CONTRACTS

The law of contracts forms the basis for the entirety of business law. Because business law undergirds the capitalism practiced in the Western world, the importance of contract law is difficult to overstate.

In its broadest sense, contract law defines a certain subset of agreements called contracts that represent legally enforceable arrangements. Thus, contracts commit individuals and organizations to specific courses of conduct with other entities or subject them to legal sanction for the failure to do so. How this application of political power is reached, what implications it has, and how it can be predicted is the subject of this article. It also touches on how the law of contracts has attempted to harmonize societal and technological change.

Only with great difficulty could a definitive history of contracts be developed. Since the beginning of recorded history, judicial and political authorities have treated promises pertaining to business relationships seriously. Notwithstanding well-known instances of enforcement in all early civilizations, a precise body of law governing business arrangements predating the Middle Ages did not emerge or survive.

The modern history of contracts is typically traced to the signing of the Magna Carta in 1215. Although influences from other lands are recognized, the emergence of Anglo-American law that ensued from that point has created a considerable corpus of law for the United States. In many ways, contract law is specific to each country, and therefore generalizations beyond the domain of a particular nation are risky.

Within the United States, the development of the federal Constitution has provided an important historical marker. Although the Constitution contains little in the way of directly pertinent provisos (the "contracts clause" provides for the restrictions placed on government when they unduly interfere with private contracts), this document set out the structure within which private contracts would be enforced. Following English tradition, most states were content to allow the progressive accumulation of cases and the *stare decisis* process to dictate the course of the law. This was only rarely punctuated by statutory guidance, except as was necessary to clarify the more technical aspects of enforcement procedures. Given the contemporaneous inactivity of the federal government, the course of contract law, until recently, has been primarily one of common law and therefore differentiated by the somewhat different trajectories found in the various states.

After the Second World War, the need to reduce legal variability was championed by legal scholars, practitioners, and others. This resulted in the construction and state ratification of the Uniform Commercial Code (UCC). This document was the transition of law from judicial interpretation of *stare decisis* toward legislative interpretation and introduced revisions in thought believed more consistent with business done on a national scale and with modern communication technology. Transactions involving the sale of tangible and moveable items (goods) are governed by the UCC, which builds on the base established by common law.

International legal harmonization for contractual matters has met with increasing success over the last twenty years. Comprehensive solutions modeled after the UCC include the United Nations Convention on Contracts for the International Sale of Goods. Although these matters involve considerable degrees of sustained political commitment, their continuing relevance suggests that there will be further progress in this direction. As more commerce cannot be confined to a single nation, these developments may represent the future of this area.

The history of contracts also reflects dominant communicative technologies. Current law embraces the possibilities created by widely available, durable writings attesting to understandings among parties. The law has not yet come to grips with the way electronic/computer based equivalents have changed the process of contracting and altered the nature of expectations that surround them.

The remainder of this article is organized into ten sections ordered to reflect the contracting process. The first three sections pertain to the basic requirements of valid contracts. Two subsequent sections include conditions under which a court might not enforce an otherwise valid contract. The sixth section contains selected materials on how contracts are interpreted. A seventh section introduces possible rights of enforcement possessed by external parties. The next sections pertain to the conclusion and consequences of contracts through either discharge of responsibilities or through court enforcement. The final section identifies horizons of contract law in which important changes can be anticipated.

INTENTION: THE KEY QUIXOTIC ELEMENT

The expression of a discernible intention for future behavior (or restraint from action) is the bedrock of the contracting

process. Intention is necessary to make an offer and to accept that offer, thus establishing a "meeting of the minds" regarding the substance of the contract. Cutting to the conclusion, the requisite intention is sometimes expressed as the desire by the parties to be bound to a contract.

The difficult aspect of intention is that it refers to a subjective or cognitive state but expressly disavows this perspective. The law of contract requires an objective test of intention and does so by evaluating the words and actions of the parties according to the hypothetical standard of the reasonable person. Intention matters insofar as it is manifested in objectively interpretable behavior. This allows differentiation between preliminary negotiations and contractual commitment and between statements made in jest or anger from those made with requisite seriousness. Because the line between subjective personal reality and objective shared reality cannot be drawn with precision, careful control over impressions created is necessary.

Contractual intention requires matching an offer and an acceptance. The party that initiates steps toward a contract is said to have made an offer and hence becomes an offeror. The offeror can be either a buyer or a seller and is distinguished only by initiating an idea that conforms to the elements of an offer. The offer, by itself, is of no legal consequence except that it empowers those to whom it is directed (the offerees) to accept it and thus construct the "meeting of the minds" that is the centerpiece of a contract.

