CONTRACTS & SALES

BARBRI BOOK EXAMPLE
CONTRACTS AND SALES

TABLE OF CONTENTS

I. WHAT IS A CONTRACT? ............................................................... 1
   A. GENERAL DEFINITION ....................................................... 1
   B. COMMON LAW VS. ARTICLE 2 SALE OF GOODS .......................... 1
      1. “Sale” Defined ......................................................... 1
      2. “Goods” Defined ...................................................... 1
      3. Contracts Involving Goods and Nongoods .......................... 1
      4. Merchants vs. Nonmerchants ....................................... 1
   C. TYPES OF CONTRACTS ....................................................... 1
      1. As to Formation ....................................................... 1
         a. Express Contract .................................................... 1
         b. Implied in Fact Contract ......................................... 2
         c. Quasi-Contract or Implied in Law Contract .................. 2
      2. As to Acceptance ....................................................... 2
         a. Bilateral Contracts—Exchange of Mutual Promises ........... 2
         b. Unilateral Contracts—Acceptance by Performance ........... 2
         c. Modern View—Most Contracts Are Bilateral ................. 2
            1) Acceptance by Promise or Start of Performance .......... 2
            2) Unilateral Contracts Limited to Two Circumstances ..... 2
      3. As to Validity ............................................................. 3
         a. Void Contract ........................................................ 3
         b. Voidable Contract .................................................. 3
         c. Unenforceable Contract ........................................... 3
   D. CREATION OF A CONTRACT ............................................... 3

II. MUTUAL ASSENT—OFFER AND ACCEPTANCE ............................... 3
   A. IN GENERAL ............................................................... 3
   B. THE OFFER ............................................................... 3
      1. Promise, Undertaking, or Commitment ............................ 4
         a. Language ............................................................. 4
         b. Surrounding Circumstances ....................................... 4
         c. Prior Practice and Relationship of the Parties .............. 4
         d. Method of Communication ........................................ 4
            1) Use of Broad Communications Media .......................... 4
            2) Advertisements, Etc. ........................................... 4
         e. Industry Custom ..................................................... 5
      2. Definite and Certain Terms .......................................... 5
         a. Identification of the Offeree .................................... 5
         b. Definiteness of Subject Matter .................................. 5
            1) Requirements for Specific Types of Contracts ............ 5
               a) Real Estate Transactions—Land and Price Terms Required . . 5
               b) Sale of Goods—Quantity Term Required .................. 5
                  (1) “Requirements” and “Output” Contracts .................. 6
                      (a) Quantity Cannot Be Unreasonably Disproportionate . . 6
Established Business vs. New Business

Reasonable Range of Choices

Services—Nature of Work Required

Missing Terms

Price

Article 2 Gap Filler

Price Fixed by Party Under Article 2

Distinguish—Vague Terms

Vagueness Can Be Cured by Part Performance

Uncertainty Can Be Cured by Acceptance

Focus on Contract

Terms to Be Agreed on Later

Communication to Offeree

Termination of Offer

Termination by Acts of Parties

Termination by Offeror—Revocation

Methods of Communication

Revocation by Direct Communication

Revocation by Publication

Revocation by Indirect Communication

Effective When Received

When a Communication Is Received

Limitations on Offeror’s Power to Revoke

Options

Merchant’s Firm Offer Under Article 2

Detrimental Reliance

Part Performance—True Unilateral Contract Offers

Implied Contract for Reasonable Time

First Restatement

Second Restatement

What Is Part Performance?

Preparations to Perform

Offeror Refuses to Accept Performance

Part Performance—Offer Indifferent as to Manner of Acceptance

Termination by Offeree

Rejection

Express Rejection

Counteroffer as Rejection

Distinguish—Mere Inquiry

Effective When Received

Revival of Offer

Rejection of Option

Lapse of Time

Must Accept Within Specified or Reasonable Time

Look to When Offer Is Received by Offeree

Termination by Operation of Law

Termination by Death or Insanity of Parties
b. Termination by Destruction of Subject Matter ........................................... 13

c. Termination by Supervening Legal Prohibition of Proposed Contract 13

D. THE ACCEPTANCE .................................................................................. 14
1. Who May Accept ...................................................................................... 14
   a. Party to Whom Offer Is Addressed or Directed ........................................... 14
   b. Offeree’s Power of Acceptance Cannot Be Assigned ................................... 14
      1) Exception—Option Contracts .................................................................. 14

2. Offeree Must Know of Offer ........................................................................ 14

3. Acceptance of Offer for Unilateral Contract .................................................. 14
   a. Completion of Performance ....................................................................... 14
   b. Notice ....................................................................................................... 15
      1) Compare—Article 2 ...............................................................................

4. Acceptance of Offer for Bilateral Contract ..................................................... 15
   a. Generally, Acceptance Must Be Communicated ......................................... 15
      1) Exception—Waiver in Offer .................................................................... 15
      2) Silence as Acceptance ............................................................................ 16
         1) Compare—Article 2 ...............................................................................
   b. Method of Acceptance ................................................................................ 16
      1) Act as an Acceptance ............................................................................. 16
      2) Offers to Buy Goods for Current or Prompt Shipment ............................... 16
         a) Shipment of Nonconforming Goods ...................................................... 16
   c. Acceptance Must Be Unequivocal ............................................................... 17
      1) Common Law Rule .............................................................................. 17
         a) Distinguish—Statements that Make Implicit Terms Explicit .................. 17
         b) Distinguish—“Grumbling Acceptance” .................................................. 17
         c) Distinguish—Request for Clarification .................................................... 17
      2) Article 2 Rule—Battle of the Forms Provision ........................................... 18
         a) Conditional Acceptance ..................................................................... 18
      3) Bilateral Contracts Formed by Performance ............................................. 18
   d. When Effective—The Mailbox Rule ............................................................ 19
      1) Effect of Offeree Sending Both Acceptance and Rejection ......................... 19
         a) Offeree Sends Rejection, Then Acceptance—Mailbox Rule
            Does Not Apply .................................................................................. 19
         b) Offeree Sends Acceptance, Then Rejection—Mailbox Rule
            Generally Applies ............................................................................. 19
      2) Acceptance by Unauthorized Means ....................................................... 19

