perform; or
- refrains from exercising a legal right

Under the **pre-existing duty rule**, a promise regarding a pre-existing obligation to the other party does not constitute a legal detriment.

#### § 5.02 Sufficiency of Consideration

##### [1] Adequate vs. Sufficient Consideration

Adequacy of consideration relates to whether the bargain involves an exchange of equal value. Generally, however, courts do not concern themselves with whether consideration is adequate, honoring the concept of freedom of contract. On the other hand, courts do require consideration to be "sufficient", which relates to whether there is a legal detriment incurred as part of a bargained exchange of promises or performances.

If a bargain gives a party a choice of alternative obligations, each alternative on its own must constitute sufficient consideration for the return promise. If a promise is void or voidable – e.g., due to the incapacity of the promisor – the sufficiency of the consideration is not necessarily negated. [See [Restatement § 78](#), comment a]

##### [2] Forbearance of Claims and Defenses

Surrender of a validly disputed claim – one for which there is a factual or legal uncertainty as to its merits – or the release of a validly asserted defense is sufficient consideration for a return promise. Forbearance of an invalid claim or defense may also serve as consideration if the proponent of such claim or defense had a good faith belief in its validity and if there exists an objective uncertainty as to its validity.

##### [3] Discharge of Obligation by Lesser or Greater Performance

Generally, a promise to pay a lesser amount than is owed or to partially perform a pre-existing obligation does not constitute a legal detriment since the promisor is merely doing that which he is already obligated to do. [*Foakes v. Beer*, H.L. 1884] However, if the promisor undertakes a greater obligation than is promised, such as paying or

performing before the obligation is due, he incurs a legal detriment sufficient to form consideration for the discharge of the obligation.

#### **[4] Illusory Promises**

An illusory promise cannot serve as consideration. An illusory promise may exist where a promise is subject to a condition which is within the control of the promisor, especially where such condition is related to the contract performance, or when the promisor, at the time of the promise is made, knows that such condition cannot occur.

#### **[5] Implied Promises of Best Efforts and Good Faith Dealing**

Agreements for exclusive dealings may appear to be based on an illusory promise since the promisor's performance is subject to conditions within its control. Nevertheless, common law and the UCC have recognized an implied promise to use best efforts in an agreement for exclusive dealings, which furnishes the necessary consideration. [See *Wood v. Lucy, Lady Duff-Gordon*, [222 N.Y. 88](#) (1917) (involving an agreement by the defendant to give the plaintiff the exclusive right to market its name and designs); [UCC § 2-306\(2\)](#)]

#### **[6] False Recitals of Consideration**

Where there is a false recitation of consideration, the agreement will not be enforced for lack of sufficient consideration. Consideration must in fact be rendered.

There is some conflict as to whether a sham recital of consideration in option contracts is sufficient to enforce the promise. [Restatement § 87](#), comment c, states "the option agreement is not invalidated by proof that the recited consideration was not in fact given." However, most courts continue to deny enforcement where there is a false recital of consideration in option contracts.

#### **[7] Nominal consideration**

If nominal consideration is given as a mere formality in order to create a binding contract rather than as a bargained exchange, the consideration is insufficient. [[Restatement § 71](#), illus.5] In option contracts, a payment or promise to pay nominal consideration is sufficient consideration to make enforceable a promise not to revoke, provided the option time is relatively short (e.g., 10 days) and the price to be paid if the option is exercised is a fair price. [See [Restatement § 87](#), comment b]

### **§ 5.03 Enforceable Promises Without Consideration**

The following types of promises are enforceable without consideration:

- 1) promises that induce a foreseeable and detrimental change of position by the promisee (**promissory estoppel**)
- 2) a new express or implied promise to pay a **debt that has become barred by the statute of limitations**
- 3) a new express promise to perform all or part of a **pre-existing obligation that has become discharged in bankruptcy**
- 4) where an original promise is voidable due to the promisor's incapacity, a new promise by such promisor **upon attaining capacity**
- 5) where an original promise is voidable due to a valid defense by the promisor such as mistake, misrepresentation or undue influence, a subsequent promise by such promisor
- 6) in contracts for the sale of goods, **contract modifications** [[UCC § 2-209\(1\)](#)], **release of a claim by a signed writing** [[UCC § 1-107](#)], and a written promise by a merchant **not to revoke an offer** [[UCC § 2-205](#)]

- 7) in some states, contract modifications in non-sale-of-goods transactions.

## Chapter 6 STATUTE OF FRAUDS

### § 6.01 Requirements of the Statute of Frauds

Certain agreements must satisfy the statute of frauds, which requires the agreement to:

- 1) be **memorialized in a writing or record**;
- 2) be **signed by or on behalf of the party against whom enforcement is sought**;
- 3) **indicate that a contract has been made between the parties**;
- 4) state with reasonable certainty the **essential terms** of the unperformed promises, in the case of **non-goods contracts**;
- 5) specify the term of **quantity**, in the case of contracts for the **sale of goods**. [UCC § 2-201](#) specifically states that "a record is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable . . . beyond the quantity of goods shown in the record."

### § 6.02 Contracts Within the Statute of Frauds

The following types of agreements fall within the statute of frauds:

- 1) **Agreements that by its terms cannot be performed within a year from the making of the contract** – The statute of frauds only applies if the contract specifically precludes performance within one year, not merely if performance would appear impossible to complete within one year of the making of the contract. (see § 6.04[3] for an exception to this writing requirement)
- 2) **Promise to answer for the debt, default or miscarriage of another** – A promise by a surety or guarantor to a creditor to pay the debt or perform the obligation of a principal debtor must be in writing where the creditor has reason to know of the surety/guarantor relationship. Many states likewise require a writing to memorialize a promise by an executor or other personal representatives to pay the obligations of the estate which they represent with their own funds. This requirement does not apply when the promise merely involves payment of another's debts with funds that belong to the debtor or which the promisor holds for the purpose of paying the debtor's obligations.
- 3) **Agreements made upon consideration of marriage**, other than mutual promises to marry, e.g., to provide a dowry or child support.
- 4) **Agreements for the sale of land and for an interest in land** (see § 6.04[2] for an exception)
- 5) **Agreements for the lease of real property for longer than one year**
- 6) **Agreement by a purchaser of real property to pay an indebtedness secured by a mortgage** or deed of trust upon the property, unless assumption of the indebtedness by the purchaser is specifically provided for in the conveyance of the property.
- 7) **Contracts for the sale of goods for the price of \$500 or more** [\[UCC § 2-201\]](#); *under the proposed revision, the price threshold is raised to \$5,000* (see § 6.04[1] for an exception)

- 8) **Contracts for sale of other personal property** – e.g, intellectual property, royalties – **in the amount or value exceeding \$5,000** [[UCC § 1-206](#)]
- 9) **Leases of goods in the total amount of \$1,000 or more** [[UCC § 2A-201](#)]
- 10) **Agreements which creates a security interest in personal property if it is not in possession of the secured party, and agreements for the assignment of contract rights** [[UCC § 9-203\(1\)\(a\)](#)]

Other types of agreements upon which different states have imposed a writing requirement include:

- 1) agreements that by its terms cannot be performed during the lifetime of the promisor;
- 2) agreements by which a principal appoints an agent to execute a contract which is itself within a provision of the statute of frauds ("equal dignities" rule)
- 3) promises to pay debts, the enforcement of which was barred by the statute of limitations
- 4) promises to pay debts discharged in bankruptcy
- 5) agreements to pay a commission to a real estate agent

## **§ 6.03 Signature**

### **[1] Generally**

An agreement that falls within the statute of frauds must be signed by or on behalf of the party against whom enforcement is sought. An agreement may consist of several writings or records and only one need be signed if the circumstances clearly indicate that the various writings relate to the same transaction.

A signature may include any mark or symbol with which the signer intends to authenticate a writing. The signature may be written, printed, stamped, engraved, or otherwise marked on the writing. Signatures may include initials, imprinted signatures, letterhead, and firm logos.

### **[2] Electronic signatures**

UETA, "E-Sign", and the UCC [*proposed revised UCC § 2-211(1)*] recognize the validity of electronic signatures.

### **[3] Signed Confirmation Between Merchants**

In a contract for the sale of goods between merchants, the contract may be enforced even against a merchant that did not sign the writing if:

- 1) within a reasonable time of the making of the oral contract, one merchant sends a signed writing to the other which would satisfy the statute of frauds as against the sender;
- 2) the other merchant receives the writing and has reason to know of the writing's contents; and
- 3) the non-signatory merchant fails to send a written notice of objection within 10 days of the date of receipt of the confirmation. [[UCC § 2-201\(2\)](#)]

### **[4] Signature by Party's Agent**

Some jurisdictions require a signed writing to evidence an agent's authorization to sign a contract that is subject to the statute of frauds on behalf of a party. This is not the majority position however.

## **§ 6.04 Avoidance of the Writing Requirement**

### **[1] Goods Contracts**

Contracts for the sale of goods that fall within the statute of frauds may be enforced, at least partially, in the absence of a writing, in the following circumstances:

- 1) **where payment has been made and accepted or the goods have been received and accepted** – Such partial performance makes only the portion performed and accepted enforceable, not the oral contract in its entirety.
- 2) in a contract for **specialty manufactured goods** where the seller cannot sell such goods to third parties in the normal course of his business, once the seller has made a substantial beginning in manufacturing or procurement of such goods, provided that the seller can establish that the goods were intended for the buyer.
- 3) where the party against whom enforcement is sought **admits in a pleading, testimony or otherwise under oath that a contract was made** but the contract is only enforceable up to the quantity of goods admitted. [\[UCC § 2-201\(3\)\(c\)\]](#)

## **[2] Contracts for the Sale of Real Estate**

Despite failure to satisfy the statute of frauds, a contract for the sale of real property will be enforceable if the buyer has taken possession and has made permanent improvements upon it. The extent of the improvements made that will justify enforcement varies from jurisdiction to jurisdiction. [See [Restatement § 129](#), comment a]

## **[3] Contracts That Cannot be Completed Within One Year**

In a contract which cannot by its terms be completed within one year, lack of a writing will not preclude enforcement once full performance has been completed.

## **[4] Equitable Estoppel**

Where the promisor makes a representation pertaining to the writing and the party seeking to enforce the contract relied to his detriment upon such representation – e.g., that the writing has been executed, that the statute of frauds will not be raised as a defense to the enforcement, or that the statute of frauds does not apply to the transaction in question – the promisor may be estopped from raising the lack of writing as a bar to enforcement.

## **[5] Promissory Estoppel**

A non-goods contract that fails to satisfy the statute of frauds may nevertheless be enforceable if the promisor's promise foreseeably induces action or forbearance on the part of the promisee or a third person and enforcement is the only means of avoiding an injustice. [\[Restatement § 139\]](#) Mere reliance on the oral contract itself is generally not enough to justify estoppel; most cases require some additional statement or promise.

