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合同法 Contracts

[美] 史蒂文·L·伊曼纽尔/著
(Steven L. Emanuel)

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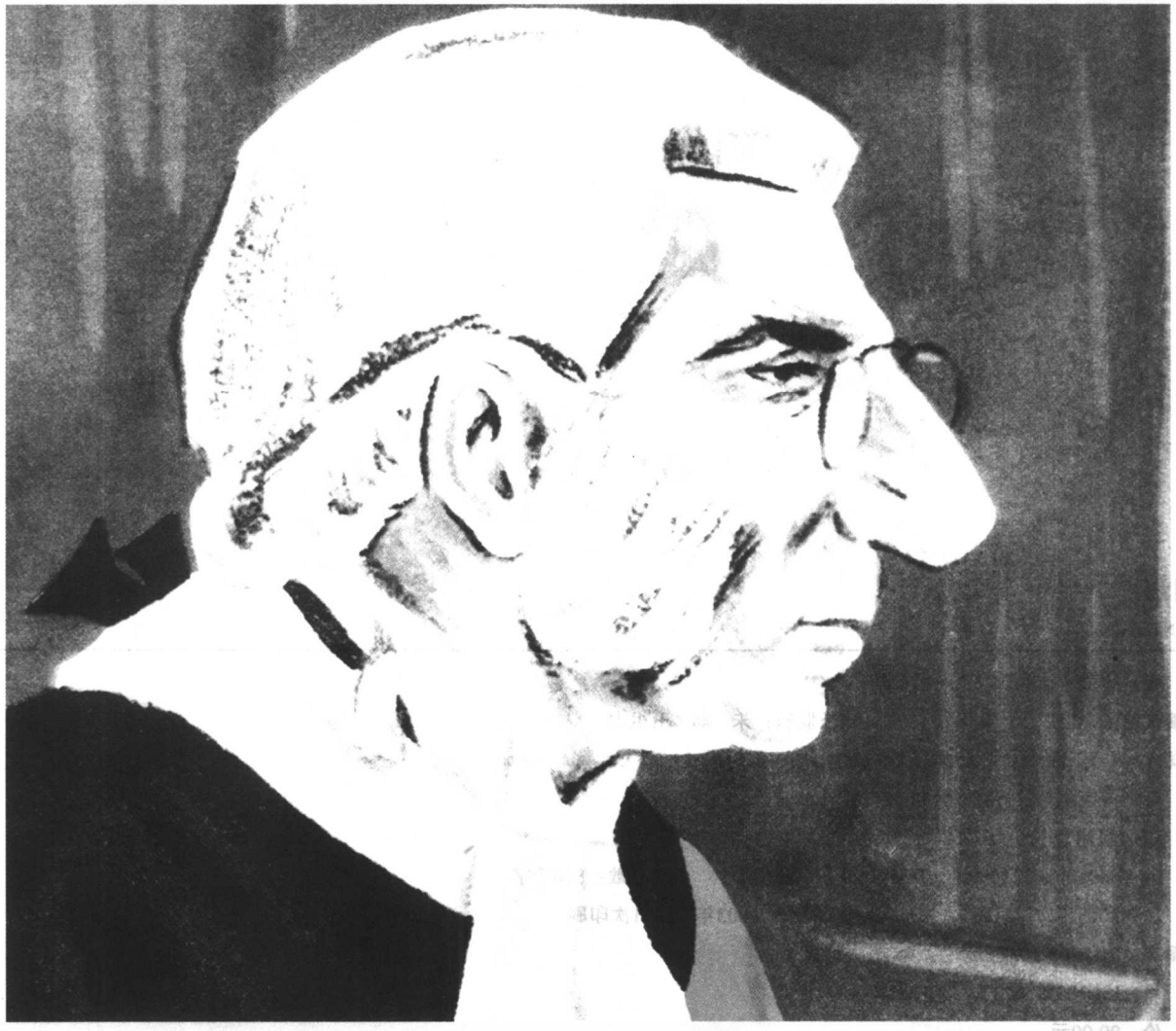

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合同法

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CHAPTER 1

INTRODUCTION

I. MEANING OF "CONTRACT"

A. Definition: A "contract" can be defined for most purposes as an ***agreement*** which the law will ***enforce*** in some way. See C&P, p. 1.

1. Containing at least one promise: A contract must contain at least one ***promise***, i.e., a commitment to do something in the ***future***. A contract is thus said to be "executory," rather than "executed."

> **Example:** Suppose *A* transfers title to her car to *B*, and in return simultaneously receives $1,000 from *B*; this whole transaction is done on the spur of the moment. No contract has been created. Since the transaction contains no promise by either party of a ***future*** performance, it is completely executed, rather than executory. If, on the other hand, *A* had ***promised*** that she would transfer title to *B*, and *B* had promised to give *A* $1,000 (or had in fact given *A* the $1,000 immediately), there *would* be a contract, since *A*'s performance was to occur in the future.

2. Written vs. oral contracts: The term "contract" is often used to refer to a written document which embodies an agreement. But for legal purposes, an agreement may be a binding and enforceable contract in most circumstances even though it is ***oral***. The few kinds of contracts for which a written document is necessary are discussed in the chapter on the Statute of Frauds, *infra*, p. 284.

