

KLUWER LAW INTERNATIONAL

# CONTRACT LAW IN THE USA

GREGORY KLOSS



Wolters Kluwer  
Law & Business

# **Contract Law in the USA**

KLUWER LAW INTERNATIONAL

## **Contract Law in the USA**

**Gregory Klass**

This book was originally published as a monograph in the International  
Encyclopaedia of Laws/Contracts.



**Wolters Kluwer**

Law & Business

AUSTIN BOSTON CHICAGO NEW YORK THE NETHERLANDS

*Published by:*  
Kluwer Law International  
PO Box 316  
2400 AH Alphen aan den Rijn  
The Netherlands  
Website: [www.kluwerlaw.com](http://www.kluwerlaw.com)

*Sold and distributed in North, Central and South America by:*  
Aspen Publishers, Inc.  
7201 McKinney Circle  
Frederick, MD 21704  
United States of America  
Email: [customer.service@aspenpublishers.com](mailto:customer.service@aspenpublishers.com)

*Sold and distributed in all other countries by:*  
Turpin Distribution Services Ltd.  
Stratton Business Park  
Pegasus Drive, Biggleswade  
Bedfordshire SG18 8TQ  
United Kingdom  
Email: [kluwerlaw@turpin-distribution.com](mailto:kluwerlaw@turpin-distribution.com)

**DISCLAIMER:** The material in this volume is in the nature of general comment only. It is not offered as advice on any particular matter and should not be taken as such. The editor and the contributing authors expressly disclaim all liability to any person with regard to anything done or omitted to be done, and with respect to the consequences of anything done or omitted to be done wholly or partly in reliance upon the whole or any part of the contents of this volume. No reader should act or refrain from acting on the basis of any matter contained in this volume without first obtaining professional advice regarding the particular facts and circumstances at issue. Any and all opinions expressed herein are those of the particular author and are not necessarily those of the editor or publisher of this volume.

*Printed on acid-free paper.*

ISBN 978-90-411-3310-6

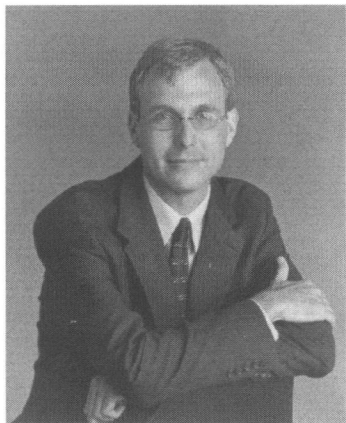
© 2010 Kluwer Law International BV, The Netherlands

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without written permission from the publisher.

Permission to use this content must be obtained from the copyright owner. Please apply to: Permissions Department, Wolters Kluwer Legal, 76 Ninth Avenue, 7th Floor, New York, NY 10011-5201, USA. Email: [permissions@kluwerlaw.com](mailto:permissions@kluwerlaw.com)

Printed and bound in Great Britain by  
CPI Antony Rowe, Chippenham and Eastbourne

## The Author



Gregory Klass is an Associate Professor at Georgetown University Law Center in Washington, D.C. He received his JD from Yale Law School in 2002, and a PhD in philosophy from the Graduate Faculty of the New School for Social Research in 1999. After graduating from law school, Professor Klass served as a clerk for the Hon. Guido Calabresi on the Second Circuit Court of Appeals, and then as Assistant Solicitor General in the Office of the New York Attorney General. Before attending law school, Professor Klass was an Assistant Professor in the Institut für Philosophie at the Technische Universität Dresden.

Professor Klass's legal scholarship focuses on contract law, with particular attention to fraud liability between contracting parties, remedies for bad-faith breach, intent to contract requirements, and the general theory of contract law. In 2006, Professor Klass was awarded the Scribes Book Award for *Insincere Promises: The Law of Misrepresented Intent*, which he co-authored with Ian Ayres. Professor Klass is admitted to practice in New York and in the Second Circuit Court of Appeals.

