

CHAPTER SIX

FORMALITY

6.1 Introduction

Free market jurisdictions have certain formality requirements about contracts, as explained briefly in Chapter 1 ("Basic Aspects of Contract Law"). Legal rules about formality requirements vary in different jurisdictions. But many jurisdictions share certain basic principles. This Chapter will discuss some of these principles.

Probably the most important type of formality requirement is a writing requirement. Contracts can generally be enforced even if they are not written. However, all important contracts should be written in a proper form. This is discussed in Section 6.2 below.

Statutes in many free market jurisdictions say that certain important types of contracts must be in a particular written form in order to be enforceable. Specifically, many jurisdictions say that writings are generally required for: agreements to transfer a substantial interest in land; agreements that cannot be performed within one year; suretyship agreements; certain agreements relating to marriage; and agreements for the sale of goods over a certain monetary amount. And there are other types of contracts which many jurisdictions require to be written. However, there are a number of situations where many jurisdictions say such agreements can be enforced even though the writing requirement is not met. Three of these exceptions are where the contract is fully performed, where it is admitted in court, and where promissory estoppel applies. Other exceptions apply to specific writing requirements. These requirements and exceptions are explained in Sections 6.3-6.4.

Modifications of contracts are subject to the same writing requirements as the original contracts were. This is discussed in Section 6.5.

When the law requires a writing for a contract to be enforceable, the law is generally flexible about the physical form of the writing, and the circumstances under which the writing is created. However, many jurisdictions say the writing must contain the essential terms of the contract, and the identity and signature of the party against whom the contract is being enforced. This is explained in Section 6.6.

Agreements that fail to meet writing requirements are generally unenforceable. Statutes in some jurisdictions say agreements that fail to meet the requirements are void. However, many jurisdictions say that such agreements can be enforced in certain situations. In fact, in some situations, the agreements may be valid, because of the exceptions noted above. In other cases, one party may be able to enforce such agreements. In addition, even where an agreement cannot be enforced because a writing requirement is not met, restitution is generally available. This is discussed in Section 6.7.

Most jurisdictions also have formality requirements other than writing requirements. These are discussed briefly in Section 6.8, below.

***** ADDITIONAL REFERENCE:** Chapter 1 ("Basic Aspects of Contract Law"), Section 1.4e contains a more concise discussion of formality requirements.

6.2 Contracts Can Generally Be Enforced Even If They Are Not Written, but All Important Contracts Should Be Written in a Proper Form

Unwritten contracts--oral or implied--can generally be enforced. The law recognizes that it is not practical for parties to put all contracts in writing. This is especially true about everyday contracts, such as for the sale of a cup of tea, or a kilo of onions. And in the case of implied contracts, the law recognizes that sometimes it is not practical or necessary for parties even to use words to make their contracts! This was discussed in some detail in Chapter 1 ("Basic Aspects of Contract Law"), Section 1.3d.

However, the law wants to encourage people making important contracts to use words, and to put those contracts in a proper written form. To achieve this goal, the law generally requires certain types of contracts to be in such a form in order to be enforceable. One example is contracts for the sale of land. In addition, it is wise to put all important contracts in writing--even if the law does not require it.

***** WHY IS THIS IMPORTANT?** Why does the law require certain types of contracts to be written, and why is it a good idea to put any important contract in writing?

A written contract that accurately records the agreement of the parties has several advantages over oral and implied contracts. These advantages benefit both the parties to the contract and a court asked to enforce the contract. Some of these advantages are discussed below.

First, if the contract is in writing, its existence cannot easily be denied by a party who may be seeking to escape her obligations. This is because the writing serves as strong proof that a contract was made. For example, if the parties made an oral agreement without any other witnesses, one party

might deny that any contract was formed. And there may be a higher risk of this where the parties do not know each other well. The law wishes to avoid this situation. In fact, a famous English statute which was adopted in 1677 and became the basis of most common law writing requirements is known as the “Statute of Frauds.” Statutes like this are designed to prevent frauds and perjury (lying under oath).

Second, if the contract is in writing, the parties' obligations are more clearly defined, and kept in a durable form. Clear written evidence is better than oral evidence. Courts may sometimes have trouble enforcing oral or implied contracts, because the testimony given by some witnesses may conflict with that of other witnesses. In fact, as noted above, it is unfortunately true that some parties may lie to the court about the terms of such contracts. Writing requirements like the Statute of Frauds protect parties from that possibility by providing strong proof of the contract terms. Moreover, written contracts are often more durable than human memory. One of the parties may die, or become ill or unavailable for some reason. If a party dies, the executor or administrator of her estate may be unable to enforce an oral agreement previously made by the deceased person. And even if no one becomes unavailable, parties may simply forget the exact nature of some terms of an unwritten contract as time passes.

Third, writing requirements should make parties think more carefully about whether they should make the contract or not. Often, people pay more attention to the terms of a contract if they must put it in writing. People may also be forced to consider the future consequences of making the contract. The law wants to encourage this kind of careful consideration about important contracts. This should help to avoid disputes, or at least simplify them. It may also protect parties from making mistakes because of momentary impulses.

So most parties (especially governments and business people) prefer to have contracts regarding important matters put in writing--even when the law does not require it! Written contracts protect the interests of the parties. In addition, as noted above, legislatures and courts also prefer written contracts. This is because written contracts can help avoid disputes; guide the resolution of any disputes that do arise, by showing more clearly what the parties agreed; and thus promote social harmony and efficiency in the economy.

*** **ADDITIONAL REFERENCE:** Chapter 1 (“Basic Aspects of Contract Law”), Section 1.3d discusses the various forms contracts may take.

6.3 Certain Important Contracts Must Generally Be Written to Be Enforceable

As noted above, many jurisdictions say that certain types of contracts generally must be written in a proper form in order to be enforceable.

This rule generally means that parties must meet the writing requirement if they wish to enforce such contracts. However, there are some important limits on that general rule, which are discussed below.

Writing requirements are usually contained in statutes. This is true even in common law jurisdictions, where some other legal rules are developed in court decisions. The statutes of different jurisdictions contain many different writing requirements.

Section 6.3 provides a basic overview of some important types of agreements that many jurisdictions generally require to be written. But first, Section 6.3a discusses three general exceptions to the rule that these types of agreements or promises must be written to be enforceable. These situations are where an agreement is fully executed; where an agreement is admitted in court by the party against whom enforcement is sought; and where promissory estoppel applies. In these situations, many jurisdictions say the agreement or promise may be enforceable despite the failure to meet a writing requirement. These general exceptions are explained first so that they need not be explained repeatedly in the discussions of specific writing requirements which follow in the rest of Section 6.3.

Then, Sections 6.3b-6.3f discuss five important types of agreements which the laws of many jurisdictions generally require to be written in order to be enforceable:

- (1) an agreement to transfer a substantial interest in land (Section 6.3b);
 - (2) an agreement which cannot possibly be performed within one year from the time the contract is made (Section 6.3c);
 - (3) a suretyship agreement, which is one to be responsible for the contract performance of another person (Section 6.3d);
 - (4) an agreement in which the promise of one person is made in exchange for marriage or the promise of marriage (Section 6.3e);
- AND (5) an agreement for the sale of goods over a certain monetary amount (Section 6.3f).

In general, in many jurisdictions, a contract must be written if it falls into any one of these categories. For example, a contract for the sale of goods below the statutory level would still be required to be written if the contract could not be performed within one year.

There are many other types of agreements that jurisdictions may require to be written to be enforceable, such as agreements for the sale of securities. Section 6.3g discusses some of these other requirements.

6.3a Situations Where Agreements or Promises Might Be Enforced Despite a Failure to Meet Writing Requirements: Executed Contracts, Admission in Court, and Promissory Estoppel

Before discussing some of the specific types of agreements some jurisdictions require to be written, the text will explain three important general exceptions to these requirements. "General exceptions" means exceptions that apply to all types of contracts or promises. There are also special exceptions that apply only to particular writing requirements. Those special exceptions are discussed in the Sections below that explain the particular requirement to which the exceptions apply.

The first general exception is that, in many jurisdictions, writing requirements apply only to executory contracts. That is, the writing requirements apply only to contracts which have not yet been fully performed.

For example, two parties may make an oral contract for the sale of very expensive goods, which the law normally requires to be written to be enforceable. But if both parties fully perform the oral agreement, the writing requirement no longer applies. So neither party can use the lack of a writing as a basis to demand a remedy, such as restitution.

Second, in many jurisdictions, if a party admits in court that there was a contract, or fails to claim correctly in court that the writing requirement was not met, then the contract is enforceable against that party. So the other party can enforce an agreement that fails to meet a writing requirement in that situation, at least to the extent the first party admits the terms of the contract.

For example, a party may admit that she made an oral contract for the sale of goods that would normally require a writing. But she may say it was for only half as many goods as the other party claims. In that situation, a court will enforce the contract to the extent of half the goods--even if there is no writing.

The effect of this second exception is that contracts in this situation appear to be basically voidable by any party who has not signed a sufficient writing. This may be both parties to the contract, or only one party, because sometimes one party signs a sufficient writing but the other party does not. Parties who have not signed a sufficient writing can actually choose whether to avoid the contract--by using the lack of a sufficient writing as a legal defense--or not to avoid the contract. This situation is somewhat like contracts made by persons with only partial capacity, such as minors. Of course, if there is no writing at all, then the situation is more like a contract made by two minors--either party can generally avoid it. What the law requires for a sufficient writing will be discussed in detail in Section 6.6, below.

Third, in common law jurisdictions, promises may be enforceable, even where there is a failure to meet a writing requirement, if the elements

of promissory estoppel are met. As explained earlier, promissory estoppel basically says that a promise may be enforceable where a party justifiably relies on it and injustice might result if it is not enforced--even where the promise fails to meet the usual requirements for an enforceable contract, such as writing requirements. Promissory estoppel was explained to some extent in Chapter 2 ("Real Agreement (Offer and Acceptance)"), Section 2.4e, and it is explained in more detail in Chapter 7 ("Other Contract Formation Problems"), Section 7.8.

For example, Case Study 175 in Chapter 7 shows how a court might enforce a promise based on promissory estoppel even though there is a failure to meet a writing requirement. In that case, the court uses promissory estoppel to enforce a promise of two parents to transfer their farm to their son--even though they had failed to meet a writing requirement--because the son had justifiably relied on the promise by leaving university and returning home to work on the farm for some years.

In situations where these general exceptions apply--or where some other special exceptions that will be discussed below apply--agreements that fail to meet writing requirements may actually be enforceable. In those situations, the agreements may be similar to voidable, or even valid.

***** WHY IS THIS IMPORTANT?** Why does the law allow parties to enforce agreements that fail to meet writing requirements in certain situations?