3. Contracts vs. quasi-contracts: Contracts must be distinguished from what are sometimes called ***"quasi-contracts."*** A quasi-contract is not a contract at all, but is rather the term used by some courts to denote a recovery imposed by law where justice so requires, even though the parties have not made any agreement. Thus a physician who renders emergency services to an injured pedestrian he finds on the sidewalk might be allowed to recover in quasi-contract even though his services were not requested by the victim (or by anyone else). Quasi-contractual recovery is discussed more fully *infra*, p. 345.

a. Implied in law: A quasi-contractual recovery is often called "implied in law" recovery. The term "implied in law" should not be confused with a contract that is "implied in fact." An "implied in fact" contract is a real contract, but one in which agreement is reached by the parties' actions, rather than their words. If a person visits a doctor to discuss an ailment, an agreement to pay a reasonable fee will be "implied in fact" even though neither party mentions payment. Implied in fact contracts are treated exactly like "express" contracts (i.e., contracts agreed upon by words) for almost all purposes, but are treated very differently from "implied in law" contracts (i.e., quasi-contracts).

II. VOID, VOIDABLE AND UNENFORCEABLE CONTRACTS

A. Differing legal consequences: The usual contract, which may be enforced by either party, is said to be "enforceable." There are, however, certain kinds of agreements which are not fully enforceable.

1. **Void contracts:** Some kinds of agreements are said to be ***"void,"*** although this is a contradiction in terms. What is meant is that these agreements have no legal effect. Thus a gambling contract might be said to be "void as against public policy." Some commentators prefer to say that no contract has been formed, rather than that a contract is void. C&P, p. 20.

2. **Voidable contracts:** A ***"voidable"*** contract is one which one party may at his option either enforce or not enforce. Thus a ***minor*** who has made what would otherwise be a binding agreement, or a person who has been induced to agree by ***fraud***, has the choice of either "avoiding" the contract (i.e., acting as if no agreement had ever been made), or enforcing it.

3. **Unenforceable contracts:** An ***"unenforceable"*** contract is one which does not give an immediate right to judicial relief, but which nonetheless has some legal status. The most important difference between an "unenforceable" contract and a so-called "void" contract is that the unenforceable contract may be converted into a fully binding contract by the act of one of the parties, while a void contract may not.

   a. **Statute of Frauds:** A common example of an unenforceable contract is an oral agreement of a type for which a writing is necessitated by the Statute of Frauds (e.g., a contract for the sale of land). If, after such an oral agreement has been reached, one party produces a written statement of its terms, the agreement is rendered enforceable against him. (A "void" contract, on the other hand, can never be rendered enforceable by the act of just one party.)

III. ECONOMIC ANALYSIS OF CONTRACT LAW

A. **Generally:** An important development in the law of contracts over the last few decades has been the increasing use of ***economic theory*** to analyze contracts problems.

   1. **The "Chicago school" of legal analysis:** The use of economic analysis is closely associated with the University of Chicago Law School, so much so that the predominant wing of economics-and-law is known as the "Chicago school." That wing has been led by Richard Posner, a University of Chicago law professor who subsequently became a judge of the U.S. Court of Appeals for the Seventh Circuit.

B. **Focus on efficiency:** The central tenet of economic analysis is that ***"efficiency"*** should be the major objective of contract law. Most scholars who promote efficiency as an objective have in mind two main sorts of goals:

   1. keeping ***"transaction costs"*** (e.g., litigation costs and legal fees) as ***low as possible***;
   2. ***allocating resources*** to their ***most highly valued uses***.

   K&C, p. 11.

C. **Various contexts:** We will be encountering a number of contexts in which economic analysis of particular contract-law rules seems especially useful. Most of these contexts involve "remedies," that is, the means by which courts attempt to protect a contracting party when the other party breaches the agreement.

   1. **Some examples:** It is hard, at this early point in your Contracts course, to give you good examples of how economic analysis may be used in contract law. However, here are a

couple of illustrations, both connected with the problem of compensating a party who has been the victim of breach.

Example 1: Treadmill Co. manufactures electric treadmills, for which it needs many component parts. Treadmill Co. gets an order for 10,000 machines from Wal-Mart stores. Treadmill Co. contracts with Component Corp. to have Component Corp. custom manufacture 100,000 precisely machined gears, 10 of which are needed for each treadmill. Component Corp. custom manufactures the first 10,000 gears, delivers them to Treadmill Co., and is paid. Wal-Mart than cancels the remainder of its contract with Treadmill. Treadmill Co. immediately tells Component Corp. to stop making any more gears. The president of Component Corp. replies, "I've got a contract, and I'm going to make the remaining 90,000 gears and insist that you pay for them." Because these gears are to be custom machined, they will have no other use, and will only be saleable for their salvage value.

If the law of Contracts permits or encourages Component Corp. to insist on finishing the contract and recovering the full contract price, economic waste — inefficiency — will obviously result. (Time and materials will be spent making the 90,000 pieces, which will just end up being sold for scrap by either Component Corp. or Treadmill.) Therefore, a court will instead require that Component ***"mitigate its damages."*** (See *infra*, p. 356). That is, Component will not be permitted to recover for any of its costs incurred after receiving the stop-manufacturing notice from Treadmill. Component will instead be allowed to recover the profits it would have made from the last 90,000 pieces, and no time and materials will be wasted. See K&C, p. 1010.

Example 2: Same initial facts as Example 1. Assume that the price under the contract with Treadmill is $1 per gear. Also, assume that after Component Corp. has custom manufactured the 100,000 gears, a new customer, Bicycle Co., says to Component Corp., "We need 100,000 gears [which coincidentally require the same specs as the ones made for Treadmill] by tomorrow, and we'll pay $3 per gear." There's no time for Component to make an additional 100,000 gears, so it will either have to forgo the Bicycle order or breach the Treadmill contract by giving Bicycle the gears made for Treadmill. Assume that the gears, if timely delivered, would be worth $1.50 per unit to Treadmill, so that Treadmill would suffer a "loss" of 50¢ by not getting the shipment on time.

