دانشگاه آزاد اسلامی

دانشکده حقوق، الهیات و معارف اسلامی

English Legal Text 1
Private law

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Contents

Contract

A contract is a legally binding agreement. Usually, a contract is an exchange of promises to act in a certain way, to provide a particular item or to pay a specified sum of money. For example, it may be an arrangement by which one person agrees to pay to another a specified amount for a specified number of hours worked. Each party to a contract is obliged to carry out his part of the bargain and a party who fails to do so is said to be in breach of contract and can be forced to rectify the breach or pay compensation for the damage caused.

A contract is formed when there is an agreement between the parties to undertake certain obligations, and agreement exists only if there has been a definite offer by one person to do a certain thing and an unconditional acceptance of the offer by the other. The contract is formed at the moment the offer is accepted and any attempt to vary or qualify an offer once it has been accepted will not succeed.

An offer exits if there is a proposal that indicates that the person who made it is ready to accept an immediate commitment to carry out the terms of the proposal. Acceptance occurs when the person to whom the proposal is made either unconditionally promises to do what is required in return for the terms of the proposal or performs the specified action, which in itself indicates acceptance of the offer.

Essential Elements of a Contract

Before an agreement can be called a contract it must have two features:

(1) intention to enter into a legally binding agreement.

Consideration for there be a legally enforceable contract, the parties must have intended to enter into a legally binding agreement. This intention is seldom stated, but it is usually inferred from the circumstances surrounding the agreement. In normal commercial transactions (such as the buying and selling of goods) the intention is obvious.

(2) The consent of parties legally capable of contracting is needed for a valid contract. In contract law, the term 'consent' bears two connotations. Under one, 'consent' means a party's assent to the terms and conditions of a proposed contract, given with the intent of creating legal effects. Under the other, 'consent' means the accord of the parties' will on the proposed contract, the uniformity of their intentions, or the meeting of their minds. In last, 'to consent' means to will the same thing that another wills and wishes us to will.

Offer and acceptance

Some of the rules respecting offer and acceptance are designed to operate only when a contrary intention has not been indicated. Thus, in German law an offer cannot be withdrawn by an offeror until the time stipulated in the offer or, if no time is stipulated, until a reasonable time has passed, but this rule yields to a statement in the offer to the effect that it shall be revocable. In Anglo-American common law, when parties contract by correspondence, the acceptance takes place on dispatch of the letter, but the offeror can stipulate that no contract will be formed until the acceptance has been received. These rules serve to fill in points on which the parties in their negotiations have not, for one reason or another, been specific.

Another function of rules relating to offer and acceptance is to enable the parties to understand and to mark when their discussions pass from an exploratory stage to the stage of commitment. The concepts of offer and acceptance are somewhat formal; they assume that the negotiations pass through clearly distinguishable phases, which is often not the case. But they help the parties to distinguish negotiation from commitment. The two words offer and acceptance become firmly associated with the assumption of obligations.

Different legal systems frequently advance comparable policies in quite different ways. Several distinctly different patterns are found in the approach of modern legal systems to the problems of whether an offeror is free to revoke an offer before acceptance and of when an acceptance is effective to form a contract. Perhaps the polar extremes are represented by German civil law on one hand and Anglo-American common law on the other. In the German view, an offer binds the offeror for any stipulated period or, when the offer is silent as to time, for a reasonable period unless the offeror has expressly made the offer revocable. The common-law rule is the opposite: an offer is revocable until it has been accepted. The two systems also have sharply divergent rules with respect to the point at which, when the parties are contracting by correspondence, the acceptance takes effect to conclude the contract. In German law the acceptance takes effect when it reaches the offeror, in the sense that the offeror either knows or can learn of it. In the common law, on the other hand, if the offeree uses an appropriate

means of communication, the acceptance is effective on dispatch unless the offeror stipulated the contrary in the offer. (A revocation by the offeror, however, does not take effect until received by the offeree.)

How are these divergencies in the rules respecting offer and acceptance to be explained? In particular, do they reflect fundamental policy differences or simply different techniques designed to forward quite similar purposes?

An examination of a typical problem posed when parties contract by correspondence suggests the latter explanation. Upon receipt of an offer, offerees frequently change their position by, for example, refusing or ignoring other offers, neglecting to seek additional offers, or themselves making propositions based on the offer made to them.

For this reason, the legal system sees a need to provide offerees with a secure point of departure for their decision, in order both to protect them and to facilitate commerce generally. The German system provides this protection by making the offer in principle irrevocable. The common law, on the other hand, found this solution excluded by its doctrine of consideration; as the offeree does not give anything in exchange for the offer's irrevocability, consideration is lacking to support an obligation not to revoke. (On the other hand, the Uniform Commercial Code, which has been adopted everywhere in the United States, provides that a firm offer made by a merchant is irrevocable even though the other party has given no consideration.)

The common law is not entirely insensitive to the offeree's predicament. The rule that the acceptance is effective upon dispatch creates a situation in which the offeror who wishes to revoke an offer is uncertain whether or not it can be revoked, since the revocation is not effective until receipt, whereas the offeree's acceptance, if one is made, takes effect on dispatch.