E. AUCTION CONTRACTS ........................................................................... 20
1. Goods Auctioned in Lots ................................................................................ 20
2. When Sale Is Complete .................................................................................. 20
3. Auction With Reserve or Without Reserve .................................................... 20
4. A Bid on Seller’s Behalf ................................................................................ 20

III. CONSIDERATION ................................................................................... 20
A. INTRODUCTION ...................................................................................... 20

B. ELEMENTS OF CONSIDERATION ....................................................... 20
1. Bargained-For Exchange ............................................................................. 20
   a. Gift ......................................................................................................... 21
      1) Act or Forbearance by Promisee Must Be of Benefit to Promisor ............ 21
      2) Economic Benefit Not Required ............................................................ 21
b. “Past” or “Moral” Consideration ........................................ 21
   1) General Rule—Not Sufficient Consideration .................. 21
   2) Exceptions .............................................................. 22
      a) Debt Barred by a Technical Defense ....................... 22
      b) Promise to Pay Arising Out of Past Material Benefit—Material Benefit Rule ...................... 22

2. Legal Value ................................................................. 22
   a. Adequacy of Consideration ........................................ 22
      1) Token Consideration ............................................. 22
      2) Sham Consideration ............................................. 23
      3) Possibility of Value ............................................. 23
   b. Legal Benefit and Legal Detriment Theories ...................... 23
      1) Majority Rule .................................................... 23
      2) Minority and First Restatement .............................. 23
      3) Second Restatement ............................................ 23
      4) Detriment and Benefit Defined .............................. 23
         a) Legal Detriment to Promisee ......................... 23
         b) Legal Benefit to Promisor ................................ 24
   c. Preexisting Legal Duty Not Consideration ....................... 24
      1) Exception—New or Different Consideration Promised .... 24
      2) Exception—Voidable Obligation ............................. 24
      3) Exception—Preexisting Duty Owed to Third Party ...... 24
      4) Exception—Honest Dispute as to Duty .................... 25
      5) Exception—Unforeseen Circumstances ....................... 25
      6) Exception—Modification of Contract for the Sale of Goods ........................................... 25
      7) Existing Debts .................................................... 25
   d. Forbearance to Sue .................................................... 26

C. MUTUAL AND ILLUSORY PROMISES—THE REQUIREMENT OF MUTUALITY .............................................. 26
   1. Requirements and Output Contracts ......................... 26
   2. Conditional Promises ............................................. 26
      a. Promise Conditioned on Satisfaction ...................... 26
   3. Right to Cancel or Withdraw ..................................... 26
   4. Exclusivity Agreements—Best Efforts Implied ................ 27
   5. Voidable Promises .................................................. 27
   6. Unilateral/Option Contracts ...................................... 27
   7. Suretyship Promises ................................................ 27
      a. Surety Makes Promise Before (or at the Same Time as) Creditor Performs or Promises to Perform—Consideration Present .......................... 27
      b. Surety Makes Promise After Creditor Performs or Promises to Perform—Generally No Consideration to Support Surety’s Promise .......... 27
         1) Exception—Obtaining Surety Is Condition Precedent .... 27
         2) Exception—Additional Consideration ................... 28
   8. Right to Choose Among Alternative Courses .................. 28
      a. Selection of Valuable Alternative Cures Illusory Promise ........................................... 28

D. PROMISSORY ESTOPPEL OR DETRIMENTAL RELIANCE ................................................. 29

IV. REQUIREMENT THAT NO DEFENSES EXIST ............................................. 29
   A. INTRODUCTION .......................................................... 29
B. DEFENSES TO FORMATION ........................................ 29
   1. Absence of Mutual Assent ..................................... 29
      a. Mutual Mistake as to Existing Facts ...................... 29
         1) Assumption of Risk .................................. 30
            a) Mistake in Value Generally Not a Defense .......... 30
      b. Compare—Unilateral Mistake .............................. 31
         1) Unilateral Mistake May Be Canceled in Equity ....... 32
         2) Error in Judgment ................................ 32
      c. Mistake by the Intermediary (Transmission) .......... 32
      d. Ambiguous Contract Language ............................ 32
         1) Neither Party Aware of Ambiguity—No Contract ...... 32
         2) Both Parties Aware of Ambiguity—No Contract ..... 33
         3) One Party Aware of Ambiguity—Contract .......... 33
         4) Subjective Intention of Parties Controls .......... 33
      e. Misrepresentation ....................................... 33
         1) Fraudulent Misrepresentation (Fraud in the Inducement)—
            Contract Voidable ................................ 33
            a) Concealment and Nondisclosure .................... 34
            b) Distinguish—Fraud in the Factum ............... 34
         2) Nonfraudulent Misrepresentation—Contract Voidable If Material . 34
         3) Justified Reliance ................................ 34
         4) Innocent Party May Rescind Agreement ............... 34
         5) Remedies for Fraud ................................ 35
   2. Absence of Consideration .................................. 35
   3. Public Policy Defenses to Contract Formation—Illegality .......... 35
      a. Some Typical Cases of Illegality ......................... 35
      b. Effect of Illegality ................................... 35
         1) Generally Contract Is Void .......................... 35
         2) Effect Depends on Timing of Illegality ............... 35
         3) Compare—Illegal Purpose ............................ 36
      c. Limitations on Illegality Defense ....................... 36
         1) Plaintiff Unaware of Illegality ...................... 36
         2) Parties Not in Pari Delicto ......................... 36
         3) Licensing—Revenue Raising vs. Protection .......... 36
            a) Revenue Raising—Contract Enforceable .......... 36
            b) Protection of Public—Contract Not Enforceable . 36
   C. DEFENSES BASED ON LACK OF CAPACITY ....................... 36
   1. Legal Incapacity to Contract ................................ 36
      a. Contracts of Infants (Minors) .......................... 36
         1) Who Is an Infant? .................................. 37
         2) Effect of Infant's Contract ......................... 37
         3) Disaffirmance .................................... 37
            a) Exceptions .................................... 37
         4) Affirmance upon Majority ........................... 37
      b. Mental Incapacity .................................... 37
      c. Intoxicated Persons ................................. 37
   2. Duress and Undue Influence ................................ 37
      a. Duress ............................................ 37
D. DEFENSES TO ENFORCEMENT .......................................................... 38

