CHAPTER 13. CONTRACTS

13.1 INTRODUCTION

A contract is defined as a "promise or set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." (Restatement (Second) of Contracts § 1, 1979)

That is, a contract is a legally enforceable promise or set of promises. To be legally enforceable a promise must meet several conditions which comprise the basic elements of a contractual agreement. An agreement is an offer by one party which is accepted by another party. Both offer and acceptance must be voluntary and the parties must have the capacity to enter into the contract. In addition, the objective(s) of the contractual agreement must be legal and the agreement must be supported by valid consideration.

Contracts, or the ideas implicit in contracts, found be found in ancient Egypt and Mesopotamia. For example, six articles (out of 282) of the Code of Hammurabi (Babylon circa 1792-1750 BC) covered the roles and responsibilities of the "master builder". Article 228 provided a contract-like condition for payment: "If a builder constructed a house for a [man] and finished (it) for him, he shall give him two shekels of silver per sar of house as his remuneration."

By the 15th Century, English Common Law Courts had established various theories pertaining to the enforcement of promises between parties but it was not until the 19th Century and the development of modern commerce in the free market of the Industrial Revolution that classical contract law began to emerge and begin to make the transition to the modern contract law that is in effect today.

Contracts facilitate transactions between parties by enabling people to enlist the help of legal institutions to support and enforce agreements - thereby reducing the dependence upon mere good faith in honoring commitments. Classical contract law stressed the "freedom of contract". That is, contracts were to be enforced strictly because they were freely (voluntary) made bargains and the individual parties determined the extent of their obligations. In such a "hands off" environment, contractual liability was absolute once the agreement was reached. Courts gave little consideration to the "quality" of the deal that was made by the parties. Even if the result was "grossly unfair", the contract would be enforced because the parties were assumed to have had equal bargaining power when the agreement was forged. Such an assumption may have been reasonable because agreements generally were reached as the result of face-to-face negotiations; a situation that allowed both parties to inspect and ascertain the quality of the goods or services (from past examples of work). Further, parties had (or tended to have) similar knowledge, and if parties had approximately equivalent bargaining power the agreement was likely to be fair.

By the end of the Industrial Revolution many of these assumptions had been undermined. For example, regional and national markets resulted in distribution chains and with improved communication, contracts were formed between parties that had never met to negotiate over goods that were becoming increasingly complex and that were unseen at the time of making the agreement. Thus, sellers knew more about their goods than the buyers, and with commercial growth, tended to be substantially more powerful in their bargaining positions than individual buyers. In addition, sellers began to use standardized contracts on a take-it-or-leave-it basis where the buyer had no opportunity to negotiate the terms.

In the 20th Century, the social and economic conditions changed the emphasis of courts to achieve a "just" result in a contract dispute. Thus, there has been a widespread increase in public intervention into private contractual relationships. For example, legislative action can dictate terms in private insurance and employment contracts, while product liability statutes impose liability regardless of the terms of the contract. The justification for such public intervention is to achieve a "just" result by protecting the interests of persons who have insufficient bargaining power to protect

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1. A sar is approximately 380 square feet.
2. In the 1970's the vast majority (over 90 percent) of contracts in use were standard or form contracts. Today, the percentage of contracts that are form contracts is likely to be much higher than that.
themselves. In modern contract law, the precise technical rules and interpretation of classical contracts have given way to broader standards that are imprecise (e.g. the concept of the reasonable person). Such vagueness is necessary to achieve the "degree of judicial discretion required to reach just decisions in the increasingly complex and varied situations where intervention is needed." (Business Law and the Regulatory Environment, p 133, 1986).

13.2 TYPES AND DEFINITIONS OF CONTRACTS.

Unilateral Contract.

A unilateral contract is a contract where only one party makes a promise. For example, Smith says to Acme Auto Service, "I will pay you $100 if you fix the scratch on the side of my car."

Though the courts tend to disfavor the separate use of unilateral contracts because of problems related to offer and acceptance and mutual obligation, the unilateral contract is useful for the courts because it allows for the imposing of contractual liability on a party without finding a "return" promise. For example, employment cases have held employers liable for pension plans while relieving the employee of the "promise" to continue in his/her employ.

Bilateral Contract.

A bilateral contract is a contract where each party makes a promise. For example, Smith says to Acme Auto Service, "If you promise to fix my car, I will promise to pay you $100." Such a contract contemplates the formation of a bilateral agreement and the contract will occur if the other party (Acme) promises to paint the scratch on the car.

Valid Contract.

A valid contract is an enforceable contract because it meets all of the legal requirements for a binding contract.

Unenforceable Contract.

An unenforceable contract meets the basic legal requirements but is nonenforceable because of some other legal rule. For example, there might be an applicable contract statute of limitations, or the contract might be formed as an oral agreement when it is of the type that should be evidenced in writing.

Voidable Contract.

If one or both parties have the legal right to cancel their obligations under the contract, the contract is voidable. Such a contract is enforceable until a party exercises his/her right to void the contract.

Void Contract.

An agreement that fails to create legal obligations because one (or more) of the basic elements required for enforceability are not present.

Express Contract.

An express contract exists when the parties have clearly stated the terms of the contractual agreement, either orally or in writing, when the contract was formed.

Implied Contract

An implied contract is said to exist when the mutual agreement of the parties can be demonstrated by the actions and conduct of the parties without an express discussion or negotiation of the terms of the agreement.

Executed and Executory Contracts.

A contract is executed when all of the parties have fulfilled their contractual obligations. Until such responsibilities are
fully performed, the contract is executory.

**Quasi Contract.**

Even though a contract does not exist, the court can impose an obligation on a party to avoid injustice. In general, a quasi contract will be imposed only when the party knowingly accepts a benefit and retains it under conditions that make it unjust to do so without paying for it. In this case, the contractual obligation is not created by voluntary consent. For example, instead of repairing the scratch on the car, ACME Auto Service repaints Smith’s car by mistake. Smith realizes that a mistake is being made when he visits to see the progress of the repair but does nothing about it. To prevent Smith from being unjustly enriched (a free paint job), the court implies a promise by the benefited party to pay the reasonable value of the benefit received.

**Promissory Estoppel.**

Unlike contract law, which protects the agreements between parties, the doctrine of promissory estoppel protects reliance. The elements of promissory estoppel are:

a. A promise that the promisor should foresee is likely to induce reliance on the part of the promisee.

b. A significant reliance on the promise by the promisee

c. An injustice is the result of that reliance.

If a person relies on a promise (the promisee) that is made by another person (promisor), even though the circumstances of the promise are insufficient to conclude that a contract is formed (one or more of the elements of a binding contract are missing) and allowing the promisor to take advantage of the absence of a contract would create an injustice for the promisee. Traditionally, promissory estoppel was used for donative promises (promises involving donations or gifts), but it is increasingly applied to prevent an offeror from revoking offers and to enforce indefinite or illusory promises, or even oral promises which ordinarily would have to executed in writing to be valid.

**THE UNIFORM COMMERCIAL CODE.**

The Uniform Commercial Code (UCC) was created to establish uniform state laws for commercial transactions which are increasingly conducted across state lines. Although many states have amended the code and state courts have interpreted sections of the code in different ways, the UCC still presents a fairly uniform body of rules for commercial transactions that promote a realistic and fair treatment. While stressing fair dealing and promoting higher standards in the market, Article 2 of the UCC, focuses on sales contracts (and only sales of goods) and considers many aspects of modern contract law but in a way that tends to be more flexible, where goods are defined as tangible, movable, personal property. Thus the UCC does not apply to real estate, intangibles such as stocks, or service contracts. 3Thus, a court that applies the UCC to a case is more likely to find that a contract existed between the parties than a court which applies contract law alone. In addition, the UCC develops the standard of reasonableness - though it is different to the reasonable man person standard that is applied in negligence/tort cases since it is founded on the real actions of people in the marketplace and not on an imaginary reasonable person.

As part of the promotion of fair dealing, the UCC recognizes that some contracts can be so grossly one-sided as to be unconscionable and provides broad powers for the court to use in order to correct such unequal contracts. The UCC also imposes a duty of good faith on the performance of contracts. Good faith is defined as "honesty in fact" and the "observance of reasonable commercial standards of fair dealing". The UCC also tends to hold merchants (typically sellers) to a higher standard than non-merchants.

One important aspect of Article 2 (of the UCC) is that while it is restricted to the sale of goods, some of the contractual concepts embodied therein have been applied to contracts that are not covered by the code. In this way, the UCC is an

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3. When a contract involves both a good and a service (painting Smith’s car) the court looks to see which predominates before it decides whether Article 2 can be applied.
important force in the evolution of contract law (for example, the concepts of good faith and unconscionability).

**THE CONTRACT BETWEEN OWNER AND ARCHITECT.**

Many disputes involving architects could be avoided by the use of contracts that anticipate more of the problems and uncertainties that arise in the design and construction of increasingly complex buildings and in an increasingly litigious environment. While some design professionals complain, "Why can't things be simpler?" and argue that the design and construction process should occur in a spirit of friendship and trust-based cooperation, the fact is that contracts must anticipate what problems might arise. It is essential that the contract between the parties is comprehensive and develops methods for handling problems when they occur. Simpler contracts merely postpone the inevitable and disputes are placed in crisis conditions where litigation is the only avenue for resolution.

Contracts are not developed for attorneys but for the parties that are contracted to perform. The language in the contract should be "plain English" with clear and concise definitions so that the parties understand what is required of them.

**Negotiating Terms and Conditions.**

Although standard contracts exist and are often used (for example, the B141 contract of the American Institute of Architects between the owner/client and the architect), many contracts are the result of negotiation. This occurs because clients are increasingly sophisticated and many corporations and institutions will have their own standard forms of contract. There are three areas of a contract which will be subject to negotiation: fees, scope of services and general conditions. The dollar amount, or fee structure will usually be a matter of negotiation, and because it is closely related, so will the scope of services to be provided. Other terms and conditions of the contract (general conditions) might be imposed or altered to reflect the specific interests/needs of the individual parties or the project to be undertaken.

The negotiation of the terms and conditions of a contract is a form of risk assessment and risk management. In this sense, risk reflects the potential for problems to occur. The terms of the contract establish a defensive posture between the parties and the degree to which defensive measures influence the contract terms is the result of the risk tolerance levels of both the client and the architect. Thus, the greater the tolerance of the client for problems, the less important it is for the contract to anticipate problems and assign the "risk" to parties other than the client. The standard AIA contract often can be used "as is" but it may not be the best way of handling the potential problems that might occur and it would be a mistake to merely assume that because the AIA has developed the contract over many years that it is ideal for a given project/client.

Some firms modify the general conditions of the contract for their own use and integrate clauses that are specific to their practice types. In such cases, a thorough review of the contract by a well-qualified attorney is essential prior to submitting the contract to the other party or signing a client-developed contract. For example, it is essential to eliminate ambiguity from individual clauses, to avoid contradictory clauses and to consider the contract in whole (for example clauses that refer to "the preceding terms etc."). In the latter situation, the need for legal-review is even more critical. Many corporate and institutional clients have developed their own contracts and certain conditions of these contracts tend to biased, transferring liability to the design professional. There is a tendency for the design professional to accept such contracts (and agree to the conditions therein) simply because they fear that to dispute the terms will upset the client and send them to the competition. In these situations it is even more important that the contract be reviewed by the firm's attorney and questionable and undesirable terms should be modified to reflect the interests of the design professional.

Under certain conditions, such as a request for proposals, the client's proposal amounts to a unilateral contract. After the signature of the design professional, the proposal becomes a contract upon the client's acceptance. Such contracts

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4. In large complex projects the standard general conditions will seldom suffice, though they may form the basis for the negotiation of specific changes and a more comprehensive contract.

5. For example, do not assume that because the contract has been prepared by a government entity it is a contract that is fair and unbiased.
greatly increase the potential for problems, and create "a greater likelihood of false expectations and misunderstanding." DPIC Companies' Guide to Better Contracts, page 4. 1987

It should be noted that the components of the contract (scope, fee, and general conditions) do not have to be a continuous document but may be incorporated by reference, or by the addition of addenda as the initial agreement is modified over time.

While it is possible to have an oral contract for the performance of services, such a contract is likely to be problematic in today's complex world. Design professionals should trust their clients but their liability extends beyond the client to include third parties who could foreseeably suffer injury/damage as a result of the services provided by the design professional. Damage could occur and disputes arise many years after the project is completed and the contract expired, and oral agreements forgotten. In addition, there is the added problem of misinterpretation by either party, despite their best intentions.6

A written agreement forces both parties to the contract to both evaluate critically and formulate their concerns in specific objective language. Thus, the potential for mutual understanding is heightened and the parties will probably have a better appreciation and understanding of the other's role and performance expectations. An improved relationship between the parties is more likely. The written agreement also will assist the parties in establishing their own rules. As a general rule, if the contract is silent on a specific issue, the applicable statutory provisions will apply. For example, if the contract does not address how disputes between the parties are to be resolved, the result will be to bring the parties to litigation. Alternatively, the contract could specify arbitration, thereby avoiding a "costly, convoluted and slow" resolution process. Similarly, the contract can establish time limitations to suits that are less than the applicable statute of limitations would otherwise require, or agree that the parties will not sue the other for consequential damages that might arise as a result of such circumstances as delays etc.7

Yet another advantage of the written contract and the process of forming the contract is that it allows both parties to become familiar with each other. As a general rule, caution is required when dealing with parties that "have little compunction about sacrificing quality or shifting their own liabilities to others". DPIC, Page 7

**13.3 RISK MANAGEMENT**

One of the primary issues in contract formation is the identification and allocation of risk. Risk management should be candidly discussed at the outset of the relationship and both parties should work to identify their respective attitudes towards risk. Not unlike the doctor, who discusses the risks of a particular medical treatment with the patient, the design professional should integrate risk management mechanisms into the contract and insure that the client/owner is fully aware of the potential for problems and the responsibilities that are associated with them.8

Either party to a contract accepts some risk, and for the design professional the primary risk is that of defending an "allegedly negligent act" that occurs during or as a result of the performance of the design professional. Such risks can arise with the client (as a result of the contract and the required duty of care) but also duties are owed to third parties (who could be reasonably foreseen to be damaged as a result of negligence). There are a variety of ways that risks can be handled:

a. The more complete and comprehensive the service that is provided by the design professional, the lower is probability that something will go wrong. A client may be motivated by the desire for a quality result at the outset but many must be "educated" to understand that the least expensive professional service is not always so in the long term.