No formal or specific language is needed to make an offer. Offers are judged by the totality of circumstances present in the situation and therefore can be made without verbal utterance. What must be apparent is the serious and present intention for a proposed transaction. Thus, statements of value are not necessarily offers to buy. Often, a broader examination of the contracting environment is necessary to distill the intent to make an offer. For example, mass media advertising is said not to be an offer and instead is the solicitation of offers. Likewise, items held up for sale by an auctioneer do not constitute an offer. An offer does not exist until a bid comes from the audience.

The modern trend of the courts is to require less intention of offering. The impact of such a position is to characterize that which might otherwise be considered preliminary negotiations as an offer. This is especially so when the sale of goods under the Uniform Commercial Code is involved.

Offers also must possess a reasonable degree of detail. In other words, they must have considerable definiteness. If offers were allowed to be vague and imprecise, it would be difficult to ascertain the existence of a matching acceptance. Furthermore, enforcement of the resulting contract would be speculative, in that its proper terms would be unclear. Reasonable definiteness can be approached as a requirement that offers possess all major terms. This invariably includes subject matter, quantity, and price. Much more may be required in some contexts, however, as courts liberally read the levels of specificity normally found in certain industries.

In contracts covered by the UCC, courts have displayed considerable willingness to supplement offers with details that render them sufficiently definite. Here, courts show a readiness to insert even major terms by taking evidence on extant market conditions and party needs expressed at the time.

Offers must be communicated to be offers. They achieve potential importance only when others are positioned to be aware of them. However, case law has backed away from the literal application of this requirement, substituting constructive delivery for actual delivery and reasonable efforts to communicate for successful communication in some instances. The communication requirement complements the intention dimension because putting an offer into the hands of another testifies to its seriousness. The communication dimension often is put at issue when offerors have died and cannot control these matters any further.

The offer's legal importance is practically limited by the ease with which offers are deemed to be terminated. Offers could not last forever or they would unfairly expose offerors to unwarranted contractual obligations over long periods of time, over which the desirability of proffered transactions could change. Understanding how offers terminate before they become contracts is essential to an application of the fleeting nature of contractual intention.

Offerors retain the right to withdraw offers until the moment that they mature into contracts. Revocations are deemed to terminate offers when the offeree receives them. However, if the offeree becomes aware of an offeror action that is inconsistent with the offer, such as a sale of the subject matter to another party, the offer is considered revoked without express communication. This common law rule allows offerors to contradict through revocation assurances made with the initial offer that the offer would remain open for a certain time, unless the offeree had obtained the right to keep that offer open through a separate contract (referred to as option contract). This result is partially reversed in the UCC through a special rule that makes certain offers by merchants (parties that routinely deal in the subject matter of this contract) irrevocable for as long as six months.

The mirror image of revocation is rejection. If an offeree refuses the terms of an offer, the offer is terminated. Any attempt to accept thereafter is deemed a new offer and, without a subsequent acceptance, does not form a contract. Attempts to alter the terms of an offer in a response are interpreted as rejection of the original offer and therefore also function to terminate the initial offer.

The lapse of time after an offer is made is a terminating condition. If a specific time is included as an element of an offer, this termination conclusion naturally results. More surprisingly, offers without a stated time provision also lapse following a reasonable period in which no acceptance occurs. For these purposes, a reasonable time is calculated by reference to the offeror's implicit intent, the speed of the offer's transmission, the degree of market fluctuations, and the context of past practices. These factors create variations in calculating a reasonable time that range from near immediacy to many months.

Offers can also terminate outside of any intention of the parties. Certain events eliminate outstanding offers. These are the death of the offeror, the adjudicated insanity of the offeror, the faultless destruction of the offer's subject matter, and the supervening illegality of the proposed transaction. Whereas the occurrence of these events terminates offers, they typically do not terminate contracts. Therefore the timing of events is often of great consequence.

Acceptances also have a number of analytically separable requirements. Several are similar to those that exist for of-

fers. The offeree must also evince the requisite intent through words or actions that are unconditional, unequivocal, and communicated.

In the common law of contracts, offerees cannot condition their consent to an offer via the addition of new terms or the alteration of others. Only if these variations are truly immaterial, implied by law or consistent with uncontravened past business practices, are they tolerated within acceptances. This requirement is greatly lessened under the UCC. There, acceptances with varied terms are tolerated as long as they do not contradict the basic intent to be bound by a contract. As to which terms the resultant contract is written upon depends on the materiality of the proposed changes and the behavior of the offeror after the contract is received. An offeror who receives an acceptance with even slightly different terms can object to the changes in a timely manner. This will result in a contract on the original terms, unless the acceptance was expressly conditioned on the changed terms.

By requiring that the acceptance is unequivocal, an affirmative action is usually required to have occurred. This requirement makes it difficult for silence to function as an acceptance. Silence in response to an offer is an acceptance only if such can be construed from past conduct or is agreed upon in advance as a form of acceptance. To have a broader rule on silence would create a duty for offerees to respond to avoid contractual liability.

