Comparative Contract law

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Housekeeping stuff

- Special thanks to:
  - my wife Avv. Francesca Giannoni-Crystal, Esq. for the kind cooperation in preparing these slides.

Housekeeping stuff

- Many slides. Why?
  - Because this course has very limited reading material.
  - Slides can be reading material and study help for the exam.
  - This course touches interesting issues but it would take much more than four days to even scratch the surface. Slides can be the starting point for you to expand on issues autonomously if you are interested.

Housekeeping stuff

- Many slides (especially the ones in small prints) are for reference only. Do not worry about!
- This course does not aim at completeness. It aims at showing that American Common law is only one of the possible legal systems.
  - *Ubi societas, ibi ius*.
- This course offers more questions than answers. I hope to stimulate curiosity.

Housekeeping stuff

- Questions / doubts:
  - you can ask me in class (better at the end of the class day because the material is a lot and the time is scarce …) or
  - write to me: info@nathancrystal.com.

Day 1

Monday July 18, 2011

I.

Introduction to legal comparison and to Civil Law systems

LEGAL COMPARISON

- What is legal comparison

  From Black's Law Dictionary, 9th Ed. 2009:

  The scholarly study of the similarities and differences between the legal systems of different jurisdictions, such as between civil-law and common-law countries. — Also termed comparative jurisprudence

LEGAL COMPARISON

- Why is it important?
  - It teaches different approaches to legal thinking

➢ Why should I care?

➢ See: Global lawyer

LAWYER IN THE GLOBAL MARKET 1/4

- **The role of the lawyer in the global market**

  More and more globalization exerts pressure towards convergence of the legal systems … but less than in other sectors (like for example accounting, banking, economics, insurance, etc.).

  Why less? The reasons are many. Probably law, more than other sectors, reflects, on one side, the core of the values of a society, on the other side, the countries' attention of their sovereignty. In complex, law is pretty local.

LAWYER IN THE GLOBAL MARKET 2/4

What it takes (at least) for a lawyer to take part to international transactions:

- Be able to understand that there might be a problem because of the law of another country, i.e. spot issues ability also in relation to other systems
- Understand the timing of operations abroad
- Understand the law making system of other countries (for example: case law or code centered?)

LAWYER IN THE GLOBAL MARKET 3/4

- Be able to work in team with foreign lawyers and understand their way of reasoning
- Understand the profession of his counterparty from its home country context (example in US lawyers are central figures of the system and are entrusted big responsibilities, not so in other countries, where maybe notaries have the role of US's lawyers)

LAWYER IN THE GLOBAL MARKET 4/4

- Be able to interact with a foreign client by understanding the way in which the client is accustomed to obtain legal answers from the local lawyers or be able to explain to his home country client why he should retain/associate a foreign lawyer for the operation
- Be flexible and receptive to new schemes
- And others, e.g. familiarity with cultural and language differences

Main differences between the Civil Law and the Common Law

- Civil Law countries have a code (actually many, for several fields) while Common law countries have … indeed a common law formed by the case law. Yes, but …

Main differences between the Civil Law and the Common Law

1. Civil law countries used to have a "common law", called "*ius commune*" in the Middle Ages and after. Then there was a fracture: the enactment of the code. The English common law did not know such a fracture. It is a continuum from the past.

2. Common law countries have statutes. When statutes are enacted, they either supplement or replace the common.

Main differences between the Civil Law and the Common Law

- Civil law judges do not create law, they apply rules while Common law judges create laws (case law). Yes, but …

Main differences between the Civil Law and the Common Law

- 1. Interpretation is creation. As every Civil lawyer knows, decisions of judges "substantially" create the applicable law. See later the example of Section 242 BGB (be patient, it will be in day 3)
- 2. Common Law is a mature system and judges are conservative people. They always link their decisions to the existing law.

Main differences between the Civil Law and the Common Law

- Common Law countries have a system of binding precedent while civil law countries do not have it. Yes, but …

Main differences between the Civil Law and the Common Law

1. A Common law judge can distinguish a precedent based on relevant facts
2. A Civil law judge generally follows the interpretation given by his supreme court. Why? Because no judge likes to be overruled.

Main differences between the Civil Law and the Common Law

- What is the point that I want to make?
- The systems are not so far apart as they used to be.
- Many solutions are similar. We will see many.
- Still, there are differences. This course aims at showing you some.

Civil Code

- What is a civil code?

  A document in civil law jurisdictions that aims at being a compendium of the applicable law in the civil law field.

Civil Code

- **Where the word "code" comes from:**
  - **Codex**

    "Literally, a volume or roll. It is particularly applied to the volume of the civil law, collected by the emperor Justinian, from all pleas and answers of the ancient lawyers, which were in loose scrolls or sheets of parchment. These he compiled into a book which goes by the name of Codex."

    (see http://www.juridicaldictionary.com)

Civil Code

- **Justinian Code**

  "A collection of the constitutions [We would call them statutes.] of the emperors, from Adrian to Justinian."

  (see http://www.juridicaldictionary.com)

- Is that like the modern civil codes? No it is more similar to the US code. It's a collection of statutes.

Civil Code

- Is a civil code the same as the US code?

  No, why? Because at Civil law a code aims at being complete on that subject matter. No common law to fill in the gaps left by the statutes.
- If there is no direct rule on a point, the judge is called: (i) to apply a structural approach (each rule must be read in the light of the others) (ii) to use analogy "legis" and "iuris", i.e. to apply the rule provided for a similar situation or to apply a general principle.

Civil Code

- Is the civil code really complete?
  - Obviously not! It could not be in the modern complex reality. In every civil law country, there are many civil statutes besides the civil code. Principle that applies is:
  - Lex specialis derogat legi generali

Examples of Civil Codes

Main European codes

- **French Civil Code ("Code Civil" or "Code Napoleon"). 1804.**

  Adopted also in countries occupied by the French during the Napoleonic empire and thus formed the basis of the private law systems also of Italy, Netherlands, Belgium, Spain, Portugal (and their colonies). Adopted also with changes in Romania and Poland and Egypt. Influenced 1865 Italian Civil Code, Quebec Code and the majority of the South American codes (for example Chile, Bolivia and Puerto Rico).

  (France also has a **Code de commerce** of 1807, last modified 2011)

Examples of Civil Codes

- **Austrian Civil Code (Allgemeines Bürgerliches Gesetzbuch – ABGB). 1811** [we will not deal with it]

- **Codigo Civil (Spain)** – originally approved with R.D. July 24 1889, last modified 2005.

- **German Civil Code (Bürgerlichen Gesetzbuches - BGB). 1900**

  Introduced also in China, still remains in force in Taiwan. Serves as a model for Portugal, Japan, Thailand, South Korea, People's Republic of China, Greece, Ukraine.

Examples of Civil Codes

- **Italian Civil Code (Codice Civile). 1942**. It incorporated also the commercial code of 1865). Partly influenced other codes, for example the code of Peru.

- **Swiss Civil Code (*Zivilgesetzbuch – ZGB)*. 1907/1912**

  Largely influenced by the BGB, and partly influenced by the Code Civil, but probably to be considered a new model of code. Adopted in Brazil and Turkey. Influenced the code of Peru.

- **Chinese Code** and **1999 Chinese Contract Law**

Contract Law in China

History

- It is arguable that there was a contract law (or even a civil law as opposed to criminal law) in imperial China.
- Draft of a civil code only in 1911, never promulgated because of the fall of the imperial dynasty.
- First civil code enacted 1930.
- A draft for a new civil code was prepared in 1949 but not enacted.

Contract Law in China

Contract Laws of the Eighties

- In the 80ies instead of modifying the old code, three pieces of legislation on contracts enacted. Not organic & enacted only to solve immediate problems from economic development:
  - Economic Contract Law of the People's Republic of China (1982);
  - Foreign-related Economic Contract Law of the People's Republic of China (1985);
  - Technology Contract Law of the People's Republic of China (1987).

  + General Principle of Civil Law (1986)

  Inspiring principles:

  -Planned Economy Oriented;

  -Public Interests Overemphasized;

  -Party Autonomy Restricted.

Contract Law in China

1999 Contract Law*

- New contract law entered into force October 1, 1999 supplemented by the principles of interpretation by the Supreme court of People's Republic of China.
- Inspiration sources: Unidroit, Uncitral, CISG, French and German civil code, English Common law.
- Inspiring principles:
  - Market Economy Oriented;
  - Freedom of Contract Emphasized;
  - Government Interference Restricted;
  - Contractual Rights Better Protected

- From now on, unless we will specify otherwise, when we will say "Chinese Law", the reference will be to the 1999 Contract Law

Contract Law in China

Let's reflect on Contract Law:

- Interaction between Freedom of Contract and Government interest. Examples:
- **Article 38 Contract under State Mandatory Plan**

  Where the state has, in light of its requirements, issued a mandatory plan or state purchase order, the relevant legal persons and other organizations shall enter into a contract based on the rights and obligations of the parties prescribed by the relevant laws and administrative regulations
- **Article 63 Performance at Government Mandated Price**

  Where a contract is to be implemented at a price mandated by the government or based on government issued pricing guidelines, if the government adjusts the price during the prescribed period of delivery, the contract price shall be the price at the time of delivery. Where a party delays in delivering the subject matter, the original price applies if the price has increased, and the new price applies if the price has decreased. Where a party delays in taking delivery or making payment, the new price applies if the price has increased, and the original price applies if the price has decreased.

International documents that a "global lawyer" should be aware of

- **CISG**

  UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (1980)

- Developed by UNCITRAL (United Nations Commission on international Trade Law and signed in Vienna in 1980 (and therefore referred also as the Vienna Convention). It has the force of law in those countries that have adopted it.
- For the text of the Convention and important case law on CISG, see http://www.unilex.info

International documents that a "global lawyer" should be aware of

- **CISG**

  UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (1980)

- Ratified by 76 countries among which Argentina, Australia, Austria, Belgium, Canada, China, France, Germany, Greece, Italy, Japan, Netherlands, Russian Federation, Spain, Swiss, and United States. Major absentees are Brazil, India, South Africa and the United Kingdom

  For a list of states that have ratified the CISG see http://www.cisg.law.pace.edu/cisg/countries/cntries.html

International documents that a “global lawyer” should be aware of

- **UNIDROIT PRINCIPLES**

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

  Private intergovernmental organization seated in Rome http://www.unidroit.org/dynasite.cfm?dsmid=103284.

  For the text of UNIDROIT and important case law, see http://www.unilex.info

  The Principles do not have the force of law, but as set forth in the Preamble to the Principles, they can be used in various ways.

International documents that a "global lawyer" should be aware of

- How? [See: Preamble to the Principles}
  - First, the Principles can be applied when the parties have agreed that their contract will be governed by the Principles. ("This contract shall be governed by the UNIDROIT Principles (2004) [except as to the Articles...")
  - Second, tribunals can apply the Principles when the contract states that it will be governed by general principles or the *lex mercatoria*.

International documents that a "global lawyer" should be aware of

- Third, tribunals can apply the Principles when the contract does not have a choice of law clause.
- Fourth, the Principles can supplement applicable law.
- Finally, the Principles can be used by law makers, contract drafters, and contract negotiators.

A knowledgeable global lawyer needs to be aware of the content of the Principles and how they can be used.

International documents that a "global lawyer" should be aware of

- Principles of European Contract Law (1999-2003), prepared by Commission on European Contract Law. ("European Principles").
  - They are a set of model rules drawn up by leading contract law academics in Europe. The development began in 1982 with the formation of the Commission on European Contract Law ("Lando Commission", named after its chairman Ole Lando). The Principles were published in 1995, in 1999 and in 2003.

II.

Contract Formation

What is a contract?

- What is a contract in American Common law

There is an ambiguity about the basis of contract law In America. On the one hand, the basis seems individual, founded on promise.

Restatement (Second) of Contracts

§1. CONTRACT DEFINED

A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.

What is a contract?

- But in my view contract is more properly based on agreement between two or more people.

- Restatement (Second) of Contracts §17

  Contract is a bargain whose elements are mutual assent and consideration.

Contract Formation *cont.ed*

- Contract in Civil Law defined

- **Article 1101 French Civil Code**:
  A contract is an agreement which binds one or more persons, towards another or several others, to give, to do, or not to do something.
- **Article 1321 Italian Civil Code**:
  A contract is the agreement between two or more parties to establish, regulate or extinguish between them an economic legal relationship.

-

Contract Formation *cont.ed*

- Germany
  - No general definition of contract in the BGB.
  - Why? BGB speaks of "legal transactions" that is a level above the concept of "contract" in the sense that a contract is necessarily a "legal transaction" but this concept includes more.
  - Note that the German code was drafted by professors (Pandettism) and its abstract character reflects its academic foundations.

. . .

Contract Formation *cont.ed*

. . .

Besides not being defined by BGB, the definition of contract is complicated by the principle of "abstraction".

The BGB differentiates between obligatory contracts (second book of the BGB on obligations), and contracts on the actual transfer of property (third book of the BGB on property). Therefore a contract consists of two acts, separated by the principle of abstraction: the agreement to create an obligation (Verpflichtungsgeschaft or Beschluss), and the performance (Verfugungsgeschaft), which consists of the transfer of ownership.

Contract Formation *cont.ed*

- Article 2 of 1999 Chinese Contract Law
  - "For purposes of this Law, a contract is an agreement between natural persons, legal persons or other organizations with equal standing, for the purpose of establishing, altering, or discharging a relationship of civil rights and obligations."

Contract Requirements

American Common law

- Mutual Assent
- Consideration

- See **Restatement (Second) of Contracts §17**.

  REQUIREMENT OF A BARGAIN 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

Contract Requirement *cont.ed*

Civil law requirements (general)

- Consent of the parties
- Object
- Cause

(+ formalities when required by law)

Contract Requirement *cont.ed*

- Example
- **Article 1108 French civil Code - Of Conditions essential to the Validity of Agreements.**

Four conditions are essential to the validity of an agreement:

The consent of the party who binds himself;

His capacity to contract;

A certain object forming the matter of the contract;

A lawful cause in the bond

Offer & Acceptance in the American Common Law

- *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."

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.

(we will analyze below the issue of the option contract)

International and European Principles

- 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.

Acceptance

Acceptance defined

- Acceptance is the expression of assent of the offeree when he still has a power of acceptance of the offer without any material addition and modification.
  - **Restatement (Second) of Contracts § 50 (Acceptance)**

    (1) Acceptance of an offer is a manifestation of assent to the terms thereof made by an offeree in a manner invited or required by the offer"

    (2) Acceptance by performance requires that at least part of what the offer requests be performed or tendered …

Mirror image rule

- Under the traditional “mirror image rule” of the Common Law the acceptance has to mirror exactly the offer and if it is not so, no contract is formed. An acceptance that modifies the offer, is a rejection and a counter offer.

Mirror image rule

- UCC Article 2 modifies the mirror image rule to facilitate contract formation, finding a contract where the traditional Common Law would find no contract.
  - Under UCC Adding a term or changing a term does not prevent acceptance to occur. The added terms become part of the contract if (i) both parties are merchants, (ii) the term does not materially alter the contract; and (iii) the offeror does not object within a reasonable time. (2-207. Additional Terms in Acceptance or Confirmation)

Mirror image rule abroad?

- Germany
  - **Section 150,2 BGB**:

    An acceptance with expansions, restrictions or other alterations is deemed to be a rejection combined with a new offer.
  - (plus, according the BGB also "The late acceptance of an offer is considered to be a new offer." Section 150,1)

Acceptance– when effective?

- At Common law, acceptance if effective when it is sent (mailbox rule). Policy: protecting the offeree against revocation once he has mailed an acceptance.
- This is not an universal rule! In fact:
- Some Civil law countries (such as France, Spain, Brazil and Argentina) also follow mailbox rule limited to the commercial contracts.

Acceptance– when effective?

- In some countries the contract is formed when the offeror knows of the acceptance of the offeree (e.g. Italy, Holland, Philippines, and Spain for the civil contracts).
- In some other countries (e.g. Germany, Austria, Russia, Belgium and Denmark), the contract is formed when the acceptance arrives at the address of the offeror.

Acceptance– when effective?

- Example: Germany
  - **Section 151 BGB Acceptance without declaration to the offeror**

    A contract comes into existence through the acceptance of the offer without the offeror needing to be notified of acceptance, if such a declaration is not to be expected according to customary practice, or if the offeror has waived it. The point of time when the offer expires is determined in accordance with the intention of the offeror, which is to be inferred from the offer or the circumstances.

- Let’s use Germany and China as examples for a more complete analysis of offer/ acceptance and revocation of offer.

Offer and acceptance under German Law 1/4

- **BGB Section 145 - Binding effect of an offer**

  Any person who offers to another to enter into a contract is bound by the offer, unless he has excluded being bound by it.

- **BGB Section 146 - Expiry of an offer**

  An offer expires if a refusal is made to the offeror, or if no acceptance is made to this person in good time in accordance with sections 147 to 149.

- **BGB Section 147- Period for acceptance**

  (1) An offer made to a person who is present may only be accepted immediately. This also applies to an offer made by one person to another using a telephone or another technical facility.

  (2) An offer made to a person who is absent may be accepted only until the time when the offeror may expect to receive the answer under ordinary circumstances.

Offer and acceptance under German Law 2/4

- **BGB Section 148 - Fixing a period for acceptance**

  If the offeror has determined a period of time for the acceptance of an offer, the acceptance may only take place within this period.

- **BGB Section 149 - Late receipt of a declaration of acceptance**

  If a declaration of acceptance received late by the offeror was sent in such a way that it would have reached him in time if it had been forwarded in the usual way, and if the offeror ought to have recognised this, he must notify the acceptor of the delay after receipt of the declaration without undue delay, unless this has already been done. If he delays the sending of the notification, the acceptance is deemed not to be late.

Offer and acceptance under German Law 3/4

- **BGB Section 150 - Late and altered acceptance**

(1) The late acceptance of an offer is considered to be a new offer.

(2) An acceptance with expansions, restrictions or other alterations is deemed to be a rejection combined with a new offer.

- **BGB Section 151 - Acceptance without declaration to the offeror**

A contract comes into existence through the acceptance of the offer without the offeror needing to be notified of acceptance, if such a declaration is not to be expected according to customary practice, or if the offeror has waived it. The point of time when the offer expires is determined in accordance with the intention of the offeror, which is to be inferred from the offer or the circumstances.

Offer and acceptance under German Law 4/4

- **BGB Section 152 Acceptance by notarial recording**

  If a contract is notarially recorded without both parties being present at the same time, the contract comes into existence, unless otherwise provided, on the recording of acceptance effected in accordance with section 128. The provision of section 151 sentence 2 applies.

- **BGB Section 153 Death or incapacity to contract of the offeror**

  The coming into existence of the contract is not prevented by the offeror dying or losing capacity to contract before acceptance, unless a different intention of the offeror is to be presumed.

Offer under Chinese law

- **Article 14**

  Definition of Offer

  An offer is a party's manifestation of intention to enter into a contract with the other party, which shall comply with the following: (i) Its terms are specific and definite; (ii) It indicates that upon acceptance by the offeree, the offeror will be bound thereby.

- **Article 16**

  Effectiveness of Offer, Offer through Electronic Message

  An offer becomes effective when it reaches the offeree. When a contract is concluded by the exchange of electronic messages, if the recipient of an electronic message has designated a specific system to receive it, the time when the electronic message enters into such specific system is deemed its time of arrival; if no specific system has been designated, the time when the electronic message first enters into any of the recipient's systems is deemed its time of arrival.

Acceptance under the Chinese Law 1/5

- **Article 21 Definition of Acceptance**

  An acceptance is the offeree's manifestation of intention to assent to an offer.

- **Article 22 Mode of Acceptance; Acceptance by Conduct**

  An acceptance shall be manifested by notification, except where it may be manifested by conduct in accordance with the relevant usage or as indicated in the offer.

Acceptance under the Chinese Law 2/5

- **Article 23 Timely Dispatch of Acceptance**

  An acceptance shall reach the offeror within the period prescribed in the offer. Where the offer does not prescribe a period for acceptance, the acceptance shall reach the offeror as follows: (i) Where the offer is made orally, the acceptance shall be dispatched immediately, unless otherwise agreed by the parties; (ii) Where the offer is made in a non-oral manner, the acceptance shall reach the offeror within a reasonable time.

- **Article 24 Commencement of the Period for Acceptance**

  Where an offer is made by a letter or a telegram, the period for acceptance commences on the date shown on the letter or the date on which the telegram is handed in for dispatch. If the letter does not specify a date, the period commences on the posting date stamped on the envelop. Where the offer is made through an instantaneous communication device such as telephone or facsimile, etc., the period for acceptance commences once the offer reaches the offeree.