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6. Some design professionals will undertake a commission based on an oral agreement but will follow-up with a written agreement as soon as possible. Such actions should only be taken with a long-standing client.
7. It should be noted that the contract cannot be used to establish conditions/terms that are contrary to public policy or law. In addition, extra-legal provisions are not binding on the parties.
8. It would be unwise to address all of the potential areas of risk at one time. It will scare the "hell" out of the client!
b. Risk can often be transferred to other parties. For example, professional liability insurance can be used to reduce a firm's exposure to loss. It is important to note that most insurance policies carry a deductible and as a result the cost of claims and defense is largely paid for by the design professional. The full cost of a claim against the design professional is not covered; including the time lost in defending the claim and the emotional stress induced by the suit.

c. Communicating (with the client) the potential for, and identifying unpreventable problems and options for dealing with them may help to reduce risk exposure because the client is better informed. Either the client or the design professional may agree to accept such risks or transfer them to another party through insurance and the payment of a fee. If the client absorbs the risk, the design professional is indemnified. Alternatively, the design professional may choose to accept the risk (but it is advisable to adjust the fee accordingly).

d. Another option is to identify the client's responsibilities, and for risks that arise from the client's negligence, it is possible to arrange for indemnification, thereby requiring the client to bear any costs that would arise from his/her negligence. The potential damages that might occur from some of these risks are so great that the design professional cannot and should not accept them and such risks must be absorbed by the client. These risks can arise when dealing with hazardous materials (asbestos, site contamination etc.) and indemnification is essential.

e. The contract can be used to eliminate "loopholes that could otherwise become traps". Loopholes might include services that have been declined by the client, and explicit recognition that the service has been explained and offered, and declined, might block an attempt to hold the design professional liable for failing to provide the service.

f. Extra-legal conditions can be created in the contract to reduce particular risks that would otherwise exist by virtue of law. Specifying arbitration as a method of dealing with disputes would be an example of an extra-legal condition. Similarly, the ability to sue for consequential damages and impact of the statute of limitations could be modified by the contract.

g. The contract can be developed in a way such that the intent of the parties cannot be misinterpreted or misunderstood. The advantage of this approach is that interpretation of the contract by a lay-person jury, or an arbitrator is simplified and within meanings intended by the parties.

h. The ultimate risk-reduction strategy is not to contract.

LIABILITY ESTABLISHED BY CONTRACT.

The design professional is subject to the doctrine of professional negligence (from common law), which requires that the professional performs with the "level of professional skill and competence ordinarily and contemporaneously demonstrated by members of the profession in the area of practice. Negligence arises as a result of damage or injury to a party because of errors and omissions of the design professional. Such negligence and liability for damages and injuries is covered by tort law and is distinct from contract law. Despite this separation, tort and contract law are not exclusive because if the contract specifies that the design professional perform in a manner that is not negligent, then both a contractual and tort liability are created. As a general rule, the design professional should avoid any contractual condition that obligates him/her to assume such liability. Contract conditions that require the design professional to perform at "the highest professional level" increases the standard of care that is well in excess of that which would normally be required. A performance level which is less than the specified standard would create a contract claim for damages. In addition, the assumption of liability can create a problem for the insurer of the design professional.9

Similar situations can occur with a warranty or guarantee that the structure is built in accordance with the plans and

9. The claim that the design professional performs at a high standard might be introduced into the contract "accidently". For example, if the firm sends a letter during the contract negotiation phase which states something to the effect that "We traditionally have performed at the highest professional level and we offer that service to you", and that letter is appended to or included in the contract by reference to past communications, then the necessary condition is established. A general rule is that all insurance policies explicitly and specifically exclude liabilities that are assumed under contract.
specifications based upon the observation of the construction process. Under such language the design professional would be subject to full liability should changed conditions be found.

**Disparate Bargaining Power.**

Disparate bargaining power between the parties can produce a situation where the contract contains conditions that may be unfair to one party. This is a contract of adhesion and may result when one party (as a public or private organization) is the source of a high proportion of contracts. The conditions that are "unfair" might include those requiring the design professional to certify that the project was completed in accordance with the plans and specifications and the failure to agree to such conditions will jeopardize the business relationship. Under these circumstances the design professional may agree and sign the contract. The recommended course of action (and one which will help to provide a defense in the event of future problems) is to immediately prepare a letter which states that the condition was accepted because the project is needed and that "the client exercised disparate bargaining power in coercing the architect to accept the provision." DPIC, page 8.

**Indemnification.**

Construction contractors are frequently required to indemnify the owner of the property against any injury arising from the construction of the building. Such indemnification is reasonable since the contractor has constructive control of the site. The architect does not have such control and shifting such risks to the design professional is not reasonable. The additional risk should be born by the party who is most capable of bearing it and in the position best able to manage it. In most situations, the risk is best transferred to an insurance company. In some situations the design professional may be able to shift some risk to the owner/client by having him/her provide indemnification. This might occur when hazardous materials are a concern. That is, the risks rightfully belong to the client/owner. Other risks, which the design professional is powerless to prevent, should also be carried by the owner.

The bottom line in the negotiation of a contract is the management of risk. Risk is the result of the interplay between the scope of services, the nature of the project, the contract conditions and the fee structure. For example, if the scope of the work to be undertaken by the design professional is reduced it might be wise to increase the defensive posture of the contract to offset the heightened risk that results from the reduced services. Alternatively, the fee might be increased to compensate for the risk.

### 13.4 OFFER AND ACCEPTANCE.

**THE OFFER**

A valid contract required agreement between two or more parties. To effect an agreement there must be a "meeting of the minds" which occurs through the process of negotiating the terms of the contract. The culmination of the negotiation process is the offer of terms and the acceptance of those terms (which form the contract/agreement). Courts focus on the objective intent of the parties in determining whether the negotiation process was concluded with the reaching of an agreement to which the parties intended to be bound.

The offer is defined as "the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it." Restatement (Second) of Contracts § 24, 1979.

Thus, the first step in deciding whether a contract exists is to decide whether an offer was made. To do so, the offer must be an objective indication of a present intent of the offeror to enter into a contract. Such intent to contract can be inferred by the definitions of the offer and whether it has been communicated to the offeree.

**Definiteness.**

The offer must state in specific/definite terms what is being promised by both parties even though the offer is made by only one party. In this regard, it is important to differentiate between an offer and invitation to offer (negotiate). For
example, ACME Aut says to Smith, "I'd like to buy your car," indicates only a willingness to negotiate in the future for Smith's car and to see if mutually acceptable terms can be formulated.

The offer must contain all of the terms of the contract so that the offeree can accept or reject the terms that are offered. Thus, the specificity of the offer is important if the offer is to be a complete and precise statement of the responsibilities of the parties to the contract (that is, a meeting of the minds).

Under modern contract law it is possible for the courts to find that a contract exists by considering the conduct of the parties. For example, under Section 2 of the UCC, if the parties act as if there was a contract (delivering goods, accepting payment etc.) then their conduct may be sufficient to establish/create a binding contract.10

If the parties have left the terms of the contract incomplete, courts using the UCC can find that the parties intended to make a contract and will interpret the partial agreement in such a way as to reach a fair settlement by attempting to extend the underlying intentions of the parties. In addition, it is recognized that absent or uncertain terms may indicate a desire not to enter into a contract.

It should be noted that under the doctrine of promissory estoppel, it is not necessary that the offer be definite. That is, "action in reliance on an indefinite agreement may justify its full or partial enforcement." [R(2)C S34-3] Until relatively recently, promissory estoppel could not be used to enforce indefinite agreements because there was no promise that was capable of being enforced. However, courts have looked at the extent of the reliance of the party to overcome the problem of indefiniteness and in such situations, award damages based on the losses incurred as a result of that reliance.

**Communication to Offeree.**

The communication of the offer to the offeree is interpreted as an objective indication that the offeror intends to be bound by the terms offered. If the offer is not communicated then it may indicate that the offeror has decided not to enter into an agreement. In regard to communication, courts have interpreted that the advertisement for the sale of goods at a specified price is not an offer but an invitation to offer/negotiate. In addition to what is normally considered an advertisement (TV, radio, newspaper etc.) advertisements also include signs, handbills, catalogs, price lists and even displayed goods. As a result of this interpretation the buyer makes the offer and the seller is free to accept or reject it. However, some advertisements may be interpreted as offers. Such ads are very specific about the nature/number of goods for sale and have often required immediate action by the buyer.

Advertisement of bids are also invitations to offer and those parties submitting bids are considered to be offerors. Under general contract principles, the bidder usually has the right to withdraw his/her bid prior to its acceptance.11 The terms of bidding can impact such rules. For example, if the advertisement calling for bids states that the contract is to awarded to the lowest responsible bidder the advertisement may be treated as an offer which is accepted by the lowest bidder. Under these conditions, the offeror must demonstrate that the lowest bidder is not responsible to interrupt the contract.

**Terms in the Offer.**

Under modern contract theory, the offeree is bound by the terms of the contract of which he/she had actual or reasonable notice. Thus, if the offeree actually read the particular term or, reasonably should have been aware of it, then it will be interpreted as part of the contract. Terms that operate as disclaimers and/or exculpatory clauses (limiting the legal duty of the offeror) are subjected to particular scrutiny and courts may insist that the offeror prove that the offeree had actual notice of such terms prior to considering them as part of the agreement.

**Duration of the Offer.**

10. The R(2)C takes a similar approach to the UCC - requiring that the terms of an offer be "reasonably certain" such that the terms "provide a basis for determining the existence of a breach and for giving an appropriate
11. Under certain conditions, promissory estoppel may be used to prevent a bidder from withdrawing the bid.
If an offer does not specify a point in time prior to which the offer must be accepted, courts will endeavor to establish a reasonable time which depends on the circumstances of the offer. For example, for items that can experience a rapid change in value (or can spoil) the duration will be short. Another factor is the nature of the negotiation - if parties negotiate in a face-to-face meeting (or by telephone) the time for acceptance generally does not extend beyond the conversation unless the parties intend otherwise. A longer time is allowed for communication of the offer by mail or telegram.

Offers usually can be terminated by the offeror at any time prior to acceptance - that is the offer is revoked. Exceptions include the use of options, firm offers and unilateral offers.

a. OPTIONS. An option is a contract which is separate from the contract for the sale of goods/property. The offeror agrees not to revoke the offer prior to a specific point in time in exchange for some valuable consideration (not a deposit). Under the terms of the option, the offeree is under no obligation to accept the offer to buy the underlying item but has simply purchased the right to buy or to consider the offer for the period of time stipulated without fear of it being revoked. Options often are used for commercial real estate transactions to "lock in" the right to buy the property at a predetermined price.

b. FIRM OFFER. Under the UCC a firm offer for the sale of goods occurs when a merchant offers goods for sale in a signed writing which contains an assurance that the offer is to be held open for a particular time. The offer is irrevocable for the stated period of time - but the period of time is less than three months.

c. UNLATERAL CONTRACT. Promissory estoppel can be used to prevent an offeror from revoking an offer. Such cases often occur in the context of bidding. For example, a subcontractor submits a bid for part of the work to the general contractor under conditions that the lowest bidder of good reputation will be accepted. The general contractor relies on the bid in forming the overall bid but after the general contractor’s bid has been accepted by the owner/client, the subcontractor endeavors to revoke the bid. Under these conditions, the subcontractor might be estopped from revoking his/her bid.

Rejection of an Offer.

An offer may also be expressly rejected by the offeree of impliedly rejected by the issuance of a counter offer with terms that are materially different. Such express or implied rejections terminate the power of the offeree to accept the original offer because the offeror may wish to make the offer to another party. However, if either offeror or offeree manifest an intention to keep the offer open despite rejection, then rejection/counter offer fails to provide a basis for reliance by the offeror that the offeree has rejected the offer. Option contracts may be an exception and some courts have held that rejection does not terminate the option and it can be exercised later by the holder up till the time of expiration.

A rejection generally is only effective when it has been actually received by the offeror. Thus, an offeree might mail a rejection only to change his/her mind and telephone acceptance. If such acceptance is received by the offeror prior to the time that the rejection is received, then the offer is not rejected.

In addition, an offer is terminated by the death or insanity of either party or the destruction of the subject matter. Similarly, if the performance of the contract becomes illegal before the contract is accepted (similarly for existing contracts) intervening legality provides a legal excuse for a party not to perform his/her contractual obligations.

12. An exception is offers to the general public since it would be impossible to communicate with every offeree to revoke the offer.
ACCEPTANCE.

Since a meeting of the minds or mutual agreement lies at the heart of contract law, the court looks at the offeree to determine the present intent to contract given the terms of the offer. In some instances, the offer may specify in detail what is required of the offeree to constitute acceptance. Acceptance is defined as a "manifestation of assent to the terms (of the offer) made by the offeree in the manner invited or required by the offer" Restatement (Second) of Contracts S 50(1) 1979.