In contracts involving the sale of goods, acceptances are deemed effective when they are sent. Other contracts may be formed either at this moment or when the acceptance is received, dependent on the means of its communication. Acceptances utilizing the same means of communication as the original offer are effective at the earlier point because they utilize the implied agency of a certain means of transport. Special rules apply with regard to the acceptance of offers that contemplate the performance of an action, rather than the promise to perform such an action.

CONTRACTUAL EXCHANGE: CONSIDERATION

In addition to a meeting of the minds, contracts need to entail the exchange of things that possess value, in a broad sense. This differentiates them from gifts and could be thought of as providing the purpose of the transaction. This is the consideration requirement of contracts.

Configuring consideration as value received is less theoretically satisfactory than viewing it as detriment undertaken. Both contracting parties must sacrifice something of value or forgo an otherwise available opportunity. In the last sense, a legal right against the other party can serve as consideration if it is forsaken. In some cases, courts have held that is it not necessary that actual benefits flow from the detriment undertaken by the other party.

Consideration must be new, or in other words, independent of preexisting contractual or extracontractual obligations. Parties cannot enforce demands for extra payments when they themselves take on no incremental sacrifice. Some contracting parties may attempt, without effect, to obligate them to do nothing other than that which they already have to do by virtue of their employment or position. This inflexible position has proved too unwieldy for the UCC, which has opened room for contractual renegotiations under conditions of mutual consent and good faith.

Two additional requirements for consideration to be present involve its mutuality and the bargaining that has taken place. Mutuality refers to the nonillusionary nature of the detriment and requires that neither party be able to fulfill their promise without detriment. This does not affect situations where one party agrees to buy all that it needs (requirements contracts) or to sell all that it can produce (output contracts) because both entail forbearance from similar contracts with alternative parties at potentially more favorable rates. Consideration also must involve the detriments existing in a quid pro quo relationship so as to differentiate a contract from the reciprocal exchange of gifts. In other words, the reason one party is willing to sacrifice one value (i.e., money) is to obtain the benefit of another party's sacrifice (i.e., goods).

In theory, courts examine only the existence of consideration and not its adequacy. Normally, parties must protect themselves to ensure the latter. In other words, the law does not require that all parties make favorable contracts. However, the doctrine of unconscionability has been raised as a means of opening the substantive fairness of consideration. Marked by grossly uneven bargaining power and procedural taints, these cases involve highly susceptible consumers or small companies. The absence of consideration that produces sufficient degrees of unfairness can also be overcome with the doctrine of promissory estoppel which grants some measure of equitable relief to parties that justifiably rely to their detriment on the promises made by others that lack consideration.

OTHER CONTRACTUAL REQUIREMENTS

In addition to a meeting of the minds and consideration, contracts must conform to standards of legality, usually as demarked by state law. Clearly, the double bind, wherein a party's compulsion to honor a contract would involve illegal behavior, needs to be alleviated.

Important and controversial areas for applying the legality requirement include wagering contracts, usurious interest charges in contracts, and licensing statutes. Specific statutes make contracts illegal that create risks upon which monetary consequences are attached. Contracts that assess abnormally high rates of interest on debts also are made specifically illegal. Courts have gradually expanded the idea that the public needs to be protected from a large variety of unlicensed parties. Through the legality requirement, the law asserts that it will not assist those who fail to conform to rules, even when those purchasing their services were fully aware of their license deficiency.

The most robust area for using the legality requirement ironically exists where no clear statutory violation is involved. Courts have gradually expanded the idea that agreements that violate public policy are not valid contracts. Within this area, contracts cannot unduly restraint trade. The courts have established some tolerance, however, as part of larger business sale or employment contracts. The so-called noncompetition agreement has legitimate objectives, such as the protection of purchased goodwill or training investments made in employees. Nonetheless, these contracts are invalidated if they fail to narrowly prohibit (in temporal and spatial dimensions) only those activities that realistically infringe upon the

other party's legitimate interests. Exculpatory clauses, wherein tort and contract liability is putatively expressly waived, are also subjected to careful scrutiny. Here, the public policy that those substantively at fault should be accountable for injury is juxtaposed with the right to select contractual language freely. Cases in this area typically hinge upon reasonable notice, ability to bargain, and the magnitude of the parties potentially affected. The assertion that contracts must conform to public policy provides the judiciary considerable room to interpret exactly what public policy may be.

Parties making contracts must possess contractual capacity to form a binding arrangement. Minors, the insane, and the intoxicated present capacity problems. Insufficient capacity typically renders contracts voidable at the option of these parties, notwithstanding the injury inflicted on the other party when a promised course of conduct is reversed. However, recent trends in this area have reduced the importance of the capacity defense. For example, minors may be deemed to have ratified contracts by failing to pursue timely disaffirmance. Minors may be barred from disaffirmance remedies if they cannot restore the other party to its prearrangement position. Emancipated minors are treated as adults when making a contract for "necessaries." The insane are also limited in employing their capacity status when contracts are substantively fair and when other parties have dealt in good faith and without knowledge of their problem. Here it is useful to distinguish between those adjudicated insane (for whom all contracts are void) and others.