Economic analysis says that the law of Contracts should impose a rule of damages such that the gears will end up going to Bicycle instead of to Treadmill. Indeed, that analysis says that the rules should be ones that encourage Component to ***break its contract*** with Treadmill and deliver to Bicycle. The standard "expectation" measure of damages — which gives Treadmill a damage award of 50¢ per gear, the difference between the contract price and the value of the gears to Treadmill — will do this: Component can charge Bicycle $3, pay 50¢ damages to Treadmill, and pocket the remaining $2.50 (which is $1.50 more than it would have gotten had it honored the contract.) So each party is better off than it would have been under a system which compels or strongly encourages the parties not to breach (e.g., a scheme under which Component had to pay Treadmill 10 times its actual losses in the event of a breach.)

Note: These two examples over-simplify many aspects of the analysis. For instance, Example 2 ignores transaction costs, such as Treadmill's legal fees in having to bring suit to collect the 50¢ per gear difference between the contract price and the value of the gears to it. Furthermore, our analysis ignores the fact that the parties always have the power to agree to a consensual "buy out" of the contract, so that a damages rule that facilitates breach is not the only way to bring about an efficient result. For instance, even if the rule was that the breaching seller (Component) had to pay 10 times the buyer's actual damages, Treadmill Co. could agree to surrender its contract rights for, say, $1 per gear, leaving all three parties better off.

Despite the oversimplification inherent in these two examples, they indicate that economic analysis can help:

(1) explain why the standard rules of contract law are what they are; and

(2) in a few instances, perhaps, show why the standard rules should be changed to produce more efficient outcomes.

IV. FLOW CHARTS

A. About our flow charts: We've worked very hard in this edition to put the key concepts of Contract law into a series of ***flow charts.***

Figure 1-1 on the next page is a "global" flow chart that tries to give you an overview of all of the major issues in analyzing a Contracts problem. Fig. 1-1 also contains references to many of the more specific flowcharts printed in the later chapters.

If you're reading this book for the first time, at the beginning of your course, don't spend too much time on the flow chart in Fig. 1-1 — just skim it, to get a sense of what the major issues are in Contracts law, and how they fit together. Later, when you're reviewing for exams, you'll want to come back and work with the flow chart in more depth.

V. SOURCES OF CONTRACT LAW

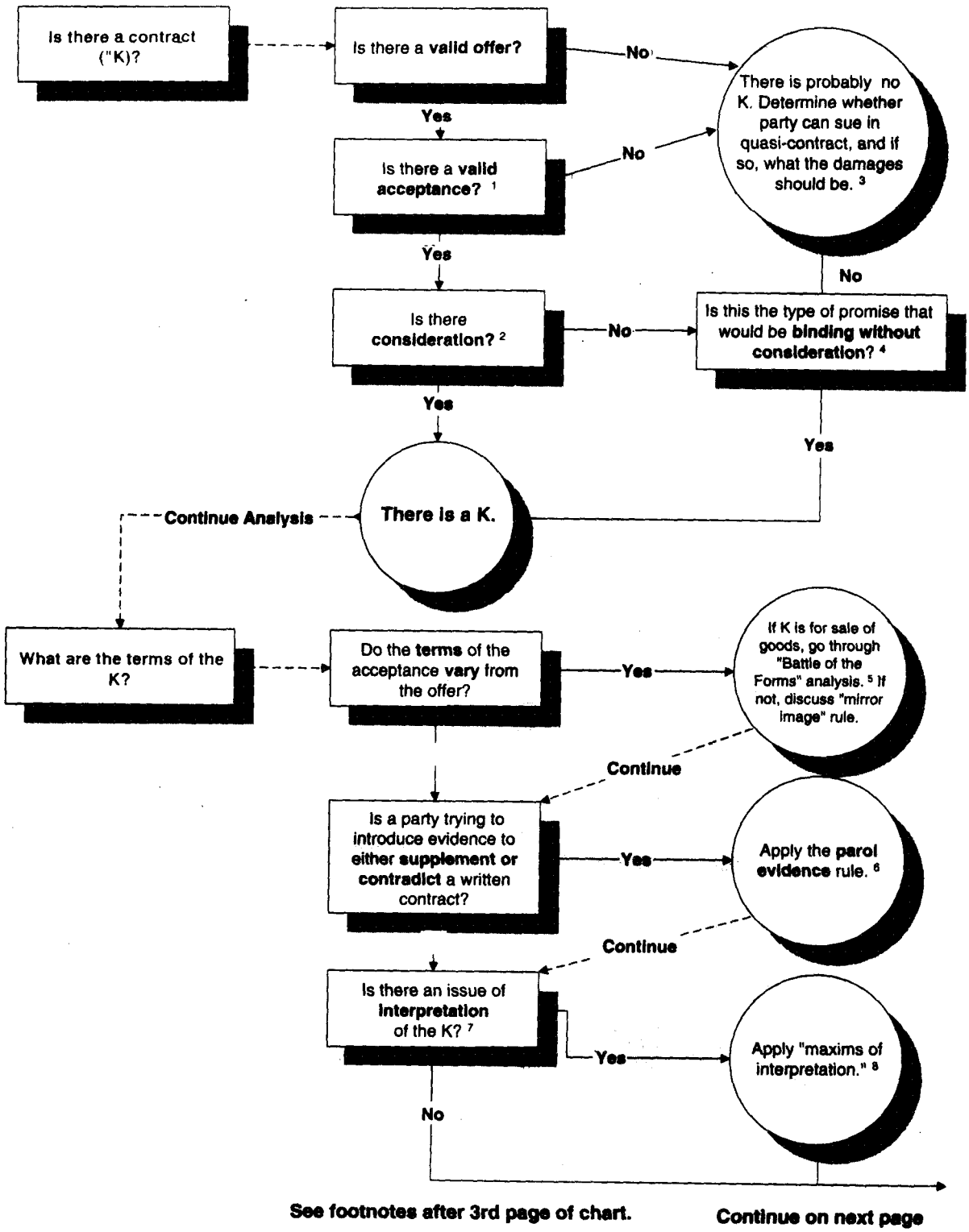
A. The UCC: In most states, most aspects of contract law are governed by case law (i.e., "common law"), rather than by statutes. But in every state except Louisiana, ***sales of goods*** (i.e., sales of things other than land or services) are governed by a statute that is roughly the same in all states, called the ***Uniform Commercial Code***. The UCC has a number of Articles, concerned with a variety of kinds of transactions; here, our principal interest will be in Article 2, which deals with sales of goods.