Such assent must be a "mirror image" of the offer otherwise it will constitute a rejection and a counter offer. Traditionally, if the existing terms are modified only slightly, then the offer is rejected but more recently courts have interpreted the "mirror image" rule more liberally and required material variances between offer and acceptance to result in an implied rejection. Under the UCC, section 2, the common law "mirror image" rule is changed for the sale of goods (because the offeror and offeree tend to use standard, but different forms of contract). In this case, the UCC provides that an expression of acceptance which is timely and definite will create a contract even though the terms of acceptance may be different, or in addition to those offered. With conditional acceptance, the new terms will form part of the agreement unless certain conditions are met; the original offer expressly limits acceptance to the terms within the offer, the offeror gives notice of objection to the new terms within a reasonable period of time, or the new/revised terms would materially affect the nature of the original offer. Merely asking about the terms (inquiry regarding terms) or complaining about the terms while accepting the offer (grumbling acceptance) does not constitute rejection of the offer.

In a unilateral contract (the exchange of a promise for an act) the offeree accepts the offer by performing the requested act(s). Once the offeree has begun performance, courts may prevent the offeror from revoking the offer. In a bilateral contract (a promise exchanged for a promise) the offeree accepts the offer by making the requested promise. However, a statement such as "I accept your offer", usually is sufficient to expressly accept the offer. Acceptance can also be implied by the actions of the offeree.

While contract law generally requires some objective indication that the offer is accepted, the general rule is that the offeree’s silence is NOT an acceptance and that the offeror cannot require the offeree to respond to the offer. Thus, if Smith (the offeror) proposes, "If I don’t hear from you in the next three days I’ll assume you are buying my car," and if the offeree does not respond, the silence will not be considered as an acceptance of the offer. However, under certain conditions, a duty can be imposed on the offeree either to affirmatively reject the offer or otherwise be bound by the terms. Such circumstances arise when the offeree’s silence objectively indicates an intention to be bound, and includes situations involving prior dealings or customary trade practices. Further, if the offeree accepts an offeror’s performance knowing what the offeror expects in return for that performance, then the offeror’s terms have been impliedly accepted.

If a written contract is anticipated by the parties but a dispute arises prior to the writing, one of the parties may argue that they did not intend to be bound until both had signed the document. In the absence of a clear intention to be bound, the court’s determination of the existence of the contract hinges upon whether a reasonable person familiar with the negotiations carried out by the parties would conclude that the parties intended to be bound. Thus, if the parties had concluded the negotiations and had reached agreement on the essential issues of the agreement, then the court would conclude that a contract existed even though no formal agreement had been signed.

The only person having the legal power to accept an offer is the original offeree. If a third party attempts to accept the offer, in lieu of the offeree (or his/her agent), the attempt is treated as an offer.

Communication of Acceptance.

The offer for a bilateral contract must be accepted such that the offeree makes the promise required by the offer ("I accept your offer", will suffice). For a unilateral contract, the offeree must perform the requested act and traditional contract law assumes that the only notice from the offeree to the offeror is performing the required act. Thus, the court would assume that the offeror will learn of the offeree’s performance. However, under the UCC and R(2)C the rule has been modified to avoid hardship to an offeror who may not know of the performance. Accordingly, the offeror is required to have reasonable certainty that performance has commenced (and within a reasonable period of time). To
achieve this, the offeree must take reasonable steps to inform the offeror, unless such action is not required in (specified by) the terms of the contracted.

The offeror can (by virtue of being the "master of his/her offer") specify or stipulate the precise manner in which acceptance is to be communicated including the time, place, and method of delivery. In the event of deviation from the specification, the offeror might not be bound by the offer. If no specification of acceptance is provided, the offeree can accept by any reasonable means of communication and within a reasonable period of time.

In some situations the timing of acceptance may be critical (for example, the offeror is trying to revoke the offer). In face-to-face dealings the problems are minimized but often there is a time lag induced by the delays in communication. If the offer stipulates that an acceptance has to be actually received for it to be effective then the time to acceptance is maximized though the past decisions of courts may affect such conditions. For example, acceptance may be effective at the time it is dispatched. This situation can occur when the offeror has led the offeree to believe that acceptance by some means other than face-to-face or telephone is acceptable. Thus, the general rule that acceptance is effective at the time it is dispatched (defined as being delivered to the agency of communication) is established if the offeree accepts by the "authorized means of communication." It should be noted that this general rule may hold even if the offeror never receives the acceptance.

The authorized means of acceptance can be expressed explicitly ("The offer may be accepted by mail")- in which case the acceptance is effective at the time of mailing, or impliedly. Under the traditional contract rule, the offeror impliedly authorizes the offeree to employ the same means as the offeror used in communicating the offer. More recently, the authorized means concept has been expanded to include an offeror who is silent on the means of communication and in such cases, authorizes acceptance by any reasonable means. The means of communication are a function of the circumstances in which the offer was made, including the nature of the transaction, the reliability of the means, the potential for rapid changes in value, the existence of prior dealings between the parties, etc.

When non-authorized means are used, the traditional rule stipulates that acceptance occurs only when it is actually received by the offeror, provided that such time is less than or equal to the time it would be received using the authorized means. More recently, the interpretation have become more liberal: acceptance by non-authorized means is effective upon the time of dispatch if it is received within the time that an authorized means would take to arrive at the offeror’s location.

13.5 REALITY OF CONSENT.

That a contract is the product of the mutual, voluntary and informed consent of the parties to the agreement is the foundation of contract law. Thus, if one of the parties consents to the agreement under the conditions of misrepresentation, duress, undue influence, or mistake then consent cannot be considered to be real and the party may be able to avoid his/her contractual obligations. In such cases, the contract is voidable and the "injured" party is given the option of canceling (rescinding) the contract.13

MISREPRESENTATION.

Misrepresentation is a false assertion (that is not in accordance with the facts) which is both justifiably relied upon by the promisee and is an important (significant) factor in the inducement to enter the contract. It is not necessary for misrepresentation to be intentional and it could occur as even in good faith. Intentional misrepresentation (with the intent to deceive) is fraud,14 but in either case the promisee has a right to cancel the contract. Minor misrepresentation, per-

13. This option provides a measure of protection for parties that have entered a contract under misrepresentation, duress, undue influence, or mistake.
14. A special case of fraud occurs when there is a relationship of trust (confidence) between the parties (a fiduciary relationship) and the promisor makes false representations or assertions about the effect or provisions of a contract. This is fraud in factum (fraud in the execution). Similarly, failing to call the attention of the relying party to significant conditions of a written contract might also be fraud. Damages for fraud can exceed those for misrepresentation because of the potential for tort damages and punitive damages.
taining to minor or relatively unimportant details, is not enough to prove misrepresentation and justify such action. The "injured" party needs to establish:

a. ASSERTION OF FACT. A promisor must make an assertion of fact or engage in equivalent conduct, either of which must relate to some past or existing fact (not regarding or pertaining to a promise or prediction about future events). For example, when trying to sell his car (1976 Cadillac) Smith asserts, "My car gets 35 miles per gallon."

The assertion of facts pertaining to the value/quality of items are "difficult to corroborate" and usually are discounted as "sales talk". In these situations, the statement of opinion reflects an individual’s judgement rather than knowledge and does not constitute misrepresentation (e.g. "This is a great car!"). In addition, the active concealment of a fact may constitute the equivalent of assertion of fact (Smith paints the car to cover extensive rust) but should not be confused with nondisclosure which is the failure to offer information.

b. MATERIALITY. The fact which is asserted (or concealed) must be material. That is, it must play a significant role in inducing the promisee (as a reasonable person) to enter the contract and is therefore a function of the unique characteristics of the promisee.

c. ACTUAL RELIANCE. If the promisee relies on the assertions and follows a course of action which is based on the assertions that have been made, then a causal connection exists between the assertion and the decision to enter the contract.

d. JUSTIFIABLE RELIANCE. A complication is added to the requirement that reliance must not only be actual but justifiable. Under traditional contract law, if the assertion is known to be false or, if the promisee could discover its inaccuracy after taking a few reasonable steps (for example, by examining the public record for title etc. or reasonably inspecting available documents) then justifiable reliance would not be found.

More recently, courts have acted so as to place a greater degree of accountability on the asserting party while decreasing the responsibility of the relying party to ascertain the facts.

Nondisclosure.

Nondisclosure is related to the issue of misrepresentation and deals with the concern of how much one party must inform the other party to the contract. An even more important question is the degree of honesty that the court should require of parties during contract negotiations when a party’s candor can affect the bargaining position. Under traditional contract law, mere silence (but not active concealment) does not constitute misrepresentation. However, in recent times, the requirement to disclose relevant details about the subject matter of the contract has been expanded by such statutes as the Land Sales Full disclosure Act and by court decisions.

The need for disclosure is also amplified in importance in fiduciary relationships because the relying party will often not be as vigilant in protecting his/her interests when the other party is held in trust and confidence.

Some states have held that a duty to disclose exists when one party has knowledge of problems which cannot be discovered by the other party. The R(2)C states that the failure to disclose is misrepresentation when it "would amount to a failure to act in good faith." All of the above examples indicate the broad expansion of the duty to disclose in an ever-widening array of contractual situation.

DURESS.

Duress occurs when a party is induced to enter a contract by wrongful coercion. For example, the use of physical compulsion will make the contract void, while the threat of physical, emotional, or economic harm/loss will make the contract voidable at the discretion or option of the injured party.

For duress resulting from the threat of physical, emotional, or economic harm to be proven, a plaintiff must show that the threat was sufficient to be considered coercive. That is, the threat must deprive the party of the ability to resist such
that there is no reasonable alternative and the party must enter the contract to avoid the harm.

For a threat to be wrongful it must contain the potential for injury or harm. However, it should be noted that taking advantage of the financial position of the party, not created by the bargainer, in not duress. Example of situations in which duress may be found include:

- the threat to breach a contract may constitute duress under certain circumstances.
- threats to initiate legal action (civil or criminal) may constitute duress if there is no reasonable basis for the suit. If the threat of legal action is made in "bad faith for an ulterior motive", even if there is a reasonable basis for the suit, then duress may exist.
- the threat of instituting a criminal proceeding, even if there is reasonable cause to believe that the other party has committed a crime, is impermissible pressure to force the party to enter the contract.

**UNDUE INFLUENCE.**

Undue influence occurs when wrongful pressure (unfair pressure) is brought to bear on a party during the process of bargaining. The doctrine of unfair pressure provides relief when the pressure is not coercive but when the party is induced to enter the contract as a result of unfair persuasion of a party who is in a position of relative physical or mental weakness and the party is vulnerable to the influence of the dominant party. Many contracts involve a measure of persuasion and there is a fine (but imprecise) line between what constitutes permissible and impermissible persuasion.

Vulnerable parties may have the capacity to enter the contract but there must be a significant relationship between the parties (often trust-based or confidential, or one of the parties holds a dominant psychological position). Even if one of the parties occupies a stronger position, the weaker party must enter the contract because of unfair pressure (persuasion). To determine this, the court examines the circumstances surrounding the contract, including the time for the affected party to consider alternatives and the opportunity to seek advice but also the relative fairness of the contract.\(^\text{15}\)

**MISTAKE.**

A mistake occurs when one party has an erroneous belief about matter which is material to the contract but unlike misrepresentation, is not the product of misstatements. Courts endeavor to secure just results when a basic misunderstanding (mistake) has occurred about a key issue in the contract. Relief requires an erroneous belief regarding a past or existing fact and that fact must be material to the subject matter of the agreement. Facts include those related to the nature or quality of the subject matter. The erroneous belief cannot be the result of ignorance or poor judgement by the injured party because the risk of mistake occurs regardless of the parties’ ignorance or lack of knowledge.

If both parties are mistaken about the subject matter, the courts will find that there was no basis for the "meeting of the minds" (which is the foundation of a contract) and the contract will be rescinded at the request of either party. Mutual mistakes may occur when conditions of the agreement are ambiguous and are interpreted differently by the parties.

A unilateral mistake occurs when only one party is mistaken. In these situations, courts are reluctant to grant relief because of the desire not to provide an easy exit from contracts and the need to encourage the parties to seek out the facts prior to entering a contract. Section 153 of R(2)C provides for relief from a unilateral mistake when the consequences of the mistake are sufficiently adverse and serious as to make enforcement of the contract unconscionable.

If the mistake is caused by the negligence of the party(ies) courts and Section 157 of R(2)C focus on the degree of negligence of the mistaken parties, though mistakes that occur through the negligence of one party are generally not the basis for relief. If the mistake takes the form of an erroneous expression in the writing of the contract (the result of drafting or preparing the document), the court will reform the contract by modifying the agreement to express what the parties intended.

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\(^\text{15}\) Undue influence is frequently an issue when relatives attempt to set aside the will or contracts of the deceased and reallocate the estate.
CONSIDERATION.

Only promises which are supported by consideration can be enforced in a court of law (as opposed to unenforceable social promises that are gratuitous agreements). Consideration is defined as something of legal value which is bargained for by the parties to the contract and given in exchange for an act or promise. Thus, under most conditions, the promisee must give up something in return for the promise. The promisor may agree (promise) to do something which she/he had no prior legal duty to do, or even to refrain from doing something. In either case, consideration does not need to have economic (monetary) value. Further, as a general rule, courts will not be concerned with the adequacy of consideration. This is a reflection of the laissez faire attitude of traditional contract law - the parties had ample opportunity to obtain a better position during the negotiations and at the time of forming the agreement, the consideration was considered to be satisfactory by both parties. Exceptions to this rule include:

a. If the consideration is inadequate on the face of the agreement then courts will determine the agreement to be a disguised gift in lieu of an enforceable bargain (for example, the exchange of $10,000 in return for $100).16

b. A gross inadequacy of consideration may reflect another basis for setting the contract aside, including undue influence, fraud, or duress, although the lack of consent or contractual capacity cannot be proven alone by the inadequacy of consideration.

c. In some instances, if the consideration is so inadequate that it "shocks the conscience of the court," the agreement can be set aside since it is not a true bargain.17

Some exceptions to the requirement for consideration occur in modern contract law. For example, promissory estoppel can be applied in donative promise situations including promises of bonuses or pensions to employees and gifts of real property as well as gifts to charitable institutions.

