

# American Contract Law in a Comparative Perspective

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# Overview

- 10 lectures examining fundamental concepts in US contract law
- Leading US cases
- Current US Law

# Overview

- Comparison with International and European Law as reflected in
  - Convention on International Sale of Goods (CISG)
  - International Institute for the Unification of Private Law (UNIDROIT), Principles of International Commercial Contracts (2004) (UNIDROIT Principles)
  - Principles of European Contract Law (1999-2003), prepared by Commission on European Contract Law (European Principles)

# **Bases of Contractual Obligation and Sources of Law**

- I: Objective Theory of Contract and
- II. the Doctrine of Consideration

# I. Objective Theory of Contract

# Leading case

*Raffles v. Wichelhaus* (England 1864)  
(the “Peerless” case)

# Facts

- Contract for sale of 125 bales of cotton
- Shipment from Bombay to Liverpool via ship “Peerless”
- Two ships Peerless
- Seller had in mind delivery on December Peerless
- Buyer had in mind delivery on October Peerless
- Buyer rejected and seller sued

# Decision

Court found no contract because no

*“consensus ad idem”*

no agreement on same thing

# Subjective theory of contract

*Raffles* usually cited as example of subjective theory of contract

Existence of contract requires actual agreement of parties

Must have “meeting of the minds”

# Some consequences of subjective theory

Contract making less secure

- Question of fact whether party intended to be bound

Possibility of strategic behavior when contract turns out to be undesirable

- Do you think the price of cotton rose or fell between October and December?

# Shift to objective theory of contract

First third of 20<sup>th</sup> century, shift in US to objective theory of contract

# Judge Learned Hand

“A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties. A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent. >

## Hand quote continued

If, however, it were proved by twenty bishops that either party, when he used the words, intended something else than the usual meaning which the law imposes upon them, he would still be held, unless there were some mutual mistake, or something else of the sort.” Hotchkiss v. National City Bank, D.C., 200 F. 287, 293.

# Restatement (First) of Contracts, §230, illus. 1 (1932)

. . . A promises to sell, and B promises to buy certain patents. A intends to sell only English patents on a certain invention. B understands that A promises to sell the English, French, and American patents on the invention. If a reasonably intelligent person . . . would understand the agreement to state a promise to sell the English and American patents, but not the French patents, there is a contract and A and B are bound by that meaning.

# Arthur Corbin criticism of objective theory

[T]to hold that, although A intends to sell Blackacre and B intends to buy Whiteacre, A must convey and B must accept Greenacre because their [contract] would so be understood by C or by a large community of third persons, is to hold justice up to ridicule. 3 Corbin on Contracts §539, at 81.

# Other possible applications of subjective/objective theory

- One party claims no contract, just a joke
- Agreements to agree when one party says did not intend to be bound until formal agreement signed
- Language used in contract has special meaning between parties or in the trade

# Current US Law

Restatement (Second) of Contracts §201  
(1981), Whose Meaning Prevails

# Restatement §201(1)

Where the parties have attached the same meaning to a promise or agreement or term thereof, it is interpreted in accordance with that meaning.

## Restatement §201(2)

Where the parties have attached different meanings to a promise or agreement or a term thereof, it is interpreted in accordance with the meaning attached by one of them if at the time the agreement was made

# Restatement §201(2)(a), (b)

(a) that party did not know of any different meaning attached by the other, and the other knew the meaning attached by the first party; or

(b) that party had no reason to know of any different meaning attached by the other, and the other had reason to know the meaning attached by the first party.

## Restatement §201(3)

(3) Except as stated in this Section, neither party is bound by the meaning attached by the other, even though the result may be a failure of mutual assent.

# Analyzing the Restatement approach

Has subjective element, §1.

Has objective element, §2.

Best characterized as modified, objective  
approach.

# International and European Contract Law

Convention on International Sale of Goods  
(CISG) Art. 8

# CISG Article 8(1)

For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.

## CISG Article 8(2)

If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.

# CISG Article 8(3)

In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties .

# International and European Contract Law

International Institute for the Unification  
of Private Law (UNIDROIT), Principles  
of International Commercial Contracts  
(2004)

# UNIDROIT Principles, Art. 4.1, Intention of the Parties

- (1) A contract shall be interpreted according to the common intention of the parties.
- (2) If such an intention cannot be established, the contract shall be interpreted according to the meaning that reasonable persons of the same kind as the parties would give to it in the same circumstances.

# International and European Contract Law

Principles of European Contract Law  
(1999-2003), prepared by Commission on  
European Contract Law

# European Principles, Art. 2:102, Intention

The intention of a party to be legally bound by contract is to be determined from the party's statements or conduct as they were reasonably understood by the other party.

# European Principles, Art. 5:101, General Rules of Interpretation

(1) A contract is to be interpreted according to the common intention of the parties even if this differs from the literal meaning of the words.

# European Principles, Art. 5:101, General Rules of Interpretation

(2) If it is established that one party intended the contract to have a particular meaning, and at the time of the conclusion of the contract the other party could not have been unaware of the first party's intention, the contract is to be interpreted in the way intended by the first party.

# European Principles, Art. 5:101, General Rules of Interpretation

(3) If an intention cannot be established according to (1) or (2), the contract is to be interpreted according to the meaning that reasonable persons of the same kind as the parties would give to it in the same circumstances.

## II. Doctrine of Consideration

# Why should promises be enforced?

- Both Civil Law and Anglo-American Law (the “common law”) have long provided legal remedy for breach of contract
- But reasons for enforcement continue to be debated
- Traditional answer of common law was doctrine of consideration: promise is legally enforceable if supported by consideration

# Doctrine and Policy Distinguished

- Doctrine: legal principle used by courts and scholars to resolve legal issue
- Policy: reason for acceptance of legal principle
- Consideration is a doctrine, but what is the policy?

