

CHAPTER ONE

BASIC ASPECTS OF CONTRACT LAW

1.1 Introduction: A Contract Is an Agreement the Law Will Enforce

A contract is an agreement the law will enforce. Because contracts are important in the modern world, the law that governs contracts is also important.

Unfortunately, contract law can also be complex. So this book explains some general principles of contract law. The book tries to make these principles as easy to understand as it can.

1.1a How This Chapter Works

This first Chapter summarizes some basic aspects of contract law. In doing so, the Chapter actually tries to achieve three different things at once.

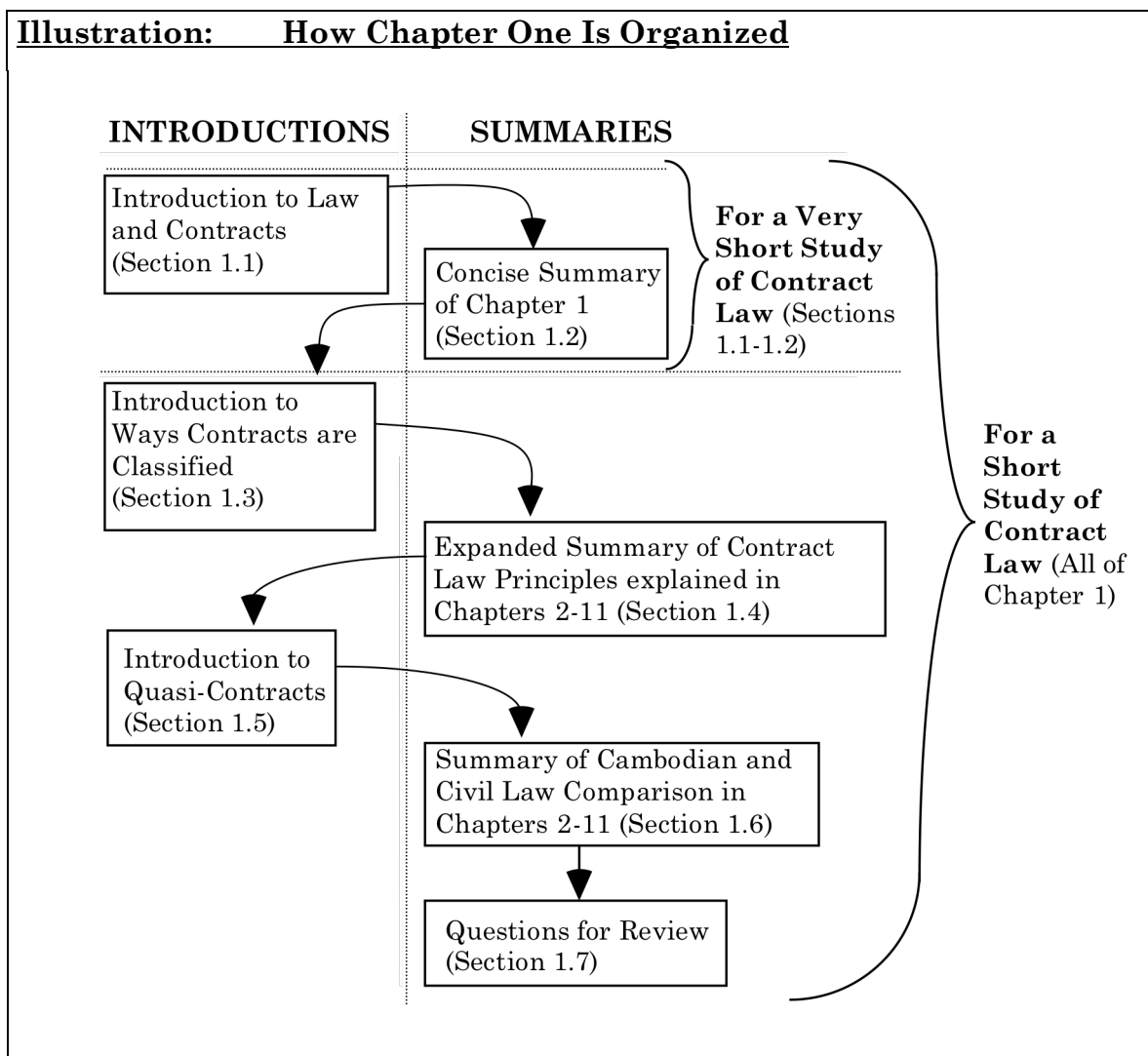
First, Chapter 1 is an introduction to this entire book, which is 11 Chapters long. The whole book is designed to be a textbook for a fairly long study of free market contract law, and to be a reference work.

Second, Chapter 1 tries to summarize some basic aspects of contract law. In this regard, Chapter 1 could be used by itself as a textbook for a shorter study of contract law, and as a shorter reference work.

Third, the first part of Chapter 1 tries to concisely summarize some very basic aspects of contract law in an even shorter format. It does this by providing in Section 1.1 a brief introduction to law and contracts, then in Section 1.2 summarizing Chapter 1 itself! So Sections 1.1-1.2 could be used by themselves as a text for a very short study of contract law, and as a quick reference. These first two Sections also provide a brief overview of the rest of the Chapter and the book.

In its attempt to work on three levels at once, Chapter 1 alternates between introductory material that should help readers understand what follows in the rest of the book, and summary material that tries to provide readers with an overview of what follows in the rest of the book. Although it may seem a little confusing, this alternating structure is designed to try

to address the different needs of a variety of potential readers. The following chart illustrates the structure of Chapter 1.



Section 1.1 now turns to a basic introduction to law and contracts in free market jurisdictions. In particular, Section 1.1 will now briefly discuss:

- (1) why contract law is important (Section 1.1b);
- (2) the role of law and courts in society (Section 1.1c); and
- (3) contract law in major legal traditions (Section 1.1d).

1.1b Contract Law Is Important

Contract law is one of the most important of all legal subjects. Contracts control most important economic transactions in the world.

They guide the activities of businesses, governments, and individuals. So contracts are crucial to the development of societies.

***** WHY IS THIS IMPORTANT?** Why is contract law important?

Contract law is important for many reasons. Contracts are essential to the activities of businesses, governments, and individuals in free market societies. Respect for contracts can aid investment and growth, which generally lead to a more prosperous society. So the basic policy in free market nations is to promote the performance and enforcement of contracts.

Unfortunately, as we all know, dispute is often present in human relations. And parties sometimes disagree about the formation, meaning, or performance of their contracts. Such disputes can be complex and difficult to resolve. Resolving them in a fair, efficient way is the task of contract law. That is why it is so important that people in business and government--and other individuals--understand contract law.

Contract disputes occur in a wide range of areas, because contracts are used in so many different aspects of life. Of course, the free market economy operates to a large extent through contracts. Business organizations--from small family businesses in local markets to the largest multinational corporations--use contracts to buy and sell raw materials, supplies, and services. Farmers make contracts to buy the equipment and supplies they need to grow things, and to sell what they produce. It is hard to imagine a business surviving without using contracts. This is because the main goal of business is to make money, and it is difficult to do that without using contracts to trade things.

Contracts are also crucial in the activities of governments in trying to protect and improve the well-being of their people. Governments make contracts to buy what they need to operate the different branches of government; to keep order and protect the public from various dangers; to build key elements of the nation's infrastructure, such as railroads and airports; to control the nation's natural resources; and sometimes to hire private parties to help them perform certain government functions. Governments also make important contracts with other governments (such as treaties) about a wide variety of matters. These matters range from trade issues to environmental standards, from human rights to peace accords that resolve wars.

For individuals, contracts make it possible to reliably get food, shelter, health care, work, education, transportation, and recreation; to marry, raise children, and care properly for families; and even to affect events after their deaths! In fact, for most people, it would be difficult to go through even a short period of life without making contracts.

Of course, one reason the importance of contracts may not be obvious is that making contracts is so common. It happens so much, and in so many different situations, that people making contracts often do not even realize they are doing so! For example, if a person buys a bowl of noodle soup for breakfast at a market stall, he has actually made a contract. The buyer of the soup has agreed to pay a certain amount of money for the soup, and the seller has agreed to provide the soup. In fact, this is probably a valid, oral, bilateral contract. There is no need to understand these legal terms yet. The point is only that even such a common act as buying soup for breakfast actually involves making a contract.

Even contracts like the soup example above, which may seem simple, are governed by the legal principles discussed in this book. For instance, in the soup example, suppose the buyer used a threat of violence to compel the seller to sell him the soup. In that case, the contract would not be valid, because of a formation problem: duress. If it was not clear which soup the parties meant, there might be interpretation problems. If the seller provided the wrong soup, defective soup, or no soup, without a legal excuse, the seller would have breached the contract. In that case, the buyer could ask a court for a remedy. So even this small transaction could involve legal problems. Contract law tries to resolve these problems.

1.1c The Role of Law and Courts in Society

In contract law, as in other legal areas, the law tries to provide some fair, efficient general rules to guide people's conduct. In general, governments and courts make these rules. Courts apply them in specific cases.

These rules often mean that a party has rights.

*** **DEFINITION:** A **right** is basically the legal ability to do or not do something, including the ability to control the acts of others.

Where one party has a right, another party generally has a duty.

*** **DEFINITION:** A **duty** is basically a legal obligation to do or not do something.

For example, if a citizen has a legal right to speak freely, then that citizen's government generally has a legal duty to allow him to speak freely. And if Borin has a legal right to receive 1,000 riels from Samen under a contract, then Samen has a legal duty to provide 1,000 riels to Borin.

For any society, it is very difficult to create and apply fair, efficient legal rules--to achieve justice. So law is not always successful at achieving this goal. This is true even though law is often complex and hard to understand, and even though law has been developing in different societies for thousands of years. Law is not always as sophisticated in resolving problems as

people wish. And there are certain human problems--such as poverty, ignorance or racism--which law alone may never be able to "solve!" These kinds of problems may be too complex, too personal, or otherwise too difficult to resolve with general legal rules alone. Law is a useful tool, but it cannot be used for everything.

Because law is complex and its goals hard to achieve, there is often disagreement among different people--particularly those in different places, cultures, or times--about whether particular legal rules are appropriate. One result is that contract law changes over time. And it often varies from one legal jurisdiction to the next. This is a natural part of the evolution of legal systems. However, it makes it very important to check the current local law relevant to any particular problem. This text presents only some general ideas about contract law. It does not state the current law in any specific jurisdiction.

It is also important to understand what this text means when it refers to "jurisdictions." The word "jurisdiction" has several meanings. For example, it can mean the extent of a particular court's power to decide cases. A court may have the "jurisdiction" to decide certain types of disputes, such as maritime or labor cases. But in this book, the term jurisdiction will generally have the following meaning.

***** DEFINITION:** A **jurisdiction** is, among other things, a geographical unit in which courts apply a particular set of legal rules.

Legal rules generally differ to some extent in different jurisdictions. Often, an entire nation will be a jurisdiction with regard to the set of legal rules that courts apply to contracts. That entire nation will apply the same contract law rules. But in some cases, units that are only parts of nations--such as provinces or states--may each have their own sets of legal rules for contracts. When this text refers to "many jurisdictions," or "some jurisdictions," it means these distinct units, whether they are nations, provinces, or states.

This text will often discuss courts, and how they think about and resolve contract disputes. However, parties often choose methods of resolving contract disputes besides court adjudication. These are sometimes called methods of alternative dispute resolution, or "**ADR**." ADR occurs only where the parties to a dispute agree to it. ADR in one form or another has actually existed for thousands of years in most societies. Parties who have or may have a contract dispute sometimes choose ADR because it can be faster, cheaper, easier, more flexible and less adversarial than adjudication. However, ADR is not always appropriate--it depends on the situation. ADR methods can be classified by



the different role of the neutral third party, or "neutral," who helps parties resolve their dispute. In many jurisdictions, the major forms of ADR are:

- (1) arbitration (with an active neutral (an "arbitrator") who applies legal rules, and who may have the power to impose a solution on the parties);
- (2) mediation (with a less active neutral (a "mediator") who enforces basic rules, offers opinions and proposes solutions);
- (3) conciliation (with an even less active neutral (a "conciliator") who enforces basic rules);

and (4) negotiation (with no neutral).

The references to courts in this text could often apply to arbitrators. This is because arbitrators try to resolve contract disputes using legal rules, and they may have the power to impose legal solutions on the parties involved. But for ease of reference, the text will usually refer only to courts.

1.1d Contract Law in Major Legal Traditions

As noted above, the law differs to some extent in different jurisdictions. However, it is also important to understand that there are some major legal traditions that have been influential in many jurisdictions throughout the modern world.

Major legal traditions include the civil law, common law, Islamic, and socialist legal traditions. Islamic legal systems exist in some nations in which most citizens are Muslims. Socialist legal systems exist in some nations with socialist systems of government. A detailed discussion of these important traditions is beyond the scope of this text.

Perhaps the two most influential traditions in the world are the civil law tradition and the common law tradition.

The common law tradition basically originated in English law. It is followed today by many nations, including Singapore, India, Australia and the United States. Very generally, the common law approach theoretically gives more power to judges to "make law" in areas where legislation is absent or unclear. Common law courts use the prior decisions of other courts as precedent to help them decide current cases. This precedent may be binding or only persuasive, depending on the relationship of the courts involved.

The civil law tradition originated in Roman law. It is followed today by many nations, such as Thailand, Indonesia, Germany and France. The civil law tradition is often viewed as giving more power to the legislature and to detailed codes drafted by that legislature, and as giving judges little or no power to "make law." So the ability of civil law judges to use prior court decisions as precedent on which to base new decisions is theoretically limited.

Today, more nations may be viewed as following the civil law tradition than the common law tradition. And the formal legal structures of Cambodia have to date been more influenced by the civil law tradition than the common law tradition.

These two major legal traditions have a great deal in common. Many feel that their approaches are gradually moving closer in important ways. Common law legislatures enact many detailed statutes. Common law judges must apply these statutes to disputes they resolve, if the statutes are relevant. Of course, no statute--no matter how detailed--can specifically govern all potential legal events in a particular area! So judges in civil law jurisdictions arguably "make law" to some extent when they decide legal disputes in areas where legislation is absent or unclear. Of course, their decisions do not have the same weight as precedent that common law court decisions do.

In addition, in the area of contract law, common law principles are influential. The common law tradition is a major source of international contract law. And many Southeast Asian jurisdictions with powerful, quickly growing economies--such as Singapore, Malaysia, and Hong Kong--follow the common law tradition.

As explained in the Preface, the main focus of this text is basic contract law principles in the common law tradition. However, there appear to be relatively few major substantive differences between the approaches of the civil law tradition and the common law tradition to contract law. In this context, a "substantive" difference is a difference in the actual rules that govern contract formation, interpretation, performance and remedies. By contrast, differences that relate mostly to rules about the procedures for resolving disputes, where law originates, or the general powers of judges or legislatures are not substantive contract law differences. In any case, where important substantive differences seem to exist, this text tries briefly to explain them. Each Chapter contains a Section which examines such differences in the approaches of the civil law tradition and the Cambodian legal tradition.

1.2 Concise Summary of Basic Aspects of Contract Law Discussed in Chapter One

Section 1.2 is a concise summary of the basic aspects of contract law discussed in Chapter 1. This concise summary is designed mainly for readers who have time only for a very brief study of the contract law principles



discussed here. But it should also serve as a quick overview of these ideas for those who are able to read further. In particular, Section 1.2 contains:

- (1) a discussion of ways the law classifies contracts;
- (2) an explanation of six basic requirements many jurisdictions have for a valid contract (real agreement, consideration (common law only), capacity, legality, formality, and no other formation problems);
- (3) an explanation of other key aspects of contract law (interpretation, performance, remedies, and third party rights and duties);
- (4) a discussion of other features of this Chapter (an introduction to quasi-contract, and Cambodian and civil law perspectives on contract law);
- (5) an illustration of very basic ways to analyze contract law problems; and
- (6) a discussion of the questions for review at the end of all Chapters in this text, and some quick questions for review of Sections 1.1 and 1.2.

Section 1.2 is intended only to introduce quickly some basic ideas. These ideas are too numerous and complex to explain fully in so small a space. In order to understand them better, readers are urged to read the rest of Chapter 1, and if possible the rest of this book.

A simple example may help explain better how some of these principles work. Suppose that, one day in 1997 at the market, Vantha says to Samneang: "I offer to sell you one kilo of rice for 2,000 riels. I will give you the rice first, then you pay me right away." Samneang promptly says: "I accept your offer." Vantha and Samneang are 30-year-old women. Section 1.2 will use this rice example to explain many of the ideas discussed.

1.2a Ways the Law Classifies Contracts

As noted above, a contract is an agreement the law will enforce. In explaining this key idea, this Chapter first discusses how the law classifies contracts. Contracts may be classified by: (1) enforceability, (2) basic nature, (3) stage of performance, and (4) form.

(1) **Enforceability** -- When classified by enforceability, contracts may generally be:

- **Valid** -- This means that the contract is enforceable in court by all parties to the contract.

- Voidable -- This means that a contract is enforceable, but at least one party to the contract can avoid (not obey) it. That party can enforce the contract against the other party, but the other party cannot enforce it against the first party unless the first party chooses to proceed with it! Voidable contracts can occur because one party is the victim or subject of certain formation problems, such as that one party made the contract under duress or lacked capacity.
- OR
- Void -- This means that the "contract" is not enforceable by anyone. This can occur where certain formation problems exist, such as a lack of real agreement or legality. In fact, since a contract is defined as an agreement the law will enforce, a "void contract" is not really a "contract" at all!

These fundamental categories are discussed more fully in Section 1.3a.

For instance, in the rice example above, Vantha and Samneang agreed that Vantha would sell Samneang one kilo of rice for 2,000 riels. If this agreement was valid, as it seems to be, then either party--Vantha or Samneang--could ask a court to enforce it. The contract would bind both of them. However, suppose the contract was voidable, perhaps because one of the parties lacked capacity. Then it would be enforceable but at least one party could avoid it. Suppose the contract was voidable because Samneang was mentally incompetent when she made it. Then Samneang could enforce the contract--but Vantha could not enforce it against Samneang unless Samneang chose to proceed with it. Finally, suppose the agreement was void, because it was illegal to sell rice. Then neither Vantha nor Samneang could enforce the agreement.

(2) **Basic Nature** -- When contracts are classified by their basic nature, they may be bilateral or unilateral. In common law jurisdictions, bilateral contracts are basically an exchange of promises, while unilateral contracts are an exchange of a promise for an act. Bilateral contracts are far more common, especially for important commercial contracts, since they provide both parties with the security of a promise that what the party wants done will be done. Bilateral contracts generally occur where one party makes an offer requesting a promise, and the other party properly accepts the offer by making the promise requested. Unilateral contracts exist in special situations where they meet the needs of the parties. They typically occur where one party makes an offer requesting a specific act, and the other party accepts by actually performing that act. Examples of unilateral contracts include many public offers and client-broker arrangements. Civil law jurisdictions may define bilateral and unilateral contracts differently. Section 1.3b discusses in more detail how contracts are classified by their basic nature.

For example, the rice contract above was a bilateral contract. It was bilateral because it was an exchange of Vantha's promise to supply rice and

Samneang's promise to pay 2,000 riels. The contract occurred because Vantha made an offer requesting a promise, and Samneang properly accepted by making the promise Vantha requested.

(3) **Stage of Performance** -- When contracts are classified by their stage of performance, they may be executed or executory. Executed contracts are those that the parties have fully performed. Executory contracts are those that have not been fully performed by all parties. This is explained in more detail in Section 1.3c.

For instance, in the rice contract example above, the contract was executory as it was described, since it had not yet been fully performed by both Vantha and Samneang. However, suppose Vantha supplied the rice to Samneang, and Samneang paid 2,000 riels for it. Once those acts occurred, the contract would be executed.

(4) **Form** -- Finally, Section 1.3d discusses how contracts are classified by their form. Contracts may be express (in words) or implied (from conduct). Implied contracts are enforceable even though the parties do not use words to make them, as long as they meet all the requirements for an enforceable contract. In implied contracts, the real agreement courts normally require may not always be obvious. Courts analyze whether the parties have really agreed based on whether a reasonable person would think the parties had done so--an objective standard. Contracts may be partly express and partly implied, where parties state some terms but not other terms. In this situation, terms can often--but not always--be implied by law, based on the circumstances.

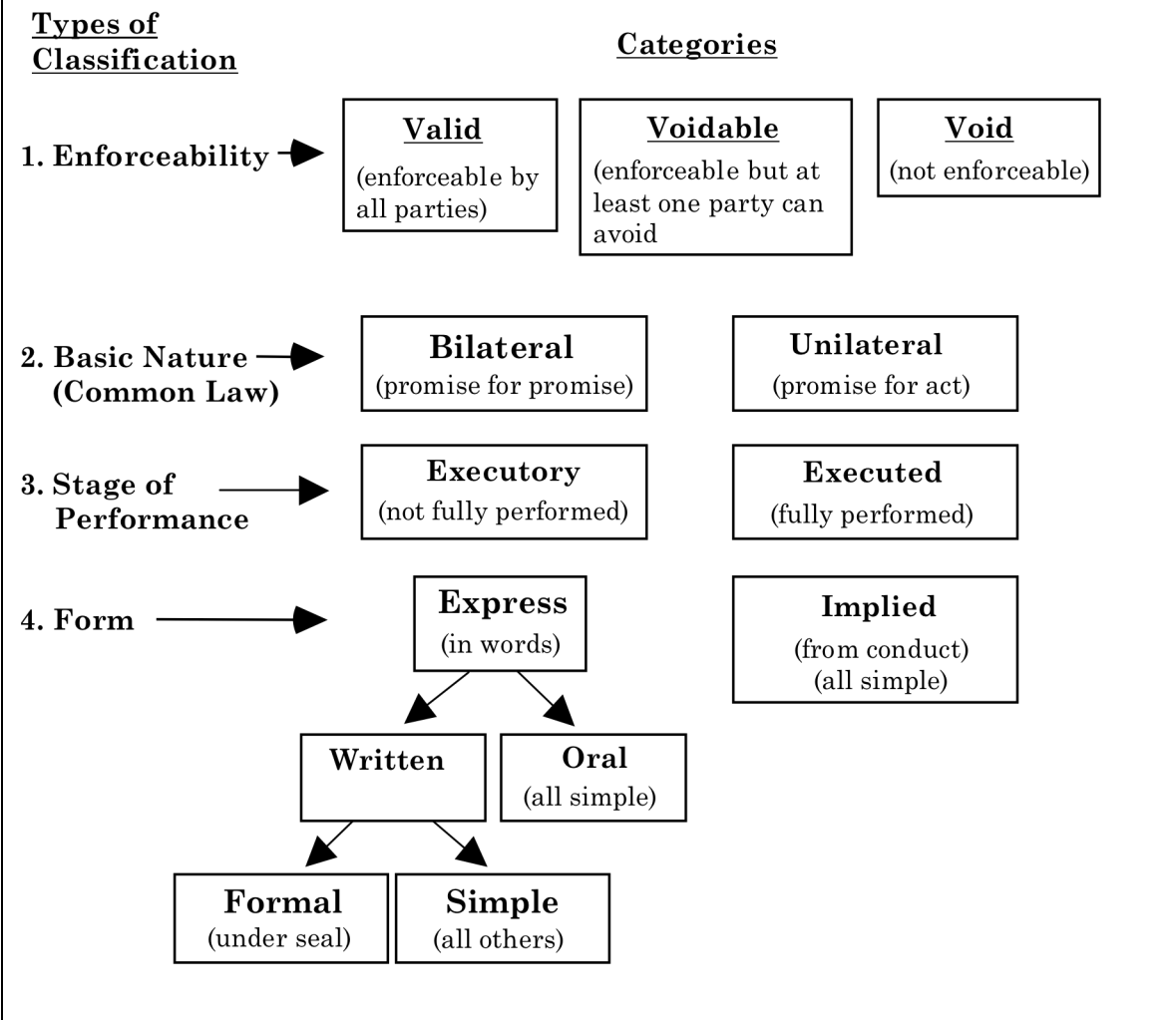
Express contracts may be written or oral. Oral contracts are generally as enforceable as written ones, and they may actually be more practical for small, common transactions. However, many jurisdictions do require certain important kinds of contracts to be written in order to be enforceable. In addition, parties should put all important contracts in writing, even if the law does not require it. That encourages parties to be clearer and more complete in making their agreement, and also provides better proof of the agreement.

Some jurisdictions also distinguish between contracts which are "formal" (made under seal) and "simple" (not made under seal). Traditionally, some jurisdictions said that formal contracts were not subject to the usual common law requirement of consideration (an exchange of legal detriment), and that parties had more time in which to bring claims about formal contracts to court than to bring claims about simple contracts. Many jurisdictions no longer distinguish between formal and simple contracts.

For instance, in the rice example above, the contract between Vantha and Samneang was basically express because the parties made it using words, rather than conduct. If they had used only hand gestures, the contract would have been implied. In addition, their contract was oral, because they used

spoken (not written) words. Finally, the contract was simple, because it was not made under seal.

Illustration: Basic Ways to Classify Contracts



1.2b Six Basic Requirements for a Valid Contract: Real Agreement, Consideration (Common Law Only), Capacity, Legality, Formality, and No Other Formation Problems

Sections 1.2b and 1.2c summarize the 10 important contract law principles explained more fully in Section 1.4 (Sections 1.4a-j), and in the remaining 10 Chapters of this book (Chapters 2-11). These principles govern whether contracts are enforceable; how courts interpret their meaning; how courts analyze contract performance; what contract remedies courts may order or allow; and third party rights and duties. The principles are numbered 1-10 in **bold** print below. The Sections and Chapters which explain them more fully appear in (parentheses).

Often, when courts face a contract problem, they must first consider enforceability. In particular, in order to be valid in many jurisdictions, contracts must satisfy legal requirements in the following six basic areas: (1) real agreement; (2) consideration (common law jurisdictions only); (3) capacity; (4) legality; (5) formality; and (6) other formation problems. Each of these areas is briefly explained below.

(1) Real Agreement -- This requirement generally means that a valid offer must be communicated from one party (the offeror) to another party (the offeree), and that the intended offeree must make a proper acceptance. To be valid, an offer must be serious, definite, reasonably clear, and not ended. An offer can be ended by the offeror, who may revoke it; by the offeree, who ends it when he makes a rejection or a counter-offer; or by some other event, such as lapse, the incompetence of a necessary party, destruction of the subject matter of the contract, or a change in the law. In common law jurisdictions, a proper acceptance of an offer that requests an act--an offer for a unilateral contract--can generally be made by full performance of that act. A proper acceptance of an offer that requests a return promise--an offer for a bilateral contract--can generally be made by communicating the promise the offeror requested in a proper manner. This generally requires that the acceptance be unequivocal and identical to the offer (a "mirror image"), and that the manner of acceptance be reasonable under the circumstances. (Section 1.4a and Chapter 2)

In the rice example above, real agreement appears to exist, because there has been a valid offer and a proper acceptance. Vantha communicated a serious, definite, reasonably clear offer to Samneang for the sale of one kilo of rice for 2,000 riels--an offer for a bilateral contract. Vantha did not revoke the offer. Samneang did not reject it or make a counter-offer. And the offer was not terminated by any other event, such as lapse or the incompetence of one of the parties. So the offer had not ended at the time Samneang tried to accept it. In addition, it appears that Samneang properly accepted the offer. This was an offer for a bilateral contract--an offer that requested a return promise. Samneang was the intended offeree, and she communicated to Vantha the promise that Vantha had requested: the promise to buy the rice for 2,000 riels. Samneang did not express any doubt, or try to change the terms of the offer--her acceptance was a "mirror image" of the offer. And she accepted promptly and in the same manner in which Vantha made the offer (orally), which was reasonable under the circumstances.

(2) Consideration -- Consideration is basically an exchange of new legal detriment between contract parties. Common law jurisdictions generally require it in order for contracts to be enforceable, but civil law jurisdictions do not. This requirement basically means each party must do or agree to do something he did not have to do before. Many exceptions to the requirement exist, such as for promises to make charitable donations. (Section 1.4b and Chapter 3)

Consideration exists in the rice example above. This means only that the parties each have some new legal detriment--that they do or agree to do something they did not have to do before. Here, Vantha has agreed to provide one kilo of rice. Samneang has agreed to pay 2,000 riels. The parties did not have these duties before. So each party has some new legal detriment. There is consideration on both sides.

(3) Capacity -- Adults generally have full capacity to make contracts. Important parties who may lack full capacity include minors and those who are mentally incompetent or intoxicated. Contracts these parties make are often voidable. Parties convicted of crimes may have a limited capacity to contract. Foreigners generally have full capacity to contract. (Section 1.4c and Chapter 4)

Both parties appear to have capacity in the rice example. Vantha and Samneang are both adults, not minors. There is no evidence that they were mentally incompetent or intoxicated when they made the agreement. And there is no evidence that they had been convicted of crimes or were foreign citizens, which in very limited circumstances could affect their capacity. So both Samneang and Vantha seem to have capacity with regard to this contract.

(4) Legality -- Agreements that violate specific statutes or public policy are generally void and therefore unenforceable. Examples of agreements that violate specific statutes are agreements to commit crimes, charge usurious interest rates, or unreasonably restrain trade. Examples of agreements that violate public policy are those to commit torts, or harm the administration of justice or the public service. (Section 1.4d and Chapter 5)

The contract in the rice example above appears to meet the requirement of legality. Contracts to sell rice are generally legal. They do not typically violate statutes or public policy, as agreements to commit crimes or harm the administration of justice might. So Samneang's contract to buy rice from Vantha is probably legal.

(5) Formality -- Both oral and written contracts are generally enforceable. But some kinds of contracts must generally be written to be enforceable. Important agreements which many jurisdictions require to be written include those to transfer a substantial interest in land; those which cannot be performed within one year; suretyship agreements; and those for the sale of goods over a certain monetary amount. (Section 1.4e and Chapter 6)

In the rice example, the requirement of formality is probably met. The type of contract Vantha and Samneang made does not fall into any of the categories of contracts that many jurisdictions say must be written to be enforceable. Their contract for the sale of rice is a sale of goods contract. Many jurisdictions do require that contracts for the sale of goods over

a certain monetary amount be written. However, these amounts are usually far higher than 2,000 riels.