If the promisee’s promise is illusory and does not bind the promisee to do, or refrain from doing something, then the promise is not consideration and the agreement lacks the mutuality of obligation that is necessary for an enforceable agreement. The right to terminate/cancel the contract does not mean that the promise is illusory unless the promise which is subject to consideration is actually a binding promise. Thus contracts which state a right to cancel/terminate at any time and for any reason and without notice would render the promise of the party with such rights to be illusory.18

A contract for all of the output of a party (or to supply all of the other party’s needs) may also be problematic since they fail to specify the quantity and some courts have determined that they are illusory. In addition, there is also the potential for exploitation (of either party). While the UCC legitimizes such contracts by limiting the demands of a party to good faith and/or a reasonable proportion; some courts are reluctant to interfere because such contracts are an important commercial vehicle to reduce costs and secure a stable source of supply.19

Preexisting Duties.

It should be noted that an agreement in which a party promises to perform a preexisting duty, the promise generally will not be considered as consideration since the promise is gratuitous and the party is already entitled to the promisee’s performance. Preexisting legal duties (such as the duty to obey the law or not to commit a civil tort) are never consideration. Similarly, a public official has a public duty to perform.

16. A contract that uses the term: "in return for $1.00 or other valuable consideration", is a nominal consideration (if no other consideration is exchanged) and is a gratuitous promise. Courts will not enforce such contracts unless the consideration was actually bargained for.

17. The UCC covers unconscionable agreements and has been applied in recent years to grossly unfair price provisions (two or three times the market price).

18. Specific circumstances surround such promises and limits establish whether the promise is illusory.

19. A similar condition occurs for exclusive dealership and the question of consideration hinges on the obligations of the parties and the legal value of the consideration.
When the preexisting duty is a duty that was established in a prior contractual relationship, and the contract is modified (forming a new contract) then the issue of consideration is less clear. In general, common law requires that new and binding consideration must be provided when an agreement is formed to modify an existing contract.

**EXAMPLE:**

Brown enters into a contract with the Smith Construction Company to construct an office building for $2.0 million. During construction, Smith informs Brown that due to increases in the cost of labor and materials, construction will stop unless Brown pays an additional $400,000. Brown agrees and Smith completes construction. At the end of construction Brown pays a total of $2.0 million and Smith demands an additional $400,000. Is the promise of an additional $400,000 enforceable.

**NO!** Brown is already entitled to receive the office building for $2.0 million in the original contract assuming that there were no clauses for cost escalation.

The application of the general rule prevents the extortion of additional funds from Brown. However, the general rule is not applied in blanket fashion though some courts have applied the preexisting duty rule to obtain a fair result. In the above example, the outcome would be different if Smith had promised something in addition to what was already agreed (e.g. finish the building sooner, install a better quality carpet, etc.) In addition, many courts will examine whether unforeseen conditions affected one party’s performance than was anticipated in the original contract before deciding to enforce or modify that agreement. In some situations, the courts have determined that the parties mutually agreed to terminate the existing agreement and then enter a new contract. Mutual termination of a contract releases the party from their obligations. 20

Valid consideration can occur when a promisee promises to refrain (forbear) from suing the other party in return for another promise (usually a sum of money). In this case, the promisee has contracted not to pursue a legal claim in exchange for the other party’s promise. While courts do not intend to sanction extortion based on spurious claim, there is strong support for the private settlement of disputes. thus there must be a good faith belief that the legal claim is valid (and has merit before the court) before forbearance is a valid consideration.

**Bargained for Exchange.**

For a promise to amount to valid consideration, it must be bargained for and given in exchange for the promise made by the other party. This forms the inducement for that party to enter into the contract by making his/her promise. Consideration which involves past events is no consideration because it was not bargained for and exchanged (it has already occurred). Similarly, promises that extend to preexisting moral obligations generally are not valid consideration, although some states enforce promises to pay for past benefits (such as housing, food, care etc.) if the promise reflects an intention to be bound and is expressed in a written contract.

**13.7 CAPACITY OF THE PARTIES.**

A party to a contract must have the legal ability (capacity) to enter the agreement and acquire the obligations and rights contained within it. Thus, a person must be capable of representing and protecting his/her interests effectively. Minors, intoxicated (alcoholically challenged) persons, and mentally incapacitated persons generally will lack capacity and have the right to avoid or escape contracts that were entered into while they were incapable and (potentially) disadvantaged during the bargaining process. Lack of capacity can be asserted by either the plaintiff (as the basis for relief) or the defendant (as a defense).

20. Special conditions exist when the preexisting duty involves the repayment of debt and the creditor agrees to accept less than what is owed (a partial payment).
Minor’s Contracts.

Generally, the age of majority for the purposes of entering a contract is 18. Until that time the parents have the right to receive their child’s services and income unless the parent consents otherwise. Emancipation of the minor can occur as a result of the parent’s express or implied consent, or through the marriage of the minor but emancipation does not give the minor the capacity to enter a contract.

The time at which a contract can be disaffirmed varies; for example, a contract that affects the title of real estate cannot be disaffirmed until majority, while other contracts disaffirmation can occur at any time between the time the contract is entered until a reasonable time after majority is attained. If a contract is disaffirmed, the minor is entitled to the return of any consideration given to the other party and is required to return any consideration remaining in his/her possession. An exception to this rule is the provision of necessaries that are essential for existence and general welfare (food, clothing, lodging, medical care, education/training, and tools of trade) for which the minor is required to pay reasonable value if the contract is disaffirmed. 21 For non-necessaries, loss or depreciation of the consideration paid/provided to the minor is treated differently by courts (on a state-by-state basis). There is a similar lack of consensus when the minor misrepresents his/her age.

Contracts with Mentally Incapacitated or Intoxicated Persons.

For contracts with mentally incapacitated parties, contracts can be voidable or void (if the party is mentally incompetent and has an appointed guardian). If the contract is voidable then the affected party has the right to disaffirm the contract under conditions similar to those for minors. Mental incapacity includes a broad range of impairment conditions including mental illness, retardation, brain damage, or senility, and is based on a test of whether the person had sufficient mental capacity to understand the effect of the agreement that was entered. R(2)S provides that a party’s contract is voidable if the party is unable to act in a manner which is reasonable given the nature of the transaction and that the other party had knowledge of the condition.

Intoxicated parties also are treated as being mentally impaired by many states if the degree of intoxication is sufficient that the person does not understand the nature of the agreement and the other party has reason to know that because of the intoxication, the person is unable to reasonably understand the agreement.

13.8 LEGALITY.

Agreements which involve the making of a promise that threatens the public interest (for example by violating a legislative or court made rule) may be invalidated on the grounds of illegality even though the parties consented voluntarily to the agreement. It is not necessary for the contract to require the commission of a crime (in which case the contract is illegal). The contract may be void simply because it is contrary to public policy as it is determined by the courts, state and federal constitutions and statutes, regulations of administrative agencies, or other sources of law. Public policy is a broadly defined concept that is founded on the prevailing moral code that protects such social institutions as the family and the judicial system and the interpretation of public policy (and public welfare) by judges (and juries) after a consideration of past decisions.

Generally, statutes which forbid specific types of conduct do not address the enforceability of contracts that entail such conduct and courts are required to consider the importance of the public policy underlying the statute and the degree of interference with that policy before intervening in the contract. There are four general categories of illegal agreements:

a. Agreements that are declared to be unenforceable by statute.

b. Agreements that violate public policy as revealed in legislation.

c. Agreements that violate public policy as revealed in legislation.

21. The liability is quasi-contractual and the minor is liable not for the full price but the reasonable value.
d. Agreements that violate a policy of unconscionability.

**VOID BY STATUTE.**

Usury statutes are enacted by the state legislature to prohibit a party from changing a rate of interest that is higher than a predetermined (stated) amount. Statutes vary in application (for example, some do not apply to corporations) and penalties (some state provide for the loss of principal and interest while others cover the excess interest over the legal rate).

Wagering statutes prohibit or regulate wagering or gambling. A wager is different from profiting from uncertain events (such as trading stocks or commodities) because a wager involves the creation of a risk while the latter merely reallocates an existing risk between the parties (for example, an insurance policy). In these instances, one party must have a legitimate or actual interest in the risk. Thus, a person who insures property that is not his/her own (or has a legitimate economic interest in - an insurable interest) then the agreement would constitute an illegal wager and the contract would be void.

**VIOLATION OF PUBLIC POLICY AS MANIFESTED IN LEGISLATION.**

Agreements to commit illegal acts\(^22\) are illegal, while agreements to promote illegal acts may be illegal if the parties know of the illegal purpose/act to follow. As a general rule, the agreement will be illegal if a direct connection exists between the illegal conduct and the agreement. Such connection must require a party to intentionally participate in, or actively facilitate a serious crime.

A special situation arises when a party agrees to provide goods or perform a service for which the party is not properly licensed (as required by the applicable statute). Both state and federal governments have enacted statutes that operate to regulate both businesses and professions by requiring a person to be licensed or registered prior to engaging in a particular business/profession. At the state level, licensing is required of such professionals as lawyers, physicians and architects. Regulations also may be established for such trades as hairdressers, real estate broker, and electrician. Requirements can include the attainment of a certain educational level, the passing of an examination, continuing education and the payment of fees. If a party to a contract is providing services which require licensing (but the party is not licensed) the status of the agreement will depend upon the balance of the public good from restricting the performance (without licensing) with enforcing the contract. To determine whether such an agreement should be enforced, the court will examine the purpose of the legislation. If a regulatory statute (to protect the public from incompetent or dishonest work) is invoked the contract will generally be unenforceable, but if the regulation is primarily a matter of raising revenue by controlling trade, then the agreement will probably be enforced. To determine whether a licensing agreement is regulatory or revenue-raising, the court looks to the intent of the legislation (including the legislative history) and the requirements for proof of skill and character and the penalties for violation.\(^23\)

**AGREEMENTS IN VIOLATION OF PUBLIC POLICY ESTABLISHED BY COURTS.**

Because public policy changes with the times to reflect both economic and social conditions, the nature of agreements that violate public policy also change. Such changes are implemented by the courts as they operate to determine and interpret public policy. Thus, what is illegal at one point in time, may not be so at another. For example, while restrictions on the restraint of competition constitute an important area of public policy and there exists anti-trust statutes at the state and federal levels, it may be possible to have agreements which restrict competition under certain conditions. This is because legitimate business interests may be served by allowing contractual restrictions on competition. If the sole purpose of the contract is to restrict competition the court will find it contradictory to public policy but some promises which are ancillary covenants not to compete are legitimate because they serve to protect a partial interest of the promisee. For example, a contract condition might require a party to refrain from practicing a profession or trade fol-

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\(^22\) An agreement that requires the commission of a tort is also illegal. For example, if one party pays another to publish a defamatory statement about a third party.

\(^23\) The application of these general rules are not mechanical and involves a complex weighing of public and private interests.
owing the sale of the business (which is the primary purpose of the contract), because part of the purchase is directed
to the goodwill of the business which might be lost if the seller immediately recommenced a similar business. Similar

covenants can be found on some partnership agreements and employment contracts and often cover a specified geo-

graphic area and a period of time following the formation of the contract.

For an ancillary covenant not to compete to be enforced the following conditions must be met:

The covenant must be an ancillary part of an otherwise valid contract.

The restriction on competition must be reasonable and no greater than to protect a legitimate interest (in
terms of time, geographic area and type of restriction).

The court will determine the hardship placed on the public and the afflicted party to determine if the restriction is con-
trary to public policy. An overly restrictive covenant may be eliminated or modified to adjust its scope/constraint to a
reasonable level. It should be noted that restrictions on an employee are judged by a stricter standard than similar cov-

enants that arise from the sale of a business.

**Exculpatory Clauses.**

Exculpatory clauses are used in an effort to relieve one party of its liability for tort claims but such clauses may be
contrary to public policy because the contract may reflect the abuse of one party’s superior bargaining position and/or
not provide motivation for the party to use care and avoid injury to other parties. While such clauses are held in disfavor
by courts, some exculpatory clauses may be valid because they reallocate the risks of a transaction in a fair and voluntary
manner and in a way that does not adversely affect the public good (as health, safety and welfare). Thus, in enforcing an exculpatory clause, the court will weigh the public good against the interests of the contracting parties and the following:

a. Does the clause relieve a party form his/her liability for intentional or wilful torts (such as fraud)?

b. Does the clause relieve a party of his/her duty of care to the public?

c. Does the clause meet the limitations imposed by statutes such as worker’s compensation statutes - which
place obligations on a party? For example, an employment contract which relieves the employer from
worker’s compensation liability will be illegal.

d. Is the clause unconscionable or the result of the superior or dominant bargaining power of a party?

**Other Agreements.**

Agreements that create a conflict between the (legal) public duties of a public employee and their personal interest are
illegal. Similarly, it is illegal to offer gifts or personal favors to elected officials in order to influence their decisions on
matters of legislation.

An agreement that induces (or tends to induce) a party who has a fiduciary responsibility (a position of trust and con-

fidence - such as a trustee, agent, or partner) to a third party is also illegal. Thus, a fiduciary should not enter into a
contractual relationship that provides the potential for conflict with his/her preexisting fiduciary responsibilities unless
such potential conflicts are disclosed fully to the principal/beneficiary and consent is obtained.

Agreements that impair or interfere with the relationships of a family are illegal because of the high value placed upon
the family as a social institution (for example, an agreement made to divorce a spouse or an agreement not to marry).

24. Remedies for the violation of the contract might include an injunction to require performance, or damages.

25. Agreements between unmarried cohabitants are increasingly enforced by the courts even though the agreement may be founded on
illegal consideration.
AGREEMENTS THAT VIOLATE PUBLIC POLICY AGAINST UNCONSCIONABILITY.