Some courts have refused to apply promissory estoppel to cases involving goods contracts because [UCC § 2-201\(3\)](#), which enumerates the circumstances under which the writing requirement may be avoided, does not include estoppel. However, [section 1-103](#), which applies to all commercial transactions, indicates that principles of law and equity, including estoppel, are to supplement the specific provisions.

# **PART III. TERMS OF THE CONTRACT**

## **Chapter 7 PAROL EVIDENCE RULE**

### **§ 7.01 Parol Evidence Rule**

The parol evidence rule operates in situations where there is a writing that represents the *final embodiment* of the contract or some of its terms. The rule governs whether parties may introduce evidence of extrinsic agreements to prove the existence of additional or modified terms.

The parol evidence rule does not bar extrinsic evidence offered for the following purposes:

- to aid in the interpretation of existing terms
- to show that a writing is or is not an integration
- to establish that an integration is complete or partial
- to establish subsequent agreements or modifications between the parties
- to show that terms were the product of illegality, fraud, duress, mistake, lack of consideration or other invalidating cause

### **[1] Finality of Writing**

The more formal and complete a writing is, the more likely it is that it represents the final embodiment of the agreement. Nevertheless, the writing need not be signed or complete in order to be deemed final. Any relevant evidence may be admitted to demonstrate that the writing was not intended to be final.

### **[2] Writing as Integration**

A written document that serves as a final embodiment of the agreement may be either a:

- 1) complete integration – an expression of the parties' agreement in its entirety; or
- 2) partial integration – an expression of only a portion of the agreement.

### **§ 7.02 Complete Integration**

If a writing is found to be a complete integration, the parol evidence rule precludes evidence of *prior or contemporaneous agreements to contradict or supplement* the contract. However, evidence of course of dealing, course of performance or trade usage that supplies a consistent additional term is permitted. [[UCC § 2-202\(1\)](#)]

### **§ 7.03 Partial Integration**

If a writing is found to be a partial integration, the parol evidence rule precludes the following types of extrinsic evidence:

- prior agreements (whether written or oral) that *contradict* a term in the contract
- contemporaneous *oral* agreements

*Consistent additional terms* to a partial integration may be established by evidence of:

- contemporaneous *writing(s)*
- course of dealing, course of performance or trade usage

[[Restatement §§ 214-216](#); [UCC § 2-202](#)]

### **§ 7.04 Determining Whether a Writing is a Complete or Partial Integration**

There are several approaches to determining whether a writing is a complete or partial integration:

- 1) "four corners" or "plain meaning" rule – If the writing appears complete and final on its face, the writing is conclusively presumed to be a complete integration.
- 2) "collateral contract" concept – All final writings are deemed to be partial integrations.
- 3) "reasonable person" approach (from Williston's rules) – If a writing appears to be a complete expression of the parties' agreement, it is a complete integration unless the additional terms are such that it would be natural to enter a separate agreement as to such terms, in which case the writing is a partial integration. This is the majority approach.
- 4) "intention of the parties" approach (Corbin) – This approach allows all relevant evidence on the issue of intent, including evidence of prior negotiations. There is increasing acceptance of this approach, as it has

been incorporated into the UCC and the Restatement Second. [See [Restatement § 210](#), comment b; [UCC § 2-202](#)]

### § 7.05 Merger Clauses

A merger clause establishes that the writing is intended to be the complete expression of the agreement between the parties. Such clauses are generally conclusive on the issue of integration and will be enforced absent proof of fraud, mistake or other defense. A merger clause contained in a contract of adhesion, however, may be given less weight than such clauses in non-adhesion contracts.

## Chapter 8 CONTRACT INTERPRETATION

### § 8.01 Approaches to Contract Interpretation

The approaches used to determine whether a writing is an integration are also employed to determine what evidence may be referred in the interpretation of a contract as a whole or its individual terms.

- 1) **"Plain meaning" rule** – If a writing or term appears to be unambiguous on its face, it must be interpreted solely on the basis of such writing. The majority of jurisdictions apply this rule, despite growing criticism.
- 2) **Williston's rules ("reasonable person" approach)** – If a writing is an integration, the meaning given to it as a whole or any individual terms therein is that of a reasonably intelligent person in the circumstances that surrounded the making of the contract. If the writing is not an integration and is unambiguous, the terms are to be interpreted by an objective test – the interpretations that a reasonable person would give them. If the writing is not an integration and is ambiguous, subjective intent of the parties is relevant.
- 3) **"Reasonable expectations of the parties" approach** – This approach, espoused by Corbin and incorporated by the Restatement and UCC, allows all relevant extrinsic evidence to assist in interpretation, including the subjective intent of the parties.

### § 8.02 Course of Performance, Course of Dealing, and Trade Usage

In both common law and goods contracts, course of performance, course of dealing and trade usage may supply both additional terms and aid in construction of existing terms.

**"Course of performance"** represents a pattern in the performance of the contract. If a contract involves repeated occasions for performance by either party, and the other party knows of the nature of the performance and has an opportunity to object to such performance, any course of performance accepted or acquiesced to without objection is relevant to the meaning of the agreement. [[UCC § 2-208](#)(1)]

**"Course of dealing"** represents a sequence of previous conduct between the parties to a particular transaction which establishes a common basis of understanding for interpreting their expressions and conduct. [[Restatement § 223](#); [UCC § 1-205](#)(1)]

**"Usage of trade"** represents a practice that is employed with regularity in a place, vocation or trade, justifying an expectation that the practice will be observed with respect to the agreement in question. [[UCC § 1-205](#)(2)]

### § 8.03 Rules of Interpretation

The following rules have developed to aid courts in interpretation:

- 1) Words and conduct of the parties are to be interpreted in light of all circumstances, giving weight to the principal purpose of the parties in making the contract, if such purpose is ascertainable.
- 2) A writing is to be interpreted as a whole, and if multiple writings pertain to the same transaction, all are to be interpreted together.
- 3) Language is to be interpreted in accordance with its general prevailing meaning, if any.
- 4) Technical terms and terms of art are to be given effect when used in relevant transactions.
- 5) Wherever possible, the manifestations of the parties' intentions are to be interpreted as consistent with each other and with any relevant course of performance, course of dealing or trade usage.

#### **§ 8.04 Standards of Preference**

- 1) An interpretation which gives a reasonable, lawful and effective meaning to terms is preferred to an interpretation which imparts an unreasonable, unlawful or null effect.
- 2) In order of their significance and the weight to be given each are: express terms, course of performance, course of dealing and trade usage.
- 3) Specific terms are to be given greater weight than general terms.
- 4) Negotiated terms are to be given greater weight than standard terms.
- 5) In some cases, such as adhesion contracts, ambiguous language may be construed against the drafter. [See [Restatement § 203](#), [§ 206](#); [UCC § 2-208](#)]

#### **§ 8.05 Certainty of Terms**

Contract terms must be reasonably certain; terms are deemed reasonably certain if they provide a basis for determining the occurrence of a breach and an appropriate remedy.

##### **[1] Open Terms**

In goods contracts, even if terms are left open, e.g., regarding price, time and place delivery, the contract 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)] Unspecified terms can be supplied by course of performance, course of dealing, trade usage, and "gap fillers," provided in [UCC § 2-305](#) through [§ 2-311](#).

##### **[2] Omitted Terms**

Where a contract is sufficiently defined but omits an essential term, the court may supply a term which is reasonable under the circumstances. [[Restatement § 204](#)]

##### **[3] Terms Set by One Party**

A contract may provide that one of the parties is to specify a term of performance. Both the common law and the UCC provide that such a term may be enforced as long as the discretion is exercised in good faith and "within limits set by commercial reasonableness." [[UCC § 2-311](#)(1)]

#### **§ 8.06 Different Meanings Intended by the Parties**

Where the parties attach different meanings to a term, the interpretation that prevails is that of the party that did not know (or had no reason to know) of any different meaning attached by the other, and the other knew (or had reason to know) the meaning attached by the first party. [[Restatement § 201](#)]

## **§ 8.07 Adhesion Contracts**

An adhesion contract is a contract drafted by one party and reduced to a form agreement that generally presents no opportunity for negotiation. While not per se objectionable, adhesion contracts are subject to greater scrutiny than contracts that result from negotiation between the parties. To protect the non-drafter, who is often in an inferior position, the Restatement provides that only those contractual provisions that a reasonable person would anticipate and agree to should be considered part of the contract. [[Restatement § 211\(3\)](#)]

## **Chapter 9 MODIFICATION**

### **§ 9.01 Good Faith Modification**

Subsequent to the formation of a contract, the parties may, by mutual assent, modify the contract. The modification must be a product of good faith and fair dealing. A modification resulting from an improper threat to breach the contract or to refuse to do business with the party from whom the modification is sought – referred to as "business compulsion", "economic duress" or "extortion of a modification" – will be held unenforceable.

A party to a contract for the sale of goods must have a legitimate reason for seeking a modification. An example of a legitimate commercial reason to seek a modification may exist where a market shift would create a loss to the party seeking relief even if such circumstances would not justify an excuse of performance. [[UCC § 2-209](#), comment 2]

### **§ 9.02 Consideration**

The UCC does not require modifications to be supported by consideration. [[UCC § 2-209\(1\)](#)] In non-sale-of-goods executory contracts, a modification must be supported by new consideration except:

- if the modification is fair and equitable in light of circumstances not anticipated by the parties at the time contract was made (the "unforeseen difficulties exception"); or
- to the extent that justice requires enforcement of the modification due to a material change of position in reliance on the modified promise. [[Restatement § 89](#)]

### **§ 9.03 Writing Requirement**

Under common law, there is some disagreement as to whether a contract that is subject to the statute of frauds may be modified orally. Jurisdictions also differ as to whether the parties may waive a contractual requirement that modifications be in writing. Nevertheless, promissory estoppel may be invoked to enforce an oral modification that is subject to the statute of frauds if it would be unjust to reinstate the original term(s) where a party materially changes position in reliance on the agreement to modify.

The UCC requires modifications to be in writing where:

- required by a signed agreement between the parties (in order to give effect to any such requirement stated on a form supplied by a merchant to a consumer, the consumer must also sign the form)
- the contract as modified falls within the statute of frauds. [[UCC § 2-209\(2\), \(3\)](#)]

### **§ 9.04 Ineffective Modification as Waiver of Original Terms**

Under both common law and the UCC, an ineffective attempted modification that is unenforceable due to noncompliance with the writing requirement (and any consideration requirement under the common law) may constitute a waiver of the original terms. A waiver is only effective against an existing contractual right and cannot create a new obligation. Waivers generally apply to conditions in the contract, e.g., delivery or filing date if time is not of the essence, but not essential parts of the bargain, e.g., promise to render services or sell goods.

Unlike terms in the formation or modification of a contract, waivers do not require mutual assent or consideration and do not fall within statutory writing requirements. Waivers can generally be retracted unless the other party has relied on such waiver to his detriment.