1. Statute of Frauds ................................................................. 39
   a. Writing Requirement ......................................................... 39
      1) Electronic Record Satisfies Writing Requirement ................. 39
   b. Signature Requirement ...................................................... 39
      1) Electronic Signature ...................................................... 39
   c. Agreements Covered ......................................................... 39
      1) Executor or Administrator Promises Personally to Pay Estate
         Debts ........................................................................... 39
      2) Promises to Pay Debt of Another (Suretyship Promises) ....... 39
         a) Must Be a Collateral Promise .......................................... 39
         b) Main Purpose Must Not Be Pecuniary Interest of Promisor ... 40
      3) Promises in Consideration of Marriage .................................. 40
      4) Interest in Land .................................................................. 40
         a) What Is an Interest in Land? ................................................ 40
         b) Items Not Within the Statute .............................................. 41
         c) Effect of Performance on Contracts ...................................... 41
      5) Performance Not Within One Year ......................................... 41
         a) Effective Date ................................................................. 41
         b) Contracts Not Within the Statute ........................................ 41
            (1) Possibility of Completion Within One Year ..................... 41
            (2) Right to Terminate Within Year .................................... 41
            (3) Lifetime Contracts ..................................................... 42
      6) Goods Priced at $500 or More ................................................ 42
         a) When Writing Not Required ............................................. 42
            (1) Specially Manufactured Goods ...................................... 42
            (2) Admissions in Pleadings or Court .................................. 42
            (3) Payment or Delivery of Goods ...................................... 43
         b) Merchants—Confirmatory Memo Rule .................................. 43
   d. Effect of Noncompliance with the Statute ................................... 43
   e. Promissory Estoppel ............................................................. 43
   f. Remedies If Contract Is Within Statute ....................................... 43
      1) Part Performance ............................................................. 44
   g. Contract Made by Agent ........................................................ 44
      2. Unconscionability .............................................................. 44
         a. Common Instances of Procedural Unconscionability ............... 44
            1) Inconspicuous Risk-Shifting Provisions ......................... 44
            2) Contracts of Adhesion—"Take It or Leave It" .................. 44
            3) Exculpatory Clauses ..................................................... 45
            4) Limitations on Remedies ............................................... 45
         b. Timing ............................................................................. 45
         c. Effect If Court Finds Unconscionable Clause .......................... 45

V. DETERMINING THE TERMS OF THE CONTRACT ................................. 45
   A. INTRODUCTION ....................................................................... 45
   B. GENERAL RULES OF CONTRACT CONSTRUCTION ........................ 45
1. Construed as a Whole .......................................................... 45
2. Ordinary Meaning of Words ................................................. 46
3. Inconsistency Between Provisions ........................................... 46
4. Custom and Usage ............................................................... 46
5. Preference to Construe Contract as Valid and Enforceable .......... 46
6. Ambiguities Construed Against Party Preparing Contract .......... 46
7. Weight Given to Conflicting Rules of Construction ..................... 46

C. PAROL EVIDENCE RULE—SUPPLEMENTING, EXPLAINING, OR
CONTRADICTING TERMS ........................................................... 46
1. Purpose ................................................................. 47
2. Is the Writing an “Integration”? ............................................. 47
   a. Is the Writing Intended as a Final Expression? ...................... 47
   b. Is the Writing a Complete or Partial Integration? .................. 47
   c. Who Makes Decision? .................................................. 47
   d. How Is Determination Made? .......................................... 47
      1) Corbin Test ......................................................... 47
      2) Williston Test ...................................................... 48
3. Extrinsic Evidence Outside Scope of Rule ................................ 48
   a. Attacking Validity .................................................... 48
      1) Formation Defects ................................................. 48
      2) Conditions Precedent ............................................. 48
         a) Distinguish from Condition Subsequent ...................... 48
   b. Interpretation ....................................................... 49
   c. Showing of “True Consideration” ................................... 49
   d. Reformation ......................................................... 49
4. Collateral Agreements and Naturally Omitted Terms .................... 49
5. Parol Evidence Rule Not Applicable to Subsequent Modifications .... 50
6. Article 2 Rule ............................................................ 50
   a. Course of Dealing ................................................... 50
   b. Usage of Trade ...................................................... 50
   c. Course of Performance ............................................. 50

D. OTHER ARTICLE 2 PROVISIONS ON INTERPRETING CONTRACTS ...... 50
1. Battle of the Forms ....................................................... 50
   a. Contracts Involving a Nonmerchant—Terms of Offer Govern .... 50
   b. Contracts Between Merchants—Additional Terms in Acceptance
      Usually Included .................................................... 51
      c. Contracts Between Merchants—Different Terms in Acceptance
         May or May Not Be Included .................................. 51
2. Supplemental (“Gap-Filler”) Terms ....................................... 52
   a. Price ............................................................... 52
   b. Place of Delivery .................................................. 52
   c. Time for Shipment or Delivery .................................. 52
   d. Time for Payment .................................................. 52
   e. Assortment ......................................................... 52
3. Delivery Terms and Risk of Loss ......................................... 52
   a. Noncarrier Case .................................................... 52
   b. Carrier Cases ....................................................... 53
      1) Shipment Contract ................................................. 53
2) Destination Contracts ................................. 53
3) Common Delivery Terms ................................. 53
   a) C.I.F. and C. & F. .................................. 53
   b) F.A.S. .............................................. 54
   c) F.O.B. .............................................. 54
  
c. Effect of Breach on Risk of Loss ......................... 54
   1) Defective Goods .................................. 54
   2) Revocation of Acceptance ........................... 54
  
d. Risk in Sale or Return and Sale on Approval Contracts .......... 55
   1) Sale or Return .................................. 55
   2) Sale on Approval .................................. 55
  