This uncertainty makes the consequences of an attempted revocation unpredictable and thereby inhibits an offeror who might otherwise seek to revoke. In sum, the German and Anglo-American systems both try to achieve, and in a measure succeed in achieving, a fair balance between the offeror and the offeree.

Consideration

In contract law, consideration is an inducement given to enter into a contract. To a contract for the sale of goods, the money paid is the consideration for the vendor, and the property sold is the consideration for the purchaser. The person seeking to enforce the promise must have paid, or bound himself to pay money, give goods, spend time in labor, or forgo some advantage or legal right. Although the law demands that on each side the consideration must be of some real value, what is paid by one need not be comparable in value to what the other party is giving. As long as there is an exchange of some kind, the courts will usually enforce the contract.

The idea that consideration must move from the promise is very closely linked to what is called the privity rule. This rule says simply that only the parties to a contract can enforce it. It is not possible by a contract between A and B to either confer an enforceable benefit on C or impose an enforceable burden on C. For example, if I promise you that I will give some money to C if you do something for me, C cannot enforce it if I break the promise. The Issue of privity is an important practical issue which quite frequently occurs in commercial dealings. It is not uncommon to see in a contract drafted by someone who is ignorant of the privity rule attempts to involve third parties.

Terms of Contracts

The terms of a contract are those elements that are expressed (that is, they are stated either verbally or in writing) to make up the total arrangement. The failure of one party to comply with one of these elements entitles the other party cither to rescind the contract or to claim damages from the offender.

When the terms are in writing but are not signed (for example, an airplane ticket), they become part of the contract if the party wishing to enforce the terms can show that the other person knew the terms were there or that reasonable steps were taken to draw them to the person's attention.

Sometimes a statement made during negotiations leading to a contract will have become a term of the contract. Whether or not a statement becomes a term depends on what appears to be the intention of the persons making the statement.

In addition to the terms that are expressly agreed by the parties, a contract may also contain implied terms, which are not written into the contract and are created either by the circumstance surrounding the contract, by the actions of the parties or by law. Thus, there are three main sources which give rise to implications:

- Terms implied to give business efficacy to the contract.
- Terms implied in law because they are required by a statute.
- Terms implied by way of custom and usage.

Implied Conditions and Warranties

A contract is made up of terms some of which are more important than others. The important term is called a condition which means that the term is basic to the main purpose of the contract. If a condition is not complied with or is broken, the purpose of the contract is destroyed and the contract discharged. The term of lesser importance is called a warranty. A warranty is subsidiary to the main purpose of the contract so that if it is not complied with, or is broken, the contract remains intact.

Both the terms, conditions and warranties, either may be stated or, where not stated, employed by the general law in order to make contract workable and to ensure fairness. For the protection of the public, legislation provides for certain basic terms to be part of the contracts. These terms are known as statute-implied terms.

It is to be noted that the words "warranty" and "condition" are also used in other contexts with a different meaning. At a more general level, a condition is simply a term in a contract, and a warranty is simply a promise in a contract by one of the parties. For example, a warranty in commercial sales may mean a promise or an agreement by seller that article sold has certain qualities or that seller has good title thereof.

Exclusion Clauses

It is quite common for traders to exclude liability for defects in goods or for damages done to the consumer or to the consumer's property. These are known as exclusion (or exemption) clauses. It is particularly important to determine whether an exemption clause forms part of the contract, does it mean the difference between the recovery of damages and no recovery at all. Generally, when a signed document contains an exclusion clause the consumer is bound by it.

However, there are some important obligations to a consumer that are placed on a seller, and these are implied by statute into consumer contract and can't be excluded. Where there is no signed document an exclusion clause cannot be enforced unless the trader can show that reasonable steps were taken to draw it to the consumer's attention before the contract was made.

Exclusion clause are often included in adhesion contracts. There are large areas of economic life in which the parties to contracts have such unequal bargaining positions that little true negotiation takes place. These contracts are often known as contracts of adhesion. Familiar examples of adhesion contracts are contracts for transportation or service concluded with public carriers and contracts of large corporations with their suppliers, dealers, and customers.

Penalty Clauses

Often, the parties to a contract will agree on a sum that is to be paid if either of them breaks the contract. If the agreed amount represents a genuine pre-estimate of what might be the loss suffered on breach of contract, the courts will enforce payment.

If the actual loss is more than the amount agreed, the party suffering the loss must forego the amount by which the actual loss exceeds the pre-estimate. On the other hand, if the amount of the loss is less than the amount agreed, the party in breach of contract will still have to pay the agreed amount.

Where the agreed amount takes the form of a threat in order to guarantee the contract (a penalty), the courts will not allow the person suffering the breach to recover more than the actual loss.

Misrepresentation

In certain situations, a contract, even when the requirements of form and capacity have been satisfied, is voidable (that is, capable of being rescinded at a certain date, so that it ceases to be of legal effect) because of misrepresentation.