## PART IV. ENFORCEMENT AND AVOIDANCE

### Chapter 10 PROMISSORY ESTOPPEL

#### § 10.01 Defined

When a promisee foreseeably relies to his detriment on the promisor's promise, even in the absence of an enforceable contract, the doctrine of promissory estoppel may be invoked to make such promise binding in order to prevent injustice. The remedy in such cases is based on the extent of the promisee's reliance, not his expectation. The Restatement, Second, eliminated the requirement from the Restatement, First, that the detriment be "substantial." [[Restatement § 90\(1\)](#)]

#### § 10.02 Applicability of Doctrine

Examples of situations in which promissory estoppel may be applied include:

- 1) **intra-family promises** [*e.g.*, *Ricketts v. Scothorn*, [57 Neb. 51](#) (1898)]
- 2) **Philanthropic subscriptions** made to educational, charitable or religious organizations
- 3) **Promises to make a gift of land** where the promisee takes possession of the land and makes improvements upon it, with the knowledge and assent of the promisor
- 4) **Promises made by a bailee** relating to bailed goods and on which the bailor relies
- 5) **Offers that become irrevocable** by virtue of the reasonably foreseeable inducement of an action or forbearance of a substantial character on the part of the offeree before acceptance [[Restatement § 87\(2\)](#)], *e.g.*, where a general contractor receives bids from a subcontractor and relies on such bid in preparing its own bid for a project
- 6) **Contract modifications** where one party materially changed position based on it [[Restatement § 89\(c\)](#)]
- 7) **Preliminary contract negotiations** where one party encourages the other to engage in activities that would facilitate entering into a contract but which would be detrimental to such party if the transaction is not in fact consummated, *e.g.*, relocation, purchase of property, or borrowing money [see, *e.g.*, *Hoffman v. Red Owl Stores*, [26 Wis. 2d 683](#) (1965)]
- 8) **Extensive contract negotiations** in which one party gradually increasingly commits itself in reliance on the negotiations resulting in a binding contract, the other party negotiates through a low ranking representative who lacks full authority to seal the agreement
- 9) **Indefinite contracts** that are too vague to be enforced but for which the courts may award reliance damages
- 10) **Letters of intent** upon which one party justifiably relies in the belief that the transaction will occur but it does not when the other party abandons the negotiations

## Chapter 11 VOID AND VOIDABLE CONTRACTS

### § 11.01 Distinction Between Void and Voidable Contracts

Certain defenses – generally those that affect assent – can render a contract voidable by the aggrieved party. Other defenses – typically those that pertain to law and public policy – may render a contract void. The distinction is not clear-cut; for example, while defenses such as incapacity, duress or mistake generally render a contract merely voidable, if the circumstances prevented a meeting of the minds, the contract will be deemed void. Likewise, contracts with an illegal purpose will generally be deemed void unless the parties are not *in pari delicto*.

The legal effects of a contract being deemed voidable as opposed to void are:

- 1) Where a contract is merely voidable, the innocent party may enforce the contract, but the contract cannot be enforced against him. If a contract is void, neither party can enforce the contract.
- 2) Rights in a voidable contract are transferable; rights cannot be transferred in a void contract.
- 3) If a party improperly transfers property to a bona fide purchaser for value, the injured party may recover the property if the contract governing the transaction is void but not if it was voidable.
- 4) Voidable contracts may be ratified by the party with the power to avoid the contract once the reason for such avoidance – such as minor age, mental impairment, duress, undue influence or mistake – no longer exists. Void contracts cannot be ratified.

### § 11.02 Defenses Affecting Assent

#### [1] Incapacity to contract

##### [a] Minors

Contracts entered into by a minor (an "infant") – one below the age at which state law deems persons to possess capacity to contract, currently 18 years old in most states – are generally voidable by the minor-party, even if he misrepresented his age. A minor can furthermore avoid contractual obligations for a reasonable time after attaining the age of majority. However, if he fails to disaffirm within a reasonable time, the contract will become binding against him.

##### [b] Mental Impairment

Mental incapacity can result from mental illness or defect – e.g., senility, insanity, retardation – or drug or alcohol intoxication.

A party that suffers a mental illness or defect at the time the contract is made may avoid the contract where the mental impairment prevented him from:

- understanding the nature and consequences of the transaction; or
- acting in a reasonable manner in relation to the transaction, and the other party had reason to know of his condition.

However, if the contract is made on fair terms and the other party was without knowledge of the mental illness or defect, the incapacitated party may be precluded from avoiding the contract where:

- the contract has been fully or partially performed; or
- the circumstances have changed such that avoidance would be unjust. [[Restatement § 15](#)]

A party that was intoxicated when the contract was made may avoid the contract *only if the other party had reason to know* that, by reason of intoxication, the party was unable to understand the nature and consequences of the transaction or was unable to act in a reasonable manner in relation to the transaction. [\[Restatement § 16\]](#)

## [2] Duress

If assent to a contract was obtained by coercion constituting duress, the contract may be avoided by the person subjected to the duress. An improper threat of harm that induces the other party to assent to contract terms constitutes duress. "Improper threat" is established where:

- the threatened act would harm the recipient and would not significantly benefit the party making the threat;
- the effectiveness of the threat in inducing the manifestation of assent is significantly increased by prior unfair dealing by the party making the threat; or
- what is threatened is otherwise a use of power for illegitimate ends. [\[Restatement § 176\(2\)\]](#)

Examples of duress include threats to:

- commit a criminal or tortious act against the party, his family or his property
- extort money
- commence a civil action under circumstances which could be deemed abuse of process
- refuse to do business with the party
- blackmail the party
- refuse to perform a contract in order to extract an economically unjustified modification
- terminate an employment contract unless the party or someone close to him consents to an agreement not connected with the employment contract.

The threat must be of sufficient gravity to make the contract voidable, determined based on an examination of the victim's experience, sophistication, age, and other relevant personal characteristics. The highest standard is applied in cases constituting "economic duress", such as refusals to do business with the victim.

## [3] Undue influence

A defense based on undue influence may arise where:

- one party takes advantage of the other party's position of weakness, e.g., based on age, illness, mental state, intoxication, etc., thus preventing the latter from exercising free will in the transaction; or
- one party breaches a fiduciary relationship with the other party.

Business contracts between an attorney and his client are presumptively invalid but can be overcome if the attorney demonstrates that:

- 1) the transaction was fair and equitable;
- 2) the attorney informed the client of the nature and consequences of the transaction;
- 3) the attorney fully disclosed his own interest in the matter; and
- 4) the attorney encouraged the client to obtain independent advice or rendered the client the type of advice that a disinterested attorney would have given a client.

## [4] Mistake

A mistake is an erroneous belief related to the facts as they exist *at the time the contract is made*.

### [a] Mutual mistake

The adversely affected party may void a contract based on mutual mistake made at the time of the contract formation where:

- 1) the mistake concerned a *basic assumption* on which the contract made;
- 2) the mistake *materially affects* the agreement; and
- 3) the adversely affected party does not bear the risk of the mistake. [\[Restatement § 152\]](#)

The Restatement's requirement that the mistake concern a basic assumption deviates from early case law that required the mistake to concern the subject matter of the contract. *E.g., Sherwood v. Walker*, [66 Mich. 568](#) (1887).

### [b] Unilateral mistake

Common law provides that a party may avoid a contract based on a unilateral mistake where the mistake was **palpable**, i.e., the other party knew or had reason to know of the mistake, such as where the contract contains an egregiously erroneous recording of a price. If the unilateral mistake is not **palpable**, the aggrieved party may avoid the contract where:

- 1) enforcement of the contract against the mistaken party would be unconscionable; and
- 2) avoidance would not result in substantial hardship to the non-mistaken party.

Additionally, the following circumstances must exist in order to avoid a unilateral impalpable mistake:

- 1) the agreement is entirely executory or the other party can be placed in the status quo ante;
- 2) the mistake is substantial (but not astronomical as that would likely make the mistake palpable); and
- 3) mistake is of a clerical or computational error or other such misconstruction of the terms.

### [c] Mistakes that do not give rise to a defense

A party seeking to avoid the contract may not rely on mistake as a defense where the party:

- assumed the risk of mistake with respect to the accuracy of facts existing at the time the contract was made
- is at fault for the mistake, e.g., erroneous calculation of costs or prices, but generally only where the fault amounts to gross negligence, violation of a legal duty or failure to act in good faith and in accordance with standards of fair dealing
- failed to read the contract (with some exceptions for adhesion contracts or where a writing does not accurately reflect an existing agreement between the parties).

### [d] Void Contracts based on Mistake

Mistakes that prevent a meeting of the minds render a contract void, such as where:

- the offeree knows that the offer is the product of a mistake
- the offeror makes the offer to a party intending it for another who is aware of the mistake
- the parties attach a materially different meaning to the communications and neither party is aware or has reason to be aware of the meaning attached by the other.

## [5] Misrepresentation

### [a] Generally

An aggrieved party may avoid a contract based on misrepresentation where:

- 1) the assertion was either material or fraudulent; and
- 2) the person seeking to avoid the contract reasonably relied to his detriment on such assertion. [[Restatement § 162](#)]

A misrepresentation is **material** if:

- it would be likely to induce a *reasonable person* to agree to the bargain, or
- the party who made the misrepresentation knew or should have known that it was *likely to induce the other party* to manifest assent to the bargain, whether or not a reasonable person would have been induced.

A misrepresentation is **fraudulent** if it was made with:

- 1) the intention of inducing the other party to rely on it, and
- 2) knowledge of its falsity or lack of adequate foundation for the representation. (scienter)

**Reasonableness of the reliance** is assessed based on the totality of the facts, including the party's age, education, and experience, and the transaction's subject matter, nature, and circumstances under which it was made. Reliance on opinion may be reasonable in some cases where the opinion is expressed by one who possesses or appears to possess superior knowledge on such matter, such as when there exists a special relationship of trust between the parties (e.g., attorney-client).

### **[b] Misrepresentations of Law and Opinion**

Misrepresentations of fact may render a contract voidable. Misrepresentations regarding the law or that constitute an opinion do not render the contract voidable, except where:

- there is a relationship of trust and confidence between the parties (particularly important in cases regarding a misrepresentation of the law where the maker of the statement is a lawyer)
- the maker of the statement is in fact or claims to be an expert on such matter
- the maker of the statement has superior access to facts underlying the false opinion
- the statement is made by a third person posing as a disinterested person
- the statement is such that no reasonable person in the position of the maker of the statement could legitimately hold such opinion

### **§ 11.03 Duress, Undue Influence, or Misrepresentation by a Third Party**

The defenses of duress, undue influence and misrepresentation may be available to an aggrieved party even if committed by a third party, if the other party to the contract knew or had reason to know that the victim was improperly induced to enter the contract. Some cases have even allowed such defenses in the absence of the other party's knowledge, unless such other party materially relied on the agreement.