4. Insurable Interest and Identification .......................... 55
5. Bilateral Contracts Formed by Performance ....................... 55
   a. Compare—Common Law Last Shot Rule .................. 55
6. Warranties .............................................. 56
   a. Warranty of Title and Against Infringement ............ 56
      1) Warranty of Title ................................ 56
      2) Warranty Against Infringement ....................... 56
      b. Implied Warranty of Merchantability ................. 56
         1) When Given .................................. 56
         2) Elements of Warranty of Merchantability ........... 56
         3) Seller’s Knowledge of Defect Not Relevant .......... 57
      c. Implied Warranty of Fitness for a Particular Purpose .... 57
      d. Express Warranties ................................ 58
         1) Distinguish—Statements of Value or Opinion ........ 58
      e. Disclaimer of Warranties ........................................
         1) Warranty of Title ................................ 58
         2) Implied Warranties ................................ 58
            a) Specific Disclaimers ........................... 58
               (1) Disclaimer of Warranty of Merchantability .... 58
               (2) Disclaimer of Warranty of Fitness for a Particular Purpose .... 58
               (3) “Conspicuous” Defined ......................... 59
            b) General Disclaimer Methods ....................... 59
               (1) By General Disclaimer Language ............... 59
               (2) By Examination or Refusal to Examine .......... 59
               (3) By Course of Dealing, Etc. ..................... 59
         3) Express Warranties ................................ 59
            a) Parol Evidence Rule ............................. 60
4) Limitations on Damages ..................................... 60
5) Timing—Disclaimers and Limitations in the Box ................. 60
   a) Compare—“Clickwrap” ................................ 60
6) Unconscionability and Warranty Disclaimers ..................... 60
f. Damages for Breach of Warranty ................................ 61
   1) In General—Difference Between Goods Tendered and as
      Warranted ............................................. 61
   2) Breach of Warranty of Title ............................. 61
      a) Special Circumstances—Appreciation and Depreciation .... 61
   g. To Whom Do Warranties Extend? ............................. 62
E. MODIFICATION OF CONTRACT TERMS .............................................. 62
1. Consideration ................................................................. 62
2. Writing ................................................................. 62
   a. Provisions Prohibiting Oral Modification Not Effective at Common
      Law ................................................................. 62
   b. U.C.C. Recognizes No-Modification Clauses ............................. 63
      1) Contract Between Merchant and Nonmerchant ......................... 63
      2) Waiver ............................................................. 63
         a) Retraction of Waiver .................................................. 63
3. Parol Evidence Rule Does Not Apply ..................................... 63

VI. PERFORMANCE AND EXCUSE OF NONPERFORMANCE ................. 63
A. INTRODUCTION ................................................................. 63
B. PERFORMANCE AT COMMON LAW ......................................... 63
C. PERFORMANCE UNDER ARTICLE 2 ......................................... 64
  1. Obligation of Good Faith .................................................. 64
  2. Seller’s Obligation of Tender and Delivery ............................... 64
     a. Noncarrier Cases .......................................................... 64
        1) Tender of Delivery .................................................. 64
        2) Place of Delivery .................................................. 64
     b. Carrier Cases ............................................................. 64
        1) Shipment Contracts—Where Seller Has Not Agreed to Tender at
           Particular Destination .................................................. 64
        2) Destination Contracts—Where Seller Has Agreed to Tender at
           Particular Destination .................................................. 64
  3. Buyer’s Obligation to Pay—Right to Inspect ............................. 65
     a. Delivery and Payment Concurrent Conditions ......................... 65
     b. Payment by Check ...................................................... 65
     c. Installment Contracts .................................................. 65
     d. Buyer’s Right of Inspection ........................................... 65
D. CONDITIONS—HAS THE DUTY TO PERFORM BECOME ABSOLUTE? .... 66
  1. Distinction Between Promise and Condition ............................. 66
     a. Definitions ............................................................. 66
        1) Promise ............................................................. 66
        2) Condition ............................................................. 66
           a) Failure of Condition vs. Breach of Contract ................... 66
           b) Excuse of Performance ........................................... 67
           c) Interrelation of Conditions and Promises ...................... 67
     b. Interpretation of Provision as Promise or Condition ................ 67
        1) Words of Agreement .................................................. 67
        2) Prior Practices ...................................................... 67
        3) Custom ............................................................. 67
        4) Third-Party Performance ............................................. 67
        5) Courts Prefer Promise in Doubtful Situations ..................... 67
        6) Reference to Time .................................................... 68
     c. Provision Both Promise and Condition ................................ 68
        1) Condition May Imply a Promise ................................... 68
        2) Express Promise and Condition ................................... 68
2. Classification of Conditions .................................................. 69
   a. Condition Precedent ..................................................... 69
   b. Conditions Concurrent ............................................... 69
   c. Condition Subsequent ............................................... 69
3. Express Conditions .......................................................... 70
   a. Promisor’s Satisfaction as Condition Precedent .................. 70
      1) Mechanical Fitness, Utility, or Marketability .............. 70
      2) Personal Taste or Judgment ..................................... 70
         a) Lack of Satisfaction Must Be Honest and in Good Faith .. 70
   b. Satisfaction of Third Person as Condition .......................... 70
4. Constructive (Implied) Conditions ...................................... 70
   a. Constructive Conditions of Performance .......................... 71
   b. Constructive Conditions of Cooperation and Notice .............. 71
   c. Order of Performance ............................................... 71
      1) Simultaneous Performance Possible—Conditions Concurrent .. 71
      2) One Performance Takes Time—Conditions Precedent .......... 72
5. Effect of Condition—Equitable Remedy ................................. 72
6. Have the Conditions Been Excused? ...................................... 72
   a. Excuse of Condition by Hindrance or Failure to Cooperate .... 72
   b. Excuse of Condition by Actual Breach ............................. 72
   c. Excuse of Condition by Anticipatory Repudiation ............... 73
      1) Executory Bilateral Contract Requirement ..................... 73
      2) Requirement that Anticipatory Repudiation Be Unequivocal .. 73
      3) Effect of Anticipatory Repudiation ............................. 73
      4) Retraction of Repudiation ...................................... 74
   d. Excuse of Condition by Prospective Inability or Unwillingness to
      Perform ................................................................. 74
      1) Distinguish from Actual and Anticipatory Repudiation ... 74
      2) What Conduct Will Suffice? ...................................... 74
      3) Effect of Prospective Failure ................................... 74
      4) Retraction of Repudiation ...................................... 74
   e. Excuse of Condition by Substantial Performance .................. 74
      1) Rule of Substantial Performance ................................. 75
      2) Substantial Performance Arises If Breach Is Minor .......... 75
      3) Inapplicable Where Breach “Willful” .......................... 75
      4) Damages Offset .................................................... 75
      5) Generally Inapplicable to Contracts for the Sale of Goods .... 75
   f. Excuse of Condition by “Divisibility” of Contract .................. 75
      1) Rule of “Divisibility” .............................................. 75
      2) What Is a “Divisible” Contract? ................................. 76
         a) Interpretation .................................................... 76
         b) Contract Expressly Indivisible ................................ 76
      3) Sales of Goods—Installment Contracts ......................... 76
   g. Excuse of Condition by Waiver or Estoppel ......................... 76
      1) Estoppel Waiver .................................................... 77
      2) Election Waiver .................................................... 77
      3) Conditions that May Be Waived ................................. 77
      4) Waiver in Installment Contracts ............................... 77
5) Right to Damages for Failure of Condition ........................................ 78
h. Excuse of Condition by Impossibility, Impracticability, or Frustration .. 78