It appears that the law allows parties to enforce such contracts in certain situations, such as when a party admits in court that the contract exists, because these writing requirements are in fact formal requirements. That means they are really more about the form--and not the substance--of agreements parties make. And although there are good reasons for the law to require some contracts to be written in a certain form, the law also believes that substance is often more important than form.

As discussed above, the law wishes to encourage parties to put important agreements in writing. This protects parties from inaccurate testimony about the existence and terms of important contracts. But many legislatures and courts do not wish to say that agreements that fail to meet the writing requirements are always void. The reason is that--unlike some of the void agreements discussed in other Chapters of this text--these agreements may be real agreements, made by competent adults, with legitimate purposes and no other formation problems. It appears that courts will enforce these agreements in some specific situations because they believe that it would be unproductive, and perhaps unfair to one or both parties, not to do so. For example, it is hard to see why a court should not enforce a legitimate agreement that has been completely performed, or admitted in court, simply because the agreement is not written in a certain form. In these situations--where the parties have basically confirmed that there was a contract, either by

performance or court admission--it seems less likely that there would be a good faith dispute about the existence or terms of the agreement. Promissory estoppel protects parties who justifiably rely on promises in a variety of situations. And in some of the special exceptions discussed in the Sections below, there may be other policy reasons not to require a writing.

Of course, if there are too many situations where courts will enforce agreements that fail to meet writing requirements, parties may have less motivation to put such agreements in writing! So it may be difficult to say when such agreements should be enforced, and when they should not. In making rules in this area, the law tries to balance its desire to encourage parties to put important agreements in writing with its desire to enforce real, legitimate agreements.

***** ADDITIONAL REFERENCE:** Chapter 1 ("Basic Aspects of Contract Law"), Section 1.3c contains a more complete discussion of executory and executed contracts; and Chapter 2 ("Real Agreement (Offer and Acceptance)"), Section 2.4e, and Chapter 7 ("Other Contract Formation Problems"), Section 7.8 contain further discussion of promissory estoppel.

6.3b Agreements to Transfer Substantial Interests in Land Must Generally Be Written

In most jurisdictions, agreements to transfer a substantial interest in land must generally be written in order to be enforceable. Sometimes it is not easy to know whether something really is a "substantial interest in land" and therefore subject to the writing requirement. In this situation, "land" basically means the ground and anything strongly attached to it, like a building or a tree. An "interest" in land basically means a right a person has in the land. So an interest in land under this writing requirement does not mean only the ownership of real property, but also includes other substantial interests in such property.

What is considered a "substantial interest" in land depends on the jurisdiction. In many jurisdictions, this requirement generally applies to:

- (1) agreements for the sale of land;
- (2) leases for more than one year;
- (3) agreements for easements for more than one year;
- (4) mortgage agreements;
- AND (5) agreements for the sale of rights to timber, minerals, structures, or similar materials to be removed from the land by the buyer.

Following are brief definitions of some of these property terms.

*** **DEFINITION:** A **lease** is an agreement to rent property; that is, an agreement in which one party promises to allow another party to possess (but not own) real or personal property for a certain amount of time.

*** **DEFINITION:** An **easement** is basically a right to use (but not possess) the real property of another person in a specified way, such as a right to cross the property to reach a road.

*** **DEFINITION:** A **mortgage** is an interest in land which secures (or guarantees) the performance of some obligation, usually the repayment of a debt.

*** **CASE STUDY 139**

FACTS Chamroeun orally agreed to sell his house and land to Sitha for \$100,000. But soon after that, Sitha saw how badly the property and road nearby became flooded during the rainy season. In fact, it was a mess! Sitha decided he did not want to buy the property after all. So he refused to go through with the agreement with Chamroeun. Chamroeun asks the court to enforce the agreement.

QUESTION OF LAW Can Chamroeun enforce this agreement against Sitha?

DECISION No. Chamroeun cannot enforce this agreement because it was an oral agreement for the sale of land.

Contracts involving the sale of a substantial interest in land, such as its sale, must be in writing in order to be enforceable. In this case, Chamroeun failed to make a written contract with Sitha about Sitha's purchase of his land. Instead, their agreement was oral. So Chamroeun cannot enforce the agreement.

On the other hand, some agreements that relate to interests in land are not generally subject to this writing requirement. These agreements include:

- (1) an agreement to buy crops, which are generally considered to be goods;
- (2) an agreement to build a building on land;
- AND (3) a partnership or joint venture agreement in which the parties agree they will later buy and sell land (as long as the agreement contains no specific transfer of land interests).

In addition, in many jurisdictions, there are four exceptions to the general rule that agreements for the transfer of a substantial interest in land must be written to be enforceable. In these special situations, courts will enforce such agreements even though they do not meet the writing requirement! These exceptions occur where:

- (1) contracts are executed;
 - (2) contracts are admitted in court;
 - (3) promissory estoppel applies;
- OR (4) contracts are partly performed, under certain circumstances (in some jurisdictions).

The first three exceptions have already been explained in Section 6.3a, above.

The fourth exception is that some jurisdictions will allow buyers of interests in land to enforce agreements that do not meet the writing requirement if the buyer has already: (1) performed part of the contract, and (2) changed her position substantially in reliance on the agreement. How much performance and reliance is required to make such agreements enforceable varies in different jurisdictions. A jurisdiction may require that the person have taken possession of the property, or paid part of the purchase price, or made some improvement to the property, or some combination of the above possibilities.

CASE STUDY 140

FACTS Sambo is tired of living in the big city. So she orally agrees to buy a piece of land in Ratanakiri from Chuon for \$2,000. The terms are that Sambo will make a down payment of \$300, and pay \$200 each month after that until the total amount is paid. The agreement gives Sambo the right to possess the land immediately.

Sambo pays Chuon the \$300 down payment, moves onto the land with her whole family, and builds a new house on the land. She makes several monthly payments on time, and she and her family are enjoying the land very much.

But one day, Chuon comes to see Sambo, returns the money Sambo has already paid, and tells her he has changed his mind about selling her the land. Chuon says he wants Sambo to leave the property, and that she must do so because the agreement was oral.

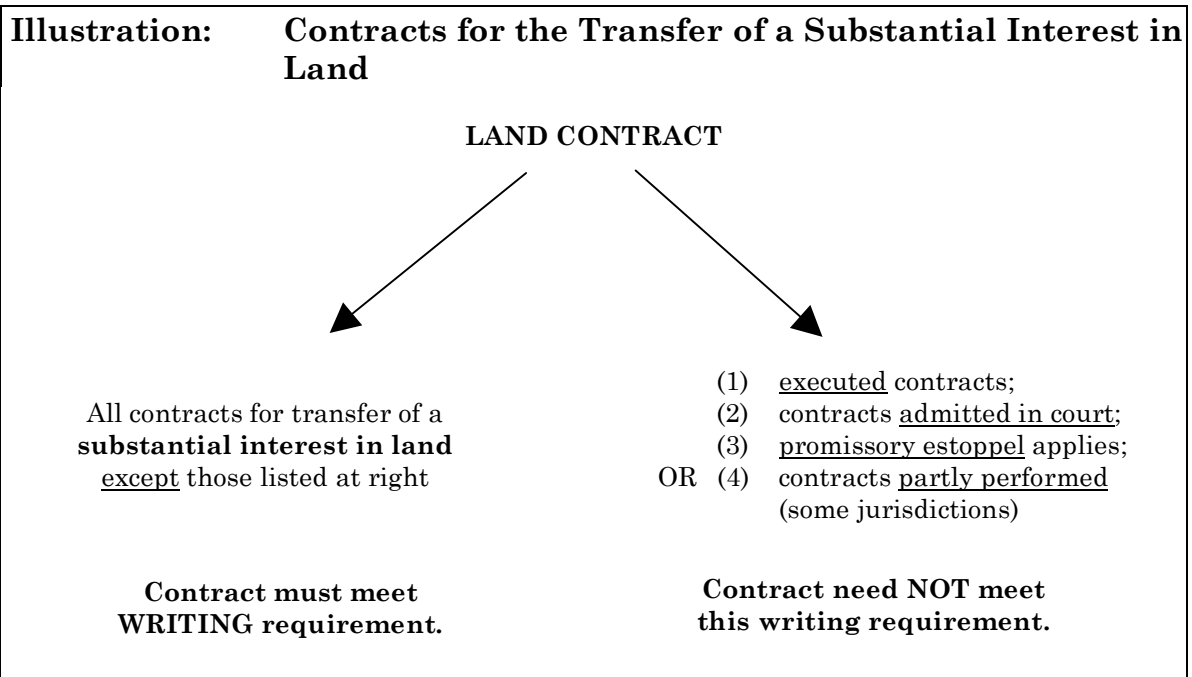
QUESTION OF LAW Can Sambo enforce this contract?

DECISION Yes, at least in some jurisdictions. Sambo has partly performed the oral land sale contract, and changed her position substantially in reliance on it.

Some jurisdictions make an exception to the general rule that contracts for the sale of land must be written where there are certain kinds of part performance by the buyer. Such jurisdictions say the contract may be enforced, even though it fails to meet the writing requirement, if the buyer has partly performed and changed her position substantially in reliance on the agreement.

In this case, the land sale contract Sambo and Chuon made was oral. However, Sambo (the buyer) partly performed by paying a large part of the sale price. And she changed her position substantially in reliance on the agreement, by taking possession of the land and building a new house on it. Therefore, in some jurisdictions, Sambo could enforce this agreement.

As noted above, different jurisdictions have different requirements for this exception. So it is important to check local law to see if the exception applies, and how it may apply.



6.3c Agreements That Cannot Be Performed Within One Year of the Time They Are Made May Be Subject to Writing Requirements

In many jurisdictions, contracts which cannot possibly be fully performed within one year of the date the contract is made must generally be written to be enforceable. This rule exists because the terms of a contract that cannot be performed within one year might easily be forgotten before the contract is completed. In that situation, it might be hard for parties and courts to enforce the contract. So the rule encourages parties to be clear about long term obligations.

However, some jurisdictions no longer apply this requirement. For example, England no longer requires this kind of contract to be written. So it is important to check the local law to see if the requirement applies.

In jurisdictions that do apply this rule, one difficult aspect of the rule is knowing whether it actually applies to a particular situation. The rule says that all contracts that cannot possibly be fully performed within one year of the date the contract is made must be written. For example, a contract for employment for five years cannot possibly be performed in only one year, so under the rule it must be written to be enforceable. However, an employment contract for the life of the employee could possibly be fully performed within one year--because the employee might die in less than a year! So this contract would not need to be written in order to be enforceable, even though it might last for many years, if the employee lived for many years. In applying this rule, what actually happens does not matter. It is the potential--at the time the contract is made--for the contract to be finished in less than one year that matters. It is also important to remember that the time in this rule is measured starting from the date the contract is made--not the date performance begins.