### **§ 11.04 Remedies in Avoidable Contracts**

#### **[1] Reformation**

When a record does not reflect the parties' agreement due to duress, mistake or misunderstanding, the remedy of reformation may be available, except where the rights of third parties, such as good faith purchasers for value, will be unfairly affected. Reformation addresses nonconformities – typically typographical and other inadvertent errors – in the *record* that evidences or embodies the agreement, not the contract itself. Reformation does not seek to remake the bargain.

#### **[2] Restitution**

Where enforcement of a contract is avoided, a party that has rendered full or partial performance under a contract may be entitled to restitution.

Special rules apply where a contract is avoided based on incapacity. Most states hold that a minor who is a plaintiff in an action to avoid a contract must make full restitution but a minor-defendant need only be liable for the value of tangible consideration still retained. A minority of states (lead by New Hampshire) takes a different approach and holds a minor liable for the entire value of any benefits received, regardless of whether he is the plaintiff or the defendant.

A mentally incapacitated party who seeks avoidance may be liable for restitution if the other party had no reason to know of the incapacity. If the incapacity should have been obvious to a reasonable person, the incapacitated party will generally be liable only for the consideration received that he still has in his possession. A minority position holds that the mentally incapacitated party need only return consideration still retained, regardless of whether his incapacity was apparent to the other party.

In addition to restitution for consideration (in whole or in part), an incapacitated party will generally be held liable for the full value of any necessities furnished to him or his dependents, such as food and medical care.

### **§ 11.05 Defenses Based on Unconscionability, Law and Public Policy**

A contract, in whole or in part, may be void or voidable based on unconscionability, illegality, or violation of public policy. If the contract performances are severable, the court may refuse to enforce the terms that offend law or public policy and enforce the remainder of the contract.

### [1] Unconscionability

Generally, a defense based on unconscionability must present both procedural and substantive unconscionability.

**Procedural unconscionability**, which is manifested by *unfair surprise*, relates to the aggrieved party's understanding of the contract terms due to factors such as:

- inconspicuous print in the writing
- unintelligible legal language
- lack of opportunity to read the contract or seek clarification of terms
- illiteracy
- imbalanced bargaining positions (such as in adhesion contracts)

**Substantive unconscionability** relates to contracts that are, in whole or in part, deemed to be oppressive, such as:

- provisions that deprive one party of the benefit of the agreement or an adequate remedy for the other party's breach
- provisions that bear no reasonable relation to the risk involved
- provisions that are substantially disadvantageous to one party without producing a commensurate benefit to the other party
- a great disparity between the cost and the selling price of the item that is the subject of the contract in absence of objective justification for such disparity

### [2] Illegality and Violation of Public Policy

Contracts that violate law or public policy may be denied enforcement, such as contracts that involve:

- a crime
- a tort
- a violation of a licensing requirement
- a restraint of trade or interference with contractual relationships of others
- impairment of family relationships
- an interference with the administration of justice
- an agreement not to be bound by usury, limitations or consumer protection statutes
- an exculpatory clause that would absolve a party for liability for harm caused by intentional or reckless conduct
- an exculpatory clause that would absolve an employer for harm caused to an employee by simple negligence
- an exculpatory clause that would absolve a public utility or other public service for harm caused in the course of fulfilling the public service function
- a situation in which the parties are not *in pari delicto* (not equally at fault)

If a contract violates a law intended to protect a given class of persons, under the principle of *in pari delicto*, the contract may not be enforced against a party who is a member of such protected class but such member may nevertheless enforce the contract against the other party, e.g., an employment contract that violates the wage-hour law may be enforced against the employer despite the fact that the employer may not enforce the illegal wage-hour provision against the employee.

## Chapter 12 IMPRACTICABILITY AND FRUSTRATION OF PURPOSE

### § 12.01 Supervening Impossibility and Impracticability of Performance

If, after a contract is formed, circumstances arise which make a party's performance impossible or impracticable, his duty to render that performance is discharged. In order to prove impracticability:

- 1) an event must have occurred that makes performance, or performance in the contemplated sense, impossible or impracticable;
- 2) the party seeking relief *must not have been at fault* in causing the event to occur;
- 3) non-occurrence of the event must have been a *basic assumption* upon which the contract was made; and
- 4) the party seeking relief *must not have assumed the risk* of the event occurring. [[Restatement § 261](#)]

Applying the same criteria, [UCC § 2-615](#) provides that a seller's delayed delivery or non-delivery of goods based on impracticability is not a breach. *The proposed revision expands the availability of the impracticability excuse to "performance" and "non-performance" of any and all sellers' contractual duties.*

Events that may make performance of the contract impossible include:

- death or disability of a person indispensable to performance of the contract
- destruction of the subject matter of the contract or other thing necessary for the performance of the contract, provided the destruction is not the fault of the party asserting impossibility
- failure of a specific thing necessary for performance to come into existence
- supervening governmental action that makes performance of the contract illegal
- where performance would subject the party to potential harm
- shortages or significant price increases in materials due to embargo or war
- other circumstances that would involve "extreme or unreasonable difficulty, expenses, injury or loss." [[Restatement § 261](#), comment d]

Increased cost alone does not excuse performance but an alternative performance that requires an unreasonable expenditure of resources may make performance of the contract impracticable.

### § 12.02 Partial Impracticability

If the circumstances giving rise to the impracticability affect only part of the performance, and the promisor can render substantial performance of his obligations, he must do so, as well as make reasonable substitute performance if available. Performance will be discharged only if the partial impracticability makes the remaining performance substantially more burdensome.

In goods contracts, if the impracticability affects only a part of the seller's capacity to perform, the seller must allocate production and deliveries among its customers. [[UCC § 2-615\(b\)](#)]

### § 12.03 Supervening Frustration of Purpose

If, after the contract is formed, circumstances arise which substantially frustrate a party's purpose in entering into the contract, the party's remaining duties are discharged, provided:

- 1) the party seeking discharge was not at fault;
- 2) the nonoccurrence of such event was a basic assumption on which the contract was made; and
- 3) the language or the circumstances do not prohibit excuse based on frustration of purpose. [[Restatement § 265](#)]

This principle does relieve a party for mere "economic" or "commercial" frustration, where all that is frustrated is the party's ability to make a profit but not the actual purpose of the contract.

### § 12.04 Existing Impracticability and Frustration of Purpose

If the impracticability or frustration of purpose exists at the time the contract was made, *no duty to perform arises* where:

- 1) the party raising the excuse, without fault, had no reason to know of the facts giving rise to the impracticability or frustration; and
- 2) the non-existence of such facts is a basic assumption on which the contract was made. [[Restatement § 266](#)]

### § 12.05 Temporary Impracticability and Frustration

Where a party is unable to perform due to a temporary impracticability, e.g., illness, the other party may be able to suspend performance of the contract, and if there is a reasonable probability that substantial performance will not occur, cancel the contract. When the temporary impracticability ceases, if the delay will make the performance substantially more burdensome, the obligation may be discharged.

## PART V. PERFORMANCE AND BREACH

### Chapter 13

### EXECUTION OF CONTRACTUAL DUTIES

#### § 13.01 Timing of Performance of Duties

Unless the contract specifies otherwise, some of the rules that dictate the order of performance of contractual duties are:

- 1) Promises capable of simultaneous performance are each due simultaneously, with each being constructively conditioned on tender of the other.
- 2) Where the duty of only one party requires a period of time for performance, such duty is due first.
- 3) Where the contract provides for a series of performances and payments, performance of one part is a condition precedent to payment, which in turn becomes the condition precedent to the next performance installment.

#### § 13.02 Conditions

A condition is the occurrence or non-occurrence of an event that gives rise to or extinguishes a contractual duty. A conditional duty becomes due upon either the fulfillment or excuse of such condition. Fulfillment of conditions becomes due as follows:

- **conditions precedent** – a promise which by its terms is to be performed prior to the return promise
- **concurrent conditions** – promises that are capable of being performed simultaneously, and neither party has a duty to perform until the other has performed
- **conditions subsequent** – an event, occurring after a duty has arisen, that discharges such duty

##### [1] Strict vs. Substantial Fulfillment

Express conditions, as well as implied conditions which may be found based on course of performance, course of dealing, trade usage or other conduct, must be strictly fulfilled in order to give rise to a conditional duty. E.g., the condition of tender of payment is likely one to require strict fulfillment.

Constructive conditions – which are judicially imposed in the interest of justice – may be fulfilled by substantial performance. Courts may interpret an express or implied condition as a constructive condition where substantial performance has been rendered in order to avoid a forfeiture.

##### [2] Excuse of conditions

If a condition fails to occur, the other party may still be obligated to perform his contractual duties if the condition is excused. A condition may be excused by:

- 1) **rejection of a proper tender of performance**, where acceptance of the performance is a condition precedent to the rejecting party's duty to perform
- 2) **wrongful prevention or hinderance of the other party's performance**, if such performance was a condition of the aggrieving party's duty, and upon demonstration by the other party that he was otherwise ready, willing and able to perform
- 3) **waiver** of a non-material condition (e.g., time or manner of delivery) that has not yet failed. A waiver can be withdrawn and the condition reinstated if the other party has not relied on such waiver to his detriment. Waiver is only available for conditions that solely benefit the party waiving it.
- 4) **election** to continue performance after a condition has failed. Under the majority view, an election cannot be withdrawn, even if the other party has not relied to his detriment on it. If the failed condition constitutes a breach, election does not foreclose an action for damages.
- 5) **equitable estoppel** where a party wrongfully prevented the occurrence of a condition
- 6) **avoidance of disproportionate forfeiture** unless the occurrence of such condition was a material part of the bargain
- 7) **impossibility of performance of a non-material condition** does not relieve the other party of his duty to perform if there would be forfeiture (need not be an extreme forfeiture in cases of impossibility)
- 8) **unreasonable withholding of approval** by a third party in some circumstances

### [3] Approval as a Condition

#### [a] Approval by a Third Party

Generally, if there is no forfeiture involved, a condition that a third party approve the performance will be enforced and will not even be excused by the third party's death or incapacity or unreasonable withholding of approval. If the failure of the condition of approval will **result in forfeiture** by the other party, whether the condition will be enforced or excused depends on the matter subject to approval. If the approval pertains to **aesthetics, taste and fancy**, the honest judgment of the third party is likely to be upheld and the condition enforced. However, if the approval concerns a matter of utilitarian function or a matter on which the third party possesses no special expertise, such condition of approval will generally be excused if deemed to have been unreasonably withheld.

#### [b] Approval by a Party

Where a party's duty is conditioned on his own approval of the other party's performance, courts generally enforce such condition – even if the other party will suffer forfeiture – where:

- approval concerns a matter of aesthetics or taste, and the disapproval is based on honest dissatisfaction; or
- approval concerns a matter of utilitarian function and it was not unreasonably withheld.