# Brief History of Consideration Doctrine

- 13<sup>th</sup> Century English law recognized two predecessors to modern contract:
  - Writ of covenant: sealed instrument
  - Writ of debt: required specific sum of money owed
- Neither provided full remedy equivalent to modern breach of contract
  - In particular, debt required specific sum owed and not available if promisor had died

# History of Consideration continued

- During 15<sup>th</sup> and 16<sup>th</sup> century, English courts gradually recognized new writ that is basis of modern contract, the writ of assumpsit
- Assumpsit replaced covenant and debt.

# History of Consideration continued

- Unlike earlier writs, which had clear limits, assumpsit did not.
- Courts gradually developed requirements. Plaintiff must plead factors defendant considered in making promise. These factors or “considerations” became formal requirements.

# Leading case

*Hamer v. Sidway* (NY 1891)

# Facts

- Wedding celebration
- William Story, Sr. uncle of William Story, 2d
- Uncle, in presence of guests and family, promised that if nephew “would refrain from drinking, using tobacco, swearing and playing cards or billiards for money until he became twenty-one years of age he would pay him a sum of \$5,000”
- Nephew “assented” and fully performed
- Uncle died and estate refused to pay.

# Analysis of *Hamer*

- Estate argued no consideration because nephew benefited rather than harmed by refraining from various activities.
- Court finds promise enforceable.
- Consideration consists of either a benefit received by promisor or detriment suffered by promisee because of promise.
- Nephew suffered detriment because refrained from doing things that had right or power to do.

# Modern US Law

- US law still requires consideration to enforce standard contract. Restatement (Second) of Contracts §17.

# Restatement (Second) of Contracts §17

## Requirement of a Bargain

- (1) Except as stated in Subsection (2), the formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration.
- (2) . . .

# Modern US Law

Modern law has moved away from benefit/detriment test. Consideration consists of any performance or promise that is bargained for and given in exchange for promise. Restatement §71.

# Restatement (Second) of Contracts §71

## Requirement of Exchange, Types of Exchanges

- (1) To constitute consideration, a performance or a return promise must be bargained for.
- (2) A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise. . . .

# International and European Contract Law

## CISG §11

A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirements as to form. It may be proved by any means, including witnesses.

# International and European Contract Law

## UNIDROIT Principles, Article 2.1 (Manner of Formation)

A contract may be concluded either by the acceptance of an offer or by conduct of the parties that is sufficient to show agreement.

# International and European Contract Law

## European Principles, Art. 2:101, Conditions for the Conclusion of a Contract

- (1) A contract is concluded if:
  - (a) the parties intend to be legally bound, and
  - (b) they reach a sufficient agreement without any further requirement.
- (2) A contract need not be concluded or evidenced in writing nor is it subject to any other requirement as to form. The contract may be proved by any means, including witnesses.

# International and European Contract Law

## European Principles, Art. 2:107, Promises Binding Without Acceptance

A promise which is intended to be legally binding without acceptance is binding.

# Analysis of US and International Approaches

- No legal system will enforce all promises. Need to be able to distinguish between promises that should be enforced and those that should not.
- Consideration doctrine does poorly:
  - historically based rather than on policy
  - under doctrine many serious commercial promises not enforceable

# Analysis of US and International Approaches

- International approach seems better as mater of policy.
  - If intention to be legally bound, should be sufficient.
  - If have concern about particular types of agreements, e.g. charitable donations or real estate, have special rules for these.

# **Bases of Contractual Obligation and Sources of Law**

Promissory Estoppel and  
Restitution

# Overview of US approach to bases of contractual liability

Lon L. Fuller, Consideration and Form, 41  
Colum. L. Rev. 799, 806, 810, 812 (1941)  
identified three grounds:

# Private Autonomy

“Among the basic conceptions of contract law the most pervasive and indispensable is the principle of private autonomy. This principle simply means that the law views private individuals as possessing a power to effect, within certain limits, changes in their legal relations. The man who conveys property to another is exercising this power; so is the man who enters a contract....”

# Reliance

“A second substantive basis of contract liability lies in a recognition that the breach of a promise may work an injury to one who has changed his position in reliance on the expectation that the promise would be fulfilled....”

# Unjust enrichment

“In return for B’s promise to give him a bicycle, A pays B five dollars; B breaks his promise. We may regard this as a case where the injustice resulting from breach of a promise relied on by the promisee is aggravated. The injustice is aggravated because not only has A lost five dollars but B has gained five dollars unjustly.”

# Policy and doctrine

Each of these policies grounds for liability has a doctrinal equivalent

## Policy

## Doctrine

Private autonomy    Breach of contract

Reliance

Promissory Estoppel

Unjust Enrichment

Restitution

# III. Promissory Estoppel

# Leading case

*Katz v. Danny Dare, Inc.* (Missouri 1980)

# Facts

Plaintiff Katz worked for Danny Dare from 1950 to his retirement in June 1975.

In 1973 Katz was injured by a robber while on the job.

Dare's president, Harry Shopmaker, decided that Katz should retire because he was unable to perform his job well after his injury.

# Facts

For 13 months Shopmaker negotiated with Katz over the terms of his retirement.

On May 22, 1975 Katz accepted the terms proposed in a letter from Shopmaker, which called for a \$13,000 annual pension.

Dare's board adopted a resolution approving this pension, and Katz retired effected June 1.