So in applying this rule, the important question to ask is: could the contract possibly be fully performed within one year from the date of the contract? If the answer is no, a writing is required. If the answer is yes, then no writing is required under this rule. The following two Case Studies show the difference between these two situations.

CASE STUDY 141

FACTS Mara telephones Poong and offers him a job managing the Blue Hotel for three years, at a salary of \$2,000 per year, starting in two weeks. Poong accepts the offer on the telephone.

But one week after Poong accepts the hotel's offer, he gets an offer for a better job negotiating contracts for a local textile manufacturer. Poong decides he does not want the hotel job after all. So he tells Mara he will not work for the hotel.

QUESTION OF LAW Can Mara enforce this agreement?

DECISION No. Mara cannot enforce the agreement because it is an oral agreement that cannot be performed within one year.

In many jurisdictions, contracts must be written if they cannot be fully performed within one year. In this case, Poong's agreement to work for Mara at the Blue Hotel requires more than one year for performance. In fact, it requires three years for performance. There is no way it can be fully performed before that time. Therefore, the agreement must be in writing

in order to be enforceable. But in this case, the agreement is oral. So Mara cannot enforce it against Poong.

CASE STUDY 142

FACTS Sary has the HIV virus. Eventually he develops AIDS. Unfortunately, he becomes very ill and is unable to care for himself any more. So he asks Sieng for help. Sieng orally offers to care for Sary for "as long as Sary lives," in return for \$1,000 to be paid by Sary immediately, and \$1,000 to be paid by Sary at the end of each full year of care by Sieng. Sary agrees orally.

Sieng begins to care for Sary. But Sieng finds that the job is very difficult, and that he has little time to spend with his own family. After six months, Sieng decides he cannot go on with the job. So he tells Sary that he is sorry, but that he cannot care for him anymore.

QUESTION OF LAW Can Sary enforce the oral contract he made with Sieng?

DECISION Yes. Sary can enforce the oral contract with Sieng because the contract could possibly be performed within one year, so it need not be written to be enforceable.

In many jurisdictions, agreements must be written if they cannot possibly be performed within one year of the time the contract is made. In this case, Sieng agreed to care for Sary for as long as Sary lived. At the time the contract was made, it was not certain that Sary would live for one year. And whenever Sary died, Sieng would have completed his obligation to care for Sary "as long as Sary lived." In other words, the agreement between Sary and Sieng might have been completely performed within one year. Of course, the agreement might not have been completed within one year. But that does not matter. What matters is the contract's potential--at the time the contract is made--to finish within one year. In this case, the contract between Sary and Sieng had the potential to finish in less than one year.

So this contract did not need be written to be enforceable. This contract is enforceable, and a court might order money damages for Sary. A court would probably not order that Sieng actually perform this personal services contract, because of the potential difficulties in enforcing the contract, as will be discussed in Chapter 10 ("Remedies"), Section 10.7a.

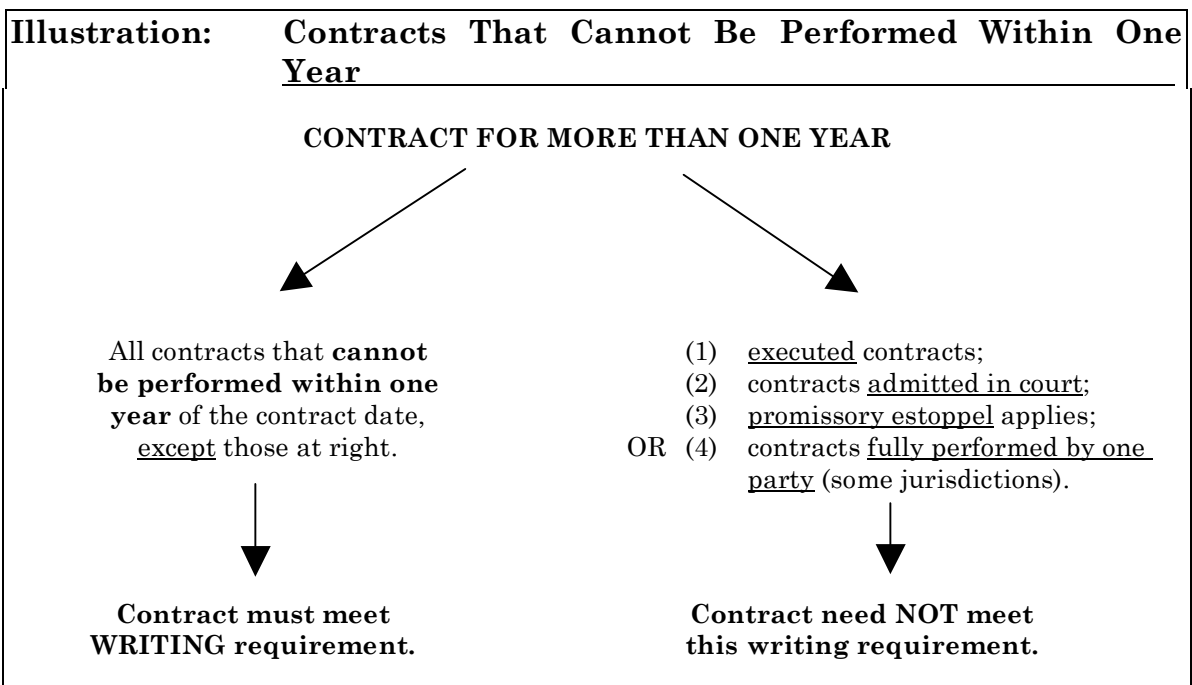
Although the law does not require a writing in situations like Case Study 142, the parties in such situations would best protect their interests by putting their agreement in writing anyway. This is because the contract might last many years. After all that time, the parties may have very different ideas or memories about the terms of their agreement.

There are four exceptions to the general rule that agreements that cannot be performed within one year must be written to be enforceable. In these special situations, courts will enforce such agreements, even though they do not meet the writing requirement! These exceptions occur where:

- (1) contracts are executed;
 - (2) contracts are admitted in court;
 - (3) promissory estoppel applies;
- OR
- (4) contracts are fully performed by one party (in some jurisdictions).

The first three exceptions were explained in Section 6.3a, above.

The fourth exception is that some jurisdictions will enforce oral agreements that cannot be performed within one year if one party has fully performed her obligations under the contract. This is really like a “part performance” exception, since the full performance of one party is only part of the entire contract. For example, if Mara in Case Study 141 actually paid Poong the full salary due to him for the whole three year employment contract, some courts at that point would enforce the contract even though it was oral. Of course, enforcing the contract at that point would basically mean enforcing Poong’s obligations, since Mara would have fully performed already. As noted above, only some jurisdictions apply this exception. So it is important to check the local law to see if the exception applies.



6.3d Suretyship Contracts (Agreements to Become Responsible for the Debts or Obligations of Another Person) May Be Subject to Writing Requirements

Suretyship contracts must be written in order to be enforceable in many jurisdictions. The main reasons for this rule appear to be to protect the surety, and to force her to think carefully before making such an agreement.

***** DEFINITION:** A **suretyship contract** is an agreement in which one person (the surety) agrees to become responsible for the debts or obligations owed by a second person (the debtor or promisor) to a third person (the creditor or promisee); the surety agrees to perform if the second person fails to pay the debt or meet the obligation.

As the above definition shows, suretyship contracts can involve obligations to pay debts or do other things. To form a suretyship contract, the surety's promise must be to meet the obligation of another person--not an obligation of the surety herself. Often, the creditor makes an agreement with the debtor at least partly because the surety agrees to pay the debt or obligation if needed--that is, the surety agrees to perform if the debtor fails to do so. For example, Emma and Max may agree that Max will give Ken certain goods, and if Ken fails to pay Max for the goods, then Emma will pay for them. That is a suretyship agreement.

In these situations, there are really two sets of promises: (1) the main set of promises between the debtor and the creditor; and (2) the suretyship set of promises between the surety and the creditor. It appears that these sets of promises can exist all in one agreement, or that the two sets can be separate agreements. Some jurisdictions distinguish between suretyship contracts and guarantee contracts. These jurisdictions appear to say that suretyship contracts generally occur where all the parties join in the same agreement, whereas guarantee contracts occur where the guarantor and creditor have an agreement separate from the main agreement between the creditor and debtor. Other jurisdictions seem to include both of the above arrangements within the term "suretyship contracts." That is the approach of this text.

In any case, the following chart shows basically how suretyship contracts work.

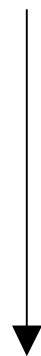
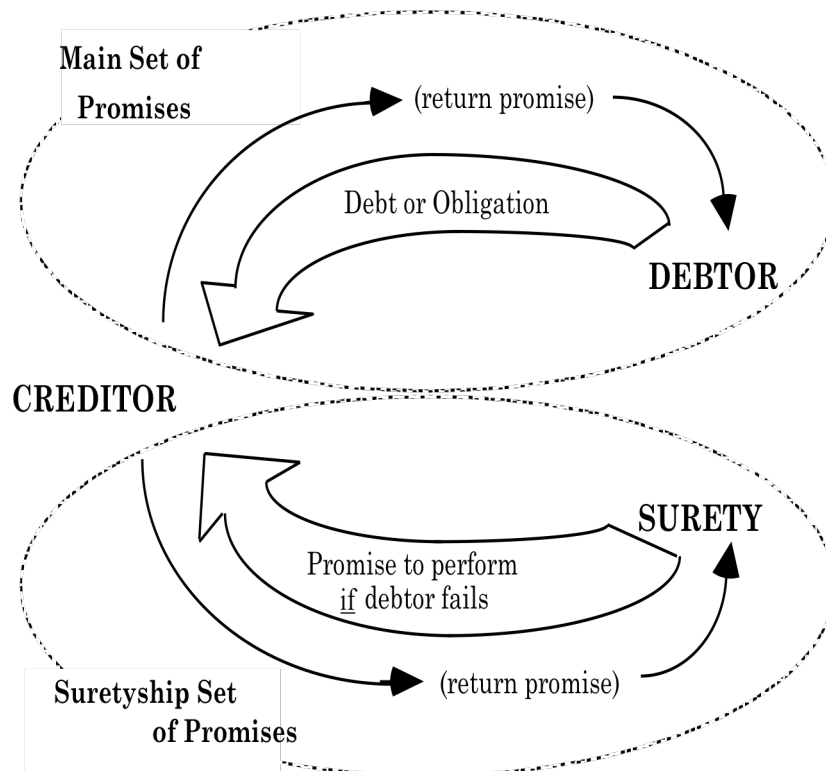


Illustration: How Suretyship Contracts Work

The general rule that suretyship agreements must be written to be enforceable is illustrated in the following Case Study.