**Chapter 14**  
**WARRANTIES IN SALES OF GOODS**

**§ 14.01 Sellers' Warranties**

**[1] Warranty of Good Title and Against Infringement**

**[a] Good Title**

Unless such warranty is disclaimed (see § 14.02[1]), in all transactions for the sale of goods, the seller warrants that:

- 1) good title in the goods is conveyed;
- 2) the seller has the right to transfer the title in the goods; and
- 3) the goods are not subject to any security interest, liens or encumbrances of which the buyer at the time of contracting has no knowledge. [[UCC § 2-312](#)(1), (2)]

*Proposed revised UCC § 2-312(1) adds that the seller warrants that transfer of the title will not unreasonably expose the buyer to litigation arising from any colorable claim to or interest in the goods.*

The UCC abolished the common law warranty of "quiet possession" which assured the buyer that no one would later assert a claim to such goods.

**[b] Against Infringement**

If a seller is a merchant that regularly deals in goods of the kind that are the subject of the contract, the seller furthermore warrants that the goods are delivered free of any rightful claim of copyright, patent or trademark infringement. However, if the goods are made according to specifications furnished by the buyer, the buyer must hold the seller harmless against any such claims for infringement that arise out of compliance with such specifications. [[UCC § 2-312](#)(3)]

**[2] Implied Warranty of Merchantability**

Contracts for the sale of goods by a merchant of goods of such kind include an implied warranty that the goods are "merchantable," unless such warranty is modified or excluded (see § 14.02[2]). This warranty also applies to the service for value of food or drink.

Goods that may be deemed merchantable include those that:

- pass without objection in the trade under the contract description
- in the case of fungible goods, are of fair average quality within the description
- are fit for the ordinary purposes for which such good are used
- run of even kind, quality, and quantity within each unit and among all units involved
- are adequately contained, packages and labeled
- conform to any promise or affirmations of fact made on the container or label

[[UCC § 2-314](#)]

**[3] Implied Warranty of Fitness for a Particular Purpose**

Unless excluded or modified (see § 14.02[3]), a sale of goods includes an implied warranty that the goods will be fit for a particular purpose where:

- 1) the seller, at the time of contracting, has reason to know of the buyer's particular purpose for which he seeks to purchase the goods; and
- 2) the buyer relies on the seller's skill or judgment to select or furnish goods suitable for such purpose. [[UCC § 2-315](#)]

**[4] Express warranties**

Where a seller:

- makes an affirmation of fact or promise relating to the goods; or
- provides a description of the goods; or
- provides a sample or model of the goods to be delivered

that becomes part of the basis of the bargain, the seller creates an express warranty that the goods will so conform. The seller need not use terms such as "warranty" or "guarantee" or possess a specific intention to make a warranty.

No express warranty is created by the seller's affirmation of the value of the goods, opinion or commendation of the goods. [[UCC § 2-313](#)]

*The proposed revision limits the application of § 2-313 to express warranties made by a seller to "an immediate buyer," defined as "a buyer that enters into a contract with the seller." New sections govern what are now referred to as "obligations" of a seller to remote purchasers created by (1) a record packaged with or accompanying the goods, and (2) advertising or other communication to the public. "Remote purchaser" is defined as "a person that buys or leases goods from an immediate buyer or other person in the normal chain of distribution."*

#### **[a] Express Warranties in Record Packaged with Goods**

Where a seller, in a record packaged with or accompanying goods:

- makes an affirmation of fact or a promise that relates to goods; or
- provides a description of the goods; or
- makes a remedial promise

to a remote purchaser, and the seller reasonably expects the record to be furnished to a remote purchaser, and the record is in fact furnished to the remote purchaser, the seller has an obligation to such purchaser that:

- 1) the goods will conform to the affirmation of fact, promise, or description, unless a reasonable person in the position of the remote purchaser would not believe that an obligation was created; and
- 2) the seller will perform the remedial promise. [[UCC § 2-313A](#)]

#### **[b] Express Warranties in Advertisements**

*Where a seller makes an affirmation of fact or promise that relates to goods, provides a description of the goods, or makes a remedial promise to a remote purchaser in an advertisement or other communication to the public, and the remote purchaser enters into a transaction of purchase with knowledge of and with the expectation that the goods will conform or that the seller will perform the remedial promise, the seller has an obligation to the remote purchaser that the goods will conform and that the seller will perform the remedial promise. [[UCC § 2-313B](#)]*

### **§ 14.02 Disclaimer of Warranties**

#### **[1] Good Title**

The warranty of good title may only be disclaimed or modified by specific language or by circumstances that give the buyer reason to know that the seller does not claim title in himself, or that he is purporting to sell only such right or title as he or a third person may have. [[UCC § 2-312\(2\)](#)]

#### **[2] Implied Warranty of Merchantability**

A disclaimer or limitation of this warranty must expressly mention "merchantability," and if in writing, this term must appear conspicuously. [[UCC § 2-316\(2\)](#)] *The proposed revision distinguishes between consumer contracts and other contracts, adding the requirement in cases of consumer contracts that the exclusion or limitation be in a record, be conspicuous and state "The seller undertakes no responsibility for the quality of the goods except as otherwise provided in this contract."*

The implied warranty of merchantability may be furthermore excluded with respect to obvious defects if the buyer had an opportunity to inspect the goods before entering into the contract (see § 14.02[4]).

### **[3] Implied warranty of fitness**

Any exclusion or modification of the implied warranty of fitness must be in writing and must appear conspicuously. The statement, "There are no warranties which extend beyond the description on the face hereof," for example, is sufficient to exclude all implied warranties of fitness. [\[UCC § 2-316\(2\)\]](#) *The proposed revision adds that in order to exclude all implied warranties of fitness, a consumer contract must state "The seller assumes no responsibility that the goods will be fit for any particular purpose for which you may be buying these goods, except as otherwise provided in the contract."*

Implied warranties of fitness are also subject to further limitation as set forth in § 14.02[4].

### **[4] Implied Warranties Generally**

#### **[a] "As is" and Other Similar Language**

Unless the circumstances indicate otherwise, all implied warranties are excluded by expressions such as "as is," "with all faults," or other language which makes plain that there is no implied warranty. [\[UCC § 2-316\(3\)\(a\)\]](#) *Under the proposed revision, where a consumer contract is in a record, such terms must appear conspicuously in the record.*

#### **[b] Discoverable Defects Upon Inspection**

When the buyer, before entering into the contract, has examined the goods or a sample or model, or has refused to examine the goods, there is no implied warranty with regard to defects which the buyer should have discovered upon examination. [\[UCC § 2-316\(3\)\(b\)\]](#) *The proposed revision puts the onus on the seller to demand such examination in order for the refusal to examine the goods to negate the implied warrant.*

"The particular buyer's skill and the normal method of examining goods in the circumstances determine what defects are excluded by the examination. . . . A professional buyer examining a product in his field will be held to have assumed the risk as to all defects which a professional in the field ought to observe, while a nonprofessional buyer will be held to have assumed the risk only for such defects as a layman might be expected to observe." [\[UCC § 2-316, comment 8\]](#)

### **[5] Express Warranties**

Where a contract contains both an express warranty and a disclaimer of warranty, they are to be construed as consistent with each other wherever reasonable, but the disclaimer will be denied effect if inconsistent with the express warranty. [See [UCC § 2-316\(1\)](#)]

### **§ 14.03 Implied Warranties Arising from Course of Dealing or Trade Usage**

In addition to the implied warranties of merchantability and fitness, other implied warranties may arise from course of dealing or trade usage, and may be excluded by course of dealing, course of performance or trade usage, unless otherwise excluded or modified. [\[UCC §§ 2-314\(3\), 2-316\(3\)\(c\)\]](#)

**Chapter 15**  
**NON-PERFORMANCE AND DEFECTIVE PERFORMANCE**

**§ 15.01 Breach Generally**

**[1] What Constitutes a Breach**

Any non-performance of a contractual duty which has become due constitutes a breach. An anticipatory repudiation of obligations also serves to breach a contract.

In contracts for the sale of goods, in addition to repudiation, a seller breaches the contract by offering a tender or delivery of non-conforming goods, and the buyer breaches by wrongfully rejecting goods, wrongfully revoking acceptance of goods, or failing to make a payment when due.

**[2] Material Breach in Non-Goods Contracts**

If a party fails to perform a promise and the breach is material, and no cure is forthcoming, the aggrieved party may:

- cancel the contract and sue for all damages under the contract; or
- continue the contract and sue for partial damages

If the breach is not material, the aggrieved party may not cancel the contract and can only sue for partial damages.

Factors which are relevant to a determination of whether a breach is material are:

- the extent to which the aggrieved party will be deprived of the benefit he reasonably expected;
- the extent to which the aggrieved party can be adequately compensated for the benefit of which he will be deprived;
- the extent to which the breaching party will suffer forfeiture;
- the likelihood that the breaching party will cure his failure, taking into account all the circumstances including any reasonable assurances;
- the extent to which the breaching party has acted according to standards of good faith and fair dealing.

[\[Restatement § 241\]](#)

**§ 15.02 Anticipatory Repudiation**

**[1] What Constitutes a Repudiation**

A party repudiates a contractual duty by:

- making a statement indicating that he will breach the contract
- engaging in a voluntary affirmative act that renders him unable to perform the duty
- failing to provide an assurance of due performance in response to such a request by the other party when there exists reasonable grounds to believe that the obligor will not perform.

[\[Restatement §§ 250, 251; UCC § 2-609\(4\), proposed revised § 2-610\(2\)\]](#)

**[2] Effect of Anticipatory Repudiation**

In non-goods contracts, anticipatory repudiation by one party entitles the other party to:

- bring an action for damages for total breach
- discharge his remaining obligations. [\[Restatement § 253\]](#)

In goods contracts, an anticipatory repudiation which will substantially impair the value of the contract to the aggrieved party, allows the aggrieved party to:

- await performance by the repudiating party for a commercially reasonable time
- seek remedy for breach even if he has notified the repudiating party that he would await performance and has urged retraction
- suspend his own performance. [\[UCC § 2-610\]](#)

### [3] Retraction of Repudiation

In goods contracts, a repudiating party may retract his repudiation up to the time his *next performance under the contract is due*, unless the aggrieved party has since:

- cancelled
- materially changed his position
- otherwise indicated that he considers the repudiation final. [\[UCC § 2-611\]](#)

The Restatement likewise allows for retraction of repudiation under similar circumstances but without terminating the right of retraction upon the repudiating party's next performance installment. [\[Restatement § 256\]](#)

## § 15.03 Non-conforming Tender of Goods

### [1] Rejection of Non-conforming Tender

#### [a] Generally

Within a reasonable time after delivery or tender of goods, a buyer may reject goods that fail to conform to the contract. In order for the rejection to be effective, the buyer must *seasonably notify the seller* of such rejection. [\[UCC § 2-602\]](#) The buyer cannot reject the goods once he has accepted them.