(6) No Other Formation Problems -- Other formation problems may affect whether agreements are valid. Important examples include agreements resulting from mistake, misrepresentation, duress, or undue influence, which are generally voidable. In limited situations, courts may refuse to enforce agreements because they are unconscionable, which occurs where there is extreme unfairness in the process of formation or terms of an agreement. Finally, where a party justifiably relies on a promise, that promise might be enforced under the common law doctrine of promissory estoppel to the extent needed to avoid injustice--even though legal requirements such as real agreement or consideration are not met. (Section 1.4f and Chapter 7)

The contract in the rice example does not appear to have any other formation problems. It does not seem that either party has made a mistake or misrepresentation of fact about the contract; that either party used duress or undue influence to make the other party agree; or that the contract is so extremely unfair in its terms or process of formation that it is unconscionable. Vantha and Samneang appear to have understood the basic nature of their agreement, and to have made the agreement freely. The bargain--one kilo of rice for 2,000 riels--does not seem extremely unfair in 1997. However, suppose this agreement failed to meet a writing requirement. And suppose Samneang told Vantha there was no need for a writing, and Vantha then spent money to travel and buy the rice from someone else. But Samneang refused to accept or pay for the rice, citing the writing requirement. In that situation, there would be no valid contract. But a common law court might enforce Samneang's promise under the doctrine of promissory estoppel (detrimental reliance). That might happen if the court felt Vantha's reliance was justifiable, and that enforcement was needed to avoid injustice. Injustice might exist here because Vantha already spent time and money in reliance on Samneang's promise.

Because all six basic requirements appear to be met, the agreement in the rice example appears to be a valid contract. So either Samneang or Vantha can enforce it in court.

1.2c Other Key Aspects of Contract Law: Interpretation, Performance, Remedies, and Third Party Rights and Duties

Courts often must decide more than simply whether contracts are enforceable. They must resolve other important problems related to contract interpretation, performance, remedies, and third party rights and duties. These issues are introduced below.

(7) Interpretation of Contracts -- Where the meaning of a contract is disputed, courts have many rules to help them interpret the contract. Many courts first try to interpret the contract subjectively (based on the actual intentions of the parties), then if that is not possible objectively

(based on what reasonable parties would likely have intended). Courts try to interpret contracts to be valid and reasonable, and to avoid inconsistency between contract terms. They consider the ordinary meaning of the disputed terms, and surrounding circumstances such as the course of performance, course of dealing, and trade practices. Courts interpret disputed terms against the contract drafter if that is reasonable. Courts may in certain cases supply omitted terms, such as the duty of good faith and fair dealing, and "gap-fillers" for sale of goods contracts. (Section 1.4g and Chapter 8)

For instance, in the rice example above, suppose Vantha delivered brown rice--but Samneang says she wanted white rice. This is an interpretation problem. To solve it, many courts would first try to interpret the contract subjectively, by asking what the parties actually intended "rice" to mean in their contract. In this situation, it might be difficult to tell--especially if both parties claim they meant what they now want! So a court might need to use objective rules of interpretation, which focus on what reasonable people would likely have meant in the same circumstances. These objective rules might include analyzing the ordinary meaning of "rice" in the circumstances, any prior course of dealing between the parties, and general trade practices relevant to the contract. Suppose this analysis showed that, when people asked for "rice" in this market, they meant white rice unless they specifically asked for some other kind. The court would probably find that "rice" in the contract between Samneang and Vantha meant white rice. Another potential interpretation problem in this example would be the parties' agreement that Samneang would pay for the rice "right away." Obviously, this phrase could be interpreted in different ways.

(8) Performance and Discharge of Duties -- In some cases, there is a problem in the performance of duties under a contract. Contract duties do not end until they have been discharged. Whether contract duties have been discharged may require analysis of what the contract requires. Two important parts of this analysis are promises and conditions. Promises are statements that a party will perform a duty when performance is due. An unexcused failure to perform a contract promise as required is a breach. A breach gives the injured party the right to ask a court for a remedy. Conditions are events which are not certain to occur, but which must occur or be excused in order for a contract duty to become due or terminate. Conditions may be stated expressly in the contract, implied-in-fact from the circumstances, or implied-in-law because of legal policy. Conditions may be precedent, subsequent, or concurrent, depending on when they may occur in relation to the duty that depends on them. A duty does not become due for performance until any conditions on which it depends are fulfilled or excused. Conditions are fulfilled by occurrence; complete performance; or in the case of implied-in-law conditions only, substantial performance. Conditions may also be excused, such as by anticipatory repudiation, improper rejection of a tender of performance, or wrongful prevention or hindrance. Duties may be discharged by complete performance, a material breach by the other party, or other events related to performance. They may also be discharged by a later agreement or

statement of the parties, such as a release or a substitute contract. And duties may be discharged by operation of law, such as by impracticability or a final court judgment. (Section 1.4h and Chapter 9)

For instance, in the rice example above, suppose Vantha fails without any legal excuse to provide rice, as the contract requires. This is a performance problem. Obviously, the duties in this contract have not been properly discharged. So courts would ask what did happen. Many courts say that, where a contract requires one party's performance to occur first, that performance is an implied condition precedent to the duty of the other party to perform. This means that, in order for one party's duty to perform to become due, the other party must actually perform first. In this case, Vantha's delivery of the rice was an implied condition precedent on which Samneang's duty to pay depended. This is because the contract said Vantha was to perform first, by providing the rice. But Vantha failed to do that. The result is that Samneang's duty to pay does not even become due! In addition, Vantha's failure to provide the rice as the contract required is a breach of the contract. This is because it is an unexcused failure to perform her promised duties under the contract when they were due to be performed. This breach gives Samneang the right to ask a court for a remedy.

(9) Remedies -- If duties have not been properly discharged, and some remedy is appropriate, a court has several options. It might order a party to pay various kinds of money damages or other types of monetary awards. These include expectation damages, which try to put the injured party in the position he would have occupied if the parties had fully performed the contract; reliance damages, which try to put the party in the position he occupied before the contract or promise was made; restitution damages, which try to compensate the party for the benefit he gave to another party; stipulated damages (damages specified in the contract); and interest. Courts do not generally order punitive damages in contract disputes. Parties can generally recover only damages that are reasonably certain and reasonably foreseeable, and that they could not reasonably have avoided. Courts can also order specific performance--order a party to perform a contract. But common law courts do so only when they think money damages are not adequate, usually because the contract's subject matter is unique, as in the case of land or unique goods. (Section 1.4i and Chapter 10)

For instance, in the rice example above, Vantha breached the contract by failing to provide the rice. That means Samneang has the right to ask a court for a remedy. She could ask a court for different kinds of money damages. In this case, Samneang might consider asking for expectation damages, which try to put her in the position she would have occupied if the contract had been fully performed. To calculate these can be complex. Basically, courts determine the difference between the value of the additional benefits the injured party expected to receive and what he saved by not having to perform his own duties. Here, a court might order Vantha to pay Samneang the difference between the value of the additional benefits Samneang expected

(one kilo of rice) and what she saved by not having to perform her own duties (2,000 riels). Suppose Samneang reasonably paid 2,100 riels to another seller to get the rice Vantha failed to supply. Many courts would say the real value of the additional benefits Samneang expected--the rice--would be 2,100 riels. In that case, Samneang's expectation damages would be 100 riels (2,100 riels minus 2,000 riels). Samneang could probably also recover interest on this amount. Or a court might order Vantha to specifically perform the contract--to actually provide the rice. However, common law courts order that only when they feel that money damages are not adequate, generally because the subject matter of the contract is unique. That would probably not be the case in a contract for common goods such as rice.

(10) Third Party Rights and Duties -- Third parties--those who are not parties to a contract--can have rights or duties under the contract. A contract party may assign his rights or delegate his duties to a third party. Contract rights can generally be assigned. Contract duties can be delegated if the other party to the original contract will still receive the substantial benefit of his bargain after the delegation. A party who delegates a duty remains liable for the performance of that duty. A third party can also have rights under a contract if he is an intended beneficiary. That occurs where the parties to the original contract clearly intended to benefit that third party when they made their contract. (Section 1.4j and Chapter 11)

For instance, in the rice example, suppose that after the contract was made Vantha assigned her right to receive the 2,000 riels to her friend Vandy. Vandy would have the right to receive the 2,000 riels from Samneang, and Vantha would no longer have that right. Or suppose that Samneang delegated her duty to pay the 2,000 riels to Kim Sean, who promised to pay the money. That would mean that Kim Sean would have the duty to pay the 2,000 riels. But in that case, Samneang would still have the duty to pay the 2,000 riels, in the event that Kim Sean failed to do so. Finally, suppose that Vantha and Samneang did not agree that Vantha would provide rice to Samneang in exchange for 2,000 riels. Suppose they agreed that Vantha would provide the rice to Inerey, and that in exchange Samneang would pay Vantha 2,000 riels. In that case, Inerey is an intended third party beneficiary of the contract between Vantha and Samneang. So he actually has the right to enforce the contract--even though he is not a party to it!

1.2d Other Features of this Chapter: Introduction to Quasi-Contract, and Cambodian and Civil Law Perspectives

After its discussion of the general principles of contract law described above, this Chapter introduces the idea of quasi-contract, which is considered one form of restitution. Quasi-contract is a doctrine that courts apply where they cannot enforce a contract for the party seeking help, but they impose contract obligations in order to avoid unjust enrichment. Not all enrichment is unjust. That generally occurs only in certain situations where a party has provided some benefit to another party with a reasonable expectation of

compensation. That might occur where there was no agreement at all; an agreement had a formation or performance problem, such as failure to meet a writing requirement or impracticability; or a breaching party sought restitution. Quasi-contract is explained in Section 1.5.

For instance, in the rice example above, suppose the law did require this contract to be written to be enforceable. And suppose that after Vantha supplied the rice to Samneang, Samneang did not pay. Instead, Samneang correctly said that the contract was actually not valid, so she had no duty to pay. However, even though there was no valid contract, Samneang refused to return the rice to Vantha. In that case, courts would likely say that Vantha could recover the reasonable value of what she had provided to Samneang--the rice--under quasi-contract, in order to avoid unjust enrichment of Samneang. Although there is no enforceable agreement, it would clearly be unjust for Samneang to keep the rice but pay no money for it.

Section 1.6 of this Chapter has a comparative feature which also appears in all other Chapters. This is a brief comparative discussion, which includes "Cambodian Law Perspective" and "Civil Law Perspective" boxes. These Sections discuss how the Cambodian and civil law traditions approach the general ideas discussed in the rest of the Chapter.

It appears that there are few truly significant substantive differences between the common law and civil law traditions with regard to contract law. Some of the most significant differences are that: common law jurisdictions generally require consideration in order for a contract to be valid, but civil law jurisdictions do not; the specific doctrine of promissory estoppel does not appear to exist in civil law jurisdictions; many civil law jurisdictions do not seem to apply any rule directly comparable to the parol evidence rule; and civil law courts are more likely to order specific performance, even where the subject matter of a contract is not unique.

1.2e Illustration of Very Basic Ways to Analyze Contract Problems

The chart below summarizes some of the very basic ways to analyze contract problems which are discussed above, in order to help the reader begin to think about this important process. Of course, to understand these ideas better, it is necessary to read the rest of this Chapter and this book!

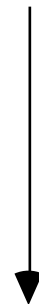
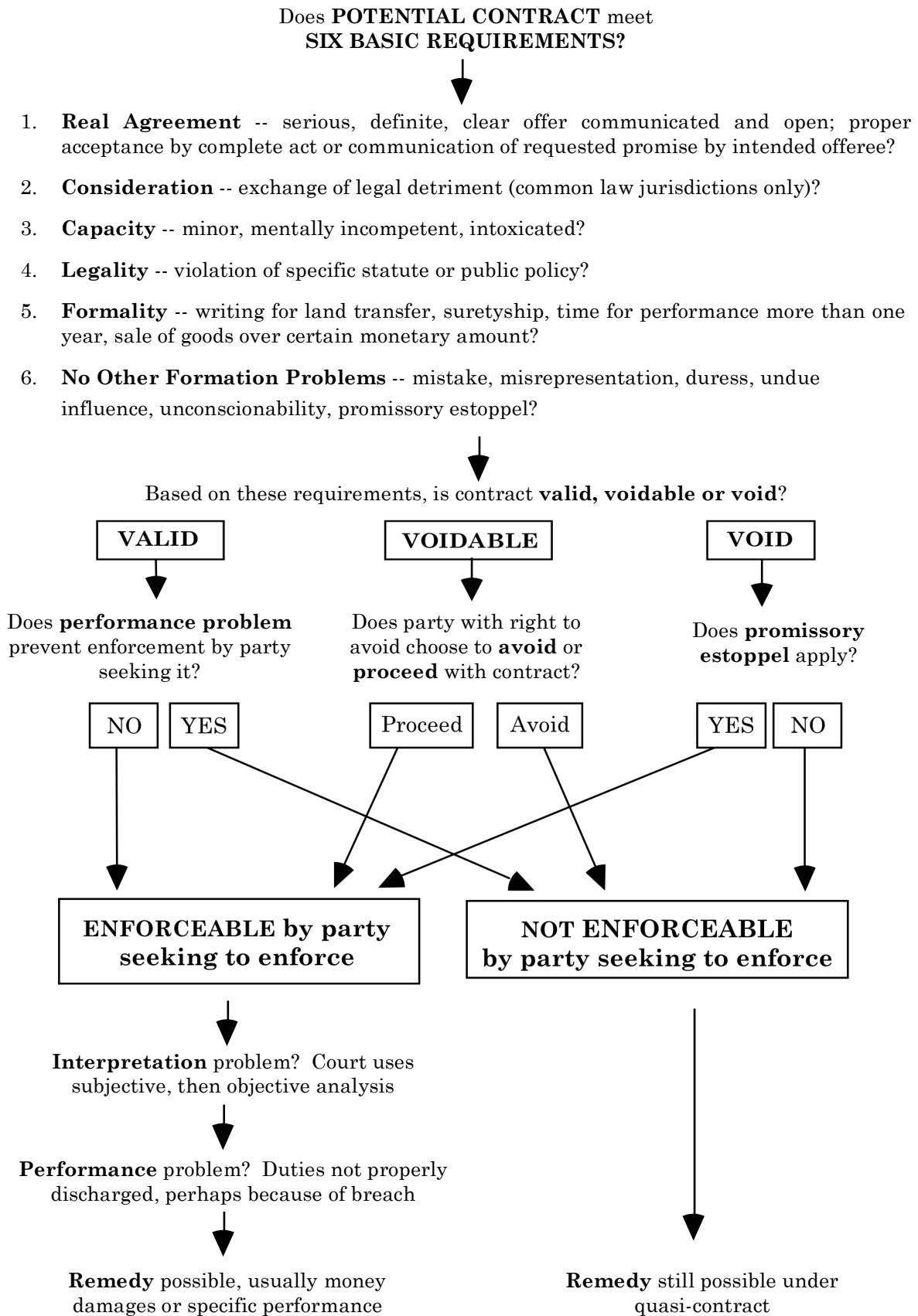


Illustration: Very Basic Ways to Analyze Contract Problems

1.2f Questions for Review

Finally, Section 1.7 of Chapter 1 contains some Questions for Review. These Sections appear at the end of each Chapter in this book. They are intended to help readers measure their basic knowledge of the topics presented in the Chapter.

Below are some quick review questions for this text up until this point, which could be used for a very short study of contract law. These questions relate to Section 1.1's introduction to law and contracts, and Section 1.2's concise summary of basic aspects of contract law.

QUICK REVIEW QUESTIONS

- (1) What is a contract?
- (2) Why is contract law important?
- (3) Explain four important ways the law classifies contracts.
- (4) Explain the six basic elements many jurisdictions require in order for a contract to be valid.
- (5) Explain some important ways courts interpret contracts.
- (6) Explain how many courts analyze contract performance and discharge of duties.
- (7) What remedies might be available in the event of a contract dispute?
- (8) How could third parties have rights or duties under a contract?
- (9) Explain the doctrine of quasi-contract.
- (10) What are some important differences between the approach to contract law discussed in this text and the approaches of the Cambodian and civil law traditions?

***** ADDITIONAL REFERENCE:** Chapters 2-11 of this book explain many of the ideas quickly introduced in Section 1.2 in more detail.

1.3 Ways Contracts are Classified

As noted above, contracts may be classified in a number of different ways. These categories help courts understand the contracts better, and apply contract law more fairly and effectively. Some of the more important

classifications will be discussed in detail below. Specifically, this Section will explain classification by:

- (1) enforceability (Section 1.3a);
- (2) basic nature (Section 1.3b);
- (3) stage of performance (Section 1.3c); and
- (4) form (Section 1.3d).

1.3a Contracts Classified by Their Enforceability: Valid, Voidable and Void Contracts

As noted in Section 1.2, perhaps the most important way courts classify contracts is by their enforceability. However, before discussing these categories, it may be helpful to state again the basic meaning of "contract."

***** DEFINITION:** A **contract** is an agreement the law will enforce.

This definition means that parties can enforce contracts in court, if they wish. That is not true about many statements or agreements that are not contracts.

For example, if Neth tells ROUNG he wants ROUNG to pay him some money, that alone is not a contract. It is simply a statement or demand by Neth. A court will not enforce it. And even when Neth and ROUNG agree about something, they may have an agreement, but not a contract. An agreement is not a contract unless it meets the requirements discussed in this Chapter.

When contracts are classified by their enforceability, there are three basic categories: valid, voidable, and void. In general, a valid contract is enforceable by all parties to it; a voidable contract is enforceable, but at least one party can avoid it; and a void "contract" is not enforceable by anyone. Certain contracts do not fit neatly into only one of these categories--they may have aspects of more than one of the categories. These contracts will be further discussed in the rest of this text. For example, certain contracts may be partly valid and partly void. The three basic categories are explained in more detail below.

(1) A Valid Contract Is Enforceable by All Parties to the Contract

Parties generally try to make contracts they can enforce. So parties try to create valid contracts.

***** DEFINITION:** A **valid contract** is a contract that is enforceable by all parties to the contract.

Most contracts are valid. However, they are not automatically valid just because the parties want them to be! In order to be valid, contracts must meet a number of legal requirements. In many jurisdictions, contracts are valid only if they meet all of the six basic requirements discussed in Section 1.2:

- (1) real agreement (offer and acceptance),
- (2) consideration (common law jurisdictions only),
- (3) capacity,
- (4) legality,
- (5) formality,

AND (6) (no) other formation problems.

To be valid, a contract must generally meet all of these requirements. So if an agreement fails to meet even one of these, it is not a valid contract. In these cases, the agreement may be voidable or void.

CASE STUDY 1

FACTS Vuth offers to buy Sereya's car. Sereya accepts. They sign a written agreement in which Vuth agrees to buy the car for \$5,000. Both parties are mentally competent adults. They both freely make the agreement, with an accurate understanding of the basic elements of the transaction.

QUESTION OF LAW Is this a valid contract?

DECISION Yes. The contract is valid, and enforceable by Vuth or Sereya, because it meets all the requirements for a valid contract.

Agreements are valid--and enforceable by all parties--if they meet all the legal requirements. In many jurisdictions, these are requirements as to real agreement (offer and acceptance), consideration (common law jurisdictions only), capacity, legality, formality, and other formation problems.

In this case, Vuth and Sereya made an agreement for the sale of a car. They appear to have a real agreement, with a valid offer and a proper acceptance. There is consideration, since both have agreed to do something they did not have to do before. Both have capacity, since they are competent adults. The agreement appears to be legal, since car sales are generally legal. Any formality requirements as to this sale of goods agreement appear to be met, since the agreement is expressed in a signed writing. And there seem to be no other formation problems, since both parties made the agreement freely and with a basic understanding of it. This is a valid contract. Either Vuth or Sereya can enforce it in court.

*** ***ADDITIONAL REFERENCE:*** Chapters 2-7 of this book explain the basic requirements for a valid contract in many jurisdictions.

(2) A Voidable Contract Is Enforceable, but At Least One Party to the Contract Can Avoid It

Sometimes there is a formation problem that creates unfairness to one of the parties to a contract. In these cases, contracts are often voidable.

***** DEFINITION:** A **voidable contract** is one that is enforceable, but which at least one party to the contract can avoid.

The main situations where voidable contracts exist are where there are formation problems related to capacity, or what this text calls other formation problems. In particular, most contracts made by parties who lack capacity because they are minors, mentally incompetent, or intoxicated are voidable by those parties. In addition, most contracts which have the formation problems of misrepresentation, duress, or undue influence, and many contracts resulting from a mistake, are voidable by the party who is the "victim" of the problem. Although these are the most common situations where contracts are voidable, there are some others. Where a contract has a formation problem with legality or formality, it may be similar to voidable, in limited situations in some jurisdictions. These situations are too complex to discuss here. But they involve an agreement with a formation problem that works to the disadvantage of one of the parties, or of which one party was not aware at the time of formation. Such formation problems will be further explained in Section 1.4 below.

There are several important legal effects of a voidable contract. Perhaps the most important one is that the party with the right to avoid need not obey the contract if he does not wish to do so. Unless that party properly indicates that he wishes to proceed with the contract, neither the other party to the contract nor a court can force him to obey it. The purpose of this rule is to protect parties who are the victims of the formation problems discussed above. The rule is also intended to deter parties from making most kinds of contracts with persons who lack capacity, and from using unfair formation practices such as duress.

Another important effect of a voidable contract is that the contract basically works like a valid contract unless the party with the right to avoid actually uses that right. That means that the party with the right to avoid the contract can enforce the contract whether the other party likes it or not. This is true even though the contract cannot be enforced against the party with the right to avoid unless he chooses to proceed with it! But if the party with the right to avoid the contract does not properly do so, then the contract is enforceable like any other contract. And of course, if the party with the right to avoid does proceed with the contract, he must perform the contract as if it was valid. That party cannot expect the other party to perform while he does not!

Where there is a voidable contract, the party with the right to avoid can disaffirm or ratify it.

***** DEFINITION:** To **disaffirm** a voidable contract is to indicate properly that a party will avoid the contract--that he will not obey it.

***** DEFINITION:** To **ratify** a voidable contract is to indicate properly that a party intends to be bound by the contract--that he will obey it.

After a party disaffirms a voidable contract, the contract cannot be enforced. However, the disaffirming party, and in some cases the party without the right to disaffirm, can get restitution of what has been provided to the other party, under the doctrine of quasi-contract.

After a party ratifies a voidable contract, the contract can be enforced like a valid contract. The party who had the right to disaffirm no longer has that right.

There are limits on a party's ability to disaffirm and ratify a voidable contract. The limits on ratification protect the party with the right to avoid. The limits on disaffirmance protect the other parties to such contracts. For example, the general rule in many jurisdictions is that persons who lack capacity cannot ratify until they actually have capacity. In the case of minors, this is true even if the minor actually does proceed with the contract! The minor can still change his mind later and avoid the contract, up until a reasonable time after he reaches the age of majority and gains capacity. The rules about disaffirmance and ratification cannot be fully discussed here. But they will be explained in more detail in Chapter 4 ("Capacity").

***** CASE STUDY 2**

FACTS Samharn, who was 17 years old, made an agreement with his neighbor Meng, who was 25 years old. The agreement said that Samharn would buy Meng's moto for \$800. However, before the time for delivery, Meng sold the moto to someone else!

Samharn asked a court for help in enforcing his agreement with Meng. But Meng claimed that the agreement was not enforceable, because Samharn was a minor who did not have the capacity to make an enforceable contract. The age of majority in the jurisdiction was 18 years old.

QUESTION OF LAW Is Meng correct that Samharn cannot enforce this agreement because Samharn lacked capacity when he made it?

DECISION No. Samharn can enforce this agreement even though he was a minor because parties who lack capacity can still enforce the voidable contracts they make.

A voidable contract is enforceable, but at least one party to such a contract can avoid it. That party can also enforce the contract if he wishes. Contracts minors make are generally voidable by the minor.

In this case, Meng made an agreement to sell his moto to Samharn, a minor. Although this contract is probably voidable by Samharn, he can enforce the contract against Meng if he wishes to do so. The contract is voidable, not void. So Meng cannot avoid the contract because Samharn was a minor. Only Samharn can avoid it. And in this case, Samharn chose to enforce--not avoid--the contract. Of course, Samharn will also be required to perform his duties under the contract.

***** ADDITIONAL REFERENCE:** Chapter 4 ("Capacity"), Chapter 5 ("Legality"), Chapter 6 ("Formality"), and Chapter 7 ("Other Contract Formation Problems") contain further discussion about contract formation problems that may cause a contract to be voidable.

(3) A Void "Contract" Is Not Enforceable by Anyone

Some formation problems are so serious that agreements with those problems cannot be enforced by anyone. These agreements are void.

***** DEFINITION:** A **void "contract"** is an agreement that is not enforceable by anyone.

Because a contract is an agreement the law will enforce, void "contracts" are not really contracts at all! So this text will generally refer to them as "agreements," rather than contracts.

The main situations where void agreements occur are where an agreement has very serious formation problems, particularly a lack of real agreement, consideration (in common law jurisdictions), or legality. (Of course, an "agreement" without real agreement may not even be an agreement!) Unconscionable agreements also appear to be void. And in many situations, agreements that fail to meet formality requirements are said to be void, though that is not always the case. Although these are probably the most important situations where void agreements occur, there are others. Some agreements with the formation problems of a lack of capacity, mistake, or misrepresentation are also void. As with voidable contracts, these situations are too complex to discuss in detail here. They will be discussed in more detail in Chapters 3-7.

The main effect of a void agreement is that it cannot be enforced by anyone. It does not matter how much the parties wanted the agreement to be binding, or what they do after the agreement is made. And no court can make the agreement enforceable.

CASE STUDY 3

FACTS Sok and Lundy agreed that Sok would give Lundy \$30, and in exchange Lundy would kill Mony. But later, Lundy refused to perform the agreement. Sok asked a court to enforce the agreement.

QUESTION OF LAW Will a court enforce the agreement between Sok and Lundy?

DECISION No. A court will not enforce this agreement because it is an agreement to commit a crime, and it is therefore void.

Void contracts cannot be enforced by anyone. Agreements that fail to meet the requirement of legality are generally void. And agreements to commit crimes can never be enforced.

In this case, Sok and Lundy agreed that Sok would pay Lundy money to kill Mony. This is an agreement to commit the crime of murder. Therefore, the agreement fails to meet the requirement of legality. It is void, and it cannot be enforced by anyone. So Sok cannot enforce it.

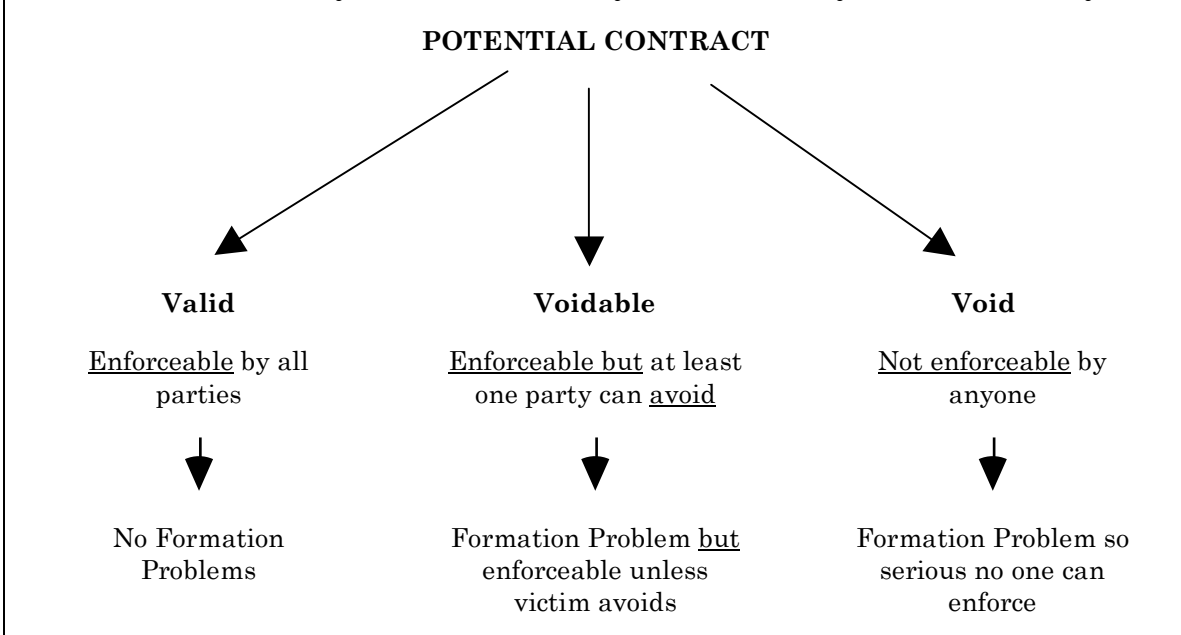
In certain special cases, contracts may be only partly void. In these unusual situations, part of the contract is unenforceable, but the remainder of the contract can be enforced. This may occur where a court is able to "sever" the void part of the contract, and fairly and effectively enforce what remains. Of course, this is often impossible. Important examples of situations where it might occur are where a court enforces a usurious loan agreement at the legal rate (severing the illegal part), and where a court enforces an agreement without an unconscionable part.

*** **ADDITIONAL REFERENCE:** Chapters 2-7 contain further discussion about contract formation problems that may cause an agreement to be void; Chapter 5 ("Legality"), Sections 5.3c, 5.4f, 5.4g, and 5.5b, Chapter 7 ("Other Contract Formation Problems"), Sections 7.3b, 7.3c, and 7.7c, and Chapter 10 ("Remedies"), Section 10.7c contain further discussion of severance.

(4) Summary of Classification of Contracts by Enforceability

The following chart illustrates the three basic ways courts classify contracts by enforceability.