**The Author**

# Table of Contents

The Author	3
List of Abbreviations	11
Preface	15
General Introduction	19
§1. THE GENERAL BACKGROUND OF THE COUNTRY	19
I. Geography	19
II. Cultural Composition	19
III. Political System	19
A. History	19
B. The Federal Government	20
C. State Government	21
D. Political Parties	21
IV. Social and Cultural Values	22
§2. U.S. LAW BELONGS TO THE COMMON LAW TRADITION	22
§3. THE PRIMACY OF LEGISLATION	23
§4. THE POSITION OF THE JUDICIARY	23
§5. THE ROLE OF THE JURY	24
§6. DISTINCTION BETWEEN LAW AND EQUITY	25
§7. DISTINCTION BETWEEN PUBLIC LAW AND PRIVATE LAW	25
§8. COMMERCIAL TRANSACTIONS	26
Introduction to the Law of Contracts	27
§1. DEFINITION OF CONTRACT	27
§2. HISTORICAL BACKGROUND OF THE LAW OF CONTRACTS	28

**Table of Contents**

§3. CLASSIFICATION OF CONTRACTS	30
§4. CONTRACT AND TORT	31
§5. CONTRACT AND QUASI-CONTRACT	33
§6. CONTRACT AND THE LAW OF PROPERTY	34
§7. CONTRACT, TRUST, AND FIDUCIARY OBLIGATIONS	37
§8. GOOD FAITH AND FAIR DEALING	40
§9. STYLE OF DRAFTING	44
§10. SOURCES OF THE LAW OF CONTRACTS	45
Selected Bibliography	47
Part I. General Principles of the Law of Contract	63
Chapter 1. Formation	63
§1. AGREEMENT AND CONSIDERATION	63
I. Agreement: Offer and Acceptance	63
II. Intention to Create Legal Relations	69
III. Consideration	71
A. The Consideration Requirement	72
B. Exceptions to the Consideration Requirement	77
C. Promissory Estoppel	78
D. Moral Obligation (“Natural Obligations”)	82
IV. Modifications to the Contract	84
§2. FORMAL AND EVIDENTIARY REQUIREMENTS	88
I. Formal Requirements	88
A. Contracts under Seal	88
B. U.S. Law Does Not Recognize the Category of Solemn Contracts	90
II. Evidentiary Requirement	90
A. The Statute of Frauds: The Existence of a Writing	90
B. No Special Role for Notary Public	96
III. Burden of Proof	96
§3. PRE-CONTRACTUAL LIABILITY AND NEGOTIATIONS	98
I. Breakdown of Negotiations	98
II. Preliminary Agreements	99
Chapter 2. Conditions of Substantive Validity	102
§1. CAPACITY OF THE PARTIES	102



## Table of Contents

§2. DEFECTS OF CONSENT	104
I. Mistake	104
II. Misrepresentation and Non-disclosure	107
III. Duress and Undue Influence	113
IV. Unconscionability	116
§3. OTHER CONDITIONS OF VALIDITY OR ENFORCEMENT	122
I. No Requirement Related to Cause or Object of the Agreement	122
II. Indefiniteness and Open Terms	123
III. Initial Impossibility or Frustration	126
IV. Public Policy	126
§4. THE CONSEQUENCES OF A DEFECT OF CONSENT OR A LACK OF SUBSTANTIVE VALIDITY	130
Chapter 3. The Contents of a Contract	131
§1. DIFFERENT TYPES OF CLAUSES	131
I. Express and Implied Terms	131
II. Standard Terms (Boilerplate)	132
III. Warranties	133
IV. Exemption Clauses and Other Limitations on Liability	136
V. Liquidated Damages and Penalty Clauses	138
VI. Arbitration Clauses	140
§2. INTERPRETATION	142
I. The Parol Evidence Rule	142
II. General Rules of Interpretation	145
§3. CONDITIONAL DUTIES	151
Chapter 4. Privity of Contract	161
§1. THIRD-PARTY BENEFICIARIES	161
§2. TRANSFERS OF CONTRACTUAL RIGHTS AND OBLIGATIONS	166
I. Assignment	167
II. Delegation	176
§3. AVOIDANCE OF FRAUDULENT TRANSFERS	178
Chapter 5. The Termination of the Contract	180
§1. PERFORMANCE AND BREACH	180
§2. IMPRACTICABILITY AND FRUSTRATION	184