While traditional contract law establishes the doctrine of freedom of contract and that the relative bargaining positions of the parties is irrelevant if the parties are free to enter the agreement, modern courts have realized that the positions can be so unequal as to be unfair and that a party may be incapable of protecting his/her interest. To respond to this problem, many legislatures have enacted measures to prevent the abuse of superior bargaining power uncertain situations (for example, rent control ordinances and minimum wage laws). Similarly, courts have responded by declaring a contract which reflects the abuse of bargaining power to be a contract of adhesion and contrary to public policy. That is, the position of one party is so strong that he/she dictated unfair terms and the other party (by virtue of his/her weaker position) had to adhere. Courts also have used the doctrine of unconscionability (taken from courts of equity and equitable doctrine) to deal with contracts that are oppressively unfair in their impact.

Unconscionability occurs when one (some) of the terms of the contract are "unreasonably advantageous" to one party and the other party has no other meaningful alternative but to accept them. To find whether a contract is unconscionable, a court may examine the process and form of the negotiations between the parties (procedural unconscionability). For example, a contract which uses complex language, fine print and the inconspicuous placement of important terms to promote a lack of understanding of one party may be unconscionable. In addition, the use of "high-pressure sales tactics" may be unconscionable. The court also will examine the degree of voluntariness of one party as it is evidenced by the relative bargaining positions and the existence of such factors as lack of time, markets conditions and economic need, and their impact on the affected party. It should be noted that unequal bargaining power alone does not constitute unconscionability but the exploitation of that power to the degree that the terms are so unfair as to "shock the conscience of the court" will be a major indicator of unconscionability (substantive unconscionability). Similarly, the doctrine of unconscionability is not used to relieve parties of bad bargains. Thus, in an unconscionable contract, one party may bear a disproportionate share of the risk or an excessive share of negative conditions, or may be deprived of remedies in the event of the breach of the contract by the other party.26

Both the UCC and R(2)C provide the power for the court to modify a contract that contains a provision which is unconscionable in such a way as to achieve a just and fair result. the action of the court might be to set aside the contract in its entirety, refuse to enforce the unconscionable provision(s), or limit the application of the provision(s) to prevent an unconscionable result.

THE EFFECT OF ILLEGALITY.

In general, illegal contracts will not be enforced by the court and a party who has performed part, or all of his/her obligations will not be allowed to recover. This approach is undertaken to serve the public good and to punish the parties to an illegal contract. However, there are exceptions to this rule to correct the potential unfairness that may result.

a. Ignorance of the facts or legislation. Although ignorance of the law in not a valid excuse, some recovery may be allowed if one of the parties was excusably ignorant of the illegality of the contract. For this to apply, the illegality must be of a relatively minor nature - not involving a serious threat to the public good, and damages cannot be covered for injuries that occur post-discovery of the illegality. If both parties are ignorant, courts permit the parties to recover what they have parted with (not what they bargained for).

b. If one of the parties is protected by the regulatory statute (a protected party - for example covered by a rent control ordinance) then the agreement will be enforced against the other party.

c. The courts may grant relief to a party when the parties are not equally in the wrong and the less guilty party was induced to enter the agreement as a result of misinterpretation, fraud, duress or undue influence.

d. If a party rescinds a contract prior to the illegal act then the party may be able to recover only the consideration that has been given to that point in time.

26. Paying a price in excess of the market price will unconscionable only if it is far in excess of the market price.
e. Courts may divide the contract into legal and illegal parts (if such division is feasible). A contract may be divisible if there are several promises or acts from each party that can be separated and if the major portion is legal, then the court will often enforce the legal part.

13.9 **THE EXPRESSION OF CONTRACTS.**

The form and language of the contract are important components which may affect the validity of the contract even though the other elements of enforceability are all present. Generally an oral contract is simpler than a written contract and if it can be proven, is equally enforceable. However, a written contract is considerably more effective in conveying the terms of the agreement because of the reduced potential for misunderstanding, misinterpretation and forgetfulness. Some classes of contracts are required to be in writing to avoid such problems. Requirements for written contracts date back to the first statute of frauds enacted by the English Parliament in 1677. Similar statutes were adopted in the American states and as a result most states require written contracts for collateral agreements, real estate contracts, contracts with a duration of more than one year, contracts for the sale of goods worth more than $500, contracts for personal liability for estate debts, and contracts for marriage as the consideration.

Other types of contracts also may be required to be in written form for specific states.

**Collateral Contracts.**

A collateral contract is an agreement in which a party promises to perform an obligation belonging to another party. For example, if one party (guarantor) agrees to pay the debt of a second party (principal debtor) to a third party, only if the debtor does not do so. However, not all three party contracts are collateral contracts. Exceptions include original contracts where a party’s responsibility to perform is not conditioned on the default of another party (that is, the obligation is original and not collateral). A variation occurs when the original debt is released and a new debtor takes his/her place and in such cases, a collateral contract may be treated as an original contract because the primary purpose is to secure a benefit for the guaranteeing party. In this situation, the contract does not need to be written because it is outside the statute of frauds.

**Interest in Land.**

The statute of frauds also includes agreements that transfer or affect the ownership interests in real estate. The written agreement is required to provide evidence of the contract for the transfer of ownership rights and includes contracts for the sale of land, placement of mortgages, the option to purchase land, and easements or rights upon the land (such as mining or oil drilling). Leases, while also representing the transfer of a real estate interest, generally do not need to be in written except when the term is longer than one year. An exception to the statute of frauds are contracts for the erection of a building (or structure) or insurance (because neither contract involves the exchange of ownership rights).

One exception to the written contract rule is part performance, where the performance (or partial performance) of the parties provides evidence of the existence of a contract. For example, an oral contract may be upheld when one party commences substantial improvements to a property or takes possession of it after paying a large part of the price. In this case, even though the contract is oral, the conduct of the party is such that it implies a contract probably exists and the action of the party is inconsistent with any other interpretation.

**Contracts of more than one year.**

A bilateral contract whose terms are such that it would take a year or more to complete (from the day the agreement is formed) comes under the restrictions of the statute of frauds and is therefore required to be written. The purpose of

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27. Two parties could also be jointly liable for a debt to a third party, in which case the parties would each be separately liable.
28. Traditionally land has been more important than other property and therefore justifies the requirement of written contracts with respect to land.
29. Any one of these three conditions alone is insufficient to demonstrate part performance.
such a time limitation is to restrict the inaccuracy that results when parties recollect the conditions that governed oral agreements formed a long time ago.

The courts have construed the interpretation of statutes of frauds very narrowly and the one year limitation applies only to executory contracts and not to contracts already completed. Further, the statute of frauds does not apply to indefinite contracts. For example, many employment contracts are for an indefinite period and often last in excess of one year. Some contracts have durations that are specified to be for life and generally are not covered simply because death could occur within one year.

**Contracts for the Sale of Goods in Excess of $500.**

The UCC (Section 2-201) covers contracts for the sales of goods for $500 or more. Under the UCC, such contracts are unenforceable unless they are in writing or there exists other evidence of a contract.

**REQUIREMENTS OF THE STATUTE OF FRAUDS.**

While states are not uniform in the requirements for contracts, most do not require the entire contract to be in writing. A memorandum, such as a letter, telegram, or even a receipt, usually will suffice to prove that a contract was formed. In some instances, an oral acceptance of a written offer will be sufficient to meet the requirements of the statute of frauds. In general, the memorandum must contain the essential terms of the agreement although the degree of specificity varies by state. Further, there must be some identification of the parties to the contract, the subject matter, and the signatures of the party (or his/her agent) to be charged as defendant in the suit. That is, a contract is only enforceable against the party that signed. Since there is no way of knowing in advance who will be plaintiff/defendant then both parties should sign, though this is not required in the statute of frauds.

In some situations several writings, such as letters, preliminary drafts of the contract and other separate documents, may be combined to produce a memorandum. In this situation, all of the documents must refer to the same agreement.

Four types of evidence can be used to satisfy the writing requirement of the UCC:

a. A memorandum confirming an oral conversation/contract which is sent by one party and not objected to by the other party (within a period of ten days) can provide evidence of a contract. Even though the other party has not signed it, the memorandum can be used against that party as a defendant if both parties are merchants, the memorandum is sent within a reasonable period of time and it binds the sending party to the agreement.

b. If the parties make a partial payment or delivery of goods, the UCC allows such partial transactions to satisfy the statute of frauds, but only for the quantities paid for/delivered.

c. If a party being sued admits that an oral agreement existed in a legal testimony or in another document that is filed with the court (deposition, interrogatories etc.) then such testimony will be sufficient to meet the statute of frauds requirements but the quantity of goods involved is taken to be the quantity admitted.

d. Specially manufactured goods constitute another exception which occurs when the goods manufactured are unsuitable for sale in the ordinary course of the seller’s business and there is a substantial beginning in the manufacturing of the goods prior to dispute.

The doctrine of promissory estoppel has been used by the courts to reverse an otherwise unjust result that would

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30. In some states (New York) “for life” contracts are covered by the statute of frauds.

31. Note that if the original contract is for $499 and the contract is later modified by increasing the price of the goods to $501, it would be required to be written.

32. Under the UCC, the requirements for a memorandum are generally less strict than statute of frauds requirements. In this case the writing need only indicate that a contract was formed and must specify the quantity of goods involved.

33. In the case of land, many statutes require a complete legal description of the property.

34. A written signature or initials, a mark, engraving, or other symbol will be enough if the signing party intended it to be an authentication of the written contract.
result with strict interpretation of the statute of frauds for oral contracts. This, if one party would suffer serious injury because of a reliance on an oral contract, the defendant may be estopped from using the statute of frauds as a defense. Such a condition also is presented in R(2)C (Section 139) and recognizes that such reliance is evidence of the existence of a contract.

If a contract does not comply with the writing requirements of the statute of frauds, it is unenforceable. However, some performance by one party (but less than what is required for partial performance) that conveys benefits to the other party may be subject to recovery by using the legal concept of the quasi-contract.

PAROL EVIDENCE RULE.

A written contract generally is formed after negotiation between the parties and the written document is assumed to represent the complete integration of all of the terms and conditions that were considered during negotiations. Thus, the written contract is a complete and finalized statement of what the parties intended and under most situations, the court will not allow the introduction of prior material to contradict the written agreement. Such actions are based on two issues; first, that the writing is the best evidence of the agreement between the parties, and second, as the later document, the intent expressed within it should prevail over preliminary/prior intent because such earlier intent is specifically excluded from the agreement.36

The parol evidence rule affects only written contracts and excludes evidence of statements that occurred prior to or during the signing of the written contract (unless such changes are made on the written contract). Post signing statements are not covered by this rule and are freely admissible in court.

Under certain conditions, parol (prior) evidence is admissible:

a. The written contract is not the best evidence of the contract. In this case, parol evidence could be used to supplement (not contradict) the written conditions. This would occur only if the agreement was a partially integrated contract (that is not completely integrated).37 A contract is partially integrated when some, but not all of the terms are expressed in the contract. In this case, parol evidence can support additional terms that were intended by the parties but not so as to contradict or modify the existing terms.

b. Parol evidence also can be introduced to explain ambiguities in the written contract (but not to contradict the existing terms).

c. Parol evidence can be used to show a situation that could invalidate the contract (such as misrepresentation, duress etc.)

d. If a contract anticipates a future uncertain event or condition that creates a duty to perform, then parol evidence can be used to show that the contract was not intended to take effect until the time of the occurrence of that event. For example, Smith agrees to sell his car to Brown when he gets a new job.

e. Subsequent agreements (occurring after the signing of the contract) can always be sued to modify, add to or subtract from the terms of the original contract.

SOME GENERAL PRINCIPLES OF CONTRACT INTERPRETATION.

a. Determine the principal objective of the contract. Every clause will be interpreted in the "light" of this objective.

b. Ordinary words are given their ordinary/usual meaning and technical words are given the special meaning according to the particular trade, profession or business of the parties. Many contract claims are based on inaccurate suppositions that arise when one party has inadequate knowledge of the field (e.g. construction) and it is important to explain technical words and phrases thoroughly to the other

35. The use of promissory estoppel to circumvent the statute of frauds is a controversial area of the law and should not be relied on.
36. The general rule for this is that if you want it in the contract then make sure that it is included in the written agreement.
37. A contract is completely integrated when the parties so state in the contract. That is, a merger clause or integration clause provides that the written contract is the integration of (or supersedes) all prior agreements. This generally forbids the use of parol evidence.
party.

c. Specific terms that follow general terms are determined to qualify the general term. For example, the contract for the sale of Smith’s car specifies in Paragraph 2.1 "I will provide a one year guarantee." while paragraph 2.1f states, "A guarantee of one year for the paint job only," will effectively create a guarantee that covers only the paint work.

d. Handwriting on a typed contract will prevail over the typed/printed conditions.

e. Any ambiguities in a contract will be interpreted or resolved against the party responsible for its drafting.

f. It is essential to define words when they are being used in the extreme case; for example, all, every, none, best. In a contract, the word "all" is interpreted to mean "absolutely without exception".

g. It is also important to be careful with the use of pronouns such as who, whose, he etc.

13.10 RIGHTS OF THIRD PARTIES.

A contract is an agreement between two parties and under most situations, only those parties have legal rights and duties under the contract. There are several ways in which third parties can have rights under the contract.

ASSIGNMENT AND DELEGATION.

Some or all of the rights and duties of a contract can be assigned or delegated to a third party. It should be noted that the transfer of a right is an assignment while the transfer of a duty to perform is a delegation. The terms are not interchangeable.

Not all rights can be assigned; for example, rights that are contrary to public policy, adversely affect the obligor (party who has a duty to perform) in a significant way by increasing the risk or the material nature of the change\(^\text{38}\), or because the original contract expressly forbids assignment of rights (though such anti-assignment clauses usually are not strictly enforced by the court).