Corporations that enter contracts without chartered or statutory power to perform them also present capacity problems. In the modern era, however, occasions of this have been made less frequent by the use of very broad boilerplate "powers" clauses in articles of incorporation. Courts anxious to reach the merits of the case increasingly look at capacity issues as unnecessary technicalities, rather than bona fide contractual problems.

ENFORCEABILITY: ISSUES OF FORM, EVIDENCE, AND PROCEDURE

Contrary to popular impression, the law does not rigidly and uniformly require that contracts be in writing. Nonetheless, if the written form is proscribed, some success in authenticating the contract with records in this form is required. Failing to do so will result in a contract being declared unenforceable, a conclusion tantamount in its consequences to the absence of a contract. Whether a contract must be in writing or not depends upon the court's interpretation of the statute of frauds (SOF). No amount of evidence, albeit convincing, in nonwritten form is admissible unless the SOF is first satisfied.

Contracts involving the sale of goods must be in writing if they involve a price in excess of $500. The UCC's adoption of a strict monetary metric for the SOF breaks with the common law tradition in the name of simplicity and predictability. When price modifications to a contract are made, the modifying agreement must itself be in writing if the total postmodification contract value is still within the SOF (i.e., >$500). The size of the modification itself does not matter. Therefore, it is possible that a modification to a contract not originally within the SOF must be in writing despite a relatively trivial monetary effect on the total contract.

Contracts not covered by the UCC (e.g., services, real property, and intangibles) must refer to their subject matter to apply the SOF correctly. Specifically, three commercially important areas exist. Contracts that convey an interest in real property must be in writing. Likewise, contracts with promises that necessarily take longer than one year to perform have to be written. Finally, contracts involving a promise to pay another's debt must be in written form. Embedded in these areas are subject matters of great value (real property), the recognition of the rapid decay in reliability of other evidentiary forms (longer than one year promises), and areas of high fraud potential (suretyship). For SOF purposes, these subject matters are interpreted broadly. For example, the real estate area includes contracts that do not necessarily convey immediate or possessory ownership rights, such as mortgages, easements, and some leases. They also require one to adopt the perspective available at the initiation of the contract. For example, the one-year requirement is not affected by the actual performance period. Counterintuitive results are sometimes produced. A two-year employment contract must be in writing, whereas a lifetime employment contract does not because the possibility of an early death leaves performance under the former unfulfilled (albeit excused), but exactly satisfied under the latter. The suretyship area should be strictly differentiated from situations wherein an unbenefited party undertakes a primary obligation. There, the so-called cosigner has a personal debt that is not within the SOF. Some courts have also inferred primary benefits in the motivation for undertaking the obligation of another's debt sufficient to take the contract out of the SOF and thereby enforce an oral promise.

The need for a writing and the associated unwillingness to consider convincing unwritten evidence in its absence could be a victory of form over substance. Accordingly, the courts tend to disfavor it. One means whereby substance can resume priority is by minimizing the evidentiary requirements to conclude that a writing is present. Very modest memoranda suffice for SOF purposes, well short of the detail and rigor conjured up by the popular image of a contract. As long as some recordation of subject matter, parties, and consideration is present in the writing, it is likely to be judged sufficient. The UCC further erodes the standard of what satisfies the SOF by allowing parties to use their own uncontroverted memos of confirmation to prove the contracts made by the recipients of that correspondence.

Some circumstances have become known as situations wherein the SOF has no application. Certain party actions have considerable intuitive power, such that the argument that no writing exists pales in comparison. Partial performance takes a contract out of the SOF. Likewise, goods specifically manufactured for one party do not have to be proven in this manner. Furthermore, the UCC makes it more consequential if parties admit (apparently unwittingly) to the existence of a contract in court or in the pleadings. This works as a bar to the use of the SOF defense.

Under the SOF, reducing a contract to writing enhances enforceability. However, the exact opposite can occur for at least some parts of a contract under the parole evidence rule. This doctrine suggests that a writing that appears to be a complete expression of the understanding between parties has the effect of nullifying inconsistent and additional oral and written agreements that either preceded or were contem-

poraneous with the final writing. In other words, the writing is taken as the exclusive source of the enforceable rights and duties of the parties. Refusing to look beyond or outside the writing protects the integrity of the writing. This rule makes it critical that the writing contains both the correct terms and all of the terms negotiated by the parties. This evidentiary construction assumes that language which does not appear has been negotiated away in the process of arriving at final contractual terms. It is invoked when the written contract is sufficiently formal and lengthy to appear complete or when the language of the contract itself asserts its exclusivity and completeness through what is known as a merger clause. Agreements barred by the parole evidence rule are unenforceable.