1. Common-law residue: Even in a transaction involving the sale of goods, if the UCC is silent as to a particular question, the case law controls. Thus UCC §1-103 provides that the "principles of law and equity" control "unless displaced by the particular provisions of this Act...."

Figure 1-1

Analyzing Contracts Questions

Use this chart to help you spot issues when analyzing any contracts exam question. Skim the questions along the far left for the general issues, and follow the body of the chart where needed for more detailed analysis.



See footnotes after 3rd page of chart. **Continue on next page**

Figure 1-1
Analyzing Contracts Questions (cont.)

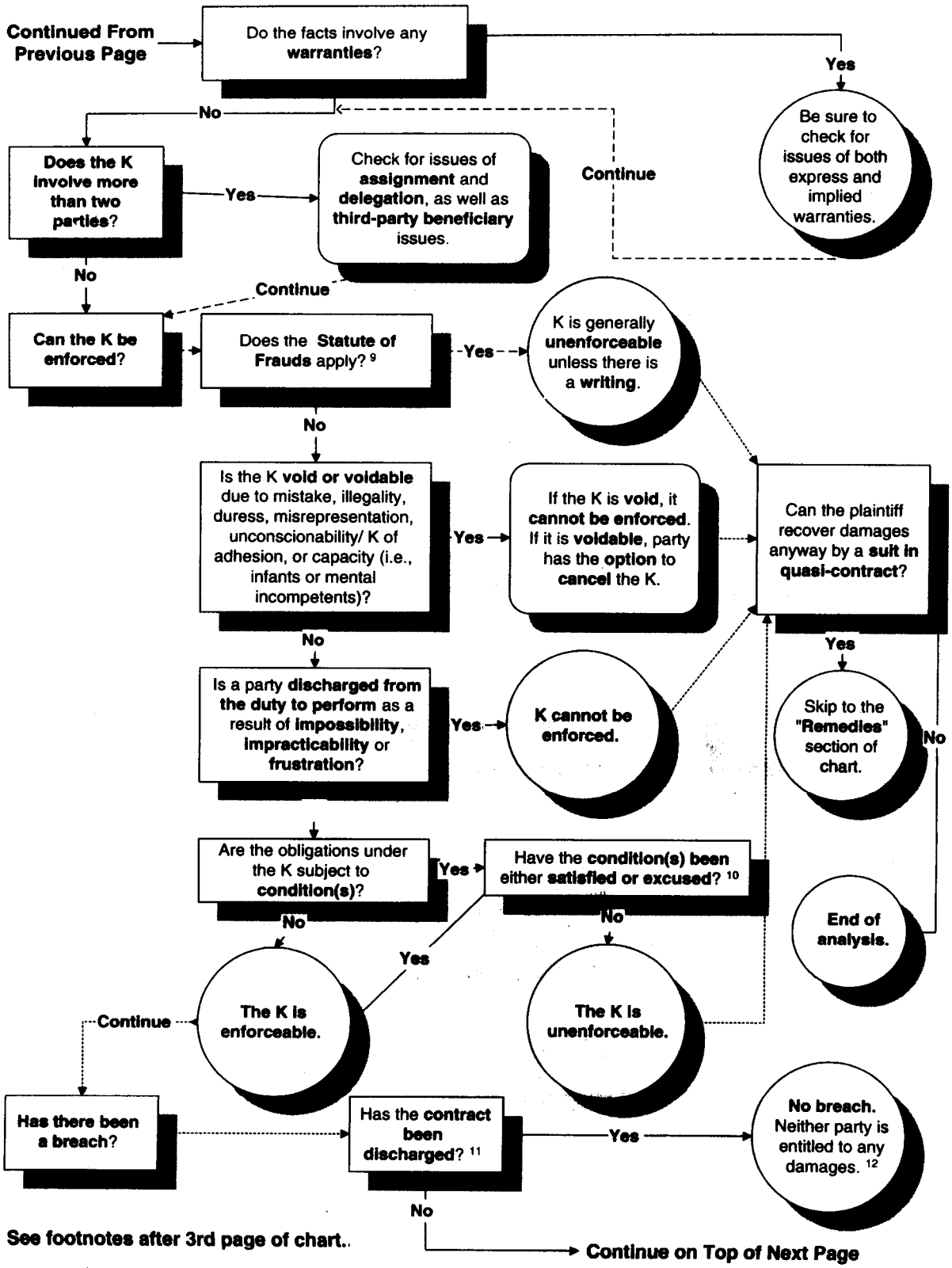
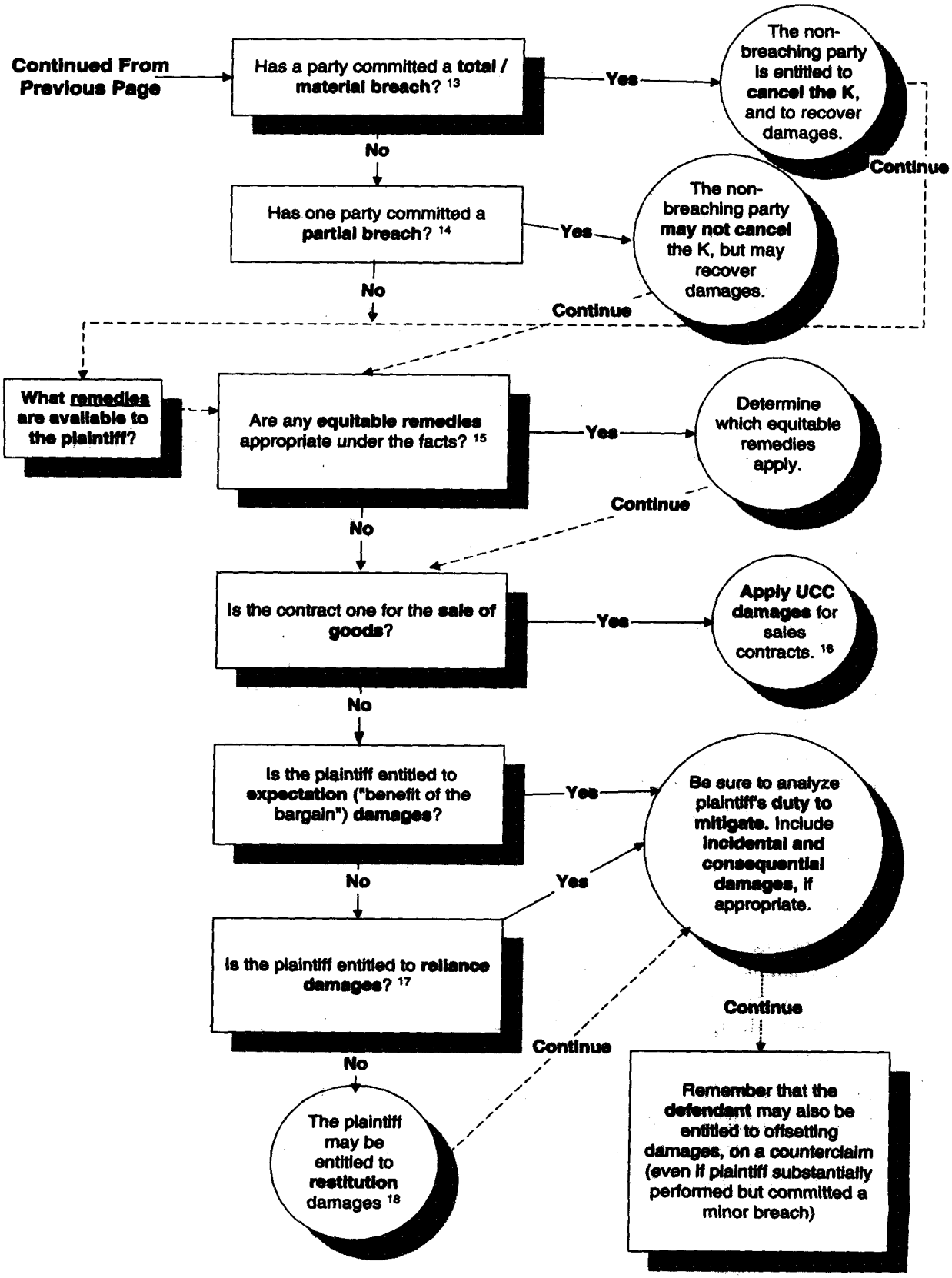