When a contract, or part of a contract is assigned, the assignee "steps into the shoes" of the assignor, and acquires the rights of the assignor to receive benefits or to sue under the contract. It is important that the party who is obliged to perform is informed that assignment has occurred so that the required performance is made to the assignee and not the assignor.

It should be noted that the assignor impliedly warrants that the assigned claim is valid. That is, the contract is legal and not voidable for such reasons as duress, or that the obligor has the capacity to contract. However, no warranty is made that the obligor is solvent. Further, the assignor warrants that good title is held to the rights that are assigned and that he/she will not act so as to reduce the value of the assigned rights.

Delegation occurs when a third party is appointed to perform the duties of an obligor. For example, in the sale of a business, the buyer of the business may be obligated to provide goods to existing customers. It should be noted that a duty to perform (by the delegating party) is not extinguished when it is transferred to another party. Full liability to perform the duty remains until the duty is performed or the third party agrees to substitute a new promise for the delegating party’s promise (called a novation). Not all duties can be delegated and there are similar limitations as for the assignment of rights. Further, the original parties to the contract can agree to restrict delegation or, the party who will receive the performance/duty has a substantial interest in having the original party perform. This is usually a factor in preventing the delegation of employment contracts and many professional services because the interest is determined by the individual’s qualities (i.e. skill, ability, and judgement).

\(^{38}\) Employment contracts cannot be assigned from one employer to another since the contract involves either (or both) a personal relationship or a personal trait such as skill, judgement, or character.
THIRD PARTY BENEFICIARIES.

When a contract is formed with the intent to convey a benefit to a third party (intended beneficiary) then that party must prove that he/she is the intended beneficiary to claim the benefit. This is achieved by demonstrating that the promisee intended to benefit the third party either by making a gift (donee beneficiary) or by the satisfaction of a legal duty (creditor beneficiary). In some cases, the third party may be an incidental beneficiary because the contract was formed with the intention of benefiting only the two parties to the contract. While both donee and creditor beneficiaries (intended beneficiaries) can sue for performance under the contract, an incidental beneficiary cannot. If the contract is modified, discharged or terminated prior to the time the rights of the third party become vested, then those rights are changed accordingly. The time at which vesting occurs varies from one jurisdiction to another and may occur when the contract is formed, when the beneficiary learns of the contract and consents to it, or when the beneficiary acts in reliance to the promise.

13.11 PERFORMANCE AND REMEDIES FOR BREACH OF CONTRACT

Most contracts are discharged when the parties complete/fulfill the obligations established by the terms of the contract but in some situations performance is incomplete or unsatisfactory. In these situations, the court endeavors to determine the rights and duties of the parties and whether the conditions of the contract were breached. The consequences of the breach are also a question for the court to decide. Sometimes the contract may specify the action to be taken in the event of incomplete or defective performance but often the court must draw upon legal principles to establish and effect the intent of the parties in a manner that is just. A duty is unconditional or absolute when it does not depend on any other occurrence except the passage of time. Under this type of contract, the promisor must perform unless the performance is excused. A breach of contract occurs if the party does not perform. A duty also can be conditioned on the occurrence of an event, the uncertain nature of which can affect a party’s duty to perform. That is, only on the actual occurrence of the event does the duty arise and as a result the failure to perform is not a breach until the event occurs.

Types of Conditions.

a. Condition Precedent: A duty that does not arise until the occurrence of a specified event (e.g. I will buy your car for $5,000 if I can get financing)
b. Concurrent Condition: A duty to perform arises at the same time for both parties (e.g. I will buy your car for $5,000)
c. Condition Subsequent: The duty to perform is discharged if an uncertain event occurs in the future.
d. Express Condition: A duty that is created directly and specifically in the terms of the contract, for example: provided that, on condition that, when, while, as soon as, etc.
e. Implied-in-Fact Condition: A duty that is not stated in specific terms in the contract but is implied by the nature of the promise.
f. Constructive Condition (Implied-in-Law) A duty is imposed by the court to achieve justice in a contract dispute.

SATISFACTORY PERFORMANCE.

Performance to the Satisfaction of Third Parties.

For example, most construction contracts provide that the owner of the property has a duty to pay for the building in a series of payments which are conditioned upon the receipt of certificates that are issued by the architect. A certificate is issued after an "inspection" of the work and indicates that the work was "satisfactory" (in accordance with the plans and specifications). In this situation, the architect is a third party to the contract between owner and builder. The standard to determine whether performance is satisfactory is a good faith standard; that is the architect should only withhold payment when in honest and good faith, he/she believes that performance is unsatisfactory. Thus, the architect’s acceptance (satisfaction with performance) creates a duty to pay for the owner. If a certificate is not forthcoming, the
builder must prove that it was withheld fraudulently or in bad faith for the court to order performance by the owner.

**Personal Satisfaction.**

A contract can be conditioned on the personal satisfaction of a party to the contract. To determine whether satisfaction with performance has occurred (or should have occurred), the court employs either an objective "reasonable man" standard or the actual and subjective standard of the party receiving the performance. The standard applied depends on the nature of the performance; for example, if personal taste and comfort are involved, then the standard is subjective. The more objective "reasonable man" standard is used when "mechanical fitness of suitability for a particular purpose" is involved.

**EXCUSE OF PERFORMANCE.**

A duty which is conditioned on the occurrence of an event generally does not have to be performed until the event occurs. However, the occurrence of the event can be excused - in which case performance of the duty then is required. There are several grounds for the excusing of a condition.

a. Performance is prevented or hindered by the promisee (for example, by refusing to grant reasonable access.

b. The "right" to the occurrence of the condition/event can be excused when the party voluntarily gives up the right (waiver). A party that relies on the waiver (or implied waiver) can use the doctrine of estoppel to prevent the other party from claiming that the condition did not occur.

c. Impossibility of performance also may provide grounds for excusing a condition.

**BREACH OF CONTRACT.**

The consequences of a breach of contract are a function of the nature and degree of performance expected of a party and the magnitude of the breach.

**Degree of Performance**

If the duty to perform is established in an express condition, then performance is required to strictly and completely comply with the contract to establish the obligation(s) of the other party. A strict performance standard arises when the duty can be performed exactly or to a high degree of perfection and includes promises involving the exchange of money, deeds to property, or the delivery of goods. Failure to provide such performance and comply with a strict performance standard can result in a substantial forfeiture by the non/under performing party. Thus, a minor deviation could effect the ability to receive the contract price (although some recovery may be possible in quasi contract). As a result, courts have introduced a lower standard of performance (substantial performance) when the duties are difficult to perform without some deviation from a perfect result, if the performance of those duties is not established as an express condition in the contract. For example, the promise to erect a building requires only substantial performance for the builder to recover the contract price (less any damages that result from performance defects). However, for such recovery to be possible, the breach of contract must not be willful.

**Material Breach.**

If the performance does not attain the degree of perfection that is anticipated and justified by the terms of the contract, there is a material breach. That is, the promisor did not give substantial performance of his/her duty. The materiality of the breach determines the consequences of the breach. In the event of a breach of contract the injured party (promisee) has the right to withhold his/her own performance and in the event that the breach is not remedied, to sue for damages. The promisor, having breached the contract, has no right of action although a theory of quasi contract could be applied to recover for the benefits that had already occurred as the result of the performance up to the time of the breach.

There are several factors that determine the standard for materiality:
a. Did the breach deprive the promisee of benefits that he/she reasonably could expect under the terms of the contract?
b. The extent of the forfeiture experienced by the promisor if the breach of contract is determined to be material.
c. The magnitude and timing of the breach
d. The good faith exercised by the promisor
e. The extent to which the promisee was injured and the ability to compensate that injury through damages.

If the promisor indicates either by express statement or implies by his/her actions, that he/she is unwilling or unable to perform the required duty prior to the time it is anticipated in the contract, the breach is an anticipatory repudiation (breach). In this case, the promisee can treat the contract as breached, withhold his/her own performance and immediately sue for damages.

It should be noted that a time delay (from the time performance is anticipated/required in the contract may be sufficient to constitute a material breach of contract. the time at which performance is due may be stated in express terms within the contract or inferred by the circumstances of the contract, in which case a reasonable time is imposed. If the contract states that "time is of the essence" for a specified performance, then the timely performance of that duty is an express condition and any delay is a material breach. If time is not of the essence then a reasonable delay can occur, though the promisee is entitled to deduct any losses that result because of the delay.

**Good Faith Performance.**

Some courts (and the UCC) have established that the parties have an obligation of good faith in the performance of their duties and the enforcement of the contract. That is, a party should not do anything to prevent the other party from receiving the benefits established in the contract. Good faith has been applied in insurance cases (when the insurance company has - in bad faith - failed to pay claims) and employment cases (when an employer discharges an employee in bad faith).

**Non-Performance of the Contract.**

Non-performance of the promisor can be excused on several grounds including the impossibility of performance when an event occurs that renders performance impossible. Impossibility results not when "I cannot do it", but when "It cannot be done". That is, merely being unable to perform the duty because of hardship or difficulty is not sufficient. Such situations include the death/illness of the promisor, the destruction of the subject matter, or supervening illegality. A related condition is the frustration of the venture. This occurs when the return performance of the promisee is worthless to the promisor.

**Discharge of Contract.**

Under normal conditions, the parties to a contract are released from the obligations of the contract when they have completed the performance of their contractual duties. That is, the contract is discharged. However, in some specific situations a duty to perform can be discharged without performance occurring, including:

a. the occurrence of a condition subsequent
b. the non-occurrence of a condition precedent
c. a material breach of the contract by the other party
d. impossibility or frustration
e. by the mutual agreement of the parties

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39. Some courts will imply this term even though it is not stated by the contract if the time of performance is a critical component of the performance.
f. by the voluntary relinquishing of the right to receive performance (waiver). It should be noted that accepting an incomplete or defective performance without objection and knowing that the other party will not remedy the defects discharges the other party from the performance of his/her obligations. Thus, to avoid waiving the rights to receive complete performance, the affected party should give prompt notice that complete performance is required.

g. by the intentional and material alteration of the conditions of the contract without the consent of the other party.

h. by exceeding the statute of limitations - which specifies the maximum period of time in which a suit can be brought. This period of time varies from state to state.

**REMEDIES FOR BREACH OF CONTRACT.**

If the court determines that a breach of contract has occurred it must then decide whether and how to compensate the injured party for the other party’s failure to perform his/her contractual duties. The remedy that is granted is not intended to punish the breaching party but to achieve a just result for the injured party. The form of the remedy is generally monetary damages but other equitable remedies may be used as well.

The claim for damages must be related to losses that can be demonstrated with reasonable certainty. That is, speculative losses are not considered and are non-recoverable. Further, the damages are limited in amount to the losses that were reasonably foreseeable by the breaching party at the time of forming the contract. The breaching party would have to have reason to know, or would reasonably be expected to know, of the circumstances that would influence the plaintiff’s loss. Finally, the plaintiff has a duty to mitigate (or minimize) the extent of the damages that occur as a result of the breach of contract and the injured party cannot recover for losses that could have been avoided without the expenditure of undue effort, humiliation or additional risk.

In determining the amount of compensatory damages, the court will endeavor to give the plaintiff the expected value or benefit of his/her bargain. This is achieved by establishing the amount of damages so as to place the plaintiff in the same position as if the other party had performed a

In addition to the loss in value, consequential damages (that arise as a consequence or as a result of the particular circumstances of the contractual relationship and incidental damages (which arise after the breach and are incurred by the plaintiff in an effort to avoid further loss). In some situations the court might award nominal damages to reflect that a technical breach of contract occurred but no measurable injury resulted.

It is also possible for the parties to a contract to establish the amount of damages if the contract is breached by express statement or provision within the contract. Such liquidated damages may be used to provide “incentives” to complete performance within a specified period of time and avoid the complication that occurs when the losses that would result by not completing with the time specified (for example) are speculative in nature. A liquidated damages provision would be enforced by the court if the amount of damages is reasonable and it would be difficult to determine actual damages. It should be noted that the court will not enforce a liquidated damages clause if the nature of the provision is to unduly penalize the defendant. Punitive damages can be awarded when the behavior of the defendant is reprehensible and a deterrent is required. Punitive damages are seldom available but may be provided for by a specific statute (such as a consumer protection statute) when the duty of good faith is breached or if the defendant committed fraud or was particularly malicious/offensive.

The court also will assist in enforcing the judgement for damages by issuing a writ of execution to seize and sell the defendant’s property in order to satisfy the judgement. Such seizures etc. are restricted by exemption laws that limit both the classes and amounts that can or cannot be taken. In addition, a court can issue a writ of garnishment to obtain the defendant’s assets that are held by third parties.

**Equitable Remedies.**

When monetary damages are inadequate compensation for a party’s injuries, the court may consider an equitable reme-
edy based on the specific circumstances of the parties and their contract. For example, the court could require the defendant to specifically perform the contract (specific performance) when the subject matter of the contract is so unique that monetary damages are inadequate.\textsuperscript{40} Another remedy available to the court is to issue an injunction that restrains the defendant from particular activities that may cause an irreparable injury to the plaintiff.

\textsuperscript{40} This remedy often is used for real estate contract disputes because real estate is unique in nature.
This is a contractor's suit against an architect for damage due to construction delays caused by the architect. The district court granted a summary judgment for the defendant architect on the ground that a prior arbitration proceeding effectively barred the litigation of these claims because they had been litigated in the arbitration proceedings and the plaintiff had received through arbitration some satisfaction for the damages claimed. The Georgia law prohibits continued litigation of inconsistent remedies after satisfaction has been obtained. Because we cannot tell from this record whether the claims here asserted were in fact decided in the arbitration proceeding or whether the plaintiff received the satisfaction contemplated under the Georgia statute, we vacate the summary judgment and remand for further action.

The Thomas County Board of Commissioners contracted with defendant Jinright & Ryan, P.C. Architects, for architectural services for, and to administer the construction of, additions and changes to the Thomas County Courthouse. The plaintiff James R. French was the contractor for that work.