CASE STUDY 143

FACTS Narann has a daughter named Dany who is very intelligent and hard working. Dany wants to attend university. However, her family is poor and cannot afford the university fees.

One day, Narann orally tells a money lender named Vanna that if Vanna will agree to lend \$500 to Dany to help her pay the university fees, then Narann will agree to repay the money if Dany fails to do so. Vanna agrees. He loans Dany the money, in exchange for Dany's promise to repay the debt and Narann's promise to guarantee the debt. Dany fails to repay any of the money.

QUESTION OF LAW Can Vanna enforce the agreement he made with Narann and recover the money from her?

DECISION No. Vanna cannot enforce the suretyship agreement with Narann because it was oral.

Suretyship agreements must generally be written to be enforceable. In this case, Narann promised to be responsible for the debt to be owed

by another person (her daughter Dany) to a creditor (Vanna). This made Narann a surety. But Vanna failed to put the suretyship agreement in writing. Therefore, it is not enforceable. Of course, Vanna can still enforce the main loan agreement against Dany.

One important example of a suretyship agreement that must be written to be enforceable is an agreement of an executor or administrator of the estate of a deceased person to pay the debts of the estate from the executor's or administrator's own personal funds.

***** DEFINITION:** An **executor or administrator of an estate** is someone who gathers the assets of a recently deceased person, pays the debts of the deceased person from those assets, and then distributes what remains to the legal heirs.

In general, executors resolve the affairs of those who leave wills, while administrators resolve the affairs of those who die without wills. For ease of discussion, this text will refer only to executors from this point forward.

The executor of an estate is not normally obligated to pay the debts of the deceased person from the executor's own personal funds. So a promise to pay the debts of the estate from personal funds of the executor is actually an agreement to become responsible for the debts of another--a suretyship contract. Therefore, such an agreement, like other suretyship contracts, generally must be in writing in order to be enforceable. In this way, the law tries to prevent creditors from holding executors personally responsible for the debts of the estate. It also tries to make executors think carefully before they agree to pay such debts from their own personal funds.

***** CASE STUDY 144**

FACTS Mono is a soldier whose nation is at war. Mono owes Samneang \$100, along with 5% per year in interest on that amount. But before Mono can repay this debt, Mono unfortunately dies fighting for his country.

After Mono's death, Pheara becomes the executor of Mono's estate. Samneang contacts Pheara to say that she is very sorry to hear about Mono's death, but that she wonders when she will be paid the \$100 plus interest that Mono owes her. Pheara tells Samneang that the estate has many debts, and it is not clear if they will all be paid. Pheara also tells Samneang orally that, if Samneang will agree to wait six more months for the money and agree to not ask for any more interest, then Pheara will pay the debt from her own personal funds, if there is no money available in Mono's estate. Samneang agrees.

QUESTION OF LAW Can Samneang enforce this oral agreement?

DECISION No, Samneang cannot enforce this agreement because it is an oral agreement of an executor (Pheara) to pay the debts of an estate from the executor's personal funds.

In general, agreements by executors to pay the debts of a deceased person's estate from personal funds must be written to be enforceable. This is because such agreements are really suretyship agreements, in which the executor agrees to be responsible for the debts of another person.

In this case, after Mono died, his executor Pheara agreed to become responsible for Mono's debt to Samneang--to pay the debt from Pheara's own personal funds if there was no money left in the estate to pay it. But this agreement was oral. Therefore, it cannot be enforced against Pheara.

There are four exceptions to the general rule that suretyship contracts must be written to be enforceable. In these special situations, courts will enforce such agreements even though they do not meet the writing requirement. These exceptions occur where:

- (1) contracts are executed;
 - (2) contracts are admitted in court;
 - (3) promissory estoppel applies;
- OR (4) there are contracts whose main purpose is the surety's own financial benefit.

The first three exceptions have already been explained in Section 6.3a, above.

The fourth exception is that a suretyship agreement that fails to meet the writing requirement is enforceable if its main purpose is to financially benefit the surety herself. This may occur even though the effect is still that the surety agrees to pay the debt of a different person (the debtor). The following Case Study illustrates this possibility.

***** CASE STUDY 145**

FACTS Vantha is a young business person who plans to open a big new factory to produce high quality condoms. Vantha makes a contract with the Modern Machine Company to have some modern machines made for her new factory.

In order to make these machines for Vantha, the Modern Company needs to continue to get supplies from the Strong Metal Company for several months. Vantha wants to make sure the Modern Company gets these supplies, so her new factory can open on time. So Vantha orally agrees with the Strong Company that if the Strong Company continues to deliver the supplies to the Modern Company, and the Modern Company fails to pay for them, then Vantha will pay for the supplies herself. Eventually,

the Modern Company does fail to pay the Strong Company for some of these supplies.

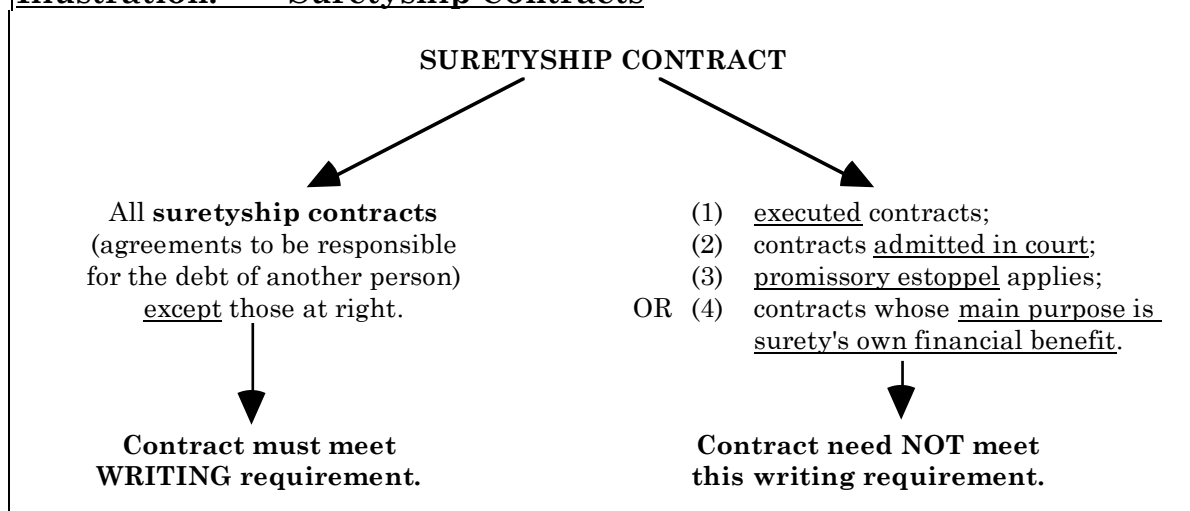
QUESTION OF LAW Can the Strong Company enforce this oral agreement against Vantha?

DECISION Yes. The Strong Company can enforce its oral suretyship agreement with Vantha because the main purpose of the agreement was to benefit Vantha financially.

If the main purpose of a suretyship agreement is to benefit the surety financially, then the agreement need not be written to be enforceable. This is an exception to the general rule about suretyship agreements.

In this case, Vantha agreed orally to pay for the supplies the Strong Company would deliver to the Modern Company--to be responsible for the debt of another--in order to make sure the machines that the Modern Company was making would be ready for her own new condom factory. So Vantha's main purpose in making the agreement was her own financial benefit, not helping the Modern Company. This contract was not required to be written. So the Strong Company can enforce it against Vantha.

Illustration: Suretyship Contracts



6.3e Agreements in Which the Promise of One Person Is Made in Exchange for Marriage or a Promise to Marry May Be Subject to Writing Requirements

In some jurisdictions, an agreement in which one person promises to do something in exchange for marriage or a promise to marry must generally be in writing to be enforceable. For example, an agreement to marry someone in exchange for \$300 must be written to be enforceable. This writing requirement also applies to promises to marry someone who is not a party

to the contract. However, as will be discussed below, this writing requirement does not apply to agreements that are no more than mutual promises to marry.

One reason for these rules may be to protect the parties to such important agreements. Another reason may be that, when a person marries for material reasons, or other reasons besides affection for her spouse, the law in many jurisdictions wants the parties to think carefully about whether that is a wise decision. The writing requirement promotes these goals.

However, it appears that many jurisdictions no longer have this requirement. And as discussed in Chapter 5 (“Legality”), Section 5.4c, many jurisdictions do not enforce agreements to marry! Even where such agreements are enforceable, it appears that modern courts would not actually order anyone to marry against her will. Courts in some jurisdictions may order a party to provide some monetary remedy because of an agreement to marry. So it is important to check the local law in this area.

*** **ADDITIONAL REFERENCE:** Chapter 5 (“Legality”), Section 5.4c contains further discussion of the legality of different kinds of contracts related to marriage.

CASE STUDY 146

FACTS Bunna orally promised his daughter Boroeth that he would transfer to Boroeth his big pink villa beside the Tonle Sap if she married Samrach. Boroeth agreed orally, and married Samrach. After the marriage, Bunna refused to give his daughter the villa he had promised. So she sued him in court.

QUESTION OF LAW Can Boroeth enforce this contract against her father?

DECISION No. Boroeth cannot enforce the agreement with Bunna because it is not in writing.

In many jurisdictions, contracts in which one party promises to do something in exchange for the other party’s marriage or promise to marry must generally be written to be enforceable, unless they are no more than mutual promises to marry. In this case, Boroeth and Bunna agreed that Bunna would give Boroeth the villa, and in exchange Boroeth would marry Samrach. But Bunna’s promise was not in writing. So it cannot be enforced against Bunna.