E. HAS THE ABSOLUTE DUTY TO PERFORM BEEN DISCHARGED? .... 78
1. Discharge by Performance ................................................................. 78
2. Discharge by Tender of Performance ................................................ 78
3. Discharge by Occurrence of Condition Subsequent ............................ 78
4. Discharge by Illegality ................................................................. 78
5. Discharge by Impossibility, Impracticability, or Frustration .............. 78
   a. Discharge by Impossibility .......................................................... 79
      1) Impossibility Must Be “Objective” ........................................ 79
      2) Timing of Impossibility ......................................................... 79
      3) Effect of Impossibility ......................................................... 79
      4) Partial Impossibility ............................................................. 79
      5) Temporary Impossibility ....................................................... 79
      6) Part Performance Prior to Impossibility—Quasi-Contractual Recovery ......................................................... 79
      7) Specific Situations ............................................................... 79
         a) Death or Physical Incapacity ............................................. 79
         b) Supervening Illegality ....................................................... 80
         c) Subsequent Destruction of Contract’s Subject Matter or Means of Performance ......................................................... 80
            (1) Compare—Contracts to Build ..................................... 80
            (2) Specificity Required .................................................... 80
               a) Subject Matter ......................................................... 80
               b) Specificity of Source ............................................... 80
            (3) If Risk of Loss Has Already Passed to Buyer ............... 81
   b. Discharge by Impracticability ..................................................... 81
      1) Test for Impracticability ........................................................ 81
      2) Contracts for the Sale of Goods .......................................... 82
         a) Allocation of Risk .......................................................... 82
         b) Events Sufficient for Discharge ........................................ 82
         c) Seller’s Partial Inability to Perform .................................. 82
      3) Temporary or Partial Impracticability .................................. 83
c. Discharge by Frustration ............................................................. 83
d. Distinguish Uses of Defenses of Impossibility/Impracticability and Frustration ............................................................. 83
6. Discharge by Rescission ............................................................... 84
   a. Mutual Rescission ................................................................. 84
      1) Contract Must Be Executory ............................................... 84
         a) Unilateral Contracts ....................................................... 84
         b) Partially Performed Bilateral Contracts ............................ 84
      2) Formalities ................................................................. 84
         a) Subject Matter Within Statute of Frauds .......................... 84
         b) Contracts for the Sale of Goods ...................................... 85
      3) Contracts Involving Third-Party Beneficiary Rights ......... 85
   b. Unilateral Rescission ............................................................. 85
7. Partial Discharge by Modification of Contract .............................. 85
   a. Mutual Assent ................................................................. 85
b. Consideration .................................................. 85
   1) Requirement Where Modification Is Only “Correction” 85
   2) Contracts for the Sale of Goods ......................... 85
8. Discharge by Novation ........................................ 86
9. Discharge by Cancellation ................................... 86
10. Discharge by Release ........................................ 86
11. Discharge by Substituted Contract ....................... 86
    a. Revocation May Be Express or Implied ............... 86
    b. Intent Governs ........................................... 86
12. Discharge by Accord and Satisfaction .................. 87
    a. Accord .................................................... 87
       1) Requirement of Consideration ..................... 87
       a) Partial Payment of Original Debt ............... 87
       2) Effect of Accord ..................................... 87
    b. Satisfaction .............................................. 87
       c. Effect of Breach of Accord Agreement Before Satisfaction 87
          1) Breach by Debtor ................................. 87
          2) Breach by Creditor .............................. 87
    d. Checks Tendered as “Payment in Full” ................. 88
13. Discharge by Account Stated ............................... 88
    a. Writing Generally Not Required ..................... 88
    b. Account May Be Implied ............................... 88
14. Discharge by Lapse .......................................... 88
    a. Time When Lapse Becomes Effective ................. 88
15. Effect of Running of Statute of Limitations .......... 88
7. Breach ......................................................... 89
   A. WHEN DOES A BREACH OCCUR? ......................... 89
   B. MATERIAL OR MINOR BREACH—COMMON LAW CONTRACTS 89
      1. Effect of Breaches .................................... 89
          a. Minor Breach ....................................... 89
          b. Material Breach ................................... 89
          c. Minor Breach Coupled with Anticipatory Repudiation 89
          d. Material Breach of Divisible Contract ....... 89
      2. Determining Materiality of Breach .................. 90
          a. General Rule ....................................... 90
             1) Amount of Benefit Received .................. 90
             2) Adequacy of Damages ........................... 90
             3) Extent of Part Performance .................... 90
             4) Hardship to Breaching Party .................. 90
             5) Negligent or Willful Behavior ................ 90
             6) Likelihood of Full Performance .............. 90
          b. Failure of Timely Performance .................... 90
             1) As Specified by Nature of Contract ......... 90
             2) When Delay Occurs ............................... 90
             3) Mercantile Contracts ............................ 91
             4) Land Contracts .................................... 91
             5) Availability of Equitable Remedy ............ 91
          c. Material Breach and Substantial Performance .... 91
C. PERFECT TENDER RULE—SALE OF GOODS .................................................. 91
   1. Commercial Unit Defined ................................................................. 91
   2. Right to Reject Cut Off by Acceptance ............................................. 91
      a. Notice ......................................................................................... 92
      a. Buyer Must Hold Goods with Reasonable Care ................................ 92
      b. When Seller Gives No Instructions on Disposal of Goods ............... 92
      c. When Buyer Resells Goods .......................................................... 92
   4. Buyer’s Right to Revoke Acceptance .................................................... 92
      a. When Acceptance May Be Revoked ............................................. 93
      b. Other Requirements for Revocation of Acceptance ......................... 93
   5. Exceptions to the Perfect Tender Rule .................................................. 93
      a. Installment Contracts ................................................................. 93
      b. Seller’s Right to Cure ................................................................. 94
         1) Single Delivery Contracts ......................................................... 94
            a) Seller Can Cure by Notice and New Tender Within Time for
               Performance ........................................................................ 94
            b) Seller’s Right to Cure Beyond Original Contract Time ............. 94
         2) Installment Contracts .............................................................. 95
   D. ANTICIPATORY REPUDIATION ................................................................. 95
   E. BREACH OF WARRANTY ................................................................. xiii.