# Facts

The company paid the pension until July 1978 when it attempted to reduce the pension by  $\frac{1}{2}$  because Katz's health had improved.

Katz refused the reduction and Dare ceased payments.

Shopmaker testified that he intended for Katz to rely on the pension but he would have fired Katz if he had not resigned.

# Decision

Court held that Katz could recover on a theory of promissory estoppel.

Katz did not have a right to his job. He was an “employee-at-will” who could be fired at any time.

Agreeing to resign was not consideration.

However, his resignation was a form of reasonable reliance allowing recovery on promissory estoppel theory.

# Comments on *Katz*

Promissory estoppel as 20<sup>th</sup> century  
development

Resulted from unfairness of application of  
consideration doctrine.

– *Kirksey v. Kirksey* (Alabama 1845).

## *Kirksey v. Kirksey*

Plaintiff was defendant's sister-in-law.

Her husband was deceased and she was living comfortably on public land which she was planning to acquire.

She received a letter from the defendant inviting her to come to his part of the state and live on a portion of his land.

## *Kirksey v. Kirksey*

The letter referred to defendant's desire to see the plaintiff and the unhealthy area in which she lived.

Shortly thereafter plaintiff moved onto defendant's land where she stayed for two years when defendant forced her to leave.

# Decision in *Kirksey v. Kirksey*

Plaintiff obtained a verdict for \$200, but the Alabama Supreme Court reversed on the ground that defendant's promise was a "mere gratuity".

A dissenting judge would have found that the loss and inconvenienced she suffered in moving 60 miles was sufficient consideration.

## Other comments on *Katz*

Before *Katz* the doctrine of promissory estoppel had been recognized in family and charitable subscription situations.

# Current US Law

Restatement (Second) of Contracts §90  
(1981), Promise Reasonably Inducing  
Action or Forbearance

## Restatement §90(1)

- (1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

## Restatement §90(2)

- (2) A charitable subscription or a marriage settlement is binding under Subsection (1) without proof that the promise induced action or forbearance

# Limits of Promissory Estoppel

While promissory originally started with donative promises, no longer limited to that situation.

- Many cases in which promissory estoppel in commercial context.
- More difficult to establish in commercial context but reasonable reliance harder to establish.

Still cases in which promise seriously made in commercial context but no recovery

- *Hayes v. Plantation Steel Co.* (Rhode Island 1982)

# International and European Contract Law

No mention of promissory estoppel in CISG,  
UNIDROIT Principles, or European Principles.

- Reliance mentioned on a couple of occasions

No need for doctrine of promissory estoppel when  
no consideration doctrine.

Does not mean that promise will be enforced.

European Principles, Art. 2:107, Promises Binding  
Without Acceptance

- A promise which is intended to be legally binding  
without acceptance is binding.

# IV. Restitution

# Leading case

*Webb v. McGowin* (Alabama 1936)

# Facts

Plaintiff was employed by a company.

Was clearing upper floors of a mill.

In doing so he started to drop a large block.

Court says that this was the usual and ordinary way of clearing this floor.

As he started to drop the block, he noticed McGowin below.

# Facts

Had he let loose of block, it would have hit McGowin causing either death or serious bodily harm.

Plaintiff could have remained safely on upper floor.

Only way to avoid hitting McGowin was for plaintiff to hold block and divert from hitting him.

Plaintiff was badly crippled for life and unable to do any work.

# Facts

A short time later, McGowin promised to pay plaintiff \$15 per week for the rest of his life.

McGowin honored agreement for 9 years until he died.

His personal representatives continued the payments for a few months, but then stopped, and Webb sued.

# Decision

The court held that McGowin's promise was legally enforceable.

The court said that there was a moral obligation to honor a promise based on a material benefit received in the past and that this was sufficient to make the promise legally enforceable.

## Comments on *Webb*

No basis for either contractual or promissory estoppel

Like promissory estoppel, restitution in this type of situation is a 20<sup>th</sup> century development

- *Mills v. Wyman* (Massachusetts 1825)

## *Mills v. Wyman* (Mass. 1825)

Wyman's son, who was 25 and living on his own, was suddenly taken ill while traveling.

Mills provided lodging and nursing to son.

After Mills incurred these expenses, Wyman wrote to Mills promising to pay him.

For reasons not given in opinion, Wyman changed his mind and refused to pay.

## *Mills v. Wyman* decision

The court held that defendant's promise was not enforceable because not supported by consideration.

The court said that Wyman had a moral obligation to pay, but that moral obligation was a matter of conscience not legal enforceability.

# Current US Law

Restatement (Second) of Contracts §86  
(1981), Promise for Benefit Received

# Restatement (Second) of Contracts §86(1)

- (1) A promise made in recognition of a benefit previously received by the promisor from the promisee is binding to the extent necessary to prevent injustice.

# Restatement (Second) of Contracts §86(2)

- (2) A promise is not binding under Subsection (1)
- (a) if the promisee conferred the benefit as a gift or for other reasons the promisor has not been unjustly enriched; or
  - (b) to the extent that its value is disproportionate to the benefit.

# Other forms of restitution in contractual context

US law provides for restitution when contract unenforceable for variety of reasons, such as fraud, mistake, failure to comply with statute of limitations.

These cases situations are similar to the situation in *Mills* in one respect

- Both involve express promises

# Restitution in absence of promise

US law also provides for restitution in some cases even when no promise made

- Emergency services
- Unjust enrichment in family context
- Unjust enrichment of third party, e.g. construction cases

# International and European Law

CISG, Arts. 81(2), 82, 84 provide for restitution in situations where contract avoided

Art. 81(2):

(2) A party who has performed the contract either wholly or in part may claim restitution from the other party of whatever the first party has supplied or paid under the contract. If both parties are bound to make restitution, they must do so concurrently.