Illustration: Ways Courts Classify Contracts by Enforceability

***** WHY IS THIS IMPORTANT?** Why do courts classify contracts as valid, voidable, or void?

As noted above, one of the most basic goals of contract law is to promote the enforcement of contracts. However, the law does not believe that agreements should be enforced in every situation! In fact, another basic element of contract law is that sometimes agreements should not be enforced. The law makes this distinction in order to promote justice and efficiency. The law believes that some agreements are helpful to society and should be enforced (those without formation problems), while others are less helpful and should be enforced only in certain cases or not at all (those with formation problems). The problem for contract law is to devise fair and efficient rules to help people know the difference. To help solve this problem, legal authorities devised the classifications of valid, voidable, and void. These provide a general basis for courts and parties to know when agreements will be enforced.

A valid contract occurs where the law believes the contract has no formation problems, so it should be enforceable by all parties to it. A contract to trade legal goods for money, with no formation problems, is an example of a valid contract.

Voidable contracts occur where the law believes the contract has a formation problem, but that it should still be enforceable unless the party who is basically the subject or "victim" of that problem wishes to avoid it. Voidable contracts are an example of how the law tries to balance competing goals: the general policy of promoting the enforcement of contracts vs. basic fairness to the party who is the victim of a formation problem. The law promotes enforcement by giving the victim the option to proceed with the contract. But this same option also promotes fairness, allowing the victim to avoid

the contract if he wishes. A contract made under duress is an example of a contract with this kind of formation problem.

Finally, void agreements occur where the law believes an agreement has a formation problem so serious that the agreement should not be enforced at all, despite the general policy in favor of enforcing contracts. A contract to commit an illegal act is an example of a contract the law believes has such a serious formation problem that it should not be enforceable by anyone. In that situation, the goal of not promoting or assisting illegal acts outweighs the goal of promoting the enforcement of contracts.

1.3b Contracts Classified by Their Basic Nature: Bilateral and Unilateral Contracts

Another important way contracts are classified is by their basic nature. In common law jurisdictions, this classification refers to whether the contract is bilateral (an exchange of promises) or unilateral (an exchange of a promise for an act).

In civil law jurisdictions, the terms "bilateral contract" and "unilateral contract" may have different meanings. For example, in France, it appears that a bilateral contract is one with obligations on both sides, whereas a unilateral contract is one with obligations on only one side, as would occur with an agreement to make a gift. Of course, that kind of unilateral agreement might not be enforceable at all in common law jurisdictions, because of a lack of consideration.

(1) In Common Law Jurisdictions, a Bilateral Contract Is Basically an Exchange of a Promise for a Promise

In most contracts, the parties basically exchange promises. In other words, each party promises to do something the other party wants, and this is the real basis for the contract. In common law jurisdictions, these are called bilateral contracts.

***** DEFINITION:** Under common law, a **bilateral contract** is a contract in which the parties exchange promises to do things.

The English word "bilateral" means "two-sided." In common law contract law, bilateral means that there are promises on two sides of the contract--on the side of each party. That means each party is making at least one promise (often many promises) to do something. So the basic nature of a bilateral contract is a promise for a promise. A contract may have more than two parties, but for ease of discussion, this text will discuss two-party contracts. The same basic rules apply to contracts with more parties.

For example, suppose Sorith and Sathya agree that Sathya will pay 1,800 riels, and in exchange Sorith will provide Sathya with one kilo of

black-eyed peas. This is a bilateral contract, because it is an exchange of promises: Sathya's promise to pay money, and Sorith's promise to provide black-eyed peas.

Many contracts, including most large commercial contracts, are bilateral. Bilateral contracts are often more useful than unilateral ones, which consist of an exchange of a promise for an act. This is because bilateral contracts generally provide more security to both parties. In a bilateral contract, each party receives an enforceable promise that what he wants to happen will actually happen. In the beans example above, that means that Sorith can enforce in court Sathya's promise to pay, and Sathya can enforce in court Sorith's promise to provide black-eyed peas. This provides security for both parties. By contrast, in a unilateral contract situation, only one side receives a promise.

*** **CASE STUDY 4**

FACTS Bunna is tired. He wants to sit down. So he makes a contract with Soheat. In the contract, Soheat promises to build Bunna a chair. In exchange, Bunna promises to pay Soheat 10,000 riels.

QUESTION OF LAW Do Soheat and Bunna have a bilateral contract?

DECISION Yes. Soheat and Bunna have a bilateral contract because they have exchanged a promise for a promise.

In common law jurisdictions, a bilateral contract is an exchange of a promise for a promise. In this case, Bunna and Soheat made a contract in which Bunna promised to pay 10,000 riels, and Soheat promised to build a chair. In other words, the parties exchanged promises. Therefore, this is a bilateral contract. So both parties must perform the promises they made.

(2) In Common Law Jurisdictions, a Unilateral Contract Is Basically an Exchange of a Promise for an Act

In common law jurisdictions, the parties can form a contract by exchanging a promise for an act. In other words, one party makes a promise, and the other party performs an act. Common law jurisdictions call these unilateral contracts. As explained in Section 1.3b above, the meaning of this term differs in civil law jurisdictions like France.

*** **DEFINITION:** Under common law, a **unilateral contract** is a contract in which the parties exchange a promise for an act.

The English word "unilateral" means "one-sided." In common law contract law, unilateral means that there is a promise on only one side of the contract. That means only one party is making a promise to do something.

The other party is not making a promise. Instead, he performs an act. So the basic nature of a unilateral contract is a promise for an act.

Unilateral contracts generally occur where one party makes an offer in which he promises to do something if another party performs some act. So instead of requesting a return promise--as in a bilateral contract--this kind of offer requests only an act. The party who receives such an offer can choose to accept the offer, by performing the act requested. Or the other party can choose not to accept the offer, not perform the act, and there is no contract. In that situation, there is nothing to enforce against the party who received the offer. Even if he starts to perform the requested act and then stops, there is nothing to enforce against him. This is because he has made no promise. In any case, the offer generally contains the promise (or promises), and the acceptance generally is the act.

For instance, in the beans example above, suppose the parties make their contract a little differently. Suppose Sathya says: "Sorith, if you provide me with one kilo of black-eyed peas, I will pay you 1,800 riels." Then Sorith provides her with the black-eyed peas. In this situation, the parties made a unilateral contract. Sathya made a promise: the promise to pay Sorith if he provided black-eyed peas. But Sorith made no promise. It was only when he provided the black-eyed peas--an act--that he formed a contract. At that point, Sathya was obligated to pay him. But Sorith had no duty to provide the black-eyed peas, because he made no promise. He could have simply walked away, and Sathya would have had nothing to enforce against him. And of course, in that case, Sathya would have had no duty to pay either. There would have been no contract at all.

So there are a few key differences between bilateral and unilateral contracts in common law jurisdictions. The most obvious one is that in unilateral contracts, only one party makes a promise. Typically, one party makes an offer that requests an act. The other party chooses whether to accept--by performing the act requested--or not accept. The other party has no duty to perform the requested act. And the party requesting the act generally has no duty unless the act is performed.

Another important difference is that unilateral contracts are generally considered to be less common than bilateral ones are. This is because unilateral contracts generally provide less security to parties. Most parties want some assurance that the acts they want performed really will be performed--such as an enforceable promise saying they will--or that otherwise a court will provide a remedy. Of course, unilateral contracts cannot give both parties that assurance. That is because the party making the promise has no assurance that anyone will perform the act he has requested! These events will be discussed in more detail in Section 1.4a of this Chapter, and in Chapter 2 ("Real Agreement (Offer and Acceptance)").

Unilateral contracts may be less common than bilateral contracts, but they do occur in certain situations where they meet the special needs of the parties. These are generally situations where the parties actually do not want, or know they cannot get, an enforceable promise that someone will perform the acts they request. Situations where unilateral contracts do occur include public offers (such as reward offers), client-broker arrangements, and some loan contracts.

CASE STUDY 5

FACTS Vandy lost her car. In order to get it back, she made a public offer in several local newspapers. The offer described the lost car and said that Vandy would pay \$500 to anyone who actually found and returned the car.

Dara saw this offer. He looked for the car, and after some time he found it. He returned the car to Vandy and requested the \$500. Vandy thanked Dara, but laughed and said she had never seen him before, so she could not possibly owe him any money.

QUESTION OF LAW Does a unilateral contract exist between Vandy and Dara?

DECISION Yes. This is a unilateral contract because Dara actually performed the act Vandy requested in her offer, so Vandy must pay Dara the \$500 as she promised.

In common law jurisdictions, a unilateral contract exists where the parties exchange a promise for an act. Specifically, it occurs where one party makes an offer requesting a specific act, and another party actually performs that act.

In this case, Vandy made a public offer in which she promised to pay \$500 to anyone who found and returned her lost car. Vandy's offer requested that anyone who saw the offer perform a specific act--find and return her car--and promised to pay \$500 to the person who actually performed that act. Dara saw the offer, then found and returned the car. When Dara did that, he formed a unilateral contract with Vandy--he exchanged his act for her promise, as she had requested. That unilateral contract requires Vandy to perform her promise: to pay Dara \$500. Of course, Dara could have chosen not to perform the act. In fact, no one had any obligation to do so. And if no one had done so, no contract would have been formed. But Dara did perform the act. So Vandy must pay him according to her promise.

An important effect of a unilateral contract is that, as soon as it is formed, the performance of one party is basically over. This is because the party who forms the contract by performing the act requested also ends his main obligation under the contract by performing that act! The party may still

have certain duties that many jurisdictions say exist in all contracts, such as the duty of good faith and fair dealing. But basically, that party is finished performing under the contract. So it is the other party--the one who made the promise--who still has his main duties to perform. If he fails to do so, then the party who performed the act requested in the offer can ask a court for a remedy. So unilateral contracts are much more likely to be enforced against the party who made the promise. In that way, the obligations under a common law unilateral contract are also "one-sided" (somewhat like the civil law idea of a unilateral contract which was described above). This is because, as soon as the contract exists, only one party still must perform his main obligation.

***** WHY IS THIS IMPORTANT?** Why do common law jurisdictions put contracts into the bilateral and unilateral categories described above, based on their basic nature?

Common law jurisdictions make this distinction for several reasons. Two important ones relate to real agreement (offer and acceptance). Specifically, whether a contract is bilateral or unilateral affects how the offeror can terminate an offer, and how the offeree can properly accept the offer.

With regard to termination of offers, many common law jurisdictions say that offerors can generally revoke offers any time before acceptance. But with unilateral contract offers, problems can occur where a party starts to perform the act requested, but the offeror tries to revoke the offer. If the offeror was permitted to revoke in that situation, it could cause great unfairness. So the law limits the ability of offerors to revoke in that situation. The specific rules about this will be discussed in detail in Chapter 2 ("Real Agreement (Offer and Acceptance)").

The distinction between bilateral and unilateral contracts is also important because it affects how an offeree can properly accept the offer. Obviously, it is crucial that the offeree know how to accept an offer properly. This distinction provides a way for the offeree to know how to do that. In general, offers for bilateral contracts are accepted when parties properly make the promise requested. Offers for unilateral contracts are accepted when parties properly perform the act requested. This is a big difference. Once again, these rules about acceptance will be explained in detail in Chapter 2.

Finally, this distinction affects the ability of parties to get a remedy for the other party's failure to perform the contract. This is because, as explained above, at the time a unilateral contract is formed, one party has basically performed his main duties under the contract. So there is not much left to enforce against that party, except certain duties that some jurisdictions imply in all contracts. But the other party has not yet performed his main duties under the unilateral contract. So the contract is much more likely to be enforced against that party. By contrast, with bilateral contracts, at the time

of formation, the duties of both parties remain to be performed. So either party may ask a court for a remedy if the other party fails to perform.

***** ADDITIONAL REFERENCE:** Chapter 2 ("Real Agreement (Offer and Acceptance)"), Sections 2.4d and 2.9-2.11 contain further discussion about the differences between bilateral and unilateral contracts; Chapter 8 ("Interpretation of Contracts"), Section 8.3j, and Chapter 9 ("Performance and Discharge of Duties"), Sections 9.4h and 9.5c, discuss duties some jurisdictions imply in all contracts; Chapter 10 ("Remedies") discusses remedies.

1.3c Contracts Classified by Their Stage of Performance: Executed and Executory Contracts

Another important way the law classifies contracts is by their stage of performance. The law basically divides contracts into two categories in this respect: executed contracts (those which have been fully performed by all parties), and executory contracts (those which have not yet been fully performed by all parties).

(1) An Executory Contract Is One That Has Not Been Fully Performed by All Parties

There is always some time between when a contract is formed and when it has been fully performed by all parties. During this time, the contract is executory.

***** DEFINITION:** An **executory contract** is one that has not yet been fully performed by all parties.

All contracts are executory for some time, whether for only a few seconds or many years.

For example, suppose Thanna makes a contract with Sambo in which Thanna agrees to work for Sambo for six months, at a salary of \$1,000 per month. This contract is executory until both parties have fully performed their duties under the contract. So the contract will be executory for at least six months, since Thanna could not possibly finish his duties until that time. And this is true even if Sambo pays Thanna his full salary of \$6,000 right after the contract is made. A contract is executory until all duties under the contract have been completely performed.

(2) An Executed Contract Is One That Has Been Fully Performed by All Parties

After some time, most contracts are fully performed by the parties, since that is the main goal of parties who make contracts. When contracts have been fully performed by all parties, they are executed.

***** DEFINITION:** An **executed contract** is one that has been fully performed by all parties to the contract.

In the example above, where Thanna agreed to work for Sambo for six months for \$1,000 per month, the contract would be executed only when both Thanna and Sambo had fully performed all their duties. So in order for this to occur, Thanna would have to have done all of the work the contract required, and Sambo would have had to pay Thanna completely as the contract required. If anything at all remained to be done--even if it was only that Sambo had paid \$5,900 instead of \$6,000--then the contract would not be executed. It would be only executory.

***** CASE STUDY 6**

FACTS Bora offered to sell Phally a fishing boat for \$2,000. The offer said that delivery was to occur one day after the contract was formed, and that payment was to occur two days after the contract was formed. Phally accepted the offer, and the next day Bora delivered the boat.

QUESTION OF LAW Is this contract executed?

DECISION No. The contract is not executed because Bora and Phally have not fully performed all of the duties under the contract.

Contracts are executed only when all parties to the contract have performed completely their duties under the contract. In this case, Bora agreed to sell his boat to Phally. Bora delivered the boat to Phally, so his duties under the contract are basically finished. However, Phally's duties are not yet finished, because he has not paid \$2,000 as the contract requires. So this contract is not executed. It will be executory until all parties have completely performed their duties.

***** WHY IS THIS IMPORTANT?** Why do many jurisdictions measure the stage of performance of contracts, and make the distinction between executory and executed contracts?

This distinction is important for several reasons. At the most basic level, it helps courts and parties know whether a contract has been fully performed or not. More importantly, it helps courts make decisions about how they will respond to a number of problems in the formation and performance of contracts. Several of these problems are discussed below.

Sometimes the law treats contract formation problems differently depending on whether the contract has been executed. For example, where a contract is voidable because one party was a minor, many jurisdictions say that different things happen to the contract when that minor reaches majority based on whether the contract is executed. Specifically, if a minor is silent about an executory contract for a reasonable time after he reaches majority,

then the effect is to disaffirm that contract. But if the minor is silent about an executed contract for a reasonable time after he reaches majority, the effect is to ratify that contract. This will be discussed in more detail in Chapter 4 ("Capacity").

In addition, many jurisdictions treat formality problems differently depending on whether the contract is executed. Specifically, many jurisdictions say that if a contract is executed, it is no longer subject to attack on the basis that it fails to meet a writing requirement. Of course, if a contract has been executed, there is not usually a need to enforce it. But the practical effect would seem to be that, after a contract is fully performed, no party can use the lack of a writing as a basis to demand a remedy such as restitution. This will be discussed further in Chapter 6 ("Formality").

The stage of performance of a contract can also affect the remedies that a court may order or allow in other situations. For example, where a contract is executed, or where a contract is completely performed on one side, the remedy of rescission (canceling the contract) may not be available. Many common law jurisdictions say that parties generally cannot mutually rescind a contract where the contract has already been fully performed on one side. This is because there would generally be no consideration for the agreement to cancel from the party who had not yet performed. That party would not be agreeing to any new legal detriment by canceling a contract under which he had already received full performance! In addition, if the contract was executed, mutual rescission would not seem possible, because there would really be nothing left to cancel. This issue might arise where there was some formation problem such as mistake, and the party who was the victim of the problem wanted to avoid the contract after it had been partly or fully performed. Of course, other remedies such as money damages might still be available. These issues will be further discussed in Chapter 9 ("Performance and Discharge of Duties") and Chapter 10 ("Remedies").

***** ADDITIONAL REFERENCE:** Chapter 4 ("Capacity"), Section 4.4 contains further discussion of the effect of stage of performance on contracts minors make; Chapter 6 ("Formality"), Section 6.3 contains further discussion of the effect of stage of performance on contracts that fail to meet writing requirements; and Chapter 9 ("Performance and Discharge of Duties"), Section 9.7a, and Chapter 10 ("Remedies"), Section 10.7b, contain further discussion of rescission.

1.3d Contracts Classified by Their Form

The law has a number of different ways to classify contracts based on their physical form. In particular, the law classifies contracts based on whether they are: express (in words) or implied (from conduct); made in written or oral words; and formal (under seal) or simple (not under seal). These categories can have important effects on the formation, performance and enforcement of contracts.

(1) Contracts May Be Express (in Words) or Implied (from Conduct)

Contracts made in words are called express contracts, while contracts implied from conduct are called implied contracts. First express contracts will be discussed.

*** **DEFINITION:** An **express contract** is one made in words.

Express contracts may be oral or written. The important thing is that the parties have used words to make their contract.

*** CASE STUDY 7

FACTS Sophoan wrote a note to Chhay which said: "I offer to sell you three standard pieces of tofu for 2,000 riels, with delivery to occur in two days at your house, and payment to be made half at the time the contract is made, and half at the time of delivery." In reply, Chhay wrote a note to Sophoan which said: "I accept your offer."

QUESTION OF LAW Is this contract express?

DECISION Yes. This contract is express because Sophoan and Chhay put their agreement in words.

Express contracts are contracts made in words. In this case, Sophoan and Chhay agreed in words that Sophoan would sell Chhay three pieces of tofu for a certain price, along with specific terms of delivery and payment. Because the parties made this contract in words, it is an express contract.

When contracts are not made in words, but instead are made through the conduct of the parties, they are called implied contracts. Implied contracts are generally enforceable, just like express contracts.

*** **DEFINITION:** An **implied contract** is one made through the conduct of the parties.

In implied contracts, parties make their contract through their actions. Of course, words are a kind of action, so it might be more precise to say that parties make implied contracts through non-verbal conduct. The conduct from which an implied contract is implied can also include the circumstances surrounding the actions of the parties. For example, courts can sometimes imply a reasonable price from the circumstances surrounding an agreement.

In order for the parties to make a contract without words, it must be clear that their conduct really shows all the elements needed for a contract to exist. That means all the requirements discussed in Section 1.2 above, including the requirement of real agreement. It is not necessary to determine exactly which party made the "offer" and which one made the "acceptance"

in order for a contract to exist. It is only necessary that, even though the parties are not using words, they must somehow show clearly and definitely enough that they really agree, and what it is that they agree. Whether the parties have done that can be hard to determine.

In order to determine whether the parties have really shown an enforceable agreement through their conduct, many jurisdictions use an objective, reasonable person standard. That means they ask whether a reasonable person in the same circumstances, using the judgment and experiences of an ordinary person, would think that the conduct of the parties showed such an agreement. This "reasonable person" standard is a very important one in law. It was already discussed briefly in Section 1.2 above, in the explanation of the objective and subjective methods many courts use to interpret contracts. An objective analysis focuses on what a reasonable person would likely have done or intended in the same situation. A subjective analysis focuses on what the parties involved in a particular transaction or situation really did or intended. In any case, courts use the objective standard to help them resolve a variety of difficult problems in contract law, and in many other fields of law.

For example, suppose Keary rides her moto into a moto parking lot, and Chantha, the lot attendant, gives Keary a ticket to show which moto is hers. Keary leaves her moto in the parking lot. In this situation, even though the parties have not used any words, they probably have a contract. This is because a reasonable person would probably say their conduct has shown that they have one. It shows that they have agreed that Chantha will allow Keary to park in the parking lot, and that Keary will pay Chantha for this. Of course, the parties have not made certain terms of the contract--such as the price--completely clear. But in this situation a court would probably imply a reasonable price, based on the circumstances surrounding the parties' agreement, such as any past dealings between the parties and the current market price for this kind of parking. This will be discussed further in later Chapters.

However, suppose Keary put her moto near--but not inside--Chantha's parking lot, then walked away without getting a ticket. In that situation, it is unlikely that the parties have a contract. This is because a reasonable person would probably not say that their conduct has shown one. Keary did not put her moto in Chantha's lot. And Chantha did not give Keary a ticket. The parties have not shown clearly that they want to have a contract together.

CASE STUDY 8

FACTS Kosal decided to ride a ferry across the river to get to work one morning. He boarded the ferry on one side of the river and rode across. Before the ferry reached the other side, Kosal paid for the ride along with all the other passengers. During all this activity, Kosal did not speak with the operator of the ferry.

QUESTION OF LAW Is there a contract between Kosal and the ferry operator?

DECISION Yes. An implied contract exists between Kosal and the ferry operator because their conduct has clearly shown that contract.

Implied contracts are those made through conduct (not words) of the parties. They exist where a reasonable person would say that the parties' conduct shows they made a contract together.

In this case, Kosal boarded a ferry and rode across a river with a number of other passengers. Before the ferry reached the other side of the river, Kosal paid the ferry operator for the ride, as the other passengers did. Kosal and the ferry operator did not communicate with each other through words. However, in this situation, Kosal and the ferry operator have an implied contract, because their conduct has shown it. Kosal boarded the ferry and began to ride across the river. The ferry operator began to take Kosal across the river. These actions created the contract. A reasonable person would probably say that Kosal expected to be taken across the river, and the ferry operator expected Kosal to pay him. Of course, the parties did not specify a price. But a court would likely imply a reasonable price, which would probably be the one everyone else was paying.

Many contracts are actually partly express and partly implied. That is, many contracts are to some extent made in words, but also to some extent implied from conduct, including the circumstances surrounding the parties' actions. This generally occurs where the parties use words for some important terms, but do not specify other terms in words. Often, the law will imply these terms, as long as that can be done in a way that is consistent with what the parties appeared to want in their contract. In fact, it might be argued that few contracts are completely express. This is because few contracts actually state in words all the terms that the law will imply, such as the duty of good faith and fair dealing, and certain warranties that many jurisdictions say exist in many kinds of contracts. On the other hand, certain essential terms cannot be implied if the parties did not specify them. This is discussed further in future Chapters, especially Chapter 2 ("Real Agreement (Offer and Acceptance)") and Chapter 8 ("Interpretation of Contracts").

CASE STUDY 9

FACTS Samneang made a written offer to sell Vantha a radio for \$100. Vantha wrote back saying that she accepted the offer.

QUESTION OF LAW Is this contract partly express and partly implied?

DECISION Yes. The contract Samneang and Vantha made is partly express, because the parties used words for some terms, but also partly

implied, because they did not use words for other terms, and these will be implied based on the circumstances.

In many cases, contracts are partly express and partly implied. That happens where the parties use words for some of the terms in their contract, but other terms are implied based on conduct, including the surrounding circumstances.

In this case, Samneang and Vantha agreed in words that Vantha would buy Samneang's radio for \$100. This means the contract is at least partly express. However, although the parties used words to make their contract, they did not specify certain important aspects of the agreement. For example, they did not say when or where delivery of the radio was to occur, or when or where payment would occur. Many jurisdictions will imply these terms even though the parties did not state them, based on the circumstances surrounding the parties' agreement. Such jurisdictions would probably say that delivery should occur within a reasonable time at Samneang's place of business (or residence), and payment should occur at the time and place of delivery. Of course, if the parties had stated these terms, the terms the parties stated would generally be enforced.

***** WHY IS THIS IMPORTANT?** Why do courts enforce both express and implied contracts?

Courts enforce both express and implied contracts because the law wants to support and encourage real agreements, whether the parties use words to make them or not. In many cases, it would not be practical or convenient for the parties to put their contracts in words. Examples include the ferry and moto parking lot situations described above. In cases like these, it would slow the parties down--and burden commercial activity--if the law required the parties to make their contracts in words. If the ferry operator had to stop and speak to one hundred different passengers, it would take a lot more time than if the passengers simply got on the boat. In these situations, it is generally better for people to use more efficient ways to make their agreements--through conduct. The law wants to support such agreements, which fulfill the reasonable expectations of the parties. So it will enforce these agreements.

It would also burden economic activity if the parties had to put every term in their contracts in words. So the law also enforces contracts that are partly express and partly implied, supplying some terms the parties did not actually specify, if it is reasonable to do so under the circumstances. Of course, not all missing terms can be implied.

In addition, the conduct of the parties must be clear enough that the courts can enforce the contract. In many situations, the parties cannot practically make their contracts unless they use words. This is especially true about agreements that are more complex than the ones above, as many

business contracts are. In these cases, parties should use clear words to describe their agreements as completely as is practical. Otherwise, the agreements may not be clear enough for the parties to perform or the courts to enforce.

***** ADDITIONAL REFERENCE:** Chapter 2 ("Real Agreement (Offer and Acceptance)"), Sections 2.3b and 2.10 contain further discussion about express and implied contracts, and about terms courts may imply in contracts; Chapter 8 ("Interpretation of Contracts"), Section 8.3j contains further discussion of terms courts may imply in contracts.

(2) Express Contracts May Be Written or Oral

When contracts are express, they may be made with written words or spoken words. Contracts made in these ways are called written contracts and oral contracts.

***** DEFINITION:** An **oral contract** is one made using spoken words.

***** DEFINITION:** A **written contract** is one made using written words.

In general, both oral and written contracts are enforceable. This is because one of the most important goals of contract law is to enforce genuine agreements of the parties, unless there is some good reason not to do so. Parties can make genuine agreements orally. So oral contracts are generally just as enforceable as written contracts, as long as they meet all the requirements for enforceability which are discussed in this Chapter. This is true even though oral contracts may seem less formal and may be harder to prove in court, and even though the law requires certain contracts to be written to be enforceable. In fact, in some situations, oral contracts may be better than written ones! This is because they may be more practical for smaller transactions that happen every day.

For example, suppose Samy took a cyclo to the market to buy some tomatoes. She is likely to make an oral contract with the cyclo driver, and an oral contract to purchase the tomatoes from a market seller. These are valid contracts. And they are probably better than written contracts would be in these situations. This is because it would probably not be practical or efficient for these parties to take the time and effort needed to make a written contract about relatively small transactions like these. And another important goal of the law is to promote an efficient economy.

However, in certain situations, the law does generally require that agreements be written in order to be enforceable. In particular, many jurisdictions require writings for agreements for the transfer of substantial interests in land; agreements for the sale of goods over a certain

monetary amount; suretyship agreements; agreements that cannot be performed within one year; and agreements in which one party promises to do something in exchange for the other party's marriage or promise to marry. These rules require parties to put such important agreements in writing if they want to enforce them. That encourages the parties to think carefully about such agreements, and to be more clear and complete in expressing them. It also helps provide better evidence for courts to enforce the agreements. This is discussed further in Section 1.4e below, and in Chapter 6 ("Formality").

In addition, even if the law does not require a contract to be written, parties should put all important contracts in writing. This is because, in many situations, written contracts are much better than oral ones. Written contracts generally provide better proof that a contract actually exists. And as noted above, they often provide a way for the parties to express their agreement more clearly and completely than an oral contract can. This protects the parties, because it makes it easier for both parties and courts to know what the parties agreed. And it can reduce the number of disputes that may occur about the contract. Written contracts are an especially good idea where the parties do not know each other well, or where performance is to occur over a long period of time (during which parties might forget the terms of an oral contract).

CASE STUDY 10

FACTS Sophea and Bun Leng agreed orally that Sophea would do carpentry work for Bun Leng for six months for \$200 per month. Sophea worked for about three months, and Bun Leng paid him at the end of each month.

But during the fourth month, Bun Leng asked Sophea to stop. Sophea said that the parties' agreement lasted for six months. But Bun Leng said: "What agreement? Show me the agreement!" Sophea asked the court for help.

QUESTION OF LAW Do Sophea and Bun Leng have an enforceable contract for six months?

DECISION Yes. Sophea and Bun Leng have an enforceable oral agreement for six months of carpentry work, but Sophea will have to provide evidence that persuades the court about the existence and terms of the agreement.

Oral contracts are generally enforceable as long as there is no specific legal requirement that they be written. However, written contracts are often better than oral ones for important agreements, because written contracts provide better proof about the existence and terms of the agreement.

In this case, Sophea and Bun Leng agreed orally that Sophea would work for Bun Leng for six months. But in the fourth month, Bun Leng

told Sophea to stop work, and denied the existence of the agreement. Despite Bun Leng's claim, Sophea has an enforceable agreement.

However, that alone does not solve Sophea's problem! That is because, in order to enforce the contract, Sophea must persuade the court about its existence and terms. In this case, it appears that Sophea has no written evidence of the contract. He can still use oral evidence, including his own testimony and other relevant evidence, to prove the contract exists. But Bun Leng will probably deny that it exists. Because the court does not know what really happened--the court was not present when Sophea and Bun Leng made their contract--it may have difficulty deciding whether there is a contract as Sophea claims. It may be Sophea's testimony against Bun Leng's testimony. The result will depend not on who is correct, but on who the court believes is correct. Sophea may convince the court that he is correct--or he may not.

That is why parties like Sophea should put important contracts like this in writing, even when the law does not require it. A writing generally provides better evidence about the existence and terms of a contract. It would give Sophea a better chance of persuading the court to enforce the contract.

Problems may occur where a contract appears to be partly written and partly oral. In these situations, it can be very difficult to know what the contract terms really are! And parties may not be able to enforce certain terms they think are in their agreements if those terms are not in the writing they create. For example, common law jurisdictions that apply the parol evidence rule generally do not allow evidence of prior statements to contradict a final contract writing, or to contradict or add terms to a final and complete contract writing. This rule encourages parties to put all important terms in the writings they make to record their contracts. So where parties use a writing, it is generally crucial for them to put all the key terms in the writing. This will be further discussed in Section 1.4g, and in Chapter 8 ("Interpretation of Contracts").