Figure 1-1

Analyzing Contracts Questions (cont.)



See footnotes on next page

Notes to Figure 1-1 (Analyzing Contracts Questions)

[1] Acceptance can be either by performance (in unilateral contract) or by promise to perform (in bilateral contract).

[2] Check for both the "bargain" and "detriment" elements. See also the "Consideration" flow charts, Figs. 3-1 through 3-4 in Chap. 3.

[3] But even in the absence of a specific valid offer and/or acceptance, consider the possibility that the parties' later actions may have recognized the existence of a contract, in which case the court will enforce that contract.

[4] See Figure 4-1 for "Promises Binding Without Consideration" flow chart.

[5] See Figures 2-3 and 2-4 for "Battle of the Forms" flow charts.

[6] See Figure 6-1 for "Parol Evidence Rule" flow chart.

[7] Your answer will be "yes" if a party is trying to show the meaning of a term contained in the writing.

[8] See Ch. 6, V(B). Remember that if the conflict concerns the meaning of a key term, it may be that there was no "mutual assent" and therefore no contract.

[9] See Figure 9-1 for "Statute of Frauds" flow chart.

[10] Check for: (1) "substantial performance" of the condition (that's enough, if the condition is constructive rather express) or (2) facts that show that the condition has been waived or otherwise excused (that's enough, for either express or constructive conditions).

[11] Your answer will be "yes" if, for example, there has been a rescission or an accord and satisfaction.

[12] Check for the possibility of a non-contractual restitution or reliance award (common where the contract was discharged for impossibility, frustration, etc.)

[13] Your answer will be "yes" if a party has not substantially performed her obligations. Be sure to include cases of anticipatory repudiation here.

[14] Your answer will be "yes" if a party has substantially performed, but nonetheless failed to comply perfectly with the contract's requirements. In that case, the other party will be entitled to damages to compensate for the non-conformity.

[15] See Ch. 10, sec. XIII. See also Figures 10-1 and 10-2 on Damages in Sales Contracts Under the UCC.

