

**Basics of Contract Law**

**1: Overview of Contract Law**

**A. Purposes:**

- i. Facilitates business – contract law ensures
  - promises will be enforced
  - legal remedies available in event of a breach
- ii. Act of creating a contract
  - encourages all parties to consider terms seriously before agreeing
  - places parties on notice of their obligations and provides documentation for ensuring clarity in the event of a misunderstanding or dispute
- iii. In the event of a breach
  - specifies a remedy (e.g. pay damages or specific performance)
  - does NOT create criminal charges

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**B. Contract Classifications:** variety of ways to classify

i. bilateral contract vs. unilateral contracts

**bilateral** – parties exchange mutual promises, contract formed at time promises exchanged, may be oral, written, or implied

**unilateral** – only one party is making a promise in exchange for performance, contract not formed until a second party performs the action requested (e.g. reward for a lost wallet)

ii. express contract vs. implied contract

**express** – terms clearly set forth verbally or in writing

**implied** – based on the conduct of the parties or the facts of a situation (can of beans from grocer)

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**C. Contract-Like Enforcement Mechanisms**

- even though contract may not exist, court may use principles of contract law to enforce contract-like obligations

i. Prevent one party from becoming unjustly enriched to the detriment of another party

Example: One party provides goods or services, other party accepts, and a reasonable person would have expected to pay rather than receive as a gift

ii. Promissory Estoppel

One party relies on an agreement to its detriment. The other party received nothing of value (i.e. no consideration) and yet they knew the other party would rely on their promise. The only way to prevent injustice is to enforce the promise.

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**2: Elements of a Contract: Offer and Acceptance**

- the three basic elements of enforceable contracts are offer, acceptance, and consideration

**A. Mutual Assent: Offer and Acceptance**

i. Mutual Assent requires:

- (1) an intent to be bound, and
- (2) definiteness of essential terms.

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**Bound?**

1. Would a reasonable person in the position of the promisee understand from the promisor's words and conduct an intent to be bound by the agreement?

2. Did the promisee, in fact, believe that a legitimate offer was made?

**- manifested an intent to be bound?**

Factors:

- (1) language of any preliminary agreement
- (2) whether there are terms left open
- (3) whether there has been partial performance
- (4) overall context of the negotiations
- (5) any relevant customs for the type of transaction (e.g. forms)

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**Indefiniteness of terms?**

1. Courts may supply reasonable terms under the circumstances, even reasonable price.

2. Contract may be unenforceable if:

- contract was so indefinite there was no meeting of the minds
- something was to be settled as part of the negotiations and never was.

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**B. Offers**

Requires manifestation of willingness to enter into a bargain.

- Price lists and price quotes are NOT offers.
- Advertisements are generally not considered offers (exceptions to the rule exist)
- An order by a consumer is the **offer**. Confirmation by the seller of your order is the **acceptance**.
- No binding agreement until the confirmation is made. (i.e. electronic or otherwise)

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**C. Termination of an Offer**

- may be accomplished before the offer is accepted
- rejection (e.g. counter offer by the seller)
- revocation (e.g. buyer modifies or changes the order before accepted)
- lapse (e.g. buyer may state offer is open for a specified time period)
- option to buy within a time period with consideration paid for the right; when period expires, offer expires
- death of a party

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**D. Acceptance**

- by any manner and by any means reasonable under the circumstances

**Mirror Image Rule:** Change any terms when accepting, then no contract is formed.

**UCC Rules:** Changes to buyer orders become proposals for new agreements, which offeror can accept or reject. Different rules among merchants with deference towards enforceable contracts.

**Mailbox Rule:** Where time lag exists, **acceptance** of an offer is enforceable when dropped in the mailbox. **Revocation** of an order is only enforceable upon actual arrival. Use phone or Internet to avoid such issues.

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**3: Consideration**

- critical element of every contract

- each party receives something in exchange for his action or promise
- or
- each party gives up something in exchange for the other parties action or promise
- "quid pro quo" must exist – "this for that"

Courts generally will not consider whether the parties made a good bargain or whether the consideration is fair

- must be more than a pretense or false claim
- "\$1 and other good and valuable consideration" has often been sufficient

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**Mutuality of Consideration**

– if only one party is bound, contract lacks consideration by one party, is illusory and unenforceable

**Illusory**

Both of the following may produce nothing and therefore are illusory

- Requirements contract– seller promises to sell buyer any quantity desired
- Output contract– buyer promises to purchase everything seller can produce

