

LEGAL LUNCHESES
CONTRACTS

1. What is a Contract?

a. Definition: “An agreement between two or more persons which creates an obligation to do or not do a particular thing.” Blacks Law Dictionary

b. Example to Consider

Joe wants to sell his truck.

Sam wants to buy a truck.

Joe: Do you want to buy my truck for \$2500?

Sam: Yes, I will buy your truck for \$2500.

Do Joe and Sam Have a Contract??

2. Essential elements of a Contract

a. Competent Parties – “Capacity to Contract”

1) Examples of “Incompetent Parties”

- Minors
- Persons with Mental Disabilities
- Corporations acting Outside the Stated Corporate Purpose

2) Effect of Incapacity – Makes the Contract Void or Voidable, depending upon the incapacity.

Example: Joe is only 17!
Contract is Voidable.

b. Subject Matter – Essential elements

- 1) Identification of Parties – Who
- 2) Description of the Subject Matter - What
- 3) Time for Performance - When
- 4) Price – How Much

c. Valuable Consideration

1) Valuable Consideration Defined: A Bargained For Legal Detriment. The promise to do, or not to do, any act which but for this bargain the promisor was not legally obligated to perform.

Example: Joe has to turn over the truck to Sam.
Sam has to pay Joe \$250

2) Mutual – Must be mutual legal obligation

- Gifts Distinguished

Example: What if Joe offered to give Sam his truck on Sunday, but on Monday, changes his mind? Can Sam force Joe to give him his truck?

- d. Mutuality of Agreement - “Meeting of the Minds”
- 1) Do both parties understand the terms of the contract the same way?

Example:

Joe has 2 trucks to sell. One is an old, beat up truck he uses to haul trash to the compactor site every Saturday am and a nice, decent truck he drives around everywhere. Joe wants to sell his “trash truck” Sam wants a truck he can drive to church on Sundays

Joe: I will sell you my truck for \$2500 (thinking “trash truck”)

Sam: I will buy your truck for \$2500. Here’s my check! (thinking Good truck)

What Truck, if any, has Sam purchased??

3. Oral v. Written Contracts

- a. **General Rule** – Oral contracts are valid and enforceable as long as they possess all of the essential Characteristics of a valid contract.

b. **Exceptions: Statute of Frauds (From 1677 English Statute)**

1. Statute of Frauds requires that some contracts must be in writing in order to be enforceable.
2. “SLY ME Good”
 - a) S: Surety Contracts – Contracts to guaranty the debt of another. Example: If Sam doesn’t pay for the truck, I will
 - b) L: Land – Contracts for the sale of land must be in writing.
 - c) Y: Year – Contracts that cannot be performed within one year. Joe to Sam: I will sell you my truck 2 years from today, and no sooner.
 - d) M: Marriage - Contracts in consideration of marriage (outdated)
 - e) E: Estate – Contract which by its terms is not to be performed within the lifetime of the promisor. Such as I promise that you will get my house upon my death.



- f) **GOOD: Sale of Goods – Contracts for the sale of Goods for more than \$500 must be in writing pursuant to the Uniform Commercial Code.**

Example: Is Joe and Sam’s contract for the purchase and sale of Joe’s truck enforceable if it’s not in writing??

c. **Effect of Writing: Parol Evidence Rule**

1) **The Rule:** If the parties to a contract have reduced that agreement to a writing mutually intended as the full and final expression of their bargain, then any evidence – whether written or oral – or prior or contemporaneous promises or understandings is legally irrelevant if it would vary, add to, or contradict the terms of that writing.

- a. Integration – Did the parties intend that the written contract be the complete agreement?
- b. “Four Corners” – Evidence as to the Agreement is limited to the “Four Corners” of the document.

2) **The Exceptions**

- a. Ambiguity
- b. Fraud

4. **Remedies – What happens if one party breaches the Agreement?**
There are several types of Remedies available.

- a. **Compensatory Damages** – Non-breaching party is compensated for the breach by the breaching party and is “put in the position he would have been had the breach not occurred”.

Example: Joe and Sam make a valid, binding contract whereby Joe is to sell Sam his “trash truck” for \$2500. The agreement provides that Joe is to deliver the truck to Sam on Tuesday, and Sam is to pay for the truck by Friday of the same week. After the agreement is made, Sam calls Joe on Monday and tells Joe that he can’t afford the truck and no longer will buy it. Joe sells the truck to Mike but can only get \$2000 for the truck. Joe has a breach of contract claim against Sam for \$500 – the difference between what Sam had agreed to buy the truck for and what Joe could sell it for after Sam’s breach.

- b. **Restitution** – Non-Breaching party is put back in the position he would have been in had the contract never been made.



Example: Same facts as above except in this case, Joe delivers the truck to Sam on Tuesday as agreed, but Sam has no money and fails to pay for the truck on Friday. Joe could ask that the Court order Sam to return the truck to Joe and treat the contract as never having been made.