#### [b] Single lot contracts

If the non-conformity occurs under a single lot contract, the buyer may:

- reject the whole lot;
- accept the whole lot; or
- accept any commercial unit and reject the remainder [\[UCC § 2-601\]](#)

The UCC adopts the "perfect tender" rule for single lot contracts, and thus, the buyer may reject goods for any non-conformity, even if the seller has substantially performed. Nevertheless, the buyer's rejection must be exercised in good faith, and the seller is entitled to cure the non-conformity under certain conditions (see § 15.04).

#### [c] Installment contracts

The perfect tender rule, otherwise applicable to goods contracts, does not apply to installment contracts. A buyer may reject an installment only if the non-conformity substantially impairs the value of the installment, and cannot be cured, by means such as allowances against the price, or by a further delivery or partial rejection. [\[UCC § 2-612\]](#) Substantial impairment may pertain to the quality of the goods, timing of tender, quantity, etc.

Any material burden in curing the non-conformity must fall on the seller but the buyer must cooperate in curing the defective tender. For example, the buyer must make a reasonable minor outlay of time or money to cure an over-shipment. [\[UCC § 2-612, comment 5\]](#)

### [2] Acceptance of Goods

An acceptance of a tender or delivery of goods can occur in one of the following ways:

- after a reasonable opportunity to inspect, the buyer indicates to the seller either that the goods conform to the contract or that he will retain them despite their non-conformity;
- after a reasonable opportunity to inspect, the buyer fails to make an effective rejection; or
- the buyer engages in any act that is inconsistent with the seller's ownership of the goods. [\[UCC § 2-606\]](#)

### [3] Revocation of Acceptance of Non-conforming Goods

A buyer who initially accepts non-conforming goods may revoke the acceptance, if the non-conformity substantially impairs its value to him, and the buyer accepted it:

- on the reasonable assumption that the non-conformity would be cured and it has not been seasonably cured; or
- without discovering such non-conformity if his acceptance was reasonably induced by the difficulty of discovery before acceptance or by the seller's assurances. [[UCC § 2-608\(1\)](#)]

The buyer must notify the seller of the revocation within a reasonable time after he discovers or should have discovered such defects and before there is any substantial change in the condition of the goods. The revocation is not effective until the buyer notifies the seller of it.

#### § 15.04 Cure of Non-conformities

If the buyer *rejects* a delivery or tender of non-conforming goods, the seller may be entitled to cure the conformity, although the seller may still be in breach with respect to the initial delivery. If the **time for performance has not yet expired**, the seller may seasonably notify the buyer of his intention to cure and then make a conforming delivery within the contract time. After **the contract time has expired**, the seller may have "further reasonable time" to make a conforming delivery, upon seasonably notifying the buyer, if the seller had reasonable grounds to believe the non-conforming goods would be acceptable with or without money allowance. *Under the proposed revision, the standard for the seller's right to cure after the contract time has expired is no longer whether he had reasonable grounds to believe the non-conforming goods would be acceptable; the new standard is whether the cure is appropriate and timely under the circumstances.*

The proposed revision makes additional changes to the rules governing cure, in all cases:

- 1) *A seller must have acted in good faith in order to be entitled to cure a non-conformity.*
- 2) *A seller's right to cure is expanded to situations where the buyer has justifiably revoked an acceptance of goods, except in consumer contracts, when the buyer had accepted without prior discovery of the non-conformity and the acceptance was reasonably induced either by the difficulty of the discovery before acceptance or by the seller's assurances.*
- 3) *A seller shall compensate the buyer for reasonable expenses incurred due to the seller's breach and subsequent cure.* [[UCC § 2-508](#)]

In non-goods contracts, the Restatement suggests a party that commits a material breach may attempt to cure the breach [See [Restatement § 241\(d\)](#)]. However, many cases hold that there is no right in non-goods contracts for the breaching party to cure, unless the contract expressly provides such right.

#### § 15.05 Assurance of Due Performance

##### [1] Right to Make a Demand for Assurances

Both the Restatement and the UCC provide that where there are reasonable grounds to believe that a party will not be able or willing to perform, the party entitled to receive such performance may make a demand for assurances from the other party that performance will be forthcoming. [[Restatement § 251](#); [UCC § 2-609](#)] Such demand in goods contracts must be in writing. Between merchants, commercial standards dictate the reasonableness of grounds for insecurity and adequacy of any assurance offered.

##### [2] Suspension of Performance Pending Assurances

Upon making a demand for assurances, a party may, if reasonable, suspend any performance for which he has not already received the agreed exchange until he receives such assurance.

##### [3] Effect of Failure to Provide Assurances

A party's failure to provide assurances within a reasonable time – in goods contracts not to exceed 30 days – constitutes a repudiation of the contract by such party.

## Chapter 16 REMEDIES

### § 16.01 Types of Remedies

#### [1] Expectation damages

Expectation damages compensate the injured party for the benefit he would have received had the contract not been breached, minus any amount he would have spent in performance of the contract. Such damages must be proven with certainty, and may be measured by the contract price, loss in value, or lost profits.

Expectation damages – which may be general or consequential – must be foreseeable. *Hadley v. Baxendale*, 156 Eng. Rep. 145 (1845). **General damages** are the natural and probable consequence of a breach and are deemed to have been within the contemplation of the breaching party. A party seeking general damages need not offer further proof that the damages were foreseeable. **Consequential (or special) damages** arise from the special facts and circumstances of the case and are not deemed to be within the contemplation of the breaching party unless he was made aware of such specific facts and circumstances. A party seeking consequential damages must demonstrate that the damages were foreseeable at the time the contract was formed.

#### [2] Reliance damages

Reliance damages compensate the injured party for expenses or loss incurred in reasonable reliance on the contract that was breached. Reliance damages are only awarded when expectation damages cannot be proven, and may not exceed the anticipated benefit of the bargain.

#### [3] Restitution

Restitution compensates a party for the benefit conferred on the other party as a result of partial performance or reliance, and is aimed at preventing unjust enrichment. Restitution damages may be measured by:

- the reasonable value of the benefit received in terms of what it would have cost to obtain such benefit from another source
- the extent to which the value of the party's property has been increased or his other interests advanced.

Restitution may be available:

- in cases of breach, to either party
- where a contract is unenforceable (e.g., due to lack of consideration or writing)
- where a contract is voidable
- where a duty is excused or discharged due to impracticability, frustration of purpose, non-occurrence of a condition, or disclaimer by a beneficiary
- in void contracts to a party not *in pari delicto*.

#### [a] Restitution by Injured Party

An party injured by a breach is entitled to restitution for any benefit he conferred on the breaching party by way of partial performance or reliance. Restitution is not available, however, if the injured party has performed all of his contractual duties and the breaching party owes no performance other than payment for a definite sum of money for the injured party's performance. [[Restatement § 373](#)]

#### [b] Restitution by Breaching Party

Where the aggrieved party justifiably suspends his performance on the ground that other party's breach discharged his remaining duties, the breaching party is entitled to restitution for any benefit he conferred by way of part performance or reliance in excess of the loss that he caused the aggrieved party by his breach. [[Restatement § 374\(1\)](#)]

#### **[4] Stipulated damages (liquidated damages)**

At the time the contract is formed, the parties may agree to a fixed sum of money or a set formula for setting damages in the event of a breach. Stipulated damages will be enforced if they reflect an honest effort to anticipate the harm caused by a breach. Stipulated damages will be deemed invalid if they represent an attempt to punish the breaching party, such as in the case of unreasonably large damages.

Under common law, the reasonableness of stipulated damages must reflect:

- 1) the anticipated or actual harm caused by the breach; and
- 2) the difficulties of proof of loss.

In sales contracts, stipulated damages must be reasonable in light of:

- 1) the anticipated or actual harm caused by the breach;
- 2) the difficulties of proof of loss; and
- 3) the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy.

[\[UCC § 2-718\]](#) *Under the proposed revision, only stipulated damages in consumer contracts must be reasonable in light of all three factors; such damages in commercial contracts need only be reasonable in light of anticipated or actual harm.*

#### **[5] Incidental Damages**

Incidental damages are available under several UCC provisions, for both buyers and sellers. Incidental damages suffered by a seller due to a buyer's breach include any commercially reasonable charges, expenses or commissions incurred by:

- the stoppage of delivery
- the transportation, care and custody of goods after the buyer's breach
- the return or resale of the goods
- actions otherwise resulting from the buyer's breach. [\[UCC § 2-710\]](#)

Incidental damages suffered by a buyer as a result of a seller's breach include expenses reasonably incurred in:

- inspection, receipt, transportation and care and custody of goods rightfully rejected
- any commercially reasonable charges, expenses, or commissions in connection with effecting cover
- any other reasonable expense incident to the delay or other seller's breach. [\[UCC § 2-715\(1\)\]](#)

#### **[6] Consequential Damages**

The existing version of Article 2 does not provide for recovery of consequential damages by sellers. *The proposed revision provides for such recovery arising out of a buyer's breach, except in consumer contracts. A seller's consequential damages include any loss resulting from general or particular requirements and needs of which the buyer at the time of contracting had reason to know and which could not reasonably be prevented by resale otherwise. [proposed revised UCC § 2-710(2), (3)]*

Consequential damages suffered by a buyer due to a seller's breach include:

- any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise
- injury to person or property proximately resulting from any breach of warranty. [\[UCC § 2-715\(2\)\]](#)

#### **[7] Interest**

Interest on damages may be awarded, calculated from the time the performance was due minus all deductions to which the party in breach is entitled, under the following circumstances:

- if the breach consists of a failure to pay a definite sum of money
- if the breach consists of failure to render performance with a fixed or ascertainable monetary value

- as justice requires on the amount that would have been just compensation had it been paid when performance was due. [[Restatement § 354](#)]

### **[8] Punitive damages**

Punitive damages are generally not available in contract actions, but if the conduct that causes the breach also constitutes a tort, punitive damages may be awarded.

### **[9] Specific Enforcement**

Specific enforcement is a remedy in the form of a court order that the breaching party render performance of the contract. Specific performance is not available if expectation damages are adequate to put the aggrieved party in as good a position as he would have been had the contract been fully performed. Expectation damages are deemed to be an inadequate remedy:

- where the subject matter is unique
- in real property transactions
- in goods contracts, "where goods are unique or in other proper circumstances," e.g., where the goods are in short supply. [[UCC § 2-716](#)]

## **§ 16.02 Mitigation of Damages**

A party aggrieved by a breach must use reasonable efforts to mitigate damages. In the specific case of breach of an employment contract, courts will not generally require an employee that has been discharged to take onerous or difficult measures to secure new employment, such as taking a far inferior position or relocating.