[16] These include specific performance and injunctions. Equitable remedies are rare in contracts cases. They are used most often in land sale contracts, and occasionally for sales of unique goods.

[17] This will be the most common form of damages in: (1) suits brought on the contract, where the plaintiff's lost profits (expectation measure) can't be shown with sufficient certainty; and (2) suits brought in quasi-contract.

[18] Restitution is used most often to prevent unjust enrichment, including cases in which both parties have been discharged (e.g., cases of impossibility or frustration).

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2. **Updating:** As of this writing, the 1995 version of the UCC is the most recent. However, a substantial revision to Article 2 is underway, and will likely be completed in 1999 or 2000. After the new version is completed, each state will have to decide whether and when to adopt it, though the vast majority are likely to do so within the first few years after completion.

B. The Restatements: In order to organize and summarize the American common law of contracts, the American Law Institute published the ***Restatement of Contracts*** in 1932. Since then, the Restatement has had enormous importance. A new edition of the Restatement, usually referred to as the *Second Restatement of Contracts*, was published in 1980 and is frequently cited here.

CHAPTER 2

OFFER AND ACCEPTANCE

ChapterScope

This chapter discusses the first major requirement for a valid contract: that the parties have reached "mutual assent" on the basic terms of the deal. Here are a few of the key principles covered in this chapter:

- **Mutual assent:** For a contract to be formed, the parties must reach ***"mutual assent."*** That is, they must ***both intend to contract***, and they must ***agree*** on at least the ***main terms*** of their deal.
- **Objective theory of contracts:** In determining whether the parties have reached mutual assent, what matters is ***not*** what each party ***subjectively intended***. Instead, a party's intentions are measured by what a ***reasonable person in the position of the other party*** would have thought the first party intended, based on the first party's actions and statements. This principle is known as the ***"objective theory of contracts."***
- **Offer and acceptance:** Normally, for a contract to come into existence, there must be an "offer" and an "acceptance."
  - **Offer:** An ***"offer"*** is a statement or act that creates a "power of acceptance." When a person makes an offer, she is indicating that she is willing to be ***immediately bound*** by the other person's acceptance, ***without further negotiation.***
  - **Acceptance:** An ***"acceptance"*** is a statement or act that indicates the offeree's immediate intent to ***enter into the deal*** proposed by the offer. As long as the acceptance takes place while the offer is still outstanding, ***a contract is formed as soon as the acceptance occurs.***
- **Duration of the power of acceptance:** When you analyze facts to see whether a valid offer and acceptance occurred, one of your key jobs is to figure out whether the offer ***ended*** before the "acceptance" occurred (in which case there's no contract). The main ways in which an offer can end are:
  - the offer is ***rejected*** by the offeree;
  - the offeree makes a ***counteroffer***;
  - the offeror ***revokes*** the offer;
  - the offer ***lapses*** by passage of time;
  - either the offeror or the offeree ***dies*** or becomes incapacitated.

I. INTENT TO CONTRACT

A. Mutual assent: For a contract to be formed, the parties must reach an agreement to which they "mutually assent." This mutual assent is almost invariably reached through what are called "the offer" and "the acceptance" (see *infra*, p. 15).

1. **Not subjective agreement:** However, this requirement of "mutual assent" does not mean that the parties must have ***subjectively*** (i.e., in their minds) been in agreement. Rather, it means that each party must ***act*** in such a way as to lead the other to reasonably believe that an agreement has been reached. The doctrine that only the parties' acts, and not their subjective thoughts, are relevant in determining whether there has been mutual assent, stems from the ***objective theory of contracts***, discussed below.

2. **Agreement required only as to major terms:** The requirement of mutual assent does not mean that the parties must agree (even by the objective standard) on ***all*** the terms of the contract. Instead, they must agree on the "major" or "essential" terms. If they disagree on minor terms, or if they have simply not provided for such minor terms, the court may conclude that one party's understanding controls, or may supply the missing terms. But the parties must, despite the minor gaps or minor disagreements, ***intend*** to have a contract. For a more full discussion of missing or misunderstood terms, see *infra*, p. 76 and p. 167.

B. Objective theory of contracts: Because neither contracting parties nor courts are mind-readers, it is important that the existence and terms of contracts be determined from the ***manifestations*** made by each of the parties, rather than by each party's subjective intention. Thus a party's intentions are to be gauged ***objectively***, rather than subjectively.

1. **Test for intent:** The objective measure of a party's intention is, in most circumstances, ***what a reasonable person in the position of the other party would conclude that his objective manifestations of intent meant***. C&P, p. 26.

   Example: *A* says to *B*, "I'll sell you my house for $1,000." *B* says, "OK, you've got a deal." *A*'s house is in fact worth considerably more than $1,000, and *A* refuses to consummate the deal. *B* sues. If *B* can demonstrate that *A*'s tone of voice or *A*'s known lack of business acumen led *B* to the reasonable conclusion that *A*'s offer was serious, the court will treat *A* as having intended to contract. This will be so even though *A* proves definitively that he intended a joke (e.g., by producing *X* to testify that *A* told *X* right after the offer that he intended a joke).

   If, on the other hand, a person in *B*'s position would reasonably have understood that *A* was joking (e.g., if *B* should have recognized the bantering tone in *A*'s voice, or should have known that *A*'s house was worth so much more than $1,000 that the offer could only have been made in jest), the court will treat *A* as not having intended to contract, and no contract will be found to have been formed.