Parties confronting the parole evidence rule retain the ability to argue several points. First, they can attempt to prove that the agreement is not a contract (i.e., intent, consideration, legality, and capacity). They can also argue fraud or some other reality of assent problem (see later). They also are free to prove a postwriting modification, because such logically cannot appear in the initial writing. The parole evidence rule has no application to disputes that entail the interpretation of ambiguous contractual language.

An enforceability contingency related to the procedure whereby rights are established in legal actions requires contemplating the statute of limitations. Victims of breach of contract do not have unlimited time to establish their right to a remedy. The statute of limitations expresses the time frame in which legal actions must be initiated. These periods measure the lapse of time between breach of contract and the filing of the complaint to begin a lawsuit. In UCC actions, the statute of limitations is four years. However, by agreement, the parties can reduce this period to as little as one year. In other actions, state law governs. Because a variety of situations can toll the statute or revive the time period after its initial exhaustion, simple mechanical approaches are fraught with peril.

The bankruptcy of the defendant in a contract action creates a public policy dimension for the enforceability of claims. The need for judicial oversight over the equitable distribution of the bankrupt's assets supersedes the sanctity of any particular enforcement. If nothing else, inadequate assets construct a very practical rationale for contractual claim unenforceability.

ENFORCEABILITY AND THE REALITY OF ASSENT

To assure that contracts express the true intent of the parties, as opposed to their nominal intent, a collection of circumstances may result in unenforceability. Collectively referred to as reality of assent situations, these fact-intensive scenarios are empirically rare but yet establish the boundaries of the law of contracts. This section considers fraud, misrepresentation, concealment, mistake, duress, and undue influence. Unlike other areas, the UCC introduces no material differences.

Fraud involves the purposeful deceit by one upon another relevant to the entry into contract. In essence, the victims' argument is that, but for the deception of the other party, they would not have entered into a contract. The first element of fraud is the distortion of a material fact. For these purposes facts need to be distinguished from opinions, about which legally significant distortion is not possible. The departure from the truth usually is accomplished in a verbal or written statement about product performance, history, attributes, or behavior. Secondly, fraud involves knowledge that a statement is false. This includes statements made with reckless disregard for truth and therefore embraces the need for speaker prudence when facts are uncertain. Third, fraud requires the intention to deceive. Other motives may produce falsities just as readily, yet not be fraudulent. Fourth, the victim must rely on the false statement. Here, both the materiality of the statement to the decision process and the reasonableness of the reliance are at issue. People are charged with a duty to self-protect against fraud and therefore are not at liberty to believe extravagant and clearly unreliable assertions. Finally, an injury must be produced. In most contexts, financial injury suffices and is established when a spread exists between value as represented and value that could be attained under truthful conditions.

Misrepresentation is closely related to fraud in most regard. Unlike fraud, misrepresentation lacks the knowledge of the falsity of a critical statement. It also lacks the intention to deceive. Thus, it depends upon some relatively innocent circumstances that differentiate that which one party says and that which another party hears. Unlike fraud, punitive damages are not appropriate. Misrepresentation usually results in relieving parties of contractual obligations. Recision of the contract is based on the equitable notion of restoring each party to their precontract position.

Concealment bears factual similarity to fraud and misrepresentation. Unlike them, however, the absence of an affirmative erroneous statement creates a distinction. Concealment bears factual similarity to fraud and misrepresentation. Concealment highlights the issue of the duty to reveal material conditions to a party whose interests oppose one's own. Generally there is no duty to tell the entire truth to the other party. However, when active steps are taken to prevent the other party from discovering the actual desirability of the subject matter, concealment is used to render the tainted contract unenforceable. A similar conclusion might be appropriate when unexpected and important conditions are obscured in contract documents. Courts are growing increasingly sympathetic to the notion that obligations that reasonable parties would not anticipate cannot be "buried in the fine print." Another concealment condition is a fiduciary relationship between the contracting parties. A precontractual relationship of trust and diminished guard contrasts with the usual relationship between contracting parties. When this relationship is other than arms length, a duty to reveal the benefits and dangers of the contract in a more realistic manner is imputed. All other things equal, concealment becomes more likely in such a situation.

In very rare and unusual circumstances, contracting parties may be deluded about the very nature of the subject matter of their transaction. When the true identity of the subject matter is revealed, the confidence with which we assert that the parties possess the requisite contractual intent is undermined. The doctrine of mistake should not be used when the mistake pertains only to value. With the benefit of hindsight, many contracts involve mistaken beliefs about future values but such is considered within the normal risks undertaken in contracts. Practically, it is very difficult to cleanly separate

mistakes of subject matter and mistakes of value. Ideally, this concept also requires that both parties be suffering from the same deviation from the actual conditions existing at the time of the contract. Therefore, it should not work to deny one party the bounty that flows from a superior forecast of the subject matter's market potentialities. In circumstances where one party is obviously making a mistake, the other party should not be able to mercilessly exploit this lacunae. For example, a construction bid that is much lower than all others may prevent its acceptance without clarification about the work that is involved.