## **§ 16.03 Seller's Remedies in Sales Contracts**

### **[1] Generally**

A buyer breaches a contract for the sale of goods by:

- wrongfully rejecting the goods
- wrongfully revoking acceptance of goods
- failing to make a payment when due
- repudiation

In the case of a buyer's breach, the seller may:

- withhold or stop delivery of goods
- resell the goods and recover damages for the breach
- recover damages for non-acceptance or repudiation
- recover lost profits
- recover the contract price
- obtain specific performance
- recover liquidated damages
- reclaim the goods [[UCC § 2-703](#)]

### **[2] Resale of Goods**

The seller may, in good faith and in a commercially reasonable manner, resell goods that the buyer wrongfully does not accept. In such cases, damages are measured by the difference between the resale and contract prices plus incidental expenses, less expenses saved as a consequence of the breach. [[UCC § 2-706](#)]

*Under the proposed revision, damages are measured by the reverse formula: the difference between the contract price and the resale price. In addition to incidental expenses, consequential damages may also be factored into the recovery, except in a consumer contract .*

### **[3] Damages for Buyer's Non-acceptance or Repudiation**

Where a buyer wrongfully rejects goods or unjustifiably revokes acceptance of goods or repudiates, damages are measured by the difference between the market price at the time and place for tender and the contract price together with any incidental damages less expenses saved as a result of the buyer's breach. [\[UCC § 2-708\]](#)

*The proposed revision again reverses the formula, and makes slight distinctions in the remedies for the buyer's non-acceptance and repudiation. Damages for non-acceptance are measured by the difference between the contract price and the market price at the time and place for tender along with any incidental or consequential damages less expenses saved. Damages for repudiation are measured by the difference between the contract price and the market price at the place for tender at the expiration of a commercially reasonable time after the seller learned of the repudiation, but no later than the time for tender along with any incidental or consequential damages less expenses saved. Consequential damages are unavailable in consumer contracts against a consumer.*

### **[4] Damages for lost profits**

If the usual damages allowed for breach are inadequate to give the seller the benefit of the bargain, the seller may recover the lost profit (including reasonable overhead), along with incidental damages, due allowance for costs reasonably incurred, and due credit for payments or proceeds of resale. [\[UCC § 2-708\(2\)\]](#) *The proposed revision omits the due allowance for costs and due credit for payment or proceeds of sale.*

### **[5] Contract Price**

The seller may recover the contract price along with incidental damages in the event of a breach by the buyer where:

- the seller does not take back the goods after an attempted revocation of the acceptance by the buyer
- the seller is unable to sell the goods at a reasonable price using reasonable efforts

[\[UCC § 2-709\]](#) *Consequential damages will become available as well in the proposed revision, except in consumer contracts.*

## **§ 16.04 Buyer's Remedies**

### **[1] Generally**

A seller breaches a contract for the sale of goods by:

- wrongfully failing to make delivery
- wrongfully failing to perform a contractual obligation
- making a non-conforming tender of goods
- repudiation

Remedies available to a buyer for a seller's breach include:

- recovery of price paid
- deduction of damages from outstanding payments due
- cancellation of the contract
- "cover"
- specific performance and replevin
- liquidated damages
- expectation, incidental, and consequential damages [\[UCC § 2-711\]](#)

### **[2] Recovery of Price Paid**

Where a seller fails to deliver goods or repudiates, or where the seller's nonconforming tender results in the buyer's rightful rejection or justifiable revocation of acceptance of goods, the buyer may recover the price already paid, whether or not he cancels the contract. [\[UCC § 2-711\]](#) *The proposed revision allows recovery of any contract price paid only if the buyer has rightfully cancelled the contract, rejected the goods or revoked acceptance of the goods [proposed UCC § 2-711(2)(a)]*

### **[3] "Cover"**

Where a seller fails to deliver goods or repudiates, or where the seller's nonconforming tender results in the buyer's rightful rejection or justifiable revocation of acceptance of goods, the buyer may "cover" by making a reasonable substitute purchase, in good faith and without unreasonable delay. The buyer may recover the difference between the cost of cover and the contract price, along with incidental or consequential damages, less expenses saved. [\[UCC § 2-712\]](#) As long as the cover was made in good faith, the price need not have been the lowest available and the goods need not be identical to those stated in the contract.

### **[4] Damages for Non-delivery or Repudiation**

Where a seller fails to deliver goods or repudiates, or where the seller's nonconforming tender results in the buyer's rightful rejection or justifiable revocation of acceptance of goods, the buyer may recover damages measured by the difference between the market price at the time *when the buyer learned of the breach* and the contract price along with incidental and consequential damages less any expenses saved. [\[UCC § 2-713\]](#)

*The proposed revision provides different times at which market price is to be set based on the manner of breach. In the case of a seller's non-delivery or a buyer's rightful rejection or justifiable revocation, proposed revised § 2-713 changes the time at which the market price is set to the time of tender under the contract. In the case of a seller's repudiation, market price is to be set at the expiration of a commercially reasonable time after the buyer learned of the repudiation, but no later than the time of tender under the contract.*

### **[5] Specific Performance and Replevin**

Where the seller fails to deliver or repudiates, the buyer may obtain specific performance of the contract where the goods are unique or in other proper circumstances, such as when the buyer is unable to cover. [\[UCC § 2-716\(1\)\]](#) *The proposed revision allows parties to contract for the remedy of specific performance in circumstances where the remedy would not otherwise be available, except in consumer contracts.*

The buyer may have a right of replevin for goods identified in the contract if, after reasonable effort, the buyer is unable to effect cover or circumstances indicate that such an effort will be unavailing. [\[UCC § 2-716\(3\)\]](#)

### **[6] Damages Resulting From Acceptance of Non-conforming Goods**

If the buyer has accepted non-conforming goods and has given notice to the seller of his claim, the buyer may:

- recover damages for the loss he reasonably incurs, to be determined in any reasonable manner [\[UCC § 2-714\(1\)\]](#)
- recover damages for breach of warranty, measured by the difference, at the time and place of acceptance, between the actual value of the goods and the value the goods would have had if they had been as warranted [\[UCC § 2-714\(2\)\]](#)
- recover incidental and consequential damages [\[UCC § 2-714\(3\)\]](#)
- deduct all or part of the damages resulting from the breach from any part of the price still due to the seller under the contract, upon notifying the seller of his intention to do so [\[UCC § 2-717\]](#)

### **[7] Resale and Offset**

Where a buyer rightfully rejects non-conforming goods or justifiably revokes acceptance of goods, the buyer may resell any goods in his possession or control to offset any payments made on their price and any incidental expenses [\[UCC § 2-711\(3\)\]](#). The buyer may not keep any profit resulting from the resale nor may he retain funds from such resale to cover the amount of damages to which he believes he will be entitled.

## **[8] Deduction of Damages from Payment Due**

Upon notifying the seller of an intention to do so, the buyer may deduct all or part of the damages resulting from the breach from any part of the price still due to the seller under the contract. [[UCC § 2-717](#)]

## **§ 16.05 Remedies in the Case of Insolvency in Goods Contracts**

### **[1] Seller's Insolvency**

Where a buyer has made partial or full payment for goods that have been identified, and the seller:

- fails to deliver or repudiates; and
- becomes insolvent within ten days of receipt of the first payment installment

the buyer may recover the goods from the seller upon tendering any unpaid portion of their price. [[UCC § 2-711](#) and [§ 2-502](#)]

### **[2] Buyer's Insolvency**

Where the seller discovers the buyer is insolvent, he may refuse delivery except for cash including payment for all previously delivered goods. If the buyer has received goods on credit while insolvent, the seller may reclaim the goods upon a demand made within ten days after the buyer's receipt of the goods. The 10-day limit does not apply if the buyer misrepresented its solvency to the seller in a writing within three months before delivery. If the seller successfully reclaims the goods, he will be precluded from all other remedies with respect to such goods. [[UCC § 2-702](#)]

*Under the proposed revision, the seller is not limited to making the demand within ten days but may do so within a reasonable time after the buyer's receipt of the goods. Furthermore, the revision would eliminate the exception regarding the misrepresentation in writing within three months before delivery.*

## **Chapter 17 DISCHARGE**

### **§ 17.01 Events that Discharge Contractual Duties**

A party's contractual duties may be discharged by the following types of occurrences:

- complete performance
- rescission of the contract
- substitute contract
- accord and satisfaction
- novation
- an account stated
- avoidance of duties in a voidable contract
- illegality
- bankruptcy
- rejection of proper tender
- occurrence of a condition subsequent
- breach by the other party
- impracticability and frustration of purpose
- failure of consideration

### **§ 17.02 Rescission**

#### **[1] When Available**

Parties to a contract may mutually agree to rescind their contract where:

- 1) there are duties still to be performed by both parties; and
- 2) any vested third party rights will not be affected.

### **[2] Writing Requirement**

The common law generally permits oral rescissions, even if the contract falls within the statute of frauds. An exception exists where the rescission would result in a transfer of title to land.

In contracts for the sale of goods, a rescission must be in writing if there is a signed agreement that expressly requires any rescission to be in a signed writing. Where such provision appears on a form supplied by a merchant, the form must be signed by the other party unless the other party is also a merchant. [[UCC § 2-209\(2\)](#)]

### **[3] Consideration**

If both parties' duties are executory, an agreement to rescind is binding without additional consideration since the release of each party's rights provides the consideration. If one party has fully performed, the other party must furnish consideration to support the rescission.

### **§ 17.03 Accord and Satisfaction**

An accord is an agreement between parties of a pre-existing contract that the obligee will accept the performance stated in the accord in satisfaction of the obligor's contractual duty. Performance of the accord suspends the contractual duty but if the obligor breaches the accord, the obligee may bring action on the original contract or the accord. [[Restatement § 281](#)]

### **§ 17.04 Substitute Contract**

Unlike an accord and satisfaction which merely suspends the original contractual duty, a substitute contract immediately discharges all duties under the original contract. If the obligor breaches the substitute contract, an action may be brought on the substitute contract alone.

### **§ 17.05 Novation**

A novation is an agreement by which a new party replaces one of the original parties to a contract, extinguishing the duties of the parties under the old contract and substituting a new contract between the remaining original party and the new party.

### **§ 17.06 Account Stated**

An account stated is an agreement by a creditor and debtor as to the amount due under a contract. Failure to object by the recipient of the account stated manifests assent to be bound by its terms, such as when a debtor opens an account with a creditor, who sends the debtor a statement of the amount due on his account. "The account stated does not itself discharge any duty but is an admission by each party of the facts asserted and a promise by the debtor to pay according to its terms." [[Restatement § 282\(2\)](#)]

### **§ 17.07 Release of a Co-obligor**

A release, rescission or accord and satisfaction that discharges one co-obligor releases other co-obligors that are jointly responsible for performing the duty in question. In order to avoid this result, an obligee may enter into a contract not to sue the obligor, thus preserving the right to bring action against the other co-obligors. [[Restatement § 295\(2\)](#)]

**PART VI. OTHER PARTIES**  
**Chapter 18**  
**ASSIGNMENT AND DELEGATION**

**§ 18.01 Assignment**

**[1] Definition and Nature of Assignment**

An assignment is a manifestation of an obligee's intention to transfer to an assignee its right to receive performance from the obligor. Upon an effective assignment, the obligee/assignor's right to receive the promised performance is extinguished.