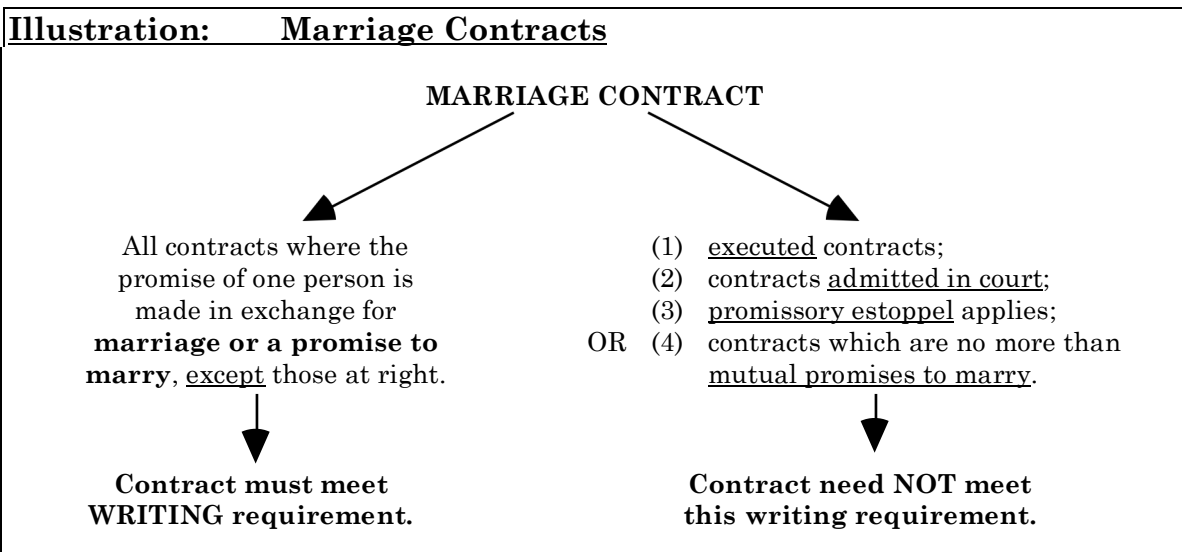
There are four exceptions to the general rule that contracts in which the promise of one person is made in exchange for marriage or a promise to marry must be written to be enforceable. In these special situations, courts will

enforce such agreements even though they do not meet the writing requirement. These exceptions occur where:

- (1) contracts are executed;
 - (2) contracts are admitted in court;
 - (3) promissory estoppel applies;
- OR
- (4) contracts are no more than mutual promises to marry.

The first three exceptions were explained in Section 6.3a, above.

The fourth exception is that no writing is required for contracts which are actually no more than mutual promises to marry--where two parties simply agree to marry each other--and there is no exchange of money, property, or other consideration. For example, in Case Study 146 above, if Boroth and Samrach had simply promised orally to marry each other, that agreement would not have been subject to a writing requirement. But if anything besides those promises was involved--as actually happened in Case Study 146--then many jurisdictions would require the agreement to be written in order to be enforceable.



6.3f Agreements for the Sale of Goods over a Certain Monetary Amount May Be Subject to Writing Requirements

In many jurisdictions, contracts for the sale of goods of more than a certain monetary amount must generally be written to be enforceable. For example, in jurisdictions in the United States, an agreement for the sale of goods of \$500 or more generally requires a sufficient writing in order to be enforceable. In France, it appears that contracts for “any thing” over 5,000 francs generally must be written to be enforceable, although there are some broad exceptions.

CASE STUDY 147

FACTS Sovandara's new job at the Ministry requires him to buy a fleet of vehicles for the Ministry. Sovandara searches carefully for the right vehicles. Finally, he orally agrees to buy 10 automobiles from Mom Thol for \$100,000.

Unfortunately, when the time comes for Mom Thol to deliver the automobiles, Mom Thol fails to do so. Mom Thol says that the automobiles will now cost Sovandara \$120,000. Sovandara asks the court to enforce the agreement.

QUESTION OF LAW Can Sovandara enforce this agreement?

DECISION No. The parties failed to put their agreement in writing, so it cannot be enforced.

In many jurisdictions, agreements for the sale of goods over a certain amount must generally be in writing to be enforceable. In this case, the sale of goods contract between Mom Thol and Sovandara for the cars was for \$100,000. This amount is far above the amounts that the laws of many jurisdictions specify for sale of goods contracts that must generally be written to be enforceable. However, in this case, there was no writing recording the agreement of Sovandara and Mom Thol. Their agreement was oral. So the agreement cannot be enforced.

In many jurisdictions, there are five exceptions to the general rule that contracts for the sale of goods over a certain amount must be written to be enforceable. In these special situations, courts will enforce such agreements even though they do not meet the writing requirement. These exceptions occur where:

- (1) contracts are executed;
- (2) contracts are admitted in court;
- (3) promissory estoppel applies;
- (4) contracts have been partly performed (enforceable to the extent of the part performance);

AND (5) contracts are for specially manufactured goods.

The first three exceptions were explained in Section 6.3a, above.

The fourth exception, which applies in many jurisdictions, says that sale of goods contracts that fail to meet the writing requirement are enforceable to the extent that payment has been made and accepted, or the goods have been received and accepted. This basically means that such contracts are enforceable to the extent that they have been partly performed, as long as the party receiving the performance has "accepted" it.

For example, suppose a buyer makes an oral agreement to buy 100 kilos of rice. If the buyer receives and accepts 10 kilos, a court would enforce the contract to the extent of the performance--the 10 kilos that were received and accepted. In general, this would appear to mean that the court would order the buyer to provide a remedy based on having the duty to pay 1/10 of the purchase price, since she received and accepted 1/10 of the rice in the oral contract.

The fifth exception, which also applies in many jurisdictions, says that a seller may be able to enforce an agreement for the sale of specialty manufactured goods that fails to meet the writing requirement. Specifically, many jurisdictions say that a seller can enforce such an agreement if:

- (1) the goods are to be specialty manufactured for the buyer;
- (2) the goods are not suitable for sale to others in the ordinary course of the seller's business;
- AND (3) the seller has made a substantial start on making the goods, or a commitment to get the goods, before the buyer repudiates the contract.

The purpose of this exception is to protect sellers of such goods when it is too late to do anything useful with the goods except sell them to the buyer who originally asked for them.

CASE STUDY 148

FACTS Heang owned a very popular restaurant in Battambang called Happy Heang's Restaurant. Heang made an oral agreement with Sambath's Glass Factory. Under the agreement, Sambath would manufacture and sell to Heang 2,000 special glasses, each with the special "Happy Heang's Restaurant" logo in blue and red, for 1,000 riels per glass.

However, after Sambath had created the design and made about half of the glasses, Heang decided he did not really want the glasses after all. So he told Sambath he would not go through with the agreement. Sambath asks the court for help.

QUESTION OF LAW Can Sambath enforce this oral agreement?

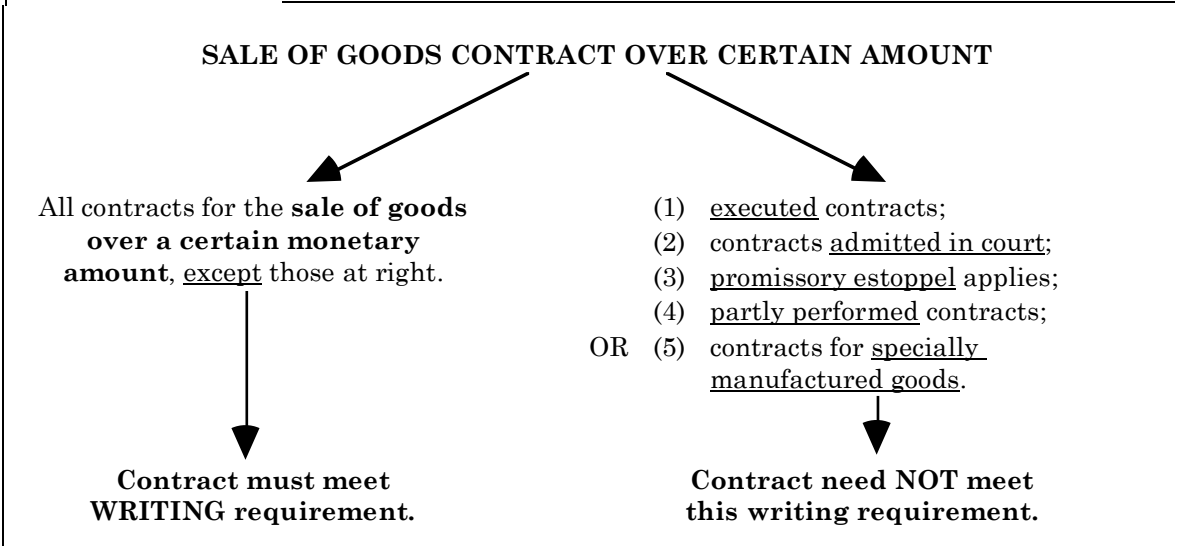
DECISION Yes. In many jurisdictions, Sambath could enforce this oral agreement for the sale of goods because of the exception for specialty manufactured goods.

The laws of many jurisdictions require that contracts for the sale of goods over a certain amount be written to be enforceable. But this is not required, in many jurisdictions, if the goods are to be specialty manufactured for the buyer, the goods are not suitable for sale to others in the ordinary

course of business, and the seller has made a substantial start on making the goods before the buyer repudiates the contract.

In this case, Happy Sambath had an agreement to make 2,000,000 riels worth of "Happy Heang" glasses for Happy Heang. Normally, many jurisdictions would require that this agreement be written to be enforceable. But in this case, the glasses were to be specially manufactured for Heang's restaurant; they were not suitable for sale to anyone else, with Heang's special design on them; and Sambath had made a very substantial start at making them before Heang told Sambath that he would not go through with the contract--since Sambath had already designed the glasses and actually made half of them! Therefore, all the requirements for the "specially manufactured goods" exception are met. So in this special situation, Sambath can enforce the contract even though it is oral.

Illustration: Contracts for the Sale of Goods over a Certain Amount



6.3g Other Contracts Some Jurisdictions Require to Be Written

The five types of contracts discussed in Sections 6.3b-f are not the only contracts that must be written in order to be enforceable in free market jurisdictions. In fact, most jurisdictions also require that various other kinds of important contracts be written.