   Similarly, if *A* can prove that *B* knew *A* was joking (e.g., *A* produces a witness who says that *B* told him, "I knew *A* was joking, but I'm going to try to force the sale anyway"), there is no mutual assent, even though it would not have been unreasonable for *B* to think *A* was serious. This is because *B* is charged with both knowledge that he actually had about *A*'s intent, and the knowledge that he should reasonably have had. If *B* either knew, or should have known, that *A* was joking, there is no mutual assent and no contract. C&P, p. 27.

   a. Secret intent: A corollary of the objective theory of contracts is that a party's ***secret*** intentions (that is, secret from the other party) are ***irrelevant*** in determining whether a contract exists, and what its terms are.

Example: Employee, a sales manager for Employer, has always worked under written contracts, the most recent of which just expired. Employee tells Employer that unless Employee's contract is immediately renewed for another year, he will immediately quit. Employer replies, "Go ahead, you're all right. Get your men out, and don't let that worry you." Employee, thinking that his contract has been renewed, makes no effort to find employment elsewhere. Two months later, his job is terminated in an economy move, and he sues Employer. Employer defends, in part, by claiming that if he made the remark at all, he did not do so with the intent to create a contract.

Held, Employer's undisclosed intent not to enter a contract was immaterial. Whatever Employer's intent, if "what [Employer] said would have been taken by a reasonable man to be an employment, and [Employee] so understood it, it constituted a valid contract...." *Embry v. Hargadine, McKittrick Dry Goods Co.*, 105 S.W. 777 (Mo. App. 1907).

2. **Other uses for objective theory:** The objective theory of contracts will be used not only to determine whether the mutual assent necessary to form a contract has occurred, but also to determine the ***meaning*** of particular terms of the contract.

   Example: *A* and *B* sign a complex agreement for a sale of goods by *B* to *A*. The contract makes no mention of whether *B* is to insure the shipment. *B* has always done so in past deals with *A*, but this time he subjectively intends not to insure the goods, because insurance prices have gone up. He says to *A*, however, "This deal's just like the ones we've done before." A court would probably hold that *A* reasonably expected *B* to insure the shipment as he had always done, and *B* will be placed under a contractual obligation to do so, despite his subjective intent to the contrary.

C. **Intent to create legal relations:** What happens if the parties go through all of the motions of giving mutual assent to what appears to be a contractual agreement, but subjectively neither party expects the "contract" to be enforceable in court? It used to be said, before around 1950, that there was no contract unless both parties intended the agreement to be legally binding. But, as Corbin has pointed out, if two ignorant farmers agree to exchange a horse for a cow, there is a contract even though neither farmer knows that there are courts to enforce such agreements. 1 Corbin § 34.

1. **Modern view:** Under modern case law, the importance of the parties' intention, or lack of intention, that the contract be legally enforceable, depends largely upon the context of the agreement.

2. **Business agreements:** Where the transaction is one which would normally be considered a ***"business"*** transaction, it will be presumed that the parties intended that the agreement be legally enforceable. Rest. 2d, § 21.

   a. **Contract made in jest:** Thus in a business context, even if one party makes an offer ***in jest***, and the other party reasonably believes that she is serious, and seriously accepts the offer, the contract will be binding.

      Example: P offers the Ds (husband and wife) $50,000 for their farm. The Ds write out a one-line statement — "We hereby agree to sell to [P] the Ferguson Farm complete for $50,000, title satisfactory to buyer" — and they sign it. When the Ds fail to go

through with the sale, P sues. The Ds defend on the ground that they were drunk when they signed the document, and were only joking, and that they thought that P was also only joking. Also, they claim that they told P, even before he left the premises, that they didn't really intend to sell the farm.

Held, the Ds are bound, even if they subjectively did not intend to sell, and were only joking. The evidence indicates that P took them completely seriously, and that he was not unreasonable in doing so. "A person cannot set up that he was merely jesting when his conduct and words would warrant a reasonable person in believing that he intended a real agreement." *Lucy v. Zehmer*, 84 S.E.2d 516 (Va. 1954).

b. Manifest intent not to have legal relations: There is one exception to this general rule that what appears to be a business transaction shall be presumed to have been intended to be enforceable. The exception is that where ***both*** parties to a business arrangement ***explicitly*** manifest their understanding that the arrangement is not to be legally binding, it will not be enforced by a court. C&P, pp. 29-30; Rest. 2d, §21.

3. Domestic and social situations: Where an agreement arises in a ***social*** or ***domestic*** situation, on the other hand, the presumption is that legal relations were ***not*** intended.

Example: Husband promises to pay a certain monthly allowance to Wife, with whom he is living amicably at the time of the promise. The couple later separate; Wife sues for the payments owing.

Held, the agreement is not enforceable, because agreements between family members living amicably together are presumed not to have been intended as legally enforceable. *Balfour v. Balfour*, 2 K.B. 571 (1919).

Note: Where an agreement is made between family members ***not*** living together amicably (e.g., a separation settlement), the agreement will usually be presumed to have been intended to be legally enforceable. Even in the *Balfour* situation, the contract will be enforced if the parties explicitly agree that it is to be enforceable. See Rest. 2d, § 21, Comment c.

D. Intent to memorialize agreement in writing: Suppose two parties negotiate with each other, reach a mutual assent on all the terms of the proposed agreement, and also decide that they will ***subsequently put their entire agreement into a formal written document*** which both will sign. Is there a contract as soon as the mutual assent is reached, or only when the formal document is written up and signed? The question can arise not only when the parties conduct their preliminary negotiations orally, but also when they exchange letters or documents.

1. Where intent to be bound manifested: If the parties' actions or words make it clear that they intend to be bound even before the legal document is drawn up, the courts will almost always find an enforceable contract, even if the document is never drawn up. Murray, p. 34. C&P, pp. 47-48.