***** ADDITIONAL REFERENCE:** Chapter 6 ("Formality") discusses writing requirements more fully; and Chapter 8 ("Interpretation of Contracts") explains how many courts handle the problem of contracts that appear to be partly written and partly oral.

(3) Formal Contracts Are Those Made under Seal, While Simple Contracts Are Those Not Made under Seal

Certain written contracts are made with a seal. In some jurisdictions, these are called formal contracts. All other contracts--whether written contracts with no seal, oral contracts, or implied contracts--are called simple contracts.

*** **DEFINITION:** A **formal contract** is one made under seal.

*** **DEFINITION:** A **simple contract** is one not made under seal.

It appears that the use of seals in contracts originally developed in some jurisdictions as a kind of signature because few people could write. Today, seals may still be used in some cases in addition to a signature.

Traditionally, seals had several effects on contracts. First, it appears that in many common law jurisdictions a seal could actually substitute for consideration in a contract. In other words, a formal contract would not require consideration in order to be enforceable. So if Sochua and Chhien agreed in a formal contract that Chhien would pay Sochua 1,000 riels, but Sochua did not do or agree to do anything in exchange, Chhien's promise would be enforceable--even though there was no consideration for it!

In addition, it seems that in some common law jurisdictions formal contracts were subject to longer statutes of limitation than simple ones. A statute of limitations says how much time a party has to make a certain kind of legal claim in court after the claim arises. For instance, in the example above with Sochua and Chhien, suppose the normal statute of limitations for a breach of contract lawsuit was four years. If the contract was made under seal--as theirs was--the time specified in that statute might be longer. If it was seven years, then Sochua and Chhien would have seven years to complain to the court about a breach.

However, it appears that many jurisdictions no longer treat formal contracts differently from simple contracts. Where that is the case, such contracts are subject to the same rules about consideration and statutes of limitations as other contracts are. For example, the Uniform Commercial Code in the United States basically says that contracts for the sale of goods made under seal will be treated the same way as simple contracts are.

One basic reason that some jurisdictions have treated formal contracts differently from simple ones appears to be to provide a way for parties to give their promises more power than they would otherwise have. The distinction may allow parties to avoid the usual common law requirement of consideration for their promises, and give parties more time to bring a legal action to enforce the promises. Presumably this would give parties more flexibility to achieve their goals than they would have under the regular rules.

*** **ADDITIONAL REFERENCE:** Chapter 3 ("Consideration"), Section 3.8c contains further discussion of formal contracts and the common law requirement of consideration, and Section 3.8d contains further discussion of statutes of limitation.

1.4 **Expanded Summary of the General Principles of Contract Law Explained in Chapters 2-11**

Section 1.4 contains an expanded summary of the general principles of contract law discussed in Chapters 2-11 of this book. These principles govern whether contracts are enforceable, how courts interpret their meaning, how courts analyze contract performance, what contract remedies courts may order or allow, and third party rights and duties. These ideas were summarized even more briefly in the concise summary in Section 1.2 above. But these are difficult principles. So even this longer summary can only discuss some of the more important ideas and give a few examples. For a deeper understanding, readers should consult Chapters 2-11.

Often, courts face the basic problem of whether a contract is enforceable. In particular, in many jurisdictions, the enforceability of contracts is affected by legal requirements in the following six basic areas:

- (1) real agreement (offer and acceptance) (Section 1.4a);
- (2) consideration (common law jurisdictions only) (Section 1.4b);
- (3) capacity (Section 1.4c);
- (4) legality (Section 1.4d);
- (5) formality (Section 1.4e); and
- (6) other formation problems (Section 1.4f).

Of course, courts often must decide issues other than whether a contract is enforceable. They must also resolve important problems related to:

- (7) interpretation of contracts (Section 1.4g);
- (8) performance and discharge of duties (Section 1.4h);
- (9) remedies (Section 1.4i); and
- (10) third party rights and duties (Section 1.4j).

These ten important areas of contract law will be discussed below.

1.4a **To Be Valid, a Contract Must Have Real Agreement (Offer and Acceptance)**

Perhaps the most basic requirement for a contract to be enforceable is that the parties make a real agreement that they intend to be enforceable by law. Of course, as discussed in Section 1.3d above, a real agreement can have many different forms, such as implied or express, oral or written. But although many forms are possible, not all "agreements" meet this requirement. To analyze whether a real agreement exists, many jurisdictions generally require a valid offer and a proper acceptance between the parties to the contract. The rest of this Section will discuss offers and acceptances.

When analyzing potential contracts, it may not always be possible to identify a distinct "offer" and "acceptance." This is especially true with implied contracts, and in cases where the parties negotiate back and forth for some time. In these situations, it may be hard to say: "this was the offer, and that was the acceptance." But the important thing for real agreement to exist is that all the required elements of a valid offer and proper acceptance exist in the conduct and words of the parties.

Offer

The first thing the law requires for a real agreement is a valid offer.

***** DEFINITION:** An **offer** is a proposal to make a contract.

The party who makes an offer is called an offeror. The party to whom the offer is made is called an offeree. For example, if Sokna says to Vuth, "I will pay you 1,000 riels if you wash these clothes," that is an offer. Sokna is the offeror, and Vuth is the offeree.

Only valid offers that meet the relevant general legal requirements can result in contracts. Specifically, in many jurisdictions, a valid offer must be:

- (1) seriously intended to create legal obligations;
- (2) definite and reasonably clear; AND
- (3) communicated to the offeree.

First, the offer must be seriously intended to create legal obligations between the offeror and offeree, based on an objective, reasonable person standard. For example, if Sophy offers to meet Molika at a restaurant for breakfast--a social engagement--there is probably no serious offer. In addition, if an offeror makes an offer in great fear or anger or as a joke, and the offeree has a reason to know that, the offer is not seriously intended.

Second, an offer must be definite and reasonably clear. This basically means that the offer must include the essential terms of the proposed contract, and that the material (important) terms the parties include must be reasonably clear. What is required depends on what kind of contract is involved and the other circumstances. For example, many jurisdictions generally require sale of goods contracts to include at least the identity and quantity of the goods. So if Sophy said to Molika, "I offer to sell you my new blue bicycle," that offer could meet this requirement. But if Sophy merely offered to sell "a bicycle," and there was no way to determine which one--the identity--the offer might not be valid. Courts can actually imply some terms that the parties omitted, generally terms that are reasonable based on the circumstances. Many jurisdictions will supply terms to a sale of goods contract, as long as the parties have included the essential ones.

Third, the offer must be communicated to the offeree. This shows that the offeror really wanted to make a contract with the offeree. For example, if Sophy writes an offer to sell her bicycle to Molika but never communicates it to Molika, Molika cannot accept that offer, even if she learns about it some other way.

It is important to note what are generally not valid offers. In particular, preliminary negotiations and invitations to negotiate are generally not valid offers. So an indication that a party plans to make a contract, or might want to make a contract, is not a valid offer. Likewise, most marketing activities are not offers, because they are usually just general invitations to the public to negotiate. For example, if Sophy paints and displays a sign saying "Bicycle for Sale Only \$50," that is probably not an offer. It is merely an invitation for the public to negotiate with her. In addition, a solicitation of bids is not an offer. So if a government solicits bids for companies to build a new hospital, the government is not making an offer--it is asking companies to make offers to it!

Offers end and are no longer valid in several situations. These are when:

- (1) the offeror revokes the offer;
- (2) the offeree makes a rejection or counter-offer; or
- (3) a specific event or circumstance ends the offer.

An offer ends if the offeror revokes it. A revocation is the offeror's withdrawal of the offer. A revocation can occur if it is communicated to the offeree before the offeree makes a proper acceptance. After acceptance, a contract is formed and the offer cannot be revoked. So if Sophy offered to sell Molika her bicycle, and Molika properly accepted, Sophy could no longer revoke. Revocations are effective on receipt by the offeree, which usually means delivery to the offeree's address. Offerors can revoke by communicating directly with the offeree. Offers can also be revoked indirectly where the offeree observes that the offer is no longer open. For instance, that might occur if Molika in the example above saw that Sophy had already sold the bicycle to someone else. Public offers can be revoked in the same way the offer was made.

There may be other limits on when an offer can be revoked. In many common law jurisdictions, an offeror can generally revoke any time before acceptance. But in many civil law jurisdictions, an offeror cannot revoke for a reasonable time, unless the offer says otherwise. And offers may not be revocable even in common law jurisdictions where:

- (1) an option contract holds the offer open;
- (2) a special statute prevents the offeror from revoking that type of offer, such as a statute governing offers for the sale of goods;

- (3) the offeree partly performs after certain unilateral contract offers;

or (4) promissory estoppel applies.

An option contract is one whose purpose is to hold an offer open. For example, Sophy and Molika might make an option contract in which Molika pays \$5 in exchange for Sophy's promise to keep her bicycle sale offer open for one week. An "irrevocable" or "firm" offer for the sale of goods can occur where a merchant agrees in writing to keep an offer open for a certain time. Where an offeree partly performs in response to a unilateral contract offer, most courts say the offer cannot be revoked until the offeree has had a reasonable chance to finish performance. Finally, an offer may not be revocable where promissory estoppel applies. Promissory estoppel says that a promise may be enforceable where a party justifiably relies on it and injustice will result if it is not enforced, even where the usual requirements--such as real agreement--are not met. For example, offers may become irrevocable where a contractor relies on bids from sub-contractors in bidding to get a large contract to do construction work for a different party.

An offeree can also terminate an offer, through a rejection or a counter-offer. A rejection is basically an offeree's refusal to accept an offer. An offer terminates when the offeror receives a rejection. A counter-offer is an offer which the original offeree makes back to the original offeror, in response to the original offer. With a counter-offer, the parties actually switch places--the original offeree becomes an offeror, and the original offeror becomes an offeree! For example, if Sophy offers to repair Molika's bicycle for \$5, and in response Molika offers \$4, Molika has made a counter-offer. Sometimes a counter-offer looks like an acceptance, but if it changes or adds terms--if it is not a "mirror image" of the offer--it is generally a counter-offer. Counter-offers terminate the original offers on receipt, just like rejections do. However, if an offeree merely inquires about an offer, that does not end the offer. An offeree might also complain but properly accept the offer--a "grumbling acceptance." Of course, an acceptance forms a contract, and so in a sense also "ends" the offer.

CASE STUDY 11

FACTS Sokun runs a shophouse that sells shoes. One day, Dina writes to Sokun: "I will build you a new addition to your shophouse, according to the attached plans, for \$5,000." Sokun thinks about the offer. Then he sends Dina a note that says: "I accept your offer to build the new part on my shophouse, according to the plans you sent, for \$4,000." Dina receives the note.

Sokun says that his response was a "grumbling acceptance," and that now there is a contract between the parties. Dina says that there is no contract yet, but that his offer to Sokun to do the work for \$5,000 is still open. The parties ask a friend with contract law training to help them.

QUESTION OF LAW Is Dina's offer still open?

DECISION No. Dina's offer is no longer open because Sokun's response was a counter-offer, which terminated Sokun's offer--but there is no contract yet.

When an offeree's response to an offer changes the terms in the original offer, it is generally a counter-offer that terminates the original offer. Of course, there is no contract unless the counter-offer is accepted.

In this case, Dina offered to do some construction work for Sokun for \$5,000. In response, Sokun said he "accepted" the offer for \$4,000. This was a counter-offer. It may have looked like an acceptance, but because it changed the terms of the offer, it was not. This counter-offer terminated Sokun's offer. Sokun can now accept the counter-offer and form a contract, if he wishes. But there is no contract yet, because there has been no acceptance yet.

Finally, an offer may be terminated by a specific event or circumstance outside the direct control of the offeror and offeree. In particular, an offer may end because of lapse; the occurrence of a condition specified in the offer; the death or adjudicated incompetence of a party or person essential to the proposed contract; destruction of the particular subject matter of the contract; or a change in the law that makes the offer illegal. In many jurisdictions, these events can terminate offers automatically. To lapse is basically to end because of the passage of time. An offer lapses either at the time that it (or a related option contract) clearly says it will, or otherwise after a reasonable time, based on the subject matter of the contract and other circumstances. For example, if Sophy offers orally to sell Molika her bicycle at the market and says the offer is "open for a limited time," that offer will probably lapse fairly soon. The occurrence of a condition the offer specified can also terminate the offer. A condition in this situation is basically an event whose occurrence will affect whether the offer ends. For example, an offer might say it ends if the offeror fails to get a loan. The death or adjudicated incompetence of a party or person essential to the proposed contract can also terminate an offer. In addition, destruction of the particular subject matter of an offer can end the offer. This rule applies only where the offer is about a specific, identified thing, such as a particular building. Finally, a change in the law making the offer illegal can terminate the offer.

Acceptance

The other major part of a real agreement is the acceptance.

***** DEFINITION:** An **acceptance** is basically an offeree's indication of agreement with an offer.

When the offeree properly accepts a valid offer, a contract is formed. In general, acceptances can occur in a variety of ways. However, there are two kinds of limits on how proper acceptances can occur. These are requirements

of the offeror and the law. The rest of this Section will discuss how these limits affect who may properly accept offers and how proper acceptances occur.

In general, only the intended offeree can properly accept and form a contract with the offeror. An attempted acceptance by anyone else is generally a new offer to the original offeror. So if Vuthy offers to sell a book to Sakorn, an attempted acceptance by Pochin is generally not an acceptance. It is generally a new offer to Vuthy. However, in two situations, even a party with whom the offeror did not want a contract can form one. The first situation is where a party who is not an intended offeree receives an offer by mistake and accepts it without knowing or having a reason to know of the mistake. In the book example, that might occur if Pochin received the offer, really thought it was for him, and had no reason--such as a different name on the offer--to know of the mistake. The second situation occurs where the offeror creates more offerees than he really wants, and more offerees accept than the offeror wanted.

In common law jurisdictions, how an offeree can properly accept depends on whether the offer is for a unilateral contract or a bilateral contract. In these jurisdictions, where the offer is for a unilateral contract, the offeree can properly accept by fully performing the act requested. Many jurisdictions traditionally said that offerees generally had no obligation even to notify offerors that they were performing the act, since the act by itself created the contract. However, the offeree must tell the offeror about the acceptance if the offer requests it. Some jurisdictions also say that the offeree must use reasonable efforts to notify the offeror if the offeror would otherwise have no adequate way to learn of the performance. For example, suppose Vuthy told Sakorn that he would pay him 2,000 riels if Sakorn delivered a particular book to a certain place. Sakorn could generally accept by delivering the book, and nothing more would be needed. But if Vuthy's offer asked for notice from Sakorn, or in some jurisdictions if Vuthy had no adequate way to know of the acceptance--such as if Vuthy was far from the place of delivery and had no way to know about it--then Sakorn would be required to notify Vuthy.

In common law jurisdictions, where the offer is for a bilateral contract, the offeree can generally accept by communicating in a proper manner the promise requested. This rule can be divided into four important general requirements. Specifically, a proper acceptance of an offer for a bilateral contract must generally:

- (1) be communicated to the offeror;
 - (2) be unequivocal and unconditional;
 - (3) be identical to--or "mirror"--the terms of the offer;
- AND (4) occur in a proper manner, including meeting any special requirements of the offeror.

First, to accept an offer for a bilateral contract, the offeree must communicate the acceptance to the offeror. In general, an offeree can communicate his acceptance through words (expressly) or conduct (impliedly). Of course, it must be clear from an acceptance by conduct that the offeree is actually making the promise the offeror wanted. For instance, if Vuthy offered to sell Sakorn a book if Sakorn promised to pay 2,000 riels, Sakorn might be able to accept simply by nodding his head or making some other positive gesture, as long as it clearly showed that he accepted the offer.

However, silence by the offeree is generally not an acceptance. So there is generally no contract if an offeree does not respond to an offer. However, in four situations silence actually can be a proper acceptance. The first occurs where the parties have previously agreed the offeree could accept through silence. The second occurs where prior similar dealings between the parties would indicate to a reasonable person that silence was an acceptance. For instance, in the book example, if Vuthy had offered to sell Sakorn a number of books in the past, and the parties' practice was that Sakorn only responded if he did not want a book, Sakorn's silence might actually be an acceptance. The third situation is where a trade usage or industry practice is that silence can be acceptance. The fourth situation occurs where the offeree substantially uses or controls the subject matter of the offer. If Vuthy lets Sakorn examine the book he is offering to sell, and Sakorn walks away and does not return the book for a long time, a court might find that this was an acceptance! But this exception does not apply where aggressive sellers try to force goods or services on parties without giving them a reasonable opportunity to object. So if Vuthy actually sends Sakorn the book through the mail along with his offer, and Sakorn does not respond--perhaps because he is too busy, or does not wish to spend his time and money replying or returning the book--there is probably no contract.

Second, an acceptance of a bilateral contract offer must generally be unequivocal and unconditional. So the acceptance must: (1) show the offeree's present agreement to the offer, and (2) not depend on any change to the offer. The acceptance generally cannot say things like "I might agree to your offer," or "let's agree to agree later." Also, the acceptance generally cannot depend on conditions, such as "I accept your offer subject to these changes." For instance, suppose Sakorn responded to Vuthy's book sale offer by saying: "I agree only if the price is 500 riels." That would not be an acceptance, but a counter-offer.

Third, the acceptance must generally be identical to the terms of the offer. This important general rule is sometimes called the "mirror image" rule, since the acceptance must look like the offer would in a mirror! Suppose an employer offers to hire a worker for \$500 per month, and the worker says "I accept at \$600 per month." That is not a proper acceptance.

In some jurisdictions, there is an exception to the mirror image rule with regard to sale of goods contracts. Some jurisdictions basically say that a response to an offer for the sale of goods which is a definite expression

of acceptance is proper even if it includes new or different terms. But those terms only become part of the contract formed in very limited circumstances. For example, in some jurisdictions in the United States, "material" (important) changes in such acceptances only become part of the contract where the offeror actually agrees. In such jurisdictions, "non-material" (not so important) changes only become part of the contract formed where both parties are merchants, the offer did not limit acceptance to the terms of the offer, and the offeror does not object.

***** CASE STUDY 12 (U.S. commercial code)**

FACTS Vuthy offers to sell Sakorn a book for 2,000 riels. In response, Sakorn says: "I accept at 1,000 riels, and you provide me the book in a plastic bag." Vuthy objects to these changes.

QUESTION OF LAW Is there a contract here?

DECISION Yes. A contract exists because Sakorn made a definite expression of acceptance, but the changes in his statement are not in the contract.

A definite expression of acceptance to an offer for the sale of goods is proper even though it varies terms in the offer. However, material changes only become part of the contract formed where the offeror agrees, and non-material changes only do where both parties are merchants, the offer allows it, and the offeror does not object.

In this case, Sakorn's definite response to Vuthy's book sale offer formed a contract, even though it changed the offer. However, the price change did not become part of the contract, since it was a material change and Vuthy did not agree. And the bag change did not become part of the contract even though it was not material, because Vuthy objected. So the parties have a book sale contract for 2,000 riels with no bag term.

Fourth, the acceptance must occur in a proper manner. It must comply with any special instructions of the offeror as to the manner of acceptance. If the offeror expressly insisted on just one manner of acceptance, only that manner will create a proper acceptance. However, if the offeror did not expressly insist on just one manner, then the acceptance is proper if made in a manner that is reasonable under the circumstances. In general, this means the offeree should use a manner that is the same as, similar to, or better than the manner in which the offeror made the offer. For example, if Vuthy made his book sale offer to Sakorn by regular mail, it would be reasonable for Sakorn to accept by regular mail, or by fax or hand delivery, since those are probably faster and more reliable than mail.

An acceptance may be effective at the time of dispatch or the time of receipt. Rules about when an acceptance is effective can be difficult. It seems

that many civil law jurisdictions say acceptances are effective when the offeror receives them (effective on receipt). But many common law jurisdictions basically say acceptances are effective when the offeree sends them (effective on dispatch) if the offeree sends them diligently and in a reasonable manner. Otherwise, they are effective on receipt, providing they actually arrive in a way that is as satisfactory as if they had been sent diligently and in a reasonable manner. The "effective on dispatch" rule can sometimes mean that acceptances are effective even though a revocation or rejection was sent first! For instance, suppose Sakorn sent an acceptance to Vuthy diligently and in a reasonable manner. That acceptance would be effective on dispatch--even if Vuthy had already sent a revocation, as long as that revocation had not yet been received.

Where it is not clear whether an offer is requesting an act or a promise--a unilateral or a bilateral contract--it appears that most courts say the offeree can accept either by performing the act or making the promise. For example, if it was not clear whether Vuthy's book sale offer was requesting that Sakorn promise to pay, or simply pay, Sakorn could accept either way.

Illustration: <u>Basic, General Elements of Real Agreement</u>		
<u>Valid OFFER</u>	<u>Proper ACCEPTANCE</u>	<u>REAL AGREEMENT</u>
	+	=
(1) <u>Seriously</u> intended;	(1) <u>Unilateral</u> : <u>Fully Perform</u> act requested	
(2) <u>Definite</u> and reasonably <u>Clear</u> ;	(2) <u>Bilateral</u> :	
(3) <u>Communicated</u> to offeree; AND	(a) <u>Communicated</u> to offeror;	
(4) <u>Not Ended</u> by offeror revocation, offeree rejection or counter- offer, or other event or circumstance.	(b) <u>Unequivocal</u> and <u>Unconditional</u> ;	
	(c) <u>Identical</u> to offer (mirror image);	
	AND (d) Occurs in proper <u>Manner</u> .	

*** **ADDITIONAL REFERENCE:** Chapter 2 ("Real Agreement (Offer and Acceptance)") discusses the key requirement of real agreement more fully.

1.4b To Be Valid, a Contract Must Generally Have Consideration in Common Law Jurisdictions

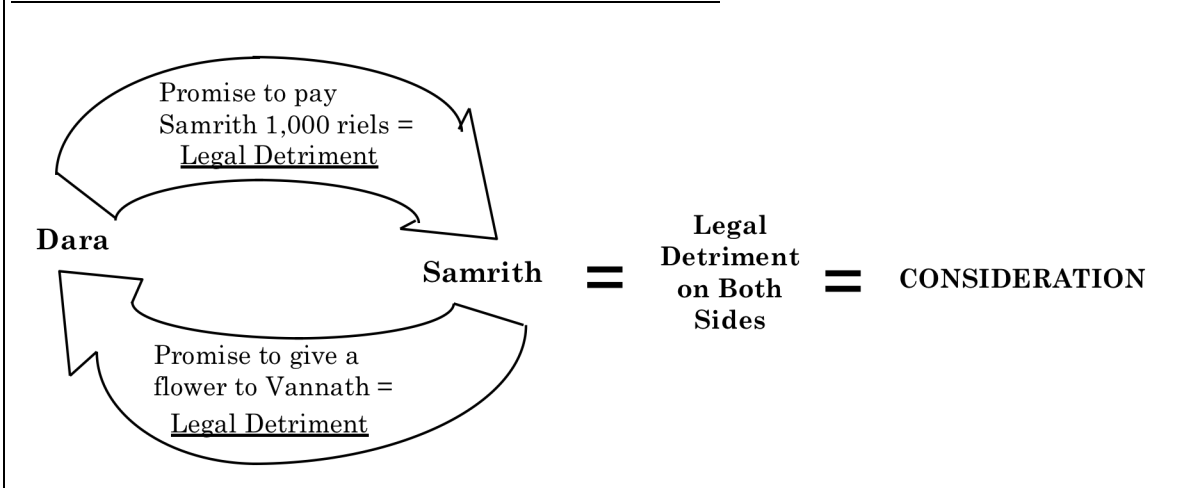
Common law jurisdictions generally require consideration.

*** **DEFINITION: Consideration** is the new "legal detriment" to each party to a contract, which generally means what each party does or agrees to do in exchange for a promise or performance from another party.

While common law jurisdictions generally require consideration, civil law jurisdictions do not require it in order for a contract to be enforceable.

This general common law requirement means that each party to an agreement must do or agree to do something that he was not required to do before--that he must have some new "legal detriment"--or the agreement is void. Consideration may be a promise to do something, such as pay money, or not do something, such as not smoke cigarettes. Consideration need not actually benefit any party to a contract. So if Dara agrees to pay Samrith 1,000 riels in exchange for Samrith's promise to give a flower to Vannath, there is consideration. It appears that Dara will receive nothing, but both Dara and Samrith have legal detriment. Consideration measures whether a party really wanted his promise to bind him legally.

Illustration: How Consideration Works



Consideration must be legally sufficient. This does not mean that it must be equal on both sides, or that the exchange of detriment must be "fair." It means only that the consideration on each side must be not obviously worthless--such as a piece of dirt. But generally, even something as small as a peppercorn (a famous common law example) is legally sufficient.

It is important to know what is generally not consideration. First, a performance of or promise to perform a pre-existing duty is generally not consideration. If Samrith makes a contract to sell Dara a flower for 1,000 riels, then Samrith says he wants 2,000 riels, and Dara agrees, there is generally no consideration, because Samrith had a pre-existing duty to supply the flower. Second, a legally unenforceable promise--a promise not to do something a party has no right to do anyway, such as commit a crime--is not consideration. Third, past consideration (an act done before the contract is made) is generally not consideration. That might occur if Samrith agrees today to provide Dara a flower because Dara gave him 1,000 riels last week. Fourth, an illusory promise, which does not actually commit a party to do anything, is not consideration. But if a seller agrees to sell all the goods he

will produce in a certain period to a certain buyer (an output contract), or a buyer agrees to buy all the goods he will need in a certain period from one seller (a requirements contract), consideration exists. Fifth, love and affection are not consideration.

CASE STUDY 13

FACTS Sokha says to his good friend Hen: "I like you very much, so I offer to give you this new car now. Do you accept?" Hen replies: "Yes."

QUESTION OF LAW Is there consideration in this agreement?

DECISION No. There is no consideration because Hen has no legal detriment--no duty to do anything he did not have to do before.

Consideration exists where all parties to a contract have some new legal detriment, which means doing or promising to do something they were not required to do before. In this case, Sokha promised to give Hen a new car. But Hen did not promise to do anything in return! So there is no consideration. This agreement would not be enforceable in a common law jurisdiction.

The partial payment of a debt is generally not consideration for the cancellation of the debt. However, some jurisdictions make exceptions in certain situations, such as where there is a good faith dispute about the debt amount; the debtor promises a new substitute performance; or the creditor "cancels" and returns to the debtor written evidence of the debt.

In many jurisdictions, modifications of existing contracts generally require new consideration. But this rule may not apply where a modified agreement is a mutual rescission (canceling of the contract); a party has unforeseen and substantial difficulties in performing; or there is a good faith modification of a sale of goods contract. For instance, in the example above for the sale of a flower--goods--some jurisdictions say that if Samrith and Dara agree in good faith to change the price to 2,000 riels, consideration exists.

There are many exceptions to the general common law rule that consideration is required. Many jurisdictions do not require it for:

- (1) promises to make charitable donations;
- (2) new promises to pay debts discharged in bankruptcy;
- (3) contracts under seal;
- (4) new promises to perform contracts unenforceable because of statutes of limitation;
- (5) new promises to perform contracts unenforceable because of failure to meet writing requirements;
- (6) firm offers for or modifications of sale of goods contracts; or
- (7) promises that meet the requirements of promissory estoppel.

So if Dara never paid Samrith for the flower and the statute of limitations expired, a new promise by Dara to pay would not require new consideration.

*** **ADDITIONAL REFERENCE:** Chapter 3 ("Consideration") contains a more complete discussion of the common law requirement of consideration.

1.4c To Be Valid, a Contract Must Satisfy Legal Requirements as to the Capacity of the Parties

Contracts must also meet legal requirements as to capacity.

*** **DEFINITION:** **Capacity** is a person's legal power or qualification to do what adults generally have the legal power or qualification to do.

In contract law, capacity means a person's ability to make an enforceable contract. In general, a person has capacity if he can understand the nature of the contract, can control his actions in making it, and the law permits him to make it. Contracts made by parties who lack capacity may be voidable or void, depending on the extent of the parties' lack of capacity.

Living adults generally have full capacity to make contracts. Legal entities such as governments and corporations also generally have capacity. However, certain types of persons may not have full capacity to make contracts. Dead persons cannot form contracts. And the following types of living persons may also lack capacity to some extent:

- (1) minors;
- (2) mentally incompetent persons;
- (3) intoxicated persons;
- (4) persons convicted of and imprisoned for serious crimes; and
- (5) in very limited situations, foreigners.

Contracts minors make are generally voidable by the minor. In many jurisdictions, the age of majority is 18 years. As noted in Section 1.3a, the minor can disaffirm (properly indicate that he will avoid) or ratify (properly indicate that he intends to be bound by) the contract. If the minor disaffirms, the contract cannot be enforced. So if a minor named Ray agrees to buy rice from Samoeun, but Ray refuses to perform, Samoeun cannot enforce the contract. A minor can generally disaffirm any time during minority, and for a reasonable time after he reaches majority. If a minor disaffirms a contract, he can generally get restitution of what he has given to the other party, or its reasonable value. Most courts say the other party can also get restitution from the minor, but only of what the minor still has. If the minor ratifies, the contract can be enforced like a valid contract. A minor cannot ratify a contract until he reaches the age of majority and gains full capacity. If the minor

is silent about a contract for a reasonable time after he reaches majority, this disaffirms executory contracts, but ratifies executed contracts.

CASE STUDY 14

FACTS Vouthy is 16 years old. The age of majority is 18. Vouthy buys a television from Samnang, an adult. A few months later, Vouthy's parents persuade him that the television purchase was not a good idea. Vouthy tells Samnang he wants his money back. Samnang refuses to give the money back.

QUESTION OF LAW Can Vouthy disaffirm and get his money back?

DECISION Yes. Vouthy can disaffirm this contract and get his money back, because he is a minor who has the right to avoid the contract.

Minors can generally disaffirm contracts they make, up until a reasonable time after they reach the age of majority. In this case, Vouthy bought a television from Samnang while he was a minor, but a few months later decided to disaffirm the contract. Vouthy can disaffirm and get his money back from Samnang. Of course, Vouthy must also give the television back to Samnang, if Vouthy still has it.