Acceptance under the Chinese Law 3/5

- **Article 25 Contract Formed upon Effectiveness of Acceptance**

  A contract is formed once the acceptance becomes effective.

- **Article 26 Effectiveness of Acceptance**

  A notice of acceptance becomes effective once it reaches the offeror. Where the acceptance does not require notification, it becomes effective once an act of acceptance is performed in accordance with the relevant usage or as required by the offer. Where a contract is concluded by the exchange of electronic messages, the time of arrival of the acceptance shall be governed by Paragraph 2 of Article 16 hereof.

Acceptance under the Chinese Law 4/5

- **Article 27 Withdrawal of Acceptance**

An acceptance may be withdrawn. The notice of withdrawal shall reach the offeror before or at the same time as the acceptance.

- **Article 28 Late Acceptance**

An acceptance dispatched by the offeree after expiration of the period for acceptance constitutes a new offer, unless the offeror timely advises the offeree that the acceptance is valid.

- **Article 29 Delayed Transmission of Acceptance**

If the offeree dispatched its acceptance within the period for acceptance, and the acceptance, which would otherwise have reached the offeror in due time under normal circumstances, reaches the offeror after expiration of the period for acceptance due to any other reason, the acceptance is valid, unless the offeror timely advises the offeree that the acceptance has been rejected on grounds of the delay.

Acceptance under the Chinese Law 5/5

- **Article 30 Acceptance Containing Material Change**

  The terms of the acceptance shall be identical to those of the offer. A purported acceptance dispatched by the offeree which materially alters the terms of the offer constitutes a new offer. A change in the subject matter, quantity, quality, price or remuneration, time, place and method of performance, liabilities for breach of contract or method of dispute resolution is a material change to the terms of the offer.

- **Article 31 Acceptance Containing Non-material Changes**

  An acceptance containing nonmaterial changes to the terms of the offer is nevertheless valid and the terms thereof prevail as the terms of the contract, unless the offeror timely objects to such changes or the offer indicated that acceptance may not contain any change to the terms thereof.

Revocation of an offer under German Law

- **BGB Section 109**

  Right of revocation of the other party (1) Until the contract is ratified, the other party is entitled to revoke it. Declaration of revocation may also be made to the minor. (2) If the other party realised that he was dealing with a minor, he may revoke the contract only if the minor untruthfully stated that the legal representative had given consent; he may not revoke in this case either if, when the contract was entered into, he had notice of the lack of consent.

Revocation of an offer under Chinese Law

Article 17 - Withdrawal of Offer

An offer may be withdrawn. The notice of withdrawal shall reach the offeree before or at the same time as the offer.

Article 18 - Revocation of Offer

An offer may be revoked. The notice of revocation shall reach the offeree before it has dispatched a notice of acceptance.

Acceptance

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.

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

Acceptance

- 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.

Which promises should 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

Brief History of Consideration Doctrine 1 / 3

- 13th 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

Brief History of Consideration Doctrine 2 / 3

- During 15th and 16th century, English courts gradually recognized new writ that is basis of modern contract, the writ of assumpsit
- Assumpsit replaced covenant and debt.
- Unlike earlier writs, which had clear limits, assumpsit did not.

Brief History of Consideration Doctrine 3 / 3

- 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) . . .

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. . . .

And Civil law?

- How does Civil Law distinguish between promises that should be enforce and promises that should not?
  - CAUSE or “CAUSA:

Cause or “Causa”

- The term “causa” in Civil law refers not to one legal doctrine, but at least to three, only one of which is covered by the Common Law doctrine of consideration.
- 1) “Cause” is intended as the economic-social reason of the contract (for example the cause of the sale is the exchange of a thing against a price).
- 2) “Cause” is intended to qualify the legality or illegality of a contract (see for example Article 1132 of the French Civil Code that says that “A cause is unlawful where it is prohibited by legislation, where it is contrary to public morals or to public order”
- 3) “Cause” is a remnant of the old Roman “*formulae*” to categorize the type of “*negotium*” that a party enters into (e.g. donandi causa, solvendi causa).

Cause or “Causa”

- **French Code**:

  Of the Cause.

  Article 1131. The agreement is not less valid, although the cause be not expressed therein.

  Article 1132. The cause is unlawful when it is prohibited by the law, when it is contrary to good morals or to public order.

  Article 1133. An obligation without a cause, or upon a false cause, or upon an unlawful cause, can have no effect.

Cause or “Causa”

- Civil codes of “French origin” qualifies “cause” – intended obviously in the first way – as one of the necessary requisites of the contract.

Italian Civil Code

Article 1325. The requisites of the contract are: 1) the mutual assent; 2) the “cause”; 3) the object; 4) the formality, when required by law under penalty of invalidity.

Article 1418,2. The lack of one of the requisites indicated in Article 1325 results in the voidness of the contract”.

Consideration v. “causa”

- Are consideration and causa the same? No!
  - US law has a very specific definition of consideration
  - Causa in civil law is a more general flexible concept.

  However, they answer the same question of grounds for enforcement of a promise.
- For a discussion of the differences between consideration and causa, see:
  - C. Larroumet, "Detrimental Reliance and Promissory Estoppel as the Cause of Contracts in Louisiana and Comparative Law" (1986) 60 Tul L Rev. 1209.

Consideration & cause in the international documents

CISG 1 / 4

- The CISG does not list consideration between the contract requirements.

- 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.

CISG 2/4

CISG does not mention consideration in its requirement for contract formation.

… Why?

2 Hypothesis:

- CISG does not mention consideration because consideration is not required by CISG.
- CISG does not mention consideration because it does not need to because of the types of transactions to which it is applicable.

CISG 3/4

As Professor Alejandro M. Garro expressed it in his "Reconciliation of Legal Traditions in the U.N. Convention on Contracts for the International Sale of Goods " (paper submitted to the 81st Annual Meeting of the American Association of Law Libraries, June 26-29, 1988, available at http://www.cisg.law.pace.edu/cisg/text/garro29.html)

> The Convention does not mention the doctrine of consideration. This omission is deprived of any significance because (1) a sale is an onerous transaction, where "consideration" is supplied by the exchange of promises to deliver and to pay; and (2) a challenge to the enforceability of a promise for lack of consideration is an issue of "validity" dehors the scope of application of the Convention, hence remitted, under conflict rules, to the applicable national law.

CISG 4/4

In conclusion,

CISG might not mention the consideration between the requirements of the contract because it did not need to and not because the drafters decided that consideration was a question of validity not subject to the Convention.

Unidroit

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.

Article 3.2 (Validity of mere agreement)

A contract is concluded, modified or terminated by the mere agreement of the parties, without any further requirement.

What does Unidroit do? 1/4

- It excludes both consideration and "causa" from requirements.

- Why?
  - See Official Comments to Article 3.2.

What does Unidroit do? 2/4

Official Comments to Article 3.2

The purpose of this article is to make it clear that the mere agreement of the parties is sufficient for the valid conclusion, modification or termination by agreement of a contract, without any of the further requirements which are to be found in some domestic laws.

1. No need for consideration. In common law systems, consideration is traditionally seen as a prerequisite for the validity or enforceability of a contract as well as for its modification or termination by the parties. However, in commercial dealings this requirement is of minimal practical importance since in that context obligations are almost always undertaken by both parties. It is for this reason that Art. 29(1) CISG dispenses with the requirement of consideration in relation to the modification and termination by the parties of contracts for the international sale of goods. The fact that the present article extends this approach to the conclusion, modification and termination by the parties of international commercial contracts in general can only bring about greater certainty and reduce litigation.

What does Unidroit do? 3/4

2. No need for cause. This article also excludes the requirement of cause which exists in some civil law systems and is in certain respects functionally similar to the common law "consideration".

Illustration. 1. At the request of its French customer A, bank B in Paris issues a guarantee on first demand in favour of C, a business partner of A in England. Neither B nor A can invoke the possible absence of consideration or cause for the guarantee.

What does Unidroit do? 4/4

- Why?

  … Unidroit drafters had in mind the typical commercial international transaction in which "obligations are almost always undertaken by both parties". But what would it happen if this were not the case? UNIDROIT Principles do not answer to this question. The issue of distinguishing between promises that are worth enforcing and promises that are not, is left open.

European Principles

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.

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.

Comparing American & international approach

- 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

Comparing American & international approach

- International approach seems better as matter of policy.
  - If intention to be legally bound, should be sufficient.

Comparing American & international approach

- If have concern about particular types of agreements, e.g. charitable donations or real estate, have special rules for these.

•See Restatement (Second) of Contracts § 90(2) (1981)

A charitable subscription or a marriage settlement is binding under subsection(1) without proof that the promise induce action or forbearance.

Let's reflect … 1 / 2

Saying that cause is a requisite of the contract, whose lack results in the contract being void, is not much different from saying that consideration is required for a contract to be enforceable.

- Query: can a system survive without a doctrine that answers the question which expectation of the parties should be protected by law?

Let's reflect … 2 / 2

- Could formalities take the place of consideration?
- - See Restatement (Second) of Contracts 87(1)(a) – promise in writing signed by the offeror that recites a purported consideration and proposes an exchange on fair term is binding notwithstanding the lack of actual consideration.

A way to overcome the requisite of "consideration": Promissory Estoppel

What is estoppel?

ESTOPPEL

- From the old French *estoupail*

[If you want to know more about the several estoppels … see Lord Denning's opinion in *McIlkenny v Chief Constable of the West Midlands* [1980] 1 QB 283, at p. 317, CA.]

Just some hints on estoppel:

Estoppel is:

- Rule of evidence that prevents a party

  (i) from making an allegation or denial that contradicts what the party has previously stated (judicial estoppel – litigants cannot advocate directly contrary position for advantage) or (ii) or to make an allegation or denial contrary to something that has already been established as being the truth (collateral estoppel or issue preclusion)

- Rule of equity – Equitable Estoppel

Promissory Estoppel

- And then, of course, promissory estoppel:

  Doctrine that substantively estops a party from taking advantage of the lack of consideration for a promise he has made.

  It's equitable, based on court's discretion i.e . . .

Promissory Estoppel

- … when a court cannot find a contract for lack of consideration but it is fair to allow the promisee to recover by virtue of his detrimental reliance on a promise that reasonably could inspire reliance, the court will allow the promisee to recover.

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 ½ 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 20th 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 or 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)

Today promissory estoppel is not only a consideration substitute …

- On one side, courts have awarded expectancy and not reliance damages. (See Prof Williston, 4 American Law Institute Proceedings app. P. 103,104)
- On the other side, courts have used promissory estoppel as a remedy not only where consideration was missing but also where mutual assent was missing. (E.M. Holmes, Restatement of Promissory Estoppel, 32 Willamette L. Rev. 263, 268. N. 7 (1996)

Does Civil Law know promissory estoppel?

- No, Civil law (with the exception of Louisiana) does not know promissory estoppel as a way to protect reliance on a promise but Civil Law does not ignore the doctrine of protection of reliance.
- Examples:
  - Doctrine of *"culpa in contraendo"* (misconduct in negotiation) and of *"venire contra factum proprium"* (allegation contrary to what previously did) are good examples of protection of reliance (similar to equitable estoppel of Common law).

Does Civil Law know promissory estoppel?

- Cases in which one party's reliance on the wrong information given by the other party in the negotiation process is protected by the law:
  - Example from Italian Code Art. 1478:
    - "If at the moment of formation of the contract the thing was not owned by the seller, the seller has a duty to procure the thing for the buyer. The buyer becomes the owner of that thing in the moment in which the seller purchased the thing from the owner"

International documents

- 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? Question open.
- 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.

Day 2

Tuesday July 19, 2011

Option and firm offer

Do you remember *Normile v. Miller* ?

- Normile's argument was that Miller could not revoke his offer prior to 5:00 pm. The court rejected the argument because this would amount to an option for which Normile had given no consideration.
- At Common Law an offeror has a duty to leave an offer open for acceptance only if the offeree gives consideration for that.

Leading case

- *Berryman v. Kmock* (Kansas 1977)

Facts

- Case involved a real estate transaction.
- Kmock 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)

Why not Promissory Estoppel?

- Kmock did not reasonably rely on option
  - He was an experienced real estate person
  - Knew that no consideration given

Current US Law 1/3

- If traditionally, an option contract was a contract in which the offeror promises to keep an offer open upon a consideration, modern law has used the option theory to create sometimes a binding offer even where consideration is absent ("constructive options").

Current US Law 2/3

- When constructive options?
  - (i) when an offeree has started to perform a unilateral contract;
  - (ii) when an offeror in writing, signing, and reciting a "purported consideration" (even nominal) for holding the offer open, proposes an exchange on fair terms within a reasonable time (only in a handful of jurisdictions). Restatement 2d 87(1).

Current US Law 3/3

See **Restatement (Second) of Contracts § 45**:

- (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.
- (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.

Firm offer at Common Law?

No. Must be supported by consideration.

- Only if the offer is made irrevocable by statute Restatement (Second) of Contracts § 87(1)(b).
- If offeror is a merchant and the contract is for the sale of goods (UCC §2-205).

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."
  - IMPORTANT: If offeree's form is used, offeror must separately sign assurance term.

FIRM OFFER in CIVIL LAW, examples

- **Art. 1329 Italian Civil Code**:

  If the offeror has bound himself to maintain the offer open for acceptance, the revocation of the offer is without effect.

FIRM OFFER in CIVIL LAW, examples

- **Chinese Law**

  Article 19 Irrevocable Offer

  An offer may not be revoked: (i) if it expressly indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; (ii) if the offeree has reason to regard the offer as irrevocable, and has undertaken preparation for performance.

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 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.

Comparison of US and International Approaches on Firm Offers

- International and Civil law approach superior in recognizing firm offers?
- Almost amounts to fraud to state, in writing, that an offer will be held open and then renege on offer.
- US law trap for unwary.

Bilateral v. Unilateral Contracts

- Bilateral: see *Normile* (above)
- Unilateral:
  - *Petterson v. Pattburg* (New York 1928) – old approach
  - Restatement (Second) of Contracts 45 – new approach

Leading Case of the old approach

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.

Modern American Approach - Restatement (2d) Contracts §45

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.

(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.

Bilateral v. Unilateral Contract under the French Code

- **French code 1102 & 1103**

A contract is synallagmatical or bilateral when the contractors bind themselves mutually some of them towards the remainder.

It is unilateral when it binds one person or several towards one other or several others, without any engagement being made on the part of such latter.

Let's reflect …

- At Common Law a contract is unilateral when the offer invite to an acceptance only by returning a performance. A contract is bilateral when the offeror invites the acceptance by a return promise. There is a presumption for bilateral contract.

  - **Restatement (Second) of Contracts § 32 (Invitation of Promise or Performance)**:

    In case of doubt, an offer is interpreted as inviting the offeree to accept either by promising to perform or by rendering the performance, as the offeree chooses.

Let's reflect …

- In Civil law the distinction between bilateral and unilateral contracts is not totally coincident with the American Common law distinction. Why?
- In Civil Law the distinction does not impinge so much on the formation but rather on the duties of the parties. If only one party has a duty to perform the contract is unilateral. While at Common law, a unilateral contract always presents a promise that has to be accepted by conduct, in Civil law you can create a unilateral conduct also without a conduct; i.e. it can be merely consensual. The effect of a unilateral contract at Common law and in Civil Law, however, is the same, only one party is bound to a duty.

The peculiar “performance contracts” in Civil law

- The performance contract are formed with the delivery of a thing (e.g. loan, bailment, deposit) and are distinguished from the “consensual contracts” that are formed with the the exchange of consent between the parties (e.g. sale)
- *Examples:*
- **French Code***:*

- **Article 1915**. Deposit in general is an act by which one party receives the property of another, on condition of keeping it safely, and restoring it in kind.

Reflection

- How are performance contracts similar to and different from unilateral contracts of Common law?
- Similar because they are both formed when performance is complete
- Different because the promise is implied in the law in the case of the performance contract but express in the case of the unilateral contract

III.

RESTITUTION

Restitution or unjust enrichment

- As an alternative ground for obligation

- Indeed, Professor and legal philosopher Lon L. Fuller (Consideration and Form, 41 Colum L. Rev. 799, 806, 810, 812 (1941)) wrote that there are three policy grounds for contractual liability: (i) private autonomy (i.e. law empowers people to make and receive enforceable promises); (ii) reliance (i.e. recognition that breach of a promise, even if the promise is unenforceable, may work an injury to one who has changed his position in reliance on the promise); (iii) unjust enrichment (it is based on the injustice resulting from the fact that a party has enriched himself to the detriment of another).

Restitution or unjust enrichment

…

- Each of these policy ground for liability has a doctrinal equivalent:
  - (i) private autonomy is protected by the doctrine of breach of contract
  - (ii) reliance is protected by the promissory estoppel doctrine;
  - (iii) unjust enrichment is protected by the restitution doctrine.

US doctrine

- Actually, in US we speak of restitution in two sets of situations:
- (i) restitution as a consequence of unenforceability of a contract;
- (ii) restitution as a consequence of a useful service performed for the benefit of another person.

US doctrine

- We will focus on the second situations only this one is a source of obligation that applies when one party has been enriched to the detriment of the other if it would be unfair for the person to retain the benefit without paying compensation.

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 20th century development. Before the twentieth century, courts did not recognize this type of obligation: a promise merely based on a previous moral obligation (as distinguished from a promise based on a preexisting legal obligation that has become inoperative for some reasons) had been held unenforceable.
  - *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.

Restitution in the Restatements

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

  (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.

  (2) A promise is not binding under Subsection

  (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.

Restatement (Second) of Contracts §86 (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.

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

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

Prima facie case on restitution

- To act in restitution, plaintiff must plead:

  (1) the conferral of a measurable benefit to defendant at plaintiff's expense; (2) the conferral non-officious (3) the conferral non gratuitous (4) measurable benefit is unjustly retained.

- Note that element 2 is easy to prove if there is a promise: defendant's promise goes to show that there was not an officious intrusion.

Restitution in Civil Law 1 /5

- No unified category of "restitution" as Common law has developed. Indeed, restitutionary remedies are scattered in many doctrines:
  - (i) restitution as the consequence of the natural end of some contracts (e.g. a rental contract at the end of which the rented thing is returned or "restituted" to the owner);
  - (ii) restitution when a contract is rescinded;
    - E.g. Italian Civil Code Article 1526 (installment sale contract): If the contract is rescinded because of the buyer's breach, the seller must restitute the received installments, but he has a right to a fair compensation for the (buyer's) use of the thing, besides a right to damages. …

Restitution in Civil Law 2 /5

- (iii) restitution as a consequence of a conferral of a benefit to another when the conferral was not intended as gratuitous.

Restitution in Civil Law 3/5

- Even last category (let's call it unjust enrichment) is also not unitary. At least three doctrines:

- (1) Enrichment without a cause
  - See e.g., Article 2041 of Italian Civil Code - General enrichment action
    - "A person that, without a cause, has been enriched to the detriment of another person, has a obligation, in the limit of his enrichment, to make whole the other person of the relevant detriment …"

  - Article 44 of Portuguese Civil Code (Enrichment without cause).

Restitution in Civil Law 4/5

- (2) Payment in error
  - See, e.g., French Civil Code, Article 1376:
    - "He who receives by error or knowingly what is not owed to him is bound to make restitution to the person from whom he has unduly received it."

Restitution in Civil Law 5/5

- (3) "*Negotiorum gestio*" or management of someone's affair

  (similar to emergency situations at Common law)

- See, e.g., French Civil Code, Art. 1372
  - Where one voluntarily manages another's business, whether the owner is aware of the management, or whether he is not, he who manages contracts a tacit undertaking to continue the management which he has embarked on, and to complete it until the owner is in a position to look after it himself; he must also take charge of all the continuations of that business.

    He is then subject to all the obligations which would result from an express authority which the owner might have confided to him.

Wouldn't be it better to unify these doctrines in Civil law?

- Well, yes.
  - For an interesting effort of unification see: Principles of European Unjustified Enrichment Law, by the Study Group on a European Civil Code (network of academics, from across the EU, conducting comparative law research in private law in the various legal jurisdictions of the EU Member State), available at www.sgecc.net/pages/downloads/articles_27.02.06.doc

Restitution as “residuary” in Civil law

- In Civil law, restitution is generally a residuary action, i.e. the plaintiff can sue in restitution only if he cannot recover under any other theory. No possibility to opt for restitution in case of losing contracts as in American Law.
  - See **Italian Civil Code 2042** (Residuary character of the cause of action).

    The enrichment action cannot be brought when the plaintiff can bring another action to be made whole of the detriment.

Germany, an example of a particularly developed unjust enrichment statute

- It covers **entire Title 26 of BGB** (but "unjust enrichment" is mentioned many times also in several other provisions of BGB). Have a look, if you have time.