A party to a contract, or an agent acting on behalf of a party to a contract, who, during the negotiations leading up to the contract, makes a statement which later turns out to have been false may be guilty of misrepresentation.

For misrepresentation to be established it must be shown that the statement was a statement of fact (rather than an expression of opinion), that is was made with the intention of inducing the person to whom it was made to act on it and that it was one of the things that induced the person to enter the contract.

In this case, the person may not only rescind the contract but also recover damages for any resulting loss. However, damages are not recoverable if the party accused of misrepresentation can show that he had reasonable grounds to believe, and did believe, that the statement was true.

Misrepresentation most commonly occurs in insurance and real-estate contracts; in such cases, a false statement regarding a matter of fact may be material to the contract and even influential in producing it. In many such cases, the injured party relies upon the false statement because it is the business of the other party to know all of the facts pertaining to it.

Mistake

As a general rule, an error of judgement gives no right to release from contract. If a person buys an article thinking it was made in Japan when it was really made in Korea, he has no right to withdraw from the contract and to get his money back. The law says that a contract once made, with agreement, consideration, etc., cannot be unmade unless there was misrepresentation or fraud by the seller.

Mistake is traditionally classified into three types:

Common Mistake. This is where both parties make the same mistake. For example, if I insure goods at sea or in another country, and unknown to me or the insurance company, the goods have been destroyed.

Mutual Mistake. This is where both parties are mistaken, but their respective mistakes are with regard to different matters, such as A agreeing to sell his car (his Paykan) and B agreeing to buy A's car (meaning A's Toyota).

The parties are at cross purposes—unknown to each other, they mean different things, the facts are equivocal, and each of the parties takes it up in different ways, Unilateral Mistake. This is where only one of the parties is mistaken and the other is not. The mistake can be to the identity, location, nature, or origin of the subject matter of the contract, or of its terms.

Generally, where agreement has been reached between the parties on the basis of a common mistake, the law will not provide for cancellation of the agreement with the exception of the following cases where the contract can be declared void:

• If the subject matter of the agreement is non-existent and neither party was aware of this.

• If a person makes a contract to buy something which already belongs to him.

• If a contract is entered into on the assumption that a person is alive who is not in fact alive. For example an agreement entered into on the basis that the tenant for life was alive is void for mistake.

When the parties have made a mutual mistake on a fundamental fact concerning the contract, but each party has made a different mistake, the offer and acceptance have not corresponded with each other and a contract has not come into existence.

Classifications of contract

Basically, there are two types of contracts namely; formal contract and simple contract. A formal contract is a contract under seal or a contract made by deed.

Formal contracts also include; negotiable instruments and judgments and recognizances entered in the record of proceedings of a court of record.

All other contracts are simple contracts. However, all contracts, whether formal or simple, come under one or more of several classifications. The most common classifications of contract include:

1. Formal contract

A formal contract is a type of contract under seal, reduced to writing, signed by the parties contracting and impressed with a seal. Formal contracts is also called specialty contracts or deeds. Its features are that it must be signed, sealed and delivered.

For signing, the person executing the deed can either sign (signature) or make a mark. Nowadays, a seal is not necessary. It suffices if there is an indication of its place in the document.

In the case of First National Security Ltd v Jones [1978] 2 All ER 221, it was held that a document could be regarded as a deed even though not sealed, where the parties clearly intended it to operate as a deed.

Delivery may be actual (where the deed is handed over to the other party) or constructive (where the party delivering the deed touches the seal with his finger and says “I deliver this my act and deed”. This is then construed as delivery and the deed becomes operative.

2. Simple contract

A simple contract (or Informal contract) is a type of contract whether written or oral, which is not under seal. Simple contracts can also be implied from the conduct of the parties.

Formerly, simple contracts were referred to as patrol contracts, but nowadays lawyers apply the word patrol specifically to simple contracts made orally and not in writing.

Simple contracts are therefore the opposite of formal contracts. Unlike formal contracts, simple contracts are not binding except there is consideration. In simple contracts, only a party who has furnished consideration can bring an action to enforce the contract. This is apparently one of the characteristics of a binding contract as well.

Certain types of simple contracts must be evidenced in writing even though not under seal, otherwise those contracts will be unenforceable in Nigeria. Some examples are; bills of exchange, promissory notes, contracts for the sale or other disposition of land, contracts for loan by a money lender etc,.

It should be emphasized that even though simple contracts may be written, it is not at par with a contract under seal or a deed for the majority distinguishing factor in a formal contract is the seal which is not present in ordinary written contracts.

3. Express Contract

Express Contract is a class of contract the term of which are expressed or stated in every clear mode, either under seal, in writing or orally. This is the usual way contracts are made.

For example; A man wants to build a house. He puts up an advertisement for tender. Another man responds to the advertisement. They meet and discuss all the necessary things involved. At the end, they sign a contract. This is an express contract.

4. Implied cntract

This classification of contract is the opposite of an express contract. Here, the terms of the contract are not expressly stated.