## Table of Contents

§3. DISCHARGE BY AGREEMENT	188
I. Termination Clauses	189
II. Agreements to Discharge Existing Contractual Duties	191
Chapter 6. Remedies	196
§1. GENERAL PRINCIPLES	196
§2. DEFENSIVE REMEDIES, INCLUDING TERMINATION	198
I. Non-performance: The Injured Party's Rights to Suspend Performance and Terminate the Contract	198
II. Anticipatory Repudiation and Adequate Assurance	207
§3. SPECIFIC PERFORMANCE AND INJUNCTIVE RELIEF	211
§4. DAMAGES	218
I. Compensatory Damages	218
A. The Basic Measure of Value	218
B. Rules Limiting Recovery	219
C. Damage Measures and Special Rules	223
II. Liquidated Damages	229
§5. RESTITUTION FOR BREACH OF CONTRACT	229
§6. NON-COMPENSATORY DAMAGES	231
§7. STATUTES OF LIMITATIONS	233
Part II. Specific Contracts	235
Chapter 1. Agency	235
Chapter 2. Bailment	240
Chapter 3. Gaming and Wagering	242
Chapter 4. Sale of Goods: Article 2 of the UCC	244
Chapter 5. Building Contracts, Hire of Work and Skills	248
Chapter 6. Lease, Commercial and Agricultural Leases	253
Chapter 7. Compromise Settlement	258
Chapter 8. Suretyship	260
§1. THE CONTRACTUAL CREATION OF SURETYSHIP	260

## Table of Contents

§2. THE SURETY'S OBLIGATIONS AND DEFENSES	262
§3. THE SURETY'S RIGHTS AGAINST THE PRINCIPAL	264
Chapter 9. Pledge	265
Chapter 10. Loans	267
Chapter 11. Contracts with the Government and Other Public Administrations	269
Chapter 12. Contract of Partnership	275
Chapter 13. Restitution, Including Quasi-contract	280
Index	285

**Table of Contents**

# List of Abbreviations

## Special Abbreviations

*This text largely follows the citation form in The Bluebook: A Uniform System of Citation (Eighteenth Edition), including its abbreviations. In the interest of economy, secondary sources that are used frequently will be cited using the following abbreviations. Full citations for these works are available in the bibliography. Where a different edition or version of a source is used, the full citation appears in the notes.*

### I. Treatises

Corbin	Corbin on Contracts, Revised Edition
Farnsworth	Farnsworth on Contracts, Third Edition
Williston	Williston on Contracts, Fourth Edition

### II. Restatements

First Restatement	Restatement of the Law of Contracts
Second Restatement	Restatement (Second) of Contracts
Restatement of Agency	Restatement (Third) of Agency
Restatement of Landlord-Tenant	Restatement (Third) of Property: Landlord & Tenant
Draft Restatement of Restitution	Draft Restatement (Third) of Restitution and Unjust Enrichment
Restatement of Suretyship	Restatement (Third) of Suretyship and Guaranty
Restatement of Trusts	Restatement (Third) of Trusts

## List of Abbreviations

# General Abbreviations

### I. Case Reporters

*Citations to Supreme Court decisions are to the United States Reports. Citations to other federal cases are to the Federal Reporter. Citations to state decisions are to the regional reporter where available. Following U.S. convention, case citations note the volume number, the source, the page number, and in parentheses the court and year. Case reports are abbreviated as follows. Most of the below reports are now in their third series.*

A./A.2d	Atlantic Reporter/Atlantic Reporter (Second Series)
F./F.2d	Federal Reporter/Federal Reporter (Second Series)
N.E./N.E.2d	North Eastern Reporter/North Eastern Reporter (Second Series)
N.W./N.W.2d	North Western Reporter/North Western Reporter (Second Series)
P./P.2d	Pacific Reporter/Pacific Reporter (Second Series)
S.E./S.E.2d	South Eastern Reporter/South Eastern Reporter (Second Series)
S.W./S.W.2d	South Western Reporter/South Western Reporter (Second Series)
So./So.2d	Southern Reporter/Southern Reporter (Second Series)
U.S.	United States Reports