VIII. REMEDIES .......................................................................................... 95
   A. NONMONETARY REMEDIES .......................................................... 95
      1. Specific Performance ................................................................. 95
         a. Available for Land and Rare or Unique Goods .......................... 95
         b. Not Available for Service Contracts ....................................... 96
            1) Injunction as Alternate Remedy .......................................... 96
         c. Covenant Not to Compete ...................................................... 96
         d. Equitable Defenses Available .............................................. 96
            1) Laches ............................................................................ 96
            2) Unclean Hands ............................................................... 96
            3) Sale to a Bona Fide Purchaser .......................................... 97
      2. Nonmonetary Remedies Under Article 2 ........................................... 97
         a. Buyer’s Nonmonetary Remedies ............................................. 97
            1) Cancellation ..................................................................... 97
            2) Buyer’s Right to Replevy Identified Goods ......................... 97
               a) On Buyer’s Prepayment ............................................. 97
               b) On Buyer’s Inability to Cover ................................... 97
            3) Buyer’s Right to Specific Performance ............................... 98
         b. Seller’s Nonmonetary Remedies ............................................. 98
            1) Seller’s Right to Withhold Goods ..................................... 98
            2) Seller’s Right to Recover Goods ....................................... 98
               a) Right to Recover from Buyer on Buyer’s Insolvency .......... 98
               b) Right to Recover Shipped or Stored Goods from Bailee ...... 98
                  (1) On Buyer’s Insolvency ............................................. 98
                  (2) On Buyer’s Breach .................................................. 98
                  (3) When Goods May Not Be Stopped ............................. 99
                  (4) Obligation of Carrier or Bailee ................................. 99
3) Seller’s Ability to Force Goods on Buyer Limited ........................................ 99
   c. Right to Demand Assurances ................................................................. 99
B. MONETARY REMEDY—DAMAGES ............................................................. 99
   1. Types of Damages ....................................................................................... 100
      a. Compensatory Damages .......................................................................... 100
         1) “Standard Measure” of Damages—Expectation Damages ......................... 100
         2) Reliance Damage Measure ..................................................................... 100
         3) Consequential Damages .......................................................................... 100
         4) Incidental Damages—Contracts for the Sale of Goods .............................. 100
         5) Certainty Rule .......................................................................................... 100
      b. Punitive Damages ...................................................................................... 101
      c. Nominal Damages .................................................................................... 101
      d. Liquidated Damages .................................................................................. 101
         1) Requirements for Enforcement ............................................................... 101
            a) U.C.C. Rule ......................................................................................... 101
         2) Recoverable Even If No Actual Damages ................................................. 101
         3) Effect of Electing Liquidated or Actual Damages ...................................... 101
   2. Contracts for Sale of Goods ......................................................................... 102
      a. Buyer’s Damages ....................................................................................... 102
         1) Seller Does Not Deliver or Buyer Rejects Goods or Revokes Acceptance .................................................................................. 102
            a) Difference Between Contract Price and Market Price ......................... 102
            b) Difference Between Contract Price and Cost of Replacement Goods—“Cover” ................................................................. 102
         2) Seller Delivers Nonconforming Goods that Buyer Accepts .................... 102
            a) Warranty Damages ............................................................................. 102
            b) Notice Requirement ........................................................................... 103
         3) Seller Anticipatorily Breaches Contract ................................................ 103
         4) Consequential Damages ......................................................................... 103
            a) Goods for Resale ................................................................................. 103
            b) Goods Necessary for Manufacturing .................................................... 103
      b. Seller’s Damages ....................................................................................... 103
         1) Buyer Refuses to Accept Goods or Anticipatorily Breaches Contract ........ 103
            a) Difference Between Contract Price and Market Price ......................... 103
            b) Difference Between Contract Price and Resale Price .......................... 104
            c) Damages Based on Lost Profits .......................................................... 104
         2) Action for Price ....................................................................................... 105
   3. Contracts for Sale of Land ........................................................................... 105
   4. Employment Contracts .............................................................................. 105
      a. Breach by Employer .................................................................................. 105
      b. Breach by Employee .................................................................................. 105
         1) Intentional Breach ................................................................................... 105
         2) Unintentional Breach .............................................................................. 105
   5. Construction Contracts ................................................................................ 105
      a. Breach by Owner ....................................................................................... 105
         1) Breach Before Construction Started ....................................................... 105
         2) Breach During Construction .................................................................. 106
<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>3) Breach After Construction Completed</td>
<td>106</td>
</tr>
<tr>
<td>b. Breach by Builder</td>
<td>106</td>
</tr>
<tr>
<td>1) Breach Before Construction Started</td>
<td>106</td>
</tr>
<tr>
<td>2) Breach During Construction</td>
<td>106</td>
</tr>
<tr>
<td>3) Breach by Late Performance</td>
<td>106</td>
</tr>
<tr>
<td>6. Contracts Calling for Installment Payments</td>
<td>107</td>
</tr>
<tr>
<td>7. Avoidable Damages (Mitigation)</td>
<td>107</td>
</tr>
<tr>
<td>a. Employment Contracts</td>
<td>107</td>
</tr>
<tr>
<td>b. Contracts for Sale of Goods</td>
<td>107</td>
</tr>
<tr>
<td>c. Manufacturing Contracts</td>
<td>107</td>
</tr>
<tr>
<td>d. Construction Contracts</td>
<td>107</td>
</tr>
<tr>
<td>C. RESTITUTION</td>
<td>107</td>
</tr>
<tr>
<td>1. Terminology</td>