There are many types of contracts which statutes in different jurisdictions may require to be written. A few examples are:

- (1) contracts for the sale of securities;
- (2) agreements to pay commissions to real estate brokers;
- (3) agency agreements under which a principal authorizes an agent to execute contracts which themselves are required to be written;

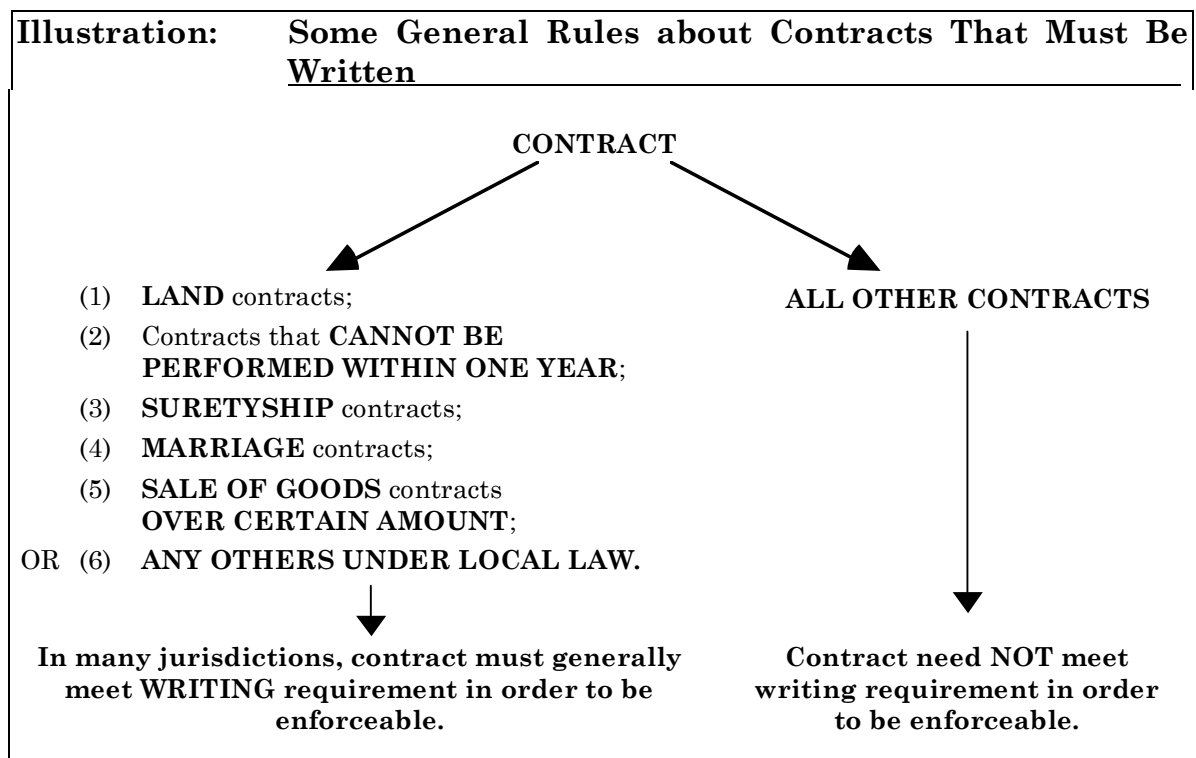
- (4) promises to pay debts which could not otherwise be enforced because of statutes of limitations; and
- (5) promises to pay debts already discharged in bankruptcy.

As readers may recall, these last two examples are also exceptions to the general requirement that consideration exist for promises to be enforceable in common law jurisdictions. Although no consideration is required in these situations, the law does want to be sure that parties think carefully about such promises before they make them--as with all other promises where the law requires a writing.

*** **ADDITIONAL REFERENCE:** Chapter 3 (“Consideration”), Section 3.8b contains a more complete discussion of promises to pay debts already discharged in bankruptcy, and Section 3.8d discusses promises to pay debts which could not otherwise be enforced because of statutes of limitations.

6.4 Summary of Some Basic Rules about Contracts That Many Jurisdictions Generally Require to Be Written

As discussed above in Section 6.3, although contracts generally need not be written in order to be enforceable, certain types of contracts must generally be written to be enforceable in many free market jurisdictions. Below is a chart that summarizes some of the basic rules about such contracts.



Of course, as discussed in Section 6.3, there are some exceptions to the general rule that the types of contracts specified above must be written. These exceptions say that, in certain situations, even contracts in these categories need not be written in order to be enforceable. The chart below summarizes some of these exceptions.

Illustration: Exceptions to Rules about Contracts That Must Be Written					
TYPE OF CONTRACT					
EXCEPTIONS	Marriage	Suretyship	Not in One Year	Interest in Land	Sale of Goods
Mutual Exchange of Promises to Marry	Need Not Be Written				
Main Purpose to Benefit Surety		Need Not Be Written			
Part Performance			Need Not Be Written	Need Not Be Written	Need Not Be Written
Specially Manufactured Goods					Need Not Be Written
Contract Executed	Need Not Be Written	Need Not Be Written	Need Not Be Written	Need Not Be Written	Need Not Be Written
Contract Admitted in Court	Need Not Be Written	Need Not Be Written	Need Not Be Written	Need Not Be Written	Need Not Be Written
Promissory Estoppel Applies	Need Not Be Written	Need Not Be Written	Need Not Be Written	Need Not Be Written	Need Not Be Written

6.5 Modifications of Contracts Are Subject to the Same Writing Requirements as the Original Contracts Were

Sometimes parties to a contract the law requires to be written seek to change terms of their original agreement after the contract has been written. When parties modify such a contract, they are really making a new contract. So the basic formula in this situation is:

Provisions from Old Contract + Modification(s) = NEW CONTRACT

This new contract must be in writing in order to be enforceable if it is a contract that the law would otherwise require to be written. This is because the writing requirement applies to the new contract in the same way as it applied to the old contract.

*** CASE STUDY 149	
FACTS	Vouch Lim is a tycoon who owns hotels in several major Cambodian cities. To supply all of her many hotel guests, Vouch Lim makes a written contract with a soft drink tycoon named Thida. This contract provides

that Vouch Lim will purchase from Thida 1,000 cases per month of a popular soft drink, for 24 months, for the price of 10,000 riels per case.

After 10 months, Vouch Lim decides that her business requires an additional 500 cases each month. Vouch Lim telephones Thida, who is on holiday in Kampot. Together they agree orally that Thida will deliver 1,500 cases (instead of only 1,000 cases) to Vouch Lim each month for the remaining 14 months of the contract.

But soon Thida realizes that she is not able to deliver that much. She tells Vouch Lim that she cannot perform the new agreement. Vouch Lim seeks to enforce the new agreement.

QUESTION OF LAW Can Vouch Lim enforce the new agreement for the additional 500 cases of soda?

DECISION No. The new agreement between Vouch Lim and Thida cannot be enforced because it failed to meet a writing requirement.

The new agreement is a contract for the sale of goods over the statutory amount in many jurisdictions, and also a contract which cannot be performed within one year. Therefore, the new agreement requires a writing containing the new terms. But in this case, the new agreement Thida and Vouch Lim made on the telephone was oral. So the new agreement cannot be enforced. Of course, the original written contract for the sale of the 1,000 cases per month can still be enforced.

6.6 What the Law Requires for a Sufficient Writing

When the law requires a contract to be written, it also requires that the writing be in a certain form in order to be sufficient. In fact, if a contract is written but does not contain what the law requires, it may still be unenforceable--as if it was not written at all! So it is very important to know not only which contracts must be written, but also what the law requires for a sufficient writing.

6.6a The Law Is Flexible about the Physical Form of the Writing

First of all, it is important to understand the physical form the writing may take. The “writing” is generally defined broadly, and many different physical forms are acceptable. The writing may be a formal document hundreds of pages long. But it may also be a short letter, a check, a receipt, or simply a note. And as technology makes available new ways to communicate by writing--such as through electronic mail--new forms will likely become acceptable.

In addition, the writing need not be only one document. In fact, the writing requirement may be satisfied by several writings. For example,

the requirement may be satisfied by a series of letters or notes between the parties, as in many of the Case Studies in this text, such as Case Studies 84-86. This flexibility is especially important in sale of goods contracts like those in Case Studies 84-86, where the parties may not have time to create one formal writing. In that situation, the parties may simply rely on a series of forms or acknowledgments sent between them.

6.6b The Law Is Flexible about the Circumstances under Which the Writing Is Created

It is also important to understand the rules about the circumstances under which the writing may be created. In general, the requirements of the law are not strict in this area either.

The law is flexible about why the writing is created, and who actually receives it. In fact, in many jurisdictions, the writing does not even need to be created for the purpose of recording the agreement. And there is no requirement that the party seeking to enforce the contract have ever seen the document!

For example, suppose two companies make a sale of goods agreement that fails to meet a writing requirement in the usual way (a written agreement signed by the parties). However, one party may still be able to enforce the agreement, using other documents that show there actually was an agreement. One way to do this might be to use an internal company memorandum from one employee to another employee at the seller's company asking the second employee to fill the order for the goods. This may be true even though the memorandum was not created for the purpose of recording the contract, and even though the party outside the company may have never seen the memorandum before going to court!

As for when the writing may be created, the law says that it need not be made at the time of the parties' agreement. It need be in existence only at the time a party seeks to enforce the contract, as the internal memorandum in the example above was. So a sufficient writing could be created much later than the time the parties actually agree about the terms of the contract--after the parties start to perform the contract, or even after a lawsuit about the contract has begun! In fact, as discussed in Chapter 3 ("Consideration"), Section 3.8e, a party may make a new written promise to meet obligations which were unenforceable before because of a failure to meet a writing requirement. Such new promises do not require new consideration to be enforceable. So if a party makes an oral agreement that is unenforceable because of failure to make a sufficient writing, but the party later signs a sufficient writing, the contract becomes enforceable against that party as soon as the writing is made!

***** ADDITIONAL REFERENCE:** Chapter 3 ("Consideration"), Section 3.8e contains further discussion of new promises to perform under contracts

that were previously unenforceable because of a failure to meet a writing requirement.

6.6c The Writing Must Contain the Essential Terms of the Contract

Finally, although as noted above the law is flexible about some aspects of the writing requirement, the law is more strict about what words the writing must actually contain in order to be sufficient. The laws of different jurisdictions have different requirements about this. So as always, it is important to check the local law relevant to any transaction.

(1) General Rules

Basically, where there is a writing requirement, the writing must contain at least every essential term of the parties' agreement. More specifically, many jurisdictions say a writing requirement is met--and the contract is enforceable--if the writing contains at least the following:

- (1) the essential terms of the contract that have not yet been performed, including a reasonable identification of the subject matter of the contract;
- (2) the identities of the parties; and
- (3) the signature of the party against whom the contract is being enforced or her agent.

Of course, as discussed above, the writing can be much more brief and basic than what is usually considered a formal written contract.

Sometimes it may not be easy to determine whether a writing meets certain parts of the above requirements about what the writing must contain. So we will examine some of these parts more closely.

First, the "essential terms" of the contract must be included in the writing. What terms are essential will differ to some extent in every contract. However, the requirement generally means the terms that are essential for the parties to understand--and the court to enforce--the contract. For example, in an employment contract for a specific time longer than one year, the essential terms would probably be the starting and ending dates of the contract, the compensation to be paid to the employee, and some description of the job of the employee. Other terms might also be essential, depending on the particular situation. This was discussed in Chapter 2 ("Real Agreement (Offer and Acceptance)"), Section 2.3b, which explained the requirement that a valid offer contain the truly essential terms of the proposed contract.

One term which many jurisdictions say will always be essential is a "reasonable identification of the subject matter." This basically means a description of what the contract is about that is sufficient for the parties

to understand it. For example, a written contract in which Saray agrees to pay \$5,000 to Kim Srong in exchange for “the green car at Kim Srong’s house” is probably sufficient, as long as both parties understand what it means. Of course, it is usually better to describe the subject matter much more carefully, to make sure there can be no dispute about what it means.

***** ADDITIONAL REFERENCE:** Chapter 2 (“Real Agreement (Offer and Acceptance)”), Section 2.3b contains a more complete discussion of what terms may be essential in different kinds of contracts, and the requirement that the material terms in a contract be definite and reasonably clear.