2. Where intent not to be bound manifested: If the parties' actions or words make it clear that they intend ***not*** to be bound unless and until the document is drawn up, the courts will not find an enforceable contract until the document is drawn up. *Id.*

3. Where no intent manifested: Where the parties have not manifested any intent at *all* about whether they want to be bound before the document is drawn up, and have indicated

only that they wish such a document to be produced, the courts are split as to whether there is a contract.

a. **Majority view:** Most have held that in this situation a contract exists ***as soon as the mutual assent is reached***, even if no formal document is ever drawn up. C&P, p. 48. Murray, p. 35.

4. **Letter of intent, contemplating more formal agreement:** A similar problem can arise where the parties sign a so-called ***"letter of intent"*** (or, as it is sometimes called, an "agreement in principle.") Such a document memorializes the basic terms on which the parties have agreed, but anticipates ***further negotiations*** on more minor issues. Often, the letter of intent indicates that a fuller and more formal agreement will be prepared later. If the parties are unable to settle the supposedly small issues, what happens if one party asserts that the letter of intent is binding, and the other disagrees?

   a. **Intent of parties, as shown by document:** All courts agree that the test is whether the parties ***intended to be bound*** by the letter of intent itself. Most courts further agree that the most important indication of the parties' intent is the terms of the letter agreement itself (since under the objective theory of contracts a party's subjective intentions are meaningless, and the best objective indication of intent is the written document). The *Empro Manufacturing* case, discussed *infra*, is an example of a case in which the court looked only to the letter of intent in deciding whether the parties had intended to be bound.

   b. **Clues in the document:** The letter of intent may contain a number of clues about whether the parties intended to be immediately bound. Here are some examples:

      - If the letter says that it is ***"subject to"*** a formal asset purchase agreement or the like, this is a strong clue that the letter itself was not intended to be binding.
      - If the document discloses particular issues on which ***further negotiation is necessary***, and these issues appear non-trivial, that militates against a finding that the letter was to be binding.
      - Any reference to ***procedural formalities*** that one or both parties must go through before any closing (e.g., shareholder approval) cuts against enforceability.
      - The ***larger or more complex*** the transaction, the less likely it is that the letter of intent was intended to be binding.

      Example: Seller wishes to sell the assets of its business. After negotiations with Buyer, the two sign a 3-page document which they entitle "letter of intent." The letter summarizes the purchase price ($2.4 million, some to be paid on closing and the rest to be paid under a promissory note.) The letter says that the arrangement will be "subject to and incorporated in a formal, definitive Asset Purchase Agreement signed by both parties." The letter also says that the purchase will be "subject to the satisfaction of certain conditions precedent to closing," including approval by the shareholders and board of directors of Buyer. The parties are then unable to agree about what security Seller will receive to ensure repayment of the note. After Buyer learns that Seller is now negotiating with a different potential purchaser, Buyer sues for an injunction, claiming that the letter of intent is enforceable.

Held, for Seller. The parties' intent to to be bound or not bound is what matters, but " 'intent' in contract law is objective rather than subjective." Here, the text and structure of the letter indicate that the parties did not manifest an intention for Seller to be bound. For instance, the letter uses the phrase "subject to" repeatedly, including twice making the deal subject to a definitive agreement. The letter indicates that the parties had not yet agreed on all details. Also, Buyer clearly left itself a number of outs (e.g., that its board approve), and there is no evidence that Seller agreed to a one-sided arrangement under which it would be bound while Buyer was not bound.

Under these circumstances, enforcing the letter would run afoul of the state's policy of "allow[ing] the parties to approach agreement in stages, without fear that by reaching a preliminary understanding they have bargained away their privilege to disagree on the specifics. Approaching agreement by stages is a valuable method of doing business." *Empro Manufacturing Co., Inc. v. Ball-Co Manufacturing, Inc.*, 870 F.2d 423 (7th Cir. 1989).

II. OFFER AND ACCEPTANCE GENERALLY

A. Requirement of offer and acceptance: The "mutual assent" necessary for the formation of a contract almost invariably takes place through what are called an "offer" and an "acceptance." That is, one party proposes a bargain (this proposal is the offer) and the other party agrees to this proposed bargain (this agreement is the acceptance).

B. Restatement definition: The Second Restatement defines an offer to be "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 [the bargain]." Rest. 2d, § 24.

C. Promise contained in offer: In most cases, the offer will contain a conditional promise, and will propose that the other party accept the proposal by making a promise in return.

> **Example:** *A* makes the following offer to *B*: "I offer to buy your 1994 Buick for $4,000, delivery and payment to occur three months from now." What *A* has done through his offer is to make a promise to pay *B* $4,000, conditional on *B*'s making a promise to deliver the car to *A*. Thus *A* has proposed that the parties exchange ***promises***.

1. Unilateral contracts: In some instances, the offer will propose not an exchange of promises, but rather an exchange of the offeror's promise for the offeree's ***act***. A contract in which only one party promises to do something, and the other party is free to act or not as she wishes, is called a ***unilateral*** contract.

> **Example:** *A* says to *B*, "If you walk across the Brooklyn Bridge, I promise to pay you $1,000." The bargain which *A* has proposed is not an exchange of promises, since *A* does not seek to have *B* promise to do anything. Instead, *A* has proposed that he exchange his promise (to pay $1,000) for *B*'s ***act*** of walking across the Bridge. Thus *A* has made an offer for a unilateral contract, since *B* is not bound to do anything, and the offer is accepted (if at all) by *B*'s act, rather than his promise. (For an explanation of what constitutes an acceptance of an offer for a unilateral contract, see *infra*, p. 26.)