- **Unjust enrichment**

  Section 812

  Claim for restitution (1) A person who obtains something as a result of the performance of another person or otherwise at his expense without legal grounds for doing so is under a duty to make restitution to him. This duty also exists if the legal grounds later lapse or if the result intended to be achieved by those efforts in accordance with the contents of the legal transaction does not occur. (2) Performance also includes the acknowledgement of the existence or non-existence of an obligation.

  Section 813

  Performance notwithstanding defence (1) Restitution of performance rendered to perform an obligation may also be demanded if the claim was subject to a defence by means of which assertion of the claim has been permanently excluded. The provisions of section 214 (2) are unaffected. (2) If an obligation due on a specific date is performed early, then the claim for return is excluded and reimbursement of interim interest may not be demanded.

  Section 814

  Knowledge that debt is not owed Restitution of performance rendered for the purpose of performing an obligation may not be demanded if the person who rendered the performance knew that he was not obliged to do so or if the performance complied with a moral duty or consideration of decency.

Germany, an example of a particularly developed unjust enrichment statute

- **Section 815**

  Non-occurrence of result A claim for return for the non-occurrence of a result intended by an act of performance is excluded if the occurrence of the result was impossible from the outset and the person who rendered the performance prevented the result from occurring in bad faith.

- **Section 816**

  Disposition by an unauthorised person (1) If an unauthorised person disposes of an object and the decision is effective against the authorised person, then he is obliged to make restitution to the authorised person of what he gains by the disposal. If the disposition is gratuitous, then the same duty applies to a person who as a result of the disposition directly gains a legal advantage. (2) If performance is rendered to an unauthorised person that is effective in relation to the authorised person, then the unauthorised person is under a duty to make restitution of the performance.

- **Section 817**

  Breach of law or public policy If the purpose of performance was determined in such a way that that the receiver, in accepting it, was violating a statutory prohibition or public policy, then the receiver is obliged to make restitution. A claim for return is excluded if the person who rendered performance was likewise guilty of such a breach, unless the performance consisted in entering into an obligation; restitution may not be demanded of any performance rendered in fulfilment of such an obligation.

- **Section 818**

  Scope of the claim to enrichment (1) The duty to make restitution extends to emoluments taken as well as to whatever the receiver acquires by reason of a right acquired or in compensation for destruction, damage or deprivation of the object obtained. (2) If restitution is not possible due to the quality of the benefit obtained, or if the receiver is for another reason unable to make restitution, then he must compensate for its value. (3) The liability to undertake restitution or to reimburse the value is excluded to the extent that the receiver is no longer enriched. (4) From the time when the action is pending onwards, the receiver is liable under the general provisions of law.

Germany, an example of a particularly developed unjust enrichment statute

- **Section 819**

  Increased liability in case of knowledge and breaches of law or public policy (1) If the receiver, at the time of receipt, knows of the defect in the legal basis or if he learns of it later, then he is obliged to make restitution from the moment of receipt or of obtaining knowledge of the defect to make restitution as if the claim for restitution had been pending from this time on. (2) If the receiver, in accepting the performance, violates a statutory prohibition or public policy, then he is likewise under the same obligation from receipt of payment onwards.
- **Section 820**

  Increased liability where the result is uncertain (1) If the performance was intended to produce a result whose occurrence, according to the contents of the legal transaction, was regarded as uncertain, then, if the result does not occur, the receiver is under a duty of restitution in the same way as if the claim for restitution had been pending at the time of receipt. The same applies if the performance has been rendered for a legal reason which according to the contents of the legal transaction was regarded as likely to lapse and the legal reason ceases to exist. (2) The receiver must only pay interest from the time when he learns that the result has not occurred or that the legal reason has ceased to exist; he is not obliged to make restitution of emoluments to the extent that he is no longer enriched at this time.
- **Section 821**

  Enrichment defence A person who enters into an obligation without legal grounds to do so may also refuse fulfilment if the claim to release from the obligation is statute-barred.
- **Section 822**

  Restitution duty of third parties If the receiver bestows the gains on a third person at no charge, then that third person is obliged to make restitution as if he had received the disposition from the creditor without legal grounds, to the extent that as a result of the bestowal the duty of the receiver to make restitution of the enrichment is excluded.

CISG

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

- 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.

UNIDROIT

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

UNIDROIT

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

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.

European Principles

- 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.

Let's reflect on the role of restitution in the international documents 1/3

- In CISG, there is no mention of restitution as remedy for unjust enrichment situations. Why so?
  - Since CISG only applies to contracts for the sale of goods, then unless we consider the unjust enrichment as contractual (and it is not treated like that either in Common Law or in Civil Law), restitution for unjust enrichment is simply outside of the scope.

Let's reflect on the role of restitution in the international documents 2/3

- In the UNIDROIT Principles, restitution is mentioned in three articles as a consequence of avoidance or termination of a contract; in none of these articles does restitution appear as a consequence of unjust enrichment.

Let's reflect on the role of restitution in these three documents 3/3

- In the European Principles, restitution goes behind the role that it performs in CISG and in UNIDROIT: indeed restitution goes behind contract law as strictly intended (see Article 2:302) but neither in the European Principles restitution is intended as a remedy to unjust enrichment. Why so?
  - Since the European Principles cover the rules of contract formation, authority of agents, validity, interpretation, contents, performance, non-performance (breach) and remedies for breach, restitution is outside the scope.

Let's reflect …

- American Common 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.
- Civil law approach seems more toward first. Integration into contract less systematic and developed.
- Restitution is outside the scope of international documents above.

And what's about Chinese Law? 1/4

In Chinese Contract Law "restitution" mentioned only in two articles:

- **Article 58 Remedies in Case of Invalidation or Cancellation**

  After a contract was invalidated or canceled, the parties shall make restitution of any property acquired thereunder; where restitution in kind is not possible or necessary, allowance shall be made in money based on the value of the property. The party at fault shall indemnify the other party for its loss sustained as a result. Where both parties were at fault, the parties shall bear their respective liabilities accordingly.

  Article 194 Remedies in Case of Revocation

  Upon revocation of the gift, the person with the revocation right may claim restitution of the gift property from the donee.

But …

And what's about Chinese Law? 2/4

Contract law is not the right place to look for restitution. Why?

… Restitution is not contractual! If you look in the Chinese Civil Code, you find an entire subsection on unjust enrichment.

CHINESE CIVIL CODE

Sub-section 4 Unjust Enrichment

Article 179

A person who acquires interests without any legal ground and prejudice to the other shall be bound to return it. The same rule shall be applied if a legal ground existed originally but disappeared subsequently.

And what's about Chinese Law? 3/4

Article 180

In any of the following cases, the prestation shall not be claimed to return:

If the prestation was for the performance of a moral obligation;

If the prestation made by the debtor for the performance of an undue obligation;

If the person who has made a prestation for the purpose of performing an obligation knew, at the time of performance, that he was not bound to perform;

If the prestation was made for an unlawful cause. Except when the unlawful cause exists only with regard to the recipient.

Article 181

In addition to the interests received, a recipient unjustly enriched shall return whatever he acquired by virtue of such interests. If restitution is impossible by reason of the very nature of the interests or by reason of any other circumstance, he shall be bound to reimburse the value.

And what's about Chinese Law? 4/4

Article 182

The recipient, who did not know of the absence of the legal ground and the interests have no longer existed, is released from the obligation to return the interests or reimburse the value.

If the recipient knew of the absence of the legal ground at the time of the receipt, or if he was subsequently aware of it, he shall be bound to return the interests acquired at the time of the receipt or such interests still existing at the time when he was aware of the absence of the legal ground plus the interest and to make compensation for the injury, if any.

Article 183

When the recipient unjustly enriched transferred gratuitously whatever he has received to a third party, and therefore the recipient is released from his obligation to return the interests, such third party shall be bound to make restitution to the extent which the recipient is released from his obligation.

IV.

FORMALITIES

Formalities in General

- What is a formality?
  - Specified procedure that must be followed to achieve a certain legal relationship
  - Examples:
    - *Family law*--to achieve the status of marriage must go through ceremony before duly appointed state official.
    - *Old contract law*—seal necessary to create contract.

Formalities in General (2)

- Rationales for formality:
- Lon L. Fuller, Consideration and Form, 41 Colum. L. Rev. 799 (1941)
- 3 functions:

Formalities in General (3)

- Evidentiary
  - Provides clear evidence that transaction occurred
- Cautionary
  - Warns participants to think before engaging in transaction
- Channeling
  - Assists judicial determination by providing test for whether relationship exists

Marriage ceremony performs these functions well.

Consideration as a formality in contract law poorly.

Let's reflect: could we substituting consideration with formalities?

- My proposal for "Restatement (Third) of Contracts":
  - A promise seriously made is legally enforceable even without consideration. A promise is seriously made if it is (1) in a writing signed by the promisor; or (2) in it a commercial transaction; or (3) there are other factors indicating that a reasonable person would consider the promise seriously made.

Statute of Frauds as a Legal Formality

- Statute of Frauds … even if we should better call it: Statute against Frauds.

- It's a sort of "evidence limitation":
  - Statute of Frauds does not provide writing as a formation requirement: if there is no writing, contract is not invalid, it's unenforceable against the party against whom enforcement is sought

Statute of Frauds—Brief History

- Recall from day 1 that doctrine of consideration developed in connection with Writ of Assumpsit
- By early 17th Century became basic remedy for breach of promise

Brief History (2)

- Unlike its predecessors, Convenant and Debt, Assumpsit did not contain clear requirements for when promise was enforceable
- Led to possibility that person could come to court and allege that other person had made a promise

Brief History (3)

- Statute of Frauds passed in England 1677
- 1954 most provisions repealed
- Still major part of American law

Rationale and Problems of SOF

- Rationale---prevent fraudulent assertion of oral promise by requiring signed writing by promisor to make most important promises enforceable
- Problem---
  - Can lead to injustice when parties make informal agreement not in writing
- Judicial attitude mixed
  - Numerous exceptions to statute created by courts when strict enforcement might be unfair

Contracts Covered

- Contract for sale of real estate
  - Leases lasting more that 6 months or a year must be in writing in most jurisdictions
- Contracts for sale of goods for at last $500—UCC 2-201
- Contracts that cannot be performed within 1 year
  - E.g. 2 year employment contract
  - But contract for "lifetime" employment not covered

Contracts Covered (2)

- Contracts to answer for debt of another ("suretyship" contracts)
- Others depending on statute in jurisdiction, e.g. business broker contracts

Sufficient Writing—General Law

- Writing (modern US law should better use term "record" to include electronic transactions) signed by "the party to be charged" (the party against whom enforcement is sought)
- States with reasonable certainty the essential terms
- Sufficient to indicate that contract made between parties (or offer made by signer to other party)

Leading Case

Crabtree v. Elizabeth Arden Sales Corp. (New York Court of Appeals 1953)

Facts

- September 1947 Crabtree entered into negotiations with Elizabeth Arden looking to possible employment as sales manager.
- Crabtree requested a three-year contract at a salary of $25,000 per year.
- Arden offered a two-year contract
  - $20,000 for first six months
  - $25,000 for next six months
  - $30,000 for second year
  - Plus $5,000 expenses for each year

Facts (2)

- Crabtree said found offer “interesting”
- Arden had her secretary made a memorandum of her offer on piece of paper that was handy
- The memorandum contained all the essential terms, but it was not signed by Ms. Arden.

Facts (3)

- A few days later Crabtree telephoned Ms. Arden's general manager, Mr. Johns, and telegraphed Ms. Arden to accept her offer.
- Ms. Arden wired back her "welcome".
- When he reported to work a few days later, Johns initialed a "pay-roll change card".

Facts (4)

- Card stated salary and had initials of Mr. Johns, but it did not state the length of employment.

Facts (5)

- Crabtree received first salary increase, but not the second
- Arden refused to approve second increase, Crabtree left, and sued for breach of contract.

Analysis of *Crabtree*

- Contract was "within" statute of frauds,
  - i.e., required to be in writing because lasted more than one year.
- Court held that first memorandum was not a sufficient writing because not "signed" by Ms. Arden—the party to be charged.
- Pay-roll charge card was signed (initialed) by Ms. Arden's agent, Mr. Johns, but it lacked one of the essential terms, period of employment.

Analysis of *Crabtree* (2)

- Court, however, held that the writing sufficient to comply with the statute of frauds could consist of several writings taken together, provided they relate to the same transaction.
- It was not necessary that all of the writings be signed.
- It was not necessary that all refer to each other.

Exceptions to Statute of Frauds

- 8 years after adoption of statute of frauds, English courts recognized "part performance" exception to statute of frauds.
- Typical situation:
  - Oral agreement to sell land.
  - Purchaser took possession and made valuable improvements.
  - Seller denied contract.
- Modern American courts have recognized a promissory estoppel exception to statute. Restatement (2d) Contracts §139.

Current law - UCC § 2-201

§ 2-201. Formal Requirements; Statute of Frauds.

(1) Except as otherwise provided in this section a contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.

Current law - UCC § 2-201

(2) Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) against such party unless written notice of objection to its contents is given within 10 days after it is received.

Current law - UCC § 2-201

(3) A contract which does not satisfy the requirements of subsection (1) but which is valid in other respects is enforceable

(a) if the goods are to be specially manufactured for the buyer and are not suitable for sale to others in the ordinary course of the seller's business and the seller, before notice of repudiation is received and under circumstances which reasonably indicate that the goods are for the buyer, has made either a substantial beginning of their manufacture or commitments for their procurement; or

Current law - UCC § 2-201

(b) if the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract for sale was made, but the contract is not enforceable under this provision beyond the quantity of goods admitted; or

(c) with respect to goods for which payment has been made and accepted or which have been received and accepted (Sec. 2-606).

Proposal for a new UCC statute of frauds, §2-201(1) - withdrawn

(1) A contract for the sale of goods for the price of $5,000 or more is not enforceable by way of action or defense unless there is some record sufficient to indicate that a contract for sale has been made between the parties and signed by the party against which enforcement is sought or by the party's authorized agent or broker. A record is not insufficient because it omits or incorrectly states a term agreed upon, but the contract is not enforceable under this subsection beyond the quantity of goods shown in the record.

(2) Between merchants if within a reasonable time a record in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) against the recipient unless notice of objection to its contents is given in a record within 10 days after it is received.

Proposal for a new UCC statute of frauds, §2-201(1) - withdrawn

A contract that does not satisfy the requirements of subsection (1) but which is valid in other respects is enforceable*:*

(a) if the goods are to be specially manufactured for the buyer . . .

(b) if the party against which enforcement is sought admits in the party's pleading, or in the party's testimony or otherwise under oath that a contract for sale was made, but the contract is not enforceable under this paragraph beyond the quantity of goods admitted; or

(c) with respect to goods for which payment has been made and accepted or which have been received and accepted**.**

4) A contract that is enforceable under this section is not unenforceable merely because it is not capable of being performed within one year or any other period after its making**.**

Leading Case

Buffaloe v. Hart (North Carolina Court of Appeals 1994)

Facts

- Buffaloe is a tobacco farmer who knew the Harts for about ten years and rented tobacco barns from them in 1988 and 1989.
- Buffaloe began negotiating with the Harts to buy 5 tobacco barns.
- Buffaloe claimed he and the Harts reached an oral agreement for him to purchase 5 barns for $20,000 payable without interest over 4 years.

Facts (2)

- On October 22 or 23, 1989 Buffaloe delivered a check to Ms. Hart for $5,000.
- The check stated that it was part payment for 5 barns.
- The next night Ms. Hart called Buffaloe to tell him she had sold the barns to the other purchasers.
- She tore up the check and sent it back to him the next day.
- The Harts denied that there was an agreement.

Decision

- The North Carolina Court of Appeals found that the Harts did not sign any writing.
- However, the court affirmed the jury determination that the "part payment" exception applied. UCC 2-201(3)(c).

Analysis of *Buffaloe*

- Application of one of several exceptions to UCC statute of frauds—part payment exception.
- No writing showing total purchase price.
  - Buffaloe allowed to submit oral testimony to establish the total price of the barns

International documents

- CISG, international equivalent of UCC, Arts. 11 and 12
- UNIDROIT Principles 1.2
- European Principles Art. 2:102(2)

CISG Art. 11

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

CISG Art. 12

Any provision of article 11, article 29 or Part II of this Convention that allows a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing does not apply where any party has his place of business in a Contracting State which has made a declaration under article 96 of this Convention. The parties may not derogate from or vary the effect of this article.

UNIDROIT Principles 1.2

No form required

Nothing in these Principles requires a contract, statement or any other act to be made in or evidenced by a particular form. It may be proved by any means, including witnesses.

European Principles Art. 2:102(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.

Comparison of US and International Law

- Statute of Frauds riddled with exceptions
  - Shows that rigid rule does not work well
- Courts and juries should be able to determine from facts whether contract really existed.
  - Judges can instruct jury that absence of writing is factor they can consider in determining whether contract existed.

What's the situation in Civil Law countries?

- Much more formalities!

- The writing requirements are scattered in many provisions of the codes and special laws. We can only make examples.

What's the situation in Civil Law countries?

- One general notation: Civil law countries generally distinguish between
  - formalities as a requirement of a contract (whose lack produces the invalidity of the contract itself)
  - Formalities for evidentiary matter (whose lack does not produce invalidity but renders practically impossible for the party to sue on the contract).

Italy

Italian Code

Article 1418, 2 " … The lack of one of the requirements provided for in article 1325 makes the contract void."

Article 1325 The requisites of the contract are: 1) the mutual assent; 2) the 'cause"; 3) the object; 4) the formality, when required by law under penalty of invalidity

And it is when?

… it's impossible to make a list. We can only make examples.

Many cases of formalities required for validity or for evidence inside the Civil Code and outside (example art. 23, 1 TUIF on contract for negotiable instruments).

Italy

- **Article 1350**

  The following must be done by a notary deed or a private deed with authenticated signature, under penalty of invalidity: 1) contracts that transfer the ownership of real estates; 2) contracts that establish, modify or transfer the usufruct on a real estate … (and other real rights) … 3) contracts that establish a co-ownership on the above rights; (4) contracts that establish or modify a servitus (and other limited rights) … 5) acts of renunciation to the above rights; … 8) renting contracts on real estates for a duration above 9 years 9) corporation contracts or partnership contracts when … (a right on a real estate) for more than 9 years or for an indeterminate duration is contributed … 11) partition acts on real estate or other real rights; 12) settlements that concerns transaction on the above legal rights; 13) the other acts expressly indicated by law…

Italy

- **Article 1742**

  The (agency) contract must be *proved* in writing.

– **Article 1751 bis**

  (…) The agreement that limits the competition of an agent after the termination of the (agency) contract must be done in writing.

Germany

- **BGB Section 126**. **Written form**

  (1) If written form is prescribed by statute, the document must be signed by the issuer with his name in his own hand, or by his notarially certified initials. (2) In the case of a contract, the signature of the parties must be made on the same document. If more than one counterpart of the contract is drawn up, it suffices if each party signs the document intended for the other party. (3) Written form may be replaced by electronic form, unless the statute leads to a different conclusion. (4) Notarial recording replaces the written form.

- **BGB Section 126b. Text form**

  If text form is prescribed by law, the declaration must be made in a document or in another manner suitable for its permanent reproduction in writing, the person making the declaration must be named and the completion of the declaration must be shown through the reproduction of a signature of the name or otherwise.

Germany

- BGB **Section 127. Agreed form**

  (1) The provisions under sections 126, 126a or 126b also apply, in case of doubt, to the form specified by legal transaction.

  (2) For compliance with the written form required by legal transaction, unless a different intention is to be assumed, it suffices if the message is transmitted by way of telecommunications and, in the case of a contract, by the exchange of letters. If such a form is chosen, notarial recording in accordance with section 126 may be demanded subsequently.(3) For compliance with the electronic form required by legal transaction, unless a different intention is to be assumed, an electronic signature other than provided for in section 126a also suffices and, in the case of a contract, the exchange of a declaration of an offer and of acceptance which are each provided with an electronic signature. If such a form is chosen, an electronic signature in accordance with section 126a may be demanded subsequently, or if this is not possible for one of the parties, notarial recording in compliance with section 126.

Germany

- **But when is formality required? Not a single provisions: many. Some examples:**
  - **BGB Section 780. Promise to fulfill an obligation**

    For a contract by means of which performance is promised in such a way that the mere promise is intended to establish the duty (promise to fulfill an obligation) to be valid, to the extent that no other form is specified, it is necessary for the commitment to be made in writing. The commitment may not be made in electronic form.