# International and European Law

## UNIDROIT Principles

- Art. 3.17 (avoidance)
- 7.3.6 (termination of contract)
- 10.11 (when limitation period expired)

# UNIDROIT Principles Art. 7.3.6

(1)

(1) On termination of the contract either party may claim restitution of whatever it has supplied, provided that such party concurrently makes restitution of whatever it has received. If restitution in kind is not possible or appropriate allowance should be made in money whenever reasonable.

# UNIDROIT Principles Art. 7.3.6

(2)

(2) However, if performance of the contract has extended over a period of time and the contract is divisible, such restitution can only be claimed for the period after termination has taken effect.

# International and European Law

## European Principles

- 2:302 (breach of confidentiality during negotiations)
- 4:115 (effect of avoidance)
- 15:104 (contract ineffective because violation of fundamental laws of EU or violation of mandatory rules)

# European Principles Art. 2:302

## Breach of Confidentiality

If confidential information is given by one party in the course of negotiations, the other party is under a duty not to disclose that information or use it for its own purposes whether or not a contract is subsequently concluded. The remedy for breach of this duty may include compensation for loss suffered and restitution of the benefit received by the other party.

# European Principles Art. 15:104 (1)

(1) When a contract is rendered ineffective under Articles 15:101 or 15:102, either party may claim restitution of whatever that party has supplied under the contract, provided that, where appropriate, concurrent restitution is made of whatever has been received.

# European Principles Art. 15:104

(3)

(3) An award of restitution may be refused to a party who knew or ought to have known of the reason for the ineffectiveness.

# Reflections on US and International Law on Restitution

US law follows two-pronged approach with regard to restitution

- General principles of restitution, e.g. Restatement of Restitution
- Integration of specific restitution concepts into contract.

European approach seems more toward first. Integration into contract less systematic and developed.

# Incorporating Principles into a contract

“Parties wishing to provide that their agreement be governed by the Principles might use the following words, adding any desired exceptions or modifications:

- This contract shall be governed by the UNIDROIT Principles (2004) [except as to Articles ...]”.

# Incorporating Principles into a contract

“Parties wishing to provide in addition for the application of the law of a particular jurisdiction might use the following words:

- This contract shall be governed by the UNIDROIT Principles (2004) [except as to Articles...], supplemented when necessary by the law of [jurisdiction X].

# Process of Agreement

- I. Bilateral Contracts
- II. Unilateral Contracts
- III. Firm Offers

# I. Bilateral Contracts

# Leading Case

*Normile v. Miller* (North Carolina 1985)

# Facts (1)

Case involved purchase and sale of home in North Carolina.

On August 4, Plaintiff Normille signed Gallery of Holmes contract to purchase real estate owned by defendant.

Contract provided that offer had to be accepted by 5:00 p.m. August 5.

## Facts (2)

Defendant Miller received contract from broker, made several changes (increase in earnest money, increase in down payment, and reduction of term of mortgage), signed with changes and gave to broker.

Broker presented to plaintiff, who did nothing to accept changes.

## Facts (3)

Next day, the broker obtained a signed contract from another person—Segal.

The terms of this contract were the same as the terms of the contract that Miller had signed the previous day.

The broker gave the Segal contract to Miller and Miller signed it at 2:00 P.M.

## Facts (4)

The broker then informed Normille that the Miller had revoked his offer.

"You snooze, you lose."

Prior to 5:00, Normille signed Miller's counteroffer and returned it with an earnest money check.

# Analysis of *Normille* (1)

Miller faced claims from both Segal and Normille, both having signed contracts.

- Which one prevails?

Document of August 4 signed by Normille constitutes an “offer.”

Under US law: “An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it.” Restatement (Second) of Contracts §24.

## Analysis of *Normille* (2)

Miller received contract signed by Normille,  
made changes, signed and sent back.

Miller's actions constitute a counteroffer.

# Counteroffers under US Law

## Restatement (2d) Contracts §39

- (1) A counter-offer is an offer made by an offeree to his offeror relating to the same matter as the original offer and proposing a substituted bargain differing from that proposed by the original offer.
- (2) An offeree's power of acceptance is terminated by his making of a counter-offer, unless the offeror has manifested a contrary intention or unless the counter-offer manifests a contrary intention of the offeree.

## Analysis of *Normille* (3)

When Normille received counteroffer from Miller, he had a power of acceptance.

An offeree's power of acceptance can be terminated in various ways:

# Termination of power of acceptance under US Law

Restatement (2d) Contracts §36:

- (1) An offeree's power of acceptance may be terminated by
  - (a) rejection or counter-offer by the offeree, or
  - (b) lapse of time, or
  - (c) revocation by the offeror, or
  - (d) death or incapacity of the offeror or offeree.
- (2) In addition, an offeree's power of acceptance is terminated by the non- occurrence of any condition of acceptance under the terms of the offer.

## Analysis of *Normille* (4)

The next day Segal made an offer to Miller, which Miller accepted by signing at 2:00 P.M.

Miller did not change Segal's offer in any way, so his action was an acceptance.

Restatement (2d) §50(1): “Acceptance of an offer is a manifestation of assent to the terms thereof made by the offeree in a manner invited or required by the offer.”

We will discuss “battle of the forms” issues on Tuesday.

## Analysis of *Normille* (5)

When Miller accepted Segal's offer, Normille still had a power of acceptance.