Conversely, the existence of a contract is inferred by law from the acts or the conduct of the parties, the circumstances surrounding the transaction or from the previous course of dealing between the parties.

For instance, for the court to uphold such a contract, the circumstances surrounding the transaction must be such as to make it reasonable or even necessary to assume that a contract existed between the parties by tacit understanding.

5. Bilateral Contract

A Bilateral Contract is also one of the classifications of contract. It is a contract between two parties. Most times, these types of contracts consist of exchange of promises. The offeror promising to do something in exchange for the offeree promising to do something else in return.

At the inception of this article, I noted that every simple contract must have consideration. In the case of a Bilateral Contract, the consideration is referred to as executor consideration. Where the contract involves more than two parties who make mutual promises, one to the other, it is known as a multilateral contract.

Both bilateral and multilateral contracts are generally known as synallagmatic contracts because the parties expressly enter into mutual engagements, each binding himself to the other.

6. Unilateral contract

A unilateral is a class of contract that is initially binding on only one party who makes the promise (the promisor). The person to whom the promise is made (the promisee) is free to perform his part of the contract or not. It is therefore a one-sided contract.

It is one sided because one party first firmly binds himself by a promise conditioned only upon the performance of an act, leaving the other party completely free to choose to perform or not to perform the act.

An example of this type of contract is a promise to reward in return of an act. For more information, see the case of Carlill v Carbolic Smoke Ball Co [1893] 1 QB 256.

7. Joint contract

A joint contract is also one of the classifications of contract. It is a contract made by two or more promisors who hold themselves jointly bound to fulfill its obligations, or one made by two or more promisees who hold themselves jointly entitled to require performance of an obligation.

For example; A and B owning a piece of land jointly contracts to sell it to C; or where E and F contracts jointly to buy a piece of land from D. E and F are joint promises.

8. Joint and Several Contract

A Joint and Several Contract is a type of contract in which two or more persons are not only equally bound together but also individually bound.

For example; A and B jointly and severally guarantee a sum of 1 million given to United Bank of Africa (UBA) to C.

The Effect of that contract (known as contract of guarantee) is that, if C fails to pay, UBA has the right to sue A and B to repay the money or choose to sue only A or B to repay the money individually. This can be seen from the case of Chemi v UBA Plc [2010] 6 NWLR (PT 1191) 474.

9. Entire contract

In an entire contract the entire or complete fulfillment of the promise by either of the parties is necessary as a condition precedent to the performance of the other party.

For example; A employs B, a painter, to paint his portrait in oil color at a price of $1,000. Until B completes the painting satisfactorily, he is not entitled to the whole or part of the fee. The reason is because, the contract is an entire contract. Conversely, the complete performance of it by B is necessary as a condition precedent to payment by A.

Accordingly, B cannot after painting the head of the portrait demand a proportional faction of the fee and abandon the rest of the work.

10. Severable or Divisible Contract

The classification of contract is the opposite of an entire contract. In the Supreme Court case of BFI Group Corporation v Bureau for Public Enterprises [2012] 18 NWLR (Pt 1332) 209, the Supreme Court defined this type of contract.

Accordingly, to the court, "a divisible contract is separable into parts, so that separate parts of the agreed consideration may be assigned to severable parts of the performance.

Such divisible agreements admit of pro rata payments for each portion that was performed, and is independent of performance of other parts of the contract".

11. Conditional contract

This is a class of contract in which the performance of the coming into effect is conditional upon some specified event. That event is called a condition.

The specified condition may be such that it suspends the effectiveness of the contract, that is to say, it prevents the contract from taking effect unless and until the the condition occurs. A condition of this kind is called a condition precedent.

Take for example; A and B enter into a building contract. It specified that the contract is not to take effect until A, the owner of the building, has paid a mobilization fee to B, the builder. The effect of the condition precedent is therefore suspensive.

12. Collateral Contract

This is a preliminary contract which is usually oral and forms the reasons or the inducement for the making of another related contract.

The importance of a collateral contract is in the fact that, if the main or principal contact fails for any reason, the collateral contract continues to stand.

That notwithstanding, there is an exception to this rule. Where the main contract is illegal the collateral contract will not continue. This can be seen from the leading case of Andrews v Hopkinson [1956] 3 All ER 422.

13. Executed and Executory contracts

Executed and Executory contracts are two different classifications of contract. An executed contract is a contract that has been completely performed on both sides. Nothing remains to be done by either party.

On the other hand, an Executory contract is the opposite of an executed contract. The performance of this type of contract lies in the future on both parties. None of the parties has taken any step to carry out the terms of the contract.

It should be noted however, that both Executed and Executory Contracts can be executed or executory only on one side.

14. Void contract

A void contract is a contract that is completely emptied of effect. It is entirely an ineffective bargain. It follows that, like an executed contract, a void contract is no contract at all.

For example; A and B enters into a contract under which A requires B to kill C with a letter bomb in turn for A paying B the sum of $100,000.

That contract is illegal and being Illegal, it is completely void. The result is that both A and B can ignore it. Neither party can enforce the contract in a court of law.