Germany

– **Section 781. Acknowledgement of a debt**

For a contract by which the existence of an obligation is acknowledged (acknowledgement of debt) to be valid, the declaration of acknowledgement must be made in writing. The declaration of acknowledgement may not be made in electronic form. If another form is prescribed to create the obligation whose existence is being acknowledged, then the acknowledgement contract requires this form.

Germany

- **Section 761. Form of life annuity commitment**

  For a contract which promises a life annuity to be valid, the promise must be made in writing, unless another form is specified. The life annuity commitment may not be issued in electronic form to the extent that the commitment serves to provide maintenance in family law.
- **Section 766. Written form of the declaration of suretyship**
  For the contract of suretyship to be valid, the declaration of suretyship must be issued in writing. The declaration of suretyship may not be made in electronic form. If the surety discharges the main obligation, the defect of form is remedied.
- (… and many more)

Spain

- **Codigo Civil**

  Article 632. The gift of a movable thing may be made orally or in writing. An oral gift shall require simultaneous delivery of the thing given. In the absence of this requirement, it shall not be effective unless it is both made and accepted in writing.

Spain

- **Article 1280.** The following must be set forth in a public instrument: 1. Acts and contracts whose purpose is the creation, transfer, amendment or extinguishing of rights in rem over immovable property. 2. Leases over the same property for six or more years, provided that they are effective against third parties. 3. Marriage articles and amendments thereof. 4. The assignment, rejection and waiver of inheritance rights or those pertaining to the marriage property community. 5. The power of attorney to marry, the general litigation power of attorney and any special powers of attorney which are to be submitted to a court; the power attorney to administer property, and any other whose purpose is an act drafted or which must be drafted in a public deed, or which is be effective against third party. 6. The assignment of actions or rights arising from an act which is set forth in a public deed. Likewise, other contracts where the amount of one of the undertakings to be provided by one or both contracting parties exceeds 1,500 pesetas must be set forth in writing, even in a private document.

And China?

- **Article 10 Forms of Contract; Writing Requirement**

  A contract may be made in a writing, in an oral conversation, as well as in any other form.

  A contract shall be in writing if a relevant law or administrative regulation so requires. A contract shall be in writing if the parties have so agreed.

And China?

Article 11 Definition of Writing

A writing means a memorandum of contract, letter or electronic message (including telegram, telex, facsimile, electronic data exchange and electronic mail), etc. which is capable of expressing its contents in a tangible form.

And China?

Interesting enough, China has a part performance exception like the American Common Law:

Article 36 Effect of Failure to Conclude Contract in Writing

Where a contract is to be concluded by a writing as required by the relevant law or administrative regulation or as agreed by the parties, if the parties failed to conclude the contract in writing but one party has performed its main obligation and the other party has accepted the performance, the contract is formed.

Day 3

Wednesday July 20, 2011

V

Interpretation

What will we deal under this label?

- (A) Contract interpretation by American courts, international documents, and civil law. Role of Trade Usage, Course of Dealing, and Course of Performance.
- (B) Filling the Gaps of Incomplete Contracts.
- (C) Adhesion Contracts in American Common law and Form contracts and EU Directive 93/13 on Unfair terms
- (D) Parol evidence rule and civil law equivalents.
- (E) Good faith: in US and Civil law countries

(A) Contract interpretation by American courts, international documents and civil law.

American courts and contract interpretation

- American courts have an active role in interpretation of contracts ➔ Query: too much activism?
- One example:
- Frigaliment Importing Co. v. B.N.S. Int'l Sales Corp. (S.D.N.Y. 1960) (commercial context + interpretation resources—trade usage).

Frigaliment Importing Co. v. B.N.S. Int'l Sales Corp. 1/6

FACTS

- Frigaliment (Swiss chicken purchaser, plaintiff) and B.N.S (chickenseller/supplier, defendant) entered 1957 in "Chicken" Purchase contract by which B.N.S promises to sell "U.S. Fresh Frozen Chicken". The supply of chicken is differentiated by weight of chicken.
- BNS shipped "fowl" and Frigaliment accepted these older chickens under objection. Then Frigaliment sues B.N.S. for breach of K (failure to ship "broiler and fryer types" for 21⁄2-3 lb category).
- Plaintiff in his mind intended young chicken suitable for broiling and frying while the defendant intended "fowl" for stewing.

Frigaliment Importing Co. v. B.N.S. Int'l Sales Corp. 2/6

- Frigaliment's interpretation argument re: "chicken"?– Ambiguous term: "chicken" = "broilers and fryers only". (narrow intended meaning). How to support?
  - Extrinsic & commercial context evidence to support
    - Negotiations: Used English "chicken" not German "Huhn", latter includes stewers by definition.
    - Trade Usage: experts "chicken"="young chicken" ="broiler and fryer types only"

Frigaliment Importing Co. v. B.N.S. Int'l Sales Corp. 3/6

- B.N.S.'s interpretation argument re: "chicken"? – Ambiguous term: "chicken" = "all chicken types" (BROAD intended meaning). How to support?
  - Extrinsic & commercial context evidence
    - Trade Usage: (1) experts say "chicken"="all types"+ (2) Dep't of Agric. regulation = stewers are "class"
    - Maxim of interpretation – reasonableness -- Mkt. price of chicken at time of K: 35-37¢/lb for broilers and fryers -- not 33¢/lb price in contract
    - Course of Performance: Frigaliment "accepted" stewers

Frigaliment Importing Co. v. B.N.S. Int'l Sales Corp. 4/6

Issue:

Did Frigaliment's extrinsic and commercial context evidence show "chicken" term meant, and should be interpreted as, "broilers and fryers" only—not "stewers"?

Court's Decision:

No—Frigaliment's evidence not meet plaintiff's burden of showing narrow "broilers and fryers" meaning was intended by parties

Frigaliment Importing Co. v. B.N.S. Int'l Sales Corp. 5/6

- Reasoning of the court:
  - "chicken" is not a clear and unambiguous term. It's ambiguous.
  - Therefore extrinsic or contextual evidence to pinpoint meaning is admissible
    - Negotiation? (terms "chicken" vs. "Huhn"). Court found that negotiation favors neither party's meaning.
    - Usage of Trade—evidence of commercial context. Court explained that to use it, you need: (1) actual knowledge or (2) constructive knowledge because "generally known in community" and "well-established . . . notorious . . . reasonable" … just like U.C.C. § 1-205(2) ("regularity of observance"), that is the case here. Court found that Usage of Trade favors B.N.S.'s interpretation (1) Dept. Agric. regulation evidenced broad "chicken" definition and (2) experts otherwise disagree on narrow trade usage.

Frigaliment Importing Co. v. B.N.S. Int'l Sales Corp. 6/6

- Course of performance (U.C.C. § 2-208 = "repeated occasions for performance" under K, which are "accepted or acquiesced in w/o objection"). Court found that it favors neither party's meaning because there was no COP either way. Indeed, "stewers" accepted, but objected by Frigaliment.
- Economic realities of market (mkt. price of chicken at time of K)—evidence of commercial context. Court found that it favors B.N.S.'s meaning because both parties "well aware" 33¢/lb K price was below current mkt. price for broilers and fryers (35- 37¢/lb).
- Holding: Frigaliment's extrinsic and commercial context evidence cannot sustain "burden of showing that 'chicken' used in narrower, rather than broader, sense".

Some thoughts on Frigaliment

- Thoughts no. 1:
  - Could the court have found that there was no contract because the parties had in their mind different meaning? Subjective v. objective approach to contract formation. Current American law follows objective approach. Old case subjective case: Raffles v Wichelhaus, 2 Hurl & C 906 Court of Exchequer, 1864 – *Peerless*.
  - For time's sake, we don't deal with this issue. But … I have slides on this issue. If you are interested, contact me (info@nathancrystal.com)

Some thoughts on Frigaliment

- Thoughts no. 2:
  - Court have admitted extrinsic evidence because the word "chicken" was ambiguous (it was a patent ambiguity). If the Court had found that the word was unambiguous, could the parties have introduced extrinsic evidence to show a latent ambiguity? Must first try to persuade the judge "in camera" that the word is ambiguous by making reference to extrinsic source.

Some thoughts on Frigaliment

- Thoughts no. 3:
  - Court found that Frigaliment did not meet his burden to prove that "chicken" had a narrow meaning. What if Frigaliment had not accepted the older chicken at all and then BNS had to sue Frigaliment for breach of contract? Who should have had the burden of proof on the "meaning" then?
  - Query: Frigaliment in-house counsel was probably Swiss. What should a "global lawyer" aware of the interpretation process in American courts should have advised Frigaliment to do when they received the "wrong" chicken?

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.

  (i.e. no meeting of the minds in the modern sense)

Analyzing the Restatement approach

- Has subjective element, §1.
- Has objective element, §2.
- Best characterized as modified, objective approach.

American Rules of interpretation

Rest 202 (Rules in Aid of Interpretation)

(1) Words and other conduct are interpreted in light of all the circumstances, and if the principal purpose of the parties is ascertainable it is given great weight.

(2) A writing is interpreted as a whole, and all writings that are part of the same transaction are interpreted together.

(3) Unless a different intention is manifested,

(a) Where language has a generally prevailing meaning [i.e. plain meaning] it is interpreted in accordance with that meaning;

(b) Technical terms and words are given their technical meaning when used in a transaction within their technical field

American Rules of interpretation

- (4) **Where an agreement involves repeated occasions for performance** by either party with knowledge of the nature of the performance and opportunity for objection to it by the other any **course of performance (COP) accepted or acquiesced in without objection is given great weight in the interpretation of the agreement.**

  (5) Wherever reasonable, the manifestations of intention of the parties to a promise or agreement are interpreted as consistent with each other and with **any relevant course of performance**, **course of dealing**, or **usage trade.**

American Rules of interpretation

- **Rest 203 (Standards of Preference In Interpretation)**
- In the **interpretation** of a promise or agreement or a term thereof, the following **standards of preference** are generally applicable:
- (a) An interpretation which gives a reasonable, lawful, and effective meaning to all terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect

American Rules of interpretation

- (b) [#1] Express terms are given greater weight than course of performance, course of dealing, and usage of trade, [#2] course of performance is given greater weight than course of dealing or usage of trade, and [#3] course of dealing is given greater weight than [#4] usage of trade.
- (c) Specific terms and exact terms are given greater weight than general language.
- (d) Separately negotiated or added terms are given greater weight than standardized terms or other terms not separately negotiate.

Hierarchy in interpretation

I. EXPRESS TERMS
II. COURSE OF PERFORMANCE
III. COURSE OF DEALING
IV. USAGE OF TRADE

What is COP, COD, TU?

- COP – Example. Think of *Frigaliment*. What if Frigaliment had accepted without objection, a first installment of old chicken and then had refused to accept a second installment of old chicken?
- COD – Example. Sellers and buyer enter into a contract for the supply of "blue T-shirts". Parties have entered various contracts before. Seller ships Carolina blue t-shirts. In the previous contracts, buyer has accepted Carolina blue t-shirts. Under the course of dealing argument, "blue" is "Carolina blue"
- TU - Parties are players in the same industry. To interpret a term, court can make reference to what the players in that industry usually intend when they use that term. 3 requirements for having a TU:

  - Practice or method of dealing
  - Having a regularity of observance
  - In a place, vocation or trade

Course of performance in the UCC

UCC 1-208 (Course of Performance or Practical Construction)

- (1) Where **the contact for sale involves repeated occasions for performances by either party with knowledge,** of the nature of the performance and opportunity for objection to it by the other, any **course of performance** accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement.

Course of performance in the UCC

- (2) The express terms of the agreement and any such course of performance, as well as any course of dealing and usage of trade, shall be construed whenever reasonable as consistent with each other; but when such construction is unreasonable, (#1)***express terms*** *shall control course of performance and (#2)****course of performance*** *shall control both (#3)* ***course of dealing*** *and (#4)* ***usage of trade.***
- (3) Subject to the provisions of the next section on modification and waiver, such course of performance shall be relevant to show a waiver or modification of any term inconsistent with such course of performance

Course of Dealing and Usage of Trade in the UCC

- **U.C.C. § 1-205**
  (Course of Dealing and Usage of Trade)
- (1)A ***course of dealing*** is a sequence of ***previous conduct between the parties to a particular transaction*** which is fairly to be regarded as ***establishing a common basis of understanding*** for interpreting their expressions and other conduct.
- (2) A ***usage of trade*** is any [1] practice or method of dealing [2] having such ***regularity of observance*** [3] in a ***place, vocation or trade*** as to justify an expectation that it will be observed with respect to the transaction in question. The existence and scope of such a usage are to be proved as facts. If it is established that such a usage is embodied in a written trade code or similar writing the interpretation of the writing is for the court.

Course of Dealing and Usage of Trade in the UCC

- (3) A ***course of dealing*** between parties and any ***usage of trade*** in the vocation or trade in which they are engaged or of which they are or should be aware give particular meaning to and supplement or qualify terms of an agreement.
- (4) The express terms of an agreement and an applicable ***course of dealing or usage of trade*** shall be construed wherever reasonable as consistent with each other; but when such construction is unreasonable ***express terms control both course of dealing and usage of trade and course of dealing controls usage of trade***.

What is the international approach?

- It is similar.
- Exactly as American law, the CISG follows a sort of modified objective approach (see article 8(2)).
- Under the CISG, subjective intent is important to determine whether a contract exists and what its terms are, but only "where the other party knew or could not have been unaware of what that intent was", i.e. only when the other party could not have been unaware of that subjective intent." (article 8(1))

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.

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.

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.

And in Civil law?

Not very different. Two examples:

Italian Civil Code.

Chapter IV: Of the interpretation of contract

Article 1366 Interpretation according to good faith

A contract must be interpreted according to good faith.

>>>>>>>>>>

And in Civil law?

Article 1367 Interpretation in favor of effectiveness of contract

In case of doubt, the contract or the single clause must be interpreted in a sense in which they can have some effect, instead of a second sense where they would have none.

Article 1370 Interpretation against the author of the clause

In case of doubt, the clauses included in the general conditions of contract or in a form prepared by one of the contracting parties are interpreted in favor of the other party.

And in Civil law?

French Civil Code

Of the Interpretation of Agreements.

1156

In agreements it is necessary to search into the mutual intention of the contracting parties, rather than to stop at the literal sense of terms.

1157

When a clause is susceptible of two meanings, it must rather be understood in that according to which it may have some effect, than in that whereby it cannot produce any.

1158

Expressions susceptible of two meanings must be taken in that which agrees best with the matter of the contract.

1159

Whatever is ambiguous must be interpreted according to the usage of the country where the contract is made.

>>>>>>>>>>>>>>>>>>

And in Civil law?

1160.

Clauses usual in the contract must be supplied therein, although they are not expressed.

1161

All the clauses of agreements are interpreted by each other, giving to each the sense derived from the entire act.

1162.

In case of doubt, the agreement is interpreted against him who has stipulated, and in favour of him who has contracted the obligation.

1163

However general the terms may be in which an agreement is couched, it only comprehends things respecting which it appears that the parties intended to contract.

1164.

When a case has been put in a contract for the purpose of explaining the obligation, it is not to be inferred to have been designed to restrict the extent to which the engagement goes of right as regards cases not expressed.

(B) Filling in the Gaps in Incomplete Contracts

- Sometimes agreements are incomplete.
- What does the system do?

  -- Implication of Contract terms. e.g. "Reasonable" Terms Omitted from contract (see *Wood v. Lucy, Lady Duff-Gordon* (N.Y. 1917) implied, reasonable term for omitted marketing efforts term);

  -- implied duties of good faith and fair dealing.

  -- specific rules in UCC

Specific written rules to fill the gaps in American Common Law

- Which rule when parties have left “a blank”?

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 documents

- 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)

COP, COD and TU as gap fillers

- See slides above for definition of COP, COD, and TU.

Civil Law?

- **French Code**
  - **Article 1135**

    Agreements bind not only as to what is expressed therein, but further as regards all the consequences which equity, usage, or law attribute to an obligation by its nature.
  - **Article 1160**.

    Clauses usual in the contract must be supplied therein, although they are not expressed.

Civil Law?

- **Spain**

  Article 1,287.

  Uses or customs of the country shall be taken into account to interpret any ambiguities in contracts, standing in for the omission of clauses which are usually set forth therein.

Civil Law?

- **Germany**

  Section 157 BGB Interpretation of contracts
  Contracts are to be interpreted as required by good faith, taking customary practice into consideration.

What's about China?

- **Article 62 Gap Filling**

  Where a relevant term of the contract was not clearly prescribed, and cannot be determined in accordance with Article 61 hereof, one of the following provisions applies: (i) If quality requirement was not clearly prescribed, performance shall be in accordance with the state standard or industry standard; absent any state or industry standard, performance shall be in accordance with the customary standard or any particular standard consistent with the purpose of the contract;

What's about China?

- (ii) If price or remuneration was not clearly prescribed, performance shall be in accordance with the prevailing market price at the place of performance at the time the contract was concluded, and if adoption of a price mandated by the government or based on government issued pricing guidelines is required by law, such requirement applies;

What's about China?

- (iii) Where the place of performance was not clearly prescribed, if the obligation is payment of money, performance shall be at the place where the payee is located; if the obligation is delivery of immovable property, performance shall be at the place where the immovable property is located; for any other subject matter, performance shall be at the place where the obligor is located;

What's in China?

- (iv) If the time of performance was not clearly prescribed, the obligor may perform, and the obligee may require performance, at any time, provided that the other party shall be given the time required for preparation; (v) If the method of performance was not clearly prescribed, performance shall be rendered in a manner which is conducive to realizing the purpose of the contract; (vi) If the party responsible for the expenses of performance was not clearly prescribed, the obligor shall bear the expenses.

(C) Adhesion Contracts in American Common law and Form contracts and EU Directive 93/13 on Unfair terms

- What is an adhesion contract?
  - Not negotiated between the parties
  - Typically standard form drafted by one of the parties and usually not read by the other
  - Usually between business and consumer but it does not need to be this way. The party that is not strong enough to negotiate can be a smaller business.

Leading case

Carnival Cruise Lines, Inc. v. Shute (United States Supreme Court 1991)

Facts

- The Shutes lived in Washington state.
- They purchased tickets for a seven-day cruise on one of defendant's ships from a travel agent in Washington.
- Defendant is a Florida-based cruise line.

Facts (2)

- The agent forwarded payment to Carnival, which mailed the tickets to the Shutes.
- On the face of each ticket was following statement:

SUBJECT TO CONDITIONS OF CONTRACT ON LAST PAGES **IMPORTANT!**

PLEASE READ

CONTRACT--ON LAST PAGES 1, 2, 3"

Facts (3)

On the last pages were the following clauses:

3. (a) The acceptance of this ticket by the person or persons named hereon as passengers shall be deemed to be an acceptance and agreement by each of them of all of the terms and conditions of this Passage Contract Ticket.

Facts (4)

"8. It is agreed by and between the passenger and the Carrier that all disputes and matters whatsoever arising under, in connection with or incident to this Contract shall be litigated, if at all, in and before a Court located in the State of Florida, U.S.A., to the exclusion of the Courts of any other state or country." (emphasis added).

Facts (5)

- The Shutes boarded the ship in Los Angeles.
- While off the coast of Mexico, Mrs. Shute suffered personal injuries when she slipped on a deck mat on ship.
- The Shutes filed suit in Washington.

Decision

- The district court dismissed on jurisdictional grounds.
- The court of appeals reversed. After finding that the district court had jurisdiction, it held that the forum selection clause was invalid because
  - it was not "freely bargained for" and
  - Evidence showed that application of the clause would deprive the Shutes of their day in court because they were not physically or financially able to sue in Florida.

Decision (2)

- The Supreme Court reversed the court of appeals, upheld the clause, and ordered the case dismissed.

Reasoning

- The Shutes conceded that they had received notice of the clause. The Court did not indicate how it would have decided the case if they had not received sufficient notice.

Reasoning (2)

- The Court then considered the Shutes' argument that the clause was not enforceable because it was not freely bargained for.
- The Court rejected this argument and held that a forum selection clause could be valid even if not bargained for.
- Including a reasonable forum selection clause may be permissible for several reasons:

Reasoning (3)

- "First, a cruise line has a special interest in limiting the fora in which it potentially could be subject to suit. Because a cruise ship typically carries passengers from many locales, it is not unlikely that a mishap on a cruise could subject the cruise line to litigation in several different fora."

Reasoning (4)

- "Additionally, a clause establishing *ex ante* the forum for dispute resolution has the salutary effect of dispelling any confusion about where suits arising from the contract must be brought and defended, sparing litigants the time and expense of pretrial motions to determine the correct forum and conserving judicial resources that otherwise would be devoted to deciding those motions."

Reasoning (5)

- "Finally, it stands to reason that passengers who purchase tickets containing a forum clause like that at issue in this case benefit in the form of reduced fares reflecting the savings that the cruise line enjoys by limiting the fora in which it may be sued."

Reasoning (6)

- The Supreme Court also rejected the holding by the court of appeals that the Shutes were physically and financially unable to sue in Florida.
  - The Court stated that the evidence in the record did not support this conclusion.
  - Florida was not a "remote alien forum."
  - A heavy burden of proof to set aside a clause on grounds of inconvenience exists.

Reasoning (7)

- Finally, the Court held that forum selection clauses were subject to judicial scrutiny for "fundamental fairness".

Reasoning (8)

- However, there was no evidence that the cruise line included the clause to discourage passengers from pursuing legitimate claims.
  - Florida was a reasonable forum because the cruise line was located there.
  - There was no evidence of fraud or overreaching.
  - The Shutes had ample notice of the clause and could have rejected the contract.

Administrative Regulation

Federal Trade Commission, Credit Practices Rule, 49 Fed. Reg. 7740 (1984) (codified in 16 C.F.R. pt. 444.)

Federal Trade Commission
Credit Practices Rule

- The US Federal Trade Commission (FTC) has jurisdiction to regulate unfair and deceptive acts or practices in commerce.
- Effective March 1, 1985, the FTC adopted a "Credit Practices Rule" that outlawed certain contractual provisions that the FTC found unfair to consumers.

FTC Rule (2)

- The Rule applies to consumer credit contracts offered by finance companies, retailers (such as auto dealers and furniture and department stores), and credit unions for any personal purpose except to buy real estate.
- Banks and Savings and Loans are subject to to similar rules issued by their regulatory agencies.

FTC Rule (3)
Prohibited Contractual Provisions

- *Confession of Judgment or Cognovit clauses*. The rule prohibits contractual provisions that require consumers to give up their right to notice of a lawsuit, to present their case in court, or to hire an attorney.
- *Waivers of Exemptions*. Many states exempt personal belongings up to a certain dollar amount from execution of judgment. The rule generally prohibits contractual provisions that waive such exemptions.

FTC Rule (4)
Prohibited Contractual Provisions

- *Wage Assignments*. The rule prohibits contractual provisions in which the consumer agrees in advance to wage deductions if the consumer defaults on the debt, unless the consumer can cancel the agreement at any time.

FTC Rule (5)
Prohibited Contractual Provisions

- *Household goods security*. The rule prohibits creditors from using household goods as security unless the consumer borrowed money to purchase such an item.
- *Required notices to cosigners*. The rule requires specific notices be given to cosigners.

FTC Rule (6)
Prohibited Contractual Provisions

- *Limitations on assessment of late charges.* Creditors are permitted to assess late charges but they may not assess late charges on late charges (pyramiding).

FTC Rule (7)

- The rule may be enforced directly by the FTC. Courts may impose fines of up to $10,000 for each violation and enjoin the unlawful practice.
- In addition, most states have "little" FTC acts, which allow consumers to bring suit for treble damages plus attorney fees.
- http://www.ftc.gov/bcp/conline/pubs/buspubs/complcred.htm

European Approach

- Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts

Article 3

1. A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.

European Approach (2)

2. A term shall always be regarded as not individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract.

European Approach (3)

- The fact that certain aspects of a term or one specific term have been individually negotiated shall not exclude the application of this Article to the rest of a contract if an overall assessment of the contract indicates that it is nevertheless a pre-formulated standard contract.
- Where any seller or supplier claims that a standard term has been individually negotiated, the burden of proof in this respect shall be incumbent on him.

European Approach (4)

3. The Annex shall contain an indicative and non-exhaustive list of the terms which may be regarded as unfair.

The annex lists 17 types of clauses that may be considered to be unfair.

European Approach (5)

(i) irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract;

European Approach (6)

(q) excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract.

European Approach (7)

Whereas, for the purposes of this Directive, assessment of unfair character shall not be made of terms which describe the main subject matter of the contract nor the quality/ price ratio of the goods or services supplied; whereas the main subject matter of the contract and the price/quality ratio may nevertheless be taken into account in assessing the fairness of other terms;

European Approach (8)

whereas it follows, inter alia, that in insurance contracts, the terms which clearly define or circumscribe the insured risk and the insurer's liability shall not be subject to such assessment since these restrictions are taken into account in calculating the premium paid by the consumer;

Comments on the European Approach

- The EU uses more of a regulatory than judicial approach to defining unfair terms than is the case in the US.
  - EU Directive
  - National legislation on Unfair terms
- EU places much more weight on individual negotiation than does the US.
- EU uses the concept of imbalance as a broad definition of unfairness. US tends to focus more on commercial reasonableness.

Comments on EU Approach (2)

- Enforcement procedures in EU seem more diverse than in US, particularly development of representative consumer organizations that are authorized to bring suit seeking a declaration that unfair terms are unenforceable.

And China?

- **Article 39 Standard Terms; Duty to Call Attention**

  Where a contract is concluded by way of standard terms, the party supplying the standard terms shall abide by the principle of fairness in prescribing the rights and obligations of the parties and shall, in a reasonable manner, call the other party's attention to the provision(s) whereby such party's liabilities are excluded or limited, and shall explain such provision(s) upon request by the other party. Standard terms are contract provisions which were prepared in advance by a party for repeated use, and which are not negotiated with the other party in the course of concluding the contract

And China?

- **Article 40 Invalidity of Certain Standard Terms**

  A standard term is invalid if it falls into any of the circumstances set forth in Article 52 and Article 53* hereof, or if it excludes the liabilities of the party supplying such term, increases the liabilities of the other party, or deprives the other party of any of its material rights.

*invalidity grounds applying to all contracts

And China?

- **Article 41 Dispute Concerning Construction of Standard Term**
- In case of any dispute concerning the construction of a standard term, such term shall be interpreted in accordance with common sense. If the standard term is subject to two or more interpretations, it shall be interpreted against the party supplying it. If a discrepancy exists between the standard term and a non-standard term, the non-standard term prevails.

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(D) Parol Evidence Rule

How the Rule Works

- Concept of a full integration
  - Writing that parties intent to be both a final and complete expression of their agreement
- Example:
  - Merger of two companies
  - Represented by counsel
  - Lengthy negotiations
  - Signed written agreement
  - Contains merger clause

How the Rule Works (2)

- Rule prohibits introduction of evidence that contradicts or supplements the written agreement.
- Rule permits introduction of evidence to explain the meaning of the agreement.

Exceptions to Parol Evidence Rule

- Subsequent agreements
- Agreement subject to oral condition to its effectiveness
- Evidence offered to show agreement invalid because of fraud, duress, etc.
- Right to equitable relief, such as reformation
- "Collateral" agreements

Application of Parol Evidence Rule is stricter when contract contains a merger clause

- Example of merger clause:

  "This Agreement constitutes the entire Agreement between the Parties with respect to the subject matter hereof and supersedes and replaces all prior or contemporaneous understandings or agreements, written or oral, regarding such subject matter."

Leading Cases

Mitchell v. Lath (New York 1928)

Facts

- Mitchell entered into a contract to buy Lath's farm for $8400 to be used as a summer vacation home.
- The contract was reduced to writing and appeared to be complete.
- Mitchell asserted, however, that defendants had orally agreed to remove an unsightly ice house from adjoining property.
- Defendants refused, and Mitchell sued for specific performance.

Decision

- For defendants, holding oral agreement unenforceable under parol evidence rule.
- Agreement did not contradict the writing, but it added an obligation to the obligations imposed on the defendants by the writing.
- When a writing setting for a contract appears to be complete on its face, it may not be contradicted or supplemented by additional obligations that relate to same subject matter.

Current US law

- Both general contract law and the UCC continue to recognize the parol evidence Rule.
  - Restatement (2d) Contracts §209 and following
  - UCC §2-202
- Both Restatement and UCC parol evidence rule subject to numerous exceptions

COP, COD and TU and the Parol Evidence Rule

- **How they act?**
  - **UCC 2-202 (Final Written; Expression: Parol or Extrinsic Evidence)**

    Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein **may not be contradicted** by evidence of any prior agreement or of a contemporaneous oral agreement, but **may be explained or supplemented**: …
- (1) by course of dealing or usage of trade (Section 1-205) or by course of performance (Section 2-208)

Example in case law

- *Nanakuli Paving and Rock Co. v. Shell Oil Co., Inc.* (9th Cir. 1981)

Is there a Parol Evidence Rule in Civil Law?

- Yes, and quite strict.
- Let’s see some examples.

Is there a Parol Evidence Rule in Civil Law?

French Civil Code

Of Testimonial Proof.

***Article* 1341.**

An act must be made before notaries or under private signature, respecting all things exceeding the sum or value of one hundred and fifty francs, even in the case of voluntary deposits; and no proof can be received by witnesses against or beyond what is contained in such acts, nor touching what shall be alleged to have been said before, at the time of or subsequently to such acts, although there may be question of a sum or value less than 150 francs; The whole without prejudice to what is prescribed in the laws relative to commerce.

Is there a Parol Evidence Rule in Civil Law?

Italian Civil Code

Article 2721 Admissibility: value limits

Witnesses are not admissible in evidence to prove contracts when the value of their objects exceeds Lire 5,000.

The judge, however, can allow the witness beyond the above said limit, considering the type of parties, the nature of the contract and any other circumstance.

Is there a Parol Evidence Rule in Civil Law?

- **Article 2722 Further terms or terms in contradiction of a written document**

  Witness evidence is not admissible if its object are further terms or terms in contradiction of a written document, if it is alleged that the agreement (on those terms) is anterior or contemporaneous (to the document).

Is there a Parol Evidence Rule in Civil Law?

- **•Article 2723 Terms subsequent to the execution of the document**

  If it is alleged that after the execution of a document parties agreed on a further term or on a term in contradiction to the content of the document, the judge can allow the witness only if considering the type of parties, the nature of the contract and any other circumstances it is probable that parties made verbal changes or modifications.

Is there a Parol Evidence Rule in Civil Law?

- **Art. 2724 Exceptions to the forbiddance of witness evidence**

  The witness evidence is always admissible:
  - when there is a writing whatsoever: “writing” is any writing coming from the person against whom the action is brought or one of his agents, that makes probable the alleged fact;
- - when for the party it was morally or materially impossible to acquire a written evidence;
  - when the party has, without guilt, lost the document that was his evidence .

Is there a Parol Evidence Rule in Civil Law?

- **Article 2725 Transactions for which a writing is requested for evidence purpose or for validity.**

  When, by law or because of agreement of the parties, a contract must be proved with a writing, the witness evidence is admissible only in the case provided by no. 3 of the preceding article.

  The same rule applies when the writing is required for the validity (of the contract).

- **Article 2726 The proof of payment or of renunciation to credit**

  The evidence rules provided for the contracts applied also to the proof of payment or of renunciation to credit.

International documents

- CISG, international equivalent of UCC. Arts. 8 (3), 6, 11
- UNIDROIT Principles Arts. 1.5, 2.1.17
- European Principles Art. 2:105

CISG Art. 8(3)

(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.

CISG Art. 11

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

CISG Arts. 6

- Art. 6:

  The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.

  Under Art. 6 may parties create a parol evidence rule by contract?

UNIDROIT Principles 2.1.17

Merger clauses

A contract in writing which contains a clause indicating that the writing completely embodies the terms on which the parties have agreed cannot be contradicted or supplemented by evidence of prior statements or agreements. However, such statements or agreements may be used to interpret the writing.

UNIDROIT Principles Art. 1.5

Exclusion or modification by the parties

The parties may exclude the application of these Principles or derogate from or vary the effect of any of their provisions, except as otherwise provided in the Principles.

European Principles Art. 2:105(1)

Merger Clause

(1) If a written contract contains an individually negotiated clause stating that the writing embodies all the terms of the contract (a merger clause), any prior statements, undertakings or agreements which are not embodied in the writing do not form part of the contract.

European Principles Art. 2:105(2)

(2) If the merger clause is not individually negotiated it will only establish a presumption that the parties intended that their prior statements, undertakings or agreements were not to form part of the contract. This rule may not be excluded or restricted.

European Principles Art. 2:105(3), (4)

(3) The parties' prior statements may be used to interpret the contract. This rule may not be excluded or restricted except by an individually negotiated clause.

(4) A party may by its statements or conduct be precluded from asserting a merger clause to the extent that the other party has reasonably relied on them.

Analysis of US and International Approaches

- US has parol evidence rule that applies to all transactions, both between merchants and between merchants and consumers, but riddled with many exceptions.
- International law would allow enforceable merger clause in commercial transactions—CISG and UNIDROIT Principles.

Analysis of US and International Approaches (2)

- European Contract Principles, which would not be limited to commercial contracts, would impose greater limitations on merger clause, depending on whether individually negotiated and on whether there has been reliance on statements.
  - Query: When is a clause individually negotiated?

(E) Good Faith

Legal systems generally agree that the law of contracts must ensure that contractual arrangements generally conform to the requirements of good faith. But how?

How to pursue “good faith”

- But that is true only in general because:
  - American law has expressly adopted good faith in the Uniform Commercial Code and in the Restatement (Second) of Contracts and …
  - in Civil Law, besides the general principle, good faith requirements have found their way into a number of more specific institutions, such as fraud and mistake as defects of consent, latent defects in sale, duties of loyalty and co-operation in the law of mandate (agency).

Good faith in Common Law

- Good faith has been characterized as
  - "a fundamental principle derived from the rule pacta sunt servanda, and other legal rules, distinctively and directly related to honesty, fairness and reasonableness, the application of which is determined at a particular time by the standards of honesty, fairness and reasonableness prevailing in the community which are considered appropriate for formulation in new or revised legal rules." (Litvinoff, Saul, "Good Faith", (1997) 71 *Tulane Law Review 1645-1674).*

Leading Case

Locke v. Warner Bros. Inc.,

(California Court of Appeals 1997)

Facts

- In 1975 Sandra Locke and Clint Eastwood began a romantic relationship during the filming of the movie *Outlaw Josey Wales.*
- In 1988 the relationship deteriorated, and in 1989 Eastwood ended it.
- Locke brought a palimony suit against Eastwood, which was settled in 1990.

Facts (2)

- In connection with the settlement Eastwood agreed to assist Locke in obtaining a development deal with Warner Bros.
- In 1990 Locke entered into a development contract with Warner Bros.

Facts (3)

- The contract had two parts.
  - Part 1 called for Warner to pay Locke $250,000 per year for three years for a "non-exclusive first look deal" on any films she was interested in developing before submitting them to another studio.
  - Part 2 called for a $750,000 "pay or play" directing deal.

Facts (4)

- Unknown to to Locke, Eastwood had agreed to reimburse Warner Bros. for its payments to Locke.
- Warner Bros. did not develop any of Locke's films or use her directing services.
- Locke subsequently learned about the side agreement between Eastwood and Warner, and she brought suit against Warner.

Decision

- On Locke's tort claim for breach of the duty of good faith and fair dealing,
  - The trial court found no liability because the contract gave Warner the right not to use Locke's services.
  - The court of appeals reversed.

Decision (2)

- The court held that when a contract confers a discretionary right on a party, the party must exercise that right in good faith.
- Locke's evidence showed the Warner had failed to exercise its discretion but had made up its mind to categorically reject her proposals.

Good Faith under US Law

- Restatement (2d) of Contracts §205
- UCC §1-304, 1-201(20)

Restatement (2d) of Contracts §205

Duty of Good Faith and Fair Dealing

Ever contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.

UCC §1-304 (rev. 2001)

Obligation of Good Faith

Every contract or duty within [the Uniform Commercial Code] imposes an obligation of good faith in its performance and enforcement.

UCC §1-201(20) (rev. 2001)

Definition of good faith

(20) "Good faith," except as otherwise provided in Article 5, means honesty in fact and the observance of reasonable commercial standards of fair dealing.

And in Civil law?

History

- Good faith is very ancient in Civil Law and has always played a major role
- - in late Roman law with the “exceptio doli” where “dolus” was not so much personal misconduct but an injustice or iniquity that would flow if the action was allowed to succeed. The “exceptio doli” gave the judge discretion to decide according to justice.

And in Civil law?

- in Middle Ages, where bona fide commonly coincided with “aequitatis”
- In the lex mercatoria, where good faith means flexibility, convenience and informality.
- In the old German law, where good faith was named “True and Glauben”.

Current good faith principles in Civil law: France and Italy

- **French Code Article 1134**

  Agreements legally formed have the force of law over those who are the makers of them. They cannot be revoked except with their mutual consent, or for causes which the law authorizes.

  They must be performed with good faith.

- **French Code Article 1135**

  Agreements bind not only as to what is expressed therein, but further as regards all the consequences which equity, usage, or law attribute to an obligation by its nature.

Current good faith principles in Civil law: France and Italy

- **Italian Code Article 1366 Interpretation according to good faith**

  A contract must be interpreted according to good faith.

Examples of good faith in Civil law: Germany

Section 157 Interpretation of contracts

Contracts are to be interpreted as required by good faith, taking customary practice into consideration.

Section 242 BGB Performance in good faith

An obligor has a duty to perform according to the requirements of good faith, taking customary practice into consideration.

Section 242 BGB in the interpretation of the German courts 1/4

- Section 242 BGB is a good example to make an important point on Civil law.
- If you know the Civil code provisions, you still cannot say that you can manage the law of that country. Why? Because the provisions are interpreted by courts and through the interpretation, new "rules" are practically created. Even if, formally only statutes are the law, the way in which courts apply statutes matters.

Section 242 BGB in the interpretation of the German courts 2/4

- Section 242 BGB specifies the way in which performance has to be rendered (i.e. according to good faith). In the interpretation of courts, Section 242 stands for the following:
- (i) it generates many ancillary duties under the contract: duties of information, documentation, cooperation, protection, disclosure, etc.

Section 242 BGB in the interpretation of the German courts 3/4

- (ii) it limits the exercise of contractual rights (e.g, it implies the doctrine of *venire contra factum proprium*; it forbids to give a thing and then to ask it back immediately; it forbids someone to rely on a thing that has been acquired dishonestly; it precludes the possibility to act unreasonably considering the interest of the other party or to react disproportionately; it may trigger a loss of right for lapse of time, even before the relevant period of prescription has elapsed)

Section 242 BGB in the interpretation of the German courts 4/4

- (iii) it allows courts to interfere in contractual relationship with correction is necessary (e.g. *doctrine of rebus sic stantibus* or collapse of underlying basis of transaction).

Are you interested in further details about good faith in Civil Law?

- See Reinhard Zimmerman and Simon Whittaker, *Good Faith in European Contract Law*, (eds), Cambridge, Cambridge University Press, 2000, 653-701

And China?

- Good faith is also important in Chinese Contract Law.
- **Article 6 Good Faith**

  The parties shall abide by the principle of good faith in exercising their rights and performing their obligations.

International documents

- CISG, Art. 7
- UNIDROIT Principles, Art. 1.7
- European Principles, Arts. 1:201, 1:102, 1:106

CISG Art. 7(1)

(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

UNIDROIT Principles Art. 1.7

Good Faith and Fair Dealing

(1) Each party must act in accordance with good faith and fair dealing in international trade.

(2) The parties may not exclude or limit this duty.

See also Art. 1.8 on inconsistent behavior and Art.4.8 on supplying an omitted term.

European Principles Art. 1:201

Good Faith and Fair Dealing

(1) Each party must act in accordance with good faith and fair dealing.

(2) The parties may not exclude or limit this duty.

European Principles (2)

- Good faith is mentioned in numerous other European Principles, such as the following:
- Arts. 1:102 and 1:106, good faith in interpretation,
- 1:202, duty to co-operate
- 2:301, negotiations contrary to good faith

Comments on US and International Law

- Both US and international law clearly recognize a concept of good faith.
- Both would look to general commercial standards in determining whether the duty has been breached.
- Whether there are significant differences in application of the concept requires detailed comparative study.
- However, the European concept of liability for failure to negotiate in good faith probably goes beyond current US law.

VI

Defenses and grounds for non performance

(selected)

Void

- void, *adj. (14c) 1. Of no legal effect; null. • The distinction between void and voidable is often of great practical importance. Whenever technical accuracy is required, void can be properly applied only to those provisions that are of no effect whatsoever — those that are an absolute nullity. — void, avoid, vb. — voidness, n.*
- [Black's Law Dictionary, 9th ed. 2009]

Voidable

- voidable, *adj. (15c) Valid until annulled; esp., (of a contract) capable of being affirmed or rejected at the option of one of the parties. • This term describes a valid act that may be voided rather than an invalid act that may be ratified. — Also termed avoidable.*
- [Black's Law Dictionary, 9th ed. 2009]

- **See also:**
  - **Restatement (Second) of Contracts Section 7**

  A voidable contract is one when one or more parties have the power, by a manifestation of election to do so, [1] to avoid the legal relations created by the contract, or [2] by ratification of contract to extinguish the power

Common Law – Civil Law: a different approach to defenses

- Common Law, looking under an "action" perspective", speaks more about defenses or grounds for non performance. They are reasons why a court would not enforce an otherwise perfect contract. If a party does not perform when a defense exists, this party does not commit a breach.
- Civil Law, looking under "substantive right" perspective, speaks more about "voidess" and "voidability" of contracts. A void contract does not produce effects (therefore it does not give rise to rights and duties).
  - A void contract cannot be ratified.
  - A voidable contract produces effects until it is pronounced void by a court upon request of the affected party.