The broker then told Normille that Miller had entered into a contract with Segal.

The receipt of this information by Normille amounted to a revocation of Miller's offer of the previous day.

# Revocation of Offer under US Law

Restatement (2d) of Contracts §43, Indirect Communication of Revocation:

“An offeree's power of acceptance is terminated when the offeror takes definite action inconsistent with an intention to enter into the proposed contract and the offeree acquires reliable information to that effect.”

## Further analysis of *Normille* (6)

If Normille had not been told of the contract with Segal and had sent his acceptance by 5:00, he probably would have had a contract with Miller.

- The effect of two contracts?

Normille argued that Miller could not revoke his offer prior to 5:00, P.M, but the court rejected this argument because Normille had not given any consideration to hold the offer open until 5:00.

# International and European Contract Law

CISG does not apply because *Normille* deals with real estate not sale of goods.

- CISG is limited to sale of goods.
- In US Uniform Commercial Code (UCC) governs offer and acceptance for sale of goods
- CISG is international equivalent of UCC.
- Will discuss CISG provisions on offer and acceptance shortly.

# UNIDROIT Principles

Document of August 4 signed by Normille  
constitutes an “offer.”

Article 2.1.2: “A proposal for concluding a  
contract constitutes an offer if it is  
sufficiently definite and indicates the  
intention of the offeror to be bound in case  
of acceptance.”

# UNIDROIT Principles (2)

Miller received offer signed by Normille,  
made changes, signed and sent back.

Miller's actions constitute a counteroffer.

Art. 2.1.11: “(1) A reply to an offer which  
purports to be an acceptance but contains  
additions, limitations or other  
modifications is a rejection of the offer  
and constitutes a counter-offer.”

# UNIDROIT Principles (3)

When Miller signed Segal's offer at 2:00 P.M., the next day, a contract was formed between Miller and Segal.

Could Miller revoke his counteroffer to Normille under the UNIDROIT Principles?

# UNIDROIT Principles (4)

## Article 2.1.4 Revocation of Offer

- (1) Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before it has dispatched an acceptance.
- (2) However, an offer cannot be revoked
  - (a) if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or
  - (b) if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.

# European Principles

Similar to UNIDROIT

Art. 2:201 definition of offer

Art. 2:208 modified acceptance as  
counteroffer

Art. 2:202 revocation of offer not permitted if  
offer states fixed time for acceptance

## II. Unilateral Contracts

# Leading Case

*Petterson v. Pattburg* (New York 1928)

# Facts

Defendant Pattberg held the mortgage on plaintiff Petterson's land.

On April 4, 1924, defendant wrote plaintiff stating that he would give plaintiff a \$780 discount if plaintiff paid the mortgage in cash by May 31, 1924.

## Facts (2)

Toward the end of May, plaintiff appeared at defendant's door.

Defendant asked who it was.

Plaintiff identified himself and said he was there to pay off the mortgage.

Defendant stated that he had sold the mortgage and refused to accept payment.

Plaintiff sued for \$780.

# Decision

Plaintiff won at the trial court but the New York Court of Appeals, the highest court, ruled for the defendant.

The court held that defendant made an offer for a unilateral contract.

A unilateral contract requires performance rather than a promise by the offeree.

To accept an offer for a unilateral contract, the offeree must complete performance required by the offer.

## Decision (2)

Defendant's offer required the act of payment by the plaintiff.

Defendant revoked his offer before plaintiff completed the act of payment.

# Dissent

A dissenting Justice argued that the court's analysis made defendant's offer a "delusion."

The dissent said that good faith required the defendant not to refuse to accept the offer of payment.

# Restatement (2d) Contracts §45 (1)

## Option Contract Created By Part Performance Or Tender

(1) Where an offer invites an offeree to accept by rendering a performance and does not invite a promissory acceptance, an option contract is created when the offeree tenders or begins the invited performance or tenders a beginning of it.

# Restatement (2d) Contracts §45 (2)

(2) The offeror's duty of performance under any option contract so created is conditional on completion or tender of the invited performance in accordance with the terms of the offer.

# International and European Contract Law

UNIDROIT Principles Art. 2.1.6

Mode of Acceptance:

(1) A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence or inactivity does not in itself amount to acceptance.

(2) An acceptance of an offer becomes effective when the indication of assent reaches the offeror.

# UNIDROIT Principles Art. 2.1.6

(3)

(3) However, if, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act without notice to the offeror, the acceptance is effective when the act is performed.

# Conclusion under UNIDROIT Principles

Contract formed on facts of *Petterson* because  
he indicated assent.

# European Principles Art. 2:204

## (1), Acceptance

(1) Any form of statement or conduct by the offeree is an acceptance if it indicates assent to the offer.

(2) Silence or inactivity does not in itself amount to acceptance.

# Comments on US and International Law

International law has eliminated traditional distinction between bilateral and unilateral contracts.

Result under US law probably same as under international law, but vestiges of unilateral/bilateral distinction remain.

# III. Firm Offers

# Leading Case

*Berryman v. Kmock* (Kansas 1977)

# Facts

Case involved a real estate transaction.

Kmoch was interested in buying a piece of property owned by Berryman.

On June 19, 1973, Berryman signed a document giving Kmoch an option to purchase certain property that he owned in Kansas for a specified price.

## Facts (2)

The option recited a consideration of \$10 and other valuable consideration.

But the \$10 was not paid.

Before Kmock exercised the option, Berryman agreed to sell the land to another person.

Kmock learned of the sale, recorded the option in the real estate records, and then told Berryman he was exercising the option.

Berryman sued Kmock to clear his title.