15. Voidable Contract

A Voidable Contract is a contract that is binding but one party has the right to set it aside. It is a contract that beings as a valid contract but is liable to be rendered void in certain circumstances.

It follows that it is valid from the inception and can continue to be valid if none of the parties takes any step to render it void.

16. Quasi Contract

From the word “Quasi” which means “something like”, one can say that a Quasi Contract is neither something like nor resembling true contract. Quasi Contract does not necessarily arise from the agreement or intention of the parties. On the contrary, in most cases, Quasi Contract arises against the will of a party.

Simply put, the term “Quasi Contract” is used by lawyers as a convenient common level for describing a variety of cases in which the law imposes obligations on person on equitable grounds in order to prevent unjust enrichment.

The principle on which the law imposes Quasi Contractual obligation is that no one should be allowed to enrich himself inequitably at another’s expense.

Right to Terminate the Contract

Article 7.3.1 of UNIDROIT Principles provides:

1. A party may terminate the contract where the failure of the other party to perform an obligation under the contract amounts to a fundamental non-performance.

2. In determining whether a failure to perform an obligation amount to a fundamental non-performance regard shall be had, in particular, to whether:

● The non-performance substantially deprives the aggrieved party of what it was entitled to expect under the contract unless the other party did not foresee and could not normally have foreseen such a result.

● Strict compliance with the obligation which has not been performed is of essence under the contract.

● The non-performance is intentional or reckless.

● The non-performance gives the aggrieved party reason to believe that it cannot rely on the other party's future performance.

● The non-performing party will suffer disproportionate loss as a result of the preparation or performance if the contract is terminated.

3. In the case of delay, the aggrieved party may also terminate the contract if the other party fails to perform before the time allowed under Article 7.1.5 has expired.

Sometimes a contract will expressly say that one party may bring the contract to an end following a particular kind of breach (or perhaps any breach) by the other party. Any clear provision to this effect will be decisive. Where parties have not made express provision about their rights following a breach of a particular term, the general rule is that a very serious breach by one party will allow the other party to choose whether or not to end the contract. To be serious, the breach would have to be:

1. A breach of any term that has very serious consequences, that is, the effect of the breach must be substantially to deprive the innocent party of what was intended to be obtained under the contract.

2. A breach of a vital term, that is, a term in relation to which, at the time the contract was signed, the party's words and conduct showed that the party considered that strict compliance with the term was essential.

Where the breach is sufficiently serious, the innocent party has a right to end the contract, but need not do so. If the contract is kept alive, the innocent party keeps his right to claim damages. If it is decided to terminate the contract, the party in breach should be informed as quickly as possible. It is dangerous to decide to terminate the contract following a breach, unless it is certain that the contract has been breached and that the breach is sufficiently serious to justify termination. Terminating a contract when not legally entitled to do so is itself a serious breach.

Illegal Contracts

A contract is illegal if it involves doing something that is criminal or a civil wrong or injurious to the public or against the public good. For example, it is an offence to sell a firearm to a person not licensed to hold one. A contract to sell a firearm in these circumstances would be illegal. A contract whose purpose is to get the party to it to break another legally binding contract that party has made already is illegal because it is a civil wrong or procure to break a contract which is binding.

A contract which otherwise is legal would be illegal if its subject matter is to be used for an unlawful purpose. If a firearm dealer were to agree to sell a firearm to a person licensed to hold a firearm in the knowledge that the buyer intends to commit murder, that contract would be illegal. Courts will not enforce an illegal contract. The general rule is that money paid or property transferred under an illegal contract cannot be recovered back.

Refusal to provide assistance is said to have the effect of deterring illegal contracts being made. There are exceptions to the rule regarding enforcement. For example, where a contract is made illegal by a statute passed for the protection of a class of persons, a member of that class can recover money paid or property transferred by him under the contract. So a tenant would be able to recover money paid to a landlord which the landlord is prohibited by the Act to collect from a tenant. Broadly speaking, a court would not aid a party who relies on an illegal contract to establish a claim.

There are some types of contracts cannot be enforced in a court of law because they are unlawful in themselves or disapproved as contrary to public policy. The following contracts are void and neither party can enforce them: restraint of trade contracts; contracts made in breach of license requirements; contracts to promote sexual immorality; contracts to promote corruption in public life; and, agreements to commit a crime or tort, such as assault. If the void part can be separated from the other terms without rendering the agreement meaningless, then the remainder may be valid. A related agreement, even if legal in itself, is usually void and illegal because of its connection with an illegal contract. A restraint of trade is treated as

contrary to public policy and therefore void unless it can be justified under the principles explained below. If a restraint is void the remainder of the contract by which the restraint is imposed is usually valid and binding; it is merely the restraint which is struck out as invalid.

A restraint of trade may be justified and be enforceable if:

- The person who imposes it has a legitimate interest to protect.
- The restraint is reasonable between the parties as a protection of that interest.
- It is also reasonable from the standpoint of the community.