The requirement of the “signature” of the party against whom the contract is being enforced basically means some writing or mark that shows the party has actually made the agreement. The “signature” could be a stamp, a special symbol, a nickname, or many other things. In fact, some courts have even said that the letterhead on stationery can be a sufficient “signature!”

The other important aspect of the signature requirement is that courts will enforce the contract against a party who signed the writing--even if the other party did not sign! For example, Phally and Sarun may agree orally that Sarun will buy a certain piece of land from Phally. Suppose Phally signs the written contract recording this transaction, but Sarun does not. In this situation, Sarun could enforce the contract, but Phally could not if Sarun did not admit to making the contract. The reason for this rule is that the party seeking to enforce the contract--Sarun in this example--is actually confirming that he has agreed to the contract by going to court. So his signature is not really needed. But it would often be unfair to enforce a contract that must be written against someone who never signed it and does not admit to making it. That could (and often does) mean that the party never actually agreed to the contract. A contract in this situation appears to be like a voidable contract in the sense that one party (the party who did not sign the writing) could choose not to proceed with it, and in that case the other party could not force her to do so.

***** CASE STUDY 150**

FACTS Ann wants to start a business to sell bicycles, so he can earn money and also reduce air pollution in the city. He starts to look for a suitable shophouse for his new business.

After a few days, Ann orally agrees to buy Mony’s shophouse and land for \$2,000. Ann gives Mony a \$100 down payment on the shophouse, and Mony writes the following note for Ann:

"Received from Ann \$100 as down payment for purchase of Mony’s shophouse and land at 77,777 Monivong Blvd. by Ann. Balance due: \$1,900."

Both Ann and Mony sign the note.

Unfortunately, there is later a dispute about the agreement. Mony returns the money, claiming there is no contract because there is no sufficient writing. Ann asks the court to enforce the contract.

QUESTION OF LAW Is this note sufficient to create an enforceable contract between Mony and Ann?

DECISION Yes. The note Ann and Mony signed is sufficient because it meets all the writing requirements for a contract for the sale of real estate.

In general, where a contract must be written, the writing must contain at least the essential terms, including a reasonable description of the subject matter, the identities of the parties, and the signature of the party against whom the contract is being enforced. In this case, the note Mony and Ann signed about the sale of Mony's shophouse meets all these requirements. The parties are stated (Mony and Ann); the essential terms are included (the sale of Mony's shophouse and land at 77,777 Monivong Blvd. to Ann for \$2000); and the parties (Mony and Ann) have signed the note. So the writing requirement has been met here, even though the note is brief and informal. The contract is enforceable.

Of course, it is usually wise for parties to make the writing more complete, in order to protect their interests, and avoid disputes and confusion. In fact, if parties fail to include a term of their agreement in the writing, they may have difficulty enforcing that term--or be unable to do so at all! In common law jurisdictions, this is partly because of the important “parol evidence rule” which will be discussed in Chapter 8 (“Interpretation of Contracts”). So although a very brief note may satisfy the writing requirement for a contract to be enforceable, it is usually better--and safer--to create as complete a document as possible.

***** ADDITIONAL REFERENCE:** Chapter 8 (“Interpretation of Contracts”), Section 8.4b discusses the parol evidence rule, which many common law jurisdictions use to determine the status of terms which are not included in the writing that records a contract.

(2) Sale of Goods Contracts

As noted above, some jurisdictions require less for writings of sale of goods contracts than they require for other types of contracts. For example, the Uniform Commercial Code in the United States says that for sale of goods contracts subject to the writing requirement, the writing must contain three things in order for the contract to be enforceable:

- (1) the identity and quantity of goods;
- (2) language sufficient to indicate that a contract has been made between the parties;

AND (3) the signature of the party against whom the contract is being enforced or her agent.

This law does not require that the writing include terms such as time or place of payment or delivery, the general quality of the goods, warranties or even price. This is because courts can generally supply (or imply) this information from other sources, such as market conditions, trade customs and practices, and the course of dealing between the parties. Of course, a well-drafted contract would probably include most or all of this information, in order to avoid disputes and protect the parties.

This rule does require that the writing contain at least the quantity of goods, and courts will not enforce the contract beyond the quantity of goods stated in the writing. For example, if a person makes an oral sale of goods contract to buy 10 tractors, but the writing recording the agreement says only 8 tractors, the party can only enforce the agreement for 8 tractors.

In addition, what will be a “sufficient” writing to show that parties actually made a contract could vary a great deal in different situations. It seems that there should be at least some indication of who is making the contract, and the fact that those persons actually have an agreement. For example, a writing that simply said “agreed 8 of Sovann's tractors for Pal Chuon” might meet this requirement. But a writing that said only “8 tractors” might not meet the requirement.

The “signature” requirement is basically the same for sale of goods contracts as it is for other contracts. However, there is one exception in some jurisdictions, such as Germany and the United States. This exception basically applies where both parties are merchants, the merchants make a sale of goods agreement that is not written, and a signed written confirmation is sent by one merchant and received by the other merchant. The exception says that this confirmation creates a contract that can be enforced against either merchant--including the one who did not sign--unless the non-signing merchant objects within a specified short time after receiving the confirmation. For example, in the United States, this time is 10 days.

This exception helps parties create more sale of goods contracts more quickly and easily. It also limits the ability of the non-signing merchant to “play the market.” The merchant might do that because in this situation she would have the option to perform the contract or not. So she could wait to see if market conditions at the time of performance made it profitable for her to perform or not. To allow this might be unfair to the merchant who did sign the writing.

***	CASE STUDY 151	(U. S. commercial code)
<u>FACTS</u>	Sin and Tech meet at a restaurant. Sin agrees to purchase three Cam-Pack Z-100 computer systems from Tech for \$1,000 per system.	

As evidence of their agreement, Sin and Tech prepare a writing on a small scrap of paper. The writing states that Tech will provide the three computer systems to Sin for \$3,000. Sin signs the piece of paper.

But later Sin decides that he does not wish to buy that type of computer. He tells Tech he does not have to perform the contract because there is no sufficient writing. Tech tries to enforce the agreement.

QUESTION OF LAW Is the writing sufficient for Tech to enforce the agreement?

DECISION Yes. Tech can enforce the agreement because the writing is sufficient for a sale of goods contract.

A sale of goods contract over a certain monetary amount generally requires a sufficient writing in order to be enforceable. Because the agreement between Sin and Tech is for the sale of goods (computers) for \$3,000--an amount higher than the statutory amount in many jurisdictions--the agreement must generally be in writing to be enforceable. And in this case, the parties' agreement is in writing.

But even if such an agreement is written, the writing must still be sufficient, or the agreement cannot generally be enforced. For a writing of a sale of goods contract to be sufficient, many jurisdictions simply require that the writing contain three things: the identity and quantity of goods; language sufficient to show the parties made a contract; and the signature of the party against whom the contract is to be enforced. In this case, the contract of Sin and Tech satisfies these requirements because it contains the identity and quantity of goods (three Cam-Pack Z-100 computer systems); sufficient evidence of a contract (the statement that Tech will sell the computers to Sin); and the signature of the party against whom the contract is being enforced (Sin). So this contract is enforceable against Sin.

*** **ADDITIONAL REFERENCE:** Chapter 2 ("Real Agreement (Offer and Acceptance)"), Section 2.3b discusses the general requirement that offers (and contracts) be definite and reasonably clear, and the less strict rules some jurisdictions have for sale of goods contracts.

6.7 Effect of Failure to Meet a Writing Requirement: the Agreement Is Generally Unenforceable, but There Are Limits on that Rule

As discussed above, the general effect of a failure to meet a writing requirement is that the agreement is unenforceable. In fact, statutes in some jurisdictions state that these contracts are void.

However, in many jurisdictions, such agreements are not always void, because of the many limits on the general rule which are discussed in Sections 6.3-6.6, above. These limits can mean that some such agreements may

basically be valid, or that they can be enforced by one party. In addition, restitution is generally available even where such an agreement is unenforceable. And in limited situations, promissory estoppel may apply.

In many jurisdictions, agreements that fail to meet writing requirements can be enforced by either party--and so are basically valid--in a fairly large number of different situations. For example, as discussed in Sections 6.3 and 6.4, this is the case if the agreements are fully executed, or if both parties admit in court that they exist. By contrast, “void” agreements such as most illegal agreements cannot generally be enforced, regardless of whether they are executed or admitted in court. Of course, as explained in Chapter 5 (“Legality”), Section 5.5, there are a few situations where illegal agreements can be enforced.

Moreover, in many jurisdictions, agreements that fail to meet writing requirements may be enforced by one party. That could make them comparable to voidable in certain situations, since one party would basically have the choice of proceeding or not proceeding with the contract. For example, as discussed above in Section 6.6, where a writing is signed by one party but not the other party, the effect is that the non-signing party can enforce the agreement, but the signing party cannot enforce it if the non-signing party does not admit to the agreement. In addition, if one party admitted in court that such a contract was made but the other party did not, that would also appear to give the party who did not admit to the contract the option to proceed or not proceed with it.

***** ADDITIONAL REFERENCE:** Chapter 1 (“Basic Aspects of Contract Law”), Section 1.3a contains further discussion of valid, voidable, and void agreements; and Chapter 5 (“Legality”), Section 5.5 discusses the few situations where parties may be able to enforce illegal agreements.

In addition, even if an agreement is not enforceable because of a failure to meet a writing requirement, the parties can still generally recover restitution. That would basically be the reasonable value of anything one party provided to the other party because of the agreement. This rule is similar to the one that says parties who disaffirm contracts must generally provide restitution of anything they have received, as explained in Chapter 4 (“Capacity”). The basis for this kind of recovery is quasi-contract, which aims to prevent unjust enrichment, as explained in Chapter 1 (“Basic Aspects of Contract Law”) and other Chapters.

***** CASE STUDY 152**

FACTS Sophat orally promises to marry Samen in exchange for Samen’s oral promise to marry him and pay him total of \$1,000. They agree that the money will be paid in installments of \$100 per month in the 10 months before the marriage.

After two months have passed, and Samen has paid Sophat \$200, Sophat decides he does not wish to marry Samen after all. Sophat says he has found someone who will pay him \$2,000 to marry her, and so he no longer needs Samen.

QUESTION OF LAW Can Samen recover the \$200 she has paid Sophat even though she cannot enforce the oral agreement?

DECISION Yes. Samen can recover the money because parties in this situation can generally get restitution of what they have already given to the other party under the agreement.

In general, parties can get restitution where a contract is not enforceable because of a failure to meet a writing requirement. In this case, Samen and Sophat made an oral agreement which was a promise of marriage in exchange for a promise to pay money and to marry. This agreement is not enforceable in many jurisdictions, because such agreements must generally be written to be enforceable. However, parties can generally get restitution of what they have given to the other party in situations like these. So Samen can recover the \$200 she gave to Sophat.