- c. **Specific Performance** – In circumstances where money damages are inadequate to compensate for the wrong, the Court may order Specific Performance – that is, forcing the parties to go through with the contract as agreed. Typically only applicable where the subject matter of the contract is unique (for example: real estate)

Example: Same facts as above, except in this case, the truck that Joe has agreed to sell to Sam is a one of a kind collector's piece. No other truck in the world like it. On the day before Joe is to deliver the truck to Sam, Joe has buyer's remorse and decides he doesn't want to sell the truck after all. Joe offers to find Sam another truck, but Joe's truck is so special that no other truck will satisfy Sam. Sam has a cause of action against Joe for breach of contract and as his remedy, can ask that the Court order Specific Performance, that is, ask that the Court order that Joe sell Sam the truck for \$2500 as agreed.

- d. **Punitive Damages** – Punitive damages are intended to punish bad behavior and are not recoverable in breach of contract cases. Purpose of contract damages is to compensate the aggrieved party, not to punish the breaching party.

Example: So in the case of Joe and Sam, if one of them breaches the contract, the court will not include any award of punitive damages.



e. **Attorneys Fees**

- 1) **American Rule** – Each party pays their own attorneys fees in breach of contract action unless there is an express agreement otherwise.

Example: Same facts as above. Joe turns truck over to Sam, Sam doesn't pay. Joe hires attorney to sue Sam for the \$2500. Unless Joe and Sam had a written contract that provided that, in event of litigation between the parties, party found to be in breach is obligated to pay non-breaching party's attorneys' fees, Joe has to pay his own attorney.

- 2) **Exception: Bad Faith** – If a party acts in “Bad Faith”, a court may award attorneys fees pursuant to the Maryland Rules. But, Bad Faith must really be BAD!

5. **Contract “Boilerplate”** – Examples of common contractual clauses:

a. **Venue** – This Agreement shall be construed and enforced in accordance with the laws of the State of Texas, USA, applicable to contracts made and to be performed within such state, without reference to its conflict of law provisions. If any disputes arise out or are related to this Agreement, the parties irrevocably consent to the venue and jurisdiction of the Courts in Harris County, Texas as the proper and convenient forum for resolution of said disputes.

b. **Entire Agreement** - This Agreement constitutes the entire agreement between the parties and there are no representations, warranties or commitments except as provided herein. This Agreement supersedes all prior and contemporaneous agreements, understandings, negotiations and discussions, whether written or oral.

c. **Amendment** - No modification or waiver of any of the terms of this Agreement shall be valid unless made in writing, and signed by the parties.

d. **Successors** - All of the terms and provisions of this Agreement shall be binding upon and inure to the benefit of and be enforceable by the respective heirs, personal representatives, successors and permitted assigns of the parties hereto.

e. **Governing law** - This Agreement shall be governed by and construed in accordance with the laws of the State of Maryland.



f. No Waiver - No exercise or waiver, in whole or in part, of any right or remedy provided for in this Agreement shall operate as a waiver of any other right or remedy. No delay on the part of any party in the exercise of any right or remedy shall operate as a waiver thereof.

g. Further Assurances - Each of the parties agree to execute such other and further instruments and to perform such acts as may be reasonably required to effectuate the purposes of this Agreement.

h. Severability - Should any provision of this Agreement be found, held, or deemed to be unenforceable, voidable or void, as contrary to law or public policy under the laws of Maryland or any other State of the United States, the parties intend that the remaining provisions of this Agreement shall nevertheless continue in full force and be binding upon the parties, their heirs, personal representatives, executors, and assigns.

i. Counterparts - This Agreement may be executed in any number of counterparts, each of which shall be considered an original for all purposes; provided, however, that all such counterparts shall together constitute one of the same instrument.

j. Time of Essence - Time shall be of the essence of each and every provision of this Agreement.

k. Assignments - This Agreement may not be assigned by either party without the express written consent of the other, such consent to not be unreasonable withheld. Any assignment made or attempted by the Borrower without such prior written consent shall be void.

l. Merger (real estate contracts) – The terms of this Contract shall survive delivery of the deed.

m. Consequential loss exclusions

6. Reviewing and Negotiating Contracts

- a. Review it – Analyze it – Understand it!
- b. Take reasonable exceptions.
- c. Be patient and persistent with owners.
- d. Keep risk:reward in balance.
- e. Get help when you need it!



7. Lies and Myths

“This is our standard contract. We can’t change it.”

“All your competitors sign this contract. They never take exception to it. You’re just too hard to work with.

“Yes, the contract makes you strictly liable for everything that goes wrong with the project. But don’t worry – we’d never enforce it that way!”

“It doesn’t matter what’s in the contract. If the owner wants to sue us, he’ll do it anyway.”



“Sign here to indicate you have no idea what you’ve signed for.”

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PALUMBO & KEFFLER, LLC
Exceeding Expectations