Contractual assent typically assumes free will. However, circumstances surrounding the contract may suggest that adherence to a contract does not represent a favorable assessment of its merits, but instead an attempt to avoid collateral sanctions. Duress is a doctrine that enables a contracting party to escape liability when it can prove extreme force brought to bear on its decision making process. Increasingly, courts are acknowledging that duress can involve force other than the threat of physical harm. Threats of reputational damage, extreme economic retaliation, and malicious and frivolous legal action have all gained some degree of respect as grounds for unenforceability within the broadened doctrine of duress.

The last conditions grouped in the reality of assent are undue influence. Similar to duress, this concept questions whether the contract is the product of fully present, rational volition. Undue influence could be thought of as a subtle and gradual form of duress. Again, the hallmark is that a purposeful attempt is made to subvert free will. However, unlike duress, undue influence requires violating a close personal relationship. Usually, a pattern of inducement into a very substantively unfair contract is evinced.

CONTRACT INTERPRETATION

Assuming a contract that is enforceable, the focus turns to what that contract means. Much on this topic can be said beyond the general notion that courts will discern the literal meaning of the language and thereby give force to the intentions of the parties. *Stare decisis* and statutory intervention have greatly expanded on this generic objective.

One recurring problem in interpretation pertains to the interpretation of time clauses. If performance is called for by a particular time, what is the consequence of late performance? The common law of contracts called for determining whether time was "of the essence" or highly material to the value of performance to the receiver of that obligation. If the contract itself stated such or such can be inferred from the circumstances, the time provision was literally applied. Otherwise, an attempt was made to compute the value of late performance and offset it against the other party's performance (i.e., payment). A similar tack is taken by the UCC in its grant of the right to attempt late performance to the seller, conditioned by the reasonable belief that it will be acceptable. This is often established by the course of dealings between the parties.

A similar issue pertains to the caliber of performance. In a complex, multifaceted contract, should proximate performance be considered adequate? The doctrine of substantial performance suggests that breach of contract will not result if the deviation from perfect performance is immaterial in its degree and that no purposeful conduct caused the shortfalls in performance. The latter element refuses to reward attempts to substitute inferior performance. Again, an uncontemplated middle ground, wherein the contract price is reduced for the performance actually delivered, is constructed. The UCC endorses a similar strategy of valuing noncompliance only as a partial offset. In an installment contract, the nonconformance of one delivery of goods does not jeopardize the performance of the entire contract unless it represents a material component of the entire contract.

The law of contract interpretation attempts to infuse a degree of reasonableness into the process. For example, contracts calling for the guarantee of satisfaction are understood to call for the application of objective criteria, if such are possible. For example, mechanical performance is subjected to expert scrutiny. Only in exceptional situations can parties invoke personal or idiosyncratic evaluation of performance, even if the contract appears to grant that privilege.

The UCC adds an important body of law on the issue of quality. Contracting parties rarely provide ample documentation regarding their agreement on the caliber of the good or service transacted. By constructing warranty law, the UCC more proactively enforces buyer's expectations whether created by the seller or not. This represents an interpretation of the contract beyond its four corners and applies social policy as it is reflected through the intentions of the parties. Express warranties stem from assertions of facts made in the description of goods that induce parties into the bargain. Accordingly, that which is interpreted as part of the contract includes the negotiations, the product's packaging, and its marketing. Implied warranties go much further. No longer based on seller behavior, these protections offer buyers "merchantable" or fair and average quality, at a minimum. Although the interpretation of sufficient quality for these purposes has to be sensitive to the price paid, the lower end of the market is effectively tapered, unless the goods are understood to be pre-owned, defective, or of lessor quality. In some circumstances, the seller undertakes an extraordinary duty to outfit the buyer's particular needs. The buyer's poor understanding of what will work for these purposes evinces that this warranty goes well beyond the literal terms of the contract. The appropriate contractual language positioned to give parties notice of its consequences can often disclaim warranties. Implied warranties also do not supervene the quality level that an inspection should reveal. In other words, buyers still must be aware of lower levels of quality delivered through the absence of guarantees or through observable, apparent defects. Nonetheless, contract interpretation is very much affected by the gradual expansion of warranty protection.