<td>108</td>
</tr>
<tr>
<td>2. Measure of Damages</td>
<td>108</td>
</tr>
<tr>
<td>3. Specific Applications</td>
<td>108</td>
</tr>
<tr>
<td>a. When Contract Breached</td>
<td>108</td>
</tr>
<tr>
<td>1) “Losing” Contracts</td>
<td>108</td>
</tr>
<tr>
<td>2) Breach by Plaintiff</td>
<td>108</td>
</tr>
<tr>
<td>a) Restitution of Advance Payments or Deposit If Buyer of Goods in Breach</td>
<td>109</td>
</tr>
<tr>
<td>(1) General Offset Provision</td>
<td>109</td>
</tr>
<tr>
<td>(2) Effect of Liquidated Damages Provision</td>
<td>109</td>
</tr>
<tr>
<td>(3) Seller's Right to Greater Damages</td>
<td>109</td>
</tr>
<tr>
<td>b. When Contract Unenforceable—Quasi-Contract Remedy</td>
<td>109</td>
</tr>
<tr>
<td>c. When No Contract Involved—Quasi-Contract Remedy</td>
<td>110</td>
</tr>
<tr>
<td>D. RESCISSION</td>
<td>110</td>
</tr>
<tr>
<td>1. Grounds</td>
<td>110</td>
</tr>
<tr>
<td>2. Defenses</td>
<td>111</td>
</tr>
<tr>
<td>3. Additional Relief</td>
<td>111</td>
</tr>
<tr>
<td>E. REFORMATION</td>
<td>111</td>
</tr>
<tr>
<td>1. Grounds</td>
<td>111</td>
</tr>
<tr>
<td>2. Clear and Convincing Evidence Standard</td>
<td>111</td>
</tr>
<tr>
<td>3. Parol Evidence Rule and Statute of Frauds Do Not Apply</td>
<td>111</td>
</tr>
<tr>
<td>4. Defenses</td>
<td>111</td>
</tr>
<tr>
<td>F. STATUTE OF LIMITATIONS UNDER U.C.C.</td>
<td>111</td>
</tr>
<tr>
<td>1. Parties May Agree to Shorter Period</td>
<td>112</td>
</tr>
<tr>
<td>2. Accrual of Action</td>
<td>112</td>
</tr>
<tr>
<td>3. Breach of Warranty Actions</td>
<td>112</td>
</tr>
<tr>
<td>a. Warranty Extends to Future Performance</td>
<td>112</td>
</tr>
<tr>
<td>b. Implied Warranties Breached on Delivery</td>
<td>112</td>
</tr>
<tr>
<td>IX. RIGHTS AND DUTIES OF THIRD PARTIES TO THE CONTRACT</td>
<td>112</td>
</tr>
<tr>
<td>A. INTRODUCTION</td>
<td>112</td>
</tr>
<tr>
<td>B. THIRD-PARTY BENEFICIARIES</td>
<td>112</td>
</tr>
<tr>
<td>1. Which Third-Party Beneficiaries Can Sue?</td>
<td>113</td>
</tr>
<tr>
<td>a. Categories of Beneficiaries</td>
<td>113</td>
</tr>
<tr>
<td>1) Intended vs. Incidental Beneficiaries</td>
<td>113</td>
</tr>
<tr>
<td>a) Test</td>
<td>113</td>
</tr>
</tbody>
</table>
b) Determining Promisee’s Intention .............................................. 113
2) Creditor or Donee Beneficiary .................................................. 114
   a) Creditor Beneficiary ............................................................ 114
   b) Donee Beneficiary ................................................................ 114
2. When Do the Rights of the Beneficiary Vest? .......................... 114
   a. Significance of Vesting .......................................................... 114
3. What Are the Rights of the Third-Party Beneficiary and the Promisee? 114
   a. Third-Party Beneficiary vs. Promisor .................................... 114
      1) Promisor’s Defenses Against Promisee .............................. 114
      2) Promisee’s Defenses Against Third-Party Beneficiary If Promise Not Absolute ......................................................... 115
   b. Third-Party Beneficiary vs. Promisee .................................... 115
      1) Exception—Detrimental Reliance ........................................ 115
   c. Promisee vs. Promisor ........................................................... 115
      1) Donee Beneficiary Situation ............................................... 115
      2) Creditor Beneficiary Situation .......................................... 116
C. ASSIGNMENT OF RIGHTS AND DELEGATION OF DUTIES .......... 116
1. Assignment of Rights ............................................................... 116
   a. Terminology ........................................................................ 116
   b. What Rights May Be Assigned? ............................................. 116
      1) General Rule ................................................................... 116
      2) Exceptions ........................................................................ 117
         a) Assigned Rights Would Substantially Change Obligor’s Duty 117
            (1) Personal Service Contracts .......................................... 117
            (2) Requirements and Output Contracts ............................ 117
               (a) Compare—Duties Under Output and Requirements Contracts ................................................................. 117
         b) Rights Assigned Would Substantially Alter Obligor’s Risk 117
         c) Assignment of Future Rights ......................................... 117
         d) Assignment Prohibited by Law ....................................... 118
         e) Express Contractual Provision Against Assignment ......... 118
            (1) Assignment of “the Contract” ..................................... 118
            (2) Assignment of Rights Under the Contract ................ 118
               (a) Factors that Make Assignment Ineffective ................ 118
   c. Effect of Assignment—Real Party in Interest ................................ 118
   d. What Is Necessary for an Effective Assignment? ..................... 119
      1) Requirement of Writing ..................................................... 119
      2) Requirement of Adequate Description ............................... 119
      3) Requirement of Present Words of Assignment .................. 119
      4) No Requirement of Consideration .................................... 119
   e. Partial Assignments ............................................................... 119
   f. Is the Assignment Revocable or Irrevocable? ......................... 119
      1) Assignments for Value Are Irrevocable .............................. 119
      2) Gratuitous Assignments Are Revocable ............................. 119
         a) Exceptions to Rule of Revocability ................................ 120
            (1) Performance by Obligor ............................................ 120
            (2) Delivery of Token Chose ......................................... 120
            (3) Assignment of Simple Chose in Writing ................. 120
g. What Are the Rights and Liabilities of the Various Parties?  
1) Assignee vs. Obligor  
   a) What Defenses Does Obligor Have Against Assignee?  
      (1) Exception—Personal Defenses Arising After Assignment  
      (a) Test  
      (2) Estoppel  
   b) Modification of the Contract  
      (1) No Effect on Rights of Assignee  
      (2) U.C.C. Position  
   c) Defenses of Assignor Not Available  
2) Assignee vs. Assignor  
   a) Assignor’s Warranties  
   b) Obligor Incapable of Performance  
   c) Rights of Sub-Assignees  
3) Do Third Parties Have Any Equities Relating to Assignment?  
   h. What Problems Exist If There Have Been Successive Assignments of
   the Same Rights?  
1) Revocable Assignments  
2) Irrevocable Assignments  
   a) First Assignee Has Priority  
   b) Exceptions  
      (1) Judgment Against Obligor  
      (2) Payment of Claim  
      (3) Delivery of Token Chose  
      (4) Novation  
      (5) Estoppel  
3) U.C.C. Rules  
2. Delegation of Duties  
   a. Terminology  
   b. What Duties May Be Delegated?  
      1) General Rule  
      2) Exceptions  
      a) Duties Involving Personal Judgment and Skill  
      b) “Special Trust” in Delegator  
      c) Change of Obligee’s Expectancy  
      d) Contractual Restriction on Delegation  
   c. What Is Necessary for Effective Delegation?  
   d. What Are Rights and Liabilities of Parties?  
      1) Obligee  
      2) Delegator  
      3) Delegate  
      a) Delegation  
      b) Assumption  
      c) Result When Duties Delegated with Assignment of Rights
D. NOVATION DISTINGUISHED FROM OTHER THIRD-PARTY SITUATIONS .......................................................... 126
E. POWER OF PERSON OTHER THAN OWNER TO TRANSFER GOOD TITLE TO A PURCHASER ......................................................... 126
1. Entrusting ................................................................. 126
2. Voidable Title Concept ................................................. 127
3. Thief Generally Cannot Pass Title .............................. 127
   a. Exceptions .......................................................... 127
I. WHAT IS A CONTRACT?