Common Law: Defenses

- There two basic policies on which they are based:
- - involuntariness of the agreement
- -public policy

Defenses, a list (only) 1 / 2

- INCAPACITY
  - mental illness
  - infancy
  - intoxication
  - MISTAKE (slides available upon interest. Write to info@nathancrystal.com)
  - Mutual or bilateral
  - Unilateral
- DURESS

Defenses, a list (only) 2/2

- MISREPRESENTATION
- UNCONSCIONABILITY (see later)
- PUBLIC POLICY (see later)

- Public policy is the only defense that gives rise to a void contract → no possibility of ratification

PUBLIC POLICY

Has a limited role in American contract law. It is very rare that a contract is held unenfoceable because of public policy.

In re Matter of Baby M (Supreme Court of New Jersey, 1988)

Deals with a surrogacy contract

FACTS

- The Sterns, married couple, want baby
- Instead of adoption, they choose surrogate
- Through an infertility center, the Sterns meet Mrs. Whitehead, willing surrogate.

In re Matter of Baby M.

- Parties entered into a surrogacy contract where Mr. Stern promises to pay $10k to Whitehead and Whitehead promised to be artificially inseminated with William Stern's sperm, to give birth and to take all actions needed to “terminate” her parental rights.

In re Matter of Baby M.

- Whitehead delivered Baby M. and gave the baby to the Sterns
- Sterns give Baby M. to Whitehead "for one week"
- Whitehead refused to give Baby M. back to the Sterns and to terminate maternal rights
- Sterns sue Whitehead for breach of contract

In re Matter of Baby M.

- Trial Court's Decision: Sterns win. The court found surrogacy K valid and enforceable. Parental rights of Whitehead terminated + Mrs. Stern allowed to adopt Baby M.
- Whitehead appeal.

In re Matter of Baby M.

Issue

- Despite otherwise valid K supported by bargained-for consideration, is Surrogacy K invalidated (or void) as against NJ law and public policy?

In re Matter of Baby M.

DECISION

YES – K for services of surrogate mother (whose parental right are terminated) “conflicts with law and public policy of NJ”.

- K is void as against the public policy

In re Matter of Baby M.

DECISION

Even if you don't have a statute, contract can be invalidated on the basis of free-floating public policy.

- Free floating public policies ("non-Statute-Based Policies to Protect Public Interest") that would be compromised by enforcing the contract:
- (i) protecting the best interest of the child
- (ii) having child raised by both natural parents
- (iii) maintaining equality of natural parents' right,
- (iv) preventing exploitation of poor and woman
- (v) preventing human commodification ("baby-selling").

In the re Matter of Baby M.

DECISION

Court have to:

- Identity interests for enforcement (i.e. justified expectations, forfeiture, public interests in enforcement)

-Identify public policies against enforceability

-weigh interest for enforcement and public policy against its enforcement.

In the re Matter of Baby M.

DECISION

- The Supreme Court of New Jersey invalidated surrogacy contracts based on against public policy but in dictum affirmed the trial court's "best interest of the child" analysis.
- The Supreme Court remanded the case to family court that, on remand, awarded Stern custody and Whitehead visitation rights.

In re Matter of Baby M.

PROLOGUE

(That does not change the legal principle)

After reaching the age of majority in March 2004, the former “Baby M” legally terminated Whitehead's parental rights and formalized Elizabeth Stern's maternity through adoption proceedings

In re Matter of Baby M.

What is the importance of the case for us?

A surrogacy contract is unenforceable because of public policy.

Current Law: Restatement (Second) of Contracts §178

- **Restatement (Second) of Contracts §178**

  (1) A promise or other term of an agreement is unenforceable on grounds of public policy if [i] legislation provides that it is unenforceable or [ii] the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms.

Current Law: Restatement (Second) of Contracts §178

- (2) In weighing the interest in the enforcement of a term, account is taken of (a) the parties' justified expectations, (b) any forfeiture that would result if enforcement were denied, and (c) any special public interest in the enforcement of the particular term.

Current Law: Restatement (Second) of Contracts §178

- (3) In weighing a public policy against enforcement of a term, account is taken of (a) the strength of that policy as manifested by legislation or judicial decisions, (b) the likelihood that a refusal to enforce the term will further that policy, (c) the seriousness of any misconduct involved and the extent to which it was deliberate, and (d) the directness of the connection between that misconduct and the term.

Current Law

- In other words:
- There are two situations of unenforceability due to public policy:
  - (1) When there is a statute that provides that a certain contractual term is unenforceable because of public policy, which is rare. When? See comment (a) to Restatement (Second) of Contract 178
  - (2) When the court makes a balance between the public policy and the interest for enforcement. How? See comment (b) and (c) to Restatement (Second) of Contract 178

Comment (a) to Restatement (Second) of Contract 178

- *a. Legislation providing for unenforceability.* Occasionally, on grounds of public policy, legislation provides that specified kinds of promises or other terms are unenforceable. Whether such legislation is valid and applicable to the particular term in dispute is beyond the scope of this Restatement. Assuming that it is, the court is bound to carry out the legislative mandate with respect to the enforceability of the term. But with respect to such other matters as the enforceability of the rest of the agreement (§§ 183, 184) and the possibility of restitution (Topic 5), a court will be guided by the same rules that apply to other terms unenforceable on grounds of public policy . . . , absent contrary provision in the legislation itself . . .. The term "legislation" is used here in the broadest sense to include any fixed text enacted by a body with authority to promulgate rules, including not only statutes, but constitutions and local ordinances, as well as administrative regulations issued pursuant to them. It also encompasses foreign laws to the extent that they are applicable under conflict of laws rules.

Comment (b) to Restatement (Second) of Contract 178

- *b. Balancing of interests*. Only infrequently does legislation, on grounds of public policy, provide that a term is unenforceable. When a court reaches that conclusion, it usually does so on the basis of a public policy derived either from its own perception of the need to protect some aspect of the public welfare or from legislation that is relevant to that policy although it says nothing explicitly about unenforceability. See §179. In some cases the contravention of public policy is so grave, as when an agreement involves a serious crime or tort, that unenforceability is plain. In other cases the contravention is so trivial as that it plainly does not preclude enforcement. In doubtful cases, however, a decision as to enforceability is reached only after a careful balancing, in the light of all the circumstances, of the interest in the enforcement of the particular promise against the policy against the enforcement of such terms. The most common factors in the balancing process are set out in Subsections (2) and (3). Enforcement will be denied only if the factors that argue against enforcement clearly outweigh the law's traditional interest in protecting the expectations of the parties, its abhorrence of any unjust enrichment, and any public interest in the enforcement of the particular term.

Comment (c) to Restatement (Second) of Contract 178

c. Strength of policy. The strength of the public policy involved is a critical factor in the balancing process. Even when the policy is one manifested by legislation, it may be too insubstantial to outweigh the interest in the enforcement of the term in question. . . . A court should be particularly alert to this possibility in the case of minor administrative regulations or local ordinances that may not be indicative of the general welfare. A disparity between a relatively modest criminal sanction provided by the legislature and a much larger forfeiture that will result if enforcement of the promise is refused may suggest that the policy is not substantial enough to justify the refusal.

And Civil Law?

- Civil Law usually speaks of "ordre public" (French term that is used also generally in many Civil law countries). Synthetically, it is the core values of the system that cannot be derogated by the parties. A foreign decision that would be inconsistent with those values could not be enforced. For a more precise definition see the "dictioner de droit prive'" ("http://www.dictionnaire-juridique.com).

Mandatory Rules

- Or lois d'application immédiate or
- "Leggi di applicazione necessaria" OR
- *"Leggi imperative"*
- Ordre public is a narrower concept than "lois d'application immédiate," which are laws of mandatory application that cannot be derogated by agreement, but which are not necessarily reflective of the core values of society.

Unconscionability

- What is unconscionability?

Leading Case

Williams v. Walker-Thomas Furniture Co.,

(United States Court of Appeals for the District of Columbia 1965)

Facts

- Ms. Williams was a low-income resident of Washington, DC.
- She purchased a number of household items form the defendant furniture store from 1957-1962.

Facts (2)

The contracts had the following features

- standard form documents prepared by the defendant.
- payments in installments
- title retention to each of the items with the defendant until all of them were paid for.
- payments were to be credited pro rata to each of the items.

Facts (3)

- As a result
  - Ms. Williams did not own any of the items until she paid for them all.
  - The company could repossess all items if she failed to make payment on any of them.
  - Whenever she bought a new item, it became subject to repossession for the debt of all others.

Facts (4)

- In 1962 Ms. Williams purchased a stereo system at a cost of $514.95.
- Shortly thereafter she defaulted and defendant attempted to repossess all items she had purchased since 1957.
- At that time her account balance was $164; she had purchased items totaling $1800.

Decision

- The lower court condemned the defendant's conduct, but concluded that it lacked the power to refuse enforcement.
- The court of appeals disagreed, holding that a court could declare a contract unenforceable if it was unconscionable.

Decision (2)

- The court defined unconscionability as follows:

  "Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party."

Decision (3)

- To determine whether a lack of meaningful choice exists, the court will examine factors, including
  - Whether gross inequality of bargaining power exists
  - Manner in which contract was entered into, such as use of fine print and sales practices.
- To determine whether contract terms are unreasonably favorable, the court will consider those terms in light of general commercial background and the needs of the particular trade or industry.

Current US Law

- Current US recognizes unconscionability as a defense against enforcement of a contact.
  - Restatement (2d) of Contracts §208
  - UCC §2-302

UCC §2-302(1)

Unconscionable Contract or Term

(1) If the court as a matter of law finds the contract or any term of the contract to have been unconscionable at the time it was made, the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable term, or it may so limit the application of any unconscionable term as to avoid any unconscionable result.

UCC §2-302(2)

(2) If it is claimed or appears to the court that the contract or any term thereof may be unconscionable, the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose, and effect to aid the court in making the determination.

- The Restatement section is substantially identical to UCC 2-302(1).

Comments about US unconscionability doctrine 1/2

- Unconscionability is never a question of fact.
- The unconscionability issue never reaches the jury. If there are factual questions, they are decided by the court.

Comments about US unconscionability doctrine 2/3

- In consumer cases, various statutes provide substantive and disclosure protection to consumers, although the unconscionability doctrine remains available if statutory protection is not available.
- In commercial cases use of the doctrine is rare because the factors showing unconscionability are more difficult to establish.

Comments about US unconscionability doctrine 3/3

- A recent area of litigation involves clauses requiring disputes to be submitted to arbitration. On occasion courts have declared such clauses unconscionable when the costs of arbitration imposed on the consumer or employee effectively deprive that person of a hearing before a tribunal.
- According to most courts, unconscionability is not the basis of a tort action (unlike fraud or nondisclosure) although it might be the basis of a statutory claim for unfair trade practices.

Action rescissionis at Civil law

ITALY

The rescission of the contract can be asked for problems that happened at the execution of the contract:

- because the K has been executed in an emergency situation of one of the parties (article 1447)*
- because of disparity of conditions (article 1448)

*we are not aware of any decision based on this rule since 1942]

Action rescissionis at Civil law

Prima facie case for rescissions for emergency situations:

1) one of the parties or a third party was in peril when the contract was formed;
2) Unfairness of the contract terms

Prima facie case for rescissions for disparity of conditions:

1) A big disproportion between the performance of the two parties such as the value of the performance of one of the parties is at least the half of the value of the performance of the other party.
2) The affected party was in a state of necessity and the other party took advantage of this condition.

International and European Law

- CISG (does not cover contract invalidity, see above)
- UNIDROIT Principles, Arts. 3.10, 2.1.20. See also 7.1.6 (exemption clauses)
- European Principles Arts. 4:109, 4:110

UNIDROIT Principles Art. 3.10(1)

Gross disparity

(1) A party may avoid the contract or an individual term of it if, at the time of the conclusion of the contract, the contract or, to term unjustifiably gave the other party an excessive advantage. Regard is to be had, among other factors

UNIDROIT Principles Art. 3.10(1)(a), (b)

(a) the fact that the other party has taken unfair advantage of the first party's dependence, economic distress or urgent needs, or of its improvidence, ignorance, inexperience or lack of bargaining skill, and

(b) the nature and purpose of the contract.

UNIDROIT Principles Art. 3.10(2), (3)

(2) Upon the request of the party entitled to avoidance, a court may adapt the contract or term in order to make it accord with reasonable commercial standards of fair dealing.

(3) A court may also adapt the contract or term upon the request of the party receiving notice of avoidance, provided that that party informs the other party of its request promptly after receiving such notice and before the other party has reasonably acted in reliance on it. The provisions of Article 3.13(2) apply accordingly.

UNIDROIT Principles Art. 2.1.20

Surprising Terms

(1) No term contained in standard terms which is of such a character that the other party could not reasonably have expected it, is effective unless it has been expressly accepted by that party.

(2) In determining whether a term is of such a character regard shall be had to its content, language and presentation.

European Principles Art. 4:109(1)

Excessive Benefit or Unfair Advantage

(1) A party may avoid a contract if, at the time of the conclusion of the contract:

(a) it was dependent on or had a relationship of trust with the other party, was in economic distress or had urgent needs, was improvident, ignorant, inexperienced or lacking in bargaining skill, and

European Principles Art. 4:109(1)(b)

(b) the other party knew or ought to have known of this and, given the circumstances and purpose of the contract, took advantage of the first party's situation in a way which was grossly unfair or took an excessive benefit.

[(2), (3) provide for judicial adaptation similar to the UNIDROIT Principles.]

European Principles Art. 4:110(1)

Unfair Terms Not Individually Negotiated

(1) A party may avoid a term which has not been individually negotiated if, contrary to the requirements of good faith and fair dealing, it causes a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of that party, taking into account the nature of the performance to be rendered under the contract, all the other terms of the contract and the circumstances at the time the contract was concluded.

European Principles Art. 4:110(2)

(2) This Article does not apply to:

(a) a term which defines the main subject matter of the contract, provided the term is in plain and intelligible language; or to

(b) the adequacy in value of one party's obligations compared to the value of the obligations of the other party.

Comments on US and International Law on Unconscionability

- In form at least, US and International Law are significantly different.
- US law has a single doctrine of unconscionability. Most courts require a combination of defects in the bargaining process and unfair terms for the doctrine to apply.

Comments (2)

- International and European law appears to recognize two distinct situations:
  - Substantive disparity in the bargain
  - Unfair or surprising terms
- By providing relief in either situation, rather than requiring a combination as under US law, relief is probably more readily available under International and European Principles.

Impossibility, impracticability and frustration of purpose

We will deal now with difficulties of performance that arise after the formation of the contract.

Common law answers to these difficulties with the doctrines of

- Impossibility/Impracticability and
- frustration of purpose.

We will see that Civil law deals with these issues in very similar terms.

A. Impossibility/Impracticability

- The common law developed the concept that a party to a contract could avoid enforcement if performance was impossible because of
  - Death of person necessary for performance
  - Destruction of subject matter of contract
- Over time English and American courts expanded the impossibility doctrine to situations in which the goal of the contract was frustrated even though performance was not impossible.

Leading Case

Mineral Park Land Co. v. Howard (California 1916)

Facts

- The defendant contractor had agreed to purchase and extract from plaintiff's land, at fixed prices (varying with the amounts taken), all the gravel required for the construction of a concrete bridge.
- The defendant procured some of the gravel used in the bridge from another source.
- The plaintiff sued for defendant's failure to take all of its gravel requirements from plaintiff's land.

Facts (2)

- The defendant showed that it had removed from plaintiff's land all the gravel that was above water-level.
- Removal of that which lay below water-level would have entailed not only a different means of extraction, but 10 to 12 times as great a cost.

Decision

- The court held that the extreme increase in the cost of extraction justified the defendant's nonperformance.
- Even though performance clearly was not literally impossible, it was sufficiently different from what the parties had both contemplated at the time of contracting as to be "impracticable."

Current US law

- Current US law recognizes a number of related doctrines
  - Impossibility because of death of a specific person or destruction of a specific thing necessary for performance of the contract. Restatement (2d) §§262, 263
  - Frustration of purpose, Restatement (2d) §264
  - Impracticability of performance, Restatement (2d) §261.

Restatement (2d) §261

Discharge by Supervening Impracticability

Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.

UCC §2-615

Excuse by Failure of Presupposed Conditions

Except to the extent that a seller may have assumed a greater obligation and subject to Section 2-614:

UCC §2-615(a)

(a) Delay in performance or nonperformance in whole or in part by a seller that complies with paragraphs (b) and (c) is not a breach of the seller's duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the nonoccurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.

UCC §2-615(b)

(b) If the causes mentioned in paragraph (a) affect only a part of the seller's capacity to perform, the seller must allocate production and deliveries among its customers but may at its option include regular customers not then under contract as well as its own requirements for further manufacture. The seller may so allocate in any manner that is fair and reasonable.

UCC §2-615(c)

(c) The seller must notify the buyer seasonably that there will be delay or nonperformance and, if allocation is required under paragraph (b), of the estimated quota thus made available for the buyer.

What's in the Civil Law?

- **French Code** – impossibility is limited to force majeure situations and chance events.
  - **Article 1148**.

    There is no ground for damages and interest, when by consequence of a superior force or of a fortuitous occurrence, the debtor has been prevented from giving or doing that to which he has bound himself, or has done that from which he was interdicted.

What's in the Civil Law?

- **Spanish Code - Article 1,156**.

  Obligations are extinguished:
- By their payment or performance.
- By the loss of the thing owed.
- By forgiveness of the debt.
- By confusion of the rights of creditor and debtor.
- By setoff.
- By novation.

What's in the Civil Law?

- **Germany**

Section 265 BGB Impossibility in case of alternative obligations

If one of the acts of performance is impossible from the beginning or if it later becomes impossible, the obligation is restricted to the other acts of performance. There is no restriction if performance becomes impossible due to a circumstance for which the party who is not entitled to the right of choice is responsible.

What's in the Civil Law?

- Chinese law also knows impossibility doctrine as force majeure exception to performance.
  - **Article 117 Force Majeure**

    A party who was unable to perform a contract due to force majeure is exempted from liability in part or in whole in light of the impact of the event of force majeure, except otherwise provided by law. Where an event of force majeure occurred after the party's delay in performance, it is not exempted from liability.

    For purposes of this Law, force majeure means any objective circumstance which is unforeseeable, unavoidable and insurmountable.

International documents

- CISG, Art. 79
- UNIDROIT Principles, Arts. 6.2.2, 6.2.3, 7.1.7
- European Principles Arts. 4:102, 6:111. See also 8:108 (Excuse due to an Impediment)

CISG Art. 79(1)

(1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.

CISG Art. 79(4), (5)

- (4) The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such nonreceipt.
- (5) Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention.

UNIDROIT Principles Art. 6.2.2

Definition of Hardship

There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished, and

UNIDROIT Principles Art. 6.2.2

(a) the events occur or become known to the disadvantaged party after the conclusion of the contract;

(b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract;

(c) the events are beyond the control of the disadvantaged party; and

(d) the risk of the events was not assumed by the disadvantaged party.

UNIDROIT Principles Art. 6.2.3(1), (2)

Effects of Hardship

(1) In case of hardship the disadvantaged party is entitled to request renegotiations. The request shall be made without undue delay and shall indicate the grounds on which it is based.

(2) The request for renegotiation does not in itself entitle the disadvantaged party to withhold performance.

UNIDROIT Principles Art. 6.2.3(3), (4)

(3) Upon failure to reach agreement within a reasonable time either party may resort to the court.

(4) If the court finds hardship it may, if reasonable,

(a) terminate the contract at a date and on terms to be fixed, or

(b) adapt the contract with a view to restoring its equilibrium.

UNIDROIT Principles Art. 7.1.7

Force Majeure

(1) Non-performance by a party is excused if that party proves that the nonperformance was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.

UNIDROIT Principles Art. 7.1.7(2), (3), (4)

(2) [deals with temporary impediment]

(3) [requirement of notice]

(4) Nothing in this article prevents a party from exercising a right to terminate the contract or to withhold performance or request interest on money due.

