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Selections For Contracts

E. ALLAN FARNSWORTH
WILLIAM F. YOUNG
CAROL SANGER
NEIL B. COHEN
RICHARD R.W. BROOKS

Restatement Second

Uniform Commercial Code

Uniform Electronic Transactions Act

UETA and Federal E-SIGN Act

UN Sales Convention

UNIDROIT Principles

Selected Contracts and Forms

2010

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SELECTED CONTRACTS AND FORMS

Compiled by

E. ALLAN FARNSWORTH
Late Alfred McCormack Professor of Law
Columbia University

WILLIAM F. YOUNG
James L. Dohr Professor of Law Emeritus
Columbia University

CAROL SANGER
Barbara Aronstein Black Professor of Law
Columbia University

NEIL B. COHEN
Jeffrey D. Forchelli Professor of Law
Brooklyn Law School

RICHARD R.W. BROOKS
Professor of Law
Yale Law School

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RESTATEMENT OF THE LAW, SECOND, CONTRACTS

(Selected Sections)

COMPILERS' NOTE

The American Law Institute was formed in 1923 as the outgrowth of a "Committee on the Establishment of a Permanent Organization for the Improvement of the Law." Its members were to be 400 practitioners, judges and law professors; there are now about 4,000. The idea of the Institute, and of "restating" the law, was broached by Professor William Draper Lewis and fostered by Elihu Root and others. The Carnegie Corporation supported work on the original Restatement, comprising nine subjects, which was completed by 1944.

Contracts was one of the first three subjects upon which the Institute began work, and the Restatement of Contracts was completed in 1932. Professor Samuel Williston acted as Reporter, with responsibility for preparing drafts. (Professor Arthur L. Corbin served as Reporter for the Chapter on Remedies.) Other experts in the subject were formed into a Committee of Advisers who conferred with the Reporter over the whole period in producing drafts for submission to the Council of the Institute. The plan was "that the drafts of the different chapters submitted to the Council shall be the product of the committee composed of the Reporter and his advisers; that these drafts after discussion and amendment by the Council and before revision shall be submitted as tentative drafts for criticism and suggestion with a view to their improvement to the annual meetings of the Institute and to bar associations and the profession generally." Restatement of Contracts, Introduction, p. x. Final promulgation depended on approval of the text by both the Council and the full meeting of Institute members. The same procedure was followed in making revisions and in preparing the Restatement, Second.

In 1962 the Institute initiated the preparation of the Restatement, Second, of Contracts, parts of which are reproduced here. Professor Robert Braucher served as Reporter until his appointment to the Supreme Judicial Court of Massachusetts in 1971; he was succeeded by Professor E. Allan Farnsworth. The work was completed in 1980.

As originally conceived, the first Restatement was to be accompanied by treatises citing and discussing case authority, but experience proved that group production of such volumes was not feasible. As they stand, the Restatements consist of sections stating rules or principles (the so-

called black letter), each followed by one or more comments with illustrations, and in the Restatement, Second, also by Reporter's Notes in which supporting authorities are collected. (Reproduced here are the black letter of selected sections and in a few instances their comments and illustrations.)

Assaults on the Restatement, along with sympathetic appraisals, have produced a rich literature. An eminent critic of the Restatement of Contracts immediately objected that the American Law Institute "seems constantly to be seeking the force of a statute without statutory enactment." Clark, The Restatement of the Law of Contracts, 42 Yale L.J. 643, 654 (1933).[1] To what measure of authority is the Restatement entitled, then, in the courts?

This general question can have only a general answer. The Supreme Court of Oregon has emphasized the difference between statutory and Restatement texts:[2]

> Although this court frequently quotes sections of the Restatements of the American Law Institute, it does not literally "adopt" them in the manner of a legislature enacting, for instance, a draft prepared by the Commissioners on Uniform State Laws, such as the Residential Landlord and Tenant Act. In the nature of common law, such quotations in opinions are no more than shorthand expressions of the court's view that the analysis summarized in the Restatement corresponds to Oregon law applicable to the facts of the case before the court. They do not enact the exact phrasing of the Restatement rule, complete with comments, illustrations, and caveats. Such quotations should not be relied on in briefs as if they committed his court or lower courts to track every detail of the Restatement analysis in other cases. The Restatements themselves purport to be just that, "restatements" of law found in other sources, although at times they candidly report that the law is in flux and offer a formula preferred on policy grounds.