Restraints must be appropriately limited in the geographical scope and in duration. Restraints on the vendors of businesses must protect the business sold and must not be excessive.

When Does a Contract End?

A contract is ended when the parties have fulfilled all their obligations under the contract. A contract can also be ended through the breach of one of its terms by one party, by mutual agreement or by the frustration of the original contract.

After certain serious breaches of contract, the innocent party has the right to choose whether to discharge the contract or keep it in force. If the decision is to end it, the party in breach must be told either orally or in writing. The contract comes to an end from that moment and neither party is bound from that date.

The parties to a contract can agree at any time that their contract should cease to bind them, although such an agreement is itself a contract which must also be supported by consideration. If both parties have obligations under the contract which have not yet been carried out, the agreement to bring the contract to an end generates its own consideration, as each party promises not to enforce the remaining obligations of the other.

Sometimes after the conclusion of the contract an event occurs which brings about a fundamentally different situation to that existing at the time of contracting, for example, where fire destroys the subject matter of the contract. If the altered circumstances are not caused by the fault of either party, a court may find that the contract has automatically ceased in which case neither party will be bound. The court must be satisfied that there is no provision in the contract that the contract should continue to bind even if such an event should occur.

Fairness and social utility

Much of the law of contract is concerned with ensuring that agreements are arrived at in a way that meets at least minimum standards respecting both parties' understanding of, and freedom to decide whether to enter into, the transactions. Such provisions include rules that void contracts made under duress or that are unconscionable bargains; protection for minors and incompetents; and formal requirements protecting against the ill-considered assumption of obligation. Thus, section 138 of the German Civil Code renders void any contract "whereby a person profiting from the distress, irresponsibility, or inexperience of another" obtains a disproportionately advantageous bargain. In addition, more general social requirements and views impinge upon contracts in a number of ways. Certain agreements are illegal, such as—in the United States—agreements in restraint of trade. Others, such as an agreement to commit a civil wrong, are held by the courts to be contrary to the public interest. Certain systems discourage some purposes, such as the assumption of a legally binding obligation to confer a gift of money or other gratuitous benefit upon another, by various special requirements.

Legal systems often have recourse to interpretation in the interest of fairness and social utility. Many litigated cases in which a remedy is sought for breach of contract are concerned with the meaning to be attached to the verbal expressions and acts of the parties in their dealing with each other. Ambiguities, for example, may be resolved against the party thought to have the superior bargaining position. This decision is common in cases in which one party is able to set the terms of a contract without bargaining. Again, a written agreement may be interpreted against the party who drafts or chooses the language. Or the court may prefer an interpretation it finds to be in accord with the public interest.

Although all legal systems try to achieve a reasonable approach to freedom of contract, there are bound to be contractual obligations that depart in some degree from the ideal. No one seeking to enforce a contract is required to show affirmatively that it advances specific ends desired by society or that the contracting process is without blemish. Such a requirement would be administratively cumbersome and expensive. In addition, it would reduce the general

usefulness of the contract as an economic and social instrument. Differences in the economic resources available to individuals are found in most societies; to the extent that these differences flow from general conditions and are reflected in, rather than produced by, individual contracts, it is usually not feasible to take remedial action through the law of contracts. A single contract, moreover, is often only one element in a complex of economic and legal relations. Thus, in times of severe inflation or deflation, it may simply not be feasible to seek to deal with the resulting inequities in terms of redoing individual contracts.

Contracts of adhesion

There are large areas of economic life in which the parties to contracts have such unequal bargaining positions that little real negotiation takes place. These contracts are often known as contracts of adhesion. Familiar examples of adhesion contracts are contracts for transportation or service concluded with public carriers and utilities and contracts of large corporations with their suppliers, dealers, and customers. In such circumstances a contract becomes a kind of private legislation, in the sense that the stronger party to a large extent assigns risks and allocates resources by its fiat rather than through a reciprocal process of bargaining. Enforcement of such standard contracts can be justified on the ground that they are economically necessary. The question then becomes whether these decisions are to be made by private enterprise or by other agencies of society—in particular, government—and to what extent the interest of those who deal with such economic enterprises can be represented and protected in the decision-making process.

Contract law in such cases provides only what can be called the legal relationship. The content of the relationship derives not from bargaining between the parties but from the fiat of the large enterprise often offset by the fiat of some government agency. In a sense, the socially regulated contract of adhesion seeks to eat the cake of bureaucratic rationality while having, as well, the cake of individual choice and decision. Doubtless both cakes are diminished in the process, but the result may well be more satisfying than if only one had to be chosen. At all events, the resulting legal-economic phenomenon is radically different from that envisaged by traditional contract law. Legislative attempts have been made in a number of countries, such as the former West Germany, the United Kingdom, and France, to strike a balance between the general freedom to contract and the protection of the weaker party.

The rules of different legal systems

Traditional contract law developed rules and principles controlling the voluntary assumption of obligations, regulating the performance of obligations so assumed, and providing sanctions for failure to perform.