Plaintiff French alleges in this suit that due to the acts and omissions of Jinright, he was unable to perform the work as planned, and that reliance on Jinright's erroneous representations in the design and construction documents interfered with his performance of the contract. Consequently, the plaintiff was unable to render performance in a timely fashion. French's contract was terminated July 3, 1979, by Thomas County on the recommendation of Jinright. The Board of Commissioners confirmed this decision on July 10, 1979.

Thereafter, French filed his notice of intent to arbitrate with the American Arbitration Association as required by his contract with Thomas County. The contract expressly excluded Jinright and others from being joined in such arbitration action without their written consent. Thomas County responded with an answer and counterclaim, but shortly thereafter withdrew from arbitration. French obtained an order compelling arbitration from federal district court. The Construction Industry Arbitration Tribunal of the American Arbitration Association conducted the arbitration. The arbitration panel held in favor of plaintiff French and awarded him $5,500. The district court affirmed the arbitration panel's award. The issue in this case is whether that arbitration and award forecloses plaintiff French's suit against Jinright.

The district court concluded that the claims for Jinright's defaults which led to plaintiff's damage were asserted in the arbitration proceeding against Thomas County on a respondeat superior theory. It is helpful to quote at length from the district court's opinion and order.

Portion of District Court Order:

Because the Defendant contends that the Plaintiff now seeks to recover from it substantially the same damages he previously sought from Thomas County in the arbitration proceedings arising from the same circumstances, it is necessary to compare the Plaintiff's present claim against the Defendant to that previously asserted against Thomas County. On August 16, 1979 the Plaintiff served on Thomas County a "Notice of Intent to Arbitrate" and in this notice stated that it was the Plaintiff's intention "to arbitrate all outstanding claims in dispute between
Petitioner as contractor and Respondent as owner" under the construction contract, and then the notice
describes "the nature of the claims in dispute", then the notice proceeds to describe in general terms the
Petitioner's contention that he was improperly delayed in the performance of the work and that his work
was improperly represented to his bonding company, etc., and the notice then sets out in two paragraphs
the following claims with regard to alleged wrongful acts of omission and commission on the part of the
architect:

"3. In addition to the foregoing acts and omissions, during the course of Petitioner attempting to perform
the work required under the Contract, Petitioner discovered concealed conditions which were at
variance with those depicted in the plans and specifications, thereby causing Petitioner to be delayed in
his progress of the work and to incur increased costs for the additional labor, material and overhead
required to perform the work under these changed conditions."

"4. In addition to the foregoing acts and omissions, during the course of Petitioner attempting to perform
the work required under the Contract, the project architect failed or refused to perform in the manner
and to the extent required of him under the Contract, thereby causing Petitioner to be without the benefit
of the architect's timely and effective (a) inspection of the work, (b) interpretation of the requirements
of the Contract documents and (c) judgment of the performance of both Respondent and Petitioner. In
short, the project architect failed or refused to exercise his best efforts to insure faithful performance by
both Respondent and Petitioner under the Contract and failed or refused to remain impartial in respect
of the performance to be rendered by Respondent and Petitioner under the Contract. As a consequence
of the project architect's failure or refusal to perform as aforesaid, Petitioner incurred additional delays
and increased costs for the additional labor, material and overhead required to perform the work under
these circumstances."

At the beginning of the arbitration proceedings the Plaintiff's counsel presented to the arbitration panel
a "Brief of Petitioner" which he described as being a summary of what the Petitioner considered to be
the "ultimate facts material to disposition of the issues before you" and also a statement of law that he
believed to be "applicable to those facts and those issues". Several of the 21 pages of this document are
devoted to a recital of the duties which were imposed upon the architect in connection with the
construction and several other pages are devoted to a detailed discussion of how the architect either by
acts of omission or commission was alleged to have been derelict in the performance of his duties. There
is a detailed outline of how the architect failed to approve partial pay requests, failed to make
arrangements for the contractor to have reasonable access to the job site, improperly ordered some of
the Petitioner's subcontractors off of the job site, improperly recommended to the owner that the owner
terminate the contract, and improperly eventually brought about the termination. Then this recital
concludes with the statement "Thereafter, the Contractor prepared and filed his Notice of Intent to
Arbitrate with the American Arbitration Association and these proceedings ensued".

In that portion of the brief submitted to the arbitrators which sets out the legal basis for the Petitioner's
claims the following statement is made.

"In every contract which contains no express covenant to the contrary, there is an implied contract that
the contractor shall be permitted to proceed with the construction of the project in accordance with the
terms of the contract without interference by the owner."

"Like the owner, the architect has an obligation to perform his duties in a timely and complete fashion
and to perform them so as not to interfere with, hinder or delay the contractor in the performance of his
work. As the owner's agent, the architect is subject to the same implied covenant of good faith and fair
dealing which binds the actual parties to the contract."

Finally, in that portion of the brief which deals with the damage claim the following appears:

"As suggested above, should any act or omission of the owner or the architect, or by any officer,
employee or authorized representative of either, delay orderly progress of the job, the contractor may
recover the damages which fairly and naturally flow from such delay."
The Court is impressed that throughout the arbitration proceedings the Plaintiff's claim was not limited to assertions of negligence or breach of contract on the part of the Thomas County Commissioners. Instead, the Plaintiff's notice of the Plaintiff's intent to arbitrate, his brief submitted with the arbitration panel and the transcript of the evidence of the arbitration proceedings contained many references to alleged fault on the part of the architect, the Defendant in this case.

End of District Court Order

This analysis by the district court fails to answer three questions: First, were the claims that were based on Jinright's fault and asserted against Thomas County decided on the merits, or on the ground that Thomas County was not responsible, even if Jinright might be? Second, does plaintiff, as he insists, have claims that can be asserted against Jinright for which Thomas County would not be responsible and could not have been asserted in the arbitration? Third, was the $5,500 obtained through arbitration full satisfaction within the meaning of the Georgia statute, or did the arbitrators decide that there might well be damages but that Thomas County is not liable because it was not the party responsible for causing the harm?

Defendant argues that plaintiff is collaterally estopped from pursuing this action. Absent a record of the claims that have been litigated and the basis of these claims, this Court is unable to determine whether collateral estoppel prevents French from pursuing this action. The doctrine of collateral estoppel has been clearly set forth in Deweese v. Town of Palm Beach, 688 F.2d 731 (11th Cir. 1982), where this Court articulated the three prerequisites to applying collateral estoppel: (1) that the issue at stake be identical to the one involved in the prior litigation, (2) that the issue have been actually litigated in the prior litigation, and (3) that the determination of the issue in the prior litigation have been a critical and necessary part of the judgment in the earlier action. 688 F.2d at 733. If these prerequisites are met, the doctrine of collateral estoppel precludes plaintiff's re-litigation of an issue decided in a prior case. Id. at 733. See Parklane Hosiery Co. v. Shore, 439 U.S. 322, 99 S. Ct. 645, 58 L. Ed. 2d 552 (1979); Collins v. Seaboard Coastline Railroad Co., 681 F.2d 1333 (11th Cir. 1982). See also, Rufenstein v. Iowa Beef Processors, Inc., 656 F.2d 198 (5th Cir. Unit A 1981), cert. denied, <=8> 455 U.S. 921, 102 S. Ct. 1279, 71 L. Ed. 2d 462 (1982); Stovall v. Price Waterhouse Co., 652 F.2d 537 (5th Cir. Unit A 1981); Port Arthur Towing Co. v. Owens-Illinois, Inc., 492 F.2d 688, 692 n. 6 (5th Cir. 1974). An application of collateral estoppel must be premised on a clear determination of the issues litigated in the arbitration proceeding. Although the district court has demonstrated that the claims were similar, the record is not sufficient to show whether all of Jinright's faults were asserted against the County and, if so, whether these were decided on the merits or on the ground that Thomas County was not responsible, even if Jinright might be.

Without a delineation of the disposition of issues in the arbitration proceeding, there is likewise no basis for determining whether French has separate claims against Jinright. Cf. Bryant v. Rushing, 121 Ga. App. 430, 174 S.E.2d 226 (1970) (holding plaintiff's settlement of medical claims as full satisfaction with insurer did not bar his negligence claims against the driver of the car).

Even if all of the claims asserted by French were not litigated in the arbitration proceeding, the district court must still consider Ga.Code Ann. @ 9-2-4 (1983). Ga.Code Ann. @ 9-2-4 (1983) provides that "[a] plaintiff may pursue any number of consistent or inconsistent remedies against the same person or different persons until he shall obtain a satisfaction from some of them." The statute does not define satisfaction.

Several cases emphasize that one can pursue inconsistent claims until satisfied. Except for McLendon Bros. v. Finch, 2 Ga. App. 421(3a,b), 58 S.E. 690 (1907), these cases do not define satisfaction. In Newby v. Maxwell, 121 Ga. App. 18, 172 S.E.2d 458 (1970), a suit against a corporation, the judgment was not paid and the plaintiff had not obtained satisfaction. The plaintiff was allowed to bring a suit against a stockholder of the corporation. Newby holds that one can pursue inconsistent claims till satisfied, not that any satisfaction is full satisfaction. In Trollinger v. Magbee Lumber Company, 132 Ga. App. 225, 207 S.E.2d 701, 703 (1974), the court states that: "the fact that the appellee had obtained judgment against Mr. Parker for the same material would not bar the present action." Trollinger does not define any satisfaction as full satisfaction, but provides only that one can pursue inconsistent claims till satisfied.

421, 58 S.E. at 690, 691, 693; see Rowland v. Vickers, 131 Ga. App. 121, 205 S.E.2d 503, 505-07 (1974) (Quillian, J., dissenting). At oral argument the court discussed with counsel whether it was possible to go behind the general arbitration award and find out what decision was made about issues critical to whether either the general rules of collateral estoppel or the Georgia Code would apply. We do not know that answer. At best, that question would seem to leave questions of fact which can not be decided on summary judgment. Upon remand, it may well be that the parties can provide the court with sufficient uncontested facts to conclude part, if not all, of the case on the affirmative defenses asserted by the defendant. Cf. Glisson v. Burkhalter, 31 Ga. App. 365, 120 S.E. 664, 665 (1923) (holding that where settlement is pleaded as an estoppel "the burden is upon the party relying thereon to sustain the plea by showing that the particular matter in controversy was necessarily or actually determined in the prior litigation."). This decision does not foreclose that opportunity. But from the record before us, we can not say that all the claims asserted by the plaintiff have been decided and satisfied.

As supplemental authority Jinright cites the recent Georgia Court of Appeals decision in two consolidated cases, Nannis Terpening and Associates, Inc. v. Mark Smith Construction Co. and Jordan v. Mark Smith Construction Co., 171 Ga. App. 111, 318 S.E.2d 89 (1984), which held that the arbitration of the claims there asserted barred state court litigation. Although the facts are similar to this action, the cases are distinguishable in that the arbitration hearings there were conducted with the express understanding that the principal would be liable for whatever construction problems the contractor had encountered that had been caused by the architect and the record was sufficient to answer the questions which remain open in this case.

VACATED and REMANDED.
Lundgren, a building contractor, appeals from an order and a summary judgment, and School District No. 5 of Baker, Oregon, ("school district") appeals from two judgments, in an action brought by Lundgren against school district and the architectural firm of Freeman, Hayslip and Tuft ("architects"). We are affirming as to all matters appealed, except the time as of which interest is allowed, and the summary judgment in favor of architects. As to these, we are reversing.

On August 7 and September 29, 1950, Lundgren entered into written contracts with school district to construct a high school and shop and a swimming pool and bathhouse. On June 27, 1952, a month after Lundgren had notified architects that the high school and shop school district notified Lundgren that it was terminating his employment because of total breach. This was done on the advice of architects, who claim to have acted pursuant to Article 19 of the General Conditions of both contracts between Lundgren and school district.¹

School district refused to pay Lundgren the amount claimed by him to be due on the contract, $55,834.01. It also refused to pay the amount claimed due on the swimming pool and bathhouse contract, $9,776.35, although a certificate of final acceptance had been issued for this contract. Lundgren sued school district for the unpaid balances ($65,610.36), for losses due to defects in plans and specifications and having to do work uncalled for by the contracts and to redo work done strictly in accordance with the contracts ($100,000), and for loss of his "normal builder's fee" ($67,000). He joined a claim against architects for wilfully and maliciously interfering with his performance of the contracts and inducing school district to breach and claimed the same damages against them as he did against school district, together with damage to reputation because of architects' claim that he had failed to substantially perform his contracts, damage to credit standing with subcontractors, materialmen and bonding companies because of architects' failure to make prompt payments ($150,000), and for punitive damages ($50,000). School district had two counterclaims, one for damages for faulty construction on both projects ($250,000), and the other for miscellaneous hearing and electricity costs. School district set off $16,626.35, the cost of completing the high school after Lundgren's employment was terminated. The district court had jurisdiction under 28 U.S.C. § 1332.

Lundgren's claim against school district was submitted to arbitration by stipulation on April 3, 1953, as agreed to in Article 29² of the General Conditions of both the high school and swimming pool contracts. The stipulation provided that "the issues between [the] parties... will be arbitrated in accordance with the Federal Arbitration Statute...." On

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1. Article 19 provides:
"If the Contractor should persistently or repeatedly refuse or should fail, except in cases for which extension of time is provided, to supply enough properly skilled workmen or proper material, or if he should fail to make prompt payment to subcontractors or for material or labor, or persistently disregard the instruction of the Architect, or otherwise be guilty of a substantial violation of any provisions of the contract, then the Owner, upon the certificate of the Architect that sufficient cause exists to justify such action, may terminate the employment of the Contractor and take possession of the premises and all materials, tools and appliances thereon and finish the work by whatever methods he may deem expedient. In such case the Contractor shall not be entitled to receive any further payments until the work is finished."
December 8, 1953 the arbitrators awarded $58,039.81 to Lundgren. The award included the unpaid balances, plus losses due to defects in plans and specifications and having unnecessarily to do and redo work, less the cost to school district for satisfactory completion. It also included "extras" not agreed to by customary written change orders. The arbitrators allowed school district the cost of heating and electricity, but denied its counterclaim for faulty construction. In their award, the arbitrators made the following statement:

"2. The following matters regarding which the parties made contentions and offered evidence before this board have not been determined by this board because their determination depends upon questions of law which this board does not feel competent to decide and which should be adjudicated by the United States District Court for the District of Oregon independently of this award, namely:

"(a) Whether in addition to the amounts awarded him herein, the plaintiff is entitled to recover the amount for the sound system and the lockers.