In the event of the loss or destruction of the contract's subject matter, the contract is called upon to provide a means to allocate the financial consequences. The common law of contracts engages in the difficult and debatable process of attempting to discern the moment that title shifts from seller to buyer. On the other hand, the UCC creates a set of default presumptions that are usually linked to the process by which the buyer attains physical possession. In the case of common carriers, the shift of the risk of loss depends on the delivery terms. Otherwise, the status of the seller as merchant or nonmerchant is important. Because the parties do not typically

contemplate the risk of loss, an expansion of the contract for purposes of this interpretation is necessary.

The UCC explicitly incorporates three contextual factors that facilitate contractual interpretation. First, the course of performance suggests how parties have acted during the interval marked by the contract. This "understanding in action" of the contract speaks clearly of its intent from the perspective of parties not consciously posturing for litigation. Secondly, the course of dealing suggests that past dealings between the parties involving similar obligations are relevant. These transactions show how these parties viewed the legal arrangements in terms of what mattered and what did not. Finally, the usage of trade recognizes that transactions are patterned by industry differences. Language often has special meanings in the hands of similarly situated practitioners.

THIRD PARTIES

The doctrine of privity of contract asserts that only the original parties to contracts can obtain rights in these obligations. However, this strict view contrasts with the many occasions where an expansion of the involved parties is appropriate. Therefore, a catalogue of the instances of third-party interfaces is essential.

Some third parties are related to the purpose of the original contract. Parties who make contracts with the explicit purpose of bestowing benefits on creditors or donees vest those collateral parties with the ability to enforce the contrast against the other party. These third-party beneficiaries should be distinguished from all others for whom benefits under these contracts would be incidental and unintentional.

Other third parties are brought into the purview of the contract by the unilateral act of one of the original parties. In most contracts, rights expected to be received under a contract can be assigned to another. This compels the other party to redirect performance except where such is prohibited by the agreement or by statute. Assignment should be valid in all cases except in situations where it substantially alters the undertaking. Assignments can be made with or without consideration and extend some warranty protection to the assignee. However, assignments do not release the assignor from the original contract. Along similar lines, third parties can obtain the duties created by the contracts of original parties. All duties except those that depend on personal skills, special training, individual character, or rarefied judgment can be delegated. Again, the other contracting party cannot be adversely affected by a change in the source of performance. Both assignments and delegations create enforcement powers in third parties.

If agreed upon by all the original parties, a new party can be substituted for an original one. This differs from assignments and delegations because it releases the original party from liability. This arrangement, called a novation, works this discharge in exchange for the establishment of the liability of a new party.

DISCHARGE OF CONTRACTS

The discharge of a contract ends its existence as a legally significant construct by terminating its benefits and obligations. This can occur by virtue of contractual anticipation, by completion or its impossibility, or by agreement.

Reflecting high levels of uncertainty, contracts sometimes contain conditions that identify triggers for terminating obligation. These can precede (conditions precedent), coincide (conditions concurrent), or succeed (conditions subsequent) the initiation of performance. Typically, they are explicit in the contract but can occasionally be implied from the circumstances.

To say that contracts are discharged by performance merely relates the obvious fact that court assistance in obtaining expectations is not required. From the perspective of one party, contractual obligation may be discharged by unilateral performance. The contract continues in existence for the party whose performance is impending.

A more debatable issue is raised by the circumstances that must be present to relieve a party of the obligation of performance. True impossibility stems from the death/incapacity of a person obligated to perform personal services or by the destruction of the contract's subject matter. This preserves the obligation of other forms of performance (i.e., payment of money) for the estate of the decedent. No discharge occurs when the parties contemplate a particular subject matter or source of goods but merely identify goods generally available.

Through the idea that the frustration of the contract's purpose should discharge contracts, the modern judiciary employs a less strict standard. When an external event greatly reduces the value of a contract to one party, there may be discharge grounds. However, this should not be used when a contract has merely become less profitable or when the external event was either attributable to that party's fault or foreseeable as a risk assumed in the contract.

A bilateral agreement to discharge a contract is honored by the courts. This is true for total recessions, novations (which discharge the contract for one of the original parties), and agreements that materially change the performance called for in the contract. The latter is referred to as an accord and satisfaction. It discharges a party's initial undertaking only upon the actual rendering of the substituted performance.

CONTRACTUAL REMEDIES

In the event that a breach of contract occurs in the absence of an enforceability or discharge condition, the court awards the victim a remedy. This is to compensate for the loss of the performance embedded in the contractual promise. Toward this end, several different types of remedies may be used alone or in combination.

Usually the award of monetary damages is sufficient to place the recipient in as good a position as it would have been in the absence of breach of contract. Additional amounts are available for losses that are caused by breach of contract as long as these contingencies should have been foreseeable by the breaching party. Transactional costs involved in making alternative arrangements are also available.

Parties that anticipate breach may insert damage calculation clauses in their contracts. Courts enforce these liquidated damage provisions as long as they are reasonable attempts to measure the actual damages incurred, as opposed to penalties. In rare circumstances (i.e., fraud) courts award punitive

damages to victims, who in this isolated instance may be better off than had no breach occurred.