Unenforceable transactions

In all systems of contract law, certain classes of transactions are treated as unenforceable by the judicial process because they are thought to involve unusual hazards for a contracting party or to be of marginal social utility. There are, in both civil-law and common-law systems, four kinds of concern that lead the systems to treat certain types of transaction as unenforceable. These four kinds of concern may be called evidentiary, cautionary, channeling, and deterrent. The evidentiary concern springs from the desire to protect both the individual citizen and the courts against manufactured evidence and insufficient proof. The cautionary concern seeks to safeguard individuals against both their own rashness and the importuning of others. The channeling concern seeks to mark off or label obligations that may be enforceable and to direct attention to the problem of the extent and kind of the legal obligation, so that individuals will know the legal significance that their actions may have. Finally, the deterrent concern refers to those types of transaction that are discouraged because they are felt to be of doubtful value to society.

Two quite different techniques are used to delineate types of transaction that are unenforceable in their natural, or normal, state. The first proceeds by describing the type in functional or economic terms. The common-law Statute of Frauds enacted by the English Parliament in 1677 provided that the following six kinds of contracts should be unenforceable unless expressed in writing: contracts to sell goods exceeding a certain value; contracts to sell any interest in land; agreements that are not to be performed within a year of

their making; agreements upon consideration of marriage; suretyship agreements; and undertakings by an executor or administrator to be surety on a debt of the deceased for which the estate is liable. Civil-law systems typically describe as unenforceable in the absence of an appropriate formality noncommercial contractual obligations exceeding a certain value; mortgages created by contract; noncommercial compromise agreements; marriage contracts; agreements binding a party to transfer all, or a fractional part of, its property; leases to run for more than one year; assumptions of the obligation to stand as surety, at least when the operation is not a commercial one on the surety's part; promise of an annuity; and promises to make gifts.

Another less direct technique for delineating unenforceable types of transaction derives from the common law's doctrine of consideration. It holds transactions unenforceable in the absence of a bargained-for exchange. This class would include, for example, promises to make gifts. The approach tends to be too all-embracing, treating certain types of transaction as suspect when there is little or no practical justification for doing so. It is not clearly demonstrated, for example, that an option agreement made by two businessmen should be handled differently from many other kinds of commercial dealings. A strong argument exists that the common law's handling of commercial options, business compromises, and other business transactions lacking an element of exchange is more a logical deduction from the general doctrine of consideration than an expression of justifiable policy concerns.

Except in cases where the ground for unenforceability is radical, when a given transaction type is considered unenforceable the legal system should prescribe an extrinsic element the addition of which will cure the defect—for example, expressing the agreement in writing, performing it in part, or having a document drawn up with the participation of a legally qualified notary or other public official who holds a special appointment from the state and is charged with handling and recording various types of transactions.

A complex situation has arisen with respect to the two most generally available extrinsic elements, the seal and the payment of a nominal consideration. Various states of the United States no longer consider the seal as an effective extrinsic element. The seal's decline is rooted in its changed significance in the modern, literate, democratic world. The seal was originally an impression, usually in wax, of a device, or design, representing an individual or a family. In modern times, the courts, with legislative assistance in a fair number of the states of the United States, have recognized easy-going substitutes for the wax seal, such as simple writing

presumed to have been made for sufficient consideration or, in special circumstances, parol (oral) agreement for valid consideration. The effect has been to render the seal progressively less effective, particularly from the cautionary perspective, and many courts now refuse to accept it as a satisfactory formality.

Nominal consideration is a subtle and ingenious formality. Its essence is the introduction of a contrived element of exchange into the transaction. Thus A, desiring to be bound to give B $10,000, requests B to promise to give (or to give) A a peppercorn in exchange. B's promise (or performance) is an element, extrinsic to a normal gift promise, introduced by the parties in an effort to render the transaction enforceable (since the law does not treat normal gift promises as enforceable). Common-law courts often accept nominal consideration when used in a business context, such as in an option arrangement or a compromise agreement; its effectiveness is understandably more doubtful in the context of a gift promise, since such a transaction involves greater dangers for one party and is socially more marginal.

Civil-law systems have less need than the common law for a formality such as nominal consideration; they prescribe methods directly in their statutes. Interestingly enough, however, in some civil-law systems an analogous, judicially developed formality has emerged—the disguised donation (donation déguisée) of French law, in which the parties cast a gift promise in the form of an onerous transaction, such as a sale. It can be argued that both the nominal considerations and the disguised donation serve at least the cautionary and channeling functions of formalities mentioned above.

Another kind of extrinsic element recognized by some courts, especially in the common-law countries, is one party's reliance upon the promise of the other. The fact of reliance argues in favour of enforcement because it indicates that an underlying understanding existed between the parties and because the relying party may suffer as a consequence of its change of position. Some courts will enforce initially suspect transactions when several extrinsic elements are present in combination. A common-law court, for example, may enforce a gift promise in which the element of reliance was present in addition to a seal or a nominal consideration. Other extrinsic elements, either alone or in combination with reliance, a seal, or a nominal consideration, may also render a transaction enforceable. Cases, for example, in which the promisor dies without attempting to revoke a gift promise could be enforced, as distinguished from cases in which the promisor seeks to revoke.