Some jurisdictions limit the ability of minors to disaffirm certain contracts, such as those for "necessaries," business contracts, contracts based on misrepresentation of the minor's age, and real estate contracts. "Necessaries" are items needed to sustain life, generally including food, clothing, and shelter. If a minor's contract for necessities has been partly or fully executed, the minor is liable for the reasonable value of what he has received (restitution). Business contracts of minors are generally valid. Where a minor makes a contract by lying about his age, courts allow him to disaffirm, but may require that he return the reasonable value of what he has received under the contract, whether he still has it or not. Finally, some courts say a minor cannot fully disaffirm a contract for the sale of real estate until reaching majority. One way to safely make contracts with minors is to require a co-signer, such as a parent.

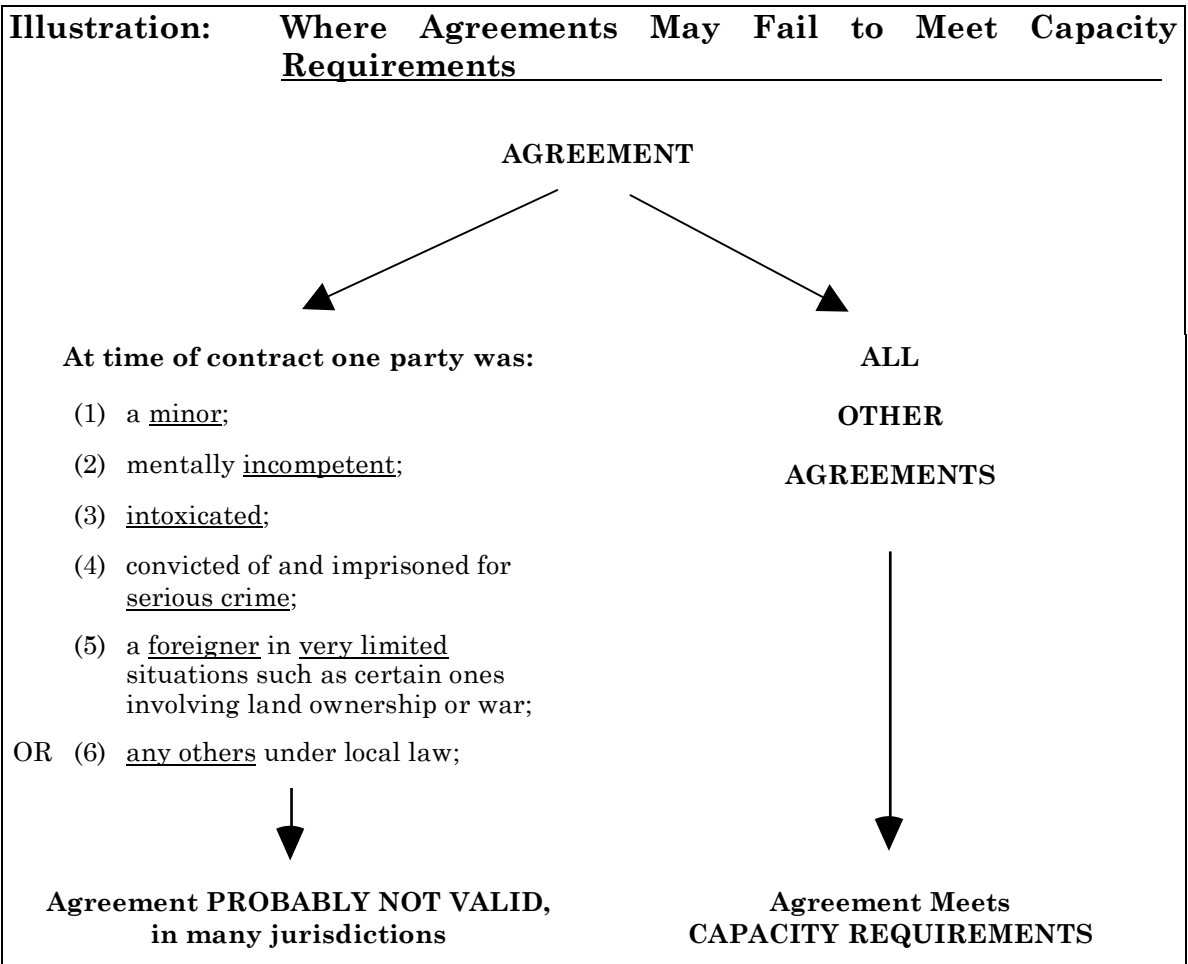
Contracts mentally incompetent persons make are generally void or voidable. In particular, many jurisdictions say contracts of persons who have been declared incompetent by a court are void, while those of incompetent persons who have not been declared incompetent by a court are voidable. Basically, a person is incompetent where he: cannot understand the nature of a particular contract; or cannot control his behavior with regard to the contract, and the other party has a reason to know that. For example, if Sary agrees to do one day of construction work for Lundy for \$10,000, but Lundy really cannot understand the nature of that agreement, the agreement is probably voidable by Lundy. Incompetent persons can disaffirm or ratify their voidable contracts, as minors can. But when incompetent persons disaffirm, most courts say they must generally provide restitution of the

reasonable value of what they have received--whether they still have it or not--especially in the case of necessities. Incompetent persons can ratify only when they gain capacity.

Contracts intoxicated persons make are generally voidable. The rules about this are similar to those for unadjudicated mentally incompetent persons. However, many courts say contracts of an intoxicated person are valid if the person was voluntarily intoxicated for reasons other than an illness and the other party had no reason to know of the intoxication. So if Sary and Lundy make an agreement while Lundy is voluntarily too drunk on vodka to understand it, and Sary has no reason to know that, the agreement is valid.

Parties convicted of serious crimes may lack full capacity to contract. Such limits generally apply only while such persons are imprisoned.

Foreigners generally have full capacity to make contracts. Some jurisdictions limit the ability of foreigners to own land. Many jurisdictions limit the ability of foreigners to make contracts with the jurisdiction's citizens while the foreigner's nation is actually at war with the nation of those citizens.



*** **ADDITIONAL REFERENCE:** Chapter 4 ("Capacity") contains a more complete discussion of the general requirement of capacity.

1.4d To Be Valid, a Contract Must Satisfy Legal Requirements as to Legality

Agreements that violate specific statutes or public policy are generally void and unenforceable. By "specific statute," this text means a statute that discusses the actual subject matter of the agreement, such as the sale of opium. "Public policy" basically means the promotion of the good of society. It may apply where no specific statute forbids the making or performance of the agreement.

Agreements that violate specific statutes--criminal or civil--are generally not enforceable. Such statutes may include:

- (1) criminal and tort statutes;
- (2) gambling statutes;
- (3) usury statutes;
- (4) regulatory licensing statutes; and
- (5) unreasonable restraint of trade statutes.

Courts will not enforce agreements to commit crimes or torts. Torts are non-contractual civil wrongs, which civil law jurisdictions define in statutes, but common law jurisdictions often define in court precedent.

CASE STUDY 15

FACTS Serey and Chhay agree to rob the Foreign Jade Bank and divide the money equally. Then they rob the Bank. But after the robbery, Chhay refuses to give Serey his share of the loot! Serey asks the court for help.

QUESTION OF LAW Will the court enforce this agreement?

DECISION No. The court will not enforce this agreement because it is an agreement to commit a crime--an illegal agreement.

Agreements to commit crimes are void and unenforceable. In this case, Serey and Chhay agreed to rob a bank. That is a crime. So this agreement is not enforceable, and the court will not enforce it for Serey.

Many courts do not enforce gambling agreements. Gambling is often banned or regulated by statute. Some jurisdictions will not enforce gambling agreements even if the gambling is legal! Of course, such courts would be refusing to enforce on the basis of public policy. So if Sovath and Thida bet illegally on the result of a soccer match, the agreement could not be enforced.

Usurious loan agreements cannot be enforced beyond the legal interest rate. Different jurisdictions may enforce such agreements at the legal rate, at no rate (0%), or not at all. So if Sovath loaned Thida money at 50% interest

where the legal limit was 20%, the agreement could not be enforced beyond 20%.

Certain agreements made by those who have violated regulatory licensing statutes are not enforceable. Such statutes mainly protect the public's welfare, rather than simply raise government funds. So an unlicensed lawyer could not enforce a fee agreement, since attorney licensing statutes protect the public's welfare by trying to ensure that attorneys are competent.

Agreements that unreasonably restrain trade in violation of statutes are generally unenforceable. Such agreements harm competition or restrict a party's freedom to do business as he chooses. Examples include agreements to fix prices, limit production, or divide territory and exclude competitors.

Many jurisdictions also say agreements are unenforceable in limited situations where they violate public policy, even though they do not violate a specific statute. Public policy is basically the promotion of the common good and well-being of society. It may be found in statutes and other government actions, court decisions, and elsewhere. But public policy must be clear and widely recognized for a court to refuse to enforce an agreement on that basis. Some key types of agreements that may violate public policy are those that:

- (1) involve the commission of torts;
- (2) harm the freedom of marriage;
- (3) harm the administration of justice;
- (4) harm public service or interfere in public affairs;
- (5) unreasonably restrain trade;
- (6) promote immorality; or
- (7) contain improper exculpatory clauses.

Agreements to commit torts cannot be enforced even where the tort is not defined in a statute, as often occurs in common law jurisdictions. So Sovath cannot enforce an agreement in which Thida agreed to hit Vuth--a tort.

Agreements which harm the freedom of marriage are not enforceable. The rules about this vary in different jurisdictions. Courts may refuse to enforce agreements to marry, agreements not to marry, and marriage brokerage agreements. For example, in many jurisdictions, Thida's father could not enforce an agreement in which Thida promised not to marry Sovath.

Agreements that harm the administration of justice are unenforceable. So an agreement in which Thida agreed to bribe a police officer or a judge in order to influence the outcome of a case could not be enforced.

Agreements that harm public service (official corruption) or interfere in public affairs are unenforceable. Official corruption occurs where a

public official performs official acts on the basis of bribes, rather than the best interests of his society. Such corruption may take many forms, including bidding corruption. So an agreement in which a contractor agrees to pay a public official money in exchange for getting a new road construction contract is unenforceable. Important types of agreements that interfere in public affairs are those that harm a nation's security or its relations with other nations, such as an unauthorized agreement to sell national secrets to a foreign government.

Agreements that unreasonably restrain trade are unenforceable even if they do not violate specific statutes, as may occur in common law jurisdictions. These include agreements not to compete. Many jurisdictions will enforce such agreements only if restricting competition is not the main goal of the agreement and the restriction is reasonable as to time and place. If a welder named Sovath promises his employer Thida that he will never work as a welder for anyone else in Cambodia, that is probably an unreasonable restriction. Exclusive dealing agreements may also unreasonably restrain trade.

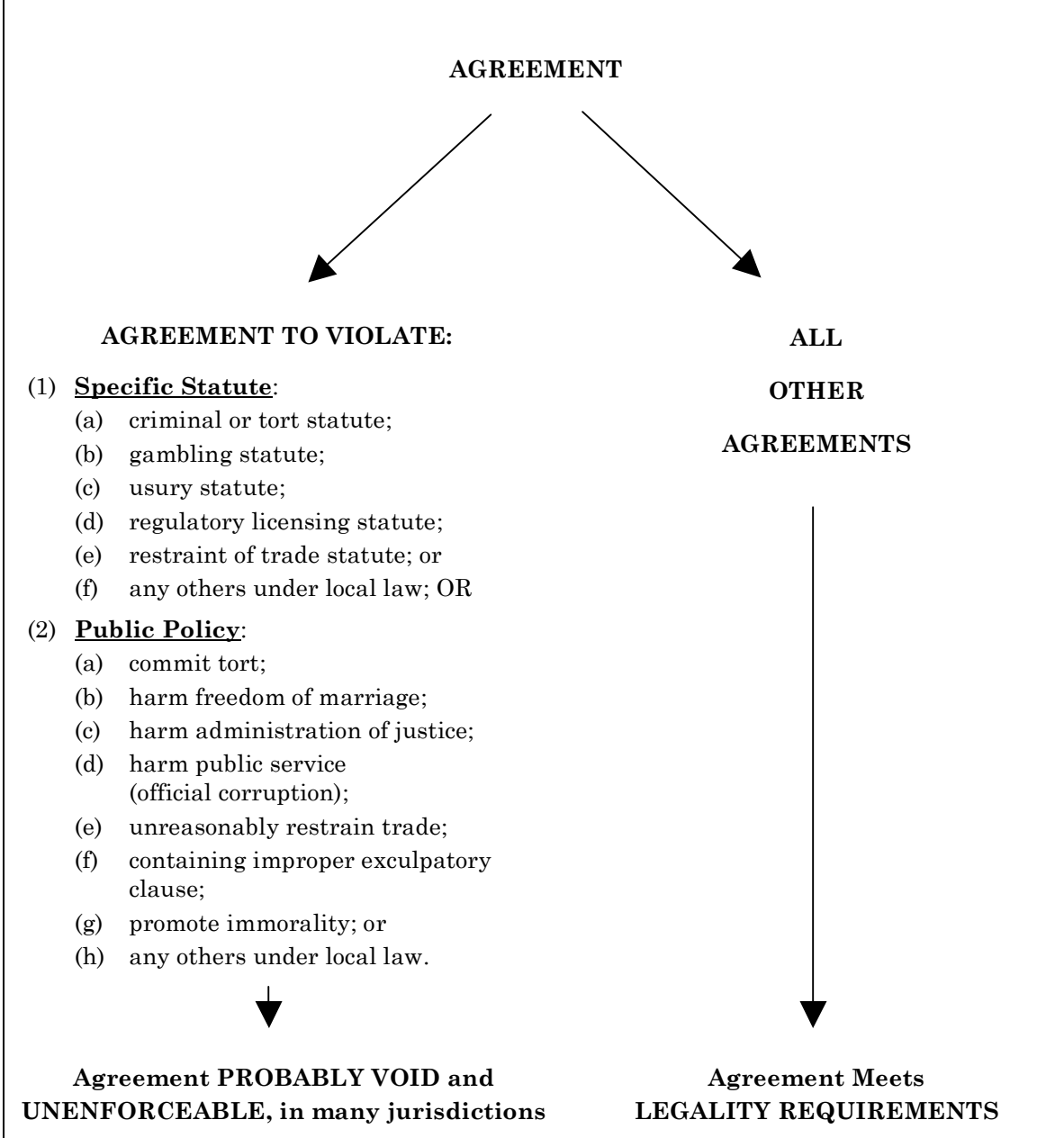
Exculpatory clauses are not enforceable as to intentional or reckless torts, but they may be enforceable as to negligent torts if it does not violate public policy. Exculpatory clauses in contracts try to relieve parties from liability for future harm, usually for torts. Businesses often use them in standard form contracts.

Agreements that promote immorality cannot be enforced. This limited rule applies only in the few appropriate cases where the above rules do not. For example, it might apply where a person sells a land mine to someone the seller knows will immediately blow up a bridge, even if land mine sales are generally legal.

Illegal agreements are generally void and unenforceable. But certain parties may be able to enforce them in limited cases. A worker may be able to enforce a labor agreement that violates a minimum wage law--but at the legal minimum wage. Courts rarely order even restitution for parties to illegal agreements. But they may do so for a party: who is significantly less "guilty" than the other party; or who withdraws before an agreement's improper goal is reached, and who has done nothing seriously wrong. Courts may be able to fairly sever illegal parts of agreements and enforce the rest. Improper exculpatory clauses might be severed. But agreements like the one in Case Study 15 are not severable.



Illustration: Where Agreements May Fail to Meet Legality Requirements



*** **ADDITIONAL REFERENCE:** Chapter 5 ("Legality") contains a more complete discussion of the requirement of legality.

1.4e To Be Valid, a Contract Must Satisfy Legal Requirements as to Formality

In many jurisdictions, contracts must meet certain formality requirements to be enforced. The most important are writing requirements.

In general, both written and unwritten contracts can be enforced. But all important contracts should be written. This provides better evidence. And

certain important contracts must be written to be enforceable. Five important types of contracts that many jurisdictions say must be written are:

- (1) agreements to transfer a substantial interest in land;
 - (2) agreements that cannot be performed within one year;
 - (3) suretyship agreements;
 - (4) certain agreements relating to marriage or promises to marry;
- and (5) agreements for the sale of goods over a certain money amount.

However, many jurisdictions say these requirements do not apply where the contract has been fully executed, where the party against whom the agreement is to be enforced has admitted in court that the contract exists, or where promissory estoppel applies.

Agreements to transfer a substantial interest in land must generally be written to be enforceable in most jurisdictions. This rule generally applies to agreements for the sale of land, leases and easements over one year, mortgages, and the sale of rights to timber, minerals, or similar materials (but not crops) to be removed by the buyer. The rule may not apply to a buyer who has partly performed and substantially relied, such as by improving the property.

CASE STUDY 16	
FACTS	Serey and Tech orally agree that Tech will buy Serey's land for \$100,000. But later Tech changes his mind and refuses to perform.
QUESTION OF LAW	Will the court enforce this land sale agreement?
DECISION	No. The court will not enforce the land sale agreement between Serey and Tech because it failed to meet a writing requirement.
Agreements for the transfer of substantial interests in land must generally be written to be enforced. In this case, Tech orally agreed to buy Serey's land. This was an agreement for the transfer of a substantial interest in the land: its sale. But the agreement was oral. So it cannot be enforced.	

Agreements which cannot possibly be performed within one year of the time the agreement was made must generally be written to be enforced in many jurisdictions. So under this rule, an oral agreement in which Thanna agreed to work for Bora for two years could not be enforced, since it could not possibly be performed within one year of the time it was made. However, some courts will enforce such oral agreements if one party has already fully performed.

Suretyship agreements must generally be written to be enforced in many jurisdictions. These are agreements in which a "surety" becomes

responsible for the obligations of a debtor to a creditor. The surety agrees to perform if the debtor does not. So an oral agreement in which Thanna agreed to pay Bora's debts if Bora did not pay could not generally be enforced. This rule applies to agreements of an executor or administrator of a deceased person's estate to pay the estate's debts from his own funds. Some courts do not apply the rule where the main purpose of the agreement is to financially benefit the surety.

Agreements where one person promises something in exchange for marriage or a promise to marry must generally be written in some jurisdictions (assuming the agreement is enforceable at all). The basic purpose of this general rule appears to encourage parties to think carefully--as writing a contract usually does--before marrying for reasons other than affection. The rule does not apply to agreements that are no more than mutual promises to marry, such as if Saray and Bunny simply promised to marry each other.

An agreement for the sale of goods over a certain monetary amount must generally be written to be enforceable in many jurisdictions. The money amount varies in different jurisdictions. If it was \$500, Bora's oral agreement to buy \$700 of rice from Thanna could not generally be enforced. But some courts will enforce such oral sale of goods agreements to the extent of any part performance, and in certain cases for specially manufactured goods.

Jurisdictions may require a variety of other types of agreements to be written to be enforced. Examples include contracts for the sale of securities, and promises to pay debts already discharged in bankruptcy proceedings.

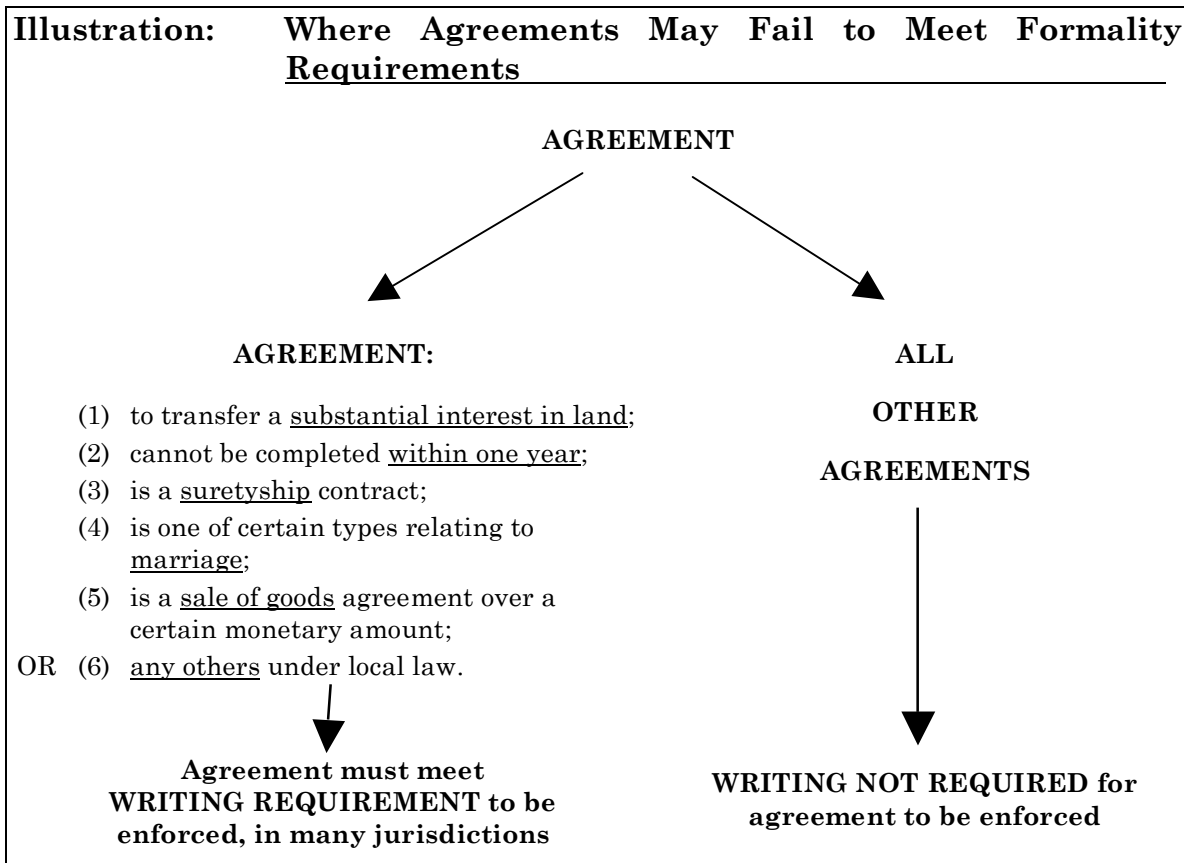
Modifications of contracts are subject to the same writing requirements as the original contracts. There, the parties are really making a new contract.

When the law requires a writing, the writing must be sufficient. In general, the law is flexible about the physical form of the writing. It can be a long formal document, but also a simple note or receipt. It can be in several different writings. The law is also flexible about the circumstances in which the writing was created. It can be made for a purpose other than enforcing the agreement (such as simply to tell someone else about the agreement). It can even be made after the actual agreement of the parties occurs! But to be sufficient, many courts say the writing must contain the essential terms of the contract, the identities of the parties, and the signature of the party against whom the contract is being enforced. For sale of goods, the essential terms are probably the identity and quantity of the goods. So Bora's agreement to buy rice from Thanna might be enforced even if it was just a signed note saying "2 tons rice."

The general effect of failure to meet a writing requirement is that the agreement cannot be enforced, but as noted above, there are many exceptions.

And parties can generally get restitution of what they provide to other parties under such agreements.

There are formality requirements other than writing requirements. For example, certain contracts may be required to be registered or notarized.



*** **ADDITIONAL REFERENCE:** Chapter 6 ("Formality") discusses formality requirements, particularly writing requirements, more fully.

1.4f To Be Valid, a Contract Must Not Have Any Other Formation Problems

Other contract formation problems may affect whether agreements are enforceable. The nature and effects of these other problems vary a lot, so they will be discussed separately below. The problems to be discussed relate to:

- (1) mistake;
- (2) misrepresentation;
- (3) duress;
- (4) undue influence;
- (5) unconscionability; and
- (6) promissory estoppel.

Agreements resulting from a mistake may be void or voidable. Rules in this area are often difficult and confusing. A mistake is a belief that is not in accord with the facts. In general, mistakes affect the enforceability of contracts only if they are about existing facts--not opinions or predictions. How a mistake affects the enforceability of an agreement often depends on whether it is a bilateral or unilateral mistake.

Bilateral mistakes are those made by both parties. An agreement resulting from such a mistake is void if the mistake is so serious that there really is no "agreement" that the courts can fairly enforce. This is rare, but may occur where the parties make mistakes about the existence of the specific subject matter, or the meaning of material terms. An example would be where Vichda agrees to sell Vandy a particular car, but unknown to the parties the car has already been destroyed by a flood.

An agreement resulting from a bilateral mistake is voidable by the party hurt by the mistake if the mistake is basic and has a material effect on the agreement, and the party seeking to avoid the agreement has not assumed the risk of that mistake. The law may assign such risks to certain parties. In general, each party assumes the risk that he will be wrong about an item's financial value. But parties may be able to avoid agreements because of mistakes about the quality or physical nature of the subject matter, such as a mistake about whether a cow is pregnant at the time of its sale.

Unilateral mistakes are those made by only one party. An agreement resulting from a unilateral mistake is void if the mistake is so serious that there really is no "agreement" that the courts can fairly enforce. This might occur where a party mistakenly transmits an offer to an unintended party who tries to accept, even though he knows or has reason to know of the mistake.

An agreement resulting from a unilateral mistake is voidable in many jurisdictions under the same rules as a bilateral mistake, except that there is an additional requirement: either the other party must have caused or had reason to know of the mistake, or enforcing the agreement must be unconscionable (extremely unfair). Obviously, this additional requirement makes it harder to avoid contracts because of unilateral mistake. However, four important situations where it might be possible are with mistakes involving: (1) the identity of the other party; (2) the nature of the subject matter of the contract; (3) the computation of prices in the contract; and (4) a failure to read carefully the written agreement. Parties may not always assume the risk that they will make a serious error in price computation, especially with regard to complex contracts. Parties generally cannot avoid a contract because they made a mistake by failing to read the contract carefully. But such avoidance might be possible where there is an adhesion contract--generally form agreements written by a stronger party about which there is little chance for negotiation--in which case the weaker party might avoid terms he would not have expected. Or such avoidance might occur where the written

document differs from the parties' prior oral agreement, in which case the court might reform the writing to reflect the prior agreement.

So mistakes can result in agreements that are void or voidable. Parties can generally rescind (cancel) such agreements and get restitution.

CASE STUDY 17

FACTS Phally and Molika negotiate and sign a long English-language agreement in which Phally agrees to buy Molika's hotel. Later, Phally learns that the written agreement says that the hotel's huge generator is not included in the contract! Phally tries to avoid the contract, saying his English is not strong and he never knew that the "no generator" term was part of the contract.

QUESTION OF LAW Can Phally avoid this contract on the basis of unilateral mistake?

DECISION Probably not. It is unlikely that Phally can meet all the requirements to avoid this contract, since in this case it appears that he basically failed to read the written agreement carefully enough, and failed to have it explained to him.

A party can avoid an agreement where a unilateral mistake is basic and about a material fact; the party did not assume the risk of the mistake; and either the other party knew of or caused it, or enforcement would be unconscionable. But parties generally assume the risk of failing to read a written agreement carefully.

Here, Phally signed an agreement to buy a hotel without knowing the agreement did not include the hotel generator. Phally probably assumed the risk of this mistake, since it seems that he failed to read the agreement carefully. There is no evidence that this is an adhesion contract, or that the parties had a different prior agreement about the generator. Phally probably cannot avoid this contract.

Most agreements resulting from misrepresentations of material facts are voidable. A misrepresentation is a statement that is not in accord with the facts. Misrepresentations may be fraudulent (intentional) or innocent (unintentional).

Agreements resulting from misrepresentation about the formation of the agreement are void. What this text calls "misrepresentation about the formation" occurs where the victim of the misrepresentation did not have a reasonable chance to know the basic nature of the agreement--as might happen where the other party deceived the victim about what he was signing!

Agreements resulting from misrepresentation in the inducement of the agreement are voidable if one party misrepresents a material fact about the agreement and the other party justifiably relies on it in making the agreement. A "material fact" is one that is important to a party's decision to make or not make a contract. This rule does not generally apply to predictions or opinions, although it may in certain cases where the speaker has a fiduciary relationship with a special duty to act for another party, or special knowledge not available to the other party. This might occur where an attorney speaks with a client. Fraud in the inducement may be affirmative, involving actual false statements, such as if Vichda falsely claimed the moto he was selling could travel at a speed of 50 kilometers per hour. Or it could be a concealment or failure to disclose. Parties generally have no duty to disclose information. But there are exceptions where parties actively conceal facts, or keep silent when they have a duty to speak. That might occur where there is a fiduciary relationship, where a party's past statements have become inaccurate, or where a party knows the other party is mistaken about a basic assumption. Concealment might exist where Vichda actively concealed the fact that the moto he was selling had already traveled 50,000 kilometers by removing the odometer.

Agreements resulting from duress are voidable. In this situation, duress is using an improper threat to induce a party to make a contract. Improper threats are generally those to commit crimes or torts that will harm the victim, his family or his property. So duress would exist if Molika threatened to harm Phally's child if Phally did not sell her his moto, and Phally could avoid an agreement made on that basis. Other examples include threats to blackmail persons, and threats not to perform existing contracts in order to get a contract modification where there is no legitimate commercial reason.

Agreements resulting from undue influence are voidable. Undue influence is improperly influencing a party to make an unfair contract, often through a relationship of trust or confidence, even though no threats are made. This seems to occur most often where fiduciary relationships are involved. For example, if Vichda is a doctor who persuades his patient Vandy to buy \$10 worth of medicine from him for \$100, that might be undue influence.

In very limited situations, courts may refuse to enforce agreements because they are unconscionable. In many jurisdictions, unconscionable agreements are those whose process of formation or actual provisions are so unfair that they "shock the conscience" of the court. This occurs rarely.

Procedural unconscionability is caused by extreme unfairness in the way the agreement is formed. It typically occurs where one party is induced to make the agreement without having any real choice or ability to bargain about the terms. This is possible particularly with adhesion contracts. These are contracts written completely by a party with much greater bargaining power,

where the other party has no real chance to negotiate about the terms, which are usually standardized, hard to understand, and unfair.

Substantive unconscionability is extreme unfairness in the actual terms of the agreement. Agreements may be substantively unconscionable where they charge grossly excessive prices or improperly interfere with legal remedies. That might occur if Vichda's contract to sell his car to Vandy: improperly tried to limit warranties the law often implies to protect consumers, such as the warranty of merchantability; or contained an improper exculpatory clause.