### II. Federal Statutes and Regulations

C.F.R.	Code of Federal Regulations
FAA	Federal Arbitration Act
FAR	Federal Acquisition Regulation
Fed. R. Civ. Pro.	Federal Rules of Civil Procedure
Fed. R. Evid.	Federal Rules of Evidence
U.S.C.	United States Code
U.S.C.A.	United States Code Annotated

### III. Uniform Laws

UAA	Uniform Arbitration Act
UCC	Uniform Commercial Code
UETA	Uniform Electronic Transactions Act
UFTA	Uniform Fraudulent Transfers Act
ULPA	Uniform Limited Partnership Act
UPA	Uniform Partnership Act
UPAA	Uniform Premarital Agreement Act

## List of Abbreviations

### IV. Journal Articles

*In accordance with Bluebook conventions, citations to journal articles include the following information in the following order and typeface: Author, Title, [volume number] Journal Name [first page], [cited page] ([year]). For example, a citation to page 510 in Samuel Williston's 1914 article titled "Consideration and Bilateral Contracts," which appeared in volume twenty-seven of the Harvard Law Review starting at page 503, would read:*

Samuel Williston, *Consideration in Bilateral Contracts*, 27 Harv. L. Rev. 503, 510 (1914).

### V. Other Abbreviations

ALI	American Law Institute
A.L.R.	American Law Reports
Am. Jur. 2d	American Jurisprudence, Second Edition
CISG	United Nations Convention on Contracts for the International Sale of Goods
NCCUSL	National Conference of Commissioners on Uniform State Laws
UDAP Acts	Unfair and Deceptive Acts and Practices Acts
U.L.A.	Uniform Laws Annotated

**List of Abbreviations**



# Preface

The attempt to describe, in summary fashion, contract law in the United States faces two practical challenges. First, contracts are governed in the United States by the common law. The lion's share of contract law is therefore found not in statutes, but scattered through tens of thousands of case holdings and the judicial opinions explaining them. As a result, not only is U.S. contract law hard to find; it is also extremely fine grained. An Appellate Court's decision on the most minor question of law has precedential weight, and is therefore part of the law of contracts. Second, there is not a single law of contract in the United States. Most contracts are governed by state, not federal law. And while there is considerable overlap among the contract law of the fifty states and other U.S. jurisdictions, there are also important differences that defy easy summary.

There is also a more scholarly concern. Perhaps in part because it is judge-made, U.S. contract law is extraordinarily flexible in its application. The great empiricist Arthur Corbin describes the work of the common law courts as follows: "Case by case, they have drawn a line, although like other lines, it is drawn with a wide and imperfect brush, not with a draftsman's pen. Being drawn by many hands, there are gaps in places and there are conflicting lines in other places."<sup>1</sup> U.S. scholars have long argued that tangled lines of precedent and the use of standards rather than rules mean that case outcomes are often driven not only by "black-letter" rules, but by courts' and juries' social, political, moral and other judgments, intuitions, and biases. These aspects of contract law too defy easy summary.

My solution to these challenges is to limit this work's ambitions. This work does not attempt anything close to a complete description of the law of contracts in the United States. For that the reader is referred to the multivolume treatises of Samuel Williston and Arthur Corbin. And it gives itself over to a purely formalist account of contract law, focusing primarily on so-called black-letter rules and ignoring many complexities in their application. Such formalist statements – or restatements – of a rule are not the rule itself. A rule exists in its application to facts. But the application is guided by the statement, and the statement is of interest in its own right. I address the diversity of sources by focusing on the two most general and important: the American Law Institute's Restatement (Second) of Contracts (the "Second Restatement") and the National Conference of Commissioners on Uniform State Laws' (NCCUSL) Uniform Commercial Code (UCC). Neither is in itself legally binding unless specifically adopted by statute, as all states have done with part or all of the UCC, or by judicial decision. The Second Restatement and the UCC, however, describe a good portion of the law of contracts, enjoy considerable persuasive authority, and have driven many changes to the law in the