# Decision and Analysis

The option was not legally enforceable under either a theory of breach of contract or promissory estoppel.

# Decision and Analysis (2)

## Breach of contract

Kmock did not give any consideration.

- \$10 was not paid.
- Time and money spent trying to sell property on which he held an option were not consideration.

Not bargained for

No special benefit

# Decision and Analysis (3)

## Promissory Estoppel

Kmock did not reasonably rely on option

- He was an experienced real estate person
- Knew that no consideration given

# Current US Law

Remains the same except for contracts involving sale of goods. See below.

The Restatement of Contracts has a section, section 87, which purports to make a document that recites a consideration enforceable, but it is almost never cited by courts.

# UCC §2-205 Firm Offer

If the contract involves the sale of goods, rather than real estate as in *Berryman*, the UCC has firm offer section.

“An offer by a merchant to buy or sell goods in a signed record that by its terms gives assurance that it will be held open is not revocable, for lack of consideration, during the time stated or if no time is stated for a reasonable time, but in no event may the period of irrevocability exceed three months. Any such term of assurance in a form supplied by the offeree must be separately signed by the offeror.”

# International and European Principles

## CISG

- Like the UCC, deals with the sale of goods
- If transaction involved sale of goods >>>>

# CISG Art. 16

- (1) Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance.
- (2) However, an offer cannot be revoked:
  - (a) if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable;  
or
  - (b) if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer

# UNIDROIT and European Principles

We already discussed sections limiting power of offer to revoke if offer says it is irrevocable:

- UNIDROIT Art. 2.1.4
- European Principles, Art. 2:202

# Comparison of US and International Approaches on Firm Offers

International approach clearly superior.

Almost amounts to fraud to state, in writing,  
that an offer will be held open and then  
renege on offer.

US law inconsistent within itself and trap for  
unwary.

# Last Lecture

## Process of Agreement

- Bilateral contracts
- Unilateral contracts
- Firm offers

# Process of Agreement

IV. Incomplete Bargains

V. Pre-acceptance reliance

VI. Battle of the Forms

# IV. Incomplete Bargains

# Leading case

*Walker v. Keith* (Kentucky 1964)

# Facts

Walker leased a piece of real estate from Keith for a period of 10 years for a rent of \$100 per month.

The lease gave Walker the right to renew for another 10 years on the same terms as the original lease except for the price.

## Facts (2)

With regard to the renewal rent, the lease said that the rent “shall be agreed upon” by the parties based on a comparison of rental values and business conditions between the date of the original lease and the renewal date.

Walker gave notice of renewal, but the parties were unable to agree on the renewal rent.

# Decision

Walker sued to enforce the renewal provision.

The trial court set a rent of \$125 per month.

The Kentucky Court of Appeals held that the renewal clause was indefinite and unenforceable.

# Reasoning

The Court recognized that some courts had enforced an “agreement to agree” on rent by setting a reasonable rental.

This court disagreed and gave two reasons.

## Reasoning (2)

- (1) *Paternalism*. The court would be making an agreement for parties that they were capable of making on their own.
- (2) *Efficiency*. Enforcement of an agreement to agree is inefficient because it requires extensive judicial time to set the rent. Parties should be given an incentive to set their own rent and avoid this expense.

# Argument for enforcement

Courts that have enforced agreements to agree have generally focused on the *intention of the parties*.

- By including the clause, the parties show an intention for the clause to have legal effect.
- Refusal to enforce the clause violates their intention.

# Current US Law--General

## Restatement (2d) Contracts §33, Certainty

(2) The terms of a contract are reasonably certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy.

(3) The fact that one or more terms of a proposed bargain are left open or uncertain may show that a manifestation of intention is not intended to be understood as an offer or as an acceptance.

# Current US Law-UCC

## UCC 2-204(3), Formation in General

Even if one or more terms are left open, a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.

# UCC—open price term

## UCC §2-305(1), Open Price Term

The parties if they so intend may conclude a contract for sale even if the price is not settled. In such a case the price is a reasonable price at the time for delivery if:

- (a) nothing is said as to price;
- (b) the price is left to be agreed by the parties and they fail to agree; or
- (c) the price is to be fixed in terms of some agreed market or other standard . . .

## *Pennzoil v. Texaco*

On January 3, 1984, Pennzoil and Getty Oil entered into an agreement in principle under which Pennzoil agreed to acquire all of the shares in Getty Oil at a price of \$110 per share plus a possible \$5 per share additional payment.

The agreement in principle was subject to execution of formal merger agreement.

## *Pennzoil v. Texaco (2)*

On January 6, 1984, Getty agreed to sell its shares to Texaco at \$125 per share.

Pennzoil sued Texaco for tortious interference with its contract with Getty.

Pennzoil recovered \$7.53 billion in actual damages plus \$3 billion in punitive damages.

Texaco lost appeals in state and federal courts.

It then filed for bankruptcy protection and eventually settled the case by paying Pennzoil \$3 billion.

# Analysis of *Pennzoil v. Texaco*

Texaco contended that there was no contract between Getty and Pennzoil because the parties had not yet executed a formal merger agreement.

The Texas court instructed the jury that whether a contract existed was a question of fact to be determined by the jury.

Case is a dramatic example of modern approach to “agreements to agree”.

# International and European Law

CISG Arts. 14(1) and 55

UNIDROIT Principles Arts. 2.1.14, 2.1.13,  
5.1.7

European Principles Arts. 2:103, 6:104

# CISG Art. 14(1)

A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance.

A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price.