When damages are inappropriate or insufficient, other remedies are available. The remedy of specific performance compels breaching parties to do exactly what they promised in a contract. This remedy fits best those situations with unique subject matter but is never applicable to personal service promises. Specific performance is not available when monetary damages suffice.

Injunctive relief prevents a party from conducting a particular action. When such an action threatens to inflict an impermissible injury upon a breach of contract victim, stopping it is a valuable remedy. An injunction often works as a preliminary solution, preventing worsening of a situation but not truly compensating for it. In other occasions, simple recession may be an adequate remedy. When parties have entered into contract as a result of flawed assent, relief from future obligations may be the only help needed.

The UCC spells out the remedies available to buyers and sellers with statutory precision. In addition to reiterating basic remedy logic of the common law, the UCC provides more calculative precision with regard to compensatory relief. Here, conditions are spelled out to explain when parties are entitled to lost profits or the value of the deal. In addition, the UCC stipulates incremental specific performance remedies available to parties when other parties become equitably insolvent (i.e., unable to pay their debts as due) in the course of performance.

NEW HORIZONS

Contract law is an interesting combination of ancient tradition and modern accommodation. The mixture is always precarious, making the speed of change difficult to predict. Because emergent contract law depends on the specific facts of cases, most of which have yet to occur, it is unlikely that a linear and rational development will transpire. However, the general success of the UCC illustrates that great and rapid progress is possible in systematic attempts to codify, streamline, and modernize contract law.

Courts are taking a more systematic look at precontractual events. The requirement that parties negotiate in good faith has always existed. However, more behavior that was not legally significant now is. The point of no return is reached earlier in the just-in-time business environment of today where the anticipation of other party's needs is vital. The consequences of belief in a contract-to-be are so large that the law often finds ways to compensate those who would otherwise have their investments suddenly vanquished. If this involves a more liberal look at the requirements of contracts, such is a small price to pay.

The application of promissory estoppel and unconscionability to business contracts between corporate actors is a second developing area. When large companies take full advantage of their dominance in contracts with small companies, these doctrines are beginning to be used. The fact that small companies have access to legal counsel and have the sophistication to realize that contracts have to be read closely and formalized with precision are no longer as consequential. An argument can be made that the personal responsibility that had been a cornerstone of contract law is being widely abrogated in furtherance of social policy.

The line that typically divided contracts and torts (civil wrongs) is blurring. Most notable here is the emerging case law in the contractual infringement area. Interfering with the contractual obligations of another, called aggressive marketing in a bygone era, is legally actionable. Commercial disparagement, wherein a competitor criticizes a product, is also reaching its apex. Warranty notions are likely to be expanded to new areas and new relationships. Caveat emptor has been under attack for some time and is unlikely to make a comeback as the way that courts are predisposed to view business relationships. The next few years are likely to bring restricted ability to freely contract for lower levels of legal protection.

Changes in contract law reflect changes in property rights. As we evolve new ways of owning, especially pertaining to intangibles, contracts for the transfer and redirection of these ownership rights will need to achieve legal protection and recognition.

One particular contract that has become increasingly common is the licensing agreement. When an individual or company owns intellectual property (patents, copyrights etc.) it can contract with another that is willing to develop its commercial potential or to extend the innovation's utility in new ways or in new areas. Licensing is at least a partial answer to many of the difficulties of doing business internationally and to the problematic ability to control exclusivity over a technology or over informational rights. Thus far, the law of contracts has proven sufficiently flexible to handle the additional complexities of these ongoing relationships.

As computer-mediated transactions become the norm, contract law can ill afford to continue stretching the concepts that presume less rapid media and personal interaction. The law is destined to be a brake on what most would presume is progress in this domain. The issue is how hard this brake will be applied. The most obvious question pertains to the Statute of Frauds because the courts need to answer how new media alter our need for a "writing" or what constitutes writing. As transaction costs, especially legal fees, escalate, the willingness of parties to enlist the aid of the courts in vindicating their contractual rights diminishes. If legal rights prove too costly to pursue, they become less important. Moreover, this tendency will retard the development of the law. Parties will continue to explore alternatives, such as arbitration and other forms of alternative dispute resolution.

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CONTRAST ENHANCEMENT IN IMAGE PROCESSING. See IMAGE PROCESSING CONTRAST ENHANCEMENT.

CONTROL. See CHAOS, BIFURCATIONS, AND THEIR CONTROL.

CONTROL, ADAPTIVE. See ADAPTIVE CONTROL.

CONTROL, AIR TRAFFIC. See AIR TRAFFIC CONTROL.

CONTROL ENGINEERING. See PID CONTROL; SERVOMECHANISM.

CONTROL, INTELLIGENT. See INTELLIGENT CONTROL.