Finally, as discussed in Section 6.3a, a party may in limited situations use the doctrine of promissory estoppel where there is a failure to meet a writing requirement. Common law courts apply promissory estoppel where one party justifiably relies on a promise and that party will suffer an unjust loss if the promise is not enforced, even though there is no enforceable contract. In the case of a failure to meet a writing requirement, the most obvious example of how this could occur would be situations like the one discussed in Section 6.3a. That was the Case Study 175 situation, where a party justifiably relied on his parents' promises to transfer their farm to him, even though there was no writing. Other potential examples of situations where promissory estoppel might be appropriate include where one party falsely tells the other party that there is no writing requirement, or that a writing will be created later, or that the party will not use the lack of a sufficient writing as a defense in court. In situations like that, the other party might justifiably rely on the first party's promise and suffer an unjust loss if the promise is not enforced. But as noted earlier, courts use promissory estoppel only in limited situations where the reliance really was justified, and the potential loss really would be unjust.

***** ADDITIONAL REFERENCE:** Chapter 1 ("Basic Aspects of Contract Law"), Section 1.5 contains a more complete discussion of quasi-contract; Chapter 4 ("Capacity") discusses the availability of restitution when parties disaffirm voidable contracts; Chapter 7 ("Other Contract Formation Problems"), Section 7.8 explains promissory estoppel; and Chapter 10 ("Remedies") discusses potential remedies when there is a contract dispute.

6.8 Formalities Other Than Writing Requirements

Many jurisdictions have other contract formality requirements, in addition to writing requirements. These requirements may be designed to protect one or both parties to the contract, or even other parties. The requirements vary from one jurisdiction to the next, and we will not discuss them in great detail. But it is important to check the local law of the relevant jurisdiction to see if any of these special requirements apply.

Some other formality requirements relate to whether contracts are enforceable. For example, some jurisdictions may require that certain types of contracts be registered with or notarized by a certain authority, or that they be made under seal, in order to be valid and enforceable. In addition, statutes in some jurisdictions say that, in certain special situations where one party may have much more bargaining power than the other party, the stronger party to the contract must put certain kinds of provisions in very visible print, or those provisions will not be enforceable. The purpose of these statutes is generally to protect consumers. For example, these kinds of statutes might regulate certain types of clauses in standard insurance contracts, such as exclusion clauses--clauses that say the insurance policy does not cover a certain type of risk. Terms in these kinds of contracts may also in certain cases be unenforceable because the contracts are adhesion contracts, which were introduced in Chapter 1 ("Basic Aspects of Contract Law"), and will be further discussed in later Chapters. Contracts generally do not require witnesses to be enforceable, though witnesses may be useful in helping parties prove aspects of a transaction in court if there is later a dispute.

Other formality requirements may not actually relate to whether a contract is enforceable, but to some aspect of the performance of the contract. Two of the most common of these requirements are that the deed recording the transfer of title to real property (full legal ownership) must be delivered to the person receiving the property and registered with some competent authority in order to be effective. This does not mean that these formalities are required for a land sale contract to be valid. The deed is different from the contract. These requirements simply mean that, even if the contract is valid, the buyer cannot get full legal title to the property until these other formality requirements are met. The basic purpose of the recording requirement is to provide an accurate public record of who owns land.

***** ADDITIONAL REFERENCE:** Chapter 7 ("Other Contract Formation Problems"), Section 7.7b discusses adhesion contracts and unconscionability; and Chapter 8 ("Interpretation of Contracts"), Section 8.3i discusses how courts may not enforce certain terms in adhesion contracts.

6.9 Formality in the Cambodian Legal Tradition and the Civil Law Tradition

The approaches of current Cambodian law and the civil law tradition appear to be generally compatible with the approach to formality discussed in this Chapter. Although there are some differences, they do not seem to be particularly important.

***** CAMBODIAN LAW PERSPECTIVE:** The current Contract Law of Cambodia (Decree #38D (1988)) and other Cambodian laws contain many provisions relevant to the discussion of formality in this Chapter. These provisions seem basically compatible with the approach discussed in this Chapter, except perhaps that Cambodian law does not appear to have writing requirements for marriage contracts or those that cannot be performed within one year. Some of the relevant provisions are discussed below.

Basic Provisions

Decree #38D imposes a number of formality requirements on contracts. Most of these are writing requirements. Many of these requirements are similar to or the same as those found in other free market jurisdictions.

Article 4 provides that contracts “may be made orally or in writing,” and that the law will set up “precise formalities” for making contracts. These provisions are consistent with the approach discussed in this Chapter.

Article 4 also states that “every contract not consistent with the formalities fixed by law shall be deemed void, except where there is any provision or rule of law contrary to this.” This provision is consistent with statutes in some free market jurisdictions. However, as discussed above in Section 6.6, such contracts are not always void in many free market jurisdictions, since courts in those jurisdictions will enforce them in some circumstances. It is not clear if this is also true under Decree #38D. Article 4 does contain an exception for “provisions” and “rules of law” contrary to the rule that says such agreements are void. It is possible that this exception would allow courts to enforce agreements that did not meet formality requirements in some situations.

In addition, Article 1 provides that a contract is an agreement to “create, change, or terminate” obligations. This appears to mean that modifications of contracts are considered to be new contracts. That would also seem to mean that such modifications are still subject to writing requirements, as in the approach discussed earlier in this Chapter.

Specific Formality Requirements

As in other free market jurisdictions, specific kinds of contracts must meet certain formality requirements in order to be enforceable under Cambodian law.

Agreements That Must Be Written

The following are types of agreements that Decree #38D requires to be in writing to be enforceable:

- (1) contracts regarding money or "items" worth more than 5,000 riels (Article 4);
- (2) agreements to withdraw existing lawsuits to avoid contracts on the basis of incapacity, mistake, duress, or fraud (Article 20);
- (3) contracts for loans with interest (Article 57);
- (4) personal property mortgage contracts (Article 65);
- (5) contracts for lease of real or personal property longer than one year (Article 101); and
- (6) suretyship contracts (Article 112).

In addition, the current Land Law of Cambodia (Decree #100D (1992)) requires that the following type of agreement be written to be enforceable:

- (7) contracts for the transfer of real property rights (estates) (Articles 179, 190, and 194).

And the current Cambodian Labor Law (1997) appears to require that the following types of agreements be written to be enforceable:

- (8) apprenticeship contracts (Articles 52-53); and
- (9) collective bargaining agreements (Article 96).

These requirements seem generally consistent with those discussed in this Chapter, except that there do not appear to be any writing requirements for marriage contracts or contracts that cannot be performed within one year. In addition, it appears that the "items" Article 4 describes may include not only goods, but other things as well. Finally, it is not clear exactly which real property rights require writings under Articles 179, 190, and 194 of the Land Law. However, "estate" is defined in great detail in Articles 6-9, and Article 10 lists nine possible estates, including "proprietary," temporary possession, easements and mortgages. It may be that these are the estates subject to the writing requirement.

What the Writing Must Contain

Although there do not appear to be any general requirements in Decree #38D as to what a writing must contain in order to be sufficient, there are such requirements as to three specific kinds of contracts.

- (1) Contracts dealing with items used in commercial trade must clearly and separately describe the items according to their quality and quantity. (Article 17)
- (2) Contracts for loans with interest must clearly state the names of the parties, residences of the parties, loan amount, amount of interest, loan duration, and due date for repayment. In addition, the borrower must sign the contract. (Article 57)
- (3) Personal property mortgage contracts must clearly specify the mortgaged property and the amount of debt. (Article 65)

These requirements seem consistent with the rules discussed in this Chapter.

Other Specific Formalities

There are a number of other formality requirements in various Cambodian laws related to contracts. In particular, Decree #38D and Decree #100D contain the following additional requirements.

- (1) Sale deeds evidencing real property transfers must be “certified and registered” in order for the transfer to be valid, and such transfers are valid against third parties at the time of the certification and registration. Personal property transfers are valid against third parties when the property is “delivered into the hands of the purchaser,” unless the transfer is done by certified deed, in which case it is valid against third parties at the time the deed is certified. (Article 41 of Decree #38D and Article 179 of Decree #100D)
- (2) Personal property mortgage contracts are “considered valid” only when the creditor is in possession of the mortgaged property. (Article 65 of Decree #38D)

These requirements seem basically compatible with the rules discussed in this Chapter.

***** CIVIL LAW PERSPECTIVE:** The civil law approach to formality appears to be generally compatible with the one discussed in this Chapter, although the specific rules and specific kinds of contracts that must be written naturally differ to some extent in different jurisdictions. As always, it is important to check the relevant local law.

In France, certain important contracts must be written to be enforceable. For example, it appears that contracts for “any thing” over 5,000 francs must generally be evidenced by a signed writing or a “notarial act” in order to be valid. However, there seem to be a number of situations that are not covered by this rule, including “commercial contracts,” or where it is “materially or morally impossible” to meet the requirement. For example, it may be “morally” impossible to use a writing for contracts within a family.

Or it might be impossible as a practical matter to use writings where they are not customary, such as at some markets. In addition, French law appears to require that real property insurance contracts, apprenticeship contracts, and residential lease contracts be written to be valid.

In France, when agreements fail to meet writing requirements, it appears that they may be either void or voidable. When agreements in the “public interest” fail to meet writing requirements, they are void and they cannot be enforced. “Public interest” agreements appear to be those that affect the public welfare, such as agreements to provide utilities, health care, or public transportation. When all other agreements fail to meet writing requirements, they seem to be voidable by either party.

6.10 Questions for Review

CHAPTER 6 – QUESTIONS FOR REVIEW

1. Are oral contracts generally enforceable?
2. Why are some contracts required to meet writing requirements?
3. List five important types of contracts that some jurisdictions generally require to be written in order to be enforceable.
4. What are three general situations where courts in many jurisdictions will enforce agreements even though they fail to meet writing requirements?
5. Describe the basic rules about when agreements for the sale of interests in land must be written.
6. Describe the basic rules about when agreements that cannot be performed within one year must be written.
7. Describe the basic rules about when suretyship agreements must be written.
8. Describe the basic rules about when marriage agreements must be written.
9. Describe the basic rules about when sale of goods agreements must be written.
10. Give examples of some other types of agreements that some jurisdictions require to be written.

11. Are contract modifications subject to the same writing requirements as the original contracts were?
12. What does the law generally require for a sufficient writing?
13. What simpler requirements do some jurisdictions have for sufficient writings of sale of goods agreements?
14. What are the effects of failure to meet a writing requirement?
15. Give examples of some formality requirements other than writing requirements.
16. Is the Cambodian approach to formality generally compatible with the one discussed in this Chapter?
17. Is the civil law approach to formality generally compatible with the one discussed in this Chapter?