A. GENERAL DEFINITION
A contract is a promise or 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.

B. COMMON LAW VS. ARTICLE 2 SALE OF GOODS
Generally, the common law governs contracts. However, special rules have been developed for contracts involving the sale of goods, and those rules are contained in Article 2 of the Uniform Commercial Code (“U.C.C.”). Article 2 has adopted much of the common law of contracts, but where the common law and Article 2 differ, Article 2 prevails in a contract for the sale of goods.

1. “Sale” Defined
A sale is a contract in which title to goods passes from the seller to the buyer for a price. [U.C.C. §2-106(1)]

2. “Goods” Defined
Article 2 defines “goods” as all things movable at the time they are identified as the goods to be sold under the contract. [U.C.C. §2-105(1)] Thus, Article 2 applies to sales of most tangible things (e.g., cars, horses, hamburgers), but does not apply to the sale of real estate, services (e.g., a health club membership), or intangibles (e.g., a patent), or to construction contracts. Goods associated with real estate (e.g., minerals, growing crops and uncut timber, and fixtures removed from the land) may fall under Article 2 under certain circumstances.

3. Contracts Involving Goods and Nongoods
If a sale involves both goods and services (e.g., a contract to paint a portrait), a court will determine which aspect is dominant and apply the law governing that aspect to the whole contract. However, if the contract divides payment between goods and services, then Article 2 will apply to the sale portion and the common law will apply to the services portion.

4. Merchants vs. Nonmerchants
A number of the rules in Article 2 depend on whether the seller and/or buyer are merchants. Article 2 generally defines “merchant” as one who regularly deals in goods of the kind sold or who otherwise by his profession holds himself out as having special knowledge or skills as to the practices or goods involved. [U.C.C. §2-104(1)] For many of the Article 2 provisions dealing with general business practices (e.g., Statute of Frauds, confirmatory memos, firm offers, modification), almost anyone in business can be deemed a merchant. However, a few Article 2 provisions (e.g., the implied warranty of merchantability) are narrower and require a person to be a merchant with respect to goods of the kind being sold.

C. TYPES OF CONTRACTS

1. As to Formation
Contracts are frequently described as express, implied, or quasi. Only the first two are actually contracts, and they differ only in 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* (*e.g.*, if a person sits in a barber’s chair and the barber cuts his hair, a contract has been formed by the parties’ 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. (*See* VIII.C., *infra.*) Their only relationship to genuine contracts is historical.

2. **As to Acceptance**

a. **Bilateral Contracts—Exchange of Mutual Promises**
The traditional bilateral contract is 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.

b. **Unilateral Contracts—Acceptance by Performance**
The traditional unilateral contract is one in which the offeror requests performance rather than a promise. Here, the offeror-promisor promises to pay upon the *completion of the requested act* by the promisee. Once the act is completed, a contract is 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.

c. **Modern View—Most Contracts Are Bilateral**

1) **Acceptance by Promise or Start of Performance**
Under Article 2 and the Restatement (Second) of Contracts, unless clearly indicated otherwise by the language or circumstances, *all* offers are “doubtful” or “indifferent” offers, which means that they may be accepted by promising or beginning performance.
*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 if Barnes gives Acme notice of its beginning of performance within a reasonable time, and it creates an implied promise on the part of Barnes to complete manufacture.

2) **Unilateral Contracts Limited to Two Circumstances**
Under Article 2 and the Second Restatement, a traditional unilateral contract (*i.e.*, a contract that can be formed only by full performance) 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 situation) that only the performance requested in the offer will manifest acceptance.

3. 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). It cannot be enforced by either party.

b. Voidable Contract
A voidable contract is one that one or both parties may elect to avoid (e.g., by raising a defense that makes it voidable, such as infancy or mental illness).

c. Unenforceable Contract
An unenforceable contract is an agreement that is otherwise valid but which 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 for consideration?
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: