

CHAPTER SEVEN

OTHER CONTRACT FORMATION PROBLEMS

7.1 Introduction

Chapters 2-6 of this text explained five basic elements that many jurisdictions require in order for a valid contract to exist. Those elements are real agreement (offer and acceptance); consideration (in common law jurisdictions); capacity; legality; and formality. These may be the most basic and common formation problems that affect whether an agreement is enforceable.

However, even if an agreement meets these basic requirements, other formation problems may affect whether it can be enforced. Some agreements with these types of problems may be called “defective” agreements. The “defects” in such agreements generally relate to how or why the agreements are formed. Specifically, the other formation problems discussed in this Chapter relate to:

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

The problems will be briefly summarized in Section 7.2 below, then discussed separately in the Sections that follow.

***** ADDITIONAL REFERENCE:** Chapter 1 ("Basic Aspects of Contract Law"), Section 1.4f contains a more concise discussion of the other contract formation problems discussed in this Chapter; and Chapters 2-6 discuss basic formation problems that may affect whether an agreement is enforceable.

7.2 A Variety of Other Formation Problems May Affect Whether Agreements Are Enforceable

An agreement may meet the basic requirements for a valid contract, and seem to be enforceable by all parties. But in certain situations, such an agreement may still be "defective" for some other reason, and therefore may be void or voidable. And in some limited situations--where promissory estoppel applies--courts may even enforce promises where there is no enforceable agreement at all!

As noted above, this Chapter will examine six other formation problems that can affect whether a court will enforce agreements. These problems are briefly summarized below.

(1) Mistake -- Agreements which result from mistakes about existing facts may be void or voidable. Mistakes are beliefs that are not in accord with the facts. They may be bilateral (made by both parties) or unilateral (made by only one party). Basically, agreements resulting from mistake are void where the mistake is so serious there really is no "agreement" courts can fairly enforce, such as where the subject matter of the agreement has actually been destroyed at the time of the agreement. Agreements resulting from bilateral mistakes are voidable where the mistake is basic and about a material fact, and the party seeking to avoid the agreement did not assume the risk of the mistake. Agreements resulting from unilateral mistakes are voidable under the same rules, except that there is an additional requirement: either the other party caused or had reason to know of the mistake, or enforcement would be unconscionable. Examples might be where one party made a serious mistake as to the identity of the other party, or as to computation of prices in the agreement, assuming all the above requirements for mistake are met. Mistake is discussed in Section 7.3 below.

(2) Misrepresentation -- Agreements that are the result of misrepresentation are generally voidable, but they may be void. Misrepresentations are statements that are not in accord with the facts. They may be fraudulent (intentional) or innocent (unintentional). Basically, agreements that result from misrepresentation about the formation of an agreement--such as where a party did not even know he was signing a contract--are void. Agreements that result from misrepresentation in the inducement of the agreement are voidable where one party misrepresents a material fact and the other party justifiably relies on it in making the agreement. A potential example would be a seller misstating the nature or condition of goods to a buyer. This is discussed in Section 7.4.

(3) Duress -- Agreements resulting from duress are voidable. Duress is using an improper threat to induce a party to make a contract. Duress generally consists of threats to commit crimes or torts that will harm the victim, his family, or his property. This will be discussed in Section 7.5.

(4) Undue Influence -- Agreements resulting from undue influence are voidable. Undue influence is improperly influencing a victim to make an unfair contract, often through a relationship of trust or confidence. This will be discussed in Section 7.6.

(5) Unconscionability -- In very limited situations, courts may refuse to enforce agreements or parts of agreements because they are unconscionable. Unconscionable agreements are basically those whose process of formation or actual terms are so unfair that they shock the conscience of the court. This is more likely to occur with adhesion contracts. It is also more likely to occur where there are elements of both procedural unconscionability (extreme unfairness in the process of formation) and substantive unconscionability (extreme unfairness in the actual terms). Courts usually say unconscionable agreements are unenforceable, though it may be possible to sever or reform the unconscionable part of the agreement and enforce what remains. This will be discussed in Section 7.7.

(6) Promissory Estoppel -- Under the limited common law doctrine of promissory estoppel (detrimental reliance), courts may enforce a promise where one party justifiably relied on it and injustice would result if it is not enforced, even though there is no enforceable agreement. The formation "problem" here is really this potential injustice. Promissory estoppel is rarely used, because it requires: a real case; a promise by one party; actual reliance by another party; justifiable reliance by that same party; and an unjust loss by the party who relied if the promise is not enforced. The last two elements are not usually present. Where courts do use the doctrine, the promise is enforceable to the extent justice requires--not necessarily to the same extent as a normal contract promise. Reliance damages seem most common where promissory estoppel applies. This is explained in Section 7.8.

Basically, agreements made under the influence of one of the first four types of events described above--mistake, misrepresentation, duress, or undue influence--may be unenforceable because they are not knowing and voluntary agreements, even though they may have an offer and an acceptance. In these four situations, parties have been forced or pressured to agree, have been tricked into agreeing, or have simply made an important mistake about the agreement.

The last two events described above--unconscionability and promissory estoppel--reflect special rules courts use in very limited situations to achieve justice where other rules will not. Unconscionable agreements are not enforceable because of some great unfairness in how the agreement was formed or its actual terms. And courts use promissory estoppel only where--even though no enforceable contract exists--one party has justifiably relied on a promise, and injustice will result if the promise is not enforced.

One other type of contract formation problem which is not discussed in detail in this Chapter is the situation where quasi-contract applies.

Under quasi-contract, courts may actually impose contract obligations--even though they cannot enforce a contract--in order to avoid unjust enrichment of one of the parties. This text will not discuss this situation in detail here because it was explained in Chapter 1 ("Basic Aspects of Contract Law"), Section 1.5. But like promissory estoppel, quasi-contract is a doctrine courts use to try to prevent injustice even though no contract can be enforced by the party seeking to do so.

*** **ADDITIONAL REFERENCE:** Chapter 1 ("Basic Aspects of Contract Law"), Section 1.5 contains a more complete discussion of quasi-contract; and Chapter 2 ("Real Agreement (Offer and Acceptance)"), Section 2.4e discusses promissory estoppel.

7.3 Agreements Resulting from a Mistake about a Material Fact May Be Void or Voidable

Sometimes parties make mistakes about their agreements at the time the agreement is formed. For example, a party who is selling various goods may add the prices incorrectly. Or a party buying something may make a mistake about how much the item is worth.

*** **DEFINITION:** A **mistake** is a belief that is not in accord with the facts.

Agreements may be invalid because of mistakes. The reason such agreements are sometimes invalid appears to be that the law feels that, when certain mistakes occur in the formation of an agreement, there has not really been a knowing agreement that can fairly be enforced. However, only certain kinds of mistakes provide a basis for parties to avoid agreements. Parties cannot avoid agreements simply because they were careless in making them!

Whether an agreement resulting from a mistake is valid depends in part on whether the mistake is made by both parties to the agreement (a "bilateral" mistake), or by only one party to the agreement (a "unilateral" mistake). The rules in this area were summarized very briefly in Section 7.2 above.

Basically, some bilateral and unilateral mistakes are so serious that no agreement at all can be formed when they occur. In these situations, courts feel that there is no "agreement" that they can fairly enforce. Any apparent agreement is void.

When mistakes in the formation of agreements are not this serious, the agreements may still be voidable if certain requirements are met. Basically, agreements resulting from bilateral mistakes are voidable where the mistake is basic and about a material fact, and the party seeking to avoid the agreement did not assume the risk of the mistake. Agreements resulting from unilateral mistakes are voidable under the same rules, except there is an additional requirement: either the other party caused or had reason to know

of the mistake, or enforcement would be unconscionable. Because of the extra requirement for unilateral mistakes, it is more difficult for a party to avoid an agreement on that basis. Obviously, the rules on this subject are complex. So it is important to read carefully Sections 7.3a and 7.3b below, where the rules are discussed specifically.

Before considering the kinds of mistakes that may cause an agreement to be invalid, it is important to understand exactly what is--and what is not--a “mistake of fact.” A mistake of fact is a wrong belief about an existing fact. A “fact” is something that is true about the present or the past. For example, if Much agrees to move a pile of rocks, believing that the rocks weigh 500 kilos, but in fact the rocks weigh 1,000 kilos, Much has made a mistake of fact.

However, a mistake of fact is different from a mistaken opinion or prediction about the future. For example, if Borin makes an agreement with someone because he has the mistaken opinion that the other party is trustworthy, that is not a mistake of fact, and Borin cannot avoid the agreement on that basis. Or if Sokry agrees to buy some rice because he mistakenly thinks that the price of rice will rise in the future, and that he can sell the rice later at a good profit, that is not a mistake of fact, and Sokry cannot avoid the agreement on that basis.

Finally, it is important to stress again that only some mistakes affect whether an agreement is enforceable. As noted above, specific requirements must be met in order for agreements to be void or voidable because of mistakes. This is because, in general, courts are reluctant to refuse to enforce agreements on the basis of mistakes--especially unilateral mistakes.

***** WHY IS THIS IMPORTANT?** Why are courts in free market jurisdictions generally reluctant to refuse to enforce agreements on the basis of mistake?

The law wishes to encourage parties to be careful and not make important mistakes about their contracts. In fact, courts will not save parties from the consequences of all mistakes. This is because the law wants the knowledge and diligence of the parties--not the courts--to be the main protection against losses due to mistakes. In this way, parties are forced to be careful, and the economic system can regulate itself, at least to some extent.

This is especially true in the case of unilateral mistakes. If courts could refuse to enforce an agreement every time a party made such a mistake, every party who made an agreement that turned out to be difficult or less profitable than he wished could try to avoid the agreement, claiming he had simply made a mistake! Then no one could rely on his agreements. And courts could not protect the reasonable expectations of the parties, which is an important goal of contract law. This could have a bad effect on development, the efficient operation of the economy, and the rule of law.

7.3a Bilateral Mistakes Occur Where Both Parties to an Agreement Are Mistaken about the Same Fact

A bilateral mistake, or “mutual mistake,” occurs when both parties to an agreement are mistaken about the same fact. For instance, Thanna may agree to buy Chuon’s moto for \$1,000, and both parties may think that is a fair price. But if neither party knows that the moto is actually worth only \$500 because of a recent change in the market, then there is a bilateral mistake. That is because both parties made a mistake about the value of the moto. Of course, not all mistakes affect the validity of agreements. In fact, the type of mistake Thanna and Chuon made probably does not affect the validity of their agreement, as will be explained later in this Section.

(1) An Agreement Resulting from a Bilateral Mistake Is Void If Both Parties Make a Mistake So Serious That There Really Is No "Agreement" Courts Can Fairly Enforce

Some bilateral mistakes are so serious that there really is no agreement courts can fairly enforce between the parties, and any apparent agreement is void. Such mistakes occur rarely. And this is a very difficult area, because while certain kinds of mistakes are serious enough that the agreement is void, there does not appear to be any clear general definition of when that happens!

In any case, it appears that such mistakes occur only when the parties have a fundamental misunderstanding about the most important terms of their apparent agreement. Two important examples of this are: (1) mistakes about the existence of the particular subject matter of the agreement; and (2) mistakes about the meaning of material terms, such as the identity of the subject matter. These are discussed below.

(1) Mistakes about the Existence of the Particular Subject Matter -- Sometimes both parties to an apparent agreement make a mistake about whether the particular subject matter of their agreement exists. Usually this problem occurs when, at the time of the agreement, the subject matter of the agreement has already been destroyed by natural or human forces, such as an earthquake or a war, but the parties do not know about it. This kind of agreement is void, because such a mistake is very serious. If the subject matter existed at the time of the offer but is destroyed before the attempted acceptance, many jurisdictions say the offer terminates at the time the subject matter is destroyed. This was already discussed in Chapter 2 ("Real Agreement (Offer and Acceptance)"), Section 2.6d. In any event, no valid agreement can occur where the specific subject matter does not exist at the time the offeree attempts to accept the offer.

CASE STUDY 153

FACTS The Blue Sea Shipping Company wants to buy a big new ship to add to its fleet of cargo ships. It decides to negotiate with a ship owner named

Peou to buy a ship called the Eternal. The parties are close to reaching an agreement.

However, only one hour before the parties reach an agreement for the sale of the Eternal, the ship sinks in a bad storm in the Gulf of Thailand and is completely destroyed. Neither the Blue Sea Company nor Peou finds out about the sinking until after the agreement is signed. When Peou finds out, he tells Blue Sea he is sorry, but he cannot honor the agreement. Blue Sea says it will ask the court to order Peou to honor the agreement or pay damages.

QUESTION OF LAW Can Blue Sea enforce this agreement?

DECISION No. This agreement is void because both parties made a mistake about the existence of the specific subject matter of the agreement (the ship Eternal).

Agreements are void when the parties both make a mistake about whether the particular subject matter of the agreement exists, because this kind of mistake is so serious that the parties really have no “agreement” the courts can fairly enforce. In this case, both the Blue Sea Company and Peou thought that the ship Eternal existed at the time they made the agreement for the sale of the ship. However, in fact, the ship had sunk and been completely destroyed just before the parties made the agreement! Because of this bilateral mistake, the agreement for the sale of the ship is void. So the Blue Sea Company cannot enforce it.

Of course, this rule applies only where the parties are negotiating about a specific subject matter. For example, suppose two parties simply agree that one party will buy “a healthy one year old cow” from the other party, and the cow that the seller is thinking about selling is actually dead. That is still an enforceable agreement. In that case, the seller must find another cow in order to obey the agreement.

***** ADDITIONAL REFERENCE:** Chapter 2 (“Real Agreement (Offer and Acceptance)”), Section 2.6d discusses the rule in many jurisdictions that destruction of the particular subject matter of an offer before acceptance terminates the offer.

(2) Mistakes about the Meaning of Material Terms -- Sometimes both parties make such a serious mistake about the meaning of a material term in the agreement, such as the identity of the subject matter, that the court cannot fairly enforce the agreement. So it is void. This basically occurs where a



material term in the parties' agreement is ambiguous--it may mean more than one thing. In this situation, many jurisdictions say the agreement is void if:

- (a) the parties have fundamentally different understandings of the meaning of the term; and
- (b) neither party knows or has any reason to know of the different understanding of the other party.

This situation occurs rarely, because the parties to such agreements usually have some reason to know about the mistake.

CASE STUDY 154

FACTS Suppose that the story in Case Study 153 happens in a somewhat different way. Suppose that the Blue Sea Company signs the same agreement with Peou about the sale of a ship called *Eternal*, but that the ship has not sunk.

However, it turns out Peou actually owns two cargo ships called *Eternal*--one docked in Thailand and one in Vietnam--and the parties to the agreement each intended a different ship! The ships are fairly similar, and neither party has any reason to know the other party intended a different ship. When Blue Sea learns of this, it says Peou must sell it the ship in Thailand, since that is what it intended to buy. But Peou refuses, saying he meant the ship in Vietnam, so that is what the agreement meant.

QUESTION OF LAW Can either party enforce this apparent agreement?

DECISION No. This apparent agreement is void because the parties had fundamentally different understandings of the term "*Eternal*"--the subject matter of the agreement--and neither party knew or had reason to know of the different understanding of the other party.

Where a material term in the parties' agreement is ambiguous, and neither party knows or has reason to know of the different understanding of the other party, then the agreement is void. In this case, Blue Sea and Peou made an agreement about the sale of a ship called "*Eternal*." However, it turned out that Peou owned two ships called "*Eternal*," and the parties had different ideas about which ship the agreement described. In addition, neither party knew or had a reason to know that the other party had a different understanding. In this situation, the mistake is so serious that a court cannot fairly enforce the agreement. Therefore, the agreement is void, and Peou cannot enforce it.

Although mistakes like the one in Case Study 154 are possible, it is much more common for parties to have different understandings of what a contract term means that are not so serious that they prevent the formation of the contract. In that situation, the contract may be voidable, and the party

hurt by the mistake may still try to avoid it, as discussed in the remainder of Section 7.3a below.

Or it may be that neither party wishes to avoid the contract, but that the parties simply have a dispute about whose understanding is correct. Courts try to resolve such disputes and enforce the contract. However, if the parties disagree about what a material term means and a court cannot interpret the term, even using all the available rules of interpretation, then the agreement probably cannot be enforced. This is basically the same situation as described in Case Study 154--a court simply cannot determine what a material term in an agreement meant, so it cannot enforce the agreement. This will be discussed in detail in Chapter 8 ("Interpretation of Contracts"), Section 8.5.

***** ADDITIONAL REFERENCE:** Chapter 8 ("Interpretation of Contracts") discusses rules courts use to help them interpret contracts; Section 8.5 discusses what courts do when they cannot interpret a material term in an agreement.

(2) An Agreement Resulting from a Bilateral Mistake Is Voidable by the Party Hurt by the Mistake If the Mistake Is Basic and Material, and the Party Seeking to Avoid the Agreement Has Not Assumed the Risk of That Mistake

As noted above, sometimes both parties make a mistake about the agreement that is not so serious that it prevents any agreement from being formed. In this situation, the contract may be voidable.

However, parties can avoid such agreements only if certain requirements are met. For example, many jurisdictions in the United States say that the party hurt by such a mistake may avoid the agreement if:

- (1) the mistake is about a basic assumption of the agreement;
- (2) the mistake has a material effect on the bargain;
- AND (3) the party trying to avoid has not assumed the risk of the mistake.

Some of these phrases are not easy to define. A "basic assumption" is something that affects what each party expects to gain from the bargain. For example, in an agreement to buy a car, one basic assumption would probably be that the car has an engine. In addition, as will be discussed below, a mistake as to the quality or value of the subject matter may also be a mistake as to a basic assumption.

A "material effect" is basically one that creates such an imbalance in the exchange of contract performances that one party benefits much more than he expected, and the other party loses much more than expected. The result is that it might be unfair to require the "losing" party to perform the agreement.

For example, two parties may agree about the sale of a car without knowing the car lacks an engine, perhaps because the engine has just been stolen. In that situation, the seller would probably receive a big benefit, and the buyer would probably suffer a big loss, since the price the parties negotiated would likely be for a car with an engine.

A party “assumes the risk” of a mistake when he agrees that if that kind of mistake occurs, then it will be his responsibility, and not the responsibility of the other party. This may occur expressly or impliedly.

The parties might expressly agree about who assumes certain risks. For example, an agreement for the sale of land might state that the seller will not be responsible for any problems related to the title to the land (ownership) that he possesses. In that situation, if there is a problem with the true title to the land, it is the responsibility of the buyer.

In other situations, a party may know that he does not have complete knowledge about the agreement and that he could be making a mistake, but the party may make the agreement anyway. If this occurs, many jurisdictions say that the party who “knows he does not know” has assumed the risk of a mistake, and that he cannot avoid the agreement on that basis. For example, if a buyer of a jewel knows that the jewel might be a fake, then he has probably assumed the risk that it will turn out to be fake. This rule is very important, since many types of agreements are made this way.

In still other situations, courts may simply place the risk of a particular mistake where it is reasonable to do so. This depends on the specific facts of the case. For example, many courts say that where a party agrees to sell land, the seller assumes the risk that the land may have valuable minerals underneath it--and so may be far more valuable than the seller thought--because otherwise the “finality” of land transactions would be harmed. Many courts also say that, when a party agrees to build a building on land owned by another party, the builder is taking the risk that the construction job may be more expensive than the parties thought. That might occur because the soil is very rocky or there is some other problem. The reason for this rule is that the law assumes the builder will have more expertise in judging soil conditions than the land owner.

It is important to remember that, in jurisdictions that apply these rules, all three of the elements above must exist for a party to avoid an agreement because of a bilateral mistake. If one element is missing, then the party who is hurt by the mistake cannot avoid the agreement.

Two important kinds of bilateral mistake which may cause parties to try to avoid agreements occur where both parties are wrong about:

- (1) the value of the subject matter of an agreement; or
- (2) the quality of the subject matter of an agreement.

Of course, these types of mistake are related. Cases that involve mistakes about value or quality can be very hard to decide. They will be discussed briefly below.

In general, unless the agreement says otherwise or there are special circumstances, each party assumes the risk that he will be wrong about an item's value. So generally neither party can avoid the agreement on that basis. For example, suppose a party pays a price higher than the market value for a new pair of shoes at the market because the party is not familiar with how much such shoes usually cost. That party cannot avoid the agreement on the basis of bilateral (or unilateral) mistake. This is because courts say that parties generally assume the risk that they will be wrong about the value of things they buy or sell. Value can be very subjective, and it may be that everyone should "know he does not know" about it. It might also be argued that beliefs about value are really opinions, so they should not be considered "mistakes of fact."

However, sometimes a party can avoid an agreement where both parties are wrong about the quality of the subject matter, based on the rules discussed above. That is, occasionally parties do not assume the risk that they will be wrong about the quality--the physical nature--of an item. This is possible where both parties are sure in their belief about some basic quality of the subject matter of the agreement, but they both turn out to be wrong.

For example, both parties may be sure about whether a particular car has an engine, or whether a certain brand of car has a certain feature, but they may turn out to be wrong. Of course, such mistakes about quality also affect the value of the subject matter. But the basic problem is the mistake about quality. In other words, the problem is not that the parties are mistaken as to the general value of cars like the one they are discussing. It is that they are mistaken about the quality or physical reality of the car.

Compare the two Case Studies below.

CASE STUDY 155

FACTS Thy and Vey were negotiating the sale of a small stone which Thy owned. Both parties believed that the stone was probably a topaz, but neither party was sure. Vey agreed to buy the stone for \$5, and the parties exchanged the money for the stone.

However, the next day, Vey showed the stone to his friend Sary, who was an expert on jewels. Sary told Vey that the stone was actually an uncut diamond worth \$4,000! When Thy heard about this, he tried to rescind the agreement and get the stone back from Vey.

QUESTION OF LAW Can Thy rescind this agreement and get the stone back?

DECISION No. Thy cannot rescind the agreement because he assumed the risk of a mistake like this.

When parties both make a mistake about an agreement, the party hurt by the mistake may avoid the agreement if the mistake was about a basic assumption of the agreement; the mistake has a material effect on the agreement; and that party did not assume the risk of the mistake.

In this case, Thy and Vey made a big mistake about the physical quality of a stone Vey agreed to buy from Thy. In fact, the stone the parties thought was a topaz turned out to be a valuable diamond! This was a mistake about a fundamental assumption. And it had a material effect on the agreement, since the difference between the values of the two different kinds of stones is very large. However, Thy assumed the risk of this mistake, because he “knew he did not know” whether the stone was really a topaz or not. Despite this, Thy made the agreement. In that situation, Thy has assumed the risk that the stone would turn out to have a different (and more valuable) physical nature--just as Vey assumed the risk that it would turn out to have a different (and less valuable) physical nature! So Thy cannot rescind the contract.

CASE STUDY 156

FACTS A farmer named Chandara wanted to buy a cow. His neighbor Sopeng offered to sell him a particular cow, which both parties believed was unable to bear young. The parties agreed to the sale of the cow at a certain price.

However, just before Sopeng was to deliver the cow to Chandara, Sopeng discovered that the cow was pregnant! He told Chandara that he would not deliver the cow, because he would have charged much more money if he had known the cow was fertile. Chandara asks the court to enforce the contract.

QUESTION OF LAW Can Sopeng avoid this agreement because of the parties' mistake about the cow?

DECISION Yes. Sopeng can avoid this agreement because the mistake about the cow meets all the requirements for parties to avoid such agreements.

When parties both make a mistake about an agreement, the party hurt by the mistake may avoid the agreement if the mistake was about a basic assumption of the agreement; the mistake has a material effect on the agreement; and that party did not assume the risk of the mistake.

In this case, both Chandara and Sopeng mistakenly thought the cow Chandara was buying from Sopeng was unable to bear young. This mistake about the quality or physical nature of the cow obviously was a mistake about a basic assumption. And it had a material effect on the agreement, since the prices for fertile cows are far higher than those for infertile cows.

The difficult question is whether Sopeng assumed the risk that the cow was fertile. Many courts would say that Sopeng did not assume this risk in this situation. This is because both parties were very confident that the cow was infertile--that it had a certain quality or physical nature. Because both were sure about this, many courts would say Sopeng did not assume this particular risk, and so he can avoid the agreement.

Of course, Sopeng did assume the risk that he was charging too low a price for an infertile cow. That is, he assumed the risk that he was making a mistake purely as to the value of the cow. Suppose it had turned out that the cow was infertile--as the parties thought--but that Sopeng had still made a big mistake about the price, because he did not know much about the market for cows. In that case, Sopeng could not avoid the agreement.

In addition, if a seller has made promises about the quality of the items being sold--which is called providing a warranty--then the buyer may still have a claim against the seller for breach of warranty, if the items turn out to be of lower quality than the warranty says. For example, suppose a seller warrants that the diamond he is selling for \$100 is real. But it turns out to be a fake worth only \$2. In that situation, the buyer may have a claim for damages against the seller for breach of warranty. Such promises might also be misrepresentations which could result in a voidable agreement, as will be discussed in Section 7.4, below.

7.3b Unilateral Mistakes Occur Where Only One of the Parties to an Agreement Is Mistaken about a Fact

A unilateral mistake occurs when only one of the parties to an agreement is mistaken about a fact. For example, suppose Heang agreed to buy Bunny's pig, and Heang thought the pig was male. But Bunny knew it was female. In that case, a unilateral mistake occurred, because only one party--Heang--was mistaken about the gender of the pig. This kind of mistake is probably more common than bilateral mistake.

Most unilateral mistakes do not affect the validity of agreements. That is, a contract is usually binding on the parties despite the fact that one of the parties made a mistake. The reason for this is that, as discussed above in Section 7.2, contract law is designed to protect the reasonable expectations of the parties to a bargain. But courts cannot protect these expectations if parties who are unhappy with their bargain can avoid the contract simply by claiming to have been "mistaken" about something when they made the contract! However, in certain special situations, even unilateral mistakes may result in void or voidable agreements.

(1) An Agreement Resulting from a Unilateral Mistake Is Void If One Party Makes a Mistake So Serious That There Really Is No "Agreement" Courts Can Fairly Enforce

Some unilateral mistakes are so serious that there really is no "agreement" between the parties that courts can fairly enforce, and any apparent agreement is void. This occurs even more rarely than with bilateral mistakes. The main example of this kind of mistake occurs where the offeror makes a mistake in transmitting his offer to the offeree, and an unintended party tries to accept the offer. As discussed in Chapter 2 ("Real Agreement (Offer and Acceptance)"), Section 2.8a and Case Study 69--about the mistake the Tith Textile Company made in offering to sell silk to its best customer--the unintended party can accept the offer and form a contract only if he does not know and has no reason to know about the mistake of the offeror. But when the unintended party knows or has reason to know of the mistake, then no contract is formed between the parties. The reason for this rule is that the law generally protects the rights of offerors to make contracts only with the parties they wish.

CASE STUDY 157

FACTS Sotheavy writes an offer to sell her television to Buntheth, an old friend and someone to whom she has sold items in the past. In Sotheavy's offer, she talks about her past dealings with Buntheth, as well as their friendship.

However, by mistake, Sotheavy sends the offer to the wrong address, where it is received by a different person--also named Buntheth! This different Buntheth tries to accept Sotheavy's offer. When Sotheavy refuses to honor the "agreement," the different Buntheth asks the court to enforce it.

QUESTION OF LAW Can the unintended Buntheth enforce an agreement against Sotheavy?

DECISION No. There is no contract here because the unintended Buntheth was not the intended offeree, and he had good reason to know that Sotheavy had made a mistake.

When an offeror makes a mistake in transmitting an offer and a party who is not the intended offeree tries to accept it, the apparent agreement is void if the party trying to accept knew or had reason to know about the mistake. In this case, Sotheavy mistakenly sent her offer to sell a television to the wrong Buntheth. But in her offer, she talked about her friendship with the right Buntheth, and about her prior dealings with the right Buntheth. These statements gave the wrong Buntheth reason to know that Sotheavy had made a mistake, and that the wrong Buntheth was not the intended offeree. So the wrong Buntheth could not accept the offer, and no contract was formed. In this case, there is nothing for the wrong Buntheth to enforce.

***** ADDITIONAL REFERENCE:** Chapter 2 (“Real Agreement (Offer and Acceptance)”), Section 2.8 contains further discussion of the general rule about who can properly accept an offer and the exceptions to that rule.

(2) An Agreement Resulting from a Unilateral Mistake Is Voidable by the Mistaken Party under the Same Rules as a Bilateral Mistake, with an Added Requirement: the Other Party Caused or Had Reason to Know of the Mistake, or Enforcement Would Be Unconscionable

Sometimes one party makes a mistake about the agreement that is not so serious that it prevents an agreement from being formed. In this situation, many jurisdictions may still allow the party who made the mistake to avoid the agreement, but only if certain requirements are met. For example, many jurisdictions in the United States say that the agreement is voidable--if:

- (1) the mistake is about a basic assumption of the agreement;
- (2) the mistake has a material effect on the bargain;
- (3) the party trying to avoid has not assumed the risk of the mistake;
- AND** (4) either (a) the other party caused the mistake or had reason to know about it;
- or (b) enforcing the agreement would be unconscionable.

The first three of these requirements are basically the same as those discussed above with regard to bilateral mistakes. Of course, in this unilateral mistake situation, the “basic assumption” and “material effect” requirements apply to the unilaterally mistaken party. In other words, the mistake must be about a “basic assumption” of the mistaken party, and have a “material effect” on the bargain the mistaken party expected.

However, for unilateral mistakes, there is an extra requirement: a party can avoid an agreement based on his unilateral mistake only if he meets all the bilateral mistake requirements, and either the other party caused or had reason to know of the mistake, or enforcing the agreement would be unconscionable. For example, a sub-contractor bidding on a construction contract might forget to include the cost of steel in his bid to the general contractor. If that happened, it would probably meet the first three requirements above. But for the sub-contractor to avoid any possible agreement, he would also have to show that the general contractor caused or had reason to know of the mistake, or that enforcement against the sub-contractor would be extremely unfair to the sub-contractor.

The first way to meet this extra requirement is to show that the other party to the agreement caused or had reason to know about the mistake. In the example above, in order to meet the extra requirement this way, the sub-contractor would have to show that the general contractor caused or

had reason to know of the mistake about the steel. This might occur if the bid was obviously wrong because it was so different from other bids.

The second way to meet the extra requirement is to show that enforcing the agreement would be unconscionable. Unconscionable agreements are discussed in more detail in Section 7.7 of this Chapter. Basically they are agreements that are extremely unfair to one party because of the process of formation or the actual terms of the agreement. In the mistake situation, the mistaken party would have to show that enforcement of the agreement would be extremely unfair. It is usually very difficult to show this. In the contractor example above, the sub-contractor would have to show that enforcement would cause him extreme hardship, probably because of the actual terms of the agreement. This might occur if the mistake would cause him to make no profit on the contract, or even lose money.

However, in order for a party to show that enforcement would be unconscionable because of a unilateral mistake, some jurisdictions say the mistaken party must show not only the bad effects for himself, but also that the other party would not be harmed if the mistaken party was allowed to avoid the agreement. For example, suppose the general contractor in the above example had already relied on the sub-contractor's bid in submitting his own bid. In that case, the sub-contractor might not be allowed to avoid any agreement formed--even if the result was that the sub-contractor would make no profit, or even lose money! This is because the general contractor would be harmed if the sub-contractor were allowed to avoid any agreement. Of course, the sub-contractor would probably not be allowed to revoke his bid for a reasonable time if the general contractor could meet the requirements of promissory estoppel. This was discussed in Chapter 2 ("Real Agreement (Offer and Acceptance)"), Section 2.4e, and will be discussed in more detail in Section 7.8 of this Chapter.

***** ADDITIONAL REFERENCE:** Chapter 2 ("Real Agreement (Offer and Acceptance)"), Section 2.4e contains further discussion of how promissory estoppel may prevent an offeror--especially a sub-contractor--from revoking a bid made to a general contractor.

This extra requirement for unilateral mistakes means that, as noted above, it is much more difficult to avoid an agreement based on a unilateral mistake. If this extra requirement is not met, the contract is probably valid. However, although it is difficult to meet all the requirements, there are still situations where parties may avoid agreements because of unilateral mistakes.

Four important situations where parties may try to avoid such agreements are where parties make unilateral mistakes:

- (1) about the identity of the other party;
- (2) about the nature of the subject matter of the contract;

- (3) about the computation of prices; or
- (4) because of a failure to read carefully the written agreement.

Each of these situations will be discussed below.

(1) The Identity of the Other Party -- Sometimes one party is mistaken about the true identity of the other party to an agreement. In other words, the first party intends to make a contract with the other party, but the first party is mistaken about who the other party really is. If this occurs, the four requirements above may be met, and the mistaken party may be able to avoid the agreement.

*** **CASE STUDY 158**

FACTS Channo was negotiating an agreement to sell an expensive diamond ring to Run Munthit, believing that Run Munthit was a wealthy man who was very well known in the province. Run Munthit told Channo about how he was thinking of buying this kind of ring for all of his many female relatives. In addition, during the negotiations, Munthit drove away from Channo's shop in a new car and came back several times, saying he had to go think about the deal.

Finally, the parties agreed to the sale of the ring for \$1,000. Channo gave Run Munthit the ring, and Run Munthit paid \$100 as a down payment, promising to pay the rest the following month. Channo agreed, not wanting to lose the sale to such a wealthy man.

Later, Channo learned that the Run Munthit who bought the ring was actually a different man with the same name as the wealthy man, and that the Run Munthit who bought the ring was not wealthy. In fact, the Run Munthit who made the agreement about the ring had almost no money left after making the \$100 down payment. And he had borrowed the new car from a friend of his, who was a taxi driver! Channo sought to avoid the contract and get his ring back.

QUESTION OF LAW Can Channo avoid this agreement?

DECISION Probably. Channo's mistake about Run Munthit's true identity probably meets the requirements for Channo to avoid the agreement based on unilateral mistake.

Where a party to an agreement makes a unilateral mistake, that party may avoid the agreement if the mistake was about a basic assumption of the agreement; the mistake has a material effect on the agreement; that party did not assume the risk of the mistake; and either the other party caused or had reason to know of the mistake, or enforcement would be unconscionable.

In this case, Channo agreed to sell Run Munthit an expensive ring because he believed Run Munthit was a wealthy man who could afford it. This case probably meets the first three requirements for Channo to avoid the agreement based on his unilateral mistake. That is because this mistake about Run Munthit's ability to pay for the ring was about a basic assumption, it will have a material effect on the agreement, and courts would probably say that sellers like Channo do not assume this kind of risk.

The fourth requirement also seems to be met here. It could be met in either of two ways. First, the less wealthy Run Munthit did have reason to know of Channo's mistake, since the wealthy Run Munthit was so well known. And the less wealthy Run Munthit may have actually caused the mistake, since it appears that he pretended to be wealthier than he was, by talking about giving expensive diamonds to many female relatives, and by driving around in his friend's new car. Even if a court did not think the requirement was met this way, it seems likely that enforcing the agreement would be unconscionable. This is because, even though the \$1,000 price might be reasonable, there is a great risk that Channo will never be paid for the ring! And even if he can get the ring back, he may be required to spend a great deal of time and trouble to do so.

So in this case, Channo can probably rescind the contract and get the ring back. Of course, he could also wait to see if the less wealthy Run Munthit actually did breach the agreement and sue if that occurred. But this might delay Channo's recovery of the ring, and increase the risk that he would not get it back at all.

A similar situation which this text has already discussed occurs if a party who is not the intended offeree receives the offer. In that situation, if the party mistakenly receiving the offer had reason to know about the mistake, then no contract is formed--the agreement is void--because in general, only the intended offeree can accept an offer. This was discussed in Chapter 2, Section 2.8, and again in Section 7.3b above. By contrast, the rule discussed immediately above applies where the mistaken party does intend to make an agreement with the person who accepts--but the mistaken party has a wrong idea about who the offeree really is.

***** ADDITIONAL REFERENCE:** Chapter 2 ("Real Agreement (Offer and Acceptance)"), Section 2.8 contains further discussion about when a party may accept an offer even though that party is not the intended offeree.

(2) The Nature of the Subject Matter -- Sometimes one party to an agreement makes a mistake about the nature of the subject matter of the agreement. This kind of unilateral mistake may also meet the requirements for the mistaken party to avoid the agreement.

CASE STUDY 159

FACTS Chheng was a government official who wished to buy dredging equipment to help improve the Kompong Som port, and increase the amount of shipping the port could handle. Chheng inspected a particular dredge owned by Nariddh, and finally agreed to buy it, for a fair price. As part of the agreement, Nariddh agreed to make certain repairs to the dredge.

However, after the dredge was delivered, Chheng found that the dredge could not perform the operations for which Chheng intended to use it. Nariddh was not aware of the operations Chheng wanted to perform with the dredge, and he did nothing to cause Chheng's mistaken belief about the dredge. Chheng seeks to avoid the contract.

QUESTION OF LAW Can Chheng avoid this agreement?

DECISION Probably not. It appears that Chheng cannot meet all the requirements to avoid this agreement based on unilateral mistake.

Where a party to an agreement makes a unilateral mistake, that party may avoid the agreement only if the party meets all four of the requirements described above. In this case, Chheng made an agreement to buy a dredge from Nariddh. But Chheng was mistaken about the work that the dredge could do. Chheng could probably meet the first two requirements, since this mistake was about a basic assumption and would probably have a material effect on his benefits under the agreement. Chheng might even be able to meet the third requirement, by showing that he had not assumed the risk of the mistake, although it seems likely that buyers usually do assume the risk of mistakes like this.

But it seems that Chheng could not meet the fourth requirement. Nariddh did not cause or have reason to know of Chheng's mistake. In addition, it seems unlikely that enforcement would be unconscionable here, because there was no unfairness in the way the contract was formed or in its terms, and Nariddh already relied on the agreement by repairing and delivering the dredge. Chheng will probably have to obey the agreement or provide a remedy.

(3) Computation of Prices -- One of the most common types of unilateral mistake occurs when a party makes a mistake in calculating the price of an offer. This occurs most often in bids for construction or other projects. Such mistakes may occur because of errors in arithmetic, because of errors in typing the offer, or because the bidder simply forgot to include something he should have, such as the figure for the cost of steel, or a sub-contractor's bid. If this kind of mistake does occur, courts apply the same requirements as for other unilateral mistakes.

It appears that courts generally say that parties do not assume the risk that they will make such mistakes. Perhaps courts believe such mistakes are often understandable, and that they should not always create binding contract obligations, which could cause great harm to the party who made the mistake. On the other hand, it is debatable how understandable such mistakes really are. It might appear that clerical and mathematical tasks are an important part of any business, and that parties in business should assume the risk that they will make errors in performing those tasks. It may be part of the normal business responsibilities of many parties not to make such errors.

In any event, compare the following two Case Studies.

CASE STUDY 160

FACTS The Ministry of Education solicited bids for the construction of 10 new primary schools in Kompong Thom Province. One of the bidders was the Future Construction Company. Future submitted a bid to do all the work for \$1,200,000. This was the lowest viable bid the Ministry received--by about \$20,000--and the Ministry accepted Future's offer.

However, a few days later, Future realized that it had made a mistake in calculating the total bid amount. In fact, it had simply added some of the figures incorrectly, and the correct total should have been \$1,225,000. Future asked the court to allow it to rescind the agreement.

QUESTION OF LAW Can Future rescind this agreement?

DECISION Probably not. Future probably cannot meet all the requirements for it to rescind the agreement based on its unilateral mistake.

Where a party to an agreement makes a unilateral mistake, that party may avoid the agreement only if the party meets all four of the requirements described above. In this case, Future made a mathematical error in calculating its total bid amount, which resulted in the Ministry receiving (and accepting) the bid at \$1,200,000, instead of the \$1,225,000 which Future would have bid if it had not made the mistake. The correctness of a total bid amount generally is a basic assumption, and many courts would say Future has not assumed the risk of this kind of mistake. But Future probably cannot show that its mistake would have a material effect on the agreement, since its error was only about 2% of the total amount of its bid. In addition, the Ministry did not cause the error, and did not have any reason to know about it, since Future's total bid was so close to the next lowest bid (only a \$20,000 difference). And it is unlikely that a court would find enforcement to be unconscionable, since it is unlikely that Future will be severely harmed by such a relatively small error. So in this case, Future probably cannot meet all the requirements to avoid the contract based on unilateral mistake.

CASE STUDY 161

FACTS Suppose that the story in Case Study 160 happened in a somewhat different way. Suppose that Future was bidding on the same construction project, but that it did not make the \$25,000 mathematical error described above. In this new scenario, Future's bid on the project was only \$1,100,000--\$120,000 less than the next lowest bid! The Ministry quickly accepted Future's bid.

However, a few days later, Future discovered that it has forgotten to include in its bid the cost of a plumbing sub-contractor, who had made a bid to do all the plumbing work for \$125,000. The correct total of its bid should have been \$1,225,000. Future asked the court to allow it to rescind the agreement.

QUESTION OF LAW Can Future rescind this agreement?

DECISION Probably. Future can probably meet all of the requirements to avoid this agreement on the basis of unilateral mistake.

Where a party to an agreement makes a unilateral mistake, that party may avoid the agreement only if the party meets all four of the requirements described above. In this case, Future forgot to include the sub-contractor's bid for the plumbing work in its general bid. That resulted in a bid \$125,000 lower than it would have been if Future had not made the mistake. This is clearly a mistake about a fundamental assumption (the bid price); it has a material effect on the deal (a difference of over 10% of the total bid amount); and Future has not assumed the risk of this mistake. In addition, the Ministry had reason to know of the mistake, because the bid was \$120,000 lower than the next lowest bid. And enforcement in this situation would probably be unconscionable. This is because it would probably destroy most or all of Future's profit, or even cause a loss. So Future can probably rescind the agreement.

One type of mistake situation where it appears courts will not usually allow a party to avoid the agreement is where a bidder makes a mistake in business judgement. Suppose the bidder simply misjudges how much labor will be needed to do a job. Courts usually say bidders cannot avoid the agreement in that situation because the bidder assumes the risk of that kind of mistake. So the bidder cannot meet the third requirement to avoid contracts because of mistakes. The reason for this may be that making judgements like that is a crucial part of the bidder's business, and so is different from the kind of mathematical or clerical errors discussed above.

*** **ADDITIONAL REFERENCE:** Chapter 3 ("Consideration"), Section 3.7, and Chapter 9 ("Performance and Discharge of Duties"), Section 9.8a contain further discussion of courts' reluctance to allow a party to avoid or not perform an agreement because it turns out to be harder than the party thought it would be.

(4) Failure to Read Carefully the Written Agreement -- Parties generally cannot avoid an agreement on the basis that they made a mistake because they failed to read carefully the written offer or agreement. The reason appears to be that, under the rules discussed above, each party assumes the risk of this kind of mistake. This is because everyone is generally expected to know what is in documents he signs!

However, there are two limits on this general rule, in some jurisdictions. These limits may apply where: (a) there is an adhesion contract; or (b) there is a prior oral agreement, and the written document the parties create to reflect the oral agreement does not conform to it. These limits will be discussed below.

This general rule about reading written agreements is very important. Because a person who fails to read carefully or understand an agreement generally cannot avoid it, a person who does not understand a written statement for some reason should always have someone else read and explain it. This is especially important in international contracts, where one or more parties may not be completely fluent in the language used in the contract. In that situation, it is essential that parties make sure they understand all aspects of the agreement, because it is so difficult to avoid agreements on the basis of a mistake caused by a failure to read and understand the agreement.

CASE STUDY 162

FACTS Chhay worked at the Ministry. Using an interpreter, Chhay discussed purchasing 100 new computers for the Ministry from the Barang Company, a foreign company whose employees spoke English. One possible term Chhay and Barang discussed was that the payments could be made in six equal monthly installments starting at the time of delivery. The parties also discussed various other possible terms, but they did not reach a final agreement. However, Barang told Chhay that it would send him a proposed written contract to consider.

Within a few days the proposed written contract (an offer) arrived. The offer was completely in English. Because Chhay did not know English too well, he did not understand all of the offer, and his interpreter was not at work that day to explain it. However, the proposed agreement seemed to reflect the terms the parties had already discussed, and Chhay decided to sign it. He signed it and returned it to Barang.

Because Chhay did not understand all of the written contract, he did not notice that it actually required payment of the full purchase price of the computers to be made within one month of delivery. The Ministry cannot pay the money this quickly, and Chhay refuses to obey this part of the contract. Barang asks the court to enforce the agreement.

QUESTION OF LAW Can Barang enforce this agreement?

DECISION Yes. Barang can enforce this agreement because Chhay simply failed to read the written agreement he signed, and he cannot meet all the requirements to avoid the contract based on this unilateral mistake.

Where a party to an agreement makes a unilateral mistake, that party may avoid the agreement only if the party meets all four of the requirements described above. In this case, Chhay made a mistake by signing a computer purchase agreement that required the Ministry to make full payment within one month of delivery, even though the Ministry was unable to do that. Chhay's mistake was caused by his failure to make sure he understood the proposed written agreement (the offer). The law says that parties like Chhay generally assume the risk of mistakes like this. So even if Chhay can meet the other requirements to avoid the agreement--such as by showing the mistake would have a material effect--he cannot meet the third requirement. So he cannot avoid the agreement, and Barang can enforce it.

As noted above, there are two limits on the general rule that a party cannot avoid an agreement where he has made a mistake because of a failure to read or understand the written agreement. The first limit occurs where there is an adhesion contract. Adhesion contracts will be discussed in more detail in Chapter 8 ("Interpretation of Contracts"), Section 8.3i, and Section 7.7 of this Chapter, which explains unconscionability. However, adhesion contracts are basically agreements written completely by one party--the stronger party--and presented to the other party in circumstances where there is no real opportunity to negotiate about the terms. In other words, adhesion contracts are presented on a "take it or leave it" basis. The weaker party must "adhere" to the written proposal of the stronger party, or not make the agreement at all. For example, large companies often have very long standard form contracts that they use to deal with thousands of different customers. Often, it is not practical for these customers to read these entire contracts every time they wish to deal with the stronger companies. In this type of situation, many courts say that contract terms a reasonable weaker party would not anticipate, and to which such a party would not agree if he had known about them, are not part of the agreement. So in that situation, a party might be able to avoid part of an agreement he made because he failed to read or understand the written agreement. One way to explain this rule is that, where there is an adhesion contract, the law says the weaker party does not assume the risk of such a mistake, because that would be unfair. But this rule is applied only in very limited situations, as will be discussed in Chapter 8.

The second limit occurs where there is already an oral agreement between the parties, and the final written statement of the agreement does not conform to the terms of the prior oral agreement. That is, the written form does not correctly express the parties' real prior agreement. In that situation, the court will often reform (or adjust) the writing to reflect the real oral agreement of the parties. So in cases like that, the party does not assume the risk that a term to which he has already agreed--as part of a valid contract--is not correctly stated in the written contract. For example, in Case Study 162

above, if Chhay and Barang had already reached an oral agreement, including agreement about how payment would occur, then Chhay's failure to notice a different payment term in a written contract might not prevent him from having a court reform the agreement to reflect the real agreement.

However, this second limit applies only where the parties have a prior agreement about the term in question. If the parties' existing oral agreement is silent about the term in question, and a party fails to notice a new term in the written statement of the agreement, it appears that the party making the mistake cannot reform or avoid the agreement. Perhaps this is because the law believes parties do not assume the risk that the other party will change an existing term, but they do assume the risk that the written statement--which is usually more complete than an oral one--will include new terms that the party will not like. Another possibility is that the new terms in such a written statement are actually proposals to modify the existing agreement--and if a party signs the written statement, he agrees to the new proposals. In any event, this means that parties should read written agreements very carefully, even if they have a prior oral agreement. Reformation of agreements resulting from mistake will be explained in Section 7.3c below, and reformation in general will be discussed in Chapter 10 ("Remedies"), Section 10.7c.

***** ADDITIONAL REFERENCE:** Chapter 8 ("Interpretation of Contracts"), Section 8.3i discusses the legal effects of adhesion contracts, and Section 8.4 explains how courts use different types of evidence to determine contract terms where there appear to be both written and oral statements related to the agreement; and Chapter 10 ("Remedies"), Section 10.7c contains further discussion about reformation of agreements.

7.3c The Effects of Mistake: Restitution Is Generally Available, and Reformation May Be Possible

As discussed above, an agreement resulting from mistake may be voidable or void, depending on the circumstances. If such an agreement is voidable, the affected party can generally avoid or rescind the agreement. And of course, void agreements cannot be enforced.

Where an agreement results from mistake, restitution is generally available. Where the agreement is voidable, a party can generally recover the reasonable value of what he has provided to the other party under the agreement. The possible responses of parties to voidable contracts--including disaffirmance and ratification--were discussed in Chapter 4 ("Capacity"). In general, the rules discussed in Chapter 4 apply to contracts that are voidable because of mistake.

Parties can also generally get restitution if the agreement is void because of a mistake. For example, suppose two parties make an agreement for the sale of a specific subject matter, and one party pays for the item. But it turns out that the item was destroyed before the agreement was made.

That bilateral mistake would create a void agreement, which could not be enforced by either party. However, in that situation, the buyer would still be able to get restitution of what he paid to the seller.

Reformation is also a potential remedy where an agreement is voidable because of mistake. As noted above, reformation basically means that a court will adjust the agreement to fix the mistake, if that is possible. For example, as discussed in Section 7.3b above, where the parties sign a document that does not accurately state their prior oral agreement, a court may simply reform the document to accord with the parties' real agreement. This would actually create a valid agreement, but one that contained the correct term--not the incorrect term in the earlier document. Of course, this is only possible in some cases. For example, it would be difficult for a court to reform a void agreement to buy an item that did not exist, or a voidable agreement like the one in Case Study 158, where there was a mistake about the true identity of a party.

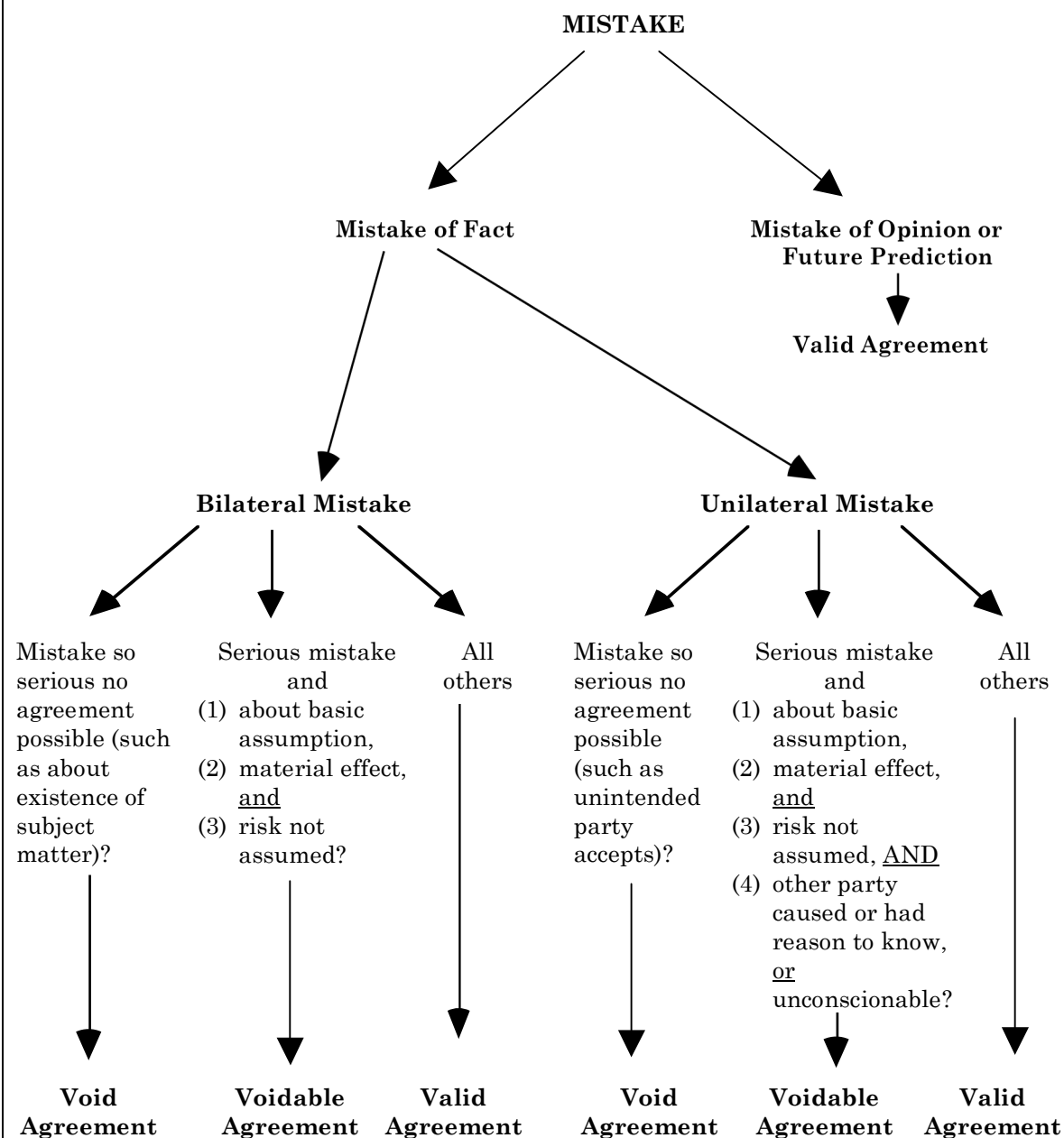
***** ADDITIONAL REFERENCE:** Chapter 4 ("Capacity") discusses the effects of voidable contracts in more detail; and Chapter 10 ("Remedies"), Section 10.7b discusses rescission, Section 10.7c discusses reformation of agreements, and the rest of the Chapter discusses other remedies.

7.3d Summary of Some Basic Rules about Mistake

The chart below illustrates some of the basic rules discussed in this Chapter about agreements resulting from mistake.

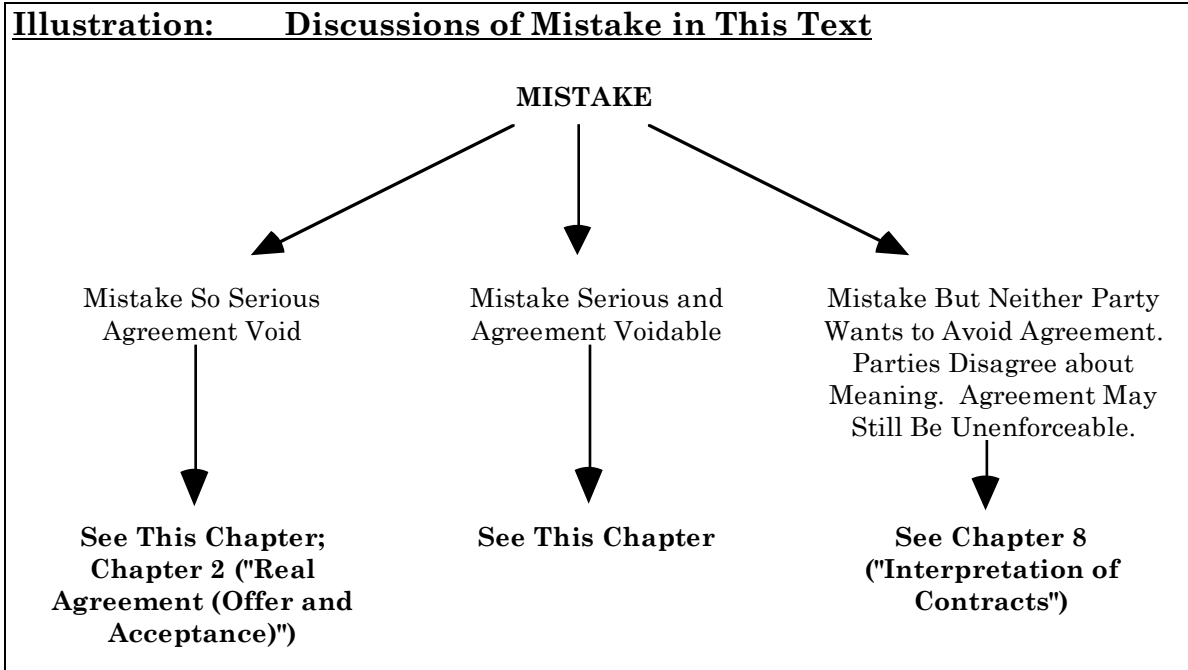


Illustration: Some Basic Rules about Agreements Resulting from Mistake



The following illustration shows where discussions of different kinds of mistakes are found in this text.





7.4 Most Agreements Resulting from Misrepresentations of Material Facts Are Voidable

Sometimes one party makes an agreement because of a false statement or deceptive act of the other party to the agreement. An example is where a party selling a house tells a potential buyer that there is never any flooding around the house, when in fact there is bad flooding every rainy season! Statements like this are called misrepresentations.

***** DEFINITION:** A **misrepresentation** is a statement that is not in accord with the facts.

When parties make agreements because of misrepresentations about material facts, the agreements may be void or voidable. Where there is a misrepresentation in the formation of an agreement--which basically means a party performs some deceptive act so that the other party has no reasonable opportunity to know the basic nature of the agreement--then the apparent agreement is void. Where there is a misrepresentation in the inducement of the agreement--which basically means that a party makes a false statement about a material (important) matter and the other party justifiably relies on the statement in making the agreement--then the agreement is voidable.

Misrepresentation may be fraudulent or innocent. The difference is that fraudulent misrepresentation occurs where a party intentionally misrepresents a material (important) fact, whereas innocent misrepresentation occurs where a party unintentionally misrepresents a material fact. It is possible that a party may make an “innocent” statement

of fact about an agreement that is actually false. This kind of misstatement occurs where the person making the statement honestly believes it to be true, but in reality it is not true.

Although misrepresentation may be fraudulent or innocent, the rules about the enforceability of agreements resulting from the two types of misrepresentation are very similar. The only difference is that it appears some courts do not require a showing that the injured party's reliance was justifiable where there is fraud.

However, many jurisdictions do say that fraud is a tort, and in some situations it may even be a crime. So although the status of contracts may not differ greatly based on whether misrepresentation is fraudulent or innocent, a party who commits fraud may have other legal problems.

As noted above, there are two basic kinds of misrepresentation: misrepresentation in the formation of the agreement, and misrepresentation in the inducement of the agreement. These two kinds are discussed below.

7.4a Agreements Resulting from Misrepresentation in the Formation Are Void

Sometimes a party to an agreement performs some deceptive act so that the other party does not really understand the basic nature of the agreement he is making. In this text, this will be called misrepresentation in the formation of the agreement. For example, this can occur if a party is about to sign a written agreement, but just before he signs, the other party substitutes another written agreement that looks similar but is actually different.

In many jurisdictions, if a party does not know or have a reasonable opportunity to know the basic nature of the agreement he made, because of this kind of misrepresentation, then the agreement is void. In these situations, a party is misrepresenting the nature of the agreement itself. Void agreements like this are similar to the ones discussed in Section 7.3a above, where there was a mistake so serious that no contract was formed. But it is important to remember that such agreements are not void if a party is merely careless about reading an agreement. For the agreement to be void, the party must show the court that he had no reasonable opportunity to know what the agreement was about. This rarely occurs.

CASE STUDY 163

FACTS Kim Sean is shopping for a new motorcycle. She finally decides to sign an agreement to buy a motorcycle from a sales person named Rotana. Rotana shows Kim Sean a proposed written agreement for the sale of the motorcycle for \$2,000. Kim Sean reads the agreement carefully and decides to sign it.

Just before Kim Sean is about to sign, Rotana's assistant brings Kim Sean some tea. As the assistant is placing the tea on the table in front of Kim Sean, some of the tea spills and splashes on the document. Rotana quickly gives Kim Sean a new written agreement to sign. The new agreement looks like the old one, and Kim Sean does not read it, since she already read the old one.

Kim Sean signs the new agreement. However, she soon discovers that the spilling of the tea was a trick, and that the new agreement says that the signer agrees to buy a \$4,000 motorcycle! Kim Sean realizes she has been tricked, and she refuses to obey the agreement. Rotana asks the court to enforce the agreement.

QUESTION OF LAW Can Rotana enforce this agreement?

DECISION No. This agreement is void because Rotana committed misrepresentation in the formation of the agreement, and Kim Sean had no reasonable opportunity to know the nature of the document she signed.

When one party performs a deceptive act so that the other party does not know or have a reasonable opportunity to know the basic nature of the agreement he is making, there is misrepresentation in the formation of the agreement, and it is void. In this case, Rotana tricked Kim Sean into signing an agreement for a motorcycle she did not intend to buy. To do this, Rotana used the spilled tea to substitute a similar but different agreement for the one Kim Sean was about to sign. Since the agreement looked the same as the one Kim Sean had just read, she had no reasonable opportunity to know that one part was different. In this situation, Kim Sean had no reasonable chance to know the basic nature of the agreement she was signing. So the agreement is void, and Rotana cannot enforce it.

Where there is some innocent misrepresentation about the formation of the agreement, and a party does not know or have reason to know the basic nature of the agreement, any apparent agreement is void. For example, this might have occurred in Case Study 163. Suppose Rotana did not know that the agreement he was giving Kim Sean to sign after the tea spilled had different terms from the agreement she meant to sign. That would probably be an innocent misrepresentation in the formation, and the resulting agreement would be void. This kind of situation could also be analyzed as a mutual mistake resulting in a void agreement, as discussed in Section 7.3a above.

7.4b Agreements Resulting from Misrepresentation in the Inducement Are Voidable

As noted above, misrepresentation in the inducement basically occurs where one party to an agreement makes a false statement about an important matter and the other party justifiably relies on that statement in making

the agreement. If misrepresentation in the inducement exists, then the agreement is voidable.

The rules discussed in this Section are basically the same whether the misrepresentation is fraudulent or innocent. The reason for this appears to be that the law wants to encourage people to be sure about the facts before they make such representations--even when they do not intend to deceive others. It seems that the only real difference is that some courts do not require the victim of fraudulent misrepresentation to show that his reliance was justifiable, as discussed below.

This Section will first explain in more detail the basic rules about when agreements are voidable because of misrepresentation in the inducement. Then it will discuss the basic types of misrepresentation in the inducement.

(1) Basic Rules about Misrepresentation in the Inducement

Many jurisdictions say that misrepresentation in the inducement exists where:

- (1) a party makes a misrepresentation (fraudulent or innocent) about an agreement;
- (2) the misrepresentation is about a material fact;
- AND (3) the other party to the agreement justifiably relies on that misrepresentation.

Each of these required elements is explained in more detail below.

(1) Misrepresentation -- A party makes a “misrepresentation” about a contract when that party makes a statement or causes a belief in the other party that has the goal of inducing the other party to agree to the contract. For example, if a seller of wood tells a potential buyer that the wood she is selling is mahogany, but the seller really has no idea what kind of wood it is, and after the contract is made the wood turns out to be a different kind, that is misrepresentation.

An important part of this requirement is that the party making the misrepresentation must have the goal of inducing the other party to make the agreement. For example, if the wood buyer in the example above merely asked a third party standing nearby what kind of wood was being sold, and the third party said “mahogany” merely because he wanted to appear knowledgeable, that would not be the basis for a claim of misrepresentation. The party making the misrepresentation must have some connection to the transaction.

It is also important to know that “misrepresentation” can include not only affirmative statements, but also concealing facts, or even failing to speak when the party has a duty to speak! These forms of misrepresentation will be discussed in more detail below.

(2) Material Fact -- A “fact” is something that is true about the present or the past. For example, the statement “I have earned \$10,000 from this business this year” is a statement of fact. But statements about the future are not facts--they are merely predictions. So statements about the future cannot generally lead to misrepresentation. For example, a statement such as “this business will earn you \$10,000 next year” is not a statement of fact.

In addition, misrepresentation cannot generally occur because of a statement of opinion. For example, the general rule is that if a sales person says that a certain car is “great” or “the best deal in the city,” these statements are not misrepresentations. The reason for this rule is that the law believes persons who hear statements like this ought to realize that the speaker is not saying something on which the listener can rely--that is, the speaker is not stating a fact--but merely an opinion.

However, in the limited situations where the speaker has some special relationship to the other party, or special knowledge not available to the other party, then a misstatement of opinion may actually be misrepresentation! Such a special relationship may exist where there is a “fiduciary relationship.” That basically means a relationship where one party is in a special position of trust and owes a special duty to act for the benefit of the other party. Examples include the relationship between a company and its shareholders, or between a lawyer and his client. So if a lawyer tells his client “I believe this contract is valid” when the lawyer does not really think so, this may be the basis for a claim of intentional misrepresentation. A misstatement of opinion may also be misrepresentation where one party has special knowledge not available to the other party. For example, if a computer expert examined a computer and told the owner “I think you need a new part” when the expert really did not think so, that may be the basis for a claim of misrepresentation. In these special situations, the person hearing the opinion has reason to believe that the speaker is basing his opinion on special knowledge. So the law says that incorrect statements of opinion in these situations may unfairly cause parties to make agreements as if they were statements of fact.

“Material” in this rule means something that is important to a party’s decision to make or not make the contract. In this situation, a fact may be material if:

- (1) it would induce a reasonable person to agree to a contract, or
- (2) it was likely to induce the actual person involved to agree and the party making the misrepresentation knew that.

For example, if a moto seller tells a buyer that a particular moto has never been in a traffic accident, that may be important to a reasonable person’s decision about whether to buy the moto, and so it may be material. If the seller tells the buyer the moto used to belong to a famous football star--knowing that the particular buyer is a passionate follower of football and the star--then this may be important to this particular buyer’s decision to buy,

and so it may be material. This is true even though a “reasonable” person might not care whether a famous athlete owned the moto! This subjective standard depends on the actual expectations or beliefs of the specific parties, rather than the “reasonable” expectations of the parties.

(3) Justifiable Reliance -- In order to show misrepresentation in the inducement, a party must generally also show that he justifiably relied on the misrepresentation the other party made. Reliance in this situation means that the misstatement actually caused the other party to act to his own detriment, either by losing money or simply by failing to get the bargain he thought he was getting. So a party must first show that he actually did rely on the misstatement in making the contract.

In addition to showing that he actually did rely on the misstatement in making the agreement, the party must generally also show that it was justifiable that he do so. Whether reliance is justifiable basically means whether it is reasonable under all the circumstances. For example, if the moto sales person above told a potential buyer that a moto had never been in an accident, but the potential buyer could see that the moto was smashed up, the potential buyer would probably not be justified in relying on the sales person’s statement. Some jurisdictions no longer require that a party show that his reliance was justifiable where the misrepresentation was intentional, perhaps to deter persons from intentionally making such false statements. In fact, it appears that the only significant difference between fraudulent and innocent misrepresentation is that all courts require parties claiming innocent misrepresentation to show that their reliance was justifiable.

Where all the above requirements above are met, the effect is that the agreement is voidable, and the injured party may avoid or rescind it. In that case, restitution is generally available. In addition, if the misrepresentation has caused other damage to the injured party, other remedies may be available. In particular, if the misrepresentation is fraudulent, then tort remedies such as punitive damages may be available. This will be explained in more detail in Chapter 10 (“Remedies”), Section 10.5d.

***** ADDITIONAL REFERENCE:** Chapter 10 (“Remedies”) discusses potential remedies where there are formation problems such as misrepresentation, and in particular, Section 10.5d discusses tort remedies that may available where there is fraud, and 10.7b discusses rescission.

(2) Types of Misrepresentation in the Inducement

There are many different situations where misrepresentation in the inducement may occur. These situations may be divided into two basic types:

- (a) affirmative misrepresentation; and
- (b) concealment or failure to disclose.

These situations will be discussed below.

(a) Affirmative Misrepresentation -- Affirmative misrepresentation is probably the most common type of misrepresentation. It occurs where one party involved in an agreement actually makes a statement--express or implied--to another party that meets the three requirements discussed above.

CASE STUDY 164

FACTS Vandy works at the Ministry of Trains. It is her job to find a company to repair a number of locomotives which have been severely damaged. Eventually Vandy finds a company called the Right On Track Corporation which appears to have a good general reputation, appears to understand the project, and is willing to do the work for a reasonable price. During the negotiations, this company assures Vandy that it has successfully completed over 20 projects just like this.

After the Ministry and the company have signed a contract and the company has begun work on the trains, Vandy notices that the company's workers do not appear to know what they are doing. She telephones some people she knows in the industry, and learns that the company has in fact never done any work like this before! Vandy asks the court to allow the Ministry to rescind the contract.

QUESTION OF LAW Can the Ministry rescind this agreement?

DECISION Yes. The Ministry can rescind this agreement, because the Right On Track Corporation misrepresented a material fact: whether it had done work like the train repair project in the past.

When one party misrepresents a material fact, and another party justifiably relies on the misrepresentation in making an agreement, the agreement is voidable on the basis of misrepresentation in the inducement. In this case, the Right On Track Corporation told Vandy that it had successfully completed over 20 projects similar to the train repair project about which the parties were negotiating. However, this statement was false. The statement was about a material fact, since experience in the field is very important to any large project like this. And the Ministry relied on the statement in making the agreement. Its reliance was justifiable because it had no reason to doubt what the company told Vandy: the company had a fairly good general reputation and it appeared to understand the project.

So in this case, the Ministry can meet all the requirements of misrepresentation in the inducement, and can rescind the agreement. The Ministry would be able to get restitution of any payments made to Right On Track Corporation. And because this was fraud, tort remedies might also be available.

Affirmative misrepresentations may also be innocent.

CASE STUDY 165

FACTS Narith is negotiating to buy a shipment of garments from Mona, the sales manager of the Haute Couture Textile Factory. Narith asks Mona whether the garments are made of silk. Mona believes that they are made of silk, and he tells Narith that they are.

However, after the garments are delivered, Narith discovers that they are not made of silk, but a material of lower quality. He asks the court to allow him to rescind the contract.

QUESTION OF LAW Can Narith rescind this agreement?

DECISION Yes. Narith can rescind this agreement because Mona misrepresented a material fact: whether the garments he was selling were made of silk.

When one party misrepresents a material fact, and another party justifiably relies on the misrepresentation in making an agreement, the agreement is voidable. In this case, Mona told Narith that the garments he was selling were made of silk, and Mona actually believed that to be true. However, it turned out to be false! In this situation, Mona made an unintentional misrepresentation about a material fact (the material of the clothes), and Narith justifiably relied on the misrepresentation in making the contract, since Narith had no reason to doubt what Mona told him.

So all the requirements are met for Narith to avoid or rescind the contract because of misrepresentation. Narith can return the clothes and recover any money he has paid.

(b) Concealment or Failure to Disclose -- When parties are negotiating a contract, there is generally no duty to disclose information to the other party. For example, in Case Study 164 above, the Right on Track Corporation would normally have had no duty to tell Vandy that it had never done the relevant kind of work before. That is, the company could have simply kept silent about its experience, and there would have been no misrepresentation.

However, there are several exceptions to this general rule. In these special situations, concealing material facts--or even failing to disclose them--can be misrepresentation in the inducement, even though the party makes no false affirmative statement! We will briefly discuss three situations where this can occur.

1. Active Concealment -- Sometimes a party actively conceals material facts from the other party to an agreement. This can be a form

of misrepresentation in the inducement, even though the party made no false statements. Consider the following Case Study.

*** CASE STUDY 166
FACTS Sokhet wants to sell his house. However, there is a big hole in the wall of one room because of a bad leak in the roof. Sokhet and several friends put a huge cabinet in front of the hole, so potential buyers cannot see it. A potential buyer named Nara makes a reasonable inspection of the house. Finally, he agrees to buy the house, unaware of the hole or the leak, and believing the house has no structural problems. Later, Nara discovers the hole and the leak. He says he will not obey the agreement. QUESTION OF LAW Can Sokhet enforce this agreement against Nara? DECISION No. This agreement is voidable by Nara because Sokhet's active concealment of the leak and the hole in the wall is misrepresentation in the inducement. When one party to an agreement actively conceals a material fact, and the other party justifiably relies on his mistaken belief about that fact, misrepresentation in the inducement exists. In this case, Sokhet actually used a large cabinet to conceal the hole in the wall of his house which the leak in the roof caused. This was an active concealment of a material fact, because reasonable house buyers find it important whether houses have leaks in the roof and holes in the walls. In addition, Nara justifiably relied on the concealment in making the agreement, since he made a reasonable inspection of the house before agreeing to buy it, thinking it had no structural problems. So all the requirements for misrepresentation in the inducement exist, and the agreement is voidable by Nara. Sokhet cannot enforce the agreement.

2. Silence When a Party Has a Duty to Speak -- In a few special situations, parties have a duty to disclose information--a duty to speak even if they are not asked about something--and failure to speak in these situations may actually be a form of misrepresentation. Three of these situations are where there are fiduciary relationships; where past statements have become inaccurate; and where parties make mistakes about basic assumptions.

a. Where there is a fiduciary relationship between the parties to an agreement, even silence can be fraud in the inducement. This is because fiduciaries have a duty to disclose material facts. As noted above, a fiduciary relationship is one where one party--the "fiduciary"--has a duty to act for the benefit of another party, who places special trust in the first party. It is the fiduciary who has the duty to speak; a non-fiduciary party generally does not have this duty. Fiduciary relationships exist between partners in

a business firm, an agent and principal, a lawyer and client, a guardian and ward, a doctor and patient, and in many other situations.

For example, suppose an attorney made an agreement to provide an existing client with additional legal services, intentionally failing to tell the client that those services were a waste of money because the legislature had just recently changed the law. This could be fraudulent misrepresentation, because it is a failure to disclose a material fact. In that situation, the client could probably avoid the contract.

b. Another situation where there may be a duty to disclose is where one party has made past statements that have become inaccurate, even though they were true at the time the party made them. If the party who made the past statement fails to tell the other party that the statement is no longer true, it may be misrepresentation in the inducement.

CASE STUDY 167

FACTS Suppose the story in Case Study 166 happened in a somewhat different way. In the new story, there is no leak in the roof or hole in the wall of Sokhet's house. And when Nara comes to look at the house, Sokhet tells him truthfully that there are no structural problems with the house, and that the roof is in good condition.

Unfortunately, a few days later a bad storm blows half of the roof off the house! Although Sokhet knows this, he fails to tell Nara when the parties get together to negotiate and sign the final agreement one week later. When Nara later learns about the damaged roof, he asks the court to help him rescind the contract.

QUESTION OF LAW Can Nara rescind this agreement?

DECISION Yes. Nara can rescind this agreement, because Sokhet failed to disclose that his prior true statements about the condition of the house had become false.

When one party to an agreement has a duty to disclose material facts, that party fails to do so, and the other party justifiably relies on the false belief caused, misrepresentation in the inducement exists. In this case, Sokhet at first truthfully told Nara that the house he was selling had no structural problems. However, a few days later there was a bad storm which damaged the roof, and Sokhet's prior statement was no longer true. But Sokhet did not disclose this to Nara. This is misrepresentation in the inducement, because Sokhet had a duty to tell Nara that his past statement about material facts (the lack of structural problems) had become false, and because Nara justifiably relied on his belief about these facts in making the agreement. In that situation, misrepresentation in the inducement exists, and Nara can rescind the agreement.

c. Finally, there may be fraudulent misrepresentation in the inducement where one party is mistaken about a basic assumption. Specifically, such misrepresentation may exist where:

- (1) one party actually knows that the other party is making a mistake about a basic assumption related to the agreement;
- (2) that first party fails to disclose this to the mistaken party;
- AND (3) this is a failure to act in good faith and according to reasonable standards of fair dealing, based on all the circumstances of the case.

This is a very limited exception, because one party must actually know that the other party is making a mistake about a basic assumption, and the court must find that the failure to disclose the mistake was a failure to act in good faith and in accord with reasonable standards of fair dealing. What is “good faith” and “fair dealing” varies in different situations. “Good faith” was briefly discussed in Chapter 3 (“Consideration”), Section 3.6a. It basically means a party’s honest conduct and not seeking unfair advantage over another party. Standards of “fair dealing” vary in different situations, but they basically mean fair conduct in the type of transaction involved. For example, a customer might look at a jewel dealer’s unlabelled stone and say “what a beautiful emerald!” But if the jewel dealer knows the stone is actually a different, less valuable type of stone, the jewel dealer’s failure to tell the customer of this mistake might be a failure to act in good faith and according to reasonable standards of fair dealing. These rules are somewhat similar to the rules about unilateral mistakes, although there are some different requirements. Unilateral mistake was discussed in more detail in Section 7.3b of this Chapter. Good faith and fair dealing will be further discussed in Chapter 8 (“Interpretation of Contracts”), Section 8.3j, and Chapter 9 (“Performance and Discharge of Duties”), Section 9.5b.

Even though there may be a duty to disclose material facts in the above special situations, it is important to remember that silence when a person has no duty to speak is not misrepresentation. So if the customer in the example above offered to sell the jewel dealer a different gem for \$500--but the merchant knew that it was actually worth \$15,000--the dealer’s superior knowledge of the stone’s value does not by itself impose a duty for the dealer to speak. Unless some special situation creates this kind of duty for the dealer, the dealer has no duty to tell the customer that the gem is worth more.

3. Half-truths -- If a party tells only part of the truth, and this part creates a false impression about other facts, then this “half truth” may be misrepresentation--even though the statement made was true! For example, suppose the company in Case Study 164 had told Vandy that it had a lot of experience because it had been awarded 20 similar contracts in the past, and this was true. The statement could still be misrepresentation if the real fact was that the company had never successfully completed any of the projects!

In that situation, telling “half” of the truth creates a false impression, and it may be misrepresentation in the inducement. This type of misrepresentation would appear to be rare. And of course, whether it exists depends on all the circumstances in each situation.

***** WHY IS THIS IMPORTANT?** Why can concealment or even failure to disclose material facts be misrepresentation in certain limited situations, even though there is generally no duty to disclose such facts?

In general, the law does not require that parties to contracts disclose all material facts to other parties. If the law did require that, it would probably be a huge burden on trade. Such a rule would force most business persons to spend a lot of their time trying to determine all the important features of their products--bad and good--and making sure their customers knew about them. It is difficult to imagine a competitive economic system where businesses would be forced to make public all the weaknesses in their products. In addition, if there were a general duty to disclose, courts might be overwhelmed with parties complaining that other parties had failed to tell them something about a particular agreement. And it might be very difficult in many cases to decide how much a party should be required to disclose. All of this would take a great deal of time and resources. And it might not encourage parties to be careful about the agreements they make, which is one of the main goals of free market contract law.

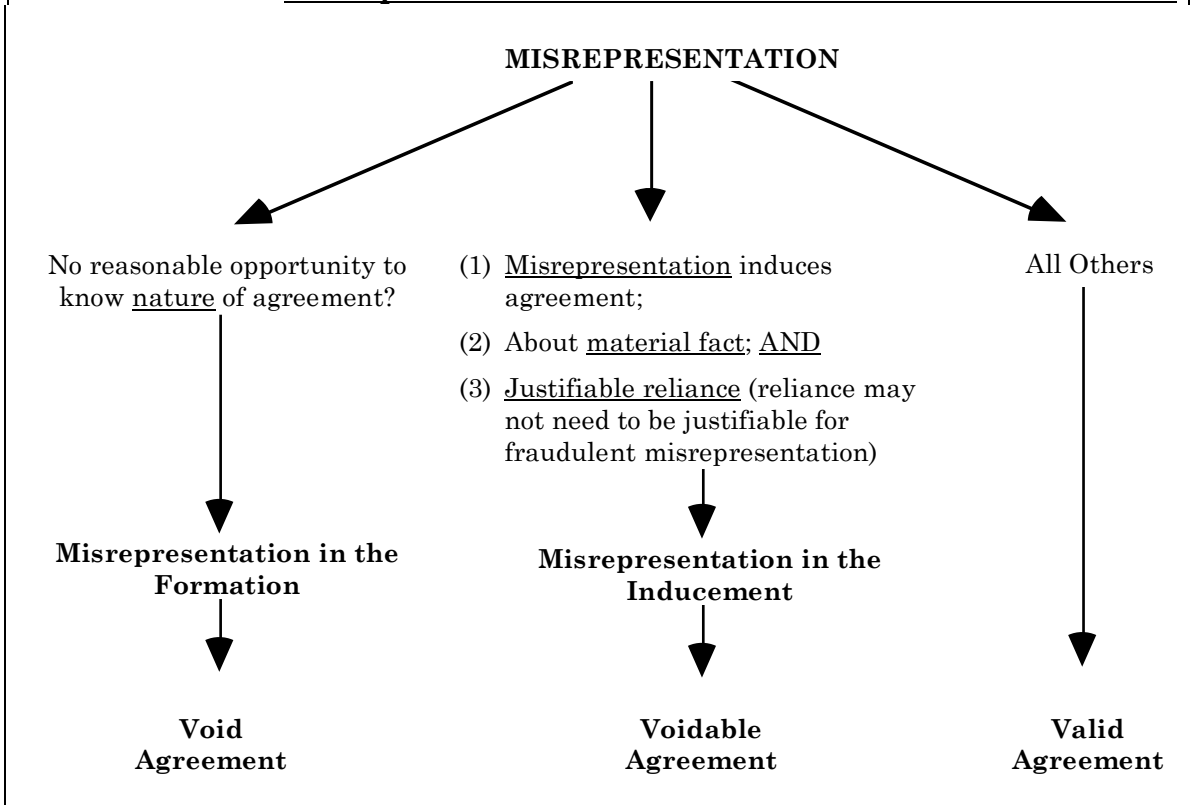
However, in certain special situations, the law does require that parties disclose material facts, and does say that failure to do so can be misrepresentation. These special situations basically occur where one party is actively trying to take advantage of the other (such as through active concealment or half-truths) or failing to meet basic standards of fairness (such as by failing to correct known mistakes about basic assumptions). When that happens, the law believes it would be unfair to allow one party to take advantage of the other party, and to offer the other party no protection at all. So the law makes this limited exception to the general rule: the law says that failure to disclose the material facts involved in such situations can be misrepresentation, and the party who is the victim of the misrepresentation can avoid the contract.

***** ADDITIONAL REFERENCE:** Chapter 8 (“Interpretation of Contracts”), Section 8.3j, and Chapter 9 (“Performance and Discharge of Duties”), Section 9.5c discuss the duty of good faith and fair dealing.

7.4c Summary of Some Basic Rules about Misrepresentation

The chart below illustrates some of the basic rules discussed in this Chapter about agreements resulting from misrepresentation.

Illustration: Some Basic Rules about Agreements Resulting from Misrepresentation



7.5 Agreements Resulting from Duress Are Voidable

When a party uses an improper threat to induce another party to make an agreement, the agreement is made under duress, and it is voidable.

***** DEFINITION: Duress** is the use of an improper threat to induce a party to do something the party would not otherwise do.

An example of an improper threat would be a situation in which Phally threatened to kill Molika with a gun if she did not sell him some land he wanted. This agreement would be the result of duress, and it would be voidable by Molika. The threat need not involve violence to be duress. For example, it may be a threat to commit a non-violent tort such as defamation.

The reason for this rule is that a party suffering duress has not voluntarily consented to the agreement--it was not made of the party's "free will." This is true even though it may look like there was an offer and acceptance, under the objective standard for "real agreement."

Two elements are required for duress to exist with regard to an agreement:

- (1) one party makes an improper threat;
- AND (2) the threat actually induces another party to make an agreement.

To be improper, a threat must generally be a threat to harm the person, family or property of the victim. So duress need not be aimed directly at the contracting party in order to be duress. In addition, the person making the threat need not be a party to the potential contract. For instance, in the example above, if Phally's father threatened to kill Molika if she did not sell the land to Phally, that would still be duress.

It could also be argued that a threat to harm other persons--not just family members--might be an improper threat that could unfairly induce a party to make an agreement, at least in certain situations. For example, if a guerrilla group kidnaps persons and threatens to harm them if a government does not make some agreement with the guerrillas, it certainly seems that any such agreement should be voidable because of duress. However, it is not clear how many jurisdictions would accept that argument. Of course, many such agreements might be also be unenforceable because of illegality, perhaps because they promote immorality. And common law jurisdictions might consider some such agreements to be based on legally unenforceable promises, and to lack consideration. That might occur where one party's promise was a promise not to do something the party had no right to do anyway, such as harm a kidnapped person. This was discussed in Chapter 3 ("Consideration"), Section 3.5b.

Duress is measured by a subjective standard, like several other contract formation problems discussed in this Chapter. That is, for duress to exist, the improper threat must have actually caused the specific victim to make the agreement. It does not matter whether the threat would have caused a reasonable person to make the agreement or not. For example, a party may threaten to slap another person's face if that person does not sell him a new car for \$50. If the car owner is very timid, and this threat actually causes him to make the agreement, the agreement is voidable because of duress. This is true even though the average person might have been able to resist the threat.

The effect of an agreement made under duress is that it is voidable by the party who is the victim of the duress. This means that the victim can avoid or rescind the agreement. But the party responsible for the duress cannot avoid the agreement. The victim can also recover restitution of whatever he has transferred to the other party under the agreement. These potential remedies for voidable contracts were discussed in Sections 7.3 and 7.4 above.

7.5a Forms of Duress

Improper threats may take many forms. They may be express or implied. In general, threats are improper if they are threats to commit crimes or torts--violent or non-violent--that will harm the victim, his family or his property. The following are examples of types of threats that may lead to contracts that are voidable because of duress:

- (1) threats to start criminal litigation against the victim or his family, which is an abuse of the courts and often a crime in itself;
- (2) threats to start civil litigation against the victim or his family without a legitimate basis, which may also be the tort of malicious prosecution;
- (3) threats to disclose embarrassing facts about a person to others, which is the crime of blackmail;
- (4) threats not to perform contracts where the threats are intended to obtain a contract modification, and there is no legitimate commercial reason for the threat; this violates the duty of good faith, and is also a tort in some jurisdictions;
- (5) threats not to trade or deal with a party in the future, in limited situations where those threats violate trade or antitrust laws.

The improper threats listed above are threats to do things that violate criminal or civil law. Authorities do not appear to agree about whether a threat to do something that does not actually violate the law may be duress. Some authorities argue that even a threat to exercise legal rights in “oppressive ways” may be duress. Others say that, even though a variety of threats may lead to duress, it is always based on criminal or civil wrongs of some kind, and that it may only appear to be otherwise because the list of such wrongs grows longer as time passes! In any event, it appears that most if not all improper threats are threats to commit crimes or civil wrongs.

Not all threats are “improper.” The threat to bring a legitimate civil action against a party is not usually duress. For example, suppose there is a bad accident on the road, and one party threatens to bring a tort lawsuit for compensation for his injuries. That is not an improper threat. So if the “threatened” party agrees to pay the threatening party a certain amount of money in return for a promise not to bring a lawsuit against him, that is not an agreement resulting from duress--it is the legitimate settlement of a legal dispute.

In addition, many threats that may seem like “economic duress” are not improper. Although examples (4) and (5) above are situations where “economic” duress may exist, there are few situations like that. For example, hard bargaining about an agreement is not duress. So if one party threatens to stop contract negotiations if the other party insists on a certain

contract term, that is not generally an improper threat, since the “threatening” party generally has a right to insist on whatever contract terms he wishes.

The following Case Studies illustrate some of the possible forms of duress.

CASE STUDY 168

FACTS Sophyt wants a new mobile phone very badly. However, Mean, the phone company sales person, will not sell Sophyt a phone because Sophyt has only \$100, which is not enough money. Sophyt tells Mean that if Mean will not sell him the phone for \$100, Mean’s young daughter may not remain healthy for much longer. As a result, Mean agrees to sell Sophyt the phone for \$100.

After hiding his daughter in a safe place, Mean tells Sophyt that he will not obey the agreement. Sophyt asks the court to enforce the agreement.

QUESTION OF LAW Can Sophyt enforce this agreement?

DECISION No. Sophyt cannot enforce this agreement because it is the result of his improper threat to harm Mean’s daughter, and that is duress.

When one party induces another party to make an agreement through use of an improper threat, the agreement is made under duress, and it is voidable by the party who has suffered the duress. In this case, Sophyt told Mean that if he did not sell Mean the phone for \$100--far less than its real price--then Mean’s daughter might not remain healthy much longer. This is an improper threat. Even though Sophyt has not actually said “I will harm your daughter unless you sell me the phone for \$100,” his words have clearly communicated that threat, under these circumstances. So in this situation, the agreement was made under duress, and it is voidable by Mean. Sophyt cannot enforce the agreement.

CASE STUDY 169

FACTS Paet is shopping for a new moto because he needs to travel often. While Paet is looking at all the used motos for sale at Rin’s Moto Shop, he sees Rin buying a whole truckload of what appear to be stolen motos. Paet threatens to report Rin to the police and have him prosecuted for buying stolen goods, which is a crime, unless Rin will sell him a new \$1,000 moto for \$50. Rin agrees, but later decides not to obey the agreement. Paet asks the court to enforce the agreement.

QUESTION OF LAW Can Paet enforce this agreement?

DECISION No. Paet cannot enforce this agreement because it is the result of his improper threat to have Rin prosecuted for buying stolen goods, and this kind of threat of criminal prosecution is duress.

When one party induces another party to make an agreement through use of an improper threat, the agreement is made under duress, and it is voidable by the party who has suffered the duress. In this case, Paet threatened to have Rin prosecuted for buying stolen motos if Rin did not sell him a \$1,000 moto for only \$50. This is duress, because threatening someone with criminal prosecution is an improper threat, and this threat caused Rin to make the agreement. So the contract is voidable by Rin, and Paet cannot enforce it if Rin chooses not to proceed.

The result in Case Study 169 is the same even if Rin actually is guilty of buying stolen goods! The reason appears to be that, even though the courts want to punish those who break criminal laws, they do not wish to help parties blackmail others, or use the criminal justice system for private gain. Enforcing such agreements might also put courts in the position of enforcing agreements not to report crimes, and might encourage witnesses of crimes to commit blackmail rather than provide evidence to the police. This would be an abuse of the judicial system.

Another important type of duress occurs where one party improperly threatens not to perform an existing contract in order to get another party to agree to a contract modification for which there is no legitimate commercial reason. An example of a legitimate reason might be that goods were damaged on the way from the seller to the buyer, or that some event made performance of the contract much more difficult than either party could have foreseen. In many jurisdictions, improper threats not to perform existing contracts are a breach of the duty of good faith in the performance of the contract. A duty of good faith and fair dealing is implied in all contracts in many jurisdictions. It was discussed above in Section 7.4b, and it will be discussed in more detail in later Chapters. One jurisdiction has said that the duty of good faith basically means that all parties have a duty not to do anything to impair the ability of the other parties to receive the benefits of the agreement. In any event, where one party threatens not to perform an existing agreement unless the other party agrees to a modification that has no legitimate commercial reason, this violates the duty of good faith, and it is duress. And in some jurisdictions, it is also a tort.

CASE STUDY 170

FACTS Suppose that the story in Case Study 99 happened in a slightly different way. In Case Study 99, a moto driver named Samnang agreed to take Sapor to Wat Phnom for 1,000 riels. But on the way to the Wat, while Samnang and Sapor were traveling through a deserted part of the city, Samnang asked Sapor for more money.

In the new story, instead of simply asking Sapor for more money, Samnang threatens to leave Sapor by the deserted road side if she does not agree to give him 3,000 riels in return for Samnang giving her the ride and two cigarettes. Sapor agrees. But once they reach the Wat, she refuses to give Samnang any more than 1,000 riels, and tells him that she hopes he dies from his cigarettes. Samnang asks the court to enforce the modified agreement.

QUESTION OF LAW Can Samnang enforce the modified agreement?

DECISION No. Samnang cannot enforce the modified agreement because it is the result of his improper threat to breach his existing contract to take Sapor to the Wat, and this kind of threat is duress.

When one party induces another party to make an agreement through use of an improper threat, the agreement is made under duress, and it is voidable by the party who has suffered the duress. In particular, duress occurs where one party threatens not to perform an existing contract in order to get another party to agree to a contract modification for which there is no legitimate commercial reason.

In this case, Samnang threatened not to perform his contract with Sapor--and leave her by the road side in a deserted part of the city--unless she agreed to pay three times as much money, in exchange for the same moto ride plus two cigarettes. This is duress, because it is an improper threat not to perform an existing contract unless Sapor agrees to a modification with no legitimate commercial purpose. So the modification is voidable, and Samnang cannot enforce it.

It is important to note that, in Case Study 99, where Samnang simply asked Sapor for more money for the same trip, the modification was unenforceable in common law jurisdictions because there was no new consideration. In Case Study 170, there is new consideration, because Samnang has agreed to do something new--give Sapor two cigarettes. But Samnang still cannot enforce the agreement, because it was the result of an improper threat, and was therefore duress.

***** ADDITIONAL REFERENCE:** Chapter 3 (“Consideration”), Section 3.7 discusses the common law requirement of consideration for modifications of existing contracts; Chapter 8 (“Interpretation of Contracts”), Section 8.3j, and Chapter 9 (“Performance and Discharge of Duties”), Section 9.5c discuss the duty of good faith and fair dealing.

7.6 Agreements Resulting from Undue Influence Are Voidable

Sometimes one party has so much power over another party--because of a relationship of trust or some other factor--that the weaker party is unable to use his free will in making an agreement, and an unfair contract occurs.

This occurs even though the weaker party has capacity and no threats are made. For example, a very dominating parent may be able to influence a very timid adult child to make an unfair agreement, even though the child has capacity and the parent makes no threats. Common law jurisdictions call this undue influence. In those jurisdictions, it results in an agreement that is voidable by the weaker party. It appears that many civil law jurisdictions do not apply the specific doctrine of undue influence. But those jurisdictions may have comparable ways to protect parties in these situations, as discussed in Section 7.9, below.

***** DEFINITION: Undue influence** is the improper influencing of a party to make an unfair contract, often through a relationship of trust or confidence, even though no threats are made.

A party must generally show two important elements in order to avoid a contract because of undue influence:

- (1) improper influence of a weaker party;
- AND (2) an unfair agreement.

The party claiming undue influence must generally show that the other party actually did improperly influence the weaker party to make the contract, and that the weaker party was unable to use his free will in making the agreement. Undue influence usually occurs as the result of a number of commonly recognized relationships where one party puts special trust and confidence in another party, and where the first party may therefore be vulnerable to the other party. Generally these are called fiduciary relationships, as explained in Section 7.4b above. Examples include the relationships between family members (especially parents and children), and between accountants, lawyers, nurses, and doctors and their clients or patients. But the mere existence of such a relationship does not mean there is automatically undue influence in an agreement. This is because, as noted above, the party claiming undue influence generally must show that there actually was improper influence. But some authorities do say that, where there is a fiduciary relationship, any unfair agreement is voidable because of undue influence--whether the stronger party improperly influenced the weaker party or not.

It appears that undue influence can also occur even when there is no recognized relationship of trust, such as those described above, but where one party is still in a position to take advantage of another party. For example, where a party is seriously ill, intoxicated, or in some other distress, even a party who is not in any of the recognized categories above may be in a position to dominate the weaker party and use undue influence to make an unfair contract. Of course, in some of these situations, the weaker party may also lack the capacity required to make a valid contract.

Another important aspect of undue influence is that the agreement must actually be unfair to the weaker party for undue influence to exist. This element is not required for parties to avoid contracts on the basis of most other contract formation problems. What is “unfair” can be very difficult for a court to decide. It will depend on all the circumstances of a particular transaction. In general, agreements are probably “unfair” if there is a significant difference between the consideration on each side. For example, if an accountant convinces a client to sell him property worth \$20,000 for only \$10,000, that is probably “unfair.”

The effect of an agreement made because of undue influence is that the agreement is voidable by the weaker party. The weaker party can avoid or rescind the agreement, and can get restitution of what he has given to the other party under the agreement.

CASE STUDY 171

FACTS Socheatra was advanced in years, ill, and totally dependent on her son Banh for support and care. Socheatra did have the capacity to make contracts, although she depended on Banh for advice about financial and other matters.

On several occasions, Banh made very insistent offers to buy Socheatra’s house for \$1,000, even though the house was worth \$50,000. Although Banh made no threats, Socheatra became very concerned that if she did not agree to this contract, Banh might stop caring for her, or at least not do a very good job. Finally, Socheatra agreed to sell Banh the house for \$1,000.

However, after speaking with her daughter, Socheatra decided she did not wish to obey the agreement. Banh asks the court to enforce the agreement.

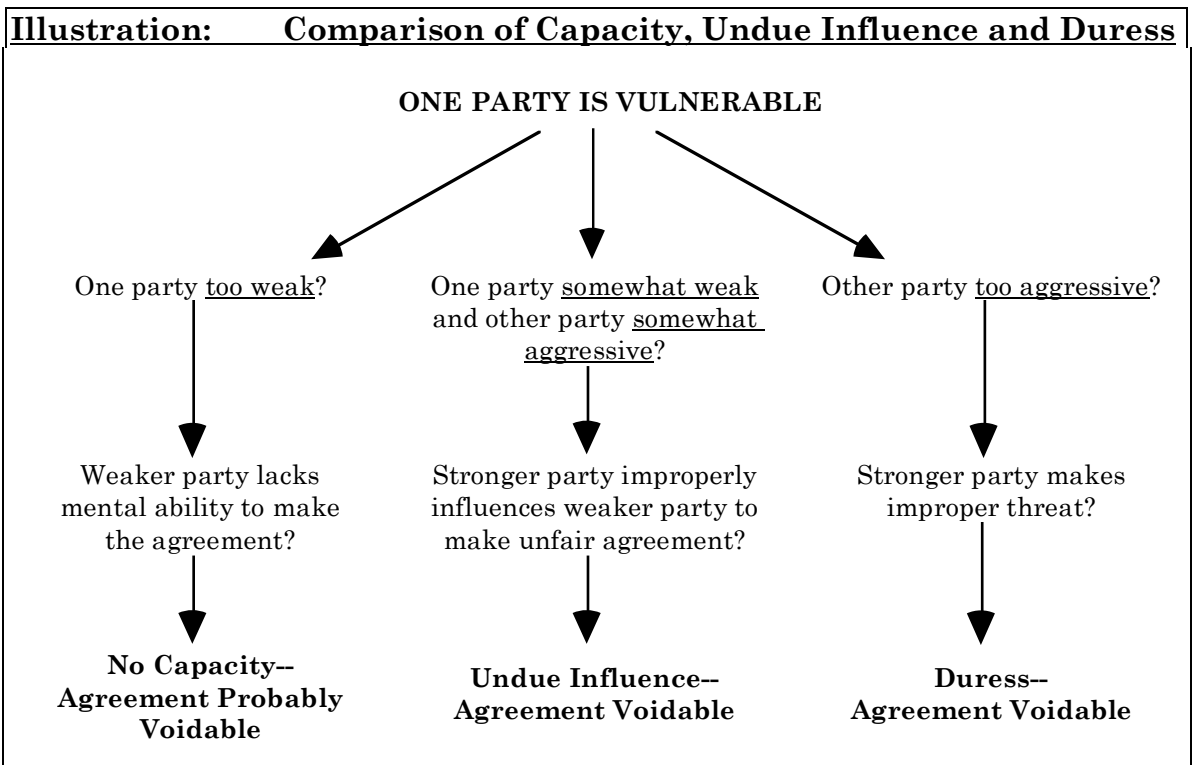
QUESTION OF LAW Can Banh enforce this agreement?

DECISION Probably not. Banh probably cannot enforce the agreement because it appears to be the result of his undue influence on his dependent mother.

Where one party uses improper influence to induce another party to make an unfair agreement, the agreement is voidable by the weaker party, because it is the result of undue influence. In this case, Banh made several persistent offers to buy the house of his dependent mother Socheatra for \$1,000, a price that was far below the real value of the house. Although Banh made no actual threats to Socheatra, and Socheatra had capacity, Socheatra became afraid that Banh would no longer care for her if she did not agree. So she agreed. This situation is probably undue influence. Banh used his position of trust and confidence--as his mother’s son and care taker--to influence her to make an unfair contract. Therefore, the agreement is

probably voidable by Socheatra. Banh probably cannot enforce it if Socheatra chooses not to proceed.

Some authorities say that undue influence actually fills a gap between capacity and duress as a basis for avoiding a contract. Capacity, undue influence and duress all try to protect parties who may be vulnerable to others in making an agreement. This protection may be needed because of the very aggressive behavior of the stronger party (as with duress), the vulnerability of the weaker party (as with capacity), or a combination of the two (as with undue influence). So where a vulnerable party was not weak enough to lack capacity, and where the other party was not so aggressive that he actually used duress, a vulnerable party may still be able to avoid an unfair agreement on the basis of undue influence, if the agreement was basically the result of a combination of his weakness and the other party's aggressiveness. Capacity was explained in detail in Chapter 4 ("Capacity"), and duress was explained in Section 7.5, above. The following chart illustrates the relationship between these three important methods many courts use to protect vulnerable parties to contracts.



***** ADDITIONAL REFERENCE:** Chapter 4 ("Capacity") contains a more complete discussion of when agreements may be unenforceable because one party lacks the mental competence to make the agreement.

7.7 In Very Limited Situations, Courts May Refuse to Enforce Agreements Because They Are Unconscionable

Sections 7.3-7.6 discuss contract formation problems that affect whether there really is a knowing and voluntary agreement between parties. This Section discusses the very limited situations where courts may refuse to enforce all or part of an agreement simply because the process of formation or terms of the agreement are too unfair to one party.

7.7a An Agreement May Be Unconscionable Where Its Process of Formation or Terms Are So Unfair That It Shocks the Conscience of the Court

Free market courts rarely refuse to enforce agreements simply because they are “unfair.” However, where the process of formation or terms of an agreement are so unfair that they shock the conscience of the court, the court may refuse to enforce the unfair terms or the entire agreement. When this limited kind of situation occurs, common law jurisdictions say that the agreement is “unconscionable.”

***** DEFINITION: Unconscionable** agreements are basically agreements whose process of formation or actual provisions are so unfair to one party that they shock the conscience of the court.

A possible example of an unconscionable agreement would be where an aggressive sales person convinces a barely literate person who does not have much money to sign a long pre-printed form agreement for the sale of a television worth \$200. The document says the price is “\$20 per month,” but provisions in very small print state that the monthly payments will continue for three years--for a total price of \$720. Even in a case like this, the agreement is only unconscionable if the court finds that it is so unfair that it is shocking!

If all or part of an agreement is unconscionable, common law courts will not enforce the unconscionable part of the agreement, and so it appears that part is void. It appears that many civil law jurisdictions do not apply the specific doctrine of unconscionability. But such jurisdictions may have comparable ways to protect parties in such situations, as discussed in Section 7.9, below.

Authorities and courts do not agree about the exact nature of what is unconscionable, nor about when this rule should be used to refuse enforcement of an agreement. In fact, this is a very confused area of the law, and it is difficult to make clear statements about it.

In general, authorities do agree that the rules about unconscionability should be used rarely, only in the most extreme circumstances. And they agree that unconscionability depends on the nature of the agreement,

especially its general commercial background, and the other surrounding circumstances. These factors are measured at the time the agreement is made, and not at some later time, such as during performance. Unfairness in performance and other performance problems will be discussed in Chapter 9 (“Performance and Discharge of Duties”).

Some authorities say that unconscionability occurs where an agreement is extremely “one-sided,” often because of a great difference in bargaining power between the parties with respect to the specific transaction. That could occur where one stronger party drafts the agreement and the other party has little ability to really negotiate about it. And many say that the real purpose of the rule about unconscionability is to protect parties from “oppression” and “unfair surprise”--and not to help parties avoid what is simply a bad bargain. Because of the purpose of the rule about unconscionability, it seems that it is generally used to help individual consumers, and less used to help businesses. Businesses may often have more trouble showing that they were victims of extremely unfair agreements.

***** ADDITIONAL REFERENCE:** Chapter 9 (“Performance and Discharge of Duties”) contains a more complete discussion of problems related to the performance of agreements, including unfair behavior.

***** WHY IS THIS IMPORTANT?** Why do common law courts refuse to enforce agreements in the very limited situation where they are unconscionable, despite the general rule that courts do not refuse to enforce contracts simply because they are “unfair?”

Courts in free market jurisdictions do not generally refuse to enforce agreements simply because they are “unfair.” As discussed in other Chapters, such as Chapter 3 (“Consideration”), Section 3.4, if courts were to refuse to enforce contracts simply because one party claimed to have a “bad deal,” or claimed that the consideration on one side was “unequal,” courts might be overwhelmed with contract disputes. Parties could not rely on their agreements, and the free market economy might not be able to function efficiently. In addition, courts do not wish to “rewrite” contracts parties make, because this would interfere with the freedom of contract. So free market courts generally let the parties decide what is an appropriate bargain, and do not refuse to enforce contracts simply because they may be “unfair.”

However, in certain very limited circumstances, courts make an exception to this important general rule. Some types of unfairness are so extreme that they “shock the conscience of the court.” Many courts will not enforce agreements like that. Even in free market societies--where most people believe that the free market and freedom of contract lead to greater development and prosperity for most people--the law believes that some limits must be placed on these freedoms, in order to make sure that they do not cause great injustice in particular cases. Of course, it can be hard to say exactly when contracts are so unfair that they meet this standard! So courts use the

rules on unconscionability only in limited situations, when it is clear that parties are unable to protect themselves from being victimized to a great degree by stronger parties. Most parties, in most situations, cannot meet this difficult standard.

***** ADDITIONAL REFERENCE:** Chapter 3 (“Consideration”), Section 3.4 contains discussion of why common law jurisdictions generally do not require that consideration be “equal” on both sides of an agreement.

In some ways, unconscionability is similar to undue influence, which also tries to protect parties who make unfair contracts, and which was explained in Section 7.6 of this Chapter. But where undue influence is based on a showing of improper influence on a weaker party, usually by a party in some special position of trust, unconscionability is based only on a showing of extreme unfairness, either in the way the agreement was formed, or the actual terms of the agreement, or both. So it appears that unconscionability requires a greater showing of unfairness, whereas undue influence requires a showing of improper influence. Of course, there is some overlap between the two claims. And it seems possible that an agreement could be the result of both undue influence and unconscionability at the same time. The following chart compares these two methods courts use--rarely--to protect parties who make contracts that are unfair to them.

Illustration:	Comparison: Undue Influence and Unconscionability	
	UNDUE INFLUENCE	UNCONSCIONABILITY
1. What is wrong with the agreement?	<u>Improper influence</u> on a weaker party, often by another party in a position of trust	<u>Extreme unfairness</u> in the process of formation or actual terms of an agreement or both
2. Status of "victim?"	Victim is <u>weaker</u> and vulnerable to influence by stronger party	Victim has much less <u>bargaining power</u> in the specific transaction
3. How "unfair" must agreement be?	Unfair	Extremely unfair
4. Will court enforce against "victim"?	Not if victim chooses to avoid, since agreement is voidable	No--unconscionable part of agreement appears to be void
5. Key Differences	(a) Designed to fight improper influence on weaker parties	(a) Designed to fight extreme unfairness
	(b) Requires unfairness	(b) Requires extreme unfairness

7.7b Forms of Unconscionability

In many jurisdictions, there are two basic types of unconscionability: procedural unconscionability and substantive unconscionability. Procedural unconscionability is caused by unfairness in the way the agreement is formed. Substantive unconscionability is caused by unfairness in the actual terms of the agreement. It seems that an agreement may be unenforceable because of either one of these types, although some authorities believe that an agreement is unlikely to be considered unconscionable unless some elements of both types are present. In any case, this text will examine the two types of unconscionability separately.

(1) Procedural Unconscionability Is Extreme Unfairness in the Process of Formation of an Agreement

Procedural unconscionability is extreme unfairness in the way the agreement was formed. It occurs where one party was induced to make the agreement without having any real choice or ability to bargain about the terms.

Procedural unconscionability can happen where one party has so much greater bargaining power that he is basically able to dictate the terms of the agreement, even if the other party does not really wish to agree to those terms. Sometimes the party with less bargaining power may have no way to obtain the subject matter of the agreement except on the more powerful party's terms. In addition, the less powerful party may not really know or understand some of the terms, although as explained in Section 7.3b, parties cannot generally avoid agreements merely because they failed to read or understand them. Despite this general rule, the weaker party's lack of understanding in this special situation may help to show procedural unconscionability. Often the less powerful party is not experienced or knowledgeable about the kind of transaction being made. The stronger party may know this and take advantage of it, with an aggressive sales technique and complex terms that are hard to understand. The stronger party may also know that the other party will have difficulty getting real benefits from the agreement, perhaps because of the financial situation of that party.

Where there is procedural unconscionability, courts may refuse to enforce some or all of the agreement. However, as noted above, this is much more likely if there are also elements of substantive unconscionability.

Procedural unconscionability is possible particularly where there are adhesion contracts. These contracts were discussed above in Section 7.3b, and they will be discussed again in Chapter 8 ("Interpretation of Contracts"), Section 8.3i.

***** DEFINITION: Adhesion contracts** are contracts written completely by a party who has much greater bargaining power, and presented to the other party in circumstances where there is no real opportunity to negotiate about the terms, which are usually standardized, difficult to understand, very favorable to the stronger party, and in small print.

As discussed above, adhesion contracts are presented on a “take it or leave it” basis, generally by a party with much greater bargaining power than the other party. The weaker party is basically forced to “adhere” to the written proposal of the stronger party, or not make the agreement at all. For example, large companies--such as insurance companies or car rental companies--often have long standard form contracts that they use to deal with thousands of different customers. Often, it is not practical for these customers to read these entire contracts--and certainly not to negotiate the contracts--every time they wish to deal with the stronger companies. And these form contracts may be very difficult for the average person to understand.

Bargaining power is measured by the particular transaction. So parties who may have power in some transactions may still be unable to negotiate about terms in other transactions. For example, even a wealthy person may face the same adhesion contract when doing certain activities, such as buying insurance.

***** CASE STUDY 172**

FACTS Yos sells insurance for the World Wide Insurance Company, a very large seller of property insurance with an office in Phnom Penh. One day, Yos goes to visit Many, who lives in a small village outside of the city and who cannot read very well.

Yos is a very skilled and persuasive sales person, with years of experience in insurance. She tells Many that he really should have insurance for his house, because the rainy season is coming and the house could easily be damaged by flooding. She tells him that he can get a comprehensive insurance policy to cover damage to his house, for only \$10 per month. She shows Many a very long, complex, pre-printed World Wide home insurance policy with a one year term. She writes “\$10 per month” in one of the few blank spaces in the policy, inviting Many to sign so he will not have to worry about his house any more. Many can read the “\$10 per month” part of the agreement, and he believes that Yos has a good product for such a low price. So he signs the agreement.

Later, Many shows the agreement to his friend Saumura, who is a student of contract law. Saumura begins to read the contract, and when she has finished two hours later, she tells Many that one part of the contract actually says that, while the policy covers “flood damage,” it does not cover “flooding directly caused by rain”--which is by far the most likely way Many’s house could be damaged, and the only reason he bought the insurance policy!

Many decides he does not need this kind of insurance, and he refuses to pay any premiums. The World Wide Company asks the court to enforce the agreement.

QUESTION OF LAW Can World Wide enforce this agreement?

DECISION Probably not. World Wide probably cannot enforce this agreement as it is written because it is unconscionable.

Where one party makes an agreement whose process of formation is very unfair--such as where the party has no real ability to bargain about the terms--the agreement may be procedurally unconscionable and unenforceable. This is especially likely where the agreement is an adhesion contract, and where there are also elements of substantive unconscionability (unfairness in the actual terms of the agreement).

In this case, Many signed a property insurance agreement that was a long, complex, pre-printed form agreement with small print which had been completely drafted by World Wide--an adhesion contract. In addition, Many was unable to read well. He was persuaded to sign the agreement by the experienced sales person Yos. She convinced him that this policy was what he needed to protect him from flood damage--even though it did not cover flood damage caused directly by rain!

In this situation, many courts would probably not enforce the agreement as it is written. It has many elements of procedural unconscionability. They include the presence of the adhesion contract, Yos' misleading behavior and persuasiveness, and Many's inability to read well. The agreement may be substantively unconscionable as well, if the amount of coverage it actually provides is worth much less than \$10 per month--which seems likely since flooding caused directly by rain is the most likely way Many's house might be damaged. It does subject Many to "unfair surprise," since he would probably never have made the agreement if he knew about the exclusion of coverage. In addition, Many might be able to show that the agreement is voidable because of unilateral mistake, misrepresentation, or even undue influence, as explained in Sections 7.3, 7.4, and 7.6, above. But even if he could not prove those claims, this agreement probably cannot be enforced as it is written because it is unconscionable.

***** ADDITIONAL REFERENCE:** Chapter 8 ("Interpretation of Contracts"), Section 8.3i contains further discussion of how courts respond to adhesion contracts.

(2) Substantive Unconscionability Is Extreme Unfairness in the Actual Terms of an Agreement

Substantive unconscionability is extreme unfairness in the actual terms of an agreement. It occurs where what the agreement actually says is so

unfair to one party, based on all the circumstances, that to enforce the agreement would shock the conscience of the court. So substantive unconscionability does not depend on unfairness in the way the agreement was formed. Of course, as noted above, some authorities believe that courts are unlikely to refuse to enforce an agreement unless some elements of both types of unconscionability are present.

There are several types of agreements courts may refuse to enforce because of substantive unconscionability. Two important types are discussed below: (1) agreements that charge excessive prices; and (2) agreements that interfere with remedies.

(1) Excessive Prices -- As discussed earlier, courts are generally very reluctant to interfere with the bargain of the parties. The general rule is that they will not refuse to enforce an agreement merely because one party claims that terms such as the price are “unfair.”

However, some courts may refuse to enforce agreements where the price in the agreement is so unfair that it is shocking, and other elements of unconscionability are present. It appears that this rule is applied mostly to protect individual consumers. One situation in which courts may use it is where the consumer buys on credit--paying in a series of installments over a certain length of time--and the consumer is not really aware of the total price that he has agreed to pay. Such consumers may also have no way to get certain products except on credit terms that are not favorable to them. Usually, this rule about excessive prices seems to require that the total price be at least two or more times the market value of the subject matter in order for the agreement to be unconscionable. Finally, it is less likely that courts would refuse to enforce agreements on this basis unless some elements of procedural unconscionability were also present.

CASE STUDY 173

FACTS Huot sells large containers of drinking water to various houses and businesses. His special service includes delivering the containers to people's homes, and taking them away when they are empty.

One day, Huot comes to Than's house and says he would like to supply Than with clean water. Than tells Huot that he does not have much money, but that his family often gets sick from bad water. Than is very excited when Huot tells him that he can get a supply of clean drinking water for only 2,000 riels each week. Huot mentions briefly that this will actually mean Than will get two bottles per week, and that there is also a “standard service charge” of 3,000 riels per week. But Huot stresses many times, in a very aggressive way, that the price is only 2,000 riels per week. Huot tells Than this is a very good price, and Than has never bought bottled water before, so he believes Huot. Huot doubts that Than will be able to pay this money for very long. But Huot decides he will try to get as much money as he can under the agreement,

then threaten to sue Than if Than fails to pay, in order to get every last bit of Than's money. Than and Huot agree that Huot will supply water to Than on this basis for 3 months.

Later, Than's wife tells him that the market price for the delivery of these bottles of water is only 700 riels each--less than one third of the amount he has agreed to pay. Than tells Huot he will not obey the agreement. Huot threatens to sue Than.

QUESTION OF LAW Can Huot enforce this agreement?

DECISION Probably not. This agreement is probably unconscionable because the price is excessive, and because of other factors.

Agreements may be unenforceable where they are substantively unconscionable because the price is extremely unfair, and where other elements of unconscionability are present. In this case, Huot made an agreement to sell Than water at a price of 2,000 riels for two large bottles per week, plus a 3,000 riels per week "service charge." This is actually 2,500 riels per bottle. But the market value of the delivery of such a bottle is about 700 riels. The price Huot charged is probably so unfair--since it is far more than three times the market price--that it is substantively unconscionable.

In addition, Huot used an aggressive sales technique, stressing the 2,000 riels price, and barely mentioned how many bottles Than would actually get and the 3,000 riels per week extra charge. Finally, Huot knew that Than was poor and desperate to improve his family's health, that he was not familiar with the bottled water market, and that he would have difficulty paying for the water for long. These are elements of procedural unconscionability.

All the above factors together mean that the agreement is probably unconscionable. So Huot probably cannot enforce it.

(2) Interference with Legal Remedies -- Sometimes agreements contain provisions that try to limit the rights of one party to the legal remedies which may be available if there is a problem in the performance of the agreement. This kind of provision can result in unconscionability if the "remedy meddling" is extremely unfair, based on the commercial setting and the other circumstances of the agreement. If such provisions are unconscionable, they are not enforceable.

Sometimes agreements may try to limit warranties that protect buyers of goods, services, or property. Warranties are complex, and they cannot be fully explained here. However, they are basically promises by a seller that his goods, services or property meet certain standards of quality, fitness, or safety. Warranties may be contained in a contract between the parties. Or they may actually be imposed by the law--even if the contract itself says nothing

about them! For example, under statutes like the Uniform Commercial Code in the United States, all sale of goods contracts automatically contain a “warranty of merchantability”--whether the contract actually says so or not. This warranty basically means the seller promises (or warrants) that the goods are of a quality and fitness sufficient to satisfy the reasonable expectations of the buyer. And there are many other kinds of warranties some jurisdictions say are automatically included in certain types of agreements, such as the “warranty of habitability” in residential lease contracts.

The reason many jurisdictions have these statutes is to protect parties--especially individual consumers--from suffering harm, and possibly losing important rights, because they lack bargaining power. So courts look very carefully at contract provisions that try to limit these warranties. Such provisions are likely to be considered unconscionable if they are extremely unfair. For example, some jurisdictions say parties may be able to limit another party’s ability to get “commercial” compensation (such as for damage to property) for breach of a warranty, but that limits on compensation for harm to persons are probably unconscionable. Otherwise--if parties with great bargaining power could completely escape warranties simply by writing a short clause into a contract--there would be little reason to have the statutes about the warranties.

Another way parties sometimes try to interfere with remedies occurs when parties use exculpatory clauses in agreements to relieve themselves from liability for future harm. This was already discussed in detail in Chapter 5 (“Legality”), Section 5.4g. As explained in Chapter 5, exculpatory clauses may be unenforceable because they violate public policy. In many jurisdictions, exculpatory clauses are not enforceable as to intentional or reckless torts. And they are enforceable as to negligent torts only if it would not violate public policy. In fact, many jurisdictions will not enforce such clauses as to negligent torts where one party has much greater bargaining power and the other party has little ability to bargain about the clause, on the basis that it violates public policy. Other courts may say such clauses are unenforceable because they are unconscionable remedy meddling. In any case, most courts look closely at such clauses. If they are extremely unfair in a particular situation, the courts are unlikely to enforce them.

***** ADDITIONAL REFERENCE:** Chapter 5 (“Legality”), Section 5.4g, and Chapter 8 (“Interpretation of Contracts”), Section 8.3i contain further discussion of exculpatory clauses.

***** CASE STUDY 174**

FACTS Vandy owns a company that sells large canisters of natural gas that people use to cook food. She tells Borin, a small restaurant owner, that she will supply his restaurant with a certain amount of gas, at a certain price, for one year. Borin likes her offer. Together the parties sign the standard, pre-printed form agreement that Vandy’s company usually uses.

A few months later, one of the natural gas canisters explodes in Borin's restaurant, seriously injuring Borin and causing damage to the restaurant. Borin is very angry. But when he looks at the agreement he signed with Vandy, he sees that there is a clause that says he waives the right to bring a lawsuit against Vandy's company for any harm caused by her gas canisters, or for breach of any warranties related to the gas canisters. He had never read this clause, which was in small print on the fourth page of the form agreement. Vandy tells him this means she has no responsibility to Borin at all for the damage he has suffered.

QUESTION OF LAW Can Vandy enforce this part of the agreement?

DECISION Probably not. This part of the agreement is probably unconscionable because it tries to limit the legal remedies normally available to Borin in a very unfair way.

Agreements are unenforceable where they are substantively unconscionable because they try to limit the remedies of one of the parties in a very unfair way, especially where other elements of unconscionability are present. In this case, a clause in the agreement between Vandy and Borin said that Borin had no right to bring a lawsuit against Vandy for any harm caused by her gas canisters, and that he waived the right to enforce any warranties related to the canisters. This kind of limiting of remedies is probably unconscionable. In addition, elements of procedural unconscionability are present: Borin had little ability to bargain about the clause, which was located in a place that was hard to find, in a standard, pre-printed form agreement. Under these circumstances, the clause limiting Borin's remedies is probably not enforceable to prevent a lawsuit against Vandy on the basis of negligence, or breach of the warranty of merchantability, at least as to Borin's personal injuries.

***** ADDITIONAL REFERENCE:** Chapter 10 ("Remedies") contains a more complete discussion of remedies available to parties when there are disputes about the performance of contracts.

7.7c Unconscionable Parts of Agreements Are Generally Unenforceable, but Severance or Reformation May Be Possible in Certain Cases

Courts usually say that unconscionable parts of agreements are "unenforceable." This generally appears to mean that such parts of agreements are void and unenforceable by anyone, although this is not completely clear. Of course, it is unlikely that a party who was the victim of such a provision would wish to enforce it as it was written.

When parts of agreements are unconscionable, courts have several options. First, courts may simply refuse to enforce the agreement at all. This is likely where the unconscionable part of the agreement cannot be severed or

reformed. That would be the case in situations such as the one in Case Study 173, where the whole water supply agreement was affected by the unconscionability in the price--obviously, a price in such an agreement is too important to be severed.

However, if it is possible to sever the unconscionable part of the agreement, courts may do that and enforce the rest of the agreement. For example, a court might simply sever an unconscionable remedy meddling provision, and enforce the rest of the agreement. Severability of illegal parts of agreements was discussed in Chapter 5 ("Legality"), Section 5.5b, and the rules are similar here.

In addition, as with usurious agreements and some agreements resulting from mistake, courts may also choose to reform the agreement by changing the unconscionable part. That could occur in a situation like Case Study 174, where a court might not enforce the gas contract provision limiting Borin's remedies as to certain claims, but might enforce it as to other claims. Of course, courts are often reluctant to reform agreements, because it really is a way of "rewriting" the parties' agreement. Unlike the situation with usurious loan agreements, where there is a statute to tell the court what the maximum "fair" interest rate is, there may be no reliable guideline to tell courts what a "fair" price or other provision in an unconscionable agreement is.

These options are similar to the way courts may deal with usurious loan agreements. In that situation, courts may either not enforce the agreement at all; enforce the agreement but without the illegal part (where courts enforce usurious agreements with no interest at all); or enforce the agreement in a "legal" form (where courts enforce a usurious agreement at the legal rate).

***** ADDITIONAL REFERENCE:** Chapter 5 ("Legality"), Section 5.5b discusses severability and the effect of usurious agreements; and Chapter 10 ("Remedies"), Section 10.7c discusses severance and reformation.

7.8 Where Promissory Estoppel Applies, a Promise May Be Enforceable If a Party Justifiably Relied on It, Even Though There Is No Valid Agreement

Sections 7.3-7.7 discuss contract formation problems that may cause an agreement to be invalid even though it appears to have the basic elements of a valid contract. This Section explains a special situation where there is no valid contract, but common law courts enforce one party's promise because another party justifiably relied on the promise, and injustice will result if the promise is not enforced. That is the formation "problem" that may lead courts to apply the doctrine of promissory estoppel.

7.8a Introduction to Promissory Estoppel (Detrimental Reliance)

Promissory estoppel, which is also called detrimental reliance, is a doctrine which the courts of some common law jurisdictions use to avoid injustice where one party justifiably relies on the promise of another party, even though there is no valid contract. The doctrine is used when one (or more) of the elements of a valid contract is missing--such as where the parties have not met the requirements of real agreement, consideration, or formality--but for unusual reasons, the only way to avoid injustice is to enforce a promise one party made. The power of courts to use promissory estoppel is very limited, because promissory estoppel is a kind of exception to regular contract law rules. It appears that civil law jurisdictions do not use the doctrine of promissory estoppel. But they may have other ways to protect parties in these situations, as discussed in Section 7.9 below.

***** DEFINITION: Promissory estoppel (detrimental reliance)** is a doctrine some common law jurisdictions use to avoid injustice by enforcing promises on which parties justifiably rely, even though there is no valid contract.

Promissory estoppel was already discussed to some extent in Chapter 2 (“Real Agreement (Offer and Acceptance)”), Section 2.4e, which explained how it may be used to make the promises of an offeror enforceable in a bidding situation, even if there is no valid agreement. In addition, Chapter 3 (“Consideration”), Section 3.8g briefly explained that promissory estoppel was an exception to the common law requirement of consideration. This Section will explain promissory estoppel in more detail.

***** ADDITIONAL REFERENCE:** Chapter 2 (“Real Agreement (Offer and Acceptance)”), Section 2.4e discusses how some courts use promissory estoppel to enforce promises offerors make where offerees have justifiably relied; and Chapter 3 (“Consideration”), Section 3.8g discusses how promissory estoppel might be used to enforce promises even where there is no consideration.

In many jurisdictions, promissory estoppel requires that the following five elements be present:

- (1) there must be a real case;
 - (2) there must be a promise by one party;
 - (3) another party must actually rely on that promise;
 - (4) that party's reliance must be justified;
- AND** (5) the party who relied on the promise will suffer unjust loss or damage if the promise is not enforced.

Because it is very difficult to meet all five of these requirements, the power of the courts to use promissory estoppel is very limited. Courts cannot use promissory estoppel to enforce every promise that is made outside of

a valid contract. The reason is that the law wants parties to meet all the requirements of valid contracts if they want promises to be enforced.

When courts do enforce promises on the basis of promissory estoppel, they enforce them only to the extent that justice requires. This means that a party using promissory estoppel to enforce a promise will probably not have the option to get all the different kinds of legal remedies that are normally available with valid contracts. In fact, where promissory estoppel applies, damages are usually limited to reliance damages, which basically try to place a party in the position he occupied before a contract or promise was made. Other remedies are possible, but reliance is the most likely. This will be discussed in more detail in Section 7.8c, below.

Although courts use promissory estoppel rarely, there are certain types of situations where it seems to be used more than other situations. The following are brief descriptions of some of these important situations.

(1) Reliance on Promises before Acceptance -- Courts sometimes use promissory estoppel where a party justifiably relies on a promise made before a valid offer and acceptance exist. This can happen in various ways. Sometimes parties may justifiably rely on promises found in valid offers before acceptance occurs. One example of this kind of situation is the one described in Case Study 55, in Chapter 2 (“Real Agreement (Offer and Acceptance)”), Section 2.4e. In that case, the court used promissory estoppel to protect a general contractor (Prosperity) who relied on a bid from a sub-contractor (Central Electric) in order to make its own bid for a construction project. In this way, promissory estoppel protects the important process of commercial bidding.

In addition, parties may rely on statements made by a party where there is not even a real offer yet, although that is rare. For example, it is possible for a party to justifiably rely on a promise by one party to a negotiation that the parties will eventually reach agreement, even though no contract can generally result from such a promise.

***** ADDITIONAL REFERENCE:** Chapter 2 (“Real Agreement (Offer and Acceptance)”), Section 2.4e explains how promissory estoppel may prevent an offeror from revoking his offer.

(2) Oral Promises That the Law Requires to Be Written -- Sometimes a party makes an oral promise that the law normally requires to be written in order to form a valid contract. Although such promises cannot generally be enforced, they may be enforceable if all the elements of promissory estoppel are met. For example, if a party justifiably relies on an oral land transfer agreement, promissory estoppel may be used to make the promise enforceable. And as explained in Chapter 6 (“Formality”), Section 6.3b, some jurisdictions say that an oral land transfer agreement may actually become enforceable if one party has partly performed it, and changed her position in reliance on

the agreement. This is similar to promissory estoppel, though not the same, because of the different elements required.

There may also be situations where it is difficult, as a practical matter, to create a writing, even though the law normally requires one. For example, civil law jurisdictions with laws like those in France do not appear to require writings when it is “materially or morally impossible” to create them, such as might occur with promises between family members, or in certain markets. In common law jurisdictions, promissory estoppel could operate to make such promises enforceable even though the writing requirement has not been met, as long as justifiable reliance exists.

***** ADDITIONAL REFERENCE:** Chapter 6 (“Formality”) explains some of the important types of agreements that many jurisdictions require to be written, including agreements for the transfer of land (Section 6.3b), and also discusses the civil law perspective on formality (Section 6.9).

(3) Promises Not Supported by Consideration -- Sometimes parties make promises that are not normally enforceable in common law jurisdictions because they are not supported by consideration. Consideration was explained in detail in Chapter 3 (“Consideration”). When there is no consideration, there is no valid agreement, but a party’s promise might still be enforceable if the requirements of promissory estoppel are met. This was already explained in Chapter 3, Section 3.8g.

One common way this might occur is where one party promises to make a gift. For example, promissory estoppel might be used where one family member promises another to give a gift in return for some past actions, or for some other reason, and the party receiving the promise justifiably relies on it. Promissory estoppel has also been used where a party has justifiably relied on a promise to give land. Case Study 175, below, illustrates both these possibilities.

Some authorities say that charitable donations are another example of a situation where promissory estoppel may apply. However, as discussed in Chapter 3, Section 3.8a, these types of promises do not need consideration to be enforceable, in many common law jurisdictions. This means that such promises--unlike promissory estoppel--do not require reliance to be enforceable. So parties do not really need the doctrine of promissory estoppel to make such promises enforceable, although some have argued that promissory estoppel is the theoretical basis for the exception, since charities may rely on such pledges in making their plans and commitments.

***** ADDITIONAL REFERENCE:** Chapter 3 (“Consideration”) explains the general common law requirement of consideration, and some exceptions to that requirement, including charitable donations (Section 3.8a), and promises that meet the requirements of promissory estoppel (Section 3.8g).

CASE STUDY 175

FACTS Kosal was the youngest of the four children in his family. Even though Kosal was the youngest, his parents saw that he worked the hardest and was the most trustworthy. So his parents promised that they would leave the family farm and land to him when they died. But though the law required all contracts to transfer a substantial interest in land to be written, Kosal's parents never put their promise to him in writing. They did tell Kosal's three siblings and several neighbors about their decision. And they repeated their promise to Kosal several times in the following years.

In reliance on his parents' promise, Kosal stopped studying at the university, and returned to his parents' farm to work for several years. Kosal's three siblings never did anything to help, and rarely visited their parents. But when the parents died years later, the other brothers came and demanded that the land be divided equally among all four of them. After trying but failing to solve the conflict directly with his brothers, Kosal now asks the court to make a decision.

QUESTION OF LAW Can Kosal enforce his parents' promise to give him the farm after they died?

DECISION Yes. Kosal can enforce the promise because, even though the promise was not written and lacks consideration, Kosal can meet all of the requirements of promissory estoppel.

Even where no valid agreement exists--because of a failure to meet requirements such as formality or consideration--a promise may still be enforceable if the five requirements of promissory estoppel are met: (1) a real case, (2) a promise, (3) actual reliance, (4) justifiable reliance, and (5) injustice if the promise is not enforced.

In this case, Kosal's parents promised to give him the family farm when they died. The law in this jurisdiction requires that land contracts be written, and common law jurisdictions generally require consideration, so this promise might not normally be enforceable.

But Kosal's situation meets the five requirements for promissory estoppel which are noted above. First, Kosal actually asked the court to make a decision in the case, so there is a real case. Second, Kosal's parents made a promise to Kosal. Third, Kosal clearly relied on that promise, since he left university and returned home to work on the farm. Fourth, Kosal's reliance was justifiable: his parents told him, his siblings and many neighbors about what they would do with the farm, and he had no reason to doubt what his parents said. And fifth, injustice would occur if the promise was not enforced, because Kosal gave up many things in reliance on the promise, including his university education, and his right to live and work somewhere else during the years that he helped his parents on the farm.

So in this situation, Kosal can enforce his parents' promise--even though the law requires such promises to be written, and even though common law jurisdictions generally require consideration for agreements to be enforceable. Kosal can probably get the farm that his parents promised him. This remedy, which is called specific performance, is appropriate because other remedies would probably not achieve justice in this special case.

***** ADDITIONAL REFERENCE:** Chapter 10 ("Remedies"), Section 10.7a discusses the remedy of specific performance, and Section 10.8c discusses remedies where courts apply promissory estoppel.

***** WHY IS THIS IMPORTANT?** Why do common law courts occasionally use promissory estoppel to enforce promises, even though there is no valid contract?

In general, promises that fail to meet the basic requirements for a valid contract cannot be enforced in free market jurisdictions. The reasons for this have been discussed throughout this text. Basically, the law creates rules about how parties must create enforceable agreements in order to protect the rights and reasonable expectations of the parties themselves. These rules also give courts reasonable standards for enforcing contract obligations, and help the free market economy function efficiently.

However, in rare situations, one party makes a promise, another person justifiably relies on that promise, and the only way to avoid injustice is to enforce the promise--even though there is no valid contract. In this way, the law tries to avoid the harsh results that might occur in some situations if the regular rules about valid contracts applied. In a way, this is an admission that the regular rules about valid contracts do not work in every situation! The law wants to be flexible enough to achieve justice when its regular rules cannot do so.

However, the rules about promissory estoppel could be very dangerous if they were not used carefully, and only in limited situations. The reason is that if courts used promissory estoppel too often, parties might no longer bother to meet all the requirements of valid contracts, and much of contract law could collapse! So courts are very careful to use promissory estoppel only in exceptional cases: when all five of the requirements described above are met.

Authorities do not seem to agree about the basis of the doctrine of promissory estoppel. Some basically say that promissory estoppel developed as a substitute for consideration, since many of the early uses of the doctrine were to enforce promises that lacked consideration. However, modern courts also apply promissory estoppel in other situations, so it might be viewed as supplying whatever else would be required to create a valid contract, such as a writing. Other authorities say much of promissory estoppel is actually based on tort law, since it is really a way of holding a party liable for damage caused

when another party is damaged through reasonable and foreseeable reliance on a promise the first party made.

7.8b The Elements of Promissory Estoppel

As explained above, it is essential that a party meet all five of the requirements of promissory estoppel if that party wants to enforce a promise on that basis. The five essential elements of promissory estoppel are more fully explained below.

(1) There Must Be a Real Case -- As noted in previous Chapters, courts in free market jurisdictions may generally use their powers only in “real cases.” This rule restricts the decision-making power of courts and arbitrators to situations in which there are genuine disputes. In practice, this basically means that such decision-makers can generally make decisions only in cases which are brought to the court or arbitrator by someone involved in the dispute. Of course, this also means that courts generally cannot make a decision in a dispute if no one involved in that dispute brings it to court.

So even if it seems that it would be helpful for a court to apply promissory estoppel in a particular situation, the court can do that only if one of the parties involved in the situation formally asks the court to do so. For example, in Case Study 175, the court could not have made a decision in the dispute between Kosal and his siblings if none of the parties involved had requested that.

(2) There Must Be a Promise by One Party -- Before the court can use promissory estoppel, the court must be satisfied that a promise was made. Most kinds of promises can be the basis for promissory estoppel, including a promise to do something, as in Case Studies 55 and 175 above, or a promise to not do something. The promise can be oral, like the promise of Kosal's parents in Case Study 175, or written, like the bid from Central Electric in Case Study 55. And the promise could be implied. Of course, certain kinds of promises cannot be enforced under any circumstances, such as promises to perform illegal acts.

(3) Another Party Must Actually Rely on the Promise -- Reliance is a very important element of promissory estoppel. In fact, one party's reliance on a promise is the basic reason the law considers enforcing the promise in such situations--even though there is no valid contract! But that party must convince the court that he really did rely on the promise. To do that, the party must show that he would not have done something except for the promise--that the promise caused him to do something. For example, in Case Study 175, Kosal could show the court that right after his parents made their promise to him, he stopped studying at the university and moved back home to take care of them and the farm. And in Case Study 55, Prosperity Construction could show its reliance on Central Electric's promise (bid) by showing the court how it had submitted its own bid, which included Central's bid.

(4) That Party's Reliance Must Be Justified -- Whether reliance was justified is probably the most important--and often the most difficult--element of promissory estoppel. Not all reliance allows a court to use promissory estoppel. On the contrary, promissory estoppel protects only parties whose reliance was justified under all the circumstances.

One way to try to see if reliance was justified, according to some authorities, is to ask whether the way the party relied was reasonably foreseeable by the party who made the promise. In other words, some courts ask whether a reasonable promisor would have foreseen how the other party would rely on the promise. For example, in Case Study 175 above, Kosal's reliance was reasonable--his parents could have foreseen it--because of several facts. The promise on which Kosal relied came from his parents (the owners of the farm); his parents made the promise in public; and they repeated it several times during the years before they died. In Case Study 55, Prosperity's reliance was reasonable--Central could have foreseen it--because the only reason general contractors like Prosperity advertise for bids is that they want to be able to choose and rely on the best sub-contractor bids possible. This "reasonably foreseeable" requirement is actually similar to one of the requirements for tort liability in many jurisdictions.

Of course, this means that if a party's reliance on a promise was not justifiable under the particular circumstances in a case, then promissory estoppel will not make the promise enforceable. In such cases, it does not matter that a party really did make a promise, or that the other party really did rely on that promise, or even that the other party will suffer damage if the court does not enforce the promise. Justifiable reliance is the key to promissory estoppel.

(5) The Party Who Relied Must Suffer an Unjust Loss or Damage If the Promise Is Not Enforced -- As discussed above, common law jurisdictions developed the doctrine of promissory estoppel in order to try to reduce injustice in cases where one party reasonably relied on a promise by another party, even though they had no valid contract. The law recognizes that when a party makes a promise, and another party relies on that promise in a reasonable way, then it might be unjust for a court to refuse to enforce that promise.

In particular, injustice will generally occur if a party will suffer real loss or damage as a result of his justifiable reliance on another party's promise, unless the court enforces the promise in some way. For example, in Case Study 175, Kosal gave up his study at the university and his right to live somewhere other than his parents' farm. He changed his entire life in reliance on the promise. And in Case Study 55, Prosperity would lose at least the \$20,000 difference between Central's bid and the cost to have another electrical firm do the work, unless the court ordered Central to obey its promise to do all the electrical work for \$50,000, or provide another remedy. So in both these cases, the parties who justifiably relied on the promise would suffer real harm if the promise was not enforced. Of course,

whether such harm will be “unjust” relates to whether the party’s reliance was justified. So if a party justifiably relied on a promise, and the party will suffer real harm if the promise is not enforced, then that harm is probably unjust.

In fact, probably the most difficult questions for courts to answer, when parties ask to have promises enforced on the basis of promissory estoppel, are the related questions of whether the fourth and fifth elements above are satisfied: whether reliance was justified, and whether unjust harm will result. Compare the following two Case Studies.

CASE STUDY 176

FACTS Ken has a bad job in Phnom Penh. His old friend Margo runs a school in Battambang, and she talks to him about a much better job there. She says to him, "I think you would be a lot happier here. I'll give you a job working for me. We pay a good salary. Why don't you settle your affairs in Phnom Penh and come up here at the beginning of next month? We'll sign a contract then." Ken agrees, and goes out to celebrate.

Ken quits his job in Phnom Penh, sells his house, and moves to Battambang. After he arrives, he goes to see Margo about the job. She says, "Sorry, there is no job." After failing to persuade Margo to at least pay him for his losses, Ken asks the court for help.

QUESTION OF LAW Can Ken enforce Margo’s promise to give him a job in Battambang?

DECISION Perhaps, to the extent necessary to avoid injustice. Ken may be able to enforce Margo’s promise, even though there is no valid contract, because he may be able to meet all of the requirements of promissory estoppel.

Even where no valid agreement exists--because of a failure to meet requirements such as a definite offer and acceptance--a promise may still be enforceable if the five requirements of promissory estoppel are met: (1) a real case; (2) a promise; (3) actual reliance; (4) justifiable reliance; and (5) injustice if the promise is not enforced.

In this case, Margo promised to give Ken a job in Battambang. But her promise was probably not definite enough to form a valid contract. There was no salary term, starting date, or even a job description.

However, a court might enforce her promise to Ken to the extent needed to prevent injustice, using promissory estoppel. This is because the five elements of promissory estoppel may be met. First, there is a real case, because Ken has asked the court for help. Second, Margo did promise to give Ken a job, although the promise was not definite enough to be a valid offer. Third, Ken clearly relied on the promise by quitting his job in Phnom Penh, selling his house, and moving to Battambang. Fourth, his reliance was

probably reasonable, even though it is rare that reliance on such an indefinite promise will be reasonable. In this case, the promise was from an old friend who Ken knew ran a school in Battambang. Ken had good reason to believe that Margo had a job for him, and that she had the power to give him one, since she ran the school. In addition, the way Ken relied was reasonable: he quit his Phnom Penh job, sold his house, and moved to Battambang. Obviously, most people would have to do these things in order to work in Battambang. And Margo should have foreseen that Ken would rely in this way--she knew he was desperate for a new job. And in fact, Margo actually told him to settle his affairs and come to Battambang! Finally, injustice will likely result if the promise is not enforced, since Ken's reliance was probably justified, and since he now has no job and no house, and he has spent money to travel to Battambang.

However, it is important to note that a court would probably not award Ken any of the money he might have earned working for Margo. There is no way the court could calculate damages like that, with such an indefinite promise. And the court would not order Margo to actually give Ken a job, because she really did not make an offer the court could enforce that way. Instead, the court would award the damages necessary to avoid injustice, which in this case would likely be reliance damages. As explained in Section 7.8c below, reliance damages would be the amount of money Ken lost by relying on Margo's promise--by quitting his job in Phnom Penh, selling his house, and moving to Battambang. This amount could be hard to determine exactly, but the court would try to do so in a fair way.

CASE STUDY 177

FACTS Suppose the facts of Case Study 176 happened in a somewhat different way. In this new scenario, the job Margo talked about was only five kilometers from Ken's house in Phnom Penh, and Ken did not quit his current job, sell his house or move. In talking about the job, Margo said basically the same things as in Case Study 176, except that the job was in Phnom Penh.

However, after this first conversation with Margo, Ken went out and purchased an expensive new car on credit in order to travel to his new job. When Ken came to see Margo about the job, Margo said there was no job. Ken complained to the court, saying that he would never have bought the car if not for the new job he thought he had, and that now he had little use for the car.

QUESTION OF LAW Can Ken enforce Margo's promise?

DECISION No. In these circumstances, Ken's purchase of an expensive car to get to the job is not reasonable reliance.

Even where no valid agreement exists--because of a failure to meet requirements such as a definite offer and acceptance--a promise may still be enforceable if the five requirements of promissory estoppel are met.

In this case, Ken relied on Margo's promise of a new job in Phnom Penh, and bought a car to get to work.

As in Case Study 176, Ken could probably meet the first three requirements of promissory estoppel, since there was a real case, a promise, and actual reliance (his purchase of the car). However, Ken's reliance in buying an expensive new car was not reasonable. Ken had other, less expensive ways to get to work, such as a moto or bicycle. At the least, he should probably have waited till he talked to Margo again before he bought anything, since her school was so close to his home. There was no way Margo could have reasonably foreseen this kind of reliance. Likewise, although Ken may suffer a loss--if he has to sell the car for less than he paid--he has not suffered an unjust loss, because he never should have bought the car in the first place. For these reasons, Ken cannot enforce Margo's promise.

The situation described in Case Studies 176 and 177, where a court may enforce a promise even though it was not definite enough to be an offer, is rare. This is because, in most situations, parties like Ken have no right to rely on promises that are not definite enough to be offers--and so it is unusual that their reliance will be reasonable. And of course, in common law jurisdictions, offers can generally be revoked any time before acceptance.

There have also been cases in a few jurisdictions where parties have actually made a valid agreement about an "at-will" job--which basically means the employer or employee can terminate the relationship any time, for any reason that does not violate public policy--but the employer has terminated the relationship before the employee even has a chance to start the job! In that situation, some courts have used promissory estoppel to give the employee compensation for reliance expenses, such as quitting an old job or moving to a different city, as long as the reliance was reasonable. However, this situation--where there is a valid employment contract, but either party can terminate it any time--appears to be more a problem of contract performance and remedies, which will be discussed in later Chapters of this text.

***** ADDITIONAL REFERENCE:** Chapter 9 ("Performance and Discharge of Duties") and Chapter 10 ("Remedies") discuss performance of contracts and what remedies may be available in different situations.

People sometimes confuse promissory estoppel with quasi-contract. Although both promissory estoppel and quasi-contract were developed to try to do justice in certain situations where the parties lack a valid contract, the two doctrines are different. Probably the biggest difference is that promissory estoppel aims to prevent unjust loss caused by justifiable reliance, and does not require unjust enrichment. But the whole purpose of quasi-contract is to prevent unjust enrichment. In addition, promissory estoppel always starts with a promise from one party, and quasi-contract may not.

Of course, there are some situations where both promissory estoppel and quasi-contract may apply. This might occur where a party suffers unjust loss because of justifiable reliance on a promise and provides unjust enrichment to another party. For example, where there is an offer for a unilateral contract, and the offeror tries to revoke after the offeree has partly performed, injustice would result if courts applied the usual common law rule that offerors can revoke any time before acceptance. As discussed in Chapter 2 (“Real Agreement (Offer and Acceptance)”), Section 2.4d, most courts in this situation say that the offeror cannot revoke for a reasonable time. For example, in Case Study 54, Prasith was not permitted to revoke his unilateral contract offer to Someth to plow a field. Even if a court did allow Prasith to revoke, Prasith would be required to pay Someth the reasonable value of the plowing he had completed, under the doctrine of quasi-contract. But promissory estoppel might apply here also! Someth could argue that he justifiably relied on Prasith’s promise to pay him for the plowing, and that he will suffer unjust loss if the promise is not enforced. So both quasi-contract and promissory estoppel might apply here--because it appears there was both unjust enrichment and unjust loss caused by justifiable reliance.

This relationship between promissory estoppel and quasi-contract is similar to the relationship between undue influence and unconscionability, doctrines which are different but may overlap in certain cases. That was discussed in Section 7.7, above.

***** ADDITIONAL REFERENCE:** Chapter 2 (“Real Agreement (Offer and Acceptance)”), Section 2.4d discusses how courts respond when one party partly performs in response to a unilateral contract offer.

The following chart compares promissory estoppel and quasi-contract.



Illustration:	Comparison: <u>Quasi-Contract</u>	Promissory	Estoppel	and
	PROMISSORY ESTOPPEL	QUASI-CONTRACT		
1. What is the main purpose?	Prevent <u>unjust loss</u> caused by justifiable reliance.	Prevent <u>unjust enrichment</u> .		
2. What happened?	One party made a <u>promise</u> on which the other party justifiably relied.	One party provided a <u>benefit</u> to another, but the first party cannot enforce a contract.		
3. What does the court do?	Enforces the promise to the extent that justice requires, whether the promisor received any benefit or not.	Imposes contract obligations on a party, usually by requiring that party to pay the reasonable value of the benefit he received.		
4. Key Differences	(a) Designed to fight <u>unjust loss</u> due to justifiable reliance. (b) Based on a promise by one party.	(a) Designed to fight <u>unjust enrichment</u> . (b) May apply where there is no promise.		

*** **ADDITIONAL REFERENCE:** Chapter 1 ("Basic Aspects of Contract Law"), Section 1.5 contains a more complete discussion of quasi-contract.

7.8c The Effects of Promissory Estoppel: the Promise Is Enforceable to the Extent Justice Requires

Where promissory estoppel applies, courts enforce the promise only to the extent that justice requires. That means that the party seeking the court's help may not be able to recover as much as if the promise was part of a valid contract.

It appears that, when courts apply promissory estoppel, they most often order reliance damages as a remedy. Reliance damages will be discussed in much more detail in Chapter 10 ("Remedies"), but basically they try to place the party in the position he occupied before the promise was made. For example, in Case Study 176, the court would probably award Ken reliance damages. That would likely mean the amount of money he lost in quitting his job, selling his house, and moving to Battambang. Specifically, this would probably be at least the salary he would lose until he could (using reasonable efforts) find a new job, any money he lost in selling his house, and the cost of his trip to Battambang. The idea would be to put him in the position he would have occupied if Margo's promise had never been made. The reason reliance damages are so often given in this situation appears to be that compensating parties for justifiable reliance is the main reason for promissory estoppel. And in most cases, giving such parties the amount they lost by relying is the best way to achieve what "justice requires."

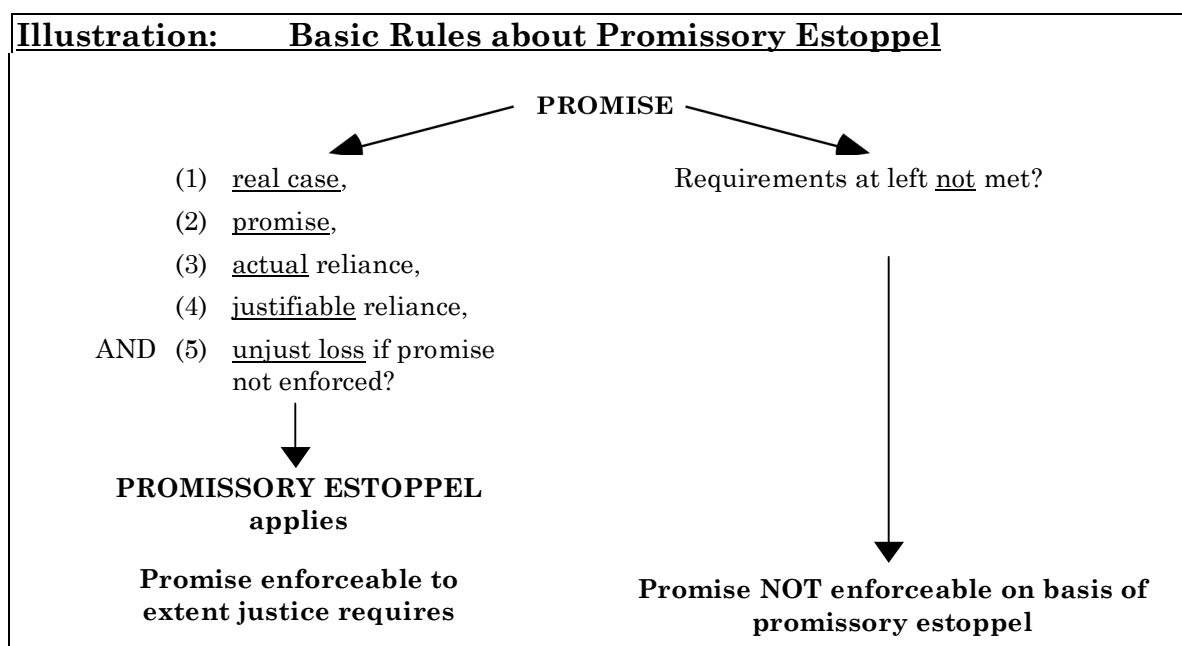
It seems unusual for courts to award more than reliance damages in promissory estoppel cases, but it is possible. In a few cases, courts may choose to award expectation damages, which basically means trying to put the injured party in the position he expected to be in if the promise or contract had been performed. Courts might use this type of remedy where reliance damages would not really achieve justice.

Or in rare cases, courts may order specific performance, which means actually ordering the party who made the promise to perform it. For example, in Case Study 175, it would probably be impossible for a court to put Kosal in the position he would have occupied if the promise had never been made. This is because it would probably be impossible to calculate what Kosal lost by relying--to determine how Kosal's position would be different if he had never left university and come home to the farm years before. And expectation damages might not really put Kosal in the position he expected to be in. That is because he expected to own the farm his parents promised. Common law courts believe land is unique, and that money would not really put him in this position. In that situation, a court might decide to simply enforce the promise specifically--giving the farm to Kosal. Specific performance will be discussed further in Chapter 10 ("Remedies").

***** ADDITIONAL REFERENCE:** Chapter 10 ("Remedies"), Section 10.2 discusses expectation damages, Section 10.3 discusses reliance damages, Section 10.7a discusses specific performance, and Section 10.8c discusses remedies where courts apply promissory estoppel.

7.8d Summary of Some Basic Rules about Promissory Estoppel

The following chart illustrates some basic rules about promissory estoppel.



7.9 The Formation Problems Discussed in This Chapter in the Cambodian Legal Tradition and the Civil Law Tradition

The approaches of the current Cambodian Contract Law (Decree #38D (1988)) and the civil law tradition to the contract formation problems discussed in this Chapter seem generally compatible with the approach discussed above. However, promissory estoppel does not appear to exist in the Cambodian and civil law traditions. And Article 12 of Decree #38D appears to provide courts with unusually broad discretion to allow parties to rescind because of a difference in consideration between the parties to the contract.

***** CAMBODIAN LAW PERSPECTIVE:** The current Contract Law of Cambodia (Decree #38D (1988)) contains provisions relevant to the contract formation problems discussed in this Chapter. These provisions seem basically compatible with the approach to those problems discussed in this Chapter, with the exception of promissory estoppel, and the broad discretion which Article 12 appears to give to courts. Some of the relevant provisions are discussed below.

Basic Provisions

Article 1 of Decree #38D basically defines a contract as a “freewill” agreement to create or affect obligations relevant to the parties. Article 3 states that every contract is valid provided that (among other things) it “arises out of a real and free agreement.” Article 6 provides that contracts which do not result from a real and free agreement are voidable. Article 7 states that agreements resulting from mistake, duress or fraud are not real agreements.

Article 13 provides that parties who wish to avoid agreements on the basis of mistake, duress or fraud must prove the matter. Article 19 states that contracts can be avoided on one of the above grounds by the “aggrieved party” or any person with a “lawful interest” in the claim. Article 19 also explains the procedure for the aggrieved or interested party to notify the other party about such a claim.

These provisions seem basically consistent with the approach discussed in this Chapter with regard to agreements that are not real and free. It is not clear whether agreements resulting from mistake or misrepresentation can be void, as they can when the problem is serious enough under the approach discussed in this Chapter. It may be that mistakes about the existence of the subject matter or the meaning of material terms would create void agreements under Article 5, which states that contracts whose “subject matter is impossible to perform” are void. It may also be that mistakes resulting in attempted acceptances by parties who are not intended offerees simply create no agreements at all under Decree #38D.

Mistake

Agreements resulting from mistake are voidable under Articles 6 and 7. Article 8 provides that parties can avoid agreements on this basis if the mistake is about the “substance of the object which is the subject matter of the contract.” Article 8 further states that mistake as to a “person” is not grounds for avoiding a contract on this basis except where the “identity of the person is the basis of the contract.”

These provisions seem basically consistent with the approach discussed in this Chapter, with a few potential exceptions. Article 8 appears to limit the grounds for claiming mistake to situations where the mistake is about the subject matter of the agreement, or about the identity of a person and the identity of this person is the “basis” of the contract. If these are the only grounds for avoiding a contract based on mistake, then this claim is somewhat more limited under Decree #38D than under the approach discussed in this Chapter. In addition, it is not clear whether the subject matter claim would apply only to mistakes about the identity or quality of the subject matter, or whether it might also apply to the existence of the subject matter. The “identity” claim appears to mean that a party can avoid where he would not have made the agreement except for the identity of the other party. It is not clear how this might apply to situations where an unintended party tries to accept an offer.

As noted above, it is not clear whether agreements resulting from mistake can be void, as they can under the approach discussed in this Chapter. It may be that mistakes about the existence of the subject matter or the meaning of material terms would create void agreements under Article 5, which states that contracts whose “subject matter is impossible to perform” are void, and that mistakes resulting in acceptances by unintended parties simply create no agreement at all under the law.

Misrepresentation

Agreements resulting from “fraud” are voidable under Articles 6 and 7. Article 10 provides that fraud is a basis to avoid a contract where one party commits “acts of deception, dishonesty, or misrepresentation” without which the other party would not have made the contract.

These provisions seem basically consistent with the approach to misrepresentation we have discussed in this Chapter. It is not clear if “innocent” misrepresentation is covered by the provisions above, since such misrepresentation is not usually “fraud.” In addition, as noted above, it is not clear whether agreements resulting from misrepresentation can be void. It may be that agreements resulting from what this text has called misrepresentation in the formation are simply not agreements at all under this law.

Duress

Agreements resulting from duress are voidable under Articles 6 and 7. Article 9 provides that parties can avoid agreements on the basis of duress if the duress is in the form of “mental or physical duress” against a party to the contract, a party’s spouse, or any ascendants or descendants of a party.

These provisions seem basically consistent with the approach discussed in this Chapter, although “duress” itself is not defined. In addition, under Decree #38D, duress apparently does not apply to threats against siblings of parties, or threats against persons related to parties through siblings.

Undue Influence

Article 11 of Decree #38D provides that if any party to a contract “take[s] advantage of the situation of another party with undue profit,” the aggrieved party can rescind the contract. This appears to mean that such an agreement is voidable. Article 11 may be similar to what we have called undue influence in this Chapter, since it appears to involve one party improperly influencing another party who is weaker to make an unfair contract.

Unconscionability

Article 2 of Decree #38D provides that parties to a contract must “collaborate with each other in an atmosphere of good conscience.” In addition, Article 11 provides that if any party to a contract “take[s] advantage of the situation of another party with undue profit,” the aggrieved party can rescind the contract. Article 12 provides that where “there is a difference between the value of the subject matter offered by one party and the value of the consideration in return, then the aggrieved party can sue to rescind the contract on the ground that he/she never intended the difference to be a gift.” These provisions appear to mean that such agreements are voidable.

Articles 11 and 12 may provide a remedy similar to the one described in this Chapter as unconscionability, because both ideas seem to be directed at unfairness in a contract as a basis for a party to rescind. Although Article 11 seems closer to the undue influence situation, there is some overlap between undue influence and unconscionability, as discussed in Section 7.7 above. Article 12 seems somewhat like substantive unconscionability, because both doctrines are directed at unfairness in the actual terms of an agreement. However, unconscionability requires a showing of extreme unfairness, whereas Article 12 does not seem to require any particular degree of unfairness. In addition, under the approach discussed in Section 7.7 above, courts usually also seem to require some elements of procedural unconscionability before they will allow a party to rescind because of unconscionability. Article 12 does not seem to require that. Overall, Article 12 appears to provide courts with more discretion to allow parties to rescind solely because there is some difference in the consideration on each side.

Promissory Estoppel

There do not appear to be any provisions of Decree #38D that correspond to what this Chapter has described as promissory estoppel. However, Article 121 of Decree #38D does state that anyone who causes damage to others through his own fault shall be liable for such damage. This is basically a tort liability statute. It seems possible that Article 121 could be used to recover damages where one party justifiably and foreseeably relies on the promise of another party, and the relying party will suffer harm if the promise is not enforced. As noted above, some authorities believe that a large part of the basis for promissory estoppel is in tort liability.

***** CIVIL LAW PERSPECTIVE:** The civil law approach to the subjects of this Chapter appears to be generally compatible with the approach discussed above, except that there does not appear to be any civil law equivalent to promissory estoppel. Of course, the exact rules about these topics differ from one jurisdiction to another, so it is important to check the relevant local law.

Civil law jurisdictions appear generally to have approaches to agreements that are defective because of mistake, misrepresentation, or duress that are comparable to the approaches discussed in this Chapter. For example, in France, agreements resulting from mistake, misrepresentation, or duress are voidable. As in common law jurisdictions, not all mistakes are considered serious enough to make an agreement voidable. Where the mistake is not serious enough, the agreement is valid. French law basically says that misrepresentation occurs where an agreement results from one party's false statement, or failure to speak where there is a duty to speak, with an intent to deceive another party. French law also provides that agreements resulting from physical or mental duress are voidable. It appears that, although the law gives courts the option to measure duress by an objective or subjective standard, most courts choose to analyze duress by a subjective standard. This means that, as in common law jurisdictions, the courts basically ask whether the improper threat actually did cause the victim to make an agreement, rather than whether it would have caused a reasonable person to do so.

It appears that many civil law jurisdictions do not apply the specific doctrine of undue influence. However, these jurisdictions may have comparable ways to protect parties in these situations. For example, in France, the doctrine of *lésion* appears to provide that an agreement made by persons in certain protected categories may be voidable where there is an unfair economic imbalance in the agreement. It appears that these categories include unemancipated minors and certain protected classes of adults, such as certain persons who lack full mental competence, and more recently those who are charged exorbitant fees by professionals such as doctors, lawyers, notaries, chartered accountants, bankers, consultants, and private detectives. This focus on unfairness to persons in certain special relationships of trust may be comparable to the common law doctrine of undue influence, although the common law doctrine is not limited to persons in such special relationships.

It appears that many civil law jurisdictions do not apply the specific doctrine of unconscionability. But as with undue influence, some civil law jurisdictions do appear to use doctrines that are comparable to unconscionability to deal with extreme unfairness in contracts.

For example, it appears that there is a German statute regulating the use of what seem to be basically adhesion contracts. This statute limits the ability of merchants to disclaim all liability for defective goods, and generally tries to protect consumers in situations where they may have little bargaining power. It also appears that German courts have used statutory requirements which are related to good faith and fair dealing to prevent unfairness in situations where common law courts might use the doctrine of unconscionability.

The situation in France appears to be similar. In France, the law regulates “abusive clauses” in adhesion contracts, where such clauses are considered to be an “abuse” of economic power by a party in a stronger bargaining position. It appears that, in some circumstances, courts have the power to remove such clauses from adhesion contracts. In addition, parties in certain protected classes may be able to avoid unfair agreements under the doctrine of *lésion*, as discussed above.

Civil law jurisdictions do not appear to have a doctrine comparable to promissory estoppel. However, as noted above in the Cambodian Law Perspective, it may be that parties could try to use tort liability statutes in civil law jurisdictions to achieve some of the same goals that promissory estoppel does. In addition, there may actually be less need for promissory estoppel under certain civil law contract rules. For example, since civil law jurisdictions do not require consideration, there is less need to find a way to enforce promises that lack consideration. In addition, in jurisdictions where offers are generally not revocable for a reasonable time, there may be less need for doctrines like promissory estoppel to prevent the injustice that may occur where offerors revoke after offerees have justifiably relied on offers.

7.10 Questions for Review

CHAPTER 7 – QUESTIONS FOR REVIEW

1. Are contracts always enforceable as long as they meet the five basic requirements discussed in Chapters 2-6 of this text?
2. What is a mistake?
3. Why are courts reluctant to refuse to enforce agreements on the basis of mistake?

4. When are agreements resulting from bilateral mistakes void?
5. When are agreements resulting from bilateral mistakes voidable?
6. In general, can parties avoid agreements because of mistakes about value?
7. When are agreements resulting from unilateral mistakes void?
8. When are agreements resulting from unilateral mistakes voidable?
9. Give examples of agreements that may be voidable because of unilateral mistakes.
10. What are some potential effects of mistake?
11. What is a misrepresentation?
12. When are agreements resulting from misrepresentation void, and when are they voidable?
13. What are the requirements for misrepresentation in the formation to exist?
14. What are the requirements for misrepresentation in the inducement to exist?
15. What are the types of misrepresentation in the inducement?
16. What is duress and what is the status of agreements resulting from it?
17. Give some examples of duress.
18. What is undue influence and what is the status of agreements resulting from it?
19. What are fiduciary relationships?
20. What is unconscionability?
21. What is procedural unconscionability?
22. What are adhesion contracts?
23. What is substantive unconscionability?
24. Give examples of substantive unconscionability.
25. What is promissory estoppel?

26. What are the requirements for promissory estoppel to apply?
27. Give examples of situations where promissory estoppel might apply.
28. What are the effects of promissory estoppel?
29. Is the Cambodian legal approach to the topics in this Chapter generally compatible with the approach discussed in this Chapter?
30. Is the civil law approach to the topics in this Chapter generally compatible with the approach discussed in this Chapter?