# CISG Art. 55

Where a contract has been validly concluded but does not expressly or implicitly fix or make provision for determining the price, the parties are considered, in the absence of any indication to the contrary, to have impliedly made reference to the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned.

UNIDROIT Principles, Art.  
2.1.14(1)

Contract with Terms Deliberately Left Open:

(1) If the parties intend to conclude a contract, the fact that they intentionally leave a term to be agreed upon in further negotiations or to be determined by a third person does not prevent a contract from coming into existence.

# UNIDROIT Principles 2.1.14(2)

(2) The existence of the contract is not affected by the fact that subsequently

(a) the parties reach no agreement on the term;  
or (b) the third person does not determine the term,

provided that there is an alternative means of rendering the term definite that is reasonable in the circumstances, having regard to the intention of the parties.

# UNIDROIT Principles 2.1.13

Conclusion of contract dependent on agreement on specific matters or in a particular form

Where in the course of negotiations one of the parties insists that the contract is not concluded until there is agreement on specific matters or in a particular form, no contract is concluded before agreement is reached on those matters or in that form.

# UNIDROIT Principles 5.1.7

## Price determination

(1) Where a contract does not fix or make provision for determining the price, the parties are considered, in the absence of any indication to the contrary, to have made reference to the price generally charged at the time of the conclusion of the contract for such performance in comparable circumstances in the trade concerned or, if no such price is available, to a reasonable price.

...

# European Principles Art. 2:103

## Sufficient Agreement

- (1) There is sufficient agreement if the terms:
  - (a) have been sufficiently defined by the parties so that the contract can be enforced, or
  - (b) can be determined under these Principles.
- (2) However, if one of the parties refuses to conclude a contract unless the parties have agreed on some specific matter, there is no contract unless agreement on that matter has been reached.

# European Principles Art. 6:104

## Determination of Price

Where the contract does not fix the price or the method of determining it, the parties are to be treated as having agreed on a reasonable price.

See also Arts. 6:105 (unilateral determination by a party) and 6:106 (determination by a third person)

# V. Pre-acceptance Reliance

# Leading Case

*James Baird Co. v. Gimbel Brothers, Inc.*  
(Second Circuit Court of Appeals 1933)

# Facts

Pennsylvania Department of Highways was taking bids for the construction of a public building.

Gimbel Bros., a linoleum supplier, sent an employee to the office of one of the contractors who had the specifications for the project.

## Facts (2)

The employee underestimated the amount of linoleum by  $\frac{1}{3}$ .

On December 24 Gimbel Bros. sent offers to 20-30 potential contractors for the project, offering to supply the linoleum for the project at two prices, depending on quality.

## Facts (3)

The offer stated that “if successful in being awarded this contract,” prices were guaranteed and that the offer was being made for “prompt acceptance after the general contract has been awarded.”

On December 28 James Baird received the offer.

## Facts (4)

Later that day Gimbel Bros. discovered its mistake and telegraphed all contractors that it was withdrawing its offer and would be substituting a new offer at approximately twice the price.

This withdrawal reached James Baird on the afternoon of the 28<sup>th</sup>, but after James Baird had submitted its bid to PDH.

## Facts (5)

On December 30 James Baird was awarded the contract and insisted that Gimbel Bros. honor its original bid.

On January 2 James Baird formally accepted Gimbel Bros. original offer.

When Gimbel Bros. refused to honor the offer James Baird brought suit.

# Decision

The Court of Appeals found for the defendant Gimbel Bros.

## No breach of contract

No contract was formed because Gimbel Bros. revoked its bid before James Baird accepted its bid.

Use of the bid by James Baird did not constitute acceptance because the bid referred to acceptance after the award of the general contract.

# Decision (2)

## Option Contract

No option contract because James Baird did not give any consideration for Gimbel Bros. to make its bid irrevocable.

## Promissory Estoppel

Court indicates that promissory estoppel applies when a promise that does not seek an exchange is relied on.

Offers are not intended to become promises until consideration received.

# Current US Law

US law now rejects decision in James Baird.

California Supreme Court adopted contrary view in *Drennan v. Star Paving Co.*

This view has been incorporated into Restatement (2d) of Contracts §87(2).

# Restatement (2d) of Contracts

## §87(2)

An offer which the offeror should reasonably expect to induce action or forbearance of a substantial character on the part of the offeree before acceptance and which does induce such action of forbearance is binding as an option contract to the extent necessary to avoid injustice.

Note that section is similar to Restatement 90.

# International and European Law

CISG Art. 16(2)

UNIDROIT Principles Art. 2.1.4(2)

European Principles Art. 2:202(3)

## CISG Art. 16(2)

(2) However, an offer cannot be revoked:

(a) if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or

(b) if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer

# UNIDROIT Principles Art. 2.1.4

(2)

## Revocation of Offer

...

- (2) However, an offer cannot be revoked
- (a) if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or
  - (b) if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.

# European Principles Art.2:202(3)

## Revocation of an Offer

(3) However, a revocation of an offer is ineffective if:

- (a) the offer indicates that it is irrevocable; or
- (b) it states a fixed time for its acceptance; or
- (c) it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.

# VI. The Battle of the Forms

# Background—Assumptions of Traditional Contract Law

The parties enter into preliminary negotiations seeking a contract.

At some point, one party makes an offer.

The other party reviews the offer and decides whether to accept.

The other party can accept, reject, or make counter-offer.

The process continues until a contract is formed or the parties break off negotiations.

## Background (2)

Modern contract making often does not proceed in this way.

In commercial transactions, one party will often submit an order using its standard form document.

The other party will respond using its standard form document.

## Background (3)

Sometimes there may be negotiations over basic terms such as price and delivery date.

Standard terms are rarely discussed.

Parties often behave as if a contract exists, even though standard terms do not agree or are in conflict.

This situation is commonly referred to as the “battle of the forms”.

# Leading case

*Roto-Lith, Ltd. v. F.P. Bartlett & Co.*  
(First Circuit Court of Appeals 1962)

# Facts

Plaintiff manufactured cellophane bags used for wrapping vegetables.

Defendant supplied a chemical used to seal the bags.

Plaintiff placed an order for the chemical using its standard order form.

Defendant accepted using a form that disclaimed all warranties.

## Facts (2)

Defendant's acceptance stated that plaintiff must notify defendant immediately if its terms were not acceptable.

Plaintiff did not object and accepted delivery of the shipment of chemicals.

The chemical was defective and the plaintiff brought suit for breach of warranty.

# Decision

The court held that the defendant seller's form constituted a counteroffer rather than an acceptance.

The buyer accepted the counteroffer by receiving the chemical without objection.

Therefore, the defendant's disclaimer of warranties was part of the contract.

# Current US law

*Roto-Lith* is now governed by UCC §2-207,  
which was revised just last year.

## UCC §2-207 (2004 rev.)

### Terms of Contract; Effect of Confirmation

- (1) Subject to Section 2-202, if (i) conduct by both parties recognizes the existence of a contract although their records do not otherwise establish a contract, (ii) a contract is formed by an offer and acceptance, or (iii) a contract formed in any manner is confirmed by a record that contains terms additional to or different from those in the contract being confirmed, the terms of the contract are:

# UCC §2-207

(a) terms that appear in the records of both parties;

(b) terms, whether in a record or not, to which both parties agree; and

(c) terms supplied or incorporated under any provision of this Act.

## *Roto-Lith* under revised 2-207

A contract exists by virtue of the conduct of the parties.

The parties did not agree on a disclaimer of warranties, nor does that term appear in both forms.

## *Roto-Lith* under revised 2-207

Therefore the contract includes terms supplied by the Code

- Disclaimers are not implied terms
- Warranty of merchantability is an implied term, UCC §2-314.

If the chemical was defective, the plaintiff could recover for breach of this warranty and the disclaimer would not apply.

# Battle of the Forms under International and European Law

CISG, Art. 19

UNIDROIT Principles Arts. 2.1.11, 2.1.22

European Principles Arts. 2:208, 2:209

## CISG Art. 19(1)

(1) A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counteroffer.

## CISG Art.19(2)

(2) However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.

## CISG Art. 19(3)

(3) Additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially.

# Analysis of CISG on battle of the forms

Result unclear but appears to adopt traditional view of *Roto-Lith* decision.

However, sufficiently unclear that courts could reach results similar to current UCC 2-207.

# UNIDROIT Principles Art. 2.1.11(1)

## Modified Acceptance

- (1) A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.

# UNIDROIT Principles Art. 2.1.11(2)

(2) However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects to the discrepancy. If the offeror does not object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.

# UNIDROIT Principles Art.

## 2.1.22

### Battle of Forms

Where both parties use standard terms and reach agreement except on those terms, a contract is concluded on the basis of the agreed terms and of any standard terms which are common in substance unless one party clearly indicates in advance, or later and without undue delay informs the other party, that it does not intend to be bound by such a contract.

# Analysis of battle of the forms under UNIDROIT Principles

Under 2.1.22 parties reached agreement  
except on standard terms.

Disclaimer not found in both forms.

Therefore, disclaimer not part of contract.

Buyer could recover if chemical defective.

# European Principles Art. 2:208

(1)

## Modified Acceptance

(1) A reply by the offeree which states or implies additional or different terms which would materially alter the terms of the offer is a rejection and a new offer.

# European Principles Art. 2:208

(2)

(2) A reply which gives a definite assent to an offer operates as an acceptance even if it states or implies additional or different terms, provided these do not materially alter the terms of the offer. The additional or different terms then become part of the contract.

# European Principles Art. 2:208

## (3)

(3) However, such a reply will be treated as a rejection of the offer if:

(a) the offer expressly limits acceptance to the terms of the offer; or

(b) the offeror objects to the additional or different terms without delay; or

(c) the offeree makes its acceptance conditional upon the offeror's assent to the additional or different terms, and the assent does not reach the offeree within a reasonable time.

# European Principles Art. 2:209

(1)

## Conflicting General Conditions

(1) If the parties have reached agreement except that the offer and acceptance refer to conflicting general conditions of contract, a contract is nonetheless formed. The general conditions form part of the contract to the extent that they are common in substance.

# European Principles Art. 2:209

## (2)

(2) However, no contract is formed if one party:

(a) has indicated in advance, explicitly, and not by way of general conditions, that it does not intend to be bound by a contract on the basis of paragraph (1); or

(b) without delay, informs the other party that it does not intend to be bound by such contract.

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# European Principles Art. 2:209

## (3)

(3) General conditions of contract are terms which have been formulated in advance for an indefinite number of contracts of a certain nature, and which have not been individually negotiated between the parties.

# Analysis under European Principles

Disclaimer was part of general conditions.

Under 2:209(1) contract formed. 2-209(2) does not apply.

Disclaimer not found in both forms.

Therefore would not be part of contract.

# Comparison of US and International Law

Largely in agreement, except perhaps for CISG.

When standard forms used, terms in standard forms  
only become part of contract when forms agree  
or when parties actually agree.

If no agreement, principles supplied by law govern.

Seems to be correct result as matter of policy.

When standard forms used, no basis for giving  
preference to either party's form.