An assignment may be gratuitous or for value. The assignment is "for value" if the assignee provides consideration for the assignment of rights, or if the assignment serves as security for or in total or partial satisfaction of a pre-existing debt. Otherwise, the assignment is gratuitous.

**[2] Non-assignable Rights**

A contractual right may not be transferred if the assignment:

- would materially alter the obligor's duty
- would materially increase the burden or risk imposed on the obligor
- would materially impair the obligor's chance of obtaining the return performance
- would materially reduce the value of the performance to the obligor
- is precluded by the contract [[Restatement § 317\(2\)\(a\)](#); [UCC § 2-210\(2\)](#)]

Even if a contract precludes assignment of the performance due under the contract, a party may nevertheless assign the right to damages arising out of contract. [[UCC § 2-210\(2\)](#)]

**[3] Assignment of Future Rights**

Modern common law permits the assignment of payment expected to arise from an *existing* employment or other continuing business relationship. [[Restatement § 321\(1\)](#)] A purported assignment of rights arising from a *contract not yet formed* is not an assignment itself but merely a promise to make an assignment in the future. [[Restatement § 321\(2\)](#)] Article 9, which applies to most commercial assignments, likewise authorizes assignment of future rights under various circumstances.

**[4] Writing Requirement**

Common law assignments need not be in writing. [[Restatement § 324](#)] In commercial contracts, an assignment of personal property, e.g., intellectual property, is not enforceable beyond \$5,000 in the absence of a writing. [[UCC § 1-206\(1\)](#)]

**[5] Rights Embodied in a Tangible Item**

If a tangible thing represents a given right, the assignor must generally transfer such item to the assignee in order for the assignee to be able to enforce that right. If a token or instrument evidences, as opposed to represents, a right, delivery of such item may demonstrate the assignor's intention to transfer but lack of such delivery does not necessarily preclude a finding that there was a valid assignment.

**[6] Revocation of Assignments**

Except as noted below, a gratuitous assignment may be revoked by:

- the assignor making a subsequent assignment of the same right;
- the assignor's death or loss of capacity

- notification of the revocation received by the assignee or the obligor

A gratuitous assignment is irrevocable:

- if the assignment is in a writing either signed or under seal that is delivered by the assignor
- if the assignment is accompanied by the delivery of a symbolic writing, i.e., a writing of a type customarily accepted as a symbol or as evidence of the right assigned, e.g., bonds, mortgages, savings account books, life insurance policies, stock certificates
- under some authorities ([Restatement § 332](#), comment d, and some courts), if the assignment is accompanied by delivery of an integrated writing that embodies the contract even though it is not a symbolic writing.

A gratuitous assignment may become irrevocable:

- if the assignee obtains payment or satisfaction of the obligation
- if the assignee obtains judgment against the obligor
- if the assignee obtains a new contract of the obligor by novation
- to the extent necessary to avoid injustice where there was foreseeable reliance by the assignee or a subassignee on the assignment [[Restatement § 332](#)]

### **[7] Modification of Contract Following Assignment**

Under common law, the assignee's rights vest upon the obligor's receipt of notification of the assignment. Upon vesting, the parties may not modify the contract in such a manner as to impair the assignee's rights.

In commercial contracts, the parties may modify or substitute the contract with respect to unexecuted performances, in accordance with reasonable commercial standards, even after the obligor has received notice of the assignment. The assignee re-acquires rights under the modified or substitute contract. [[UCC § 9-405](#)]

### **[8] Voidable Assignments**

An assignment may be voidable on the same grounds as a contract, e.g., infancy, mental impairment, duress. If the assignment is voidable and the obligor pays the assignee in good faith without notice of the cause of the voidability, the obligor's duty to the assignor is discharged. However, if he pays the assignee knowing that the assignment is voidable, he may still be liable to the assignor.

### **[9] Multiple Assignments of the Same Right**

Partial and multiple assignments are permissible under modern law since the availability of joinder protects the obligor from multiple lawsuits by multiple assignees. The common law has several approaches to determining priority among several assignees:

- 1) "English" rule – this minority position provides that the first assignee to give notice to the debtor prevails
- 2) "New York" rule – priority is given to the first to receive an assignment; the first assignee may recover from a second assignee who already received payment from the obligor, although the obligor's duty is discharged by payment to the second assignee
- 3) "Massachusetts" rule – this rule which was adopted by the Restatement provides that the first assignee prevails unless a second assignee who pays value in good faith without notice of the first assignment:
  - a) obtains payment for the obligor;
  - b) recovers a judgment against the obligor;
  - c) enters into a new contract with the obligor; or
  - d) receives a tangible token or symbolic writing, surrender of which is required by the contract.

In certain commercial transactions, multiple assignments of the same right are governed by Article 9. Article 9 requires the assignor to file a one-page "financing statement" in a public office such as the office of the Secretary of State, putting other potential assignees and creditors on notice that the contract rights have been assigned. In general, priority is given to the first person that files the financing statement. [[UCC § 9-109](#)]

#### **[10] Defenses by the Obligor against the Assignee**

An assignee has no greater rights than the assignor, and thus an obligor may assert against an assignee defenses based on:

- voidability (e.g., lack of capacity)
- unenforceability (e.g., lack of consideration, failure to satisfy a writing requirement)
- impracticability, public policy, non-occurrence of a condition, or present or prospective failure of performance by the obligee
- any claim that accrues before the obligor receives notice of the assignment. [[Restatement § 336](#)]

Once the obligor receives notice of the assignment, the obligor cannot assert against the assignee defenses based on:

- payment made to the assignor made after the notice; or
- subsequent agreement or modification between the obligor and assignor.

Under Article 9, the defense of payment is available to the obligor if payment was made prior to receiving notice of the assignment and before the assignee demands payment. After such demand, the obligor may not longer make payments to the obligee/assignor and claim a defense of payment. [[UCC § 9-406](#)]

### **§ 18.02 Delegation of Duties**

#### **[1] Right to Delegate**

Unless the parties otherwise agree, an obligor may delegate the performance of his duties under the contract to another provided the obligee will receive the substantial benefit of the bargain. Examples of delegable duties include:

- duty to pay money
- duty to deliver a fungible good
- duty to perform impersonal, routine or mechanical services unless circumstances indicate that the specific performance of the obligor was sought

However, if the performance to be rendered is for personal services or otherwise involves the exercise of skill and discretion, the duty may be found to be too personal to delegate. Examples of duties that are generally found to be **non-delegable** include:

- professional services, such as those of an attorney or accountant (although delegation by the professional to other members of the firm is not precluded)
- otherwise delegable duties to a person who lacks the requisite skill or experience

[See [Restatement § 318\(2\)](#); [UCC § 2-210\(1\)](#)]

#### **[2] Liability of Delegator**

Delegation does not extinguish the delegator/obligor's duty. However, if the obligee agrees to a substitution of the delegatee for the delegator/obligor, a novation results and the delegator is released from the obligation to perform. The delegatee's promise to perform serves as the consideration that supports the release. A novation can be implied where the delegator repudiates his obligations and the obligee accepts performance from the delegatee without expressly reserving his rights against the delegator.

An obligee does not waive his rights against the delegator by acceptance of complete or partial performance by a delegate, except where:

- 1) the duty is non-delegable due to its personal nature; and
- 2) the obligee accepted the performance knowing that it was rendered by a delegatee

### [3] Liability of Delegatee

A delegatee is not liable for the performance of contractual duties unless he expressly or impliedly assumes responsibility for such performance. If the delegatee does promise to perform, his failure to do so gives rise to the following rights:

- the delegator may sue for breach of contract
- the obligee may sue as a third party beneficiary of the contract between the delegator and delegatee

In contracts for the sale of goods, an obligee may treat any assignment which delegates performance as creating reasonable grounds for insecurity and may demand assurances from the assignee/delegatee. [[UCC § 2-210\(5\)](#)]

### [4] Delegation Clauses

Contract clauses permitting delegation of duties are enforceable if the obligee's assent to the clause was given for consideration or if the delegator changed his positions in reliance on the obligee's consent. Clauses that prohibit delegation are generally interpreted to only prohibit delegation of duties that are of a personal or unique nature.

### § 18.03 Interpretation of Assignment Clauses

Unless circumstances indicate otherwise, a contract term *prohibiting* "assignment of the contract" bars only the delegation of performance of a duty or condition by the assignor to an assignee. A contract term *providing for* "assignment of the contract" or "all of my rights under the contract" or other similar terms encompasses both an assignment of rights and delegation of unperformed duties under the contract. [[Restatement §§ 322\(1\), 328\(1\); UCC § 2-210\(3\), \(4\)](#)]

## Chapter 19 THIRD PARTY CONTRACTS

### § 19.01 Third Party's Right of Enforcement

In order for a third party to be entitled to enforce a contract of which it is the beneficiary, the principle parties to the contract must have intended to create legally enforceable rights in the third party.

Third parties possessing the right of enforcement fall into two categories:

- 1) **donee beneficiaries** – third parties upon whom the promisee attempts to confer a gift
- 2) **creditor beneficiaries** – third parties to whom the promisee owes a debt, which is to be satisfied by performance of the promise

The Restatement instead uses the term "intended beneficiary" to designate all third party with rights of enforcement. [[Restatement § 302](#)]

A third party upon whom the parties to the contract did not intend to bestow enforcement rights is classified as an **incidental beneficiary** to the contract.

### § 19.02 From Whom Third Party May Seek Enforcement

Where the promisor fails to perform the promise that was made for the benefit of a creditor beneficiary and the creditor beneficiary brings action against the promisee, the promisee may then bring action against the promisor. However, where the promisor fails to perform the promise that was made for the benefit of a donee beneficiary and the donee beneficiary brings action against the promisee, in most jurisdictions the promisee does not have an action against the promisor, although some courts allow an action for specific performance.

### § 19.03 Vesting of Third Party's Rights

Once the third party's rights have vested, the original parties cannot modify or rescind a contract in such a manner that would derogate the third party beneficiary's rights, without the third party's consent. Jurisdictions differ as to whether the third party's rights vest:

- at the time the contract is made;
- at the time the third party learns of the contract and agrees to accept the benefits flowing from it (if the third party does not expressly reject the benefits, he is deemed to have accepted them)
- upon a change in position, even if only slight, by the third party beneficiary in reliance upon the contract (this is the majority approach set forth in [Restatement § 311\(3\)](#))

While some states apply a consistent rule for all third party beneficiaries, others apply different rules depending on the status of the beneficiary. Some states apply different vesting rules to donee and creditor beneficiaries, with the rights of donee beneficiaries vesting earlier – at the time the contract is made or upon learning of the contract and accepting the benefits – and the rights of creditor beneficiaries vesting upon a change in position. Some states provide for immediate vesting of the rights of a third party beneficiary who is a minor.

#### **§ 19.04 Defenses Against the Third Party Beneficiary**

The promisor can assert any claim or defense arising out of the contract against the third party that he could have asserted against the promisee, except for any modification or rescission that derogates the third party's rights after such rights have vested.