Courts usually say unconscionable agreements are unenforceable. But if the unconscionable part can be properly reformed or severed, as a remedy meddling provision might, the court might do that and enforce what remains.

Where the common law doctrine of promissory estoppel (detrimental reliance) applies, a promise may be enforceable if a party justifiably relied on it--even though there is no valid agreement! Promissory estoppel requires:

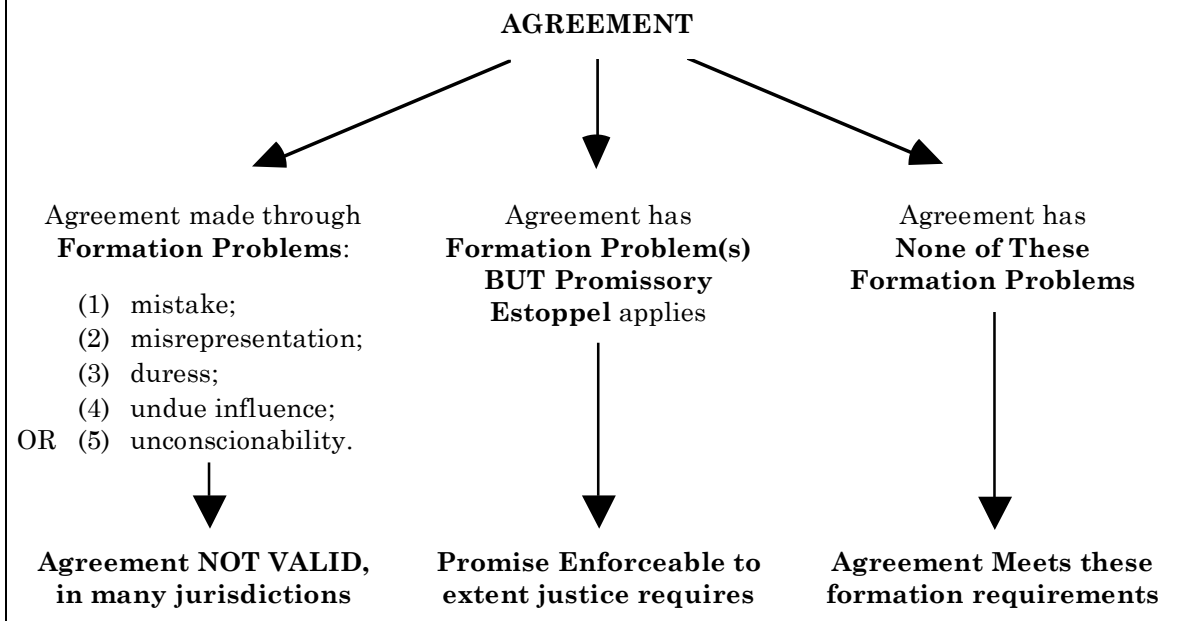
- (1) a real case brought to court by a party with a legal interest;
 - (2) a promise by one party;
 - (3) actual reliance by another party;
 - (4) justifiable reliance by that same party;
- AND (5) unjust loss to the party who relied if the promise is not enforced.

Promissory estoppel is rare, since the last two requirements are hard to meet.

Some important situations where promissory estoppel may be used are where there is reliance on: promises before there is an acceptance; oral promises the law normally requires to be written; and promises not supported by consideration. Reliance on promises before acceptance may occur where a general contractor relies on bids (offers) of sub-contractors in bidding on a large contract. Reliance on promises without consideration might occur where a party promises to do something based on some past action, and the party receiving the promise justifiably relies on it. Suppose Vandy promised to give her moto to Vichda because Vichda had cared for Vandy for a year during which she was very ill, and Vichda justifiably relied by spending money to buy a new helmet and have the moto repaired. That promise might be enforced.

Where promissory estoppel applies, a promise is enforceable to the extent justice requires--not necessarily to the same extent as a normal contract promise. The most common remedy where promissory estoppel applies seems to be reliance damages, which compensate the injured party for what he lost in relying. In the moto example above, a court might compensate Vichda for what he lost in relying--what he spent to buy the helmet and have the moto repaired--rather than for the entire value of the moto.

Illustration: Where Agreements May Have Other Formation Problems



*** **ADDITIONAL REFERENCE:** Chapter 7 ("Other Contract Formation Problems") discusses other contract formation problems more fully.

1.4g Courts Use Various Methods to Help Them Interpret Contracts

Disputes may occur about what an agreement means. In these situations, parties often ask courts to interpret the contract. Sometimes courts must interpret contracts to determine if they are enforceable. More often, courts must decide the real meaning of enforceable contracts. A number of legal rules guide and limit how courts do that. This Section will discuss ten basic rules of contract interpretation; the evidence courts use to help them interpret; and what happens when a court cannot interpret a contract term.

Rule No. 1 -- Courts try to interpret contracts so that they are valid and reasonable, but they cannot interpret contracts any way they wish. So a court would interpret the term "full time" in an employment contract to comply with existing labor law. But a court cannot interpret an invalid contract to be valid.

Rule No. 2 -- Where the meaning of a disputed term is not clear, many courts say interpretation should be subjective (based on the parties' actual intentions), but if that is not possible, then it should be objective (based on what reasonable people would likely have intended). For example, many jurisdictions say that if the parties actually intended the same thing, a court should enforce that meaning. If it is not clear the parties intended the same thing, and only one party knew or should have known what the other party intended, then the court enforces the other party's meaning. If these steps fail, the court uses the objective rules of interpretation explained in the rest of

this Section. So if Chhon and Soubert made a tofu sale contract but now disagree about whether "tofu" meant firm or soft tofu, a court would first see if the parties actually meant the same thing; failing that, it would see if only one party knew or should have known the other party's meaning, such as where Chhon knew Soubert meant firm tofu; failing that, it would apply various objective rules to see what "tofu" meant, such as looking at the term's ordinary meaning and relevant trade practices.

Rule No. 3 -- Courts consider the whole contract. This requires the court to examine the whole agreement, which may define some of its own terms, and may consist of a number of different documents or statements.

Rule No. 4 -- Courts try to avoid inconsistency between terms. So if a chicken sale contract contains many references to "chickens," but also one to "fish," a court would likely interpret that one reference to "fish" as a mistake.

Rule No. 5 -- When terms in a contract conflict, courts value certain types of terms more highly than other types of terms. Generally, specific terms are stronger than general terms, and separately negotiated terms are stronger than pre-printed terms. So handwritten terms are stronger than typed ones, which are stronger than pre-printed "standard" terms.

Rule No. 6 -- If the meaning of a disputed term is not clear, courts consider the ordinary meaning that a reasonable person in the parties' situation would understand the term to have. To determine this, courts might consult standard reference works such as dictionaries and technical manuals.

Rule No. 7 -- If the meaning of a term is disputed, courts consider the main purposes of the parties when they made the contract. These might be based on the actual contract terms, the type of contract, or other evidence.

Rule No. 8 -- If the meaning of a term is disputed, courts consider all the surrounding circumstances, particularly the course of performance, prior dealings, and trade usages. The most important is the course of performance, which is conduct of the parties after they made the contract indicating they had a particular understanding of its terms. An example might be a party's failure to object to a performance, which might suggest that it matched his understanding of the contract. Second most important is any prior dealings between the parties, before the contract was made. Third most important is any trade usages which relate to the type of contract the parties made.

Rule No. 9 -- Disputed terms are interpreted against the party who drafted the contract, if that is reasonable. In adhesion contracts, where one party drafts the contract, many courts will not enforce terms that a reasonable other party would not expect to be in the contract, and to which the other party would not have agreed if he had known--even if the meaning of those terms is clear! An example might be an improper exculpatory clause.

Rule No. 10 -- Courts in many jurisdictions interpret contracts to contain specific terms that the law requires or allows, if the parties omitted those terms. Many jurisdictions require courts to consider certain specific terms, such as the duty of good faith and fair dealing, to be part of contracts. The duty of good faith and fair dealing basically requires a contract party to be honest and not seek unfair advantage (good faith), and to follow reasonable standards of fair conduct (fair dealing). An example of a violation of this duty would be intentionally giving an improper contract performance.

Many jurisdictions also allow courts to supply certain terms in order to resolve disputes, such as "gap-fillers" for sale of goods contracts. Courts cannot supply essential terms, such as identity or quantity terms in such contracts. But many will supply certain missing terms, such as: a reasonable price; that the buyer pays cash at the time and place of delivery; and that the seller delivers all the goods in a reasonable time, usually at the seller's place of business, or at his residence.

CASE STUDY 18

FACTS Vin and Nguon agree that Vin will "buy two small Model X-3 notebooks" from Nguon but state no other terms. Nguon says they have no contract.

QUESTION OF LAW Do Vin and Nguon have a contract?

DECISION Yes, in many jurisdictions. Many courts will supply certain missing terms to such sale of goods agreements and enforce them.

Many courts will supply certain missing terms to sale of goods agreements. Here, Vin agreed to buy two notebooks, but the parties said nothing about price, payment or delivery. Many courts would imply: a reasonable price; that the buyer pays cash at the time and place of delivery; and that the seller delivers all the goods in a reasonable time, usually at the seller's place of business, or otherwise at his residence. So the contract would require Vin to pay a reasonable price in cash at the time of delivery, and Nguon to deliver both notebooks within a reasonable time, probably at his place of business.

In order to interpret contracts, courts use various types of evidence. In general, this can include documents other than the contract, testimony from the parties or other witnesses, and reference materials.

However, many common law jurisdictions use the parol evidence rule to limit the evidence courts can use with regard to written contracts. This rule says that where a final writing contains contract terms of the parties, a court cannot generally allow evidence of statements made by the parties prior to that writing to contradict or add to the terms of a complete writing, or contradict the terms of an incomplete writing. So if the contract in Case Study

18 was in a final, complete writing, a court could not allow evidence of prior statements to add a price term, or change the quantity term. But this rule does not apply: where there is no writing; where the writing is not final; where prior statements are presented to help a court determine whether a writing is complete, or understand the meaning of the terms in the writing; to evidence of statements made after the time of the writing; or to evidence used to show the agreement is not valid. So it would not apply to statements used to explain exactly which "notebooks" Vin and Nguon meant, or to show that Vin made the contract under duress.

When a court cannot interpret a disputed agreement term, the result often depends on whether the term is material. When a material term cannot be interpreted, the agreement is probably unenforceable. In Case Study 18, if the parties had tried to set a price--a material term--but their term could not be interpreted, the agreement probably could not be enforced. When a non-material term cannot be interpreted, the agreement might be enforceable without the term. In that case, the court might be able to sever the term.

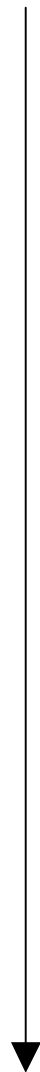
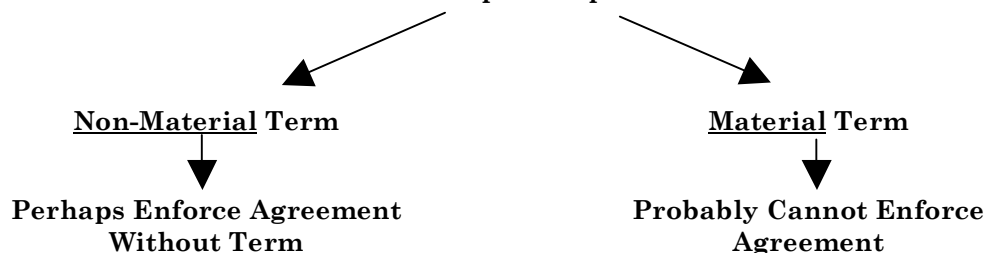


Illustration: How Many Courts Interpret Contracts**AGREEMENT WITH INTERPRETATION PROBLEM**

- (1) Interpret to be valid and reasonable if possible;
 - (2) Use subjective, then objective interpretation;
 - (3) Consider whole agreement;
 - (4) Try to avoid inconsistency between terms;
 - (5) Value certain terms more highly;
 - (6) Consider ordinary meaning of agreement;
 - (7) Consider main purposes of parties;
 - (8) Consider surrounding circumstances (course of performance, prior dealings, trade usages);
 - (9) Interpret against drafter if reasonable;
 - (10) Interpret to contain certain terms the law requires or allows.
- Parol Evidence Rule (common law)--generally bars use of evidence of prior statements to contradict or add to the terms of a complete final writing, or to contradict the terms of an incomplete final writing.

Still cannot interpret disputed term?

***** ADDITIONAL REFERENCE:** Chapter 8 ("Interpretation of Contracts") discusses interpretation of contracts more fully.

1.4h How Courts Analyze Performance of Contracts and Discharge of Duties

In many cases, a contract is enforceable, and its meaning can be determined. But courts must often resolve disputes about whether parties have performed the contract properly, and whether any duties remain to be performed.

Contract duties do not end until they have been discharged--ended. Whether the duties have become due for performance, and whether they have been discharged, may depend on the nature of performances the contract requires. That may depend on whether any conditions to performance have been fulfilled or excused, and whether promises in the contract have been

properly performed. Contract duties do not become due until any conditions on which they depend are fulfilled or excused. Conditions may be fulfilled by occurrence or performance, and excused in various ways. How this occurs may vary in particular situations. Duties may be finally discharged by performance, breach, or other events related directly to performance; by a later agreement or statement of the parties; or by operation of law. This Section discusses these complex but important issues.

Nature of Performances the Contract Requires

Whether contract duties have been discharged may require analysis of the nature of performances the contract requires. Two important parts of this analysis are promises and conditions.

Promises are statements that a party will perform a duty when performance is due. Promises create contract duties. An unexcused failure to perform a contract promise when it is due is a breach. A breach gives the injured party the right to ask a court for a remedy.

Conditions are events which are not certain to occur but which must occur or be excused in order for a contract duty to become due or terminate. Conditions may be performances of the parties, or other events. If conditions are not fulfilled or excused, then any duties which depend on the conditions do not become due for performance. For example, suppose Navy and Ham agree that Ham will provide a shirt to Navy, and Navy will pay 10,000 riels for the shirt, but that Navy's duty to pay becomes due "only if Ham first delivers the shirt to Navy." In this case, Ham promised to make a shirt, and Navy promised to pay for it. However, the contract also has a condition: the delivery of the shirt. Navy's duty to pay does not become due unless Ham delivers the shirt to her.

Conditions can be classified by when they may occur. Conditions precedent are those that must occur before a duty of performance becomes due. An example appears in the shirt contract above.

Conditions subsequent are those that terminate a duty of performance that is already due. These are rare. An example would be when an insurer's duty to pay a policyholder's claim becomes due, but the insurer does not pay. The insurance contract may provide that the insurer's duty to pay will terminate after a certain time if the policyholder fails to bring a lawsuit about the claim within that time. The policyholder's failure to sue is the condition subsequent. Under the insurance contract, the insurer's duty to pay was due, but it terminated because the policyholder failed to sue within the time specified in the contract.

Finally, conditions concurrent are those that must occur roughly simultaneously in order for each party's duty to perform to become due. The law implies these where the performances of the parties can occur at roughly

the same time, as in most sale of goods contracts. In the shirt example above, if the parties had not included a condition in their contract, each party's duty to perform probably would have depended on the other party's performance (or tender of performance).

Conditions can also be classified by how they are created. Express conditions are those created by words in the contract. Courts require that these be completely fulfilled (or excused) in order for the duties that depend on them to become due. An example appeared in the shirt contract above.

Implied-in-fact conditions are those courts find exist because of the apparent intentions of the parties to the contract, even though they are not expressly stated. These may occur where one party must do something in order for the other party to be able to perform. If the shirt contract above required Ham to deliver a shirt "in a color of Navy's choice," Navy would obviously have to pick a color in order for Ham to perform! So that act of choosing would be an implied-in-fact condition to Ham's duty to provide the shirt to Navy. These conditions must be completely fulfilled (or excused) in order for duties to become due.

Implied-in-law conditions are those courts find exist in contracts in order to achieve justice in certain types of situations, unless the parties expressed a different idea. In particular:

- (1) if the parties' performances can occur roughly at the same time, each party's performance is generally a condition concurrent to the other party's duty to perform;
- (2) if one party's duty requires a period of time to perform and the other party's duty does not, the longer performance is generally a condition precedent to the other party's duty; and
- (3) if the performance of one party's duty is to occur earlier than the performance of the other party's duty, the earlier performance is a condition precedent to the later duty.

Implied-in-law conditions can be fulfilled by substantial performance, which occurs where there is only a minor breach. So if the law implied conditions concurrent in the shirt contract above, substantial performance by Ham or Navy would cause the other party's duty to become due.

How Conditions Are Fulfilled or Excused

A duty does not become due for performance until any conditions on which it depends are fulfilled or excused. Conditions are fulfilled by occurrence or performance. Conditions may be excused in certain situations where it would be unfair to expect them to be fulfilled.

A condition is fulfilled if it occurs. Suppose a contract duty becomes due if it rains, and it does rain. The condition has occurred. So it is fulfilled.

A condition is fulfilled by complete performance, where that condition is also a performance promised in the contract. So if Ham delivers the shirt exactly as required in the contract above, the condition precedent to Navy's duty to pay is fulfilled, and Navy's duty becomes due for performance.

An implied-in-law condition is fulfilled by substantial performance (or complete performance). A party has substantially performed if he has committed only a minor breach--not a material (important) breach. As noted above, a breach is a failure to perform a contract promise without a legal excuse. Any breach gives the injured party the right to ask a court for a remedy, such as money damages.

To determine if there has been substantial performance--and only a minor breach--many courts in the United States consider the following factors:

- (1) Has the party harmed received the benefit he reasonably expected from the contract?
- (2) Can the party harmed be adequately compensated for the breach by money damages?
- (3) Will the breaching party suffer forfeiture or hardship if the breach is considered material?
- (4) Will the breaching party fix or "cure" his failure to perform, and perform fully?
- (5) Has the breaching party followed the standards of good faith and fair dealing?

The more positive the answers to these questions are, the more likely it is that substantial performance has occurred. A "forfeiture" is basically a loss of something to another person with no adequate legal remedy for the person suffering the loss. It can occur where one contract party provides some performance to another party, but the first party cannot recover under the contract for his performance, because a condition to the other party's duty to perform has failed, and that party's duty has not become due.

Since every case is different, each factor above must be closely examined to see if a breach is material or minor in any particular situation. However, potential examples of minor breaches include small delays in performance where time is not crucial, or minor problems in the quality of performance. Potential examples of material breaches include delivering a completely wrong kind of goods, or not doing most of the work required in a labor contract. Delay in performance will not generally be a material breach unless it significantly deprives the other party of the benefit of the contract.

CASE STUDY 19

FACTS San and Chanto make a contract in which they agree that San will build a new shophouse for Chanto and his family, and complete work no later than December 31. However, San is two days late in finishing. Chanto says his duty to pay for the work is not due. San asks the court for help.

QUESTION OF LAW Is Chanto's duty to pay for San's work due?

DECISION Probably. San has probably substantially performed--and so caused Chanto's duty to pay to become due--because this small delay in completing the shophouse is probably only a minor breach.

Implied-in-law conditions can be fulfilled by substantial performance. In this case, San had a contract to build a shophouse for Chanto. Many courts would say that San's completion of the shophouse was an implied-in-law condition precedent to Chanto's duty to pay for it, since the building would take time to complete and the payment probably would not. But San was two days late.

This was probably a minor breach. Chanto received the benefit he reasonably expected--a new shophouse basically on time. There is no evidence that money damages are inadequate to compensate Chanto for the breach, or that San did not follow standards of good faith and fair dealing. And San may suffer a forfeiture if the breach is considered material. He could not get the contract price (though perhaps he could get restitution) for his work if Chanto's duty to pay did not become due. On the other hand, this breach cannot be cured, since the due date has passed. But on the whole, a court would likely say this breach was minor. Chanto's duty to pay would become due, though he could get a remedy for San's breach.

A condition may be excused by an anticipatory repudiation by the party whose duty depends on the condition. An anticipatory repudiation is basically a statement by one contract party to another contract party that clearly shows the first party does not intend to perform a contract duty in the future when it is due. An example would be if Ham said to Navy: "I will not deliver the shirt." But if Ham merely said something like "I am not sure about the contract," that would not be enough to be an anticipatory repudiation. In addition to excusing conditions, an anticipatory repudiation also gives the other party the right to stop performance, treat the repudiation as a material breach and immediately ask a court for a remedy, and other options. A repudiation can be retracted by the repudiating party up until the time for his performance, unless the other party indicates that he considers the repudiation final, or detrimentally relies on it. Detrimental reliance might occur where the other party makes a new contract with a different party to substitute for the original contract.

A condition may also be excused by the prospective inability or unwillingness to perform of the party whose duty depends on the condition. This occurs where circumstances provide a reason to believe that it is likely that a party will be unable or unwilling to perform a contract duty. An example would be if Ham told Navy: "I doubt very much that I can deliver the shirt." One difference between this and anticipatory repudiation is in how clear it is that the party will not perform. Another difference is that there need not be any statement for prospective inability or unwillingness to exist. For example, Navy could become aware some other way that Ham will likely not be able to supply the shirt. Where there is a prospective inability or unwillingness, the other party can stop his own performance. Some courts allow a party to treat this problem as a material breach and immediately seek a remedy. Others allow a party to seek adequate assurances from the party whose performance is in doubt. If the seeking party does not receive such assurances, the prospective inability or unwillingness actually becomes an anticipatory repudiation. A party whose performance is in doubt can fix or "retract" this problem by a communication to the other party showing his new ability or willingness, unless the other party has detrimentally relied.

A condition may be excused by the failure or occurrence of a prior condition. If one condition depends on the occurrence of a prior condition, and the earlier condition fails, then the later condition may be excused. This might happen with implied-in-fact conditions, such as if Ham's supplying of the shirt (a condition) depended on Navy's choosing the shirt she wanted (another condition). If Navy failed to choose, it would excuse the condition that was Ham's delivery of the shirt, and Navy's duty to pay would become due. If Navy performed and chose the shirt, then Ham's duty to provide the shirt would also become due.

A condition may be excused by improper rejection of a tender of performance. A tender of performance is basically a party's offer to perform his existing contract duties, with the present ability to do so. This kind of rejection might occur if Ham presented the correct shirt to Navy according to the contract, but Navy refused it without any good reason.

A condition may be excused by wrongful prevention or hindrance by the party whose duty depends on the condition. This occurs where such a party's wrongful actions prevent a condition's occurrence or make it very difficult. Such conduct might also be a material breach. Whether conduct is wrongful depends on whether the other party assumed the risk that it would occur. Buyers and sellers of goods generally assume the risk that a change in the market supply or price will hinder their performance--but not that the other party will knowingly prevent it. Ham would probably assume the risk that shirts would become more difficult or expensive to supply, even if Navy caused this market change. But he probably would not assume the risk that Navy would buy every available shirt, knowing that would prevent Ham's performance.

A condition may be excused by waiver by the party whose duty depends on the condition. A waiver of a condition basically occurs where a party indicates through words or conduct that he will not insist that a condition occur in order for his contract duty to become due. Waiving a condition does not generally affect the promises under a contract. So the waiving party still generally has the right to seek a remedy for any breach by the other party, unless the waiver is part of a binding contract modification.

A waiver can occur before a condition is scheduled to occur, or after a condition fails to occur. Before a condition is to occur, it appears that a party whose duty depends on the condition generally can waive the right to the benefit of that condition. Suppose Tech had a contract to do some work for Chhay. Chhay could waive the implied-in-law condition precedent which is Tech's substantial performance of the work, a condition which would be required to be fulfilled in order for Chhay's duty to pay to become due. Both parties would owe basically the same duties as they did before, but Tech would not be required to perform first in order for Chhay's duty to pay to become due. One exception to this general rule is that most material express conditions cannot be waived in common law jurisdictions. This exception may not apply where promissory estoppel or a special statute such as one governing the sale of goods applies.

A party waiving before a condition is to occur can generally retract his waiver until the other party justifiably relies on it. So Chhay could retract his waiver, unless Tech had justifiably relied on the waiver. That might occur if Chhay promised to pay Tech at some time before Tech would finish work, and Tech made other commitments to use the payment at that earlier time, in reliance on Chhay's promise.

After a condition fails to occur, a party whose duty depends on the occurrence of the condition may elect to continue with the contract despite the failure of the condition. The party can do this expressly by saying he is, or impliedly by continuing his own performance or accepting benefits under the contract. A waiving party generally cannot retract this kind of waiver. Suppose Tech fails to do some of the work required by his contract with Chhay, but Chhay pays Tech anyway after Tech promises to do the work the next day. Chhay has waived the benefit of the implied condition precedent to his duty to pay for the work. Of course, Chhay can still seek a remedy for the breach by Tech.

A condition may also be excused by estoppel. Estoppel occurs where it would be unfair to allow a party to make a certain legal claim because of inconsistent prior actions by that party. So if Navy wrongly prevented Ham from delivering the shirt their contract required, some courts might say she was estopped from claiming Ham did not fulfill the condition to her duty.

Conditions may be excused by impossibility of performance. This may occur where the condition does not involve a material part of the contract and

a forfeiture could result from the failure of the condition. An example might be where an express condition of approval of performance becomes impossible. This could occur where a non-party who is to give the approval dies, and the party whose performance is being evaluated may suffer a forfeiture if the condition is not excused.

The failure of a condition to occur may not affect the whole contract if the contract is severable. Contracts may be "severable" or "entire" (not severable). If a contract is severable, the failure of a condition as to one part does not affect the performance of the other parts (unless the failure is also some other problem, like a material breach). In many jurisdictions, contracts are severable if performance by each party can be divided into more than one part, the number of parts due from each party is the same, and the performance of each part by one party appears to be the agreed exchange for the performance of the corresponding part by the other party. Ham and Navy's one shirt contract above would not be severable. But many employment contracts are severable by pay periods. In those cases, a failure of an employee to fulfill a condition as to one period would not affect the employer's duty to pay for other periods (unless the failure was also some other problem, such as a material breach).

Conditions of approval are subject to certain limits. Conditions of approval are express conditions that say one party's duty depends on that party's approval of the other party's performance, or the approval of a person who is not a contract party. The law limits the power of the evaluating party to cause the condition to fail. If these limits are not followed, then the condition is excused.

Where there is a condition of approval by a party to the contract, common law jurisdictions say the party cannot have complete discretion to disapprove, or else his contract promise is illusory and there is no consideration. Assuming there is an enforceable contract, many jurisdictions say that such conditions of approval that involve matters of aesthetics and taste will fail if the evaluator honestly disapproves of the performance. But if they involve matters of practical standards that can be measured more objectively, they will fail only if the evaluating party is reasonable in rejecting the performance. So if Navy's duty to pay depended on whether she approved the shirt Ham was to supply to her, and she did not approve, a court would first have to decide whether the approval was more about aesthetics or practical matters, since clothing has both aesthetic and practical elements. If the condition was aesthetic, Navy's disapproval would have to be honest in order to cause the condition to fail. If the condition was practical, Navy's disapproval would have to be reasonable.

Where there is a condition of approval by a non-party, many courts first ask whether there will be a forfeiture if the non-party disapproves. A forfeiture could occur if the party whose performance is being evaluated cannot be paid under the contract for all his work unless the condition is

fulfilled or excused. If there will be no forfeiture, it appears that rejection will generally cause the condition to fail unless fraud or collusion was involved. If there will be a forfeiture, there are two possibilities. If the condition involves a matter of aesthetics and the parties chose a special non-party to analyze the performance (not one chosen from a group of many qualified evaluators), then the condition will fail if the evaluator honestly disapproves. In all other cases involving forfeitures, courts examine four factors to see whether disapproval will cause a condition to fail: (1) the size of the potential forfeiture of the party whose performance is being evaluated (the larger this is, the less likely the condition will fail); (2) the nature of the performance (aesthetic or practical); (3) whether the rejection was reasonable (the less reasonable, the less likely the condition will fail); and (4) the expertise of the evaluating non-party (evaluators with more expertise get more discretion).

Performance of Duties in Particular Situations

The rules above do not apply exactly the same way in all situations. For example, they vary in some jurisdictions with regard to construction contracts, sale of goods contracts, and the duty of good faith and fair dealing.

In construction contracts, there is a great potential for forfeiture where a builder performs substantially but not completely, and the contract seems to have an express condition requiring complete performance. If possible, courts interpret such a condition to be implied-in-law, so that substantial performance will fulfill the condition and there will be no forfeiture. But if that interpretation is not possible, some courts may refuse to enforce the express condition, and instead apply the substantial performance rule.

Special performance rules may also apply to sale of goods contracts. Two key areas where such rules exist are with regard to waiver and tender of performance. Some common law statutes, such as the Uniform Commercial Code ("UCC") in the United States, allow parties to make good faith modifications of sale of goods contracts even if there is no new consideration. So such parties can waive the right to the benefits of even material express conditions and promises.

The UCC also provides special rules about tender of performance in sale of goods contracts. These depend on whether the contract is a "single lot" or "installment" contract. Basically, installment contracts are those that require or authorize the delivery of goods in separate lots. All other contracts are single lot contracts. The general UCC rule for single lot contracts is that the buyer has the right to reject a tender of goods if that tender fails in any way to follow the terms of the contract. However, there are so many limits on this general rule--such as the seller's right to "cure" the non-conforming tender in certain situations--that the practical result seems to be that courts often do not allow buyers to reject goods unless the non-conformity is serious. For example, suppose a contract required Kosal to deliver some photographic film to Samy, but Kosal delivered the wrong kind of film and Samy rejected his tender.

Kosal could still cure this non-conforming tender up until the time for delivery expired, and even for a reasonable time afterwards, if Kosal reasonably thought his non-conforming tender would be acceptable to Samy. The general UCC rule for installment contracts is that the buyer can reject a non-conforming tender of an installment only if the non-conformity substantially reduces the value of the installment and it cannot be cured.

Many jurisdictions say that the duty of good faith and fair dealing is present in every contract. This duty applies in the performance and enforcement of contracts, and in some situations even at the negotiation stage. Examples of conduct that may violate this duty include intentionally giving an imperfect performance, and interfering with the other party's performance or ability to benefit from the contract.