There is agreement among those who applaud the Restatement and those who deprecate it about the persuasiveness of an ideal restatement of the law. "A restatement, then, can have no other authority than as the product of men learned in the subject who have studied and deliberated over it. It needs no other, and what could be higher?" Clark, op. cit. supra, p. 655. Judge Herbert Goodrich, for many years Director of the Institute, explained:

> If an advocate thinks the Restatement was wrong as applied to his case, he can urge the court not to follow it, but to apply some other

1. On occasion a legislature has given statutory backing to the Restatement. The Virgin Islands Code (Title 1, § 4) provides: "The rules of the common law, as expressed in the restatements of the law approved by the American Law Institute . . ., shall be the rules of decision . . . in cases to which they apply, in the absence of local laws to the contrary."

2. Brewer v. Erwin, 600 P.2d 398, 410 n. 12 (Or.1979).

> rule. If the court agrees, it will do so, but it will so do with the knowledge that the rule which it rejects has been written by the people who by training and reputation are supposed to be eminently learned in the particular subject and that the specialist's conclusions have been discussed and defended before a body of very able critics. The presumption is in favor of the Restatement.... Yet it can be overthrown and that fact leaves Restatement acceptance to persuasion. It is common law "persuasive authority" with a high degree of persuasion.

Restatement and Codification, David D. Field Centenary Essays 241, 244–45 (1949).

The Restatement Second. To a substantial extent the Restatement Second reflects the thought of two men in particular: Professor Arthur Corbin and Professor Karl Llewellyn, who shared an attitude toward law sometimes described as "legal realism."[3] Professor Corbin prepared a critical review of the original Restatement, which "has been the basis for much of the work on the revision."[4] He served also as consultant for the Restatement, Second, in its early stages. Professor Llewellyn's efforts affected the revision less directly, largely through the impact of his contributions to the Uniform Commercial Code.

In restating the law of contracts for the second half of the twentieth century, an obvious difficulty arose from the fact that large tracts of the subject had recently been occupied by legislation such as the Code and, to a lesser extent, consumer-protection statutes. Indeed, the worth of the enterprise was questioned on the ground of an apparently diminishing importance of common law doctrine. In response, Professor Braucher made this claim:

> The effort to restate the law of contracts in modern terms highlights the reliance of private autonomy in an era of expanding government activity.... Freedom of contract, refined and redefined in response to social change, has power as it always had.[5]

A continuing theme of controversy about the Restatements is the wisdom or unwisdom of departing from rules derived from existing precedents, in the interest of a more just and more convenient regime of law. Professor Herbert Wechsler, when Director of the Institute, proposed "a working formula" that received the unanimous approval of the

3. For symposia devoted to the Restatement, Second, see 81 Colum.L.Rev. 1 (1981) and 67 Cornell L.Rev. 631 (1982).

4. Braucher, Formation of Contract and the Second Restatement, 78 Yale L.J. 598 (1969). See also Perillo, Twelve Letters from Arthur L. Corbin to Robert Braucher Annotated, 50 Wash. & Lee L. Rev. 755 (1993).

5. *Id.* at 615–16. For another comment by Professor Braucher, see Offer and Acceptance in the Second Restatement, 74 Yale L.J. 302 (1964).

Council: "we should feel obliged in our deliberations to give weight to all of the considerations that the courts, under a proper view of the judicial function, deem it right to weigh in theirs."[6] An example of creative restating from the first Restatement of Contracts was the formulation of the doctrine of promissory estoppel, in section 90.[7]

6. Wechsler, The Course of the Restatements, 55 A.B.A.J. 147, 150 (1969).

7. The Oregon opinion quoted above refers to a section of the Torts Restatement as a "bold sally." Notwithstanding that, the section has gained widespread adherence.

RESTATEMENT (SECOND) OF CONTRACTS[1]

(Selected Sections)

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