Performance

Contract law seeks to protect parties to an agreement not only by requiring formalities but in many other ways as well. Thus rules respecting deceit, fraud, and undue influence are designed to ensure that contractual obligations are assumed freely and without one party misleading the other. Other rules regulate the modification of ongoing contractual relations with a view to preventing a party with considerable bargaining power from unfairly imposing changes in the contract.

The law also allows contractual relations to be adjusted when they have been thrown out of balance by unforeseen circumstances. The task of adjustment is relatively easy in cases in which both parties made a mistake or in which one party laboured under a mistaken assumption that was, or plainly should have been, known to the other. The problem of mistake becomes more intractable when the error is chargeable to only one party. The solutions reached for such situations are complex and defy general statement.

Catastrophic events such as inflation, political upheaval, or natural disasters may upset the economy of a contract. In the case of natural catastrophes, relief is frequently available under theories of force majeure (action by a superior or irresistible force) and “act of God” (act of nature that is unforeseeable and unpreventable by human intervention). When the unsettling circumstances are economic in their nature, as with severe inflation or deflation, a solution is difficult to find. A party who benefits from inflation in one contractual or economic relation may suffer from it in another. A general readjustment in contracts would be enormously complicated and time-consuming and would interject an undesirable element of uncertainty into economic and business activity. Only under exceptional circumstances—and usually in the form of special legislation—are contractual relations adjusted for the effects of severe economic dislocations.

Failure to perform

Another branch of contract law deals with the sanctions that are made available to a contracting party when the other party fails to perform its contractual obligations. When these sanctions take the form of money damages—as they usually do in practice, even though some civil-law systems have a theoretical preference for specific relief—the system must decide whether plaintiffs are to be put in the same position economically that they would have been in had the contract been performed (expectancy damages) or simply reimbursed for the actual losses, if any, flowing from their reliance on the contract (reliance damages). Reliance damages can, of course, be very large. A subcontractor who fails to deliver parts required for the construction of an ocean liner (or delivers faulty parts) may be responsible for heavy reliance damages resulting from delay in the work or actual damage to the vessel. Legal systems utilize various techniques to limit both reliance and expectancy damages when otherwise they would be unreasonably large.

If a person has agreed to buy an article from a merchant, a refusal to take delivery will not ordinarily produce substantial reliance damages. Delivery costs will have been incurred, but the merchant will presumably not have lost sales elsewhere. In such circumstances, the merchant will seek to recover not delivery costs but lost profit—the expectancy damages. The law allows relief on the basis that the expectancy created by an enforceable promise has a current economic value, measured by the economic gain that the party would derive if the particular agreement were performed.

In some circumstances, performance is not measurable in terms of market value—as, for example, when one relative has agreed to sell to another a family painting of sentimental value but of little intrinsic worth. Many legal systems in such a case require specific performance (that is, compliance with the precise terms agreed upon in the contract). The availability of specific relief varies among contemporary legal systems, for reasons that seem more historical and doctrinal than practical.

Other problems of contract law

Many contracts involve more than two persons. The law of contracts provides special rules for regulating claims by multiparty plaintiffs or claims against multiparty defendants, or for determining rights among the parties. Multiparty problems arise in other contexts as well. There is the problem of whether the immediate parties to a contract can enter into an agreement that will confer rights upon a person not an original party to the contract. Probably because the dogmatic structure of contract law was largely formed on the model of the simpler two-party situation, and because the contract for the benefit of third parties did not have great practical importance until such relatively modern developments as the emergence of life insurance, many systems of contract law have encountered difficulty in working out the relationship between the third party and the underlying contract. English law took the view that, as a rule, persons cannot acquire a right on a contract to which they are not a party. Some of the problems posed are difficult to resolve: under what circumstances and to what extent should the third party control the underlying contract when, for example, the original parties desire to rescind or modify it?

Another variation of the party problem is presented by efforts to add or substitute parties to a contract. In the absence of an express regulation of the problem in the basic contract, the law works with the notion of the presumed intention of the contracting parties, based on considerations of fairness and practicality. A contracting party cannot, in principle, assign to another its right under a contract if the assignment would result in a significant change in the burden assumed by the other contracting party. A contractual right to receive money or goods is a different matter; it can ordinarily be assigned because the resulting burden on the person under obligation is not great, and because society as a whole benefits from having this flexible economic and legal instrument.

One problem of contract law that has been mentioned above deserves further consideration—the problem of interpretation. Many rules of contract law are simply presumptions, based on experience and tradition, as to what the parties ordinarily intend; if

they clearly intend otherwise, the rules are not mandatory. Problems of interpretation frequently arise with respect to the particulars of a given agreement; thus the court seeks to determine what the parties actually had in mind. The effort to ascertain intention may encounter difficulties arising from the law of evidence. Many legal systems limit the use of testimonial evidence to explain the essential elements of a written contract.