How Contract Duties May Be Discharged

Duties may be discharged by events related directly to performance, a later agreement or statement of the parties, or by operation of law. These possibilities are explained below.

Duties may be discharged by performance, breach, or other events related directly to the performance of the contract. These potential events are discussed below.

First, complete performance discharges the contract duties of the performing party. This rule does not apply to obligations the party may have--even after his own performance--not to violate general legal duties he owes the other party, such as the duty of good faith and fair dealing.

A breach may discharge the contract duties of the innocent party. In general, a breach that causes a condition to fail--and so causes a duty not to become due--may discharge duties. The most common way for this to occur is where there is a material breach. Where that occurs, the non-breaching party basically has three options: (1) end the contract and cause only his own duties to be discharged, then sue for breach; (2) unilaterally rescind the contract and cause all duties in the contract to be discharged; or (3) continue with the contract, which would generally result in a waiver of the benefit of the condition. For instance, in the photographic film example above, if Kosal materially breached by failing to deliver the film as required, Samy could simply end the contract and cause her own duties to be discharged, then ask a court for a remedy for Kosal's breach; rescind the contract and end all duties; or continue with the contract, hoping Kosal would perform. In general, a party can also cure his breach if he can fix the problem within a reasonable or appropriate time. Samy would have to allow Kosal a reasonable opportunity to do that.

An anticipatory repudiation may also discharge the contract duties of the innocent party. This is because it basically gives the non-repudiating party the same options discussed above as to a material breach.

An improper rejection of a tender of performance may discharge the contract duties of the tendering party. That occurs where the party who improperly rejected fails to cure his improper rejection.

The occurrence of a condition subsequent may discharge contract duties. This is because that occurrence actually terminates a legal duty that is already due for performance.

Finally, the avoidance of a voidable contract may discharge contract duties. This could occur because of a number of formation problems.

Contract duties may be discharged by a later agreement or later statement of the parties. That can occur through a mutual rescission, release, substitute contract, accord and satisfaction, novation, or account stated.

A mutual rescission occurs where contract parties agree to cancel their contract, and so discharge all the duties under that contract. A mutual rescission can be express or implied. For instance, in the photographic film example above, Kosal and Samy could mutually agree to cancel their contract impliedly, perhaps by making a new contract that had the effect of changing the duties under the old one. Common law jurisdictions generally require consideration in order for a mutual rescission to be enforceable. A mutual rescission cannot affect the contract rights of third parties if those rights are "vested," which basically means if they are the present property of the holder of the right.

A release may also discharge contract duties. A release is a signed document in which a party discharges duties owed to him. So Samy could discharge Kosal's contract duties by signing a statement saying she was discharging them. It seems that some common law jurisdictions require consideration for releases, but others do not.

A substitute contract may discharge contract duties. A substitute contract is a new contract between parties that immediately discharges the duties under an old contract between the parties. As with releases, it seems that some common law jurisdictions require consideration for substitute contracts, while others do not.

An accord and satisfaction may discharge contract duties. An accord and satisfaction occurs where the parties to an existing contract make a new contract that substitutes a different duty for a duty owed under the old contract (the "accord"), and then that new duty is performed as required by the new contract (the "satisfaction"). An accord does not immediately discharge the duty under the old contract, but only suspends the duty until satisfaction

occurs. Some common law jurisdictions require consideration in order for accords to be valid.

A novation may discharge contract duties. A novation is an agreement among contract parties and a new party to substitute the new party for one of the original parties and immediately discharge the duties under the original contract. This results in a new contract between the new party and one of the parties to the old contract.

An account stated may discharge contract duties. An account stated is an agreement between a creditor and a debtor that a particular sum is what the debtor owes the creditor because of prior transactions. The account stated immediately discharges the duties from the prior transactions.

Finally, contract duties may be discharged by operation of law. That can happen through impossibility or impracticability, frustration of purpose, bankruptcy, a final court judgment or arbitration award, or the passing of time set by a statute of limitations.

Impossibility or impracticability of the performance of a contract may discharge contract duties. Many jurisdictions say this can occur where: (1) some event causes performance of a contract to become impossible or highly impracticable; (2) neither contract party caused the event; and (3) neither party assumed the risk of the event. In order to be "impracticable," the increased difficulty a party encounters in performing a contract must be extreme. A party may assume the risk in the contract, or because the law says so. For example, parties generally assume the risk that market prices and expenses will change substantially, but not the risk that performance will unexpectedly become extremely difficult. The effect of impracticability is that all duties under a contract are discharged. Some important situations where impracticability may occur are where performance of the contract becomes illegal; a party or other person needed for the performance of the contract dies or becomes incapacitated; the specific subject matter of the contract is destroyed; or a natural or human disaster makes performance of the contract extremely difficult or expensive. Potential examples of such disasters include crop failures, earthquakes, floods, wars and trade embargoes.

Frustration of purpose may also discharge contract duties. Frustration of purpose occurs where both contract parties understood the main purpose of the contract; some event has made contract performance almost or totally valueless to one party; that party did not cause the event; and the parties did not expect the event to occur. This discharges all contract duties. An example might be where a party rented space for a short time in order to celebrate or observe a particular event, and then the event was canceled.

Bankruptcy proceedings may also discharge contract duties. When the liability of a person under a contract is resolved in bankruptcy proceedings,

the duties under that contract are generally discharged, and the only duties remaining are those created in the bankruptcy proceeding.

Sometimes a contract dispute is resolved by a final court judgment or proper arbitration award. In that situation, the duties under the original contract are generally discharged and "merged" into the judgment or award.

Finally, the passing of the time set by a statute of limitations may discharge contract duties. In some jurisdictions, this only bars a lawsuit about the contract duties, provided the issue is properly raised in court.

CASE STUDY 20

FACTS Thy makes a contract promise to ship 100 boxes of cassette tapes by road to Vey, who lives three hundred kilometers away, within five days. The tapes will not be useful to Vey after five days. Planes do not fly to Vey's town. Before Thy can ship the tapes, unexpectedly severe flooding makes it impossible for the tapes to be delivered by land for at least several weeks.

QUESTION OF LAW Have the duties in this contract been discharged?

DECISION Probably. The duties under this contract have probably been discharged because Thy's shipment to Vey of the tapes has probably become legally impossible, or at least impracticable, due to the severe flooding.

Contract duties are discharged where an event causes performance to become impossible or highly impracticable, neither party caused the event, and neither party assumed the risk of the event. In this case, Thy agreed to ship cassette tapes to Vey by road within five days. But unexpectedly severe flooding made it impossible to deliver the tapes for at least several weeks, long after the tapes would no longer be useful to Vey. Thy's performance has become impossible or at least impracticable, neither party expected this flooding, and it does not seem that either party assumed the risk that it would occur. So the duties in this contract have probably been discharged.



Illustration: How Many Courts Analyze Contract Performance and Discharge of Duties

IS CONTRACT DUTY DUE?
Have Any Conditions Been:

- (1) **Fulfilled by:**
 - (a) occurrence;
 - (b) complete performance; or
 - (c) substantial performance (implied-in-law only); OR
- (2) **Excused by:**
 - (a) anticipatory repudiation;
 - (b) prospective inability or unwillingness to perform;
 - (c) failure or occurrence of a prior condition;
 - (d) improper rejection of a tender of performance;
 - (e) wrongful prevention or hindrance;
 - (f) waiver or estoppel; or
 - (g) impossibility of performance?

HAS DUTY BEEN DISCHARGED?

- (1) **By Performance, Breach, or Other Events Related Directly to Performance:**
 - (a) complete performance;
 - (b) breach;
 - (c) anticipatory repudiation;
 - (d) improper rejection of tender of performance;
 - (e) occurrence of condition subsequent; or
 - (f) avoidance of a voidable contract; OR
- (2) **By Later Agreement or Statement of Parties:**
 - (a) mutual rescission;
 - (b) release;
 - (c) substitute contract;
 - (d) accord and satisfaction;
 - (e) novation; or
 - (f) account stated; OR
- (3) **By Operation of Law:**
 - (a) impossibility or impracticability of performance;
 - (b) frustration of purpose;
 - (c) bankruptcy proceedings;
 - (d) final court judgment or arbitration award;
 - (e) statute of limitations?

***** ADDITIONAL REFERENCE:** Chapter 9 ("Performance and Discharge of Duties") discusses more fully how courts analyze performance and discharge of duties.

1.4i Courts May Order or Allow Various Remedies Where There Is a Contract Dispute

If there is a contract dispute, and contract duties have not been properly discharged, various kinds of remedies may be available. The two main groups of remedies courts may order are money damages and non-monetary remedies. One important limit on such potential remedies is that courts generally have no power to impose criminal penalties in contract disputes. Another key limit is that the law often cannot fully compensate the parties for the harm caused by a contract problem and dispute. So it is often wise to consider alternative dispute resolution (ADR) in order to try to minimize this problem.

Perhaps the most important type of money damages many courts will order a breaching party to pay an injured party is expectation damages. These are damages that try to place the injured party as close as possible to the position he would have occupied if the parties had fully performed the contract. This usually comes closest to giving the injured party the "benefit of his bargain." To calculate expectation damages, many courts determine the value in money of the additional benefits the injured party would have received if the breaching party had fully performed, then subtract the value of what the injured party saved (if any) because he was not required to perform his own duties. The resulting amount is the expectation damages.

CASE STUDY 21

FACTS Vanarong and Mouly make a contract in which Mouly agrees to supply a certain number of palm trees to Vanarong for his new hotel for \$1,000. Mouly supplies the trees according to the contract, but Vanarong pays only \$800, telling Mouly he will get the rest of the money to him soon. But Vanarong never pays. So Mouly asks the court for expectation damages.

QUESTION OF LAW What are Mouly's expectation damages in this case?

DECISION Mouly's expectation damages are \$200. This is because that is the amount of the additional benefits Mouly expected to receive (\$200) minus the amount Mouly saved by not having to perform his own duties (\$0).

Many jurisdictions calculate expectation damages by determining the value of the additional benefits the injured party expected, then subtracting what that party saved by not having to perform his own duties. In this case, Vanarong breached his obligation to pay Mouly for palm trees by paying only \$800, instead of the \$1,000 the contract required. Mouly's expectation damages would be the value of the additional benefits he expected to receive (\$200) minus what he saved by not having to perform (\$0, since he did perform his own duties). $\$200 - 0 = \$200$. So Mouly's expectation damages are \$200.

A court may order reliance damages where expectation damages are not appropriate. Reliance damages try to place a party injured by a

contract breach or failure to perform a promise as close as possible to the position he occupied before the contract or promise was made. Suppose Chan and Sastra make a contract in which Chan agrees to build Sastra a \$100,000 building, Chan spends \$10,000 on the construction, then Sastra repudiates. Chan's expectation damages might be hard to prove. So he might ask a court to award him what he spent in reliance on the contract--\$10,000--which would basically put him in the position he occupied before the contract was made.

A court might order a party to pay restitution damages where neither expectation nor reliance damages are appropriate. Restitution damages try to compensate a party for the value of the benefit he has given to another party, in order to avoid unjust enrichment. Restitution damages are likely to be awarded where there was no valid contract, but one party provided some benefit to another, and there would be unjust enrichment if the other party was allowed to keep that benefit. Such damages may also be awarded where there was a valid contract, but there was a bilateral or unilateral rescission; duties were discharged by impracticability or frustration of purpose; an injured party can recover more by restitution than by using other measures of damages; or a breaching party wishes to recover what he has provided to the other party. Most of these are quasi-contract situations.

For example, restitution might be awarded where a party provides urgently needed health care to an unconscious accident victim. There would be no valid contract, since an unconscious person cannot make one, but many courts consider it unjust to allow the victim to keep the benefit of the health care without compensating the person who provided it. Another example might be if the breaching party Sastra in the construction example above had actually provided Chan with some benefit prior to Sastra's breach. Sastra might be able to get restitution, once the court took account of the damages caused by his breach.

In certain situations, courts may order a party to pay other damages or monetary awards. Courts may order a party to pay stipulated damages (liquidated damages) where the contract itself describes the damages to be paid in the event of a breach. In many common law jurisdictions, such clauses are enforceable, as long as they are reasonable compared to the damages the parties might have expected when they made the contract or the damages that actually resulted from the breach. So if Chan and Sastra's \$100,000 construction contract had a stipulated damages clause saying Chan had to pay Sastra \$1,000,000 for each day Sastra was late in finishing the building, common law courts might find that clause unreasonable, and not enforce it.

Courts might order a party to pay nominal damages where a breach has occurred but no real harm is proved. Nominal damages are a small sum awarded to show that a legal wrong has occurred.

In addition, courts may order a party to pay interest in contract disputes. Most jurisdictions award parties interest at a certain rate on

the amount of a court judgment from the time of the judgment until it is paid. Many jurisdictions also award pre-judgment interest on the amount of damages caused by a contract breach from the time of the breach, if the amount of these damages was certain enough at the time of the breach.

However, courts resolving contract disputes generally do not order parties to pay punitive damages. Courts award punitive damages to punish a party who has committed a civil wrong, and deter him and others from committing such wrongs in the future. Courts do not generally believe contract breaches are serious enough wrongs to justify such damages. But such damages might be awarded if a party's conduct in breaching a contract is also a tort, such as fraud or bad faith. A bad faith breach of contract may be a tort in limited cases where a contract party's breach is especially malicious or unjustifiable--such as where a party denies without any legitimate reason that a contract even exists!

There are several important general limits on the damages parties can recover in contract disputes. These are that parties can recover only damages they prove with reasonable certainty, that they could have reasonably foreseen, and that they could not have reasonably avoided.

First, parties can generally recover only damages that they prove with reasonable certainty. This rule is especially important where courts must decide whether expectation damages are too uncertain. That might be a problem in certain types of cases, such as those involving new businesses.

Second, parties can generally recover only damages that a reasonable person could have foreseen. In applying this rule, many jurisdictions say that parties may recover two types of contract damages: (1) those that are a natural and usual (foreseeable) result of the type of breach involved (general damages); and (2) those that occur because of special circumstances, which can be recovered only if the breaching party actually knew about the special circumstances (consequential damages). Suppose Chan contracted to build Sastra a factory, but breached by failing to complete the building on time. Sastra could recover general damages, such as his normal losses because he could not use the building for the time Chan was late in delivering it. But suppose Sastra also had a manufacturing contract with a stipulated damages clause. Chan's late delivery of the building caused Sastra to breach this manufacturing contract, and to owe a large amount in stipulated damages. These would be consequential damages, since they occurred because of special circumstances: the manufacturing contract with the stipulated damages clause. So Sastra could recover these damages from Chan only if Chan actually knew about Sastra's manufacturing contract.

Third, parties cannot recover damages that they could reasonably have avoided. This means that, when a breach occurs, the injured party should stop his own performance if continuing would increase his damages. It may also mean that a party should use reasonable efforts to find a

substitute performance. In the construction example above, if Sastra repudiated after Chan had started building, Chan would have to decide whether he could best avoid further damages by stopping his work, or completing the building.

Courts may also order or allow various non-monetary remedies. First, courts may order specific performance of the contract, which is to order that a breaching party actually perform the contract. It appears that courts often order specific performance in civil law jurisdictions. However, in many common law jurisdictions, courts prefer to order money damages. Such common law courts order specific performance only where money damages are not adequate to compensate the injured party, and the court believes it can adequately enforce the order. This occurs primarily where the subject matter of the contract is unique, as with contracts for the sale of land or unique goods like art. So this remedy would probably not be available in common law jurisdictions for contracts for common goods such as rice. Nor would it generally be available for construction or personal services contracts, since it might be difficult for a court to enforce the order in those situations.

In addition, courts may order or allow rescission of the contract. This is basically the cancellation of the contract, by one or both parties. Restitution is often available in this situation.

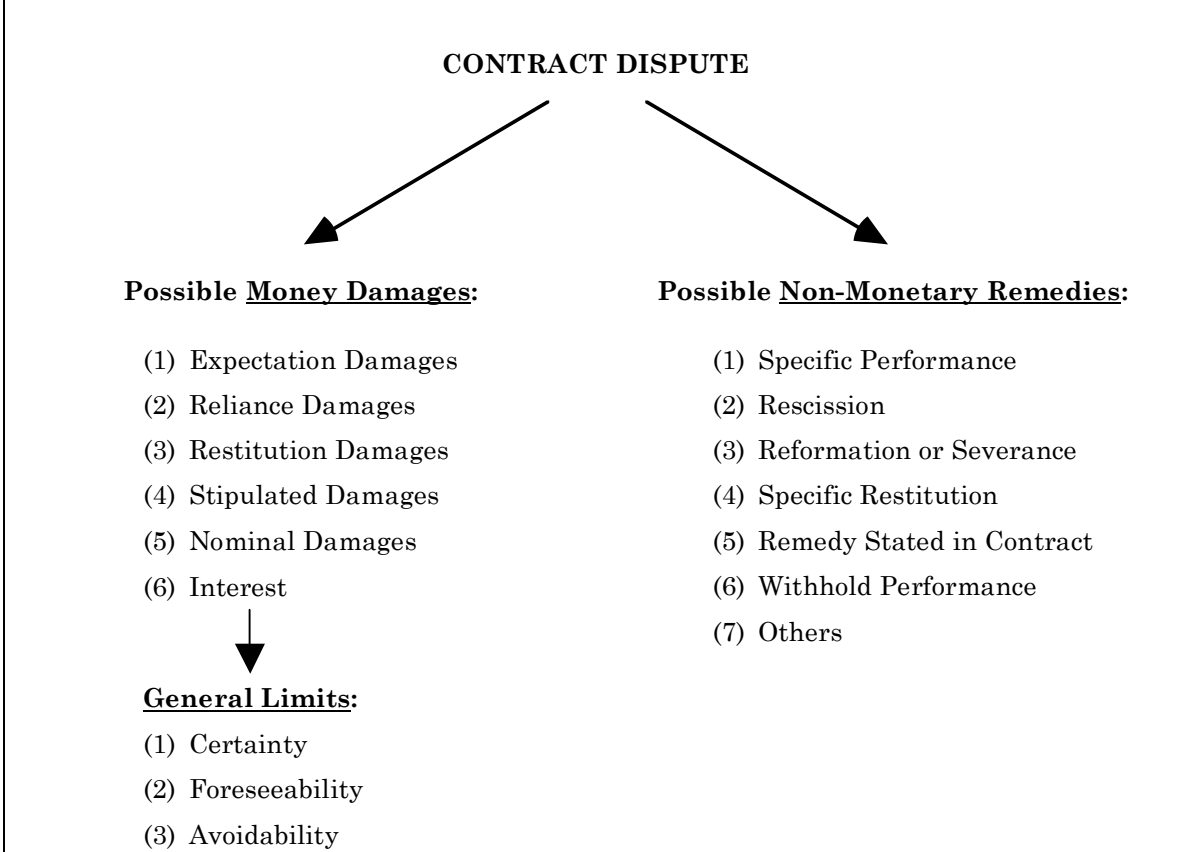
Courts may also order reformation or severance of the contract. That occurs where a court can fairly and effectively change part of an agreement with a formation problem, and then enforce what remains. This remedy seems to be used primarily for formation problems related to mistake or legality, such as for usurious loan agreements.

And courts may order or allow other remedies. These include: specific restitution, which is the return of the actual benefit a party receives, rather than its money value; non-monetary remedies stipulated in the contract, such as the right to the repair or replacement of a product; or the withholding of performance, which would be available if a condition failed.

Remedies may vary to some extent in particular situations. Many jurisdictions have special remedies for sale of goods contracts. Under the Uniform Commercial Code in the United States, sellers and buyers of goods have specific remedies. Under the UCC, when a buyer breaches without finally accepting the goods, and the seller resells the goods in a good faith and reasonable way, the seller can recover the difference between the resale price and the contract price, plus incidental expenses he had in making the resale. If the seller does not resell, he can get the difference between the contract price and the market price at the time and place of tender, plus incidental expenses. When a seller breaches and the buyer does not accept the goods, and the buyer "covers" by finding substitute goods in a good faith and reasonable way, the buyer can recover the difference between the cover price and the contract price, plus incidental and consequential damages.

If the buyer does not cover this way, he can get the difference between the contract price and the market price at the time he learned of the breach, plus incidental and consequential damages. Where courts find a quasi-contract, they generally award restitution, in order to prevent unjust enrichment. And where courts apply promissory estoppel (detrimental reliance), reliance damages appear to be most commonly ordered.

Illustration: Remedies Courts May Order or Allow



*** **ADDITIONAL REFERENCE:** Chapter 10 ("Remedies") contains a more complete discussion of remedies courts may order or allow.

1.4j Third Parties May Have Contract Rights or Duties in Certain Situations

In some situations, third parties may actually have rights or duties under a contract--even though they are not parties to the contract! In particular, this can occur where a contract party assigns his rights to a third party; a contract party delegates his duties to a third party; or a third party beneficiary gains rights under the contract.

An assignment of rights occurs where a party to a contract transfers his rights under the contract to a third party who is not a party to the original contract. This transfer is not a promise or a contract, but a present-time transfer--like a gift. A valid assignment requires that the assignor of the right communicate his intention to assign the right to the assignee.

Assignments are not subject to the common law requirement of consideration, though assignments without consideration may be terminated in certain cases in common law jurisdictions. Contract rights can generally be assigned. However, many jurisdictions say contract rights cannot be assigned: (1) if the assignment would materially change the duty of the other party to the original contract, materially increase the financial or other risk to that party because of the contract, or substantially reduce the value of the performance that party will receive; (2) if a valid part of the original contract forbids the assignment; or (3) if the assignment violates a statute or public policy. When a party assigns his rights to a third party, the third party gains those rights like the party would gain property. The transferring party no longer has the rights. So the third party basically "stands in the shoes" of the transferring party, holding the same contract rights and subject to the same legal defenses.

CASE STUDY 22

FACTS Inerey and Samy make a contract in which Inerey agrees to provide cleaning services to Samy for her book shop at a certain salary. Soon afterwards, Samy tries to assign her right to receive Inerey's services to Bora for his moto repair shop. But Inerey objects, saying that Bora's shop would be far more difficult to clean.

QUESTION OF LAW Can Samy assign her right to receive Inerey's cleaning services to Bora?

DECISION Probably not. Samy probably cannot assign her right to receive Inerey's cleaning services to Bora in this situation, because it would probably cause a material change in Inerey's duties.

Many jurisdictions say that rights cannot be assigned in situations where the assignment would materially change the duties of the other party to the contract. In this case, Samy tried to assign her right to receive Inerey's cleaning services to Bora. But Inerey objected, saying that it would be very different for him to work for Bora, because cleaning Bora's moto repair business would be very different from cleaning Samy's book shop. This assignment would seem to materially change Inerey's duties. So it is probably not valid.

A delegation of duties occurs where a party to a contract transfers his duties under the contract to a third party who is not a party to the original contract. When a party delegates his duties to a third party, the third party may have the option to perform, or he may promise to perform. The third party becomes obligated to perform those duties only if he has promised to perform them. However, unlike in the situation where a party assigns rights, the delegating party remains responsible for the performance of the duties, even after he has delegated them. So if Samy in Case Study 22 delegated her duty to pay Inerey to Jeudy, Samy would remain responsible for the duty,

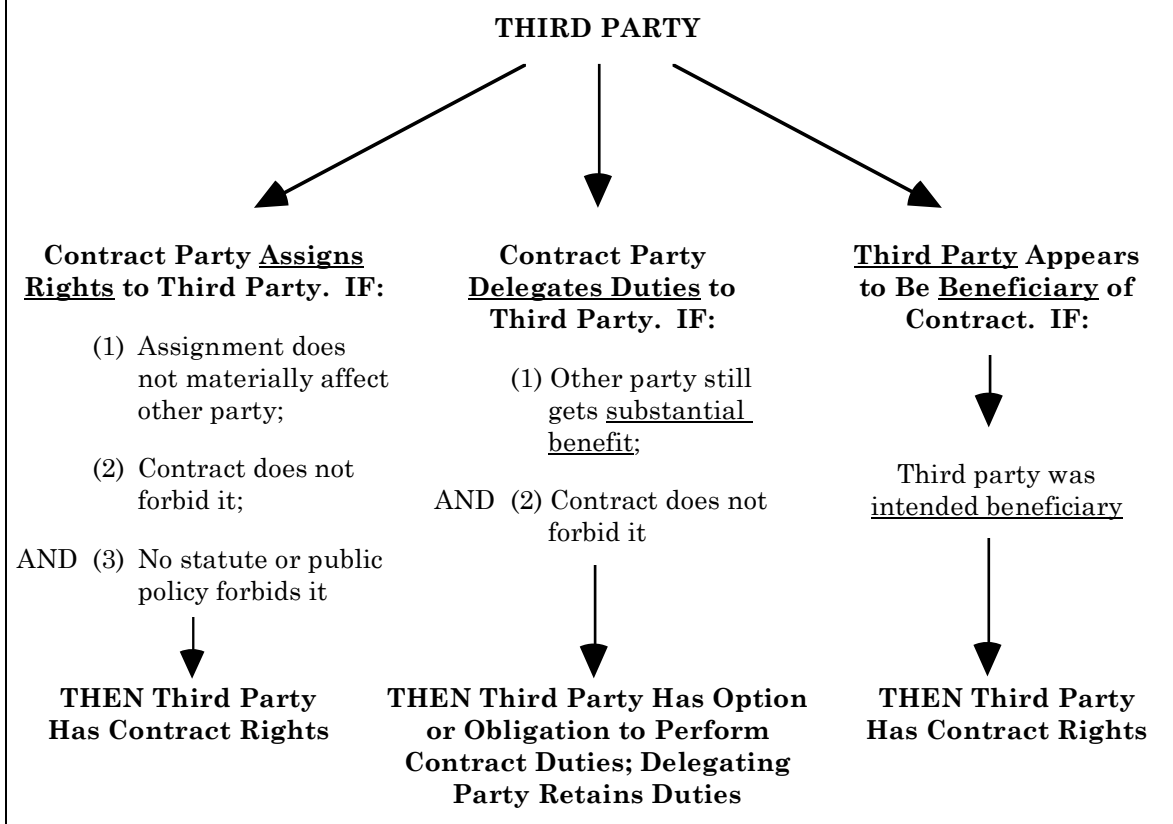
and would have to pay Inserey if Jeudy failed to do so. An effective delegation requires that the delegating party clearly indicate his intent to transfer the contract duty. Contract duties can be delegated as long as the party with the right to receive performance of the duties will still receive the substantial benefit of his original bargain, and no valid part of the original contract forbids the delegation. Types of duties that are likely to be delegable include duties to pay money, or provide commonly available goods or relatively simple services. Duties are less likely to be effectively delegated if they involve personal services or other types of unique skills or abilities, such as the professional services of physicians.

A third party beneficiary can actually gain rights under a contract, even though that third party was not a party to the contract. Many jurisdictions say this occurs only where the third party was an intended beneficiary. That means that the parties to the original contract intended at the time they made their contract that the third party gain the right to enforce it. But if a third party is merely an unintended or "incidental" beneficiary, he cannot enforce the contract. Intended beneficiaries may be donee beneficiaries. They exist where the party receiving the promise that will benefit the third party beneficiary is basically trying to make a gift to the beneficiary. Or they may be creditor beneficiaries. They exist where the party receiving the promise that will benefit the third party beneficiary is trying to fulfill some existing legal duty that he owes or believes he owes to the beneficiary (a duty which remains enforceable). An important reason courts make this donee/creditor distinction is that it may affect when the rights of the beneficiaries "vest." Vesting is basically to become the present property of the holder of the right, so that the right cannot be changed without the holder's consent. Important examples of donee beneficiaries include third party beneficiaries under life insurance policies. Important examples of creditor beneficiaries include loan creditors like banks after a third party assumes a debtor's duty to repay a loan secured by an interest in real property.

For instance, suppose Samy and Bora agree that Bora will buy Samy's shophouse. As part of their contract, Bora assumes Samy's duty to finish repaying a loan which she has with the Big Bank, and which is secured by a mortgage on the shophouse. In that situation, the Bank is a third party beneficiary of the contract between Samy and Bora. That is because the parties clearly intended to benefit the Bank in their contract. So the Bank will actually gain the right to enforce the contract against Bora--and against Samy, in the event that Bora fails to repay the loan according to the loan contract.



Illustration: How Third Parties Can Have Rights or Duties under Contracts



*** **ADDITIONAL REFERENCE:** Chapter 11 ("Third Party Rights and Duties") contains a more complete discussion of third party rights and duties.

1.5 The Doctrine of Quasi-Contract Applies Where a Party Seeking Help Cannot Enforce a Contract, but a Court Imposes a Contract Obligation in Order to Avoid Unjust Enrichment

Quasi-contract is a doctrine that courts apply where a party seeking help cannot enforce a contract, but the court imposes contract obligations in order to avoid unjust enrichment. Quasi-contracts are not really contracts. They are usually considered to be one type of restitution. Courts impose quasi-contracts only in certain situations where a party has provided some benefit to another party with a reasonable expectation of compensation. Specifically, many jurisdictions say there are three basic requirements for a quasi-contract to exist: (1) a real case; (2) enrichment of a party; and (3) that the enrichment be unjust. Some of the more important situations where courts may impose quasi-contracts are where the parties do not even have any agreement; an agreement cannot be enforced because of a formation or performance problem; or a breaching party seeks recovery. These ideas will be discussed in more detail below.

1.5a Courts Apply Quasi-Contract in Order to Avoid Unjust Enrichment

As noted above, a quasi-contract is not really a contract, but a legal doctrine that courts apply in order to avoid unjust enrichment.

***** DEFINITION:** **Quasi-contract** is a doctrine under which courts impose contract obligations on a party, even though they cannot enforce a contract for the party seeking help, in order to avoid unjust enrichment.

Quasi-contract is often referred to as "restitution," or a type of restitution. It appears that authorities generally consider quasi-contract to be one part of the larger legal area of restitution, which has the goal of avoiding unjust enrichment in a variety of areas, including contract law. In any case, this text will often use the two terms to refer to situations where courts act to avoid unjust enrichment.