European Principles Art. 4:102

Initial Impossibility

A contract is not invalid merely because at the time it was concluded performance of the obligation assumed was impossible, or because a party was not entitled to dispose of the assets to which the contract relates.

European Principles Art. 6:111(1)

Change of Circumstances

(1) A party is bound to fulfill its obligations even if performance has become more onerous, whether because the cost of performance has increased or because the value of the performance it receives has diminished.

European Principles Art. 6:111(2)

(2) If, however, performance of the contract becomes excessively onerous because of a change of circumstances, the parties are bound to enter into negotiations with a view to adapting the contract or terminating it, provided that:

European Principles Art. 6:111(2)(a), (b), (c)

(a) the change of circumstances occurred after the time of conclusion of the contract,

(b) the possibility of a change of circumstances was not one which could reasonably have been taken into account at the time of conclusion of the contract, and

(c) the risk of the change of circumstances is not one which, according to the contract, the party affected should be required to bear.

European Principles Art. 6:111(3)

(3) If the parties fail to reach agreement within a reasonable period, the court may:

(a) end the contract at a date and on terms to be determined by the court ; or

(b) adapt the contract in order to distribute between the parties in a just and equitable manner the losses and gains resulting from the change of circumstances.

In either case, the court may award damages for the loss suffered through a party refusing to negotiate or breaking off negotiations contrary to good faith and fair dealing.

Let's reflect on market change

- Sometimes – especially in case of economic crisis – a party claims that market changes should be the basis of relief from contractual obligations.
- Can dramatic market changes can make performance commercially impracticable?

Let's reflect on market change

- A leading case dealing with whether a party can obtain relief from enforcement of a contract on the ground of commercial impracticability when dramatic market change makes performance substantially more expensive or substantially less valuable is Karl Wendt Farm Equipment Co. v. International Harvester Co (931 F.2d 1112 (6th Cir. 1991).

Let's reflect on market change

International Harvester v. Karl Wendt

- Wendt (plaintiff) and International Harvester Co. (defendant) entered into a contract in which Wendt was a dealer in Michigan of goods made by IH.
- Years later, there was a dramatic recession in the farm equipment market and IH had substantial losses, in the amount of approximately $1 million per day.
- IH faced the possibility of bankruptcy unless it could stop these dramatic losses.
- IH, therefore, sold its farm equipment division to a competitor (Case/Tenneco) that already had its own dealers in Michigan and Wendt was not offered a franchise.

Let's reflect on market change

- Wendt sued alleging breach of IH's Dealer Agreement
- The 6th Circuit found for the plaintiff. Reversing the trial court that had found impracticability of performance in the facts of the case, the appellate court held that impracticability of performance is a valid defense, but it was not applicable on these facts.
- In particular, the court held that to invoke impracticability you have to show a failure of a basic assumption on which the contract was based. However, stability of the market is not a valid assumption because markets are subject to dramatic changes.

Let's reflect on market change

- The 6th Circuit also denied that mutual profitability be used as the primary purpose of the contract and as a way to rescind or void the contract due to frustration of purpose. [We will see later why the Court rejected IH's frustration argument]

Let's reflect on market change

- As *International Harvester* illustrates, under common law principles and the Uniform Commercial Code relief is rarely, if ever, available because of fundamental market changes.
- International commercial law as reflected in the UNIDROIT Principles and the CISG may be somewhat more receptive to these claims, but even under these bodies of law, relief would be the exception rather than the rule.

Let's reflect on market change

- And so?
- Contracting parties who wish to protect against dramatic market changes should consider including in their contracts appropriate provisions dealing with market change. Which one?
  - Use of whereas clauses to express the parties' intent
  - Use of express conditions
  - MAC (market adverse condition) clause
  - *Force majeure* clause
  - Hardship Clauses
  - Renegotiation and adjustment clauses
  - Choice of law, forum and arbitration

Let's reflect on market change

- If you are interested in this subject matter, see:
  - Nathan M. Crystal and Francesca Giannoni-Crystal, *Contract Enforceability During Economic Crisis: Legal Principles and Drafting Solutions*, (2010), *Global Jurist*: Vol. 10 : Iss. 3 (Advances), Article 3, available at: http://www.bepress.com/gj/vol10/iss3/art3

B. Frustration of purpose

- Frustration of purpose recognized at first in coronation cases. Rental of rooms overlooking parade route. Renters could avoid K because of frustration.
    - *Krell v. Henry*, 2 K.B. 740 (1903).

Krell v. Henry, 2 K.B. 740 (1903)

FACTS

- Henry (D) contracted to use Krell's (P) flat in London to view the coronation procession of King Edward VII. Under the terms of the contract Henry was granted use of the flat for two days in exchange for 75 pounds, but the contract did not mention the purpose of Henry's use. Henry refused to honor the agreement after the King became ill and the coronation was postponed.
- Krell sued for the balance due under the contract and Henry countersued for the return of his deposit.

Krell v. Henry, 2 K.B. 740 (1903)

Holding

Performance will be excused when the purpose of a contract is frustrated by an unforeseeable supervening event and the purpose was within the contemplation of both parties when the contract was executed. A contract's purpose may be inferred from surrounding circumstances.

Frustration of purpose today

- And a modern case?

  Do you remember the case of *International Harvester*?
- The Court also reject's IH's cross appeal on other defenses, including the defense of frustration of purpose.
- Why? The court notes 3 elements for frustration: frustration of principal purpose, substantial, and basic assumption.
- The court holds that the principal purpose of this contract was establishment of the rights and duties of franchisor and dealer, not mutual profitability. The court also notes that the frustrating event was the fault of IH because it chose to sell its assets.

Frustration of purpose in Civil law

- In Civil Law, lawyers speak of presupposition when the parties, while executing the agreement, refer to an external fact, current or future, that is not expressly mentioned in the agreement but it is however the objective purpose of it.

History

- The doctrine has been elaborated by the Germans at the beginning of 1900. They spoke of *Voraussetzung* The doctrine had a subjective dimension.
- Later the doctrine has reached a more objective dimension. Lawyers started to speak of "*Geschäftsgrundlage*".

Frustration of purpose in Civil law

How presupposition is different from condition?

- A condition is a future and uncertain event from which the beginning or the termination of the effectiveness of the contract depend. The condition must be expressly inserted into the contract.
- The presupposition is substantially an unexpressed condition.

Frustration of purpose in Civil Law

Examples: Germany

Section 313 Interference with the basis of the transaction

- (1) If circumstances which became the basis of a contract have significantly changed since the contract was entered into and if the parties would not have entered into the contract or would have entered into it with different contents if they had foreseen this change,

Frustration of purpose in Civil Law

…

adaptation of the contract may be demanded to the extent that, taking account of all the circumstances of the specific case, in particular the contractual or statutory distribution of risk, one of the parties cannot reasonably be expected to uphold the contract without alteration.

Frustation of purpose in Civil Law

. . .

- (2) It is equivalent to a change of circumstances if material conceptions that have become the basis of the contract are found to be incorrect. (3) If adaptation of the contract is not possible or one party cannot reasonably be expected to accept it, the disadvantaged party may revoke the contract. In the case of continuing obligations, the right to terminate takes the place of the right to revoke.

Frustration of purpose in Civil Law

Italy.

Italian law knows the doctrine but it is not inserted in the code. It has been created by the judges as an analogy to expressed condition.

Day 4

Thursday July 20, 2011

VII

Breach and remedies

Concept of material breach

Leading Case

Jacob & Youngs, Inc. v. Kent

(New York 1921)

Facts

- The plaintiff contractor, J&Y, agreed to construct a residence for Kent.
  - For $77,000 in 1914, it must have been a show place.
- The contract called for standard pipe "of Reading manufacture."
- The plaintiff inspected the first 1000 feet of pipe, which was of Reading manufacture, but failed to examine subsequent deliveries

Facts (2)

- Between 1000 and 1500 feet of non-Reading pipe was installed, much of it in the interior of the building.
- Kent occupied the building in June 1914, but he did not learn of the contractor's failure to use Reading pipe until March 1915.

Facts (3)

- Kent's architect was unwilling to issue a certificate of completion, and Kent refused to pay the balance of the contract price, $3,483.46, until the contractor replaced the pipe.
- The contractor declined this demand because of the expense involved in removing the pipe from the building.

Facts (4)

- Instead, the contractor brought suit for the balance of the purchase price, offering to show that the installed pipe was of the same quality as Reading pipe.

Decision

- The trial court refused to consider this evidence that the installed pipe was the same quality as Reading pipe.
- The Court of Appeals reversed with instructions to enter judgment for plaintiff.

Decision (2)

- Justice Cardozo held that the contractor's failure to use Reading pipe was a breach of the contract, but he refused to hold that this justified Kent in refusing to pay the balance of the purchase price.
  - In other words, the contractor's use of non-Reading pipe was a breach of promise but not a failure of a condition to Kent's duty to pay the purchase price.

Decision (3)

- Instead, he decided that only a substantial deviation from the contract would justify Kent's refusal to pay for the work done.
- He reasoned that considerations "partly of justice and partly of presumable intention" justified the court in refusing to decree a forfeiture for minor faults.

Decision (4)

- Cardozo also held that the measure of damages for the breach would be the difference in value between the home had the Reading pipe been installed and the home with the pipe that was actually used, rather than the cost of correcting the defects.
  - This produced an award of -0- damages.

Comments on *J&Y*

- The case stands for the substantial performance doctrine.
- Under this doctrine a party's duty to performed is subject to an implied or constructive condition that the other party "substantially perform."

Comments on *J&Y*

- Cardozo also held that the doctrine would not apply if the breaching party had acted willfully or if the contract and made strict performance an express condition of the contract.

Current US Law—Constructive Conditions

- Current general US law recognizes the substantial performance doctrine of *J&Y* for constructive conditions. Restatement (2d) of Contracts §237.

Current US Law—Constructive Conditions (2)

- UCC §2-601 provides for a perfect tender rule, which allows the buyer to reject goods that fail to conform to the contract in any respect.
  - However, the perfect tender rule is subject to numerous exceptions so in practice it may not be that different from the substantial performance doctrine

Hints to US Law on Express Conditions

- Current US law in theory provides for strict performance (rather than substantial performance) of express conditions.
- Restatement (2d) of Contracts §225(1):

  "Performance of a duty subject to a condition cannot become due unless the condition occurs or its non-occurrence is excused."
- However, US law provides for excuse of express conditions on various grounds, including fairness to avoid forfeiture. Restatement (2d) §229.

Civil Law

- While Common law talks about “substantial performance of constructive condition” or “material breach”, the concept of “importance of the breach” is also known by Civil Law.
- See for example **Germany**
  - **section 281 BGB. Damages in lieu of performance for nonperformance or failure to render performance as owed**

    If the obligor has not rendered performance as owed, the obligee may not demand damages in lieu of performance if the breach of duty is immaterial.

Civil Law

Section 323 BGB Revocation for nonperformance or for performance not in conformity with the contract

(…)

If the obligor has performed in part, the obligee may revoke the whole contract only if he has no interest in part performance. If the obligor has not performed in conformity with the contract, the obligee may not revoke the contract if the breach of duty is trivial.

Reflection: trivial is "*de minimis*" or something more?

Civil Law

- Civil law, however does not name it this way, also knows the doctrine of "constructive condition". Usually Civil law speaks of "exception of default".

  ❑ **Italian Civil Code**

  – **Art. 1460 Exception of default**

  In contracts with corresponding obligations, each of the contracting parties can refuse to perform his or her own obligation, if the other party fails to perform or does not offer to perform simultaneously his or her own obligation, except different terms for the performance are agreed by the parties or result from the nature of the contract. Nevertheless, no party can refuse to perform if, with regard to the circumstances, the refusal is contrary to good faith.

Civil Law

- **Germany**

Section 323 BGB Revocation for nonperformance or for performance not in conformity with the contract

(1) If, in the case of a reciprocal contract, the obligor does not render an act of performance which is due, or does not render it in conformity with the contract, then the obligee may revoke the contract, if he has specified, without result, an additional period for performance or cure.

(2) The specification of a period of time can be dispensed with if 1. the obligor seriously and definitively refuses performance, 2. the obligor does not render performance by a date specified in the contract or within a specific period and the obligee, in the contract, has made the continuation of his interest in performance subject to performance being rendered in good time, or3.there are special circumstances which, when the interests of both parties are weighed, justify immediate revocation. (3) If the nature of the breach of duty is such that setting a period of time is out of the question, a warning notice is given instead.

Civil Law

…

(4) The obligee may revoke the contract before performance is due if it is obvious that the requirements for revocation will be met.

(5) If the obligor has performed in part, the obligee may revoke the whole contract only if he has nointerest in part performance. If the obligor has not performed in conformity with the contract, the obligee may not revoke the contract if the breach of duty is trivial.

(6) Revocation is excluded if the obligee is solely or very predominantly responsible for the circumstance that would entitle him to revoke the contract or if the circumstance for which the obligoris not responsible occurs at a time when the obligee is in default of acceptance.

International documents

- CISG Art. 49, 25
- UNIDROIT Principles Art. 7.3.1
- European Principles, Art. 8:103

CISG Art. 49

(1) The buyer may declare the contract avoided:

(a) if the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or

(b) in case of non-delivery . . .

Art. 64 on seller's right to avoid the contract is similar.

See also Art. 48 on seller's right to cure.

CISG Art. 25

A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.

UNIDROIT Principles Art. 7.3.1

Right to Terminate the Contract

(1) A party may terminate the contract where the failure of the other party to perform an obligation under the contract amounts to a fundamental non-performance.

(2) In determining whether a failure to perform an obligation amounts to a fundamental non-performance regard shall be had, in particular, to whether

UNIDROIT Principles Art. 7.3.1(2)(a), (b), (c)

(a) the non-performance substantially deprives the aggrieved party of what it was entitled to expect under the contract unless the other party did not foresee and could not reasonably have foreseen such result;

(b) strict compliance with the obligation which has not been performed is of essence under the contract;

(c) the non-performance is intentional or reckless;

UNIDROIT Principles Art. 7.3.1(2)(d), (e)

(d) the non-performance gives the aggrieved party reason to believe that it cannot rely on the other party's future performance;

(e) the non-performing party will suffer disproportionate loss as a result of the preparation or performance if the contract is terminated.

See also Art. 7.1.4 (cure by non-performing party).

European Principles non performance

Art. 8:103 Fundamental Non-Performance

A non-performance of an obligation is fundamental to the contract if:

(a) strict compliance with the obligation is of the essence of the contract; or

(b) the non-performance substantially deprives the aggrieved party of what it was entitled to expect under the contract, unless the other party did not foresee and could not reasonably have foreseen that result; or

European Principles Art. 8:103(c)

(c) the non-performance is intentional and gives the aggrieved party reason to believe that it cannot rely on the other party's future performance.

See also Art.8:104 on Cure by Non-Performing Party

Comment on US and International Law

- International documents generally appear to require a breach to be fundamental before a contract can be avoided, unless strict performance is of the essence of the contract.
- US law requires substantial performance of constructive conditions and strict performance of express conditions, subject to excuse.
- While the formulation of the law of conditions is different, the substantive differences do not seem great.

Which remedy in case of breach?

- American Common Law: monetary damages as basic remedy
- Civil Law: specific performance as basic remedy

American Common Law

- Recovery of expectation damages is the normal remedy for breach of contract in the US, whether for breach of general contracts or sales of goods covered by the UCC.
- Specific performance is the purest form of expectation recovery, yet in the US a special showing is required to obtain specific performance.

American Common Law

- Expectation damages look to the future, attempting to place the injured party in the position that the party would have been in had the contract been fully performed.

Formulas for recovery

- General formula applicable to all contracts

  Loss in value + other loss

  – cost avoided – loss avoided

- Restatement (2d) of Contracts §347.

Formulas for recovery

- Formulas used for specific contracts:
  - Construction contract (breach by owner)

    Contractor's expected net profit + unreimbursed expenses
  - Employment contract (breach by employer)

    Unpaid wages for remaining term of contract – wages that employee could have earned from comparable employment

UCC Damage Remedies for Sellers

- 2-706 Resale
- 2-708 Non-Acceptance or Repudiation
- 2-709 Price
- 2-710 Incidental and Consequential Damages
- 2-718 Liquidated Damages

UCC Damage Remedies for Buyers

- 2-712 Cover
- 2-713 Damages for Non-Delivery or Repudiation
- 2-714 Damages for Accepted Goods
- 2-718 Liquidated Damages

When is specific performance possible?

- In American Common Law, very rarely.

Leading Case

City Stores Co. v. Ammerman (US District Court, District of Columbia 1967)

Facts

- Defendants wanted to construct a shopping mall on a tract of land in Virginia, near Washington, DC.
- In order to get a building permit, they had to persuade the county to rezone the property.
- Defendants' situation was difficult because the planning commission had voted against their proposal.

Facts (2)

- A strong competitor had proposed another shopping mall close by.
- The hearing on the defendants' application before the zoning board was scheduled for May 31, 1962.
- In order to bolster their application, defendants asked for letters of support from several major department stores, including one owned by plaintiff.

Facts (3)

- Other stores had been unwilling to express a preference for defendants' application over its competitor.
- Normally, plaintiff would have also been unwilling to express a preference, but plaintiff had a very strong interest in opening stores in the area.

Facts (4)

- Plaintiff wrote a letter to the zoning board stating that the site proposed by defendants was preferable to any other in the area and expressing a strong desire to become a major tenant in the center.
- The court found that the plaintiff wrote this letter in exchange for and in consideration of defendants' promise that it would be given the opportunity to become a major tenant in defendants' center on the same terms granted to other major tenants.

Facts (5)

"You have our assurance that in the event we are successful with our application, that we will give you the opportunity to become one of our contemplated center's major tenants with rental and terms at least equal to that of any other major department store in the center."

Facts (6)

- Defendants did succeed in obtaining zoning approval.
- They entered into leases with two other major department stores for the center, but refused to give plaintiff a lease.
- Plaintiff brought suit for specific performance of defendants' promise.

Decision

- In considering plaintiff's request for specific performance, the court had to analyze the major limitations on the award of specific performance in the US:

Decision (2)

- (1) To obtain specific performance, the remedy at law of damages must be inadequate. Restatement (2d) of Contracts §360:
  - Uniqueness of subject of contract, e.g. land
  - Lack of substitute on market
  - Difficulty of proving damages
  - Difficult of collecting damages

Decision (3)

- The court found that damages were inadequate because it would be difficult to prove with any degree of certainty the profits that plaintiff would lose if it did not receive a lease.

Decision (4)

- (2) Specific performance must not be impractical.
  - The contract must be sufficiently definite to be enforced,
  - performance must not be inherently personal, and
  - the difficulties of supervision must not outweigh the potential benefits.

Decision (5)

- The court found that the parties could be ordered to negotiate a lease and if they failed to reach agreement, the terms of the other leases signed by defendants would provide sufficient definiteness to enforce the contract.
- The court noted the modern trend to enforce contracts even when some degree of supervision is required.

Decision (6)

- (3) Specific performance is discretionary and can be denied if the contract is unfair or if the party seeking relief has acted inequitably or if it would involve undue hardship to the defendant or third parties. Restatement (2d) of Contracts §364.

Decision (7)

- Defendants contended that an award of specific performance would be harsh because defendants would then be unable to enter into a lease with Sears.
- They also argued that plaintiff was guilty of laches (delay) in seeking specific performance.

Decision (8)

- The court rejected these claims:
  - Loss of a lease with Sears would only mean that defendants would make less money.
  - Plaintiff did not unreasonably delay and had informed defendants at every opportunity that they would seek enforcement.

UCC Specific Performance

- UCC §2-716
  - Specific performance may be ordered when the goods are "unique" or in "other proper circumstances".
- The comments state that the goal of the section is to continue traditional rules, with perhaps some liberalization in the award of specific performance.
- Under the Code courts are almost certain to deny specific performance when goods are available on the market.

Why doesn't US law allow specific performance more easily?

- History:
  - Law courts traditionally awarded damages.
  - Equity courts provided *in personam* relief.
  - Inadequacy of damages was jurisdictional pre-requisite for equity courts to act.
  - No longer makes sense because we no longer have separate courts of law and equity.

Why not?

- Economic analysis
  - Substantial body of literature in US applying principles of economic analysis to contract issues
  - Scholars divided on issue. Some have argued that traditional rules make sense economically because routine award of specific performance would increase bargaining costs.
  - Others disagree.
  - Compelling case for changing rules has not been made.

