CONTRACTS

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I. WHAT IS A CONTRACT?

A. GENERAL DEFINITION

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

B. LAW GOVERNING CONTRACTS

Generally, the common law governs contracts. However, contracts for the sale of ***goods*** (*i.e.,* things that are movable) are governed by special rules found in Article 2 of the Uniform Commercial Code ("U.C.C."). The common law still applies to contracts for the sale of goods, but any rules in the U.C.C. that conflict with the common law replace the common law. The differences between Article 2 and the common law are often pointed out in this outline, but are explained in more detail in the Sales outline.

C. TYPES OF CONTRACTS

1. Types of Contracts as to Formation

Contracts are frequently described as express, implied, or quasi. Only the first two are actually contracts, and they differ in no way other than the manner in which they are formed.

a. Express Contract

Express contracts are formed ***by language***, oral or written.

b. Implied in Fact Contract

Implied contracts are formed by manifestations of assent other than oral or written language, *i.e.,* ***by conduct***.

c. Quasi-Contract or Implied in Law Contract

Quasi-contracts are ***not contracts*** at all. They are constructed by courts to ***avoid unjust enrichment*** by permitting the plaintiff to bring an action in restitution to recover the amount of the benefit conferred on the defendant. Their only relationship to genuine contracts is historical.

2. Types of Contracts as to Acceptance

a. Traditional Bilateral/Unilateral Contracts

1) Bilateral Contracts—Exchange of Mutual Promises

The traditional bilateral contract was one consisting of the exchange of mutual promises, *i.e.,* a promise for a promise, in which each party is both a promisor and a promisee.

Example: Sidney promises to sell Blackacre to Bertram for $6,000, and Bertram promises to purchase Blackacre at that price.

2) Unilateral Contracts—Acceptance by Performance

The traditional unilateral contract was one in which the offer requested performance rather than a promise. Here, the offeror-promisor would promise to pay upon the ***completion of the requested act*** by the promisee. Once the act was completed, a contract was formed. In such contracts, there is one promisor and one promisee.

Example: Susan promises to pay Charles $5 if he will deliver a textbook to Rick. Charles is not obligated to deliver the book, but if he does in fact deliver it, Susan is obligated to pay him the $5.

b. Modern View—Most Contracts Are Bilateral

1) Acceptance by Promise or Start of Performance

Under the U.C.C. and the Restatement (Second) of Contracts, it is possible to form a bilateral contract by starting performance. ***All*** offers are "doubtful" or "indifferent" offers, which may be accepted by promising or by performing, unless clearly indicated otherwise by the language or circumstances. In this typical situation, an offer that is accepted by the beginning of performance constitutes a bilateral contract. Therefore, it is no longer accurate to suggest that bilateral contracts are relegated to an exchange of promises.

Example: Acme Co. orders specifically manufactured goods from Barnes Manufacturing Co. Recognizing the speed with which the order must be filled, Barnes begins to manufacture the ordered item shortly after the order is received. This constitutes an acceptance of the offer and creates an implied promise on the part of Barnes to complete manufacture. *Note:* Notification within a reasonable time is essential in such cases as a condition to the duty of Acme Co. to pay once the goods are completed.

2) Unilateral Contracts Limited to Two Circumstances

Neither the U.C.C. nor the Second Restatement employs the term "unilateral contract." In fact, under the U.C.C. and Second Restatement, a traditional unilateral contract occurs in only two situations: (i) where the offeror clearly (unambiguously) indicates that ***completion of performance is the only manner of acceptance***—the offeror is the master of the offer and may create the offer in this fashion; and (ii) where there is an ***offer to the public***, such as a reward offer, which so clearly contemplates acceptance by performance rather than a promise (not to mention the total ineffectiveness of a promise in such a situation), that only the performance requested in the offer will manifest acceptance.

Note: While the U.C.C. and Second Restatement are clear along these lines, you should remember the traditional distinctions between bilateral and unilateral contracts until the new usage is firmly entrenched.

3) Test for Determining Bilateral vs. Unilateral Contracts

Under the old view of the bilateral/unilateral dichotomy ***or*** the Second Restatement/U.C.C. view, the only workable test to decide whether the contract is bilateral or unilateral is whether, at the time the contract is formed, ***each party has a right and a duty*** (bilateral) or ***one party only has a right and the other party only has a duty*** (unilateral). (*See* II.E., *infra,* for further discussion of unilateral vs. bilateral contracts.)

3. Types of Contracts as to Validity

a. Void Contract
A void contract is one that is totally ***without any legal effect*** from the beginning (*e.g.,* an agreement to commit a crime).

b. Voidable Contract
A voidable contract is one that one or both parties may ***elect to avoid*** or to ratify (*e.g.,* contracts of infants or mentally ill parties).

c. Unenforceable Contract
An unenforceable contract is an agreement that is otherwise valid, but that may not be enforceable due to ***various defenses*** extraneous to contract formation, such as the statute of limitations or Statute of Frauds.

D. CREATION OF A CONTRACT

When a suit is brought in which one party seeks to enforce a contract or to obtain damages for breach of contract, a court must first decide whether there was in fact a contract. In making this determination, a court will ask the following three basic questions:

1. Was there ***mutual assent***?

2. Was there ***consideration*** or some substitute therefor?

3. Are there any ***defenses*** to creation of the contract?

II. MUTUAL ASSENT—OFFER AND ACCEPTANCE

A. IN GENERAL

Mutual assent is often said to be an agreement on the "same bargain at the same time"—"a meeting of the minds." The process by which parties reach this meeting of the minds generally is some form of negotiation, during which, at some point, one party makes a proposal (an offer) and the other agrees to it (an acceptance). An actual subjective meeting of the minds is not necessary. Rather, courts use an ***objective measure***, by which each party is bound to the ***apparent intention*** that he manifested to the other(s).

B. THE OFFER

An offer creates a power of acceptance in the offeree and a corresponding liability on the part of the offeror. For a communication to be an offer, it must create a ***reasonable expectation*** in the offeree that the offeror is willing to enter into a contract on the basis of the offered terms. In deciding whether a communication creates this reasonable expectation, you should ask the following three questions:

(i) Was there an expression of a ***promise***, ***undertaking***, ***or commitment*** to enter into a contract?

(ii) Were there ***certainty and definiteness*** in the essential terms?

(iii) Was there ***communication*** of the above to the offeree?