**However**, UCC enforces both and both parties must act in good faith

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**Legal Duty Rule**

- consideration cannot be something one is already obligated to perform

i. Partial Payment checks stating "in full payment"  
 - does not remove obligation to pay the full amount (i.e. not a new contract)

ii. Past Consideration  
 - something given before the promise is made  
 - one may not bargain for something that has already happened

iii. Promissory Estoppel  
 - enforcing a promise not supported by consideration in order to prevent injustice  
 - one party induced to act based on a promise even though not supported by consideration  
 - court determines the reasonable consideration

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**4: Contract Defenses.**

Otherwise binding contracts are **unenforceable** if defect in:

- the agreement
- the terms
- the bargaining process

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**A. Incapacity** – person lacking mental capacity to understand the nature and quality of the act to be performed or its consequences

(1) **Minors** – legal incapacity to be bound (under 18)  
Exception: emancipated minors for necessities

(2) **Mental Incapacitation** – schizophrenia, Alzheimer's disease, temporary intoxication from drugs or alcohol

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**B. Contracts Against the Law or Public Policy**

(1) **Contract to commit a crime** – unenforceable

(2) **Against public policy** – performance injurious to the public or interferes with public welfare or safety may be voided by court

(3) **Non-Compete Agreements** – can go too far in unfairly limiting free trade

Factors:

- restraint greater than necessary to protect the employer's legitimate interests?
- employer's interests outweighed by hardship on the employee and likely injury to the public?
- is restraint reasonable in duration, subject matter, and geographic area?

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**(4) Exculpatory Provisions**

- signer promises to refrain from suing for injuries sustained during actions run by the defendant (typically something dangerous)
- can go too far (i.e. attempting to override safety regulations required by law)

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**C. Unconscionability**

- an agreement that is overwhelmingly one-sided when one party lacks meaningful bargaining power in entering the contract

**Factors:**

- Whether parties used "a standardized agreement executed by parties of unequal bargaining power"
  - Whether parties had an "opportunity to read or become familiar with the document before signing it"
  - Whether there was "use of fine print in the portion of the contract containing the provision" under dispute
  - The relationship of the parties including factors of assent, unfair surprise, and notice.
- terms must be also unfair.

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If unconscionable, court may:

- void whole contract,
- void part of contract, or
- modify the contract as to the unconscionable provisions.

Click-wrap agreements

- generally upheld if sufficiently clear

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**D. Duress and Undue Influence**

**E. Mistake and Misrepresentation**

**F. Statute of Frauds**

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**5: Performance and Breach**

**A. Conditions**

**B. Material Breach**

**C. Impossibility, Impracticability, and Frustration of Purpose**

**D. Contract Remedies**

- mutually exclusive among
  - i. Expectation Damages
  - ii. Restitution Damages
  - iii. Reliance Damages
- non-breaching part has duty to mitigate damages
- nominal damages sometimes sought in order to allow punitive damages

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**E. Liquidated Damages**

- contract clause states amount of damages in event of breach
- clause supported where precisely measuring loss may be difficult and estimated amount is reasonable (e.g. estimate of losses if building not completed on time and paying tenants can't move in and other contracts lost as a result of being non-operational)
- losses if software or website not completed on time?
- if too high or designed as a penalty, than against public policy

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**F. Specific Performance**

- party ordered to perform the contract terms
  - goods are unique and money would not give non-breaching party benefit of their bargain
  - often used in sale of land

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**E-Commerce Regulation  
Contracts and Transactions in E-Commerce**

**Contracts of Adhesion in Digital Commerce**

- website user must agree to agreement or refuse all offered terms
- no bargaining power for consumer
- viewed with increased judicial scrutiny

Most sites now require customer to manifest assent through some intentional conduct:

- Click-wrap agreement
- Scroll-wrap agreement (scroll before allowed to click)

- generally held to meet standards of notice and voluntary acceptance
- browse-wrap agreements (acceptance by use) now often invalidated due to no volitional act indicating voluntary acceptance

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**Best Practices and policy Guidelines for Electronic Transfers**

- follow "DotCom Disclosures" guidance document

**Models for e-Commerce Agreements**

- *Principles of the Law of Software Contracts* (American Law Institute model law)
  - designed like a restatement of existing state contract law from across the nation
  - useful tool for reviewing contracts in e-commerce

**Filling Gaps and Interpreting Electronic Agreements**

- ALI model law serves role of filling in contract gaps for electronic transactions similar to the way UCC does for sale of goods

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