Comment on Personal Service Contracts

- Under US law contracts for personal services will not be specifically enforced. Restatement (2d) of Contracts §367.
- International and European Law are similar but perhaps somewhat less restrictive:
  - UNIDROIT Principles, Art. 7.2.2(d) ("exclusively personal character")
  - European Principles Art. 9:102(2)(c) ("personal character or depends upon a personal relationship")

Comment on personal service contracts (2)

- However English and American courts will issue an injunction to prevent someone who has unique services (actors, singers, athletes) from breaching a contract to work for a competitor.
- US courts today will order employees reinstated to their jobs when they have been fired in violation of statutory protections, such as discrimination.

And in Civil Law?

- In Civil law, specific performance is the basis remedy.
- See for example:

- Germany
- Italy
- Spain

Civil Law

- **Germany**

  The main provision on breach is Section 280 BGB:

  - **Section 280 Damages for breach of duty**

    (1) If the obligor breaches a duty arising from the obligation, the obligee may demand damages for the damage caused thereby. This does not apply if the obligor is not responsible for the breach of duty. (2) Damages for delay in performance may be demanded by the obligee only subject to the additional requirement of section 286. (3) Damages in lieu of performance may be demanded by the obligee only subject to the additional requirements of sections 281, 282 or 283.

Civil Law

- **Italy**

  Article 1453. In the bilateral contract, when one of the parties does not perform his duty, the other party may at his option demand the performance or the cancellation of the contract, without affecting, in both cases, the right to damages.

And in Civil Law?

Italian Civil Code:

- **Article 2930**

If [the obligor] has not performed the duty of delivery of a specified movable or immovable thing, the obligee has the right to obtain the delivery or the availability [of it], pursuant the rules of the code of civil procedure.

And in Civil Law?

- **Article 2931**

  If [the obligor] has not performed the duty of doing [something], the obligee has the right to obtain the duty to be performed at the obligor's expense, pursuant the rules of the code of civil procedure.

And in Civil Law?

Article 2932

If the person that is obliged to enter into a contract, does not perform this duty, the other party, if it is possible and it is not excluded by the source of the obligation, has the right to obtain a court decision to produce the effects of the contract that has not been entered into. If it is a contract having as an object the transfer of the ownership right to a specified thing or the constitution or the transfer of another right, [the judge] cannot accept the claim if the party who has filed it does not perform his or her performance or does tender the performance according to the law, unless this latter performance is not still due.

And in Civil Law?

- **Spanish Codigo Civil**

  Article 1,096. Where a specific thing is to be delivered, the creditor may compel the debtor to perform delivery, irrespective of the rights granted to him under article 1101. If the thing should be indeterminate or generic he may request the performance of the obligation at the debtor's expense.

And in Civil Law?

Article 1,098. If the person obliged to do something should fail to do it, it shall be ordered to be done at his expense. The same shall also be observed if he should perform contravening the content of the obligation. Likewise, he may be ordered to undo anything which was done badly.

Article 1,099. The provisions of the second paragraph of the preceding article shall also be observed where the obligation consists of not doing something and the debtor should do what he was forbidden to do.

And in Civil Law?

- For the rest, when specific performance is not available, the principles on monetary damages are very similar to the ones of Common Law.
  - See for example, the **French Code**.
- **1149**. The damages and interest due to the creditor are, in general, to the amount of the loss which he has sustained or of the gain of which he has been deprived; saving the exceptions and modifications following.

And in Civil Law?

- **1150.** The debtor is only bound for the damages and interest which were foreseen, or which might have been foreseen at the time of the contract, when it is not in consequence of his fraud that the obligation has not been executed.
- **1151**. Even in the case where the non-performance of the contract results from the fraud of the debtor, the damages and interest must not comprehend, as regards the loss sustained by the creditor and the gain of which he has been deprived, any thing which is not the immediate and direct consequence of the non-performance of the contract.

And China?

- Specific performance is also the rule in China.

- **Article 109 Monetary Specific Performance**

  If a party fails to pay the price or remuneration, the other party may require payment thereof.

And China?

- **Article 110 Non-monetary Specific Performance; Exceptions**

  Where a party fails to perform, or rendered non-conforming performance of, a non-monetary obligation, the other party may require performance, except where: (i) performance is impossible in law or in fact; (ii) the subject matter of the obligation does not lend itself to enforcement by specific performance or the cost of performance is excessive; (iii) the obligee does not require performance within a reasonable time

International documents

- The basic remedy for breach of contract under International and European Law is specific performance.
- Damages are the secondary remedy if specific performance is not available or if the contract has been avoided.
- Rules on damages: (we skip but slides available on request)
  - CISG Arts. 74, 75, 76
  - UNIDROIT Principles Arts. 7.4.2, 7.4.5, 7.4.6, 7.4.10
  - European Principles Art. 9:502, 9:506, 9:507

International documents

- Rules on specific performance:
  - CISG Arts. 28, 46, 62
  - UNIDROIT Principles Arts. 7.2.1, 7.2.2, 7.2.3
  - European Principles Arts. 9:101, 9:102

CISG 28

If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgment for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention.

CISG Art. 46(1), (2)

(1) The buyer may require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with this requirement.

(2) If the goods do not conform with the contract, the buyer may require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach of contract and a request for substitute goods is made either in conjunction with notice given under article 39 or within a reasonable time thereafter.

CISG Art. 46(3)

(3) If the goods do not conform with the contract, the buyer may require the seller to remedy the lack of conformity by repair, unless this is unreasonable having regard to all the circumstances. A request for repair must be made either in conjunction with notice given under article 39 or within a reasonable time thereafter.

CISG Art. 62

The seller may require the buyer to pay the price, take delivery or perform his other obligations, unless the seller has resorted to a remedy which is inconsistent with this requirement.

UNIDROIT Principles Art. 7.2.1

Performance of Monetary Obligation

Where a party who is obliged to pay money does not do so, the other party may require payment.

UNIDROIT Principles Art. 7.2.2(a), (b)

Performance of Non-monetary Obligation

Where a party who owes an obligation other than one to pay money does not perform, the other party may require performance, unless

(a) performance is impossible in law or in fact;

(b) performance or, where relevant, enforcement is unreasonably burdensome or expensive;

UNIDROIT Principles Art. 7.2.2(c), (d), (e)

(c) the party entitled to performance may reasonably obtain performance from another source;

(d) performance is of an exclusively personal character; or

(e) the party entitled to performance does not require performance within a reasonable time after it has, or ought to have, become aware of the non-performance.

UNIDROIT Principles Art. 7.2.3

Repair and Replacement of Defective Performance

The right to performance includes in appropriate cases the right to require repair, replacement, or other cure of defective performance. The provisions of Articles 7.2.1 and 7.2.2 apply accordingly.

European Principles Art. 9:101

Monetary Obligations

(1) The creditor is entitled to recover money which is due.

(2) Where the creditor has not yet performed its obligation and it is clear that the debtor will be unwilling to receive performance, the creditor may nonetheless proceed with its performance and may recover any sum due under the contract unless:

European Principles Art. 9:101(2)(a), (b)

(a) it could have made a reasonable substitute transaction without significant effort or expense; or

(b) performance would be unreasonable in the circumstances.

European Principles Art. 9:102

Non-Monetary Obligations

(1) The aggrieved party is entitled to specific performance of an obligation other than one to pay money, including the remedying of a defective performance.

(2) Specific performance cannot, however, be obtained where:

European Principles Art. 9:102(2)(a)-(d)

(a) performance would be unlawful or impossible; or

(b) performance would cause the debtor unreasonable effort or expense; or

(c) the performance consists in the provision of services or work of a personal character or depends upon a personal relationship, or

(d) the aggrieved party may reasonably obtain performance from another source.

European Principles Art. 9:102(3)

(3) The aggrieved party will lose the right to specific performance if it fails to seek it within a reasonable time after it has or ought to have become aware of the non-performance.

Comments on US and international documents

- CISG provides for specific performance unless precluded by local law of court hearing matter, Art. 28.
- UNIDROIT and European Principles provide for specific performance but with some limitations, for example, when performance is impossible, harsh, or substitute contracts are available.

Comments (2)

- US law has many of same limitations as under International Principles, but also imposes requirement that damages be inadequate.
- Thus, specific performance less readily available in US.

VIII

THIRD PARTY BENEFICIARY

American Common Law

American doctrine of third party beneficiary (TPB):

- Up to now we have dealt with rights of parties to contract. Typically two, but may be more than two.
- Now focusing on whether original parties can create rights in third parties, who will be referred to as third party beneficiaries.

Leading case

- *Lawrence v. Fox,* Ct of App NY [1859]

Facts

- Holly owed Lawrence $300.
- Holly loaned Fox $300 stating that he owned Lawrence money so that Fox should pay Lawrence instead of Holly. Fox promised Holly to repay Lawrence. But Fox then refused to do that.
- Lawrence brought suit.

  (Interesting aspect was that gambling debt so no right against Holly).

Facts

- Defendant moved for non-suit by arguing that there was no proof tending to show that Holly was indebted to the plaintiff; that the agreement by the defendant with Holly to pay the plaintiff was void for want of consideration, and that there was no privity between the plaintiff and defendant.
- The court overruled the motion and the jury found for the defendant.

Decision

- Since the third party was a creditor of the promisee (and therefore a "creditor TPB"), TPB had an action for breach of contract against the promisor that had not performed

Reflections on *Lawrence v. Fox*

- What problem with suit?
  - Not in privity of contract.
- Why allow?
  - Practicality. Avoid circuity of litigation.

Gradual expansion in TPB

How? From third party creditor to third party donee beneficiary.

Seaver v. Ransom, Ct of App NY [1918]

Facts

Mrs. Beman was about to die. She owned a house and a lot. Her husband drew up a will according to her instructions. Pl was her niece who sometimes lived with the Bemans. When the will was read Mrs. Beman isolated an error, she had wanted the house to go to the Pl, but it was identified as going to her husband.

Facts 2

- Because she was failing fast her husband asked her to sign the will, and stated that he would leave enough in his will to make up the difference. After he died there was no provision to this effect.
- The Plaintiff, Marion Seaver (Plaintiff), sued the Defendants, Matt Ransom and another (Defendants), as executors of the estate of Samuel Beman (Beman), to enforce a contract made between Judge Beman and his late wife, Mrs. Beman, for the benefit of the Plaintiff.

DECISION

Legal issue

Whether the Plaintiff can recover against an agreement whereby Mr. Beman induced his wife to execute the will by his promise to give Pl $6000?

Decision

YES, any third person, for whose direct benefit a contract was intended, can sue on it – "donee beneficiary".

DECISION 2

REASONING

- Even if privity between a plaintiff and defendant is necessary to the maintenance of an action arising out of a breach of duty on the contract, here privity is recognized. The beneficiary has right to sue on a contract made expressly for his benefit has been fully recognized.

Comments on *Seaver v. Ransom*

- How an expansion of TPB?
  - Here dealing with donee rather than creditor.
  - Unless right re recognized, no cause of action.
  - Not true with creditor Ben.

Current Law

The Restatement (First) of Contracts codified these principles, recognizing rights of donee and creditor beneficiaries.

The Restatement (Second) of Contracts expands the categories of possible TPBs.

> **Rest 302** (Intended and Incidental Beneficiaries)
>
> (1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an **intended beneficiary** if [#1] recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties **and** [#2] either

Current Law

- (a) the performance of the promise will satisfy an obligation of the promisee to pay money [or other debt] to the beneficiary [***creditor TPB***—*Lawrence v. Fox*] or
- (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance [***donee TPB***—*Seaver v. Ransom*].
- (2) An **incidental beneficiary** is a beneficiary who is not an intended beneficiary.

Current Law

Rest § 304 (Creation of Duty to Beneficiary)

A promise in a contract creates a duty in the promisor to any intended beneficiary to perform the promise, and the **intended beneficiary** may enforce the duty.

Rest. § 315 (Effect of a Promise of Incidental Benefit)

An **incidental beneficiary** acquires by virtue of the promise no right against the promisor or the promisee.

Current Law

Key points

- When B will have a viable claim? When B is an intended beneficiary (TPB creditor or TPD donee).
- Beneficiary does not have to have knowledge at the time of the formation of contract.
- Intended versus incidental.
- Intention to confer rights is key.
- Example of incidental beneficiary. C agrees to construct apartment project on O's land. The development will increase value of N's land. C breaches. N does not have right against C for breach of contract. O did not intend to benefit.

Civil Law

- General principle:
  - "*Res inter alios acta tertio neque nocet neque prodest*"
  - In other words: contracts do not have any effect towards a third party
  - Let's see some applications of this general principle and some exceptions

Civil Law

- **French Civil Code**

  1119. A man cannot, in general, bind himself or stipulate in his own name except for himself.

  1165. Agreements have no effect but between the contracting parties; they do not work injury to a third person, nor can they profit him except in the case provided for by article 1121.

Civil Law

- There are exceptions.
- **French Code**

  1121. A man may in like manner stipulate for the benefit of a third person, when such is the condition of a stipulation that a man makes for himself or of a donation which he makes to another. He who has made such stipulation can no longer revoke it, if the third party has declared his readiness to profit by it.

Civil Law

- Besides, generally, a man agrees for himself and his heirs and assigns.
- See for example French Code
- **1122.** A man is deemed to have stipulated for himself and for his heirs arid assigns, unless the contrary be expressed, or result from the nature of the agreement.

France

1166. Nevertheless creditors may put in force all claims and suits belonging to their debtor, with the exception of those which are exclusively attached to the person.

France

1167. They may also, in their own name, impeach acts made by their debtor in fraud of their rights. They must nevertheless, as regards their rights, set forth under the title "Of Succession," and under the title "Of the Marriage Contract, and of the respective Rights of Married Persons," conform themselves to the rules which are therein prescribed.

IX

Assignment and delegation

Assignment
Definition & Terminology

Defined. Transfer of right to someone else (TP).

Terminology:

- Obligor
- Assignor (original promisee)
- Assignee (third party)

How it works

The promisee of a right (that becomes assignor) - can assign to a TP (assignee) a right under a contract. When he does so, the original obligor will be obligated toward the assignee and the assignor will have no right anymore toward the obligor.

Which rights can I assign?

- Generally rights are assignable.
- Right is **nonassignable** when assignment would materially change the duty of obligor OR materially would increase burden or risk on obligor or would materially reduce value to obligor.
- Right to receive payment are almost always assignable

Current law

- Rest. 317 - Assignment Of Right

- Effect of assignment =
  - creates in the assignee a right to receive performance from obligor
  - extinguishes in the assignor right to receive performance from obligor.

And Civil Law?

French code

- **1295**

  The debtor who has accepted absolutely and unconditionally the cession which a creditor has made of his rights to a third person, can no longer oppose to the assignee the compensation, which he might before acceptance have opposed to the creditor. With respect to cession which has not been accepted by the debtor, but which has been notified to him, it only prevents the compensation of debts posterior to such notification.

And Civil Law?

Spanish Codigo Civil – has a quite detailed regulation of assignment that distinguishes, among other things, in point of responsibility, between a sale in good faith and a sale in bad faith.

Article 1,526. Assignment of a credit, right or action shall not be effective against third parties until the date on which it is to be considered certain in accordance with articles 1218 and 1227. If it should refer to immovable property, it shall be effective from the date of registration thereof in the Registry.

And Civil Law?

Article 1,527. The debtor who, prior to becoming aware of the assignment, should pay the creditor, shall be released from the obligation.

Article 1,528. The sale or assignment of a credit comprises that of all ancillary rights thereof, such as guaranty, mortgage, pledge or privilege.

And Civil Law?

Article 1,529. The seller in good faith shall be liable for the existence and lawfulness of the credits at the time of the sale, unless it has been sold as a doubtful credit; but not for the debtor's solvency, unless expressly provided or unless the insolvency should be prior and publicly known. Even in these cases, he shall only be liable for the price received and any expenses mentioned in number 1 of article 1518. The seller in bad faith shall always be liable for the payment of all expenses and damages.

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And Civil Law?

Article 1,530. Where the assignor in good faith should have agreed to be liable for the debtor's solvency, and the contracting parties should have agreed no provision concerning the duration of such liability, it shall only last one year, counting from the assignment of the credit, if the term should have already expired. If the credit should be payable in a forward term or period which has not expired, liability shall cease one year after maturity thereof. If the credit should consist of a perpetual income, liability shall be extinguished after ten years, counting from the date of the assignment.

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And Civil Law?

GERMANY

Section 398 BGB Assignment

A claim may be transferred by the obligee to another person by contract with that person (assignment). When the contract is entered into, the new obligee steps into the shoes of the previous obligee.

China

Article 79 Assignment of Rights; Exceptions

The obligee may assign its rights under a contract in whole or in part to a third person, except where such assignment is prohibited:

(i) in light of the nature of the contract;

(ii) by agreement between the parties;

(iii) by law.

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Article 80 Duty to Notify When Assigning Rights; Revocation of Assignment Subject to Assignee's Consent

Where the obligee assigns its rights, it shall notify the obligor. Such assignment is not binding upon the obligor if notice was not given. A notice of assignment of rights given by the obligee may not be revoked, except with the consent of the assignee.

Article 81 Assumption of Incidental Right in Case of Assignment

Where the obligee assigns a right, the assignee shall assume any incidental right associated with the obligee's right, except where such incidental right is exclusively personal to the obligee.

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Article 82 Assigned Rights Subject to Accrued Defenses of Obligor

Upon receipt of the notice of assignment of the obligee's right, the obligor may, in respect of the assignee, avail itself of any defense it has against the assignor.

Article 83 Availability of Set-off to Obligor

Upon receipt of the notice of assignment of the obligee's right, if the obligor has any right to performance by the assignor which is due before or at the same time as the assigned obligee's right, the obligor may avail itself of any set-off against the assignee.

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- Plus **article 87** reserves the application of special laws:
  - Article 87 Assignment Subject to Approval

    Where the obligee's assignment of a right or the obligor's delegation of an obligation is subject to any procedure such as approval or registration, etc. as required by a relevant law or administrative regulation, such provision applies.

Delegation

Definition & Terminology

Defined. Gives responsibility to perform duty under K to TP.

Terminology:

- Delegator (old promisor or obligor)
- Promisee (or obligee)
- Delegatee (or TP Delegate)

How it works

Promisor (that becomes delegator) transfers or delegates a duty he has toward the promisee under a contract to a third party (delegatee). As a consequence, the promisee will have a right towards the delegatee AND the delegator.

Which duties can I delegate?

- Generally duties are delegable.
- Personal services or personal skill type services are not delegable.
- Parties can always add a clause to their contract to the effect that duties under the K are not delegable

Current law

- Delegation creates an obligation from the delegatee to the obligee to perform.
- But unless agreed by the obligee, it does not extinguish or discharge the obligation of delegator to perform its duty.
- Note the difference with the assignment on this last point.
- Rest. § 318.

And Civil Law?

French code

- **1274**

  Novation by the substitution of a new debtor, may be effected without the concurrence of the first.

- **1275**

  The delegation by which a debtor gives to a creditor another debtor who binds himself towards the creditor, does not operate as a novation, if the creditor has not expressly declared that he intended to discharge his debtor who has made the delegation.

And Civil Law?

French code

- **1276**

  The creditor who has discharged the debtor by whom delegation has been made, has no remedy against such debtor, if the delegated person become insolvent, unless the acts contain an express reservation thereof, or that the delegated party has been already openly a bankrupt, or has fallen into embarrassment at the moment of the delegation.

- **1277**

  The simple indication made by the debtor, of a person who is to pay in his place, does not operate novation. The same rule applies to the simple indication made by the creditor, of a person who is to receive for him.

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- **Article 84 Delegation of Obligations Subject to Consent by Obligee**

  Where the obligor delegates its obligations under a contract in whole or in part to a third person, such delegation is subject to consent by the obligee.

- **Article 85 Availability of Defenses to New Obligor**

  Where the obligor has delegated an obligation, the new obligor may avail itself of any of the original obligor's defenses against the obligee.

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- **Article 86 Assumption of Incidental Obligation in Case of Delegation**

  Where the obligor delegates an obligation, the new obligor shall assume any incidental obligation associated with the main obligation, except where such incidental obligation is exclusively personal to the original obligor.

  + Art. 87 (above) applies also to delegation.

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- Note that pursuant to Chinese Contracts law, it is also possible to assign contractual rights and at the same time, delegate duties. Consent of the other party is required.
- **Article 88 Concurrent Assignment and Delegation**

  Upon consent by the other party, one party may concurrently assign its rights and delegate its obligations under a contract to a third person. Article 89 Provisions Applicable to Concurrent Assignment Where a party concurrently assigns its rights and delegates its obligations, the provisions in Article 79, Articles 81 to 83, and Articles 85 to 87 apply.

Reflection

- In the Common Law, for the case above, we commonly speak about "assignment of a contract" even if technically it amounts to both an assignment of rights and a delegation of duties.