The term "quasi-contract" is based on the word "quasi," which can mean seemingly, somewhat or not really. This shows that a quasi-contract is seemingly or in some ways like a contract, but is not really a contract. It is a doctrine under which a court imposes contract obligations, but those obligations are not really based on an enforceable contract. They are based on a court's actions to achieve the important legal goal of avoiding unjust enrichment. In fact, some authorities refer to quasi-contracts as "constructive contracts," since the court actually "builds" the contract obligation itself.

One of the most common examples of a situation where a court might apply quasi-contract is where a health care worker provides emergency care to an unconscious car accident victim. Suppose a doctor named Sokna found Vichda unconscious and seriously injured by the side of the road following a bad moto accident. If Sokna provided needed health care to Vichda, Sokna would probably be able to recover the reasonable value of the services she provided under the doctrine of quasi-contract--even though she could not possibly have made an enforceable contract with the unconscious Vichda! The reason quasi-contract might be available is that otherwise there would probably be unjust enrichment of Vichda.

Where courts do impose a quasi-contract, it appears that the remedy they most often award is restitution damages. This was briefly noted in Section 1.4i above, and will be discussed in more detail in Chapter 10 ("Remedies"), Section 10.8b. Restitution generally involves the court ordering one party to give another party the reasonable value of the benefit that first party received from the other party.

Although restitution appears to be the remedy most commonly awarded where a court imposes a quasi-contract, reliance damages may also be awarded in certain cases. Such cases include where the amount of enrichment is difficult to measure, or where restitution alone will not achieve justice.

For instance, in the health care example above, suppose that Sokna had to buy some special tools in order to treat Vichda, but that those tools were not really useful in Sokna's usual medical practice. This might occur if Vichda was trapped in a crashed car, and Sokna had to buy a hacksaw and a crowbar to get him out of the car and treat him. The costs of those tools would probably be considered a reliance expense, and a court might award Sokna those damages if it felt that was necessary to avoid injustice.

***** WHY IS THIS IMPORTANT?** Why do courts impose contract obligations under the doctrine of quasi-contract, even though they cannot actually enforce a contract for the party seeking help?

Courts apply quasi-contract, a form of restitution, in order to achieve justice in situations where the other contract law rules may not be able to do so. In this way, quasi-contract is a kind of "gap-filler." Sometimes one party provides a benefit to another party with some reasonable expectation of compensation, but the party providing the benefit cannot enforce any contract. This could occur because the parties have no agreement, or because there is some problem with the formation or performance of the agreement. In cases like this, there might be unjust enrichment if the party who received the benefit was not required to compensate the party who provided the benefit. So courts will impose contract obligations, even though they cannot enforce any agreement for the party seeking help, in order to achieve justice. This legal goal of avoiding unjust enrichment is present in a number of legal areas besides contract law where restitution may apply.

Of course, the power to impose contract obligations even though no agreement can be enforced for the party seeking help is a great power. So courts are very careful to apply it only in those cases where unjust enrichment really exists.

***** ADDITIONAL REFERENCE:** Chapter 10 ("Remedies"), Sections 10.4a and 10.8b contain a more complete discussion of remedies where courts impose a quasi-contract, particularly restitution damages.

1.5b The Basic Elements of Quasi-Contract

The doctrine of quasi-contract is used only in certain situations. Courts will not use it in every case where one party receives something from another party. In fact, as noted above, many jurisdictions say there are three basic requirements in order for a court to impose a quasi-contract:

- (1) there must be a real case between parties with legal interests in the matter;
- (2) there must be enrichment of one of the parties;
- AND (3) the enrichment must be unjust.

These three requirements are explained in more detail below.

(1) A Real Case -- The first basic requirement for a court to find a quasi-contract to exist is a real case. This means that one party (the plaintiff) with a real legal interest in the matter must formally ask a court to decide a legal dispute he has with another party (the defendant). A court has no power to act in such a situation unless a proper party actually asks it to act. In fact, it is a fundamental legal rule in free market jurisdictions that courts have no power to act unless there is a genuine dispute between parties, and at least one of the parties asks the court to intervene.

This basic rule applies to contract and quasi-contract disputes in the same way as it does to other legal disputes. It does not matter if the court, or some other party not involved in the situation, thinks there may be unjust enrichment. Those parties do not have the power to create a real case about the situation.

For instance, in the accident victim example above, this rule would basically mean that Sokna would have to ask a court to resolve her dispute with Vichda. A court could not act in the dispute unless Sokna did that. In addition, it is unlikely that anyone else would be able to persuade a court to act for Sokna. So even if Sokna's sister Sereypheap was very angry because Vichda would not pay Sokna for her services, Sereypheap could not generally persuade a court to act in the dispute.

(2) Enrichment of a Party -- The second requirement for a court to impose a quasi-contract is enrichment of a party. This will typically be enrichment of the defendant in the court case by the plaintiff.

Enrichment simply means that the defendant must have benefited in some way. Often this is easy to see. For instance, in the accident victim example above, if Sokna provides medical care and Vichda's condition improves, it is easy to see that Vichda has received a benefit. Or if a worker repairs the leaky roof of someone's house so that it does not leak, it is obvious that the house owner has benefited.

However, sometimes enrichment is not so easy to see. Suppose Sokna provided competent and valuable medical care to Vichda at the side of the road, but Vichda was so badly injured that he died despite Sokna's efforts. In that situation, it appears that many jurisdictions would still say that Vichda's estate could be liable under quasi-contract for the reasonable value of Sokna's services! The reason seems to be that Sokna has still provided something of value to Vichda--even though Vichda was unable to use the services much because his condition was so poor. In addition, if Sokna was not compensated, she would probably have an unjust loss.

(3) The Enrichment Must Be Unjust -- The final element needed for a quasi-contract to exist is that the enrichment must be unjust. This basically

means that a court must feel that it would truly be unfair if one party was not ordered to re-pay another party for something that party provided to the first party. In other words, a court must believe that there will be unjust enrichment of one party (the defendant) and an unjust loss for the other (the plaintiff).

Not all enrichment is unjust. Sometimes there is enrichment, but none or only some of it is considered to be "unjust." In order to determine whether enrichment is unjust, a court must consider all the circumstances of each case. One important element many courts appear to require in order to find unjust enrichment is that the party who provided the benefit to another actually expected compensation at the time he provided it, and that that expectation was reasonable. For instance, if an aid organization helps a poor person with the understanding that the help is free, the aid group cannot later ask the aid recipient to compensate it--even if that poor person has become rich! This is because the group never actually expected to be paid. Consider also the following Case Study.

CASE STUDY 23

FACTS Chito is riding his moto one day when he notices that Lam's house is not as well protected from potential flooding as it could be, since flooding occurs every year in the area around Lam's house. The next day, after Lam has gone to work, Chito comes to Lam's house and makes improvements that will protect the house better from flooding. But Chito never says anything to Lam about what he is doing. When Lam gets back from work, he is shocked.

The next day, Chito comes and asks Lam to pay him for his work. Lam refuses. Lam admits that his house has been improved. But Lam says that he never asked Chito to do the work, and that he cannot afford to pay for it anyway. Chito asks the court for help.

QUESTION OF LAW Can Chito recover anything for the benefit he has provided to Lam, under the doctrine of quasi-contract?

DECISION Probably not. Chito probably cannot recover anything from Lam here because, although Chito did provide enrichment to Lam, it was probably not unjust enrichment.

Many jurisdictions say that courts can impose contract obligations under the doctrine of quasi-contract in real cases in order to avoid unjust enrichment, even though the court cannot enforce any contract for the party seeking help.

In this case, Chito asked the court for help with regard to the work he did on Lam's house, so there is a real case. And Chito clearly provided some benefit to Lam by improving his house, so there is enrichment.

However, the enrichment is probably not unjust. This is because, although Chito may have actually expected Lam to pay him for his work, Chito really had no good reason to expect that Lam would do so, and it would probably be unjust to ask Lam to do so. Chito never asked Lam whether he wanted the work done. Nothing prevented Chito from asking Lam this. In addition, Lam did not want the work done, and he cannot afford to pay for it. In this situation, the enrichment to Lam is not unjust. And Chito's loss is not unjust either. So a court would be very unlikely to order Lam to pay anything to Chito under the doctrine of quasi-contract.

Some jurisdictions call parties like Chito in Case Study 23 "officious intermeddlers." This basically means that such persons unjustifiably meddle in the affairs of others.

However, one situation where unjust enrichment might occur in this kind of case would be if the work was done in an emergency. For example, in Case Study 23, suppose that when Chito saw Lam's house, flood waters were very high around the house. Flooding might have severely damaged the house at any time. Suppose Chito tried to find Lam to tell him about the problem, but no one was home. So Chito quickly did some work to keep the flooding out. In that situation, the enrichment of Lam would likely be unjust. This is because Chito was not a "meddler," but someone who was trying to save Lam's house in an emergency, and who tried his best to contact Lam about the problem. Here, it would be reasonable for Chito to expect compensation for his work, and a court would likely order Lam to pay Chito its reasonable value. This example is similar to the unconscious accident victim example above.

Another situation where unjust enrichment might exist in this type of case would be where there was a mistake. Suppose Chito in Case Study 23 made a contract to strengthen the house of Lam's neighbor to protect it from flooding, but Chito got confused and did the work on Lam's house by mistake. In that case, it might still be unreasonable to expect Lam to pay. But suppose Lam was actually trying to sell his house at the time, and that the improvements Chito provided allowed Lam to get more money for the house. It might be unjust to allow Lam to be enriched in that way without compensating Chito. If a court did decide that there was unjust enrichment, it would probably order Lam to pay Chito the reasonable value of his services, not the actual increase in the sale price of the house, which would likely be more than the reasonable value of the services. This is because the reasonable value of the services would probably be a better measure of how much Lam had been unjustly enriched--the amount Lam would have normally had to pay someone like Chito to do the work if Lam had actually requested it. The rest of the money would be enrichment to Lam, but probably not unjust enrichment.

Obviously, it can be difficult for a court to decide whether enrichment is really unjust, and how much unjust enrichment exists. So it is important for

the court to consider very carefully the factors discussed above and all the circumstances of each case, and to act only where enrichment really is unjust.

Sometimes it can be easy to confuse quasi-contract with implied contracts, which were discussed in Section 1.3d above. In both situations, the parties may not use words to express an agreement, but a court may enforce contract obligations anyway. However, the nature and requirements of quasi-contracts and implied contracts are actually very different. The following chart tries to illustrate this.

Illustration: <u>Comparison of Implied Contracts and Quasi-Contracts</u>		
	<u>IMPLIED CONTRACT</u>	<u>QUASI-CONTRACT</u>
1. What is it?	<u>Enforceable contract</u> based on the conduct (not words) of the parties.	<u>Not a contract</u> , but contract obligations court imposes to avoid unjust enrichment.
2. How is it created?	By the <u>parties</u> , who make a contract with their actions.	By the <u>court</u> , which imposes contract obligations whether parties have an agreement or not.
3. Why does the court act?	To <u>enforce the agreement</u> of the parties.	To <u>avoid unjust enrichment</u> of a party.
4. What remedy will court order?	<u>Full range</u> of contract remedies might be available.	Court likely to order <u>restitution</u> (reasonable value of benefit given) or perhaps reliance.
5. What are some key differences?	Enforcement of a valid contract. Purpose is to enforce agreement of the parties.	Not enforcement of a valid contract. Purpose is to avoid unjust enrichment.

1.5c **Important Situations Where Courts May Use Quasi-Contract**

As noted above, courts are very careful to use the doctrine of quasi-contract only in situations where there really is unjust enrichment. However, there are a number of different types of situations where the doctrine may be used. As noted in Section 1.5, some of the more important situations where courts may impose quasi-contract obligations are where:

- (1) parties do not even have any agreement;
- (2) an agreement cannot be enforced because of a formation or performance problem; or
- (3) a breaching party seeks recovery.

Each of these situations will be discussed in more detail below. They are also discussed in some detail in Chapter 10 ("Remedies"), Section 10.4a, regarding restitution damages.

(1) Parties Do Not Even Have an Agreement -- Sometimes courts will decide to impose quasi-contracts even though parties do not even have any agreement at all together--including in situations where they have not even discussed one! Of course, this has been the case with a number of the examples discussed above. This Section will briefly discuss some of the important situations where this might occur.

One situation where a court may impose a quasi-contract even though there is no agreement is where one party provides some benefit to another in an emergency. Of course, this was the situation in the example above involving the unconscious accident victim. It was also the situation in the example related to Case Study 23 in which Chito did work on Lam's house to save it from flooding which had placed it in danger. Important factors here include whether the situation was really an emergency, and whether the person providing the benefit tried reasonably but failed to contact the other party to ask if that party wanted the work done. If both of those factors are present, it appears more likely that a court will find some amount of unjust enrichment.

Another situation where a quasi-contract may occur despite the lack of any agreement is where a party provides benefits by mistake. This was the case in the example related to Case Study 23 where Chito did work on Lam's house by mistake, when he should have done the work for Lam's neighbor. In that kind of situation, important factors seem to be how much the party receiving the benefit has really benefited, and whether it seems fair to make that party pay for a benefit for which he never asked. For instance, if Lam was selling his house and he got more money because of the flooding repair work, it seems clear that he benefited, and it seems fair that he should compensate Chito. But if Lam was not selling his house, and especially if he could not really afford the work, then it seems much less likely that a court would find unjust enrichment and impose a quasi-contract.

Another situation where a court might impose a quasi-contract is where a party supplies something another party needs to live--even where there is actually a refusal to agree to accept the benefit! Suppose a nurse sees a child who is clearly very sick with a life-threatening illness. In many jurisdictions, the nurse would normally require the permission of the child's parent or guardian to treat the child. Suppose the nurse finds the parents and asks, but they refuse permission for him to treat the child. The nurse treats the child despite the parents' refusal. In some jurisdictions, the nurse might be able to recover for the reasonable value of his services from the parents under quasi-contract. This is because parents generally have a legal duty to care for their children, because the nurse appeared to provide a benefit to the child (and therefore to the parents), and because it might be unjust not to compensate

the nurse--even though the parents actually refused to allow him to treat the child! Of course, this kind of case would not be easy to decide. It could involve difficult issues about the different interests of children, parents, and society, and competing views about health and well-being.

(2) Agreement Cannot Be Enforced Because of Formation or Performance Problem -- A very important situation where a court may use quasi-contract is where the parties actually have some agreement, but it cannot be enforced because of one of a wide variety of the formation or performance problems discussed earlier in this Chapter. This could occur where an agreement cannot be enforced because of formation problems such as a failure to meet a writing requirement, a lack of capacity, or mistake, or because of performance problems such as rescission or impracticability. In these cases, even though a party cannot enforce the agreement, courts may order another party to pay him a certain amount in order to avoid unjust enrichment.

CASE STUDY 24

FACTS Piseth and Huot agree that Piseth will buy Huot's bicycle for \$50. Their agreement is that Piseth will pay Huot on the day of the agreement, and get the bicycle from Huot the next day, after Huot has made certain repairs. However, the parties soon learn that, at the time they made their agreement, the bicycle had already been destroyed by a grenade explosion at the casino next to Huot's house! Neither party knew that at the time of the agreement.

The parties agree that their prior agreement was void because of this mutual mistake. But Huot refuses to return the \$50 Piseth paid him, claiming that this is not possible with void agreements. Piseth asks the court for help.

QUESTION OF LAW Can Piseth get restitution of his money in this case?

DECISION Yes. Piseth can get restitution of his \$50 under the doctrine of quasi-contract because otherwise, Huot would be unjustly enriched.

Many jurisdictions say that courts can impose contract obligations under the doctrine of quasi-contract in real cases in order to avoid unjust enrichment, even though the court cannot enforce any contract for the party seeking help. In this case, Piseth and Huot agreed that Piseth would buy Huot's bicycle for \$50. But they later learned that the bicycle had been destroyed before the agreement was made. The agreement was void because of this mutual mistake. In this situation, there is a real case, because Piseth has asked the court for help. There has been enrichment of Huot, since he has received \$50 from Piseth. And it would unjust if Huot were allowed to keep this money, since he has done nothing to earn it, and Piseth has received nothing in return. So a court would order Huot to return the \$50 to Piseth under the doctrine of quasi-contract.

(3) Breaching Party Seeks Recovery -- Another important situation where courts in many jurisdictions may impose a quasi-contract is where a party who has breached a contract seeks restitution of benefits he has provided to the other party. It seems that in the past many courts would not allow a breaching party to recover for such benefits. However, it now appears that many jurisdictions will allow such parties to recover for the benefits they have given under the contract.

There are some limits on the ability of breaching parties to get restitution under quasi-contract. Obviously, the amount of such restitution will be reduced by the amount of any damage the breaching party has caused to the other party. Also, many courts limit the amount of restitution for a breaching party to the portion of the contract price that the breaching party would have received for the benefit he provided. And many courts appear to say that a breaching party cannot get such restitution where the breach was intentional, rather than merely negligent or accidental. This is further discussed in Chapter 10 ("Remedies"), Section 10.4a.

For example, in the Case Study 24 situation, suppose the bicycle was not destroyed, but that Piseth paid only \$10 of the money the contract required, thus materially breaching the contract. Huot refused to deliver the bicycle, correctly saying his duty to do so had not become due. Piseth asked for his \$10 back, but Huot refused. In this situation, Piseth could probably get restitution of his \$10 under the doctrine of quasi-contract. Of course, this restitution would be reduced by any damage Huot could prove he suffered because of Piseth's breach.

***** ADDITIONAL REFERENCE:** Chapters 2-7 discuss formation problems which may result in a court imposing a quasi-contract; Chapter 9 ("Performance and Discharge of Duties") discusses performance problems that may result in a court imposing a quasi-contract; and Chapter 10 ("Remedies"), Sections 10.4a and 10.8b discuss remedies where courts impose a quasi-contract, particularly restitution damages.

1.6 Basic Aspects of Contract Law in the Cambodian Legal Tradition and the Civil Law Tradition

The approaches of the Cambodian legal tradition and the civil law tradition to the basic principles discussed above seem generally compatible with the approach discussed in this Chapter. Of course, a number of the elements and ideas discussed in this Chapter and the rest of this book do not appear in the Cambodian law or civil law traditions. And a number of elements from those traditions do not appear in this book. But the focus of this text is on general compatibility, and any truly important differences. Some of the significant differences among the traditions will be discussed briefly below, and discussed in more detail in the rest of the book.

In general, it is crucial to understand that legal traditions and rules vary from one jurisdiction to the next. Therefore, it is very important to check the local law that applies to any particular contract or transaction.

***** CAMBODIAN LAW PERSPECTIVE:** The current Contract Law of Cambodia (Decree #38D (1988)) and other Cambodian laws contain many provisions relevant to the basic aspects of contract law discussed above. Most of these provisions seem generally compatible with the ideas discussed in this text. Of course there are differences, and certain ideas and elements in each tradition do not appear in the other tradition. Perhaps some of the more significant differences are that Cambodian law does not require consideration for a contract to be valid, and that it does not appear to contain ideas directly comparable to quasi-contract, promissory estoppel, the parol evidence rule, or conditions. This text will now briefly compare the approaches of the two traditions to the material discussed in each Chapter of this book.

With regard to the introductory material presented earlier in Chapter 1, the approach of Cambodian law appears to be generally compatible with the approach explained in that material. With respect to basic ways to classify contracts, Decree #38D describes which agreements are valid, voidable, and void. Article 3 provides that contracts are valid provided that they "arise out of a real and free agreement," are made by parties with capacity, and have a subject matter that is certain, lawful, possible to perform, and "consistent with public order and good custom." Article 5 provides that agreements are void if they are illegal, "not consistent with public order or good custom," "not consistent with social interests or principles of social ethics," or have a subject matter that is impossible to perform. Article 6 provides that contracts are voidable where they do not result from a "real or free agreement," or are made by a party who lacks capacity. Article 4 of Decree #38D provides that contracts may generally be made orally or in writing, though certain provisions of the law state that certain types of contracts must be written to be enforceable.

With regard to the doctrine of quasi-contract explained earlier in Chapter 1, Decree #38D does not appear to contain anything directly comparable to that doctrine. However, certain provisions in Decree #38D would appear to accomplish similar results. For example, Article 21 provides that following the avoidance of a contract, the "situation prior to entering into the contract shall be restored." This would seem to be a reliance remedy, which would include restitution, thus preventing unjust enrichment even where a contract was voidable.

With regard to real agreement (offer and acceptance), the approach of Cambodian law also appears generally compatible with that discussed in Chapter 2 ("Real Agreement (Offer and Acceptance)"). Articles 1 and 3 of Decree #38D show that the Decree requires contracts to be the result of a "real and free agreement." The Decree does not appear to discuss "offer" and "acceptance" specifically.

Decree #38D does not require consideration in order for contracts to be valid, unlike common law jurisdictions, as noted in Chapter 3 ("Consideration"). However, Article 12 does appear to suggest that if the value of what each party gives in a contract is not equal, then the aggrieved party can sue to rescind the contract.

With regard to capacity, the approach of Cambodian law seems generally consistent with that discussed in Chapter 4 ("Capacity"). Articles 3 and 6 of Decree #38D show that a contract is voidable if a party to the contract lacks capacity. Under Article 14, minors under 18 years of age and "interdicted persons" lack capacity.

With regard to legality, the approach of Cambodian law seems generally consistent with that discussed in Chapter 5 ("Legality"). Articles 3 and 5 of Decree #38D show that agreements are void if they are illegal, "not consistent with public order or good custom," or "not consistent with social interests or principles of social ethics," or have a subject matter which is impossible to perform. Other provisions in Decree #38D and many other laws specify some of the categories of agreements that are illegal.

With regard to formality, the approach of Cambodian law seems generally compatible with that discussed in Chapter 6 ("Formality"). Article 4 of Decree #38D provides that contracts may generally be oral or written, but that certain contracts may be subject to certain "formalities." Decree #38D and other Cambodian laws contain a number of writing requirements.

With regard to the other formation problems discussed in Chapter 7 ("Other Contract Formation Problems"), the approach of Cambodian law seems generally consistent with that discussed in this text. Perhaps the most important difference is that Decree #38D does not appear to contain any provisions that correspond to the doctrine of promissory estoppel.

With regard to contract interpretation problems, the approach of Cambodian law seems basically consistent with that discussed in Chapter 8 ("Interpretation of Contracts"). Perhaps the most important difference is that Decree #38D does not appear to contain any rule comparable to the parol evidence rule.

With respect to performance and discharge of duties, Cambodian law addresses many of the same issues as the approach discussed in Chapter 9 ("Performance and Discharge of Duties"), and some elements of Cambodian law are comparable to those discussed in that Chapter. Decree #38D regulates contract performance, particularly in Articles 29-33, which contain general provisions about performance, and in Chapter 2, which governs the performance of particular types of contracts. One important difference is that Decree #38D does not contain the specific idea of conditions, though there are provisions about specific types of contracts that seem to accomplish similar goals.

With regard to remedies, the approach of Cambodian law appears to be generally compatible with the one discussed in Chapter 10 ("Remedies"), though in many cases the approaches do not use the same terminology. Decree #38D describes remedies available where there is a formation problem (Articles 18-21), where there is a failure to perform properly (Article 31), and in certain particular situations (Chapter 2).

Finally, with respect to third party rights and duties, the approach of Cambodian law seems generally compatible with the one discussed in Chapter 11 ("Third Party Rights and Duties"). For example, Decree #38D contains provisions dealing with third party rights and duties with regard to sales contracts (Chapter 2, Section 1), leases (Article 103), and suretyship contracts (Article 112).

***** CIVIL LAW PERSPECTIVE:** The civil law approach to the basic aspects of contract law discussed above appears to be generally compatible with the one discussed in this Chapter. Of course, a number of ideas and elements do not appear in both traditions, and there are some differences. Some of these are discussed briefly below and in the rest of this text. The exact rules about these basic aspects vary to some extent in all jurisdictions.

In general, it appears that there are few truly significant substantive differences between the common law and civil law traditions with regard to contract law. Some of the more significant differences are that common law jurisdictions generally require consideration in order for a contract to be valid, but civil law jurisdictions do not; that the specific doctrine of promissory estoppel does not appear to exist in civil law jurisdictions; that many civil law jurisdictions do not seem to apply any rule directly comparable to the parol evidence rule; and that civil law courts are more likely to order specific performance, even where the subject matter of a contract is not unique. This text will now briefly compare the approaches of the two traditions to the material in each Chapter in this text.

With regard to the introductory material presented earlier in Chapter 1, the approach of the civil law tradition appears to be generally compatible with the approach discussed in that material. With respect to basic ways to classify contracts, it appears that civil law jurisdictions may classify agreements in categories roughly comparable to the valid, voidable and void categories described in this Chapter. One difference is that many civil law and common law jurisdictions seem to define the terms "bilateral contract" and "unilateral contract" in different ways. In common law jurisdictions, a bilateral contract is basically an exchange of a promise for a promise, while a unilateral contract is basically an exchange of a promise for an act. However, in civil law jurisdictions like France, it appears that a bilateral contract is one with obligations on both sides, whereas a unilateral contract is one with obligations on only one side, as in the case of an agreement to give a gift. That kind of unilateral agreement might not be enforceable at all in common law jurisdictions, because of a lack of consideration.

The doctrine of quasi-contract, which was discussed earlier in Chapter 1, appears to exist in at least some civil law jurisdictions in a form which is very roughly comparable to that explained here. For example, this seems to be the case in France.

With regard to real agreement (offer and acceptance), the approach of the civil law tradition also appears generally compatible with that discussed in Chapter 2 ("Real Agreement (Offer and Acceptance)"). There are a few significant differences. First, as noted above, civil law jurisdictions like France appear to define bilateral and unilateral contracts differently, which would affect to some extent the principles explained in Chapter 2 with regard to how those kinds of contracts are formed. Second, many civil law jurisdictions appear to say that an offeror cannot revoke an offer for a reasonable time, as long as no expiration time is specified in the offer itself. Third, some civil law jurisdictions appear to say that acceptances are generally effective on receipt.

Civil law jurisdictions do not require consideration in order for contracts to be valid, unlike common law jurisdictions, as noted in Chapter 3 ("Consideration"). This may be the most important single difference between the traditions.

With regard to capacity, the approach of the civil law tradition seems generally consistent with that discussed in Chapter 4 ("Capacity"). For example, French law appears to provide that contracts made by minors and "protected adults" are generally voidable.

With regard to legality, the approach of the civil law tradition seems generally consistent with that discussed in Chapter 5 ("Legality"). Jurisdictions such as France will not enforce agreements contrary to "public order," which is roughly comparable to "public policy."

With regard to formality, the approach of the civil law tradition seems generally consistent with that discussed in Chapter 6 ("Formality"). The specific types of contracts that must be written to be enforceable are generally comparable to those discussed in this text.

With regard to the other formation problems discussed in Chapter 7 ("Other Contract Formation Problems"), the approach of the civil law tradition seems generally consistent with that discussed in this text. Perhaps the most significant difference is that there does not appear to be any civil law equivalent to the doctrine of promissory estoppel, though civil law jurisdictions may need it less with their different rules about real agreement and consideration. In addition, though many civil law jurisdictions do not apply the specific doctrines of undue influence or unconscionability, they do appear to use comparable doctrines to deal with such formation problems.

With regard to contract interpretation problems, the approach of the civil law tradition seems broadly consistent with that discussed in Chapter 8 ("Interpretation of Contracts"). Perhaps the most significant difference is that many civil law jurisdictions do not seem to apply any rule directly comparable to the parol evidence rule.

With respect to performance and discharge of duties, the approach of the civil law tradition seems generally comparable to that discussed in Chapter 9 ("Performance and Discharge of Duties"). Civil law jurisdictions may not use all of the same terminology that common law jurisdictions do. In addition, some civil law jurisdictions may limit the use of the doctrine of impossibility to situations where performance really is impossible, rather than merely impracticable.

With regard to remedies, the approach of the civil law tradition appears to be generally compatible with the one discussed in Chapter 10 ("Remedies"). Perhaps the most important difference in this area is that civil law courts seem more likely to order specific performance than common law courts are, and that specific performance might be available even for contracts involving commonly available goods in civil law jurisdictions. Another difference is that civil law jurisdictions may be somewhat more willing to order contract remedies that may be viewed as punitive than common law jurisdictions are.

Finally, with respect to third party rights and duties, the approach of the civil law tradition seems generally compatible with the one discussed in Chapter 11 ("Third Party Rights and Duties"). It appears that civil law jurisdictions like France apply doctrines that are comparable to the concepts of assignment of rights, delegation of duties, and third party beneficiaries.

*** ***ADDITIONAL REFERENCE:*** Chapters 2-11 discuss the approaches of the Cambodian and civil law traditions to contract law in more detail.

1.7 Questions for Review

CHAPTER 1 -- QUESTIONS FOR REVIEW

1. What is a contract?
2. Why is contract law important?
3. What is the general goal of law?
4. Explain the basic natures of the civil law tradition and the common law tradition.
5. Explain the differences between valid, voidable and void agreements.

6. Explain the differences between bilateral and unilateral contracts.
7. Explain the difference between executed and executory contracts.
8. Explain the difference between express and implied contracts.
9. Explain the difference between oral and written contracts.
10. Which contracts should parties put in writing? Why?
11. Explain the differences between formal and simple contracts.
12. What are the six basic elements many jurisdictions require in order for a contract to be valid?
13. What is required for a valid offer to exist?
14. What is required for a proper acceptance?
15. What is consideration, and under what circumstances is it required?
16. What is capacity, and who may lack capacity to some extent?
17. In what situations may an agreement lack legality?
18. Name some important types of agreements that may need to be written to be enforceable.
19. Explain some other formation problems that may affect the enforceability of an agreement.
20. Describe some methods courts use to help them interpret contracts.
21. What is the parol evidence rule?
22. What are the differences between promises and conditions?
23. How may conditions be fulfilled or excused?
24. How may contract duties be discharged?
25. What remedies may courts order or allow where there is a contract dispute?
26. In what situations may third parties have contract rights or duties?
27. What are the basic elements of a quasi-contract?
28. In what situations might courts impose quasi-contracts?

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| 29. | Is the Cambodian law approach to basic aspects of contract law generally compatible with the approach discussed in this Chapter? What are some important differences? |
| 30. | Is the civil law approach to basic aspects of contract law generally compatible with the approach discussed in this Chapter? What are some important differences? |