"(b) Whether the defendant School District No. 5 breached its contracts with the plaintiff by terminating them on or about July 8, 1952, and, if so, whether it is liable to the plaintiff for damages resulting therefrom, and, if so, in what amount.

"3. All of the claims of either party against the other were submitted to and determined by this board as shown in its final decisions, and except to the extent indicated therein and in paragraph... 2 of this award, each and every contention and claim of either party against the other has been and is hereby denied."

The district court, acting under 9 U.S.C. § 9 (the Federal Arbitration Act) confirmed the award on June 17, 1954 and revised it on March 21, 1957. It allowed Lundgren interest on the award at 6% per annum as of June 26, 1952, the date when school district terminated Lundgren's employment. On April 22, 1957, the court reformed the high school contract so as to give Lundgren an additional amount for installing a sound system and lockers, again allowing interest as of June 26, 1952. On December 15, 1958, the district court ordered that in spite of the reservation of the issue of breach by the arbitrators, no issue remained between Lundgren and school district.

School district appeals from the judgments of June 17, 1954 (as revised on March 21, 1957) and April 22, 1957, and Lundgren appeals from the order of December 15, 1958, and the summary judgment of November 7, 1960 in favor of architects.

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2. Article 29 provides:

"All disputes, claims or questions subject to arbitration under this contract shall be submitted to arbitration... and this agreement shall be specifically enforceable under the prevailing arbitration laws, and judgment upon the award rendered may be entered in the highest court of the forum, state or federal, having jurisdiction. It is mutually agreed that the decision of the arbitrators shall be a condition precedent to any right of legal action that either party may have against the others."

3. School district's appeal to this court from both orders was dismissed as premature (School District No. 5 v. Lundgren, 1958, 259 F.2d 101). Lundgren's suit against architects was never submitted to arbitration. On November 7, 1960, the district court entered a summary judgment for the architects (F.R.Civ.P. Rule 56, 28 U.S.C.).

4. It held, as to all claims except that for punitive damages:

"2. When plaintiff proceeded with the arbitration, he elected to proceed under the terms of Article 29 of the General Conditions of the Contract signed by him. By so arbitrating plaintiff voluntarily elected his remedy, secured a judgment and has now been fully compensated on his theory of restitution. Because of this voluntary election of remedies by the plaintiff, he cannot now recover a second time on a different theory of liability for the same alleged wrong."

As to punitive damages, the district court held:

"3. The only issue raised by the complaint which has not been finally determined by the arbitrators and the Court is whether the individual defendants are liable for punitive damages by reason of their alleged intentional interference with the business of plaintiff. In this regard plaintiff has no claim against the individual defendants because it is undisputed that in all of their actions in connection with the performance under the contract that the individual defendants were acting as architects for the construction work done and as such were either quasi-arbitrators or agents of the school district. At quasi-arbitrators the individual defendants are immune from legal action by plaintiff to interfere with said contracts and were privileged to do so."

5. All the appeals are timely. (Lundgren v. Freeman et al., No. 17,232).
A. The appeal of School District

1. The claim that "points of law" were reserved.

School district contends that the trial court erroneously confirmed the arbitrators' allowance to Lundgren of "extras" and losses caused by defects in the plans and specifications. It says that when the parties stipulated to arbitration they meant to reserve "points of law" to the court and that, as shown by exchanges between arbitrators and counsel in the arbitration proceedings, the arbitrators, in fact, intended to reserve all "points of law" in spite of a contrary recitation in their award, and that both the matter of "extras" and the matter of errors in the plans and specifications present "points of law". The record does not support these contentions.

The arbitrators in their award specifically said that they had considered "contentions of fact and of law". The Federal Arbitration Act provides only four grounds on which a court may vacate an arbitration award (see 9 U.S.C. S 10), the one relevant here being that the arbitrators exceeded their powers. This must be clearly shown. (E.g., see Textile Workers Union of America v. American Thread Co., 4 Cir., 1961, 291 F.2d 894.) By considering "contentions of law" the arbitrators were not exceeding their powers. The scope of the arbitrators' power rests ultimately on the agreement of the parties (e.g., Metro Industrial Painting Corp. v. Terminal Const. Co., 2 Cir., 1961, 287 F.2d 382; Local 205, United Electrical Radio and Machine Workers of America v. General Electric Co., 1 Cir., 1956, 233 F.2d 85, affd. 353 U.S. 547, 77 S.Ct. 921, 1 L.Ed. 2d 1028). The policy of the Arbitration Act is that the agreement be liberally construed in favor of arbitration. (E.g., Metro Industrial Painting Corp. v. Terminal Const. Co., supra, 2 Cir., 1961, 287 F.2d 382; see Local 201, International Union of Electrical, Radio and Machine Workers v. General Electric Co., 1 Cir; 1959, 262 F.2d 265).

The original arbitration agreement is broadly framed; it provides that "all disputes, claims or questions subject to arbitration under this contract shall be submitted...". Shortly after the stipulation to arbitrate, Lundgren's attorney on April 27, 1953 wrote the school district's attorney asking for confirmation of Lundgren's understanding that "the award made by the arbitrators* * * shall constitute the award upon which the court in pending litigation shall enter judgment; said award being subject to attack or review only as provided in the federal arbitration statute...". There was no reply. In the arbitration hearings themselves there is evidence that counsel for both sides may have assumed that "points of law" would be reserved to the court, but there is no evidence that the parties actually agreed to modification of the arbitration agreement in the sense that both intentionally agreed to change the agreement so that "points of law" were not to be arbitrated (see, e.g., American Locomotive Co. v. Chemical Research Corp., 6 Cir., 1948, 171 F.2d 115; 9 U.S.C. S 2).6

The scope of review given the courts in overseeing arbitration proceedings under the Federal Arbitration Act is limited. It does not include reviewing questions of law. Section 9 of the Act provides only that the court shall enter judgment on the award, Section 10, that the court may vacate the award for fraud in procurement, corruption, misconduct or exceeding of powers, and Section 11, that the court may correct the award for material miscalculations, exceeding of powers, and imperfection in form. (9 U.S.C. Ss 9, 10, 11).

2. The allowance of interest.

School district also contends that the court erred in allowing interest as of June 26, 1952, in the judgments of June 17, 1954 and April 22, 1957. We do not accept school district's contention that it is altogether immune, as an arm of the sovereign, from claims for interest. School district's liability is a "general" one for it is based on Oregon Revised Statute S 30.320.7

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6. Perhaps the arbitrators could have reserved points of law, for when the scope of arbitration is stated broadly, as in the agreement in the principal case, the arbitrators may have an implied authority to determine what issues are arbitrable. (See Local 205, United Electrical, Radio and Machine Workers of America v. General Electric Co; supra, 1 Cir., 1956, 233 F.2d 85; Local 201, International Union of Electrical, Radio and Machine Workers v. General Electric Co., supra, 1 Cir., 1959, 262 F.2d 265). Here, although the arbitrators may have been acting pursuant to such an implied authority in expressly reserving two "questions of law" for the court, their award shows they did not reserve all "questions of law".
Recent cases indicate that the general interest statute applies if a state agency is liable under ORS S 30.320. (Eldon v. Chandler, 1954, 202 Or. 407, 275 P.2d 748; North Pacific Construction Co. v. Wallowa County, 1926, 119 Or. 565, 249 P. 1100.

The peculiar Oregon rule as to a "special" liability does not apply here. The Oregon rule is, that where a statute creates a special liability of a state agency, acting in its governmental capacity, the general interest statute (ORS S82.010) is inapplicable. Seton v. Hoyt, 1899, 34 Or. 266, 55 P. 967, 43 L.R.A. 634 (statute on payment of county warrants); Northwestern Ice & Cold Storage Co. v. Multnomah County, 1961, 228 Or. 507, 365 P.2d 876 (compensation for unfair condemnation). And since interest may never be awarded against the sovereign on principles of equity (see Seton v. Hoyt, supra,1899, 34 Or. 266, 55 P. 967), special legislation allowing interest in necessary.

The court did err in awarding interest as of June 26, 1952, the date school district allegedly breached its contract. Under ORS S 82.010(1) (a), money is "due" when there is a wrongful withholding of money, the amount being either ascertained, or ascertainable by simple computation or reference to recognized standards. (E.g., Public Market Co. of Portland v. City of Portland, 1943, 171 Or. 522, 130 P.2d 624, 138 P.2d 916; Northern Pacific R. Co. v. Twohy Bros. Co., 9 Cir., 1938, 95 F.2d 220; Northern Pacific Construction Co. v. Wallowa County, 1926, 119 Or. 565, 249 P. 1100). The theory is that the party in breach should compensate the injured party for wrongfully withholding from him the use of an easily ascertainable sum of money after the due date. (Public Market Co. of Portland, supra, 1943, 171 Or. 522, 130 P.2d 624, 138 P.2d 916, 918-919; Northern Pacific R. Co. v. Twohy Bros. Co., 9 Cir; 1938, 95 F.2d 220, 226).

The general interest statute provides (Oregon Revised Statutes 82.010):

"(1) the legal rate of interest is six percent per annum and is payable on:

"(a) All moneys after they become due; but open accounts bear interest from the date of the last item thereof.

... * *

"(d) Money due upon the settlement of matured accounts from the day the balance is ascertained." Here, there has been no finding that school district withheld payment in breach of contract on June 26, 1952. Article 19 of the General Conditions (note 1, supra) allowed school district to withhold further payments, until the job was satisfactorily completed, in the event the contractor's employment was terminated for total breach. There is no determination in the arbitrators' award that Lundgren was not in such breach or that school district's refusal to make final payment on June 26, 1952 was not in accordance with Article 19. The arbitrators did deny school district's counterclaim for damages for improper construction, but they allowed it to recover for the cost of completion and for certain other matters. And they expressly reserved for court determination the question whether school district breached its contracts with Lundgren by terminating. Nor did the court make a finding that there was such a breach.8 The most that can be said is that there were some breaches on both sides, but that Lundgren's were not so substantial as to deny him recovery.

Moreover, and more important, it does not appear that the amount due was either ascertained or ascertainable by simple computation by reference to recognized standards. Cross demands and claims by Lundgren and school district, as to

7. "A suit or action may be maintained against any county and against the State of Oregon by and through and in the name of the appropriate state agency upon a contract made by the county in its corporate character, or made by such agency and within the scope of its authority, and not otherwise...."

8. Further, even if school district did wrongfully terminate Lundgren's employment on June 26, Article 20 of the General Conditions provides that final payment is not due until 35 days after the final acceptance by the architects. Nothing in the award suggests that architects wrongfully refused to issue a certificate of final acceptance on or before June 26, 1952. The court, during exchanges with the attorneys in a pretrial conference in December, 1958, remarked that it thought there had been a breach by the school district, but this hardly amounts to a holding and was long after the judgments awarding interest had been entered. Moreover, we do not think that a reviewing court in affirming an award, is entitled to determine that there has been a wrongful withholding as of a certain date and award interest from that date, where the arbitrators have made no such determination. As we will show, it makes no difference that the arbitrators purported to reserve the determination of whether there was a breach to the court.
many disputed items, were submitted to the arbitrators. Many were allowed; many more were not. It cannot fairly be
said that the net amount due Lundgren was ascertained or ascertainable until the arbitrators made their award.

The Oregon general interest statute provides not only that interest is payable on moneys after they become "due" (ORS
S 82.010(1) (a)), and on money due upon the settlement of matured accounts "from the day the balance is ascertained"
(ORS S 82.010(1) (d)), but also provides that interest on judgment and decrees for the payment of money shall be from
the date of their entry. Oregon Revised Statutes, S 82.010(1) (b). The last is true even if there is a subsequent appeal -
if the judgment is affirmed. But if the judgment is modified on appeal, interest runs as of the date of the modification.
(Compton v. Hammond Lumber Co., 1936, 154 Or. 650, 61 P.2d 1257). The policy behind these provisions seems to
be that once a balance due has been ascertained, interest should run from this date, and that one party's having the right
to have the correctness of the determination further litigated, as by motion for new trial or appeal, should have no effect
if such further litigation be unsuccessful.

We think that, in the application of this policy, the Oregon courts would hold that interest runs from the date of the
award. The parties selected arbitrators, rather than a court, as the body that would, in the first instance, determine the
amount due. This they had a right to do; this the law encourages them to do. It should be the rule, rather than the excep-
tion, that when arbitrators hand down an award the parties will comply with it, without the necessity of court proceed-
ings, just as it is (or should be) the normal or usual result that parties comply with a judgment, without the necessity
of resort to process or appeal. In the case of judgments, with the exception above noted, the date of judgment is the
latest date when interest begins, although appeal is available. Likewise, in the case of arbitration awards, the date of
the award, unless the award be modified by the court, should be the latest date when interest begins. (See 47 C.J.S.
Interest S 20). We hold that the moneys under the arbitration award were not due, under ORS S 82.010(1) (a), or the
balance ascertained, under S 82.010(1) (d), until the date of the award, December 8, 1953. As to the sound system and
lockers, interest should run from the date of the reformation, April 22, 1957.

3. The question of reformation.

School district's last point is that the court erroneously decreed reformation of the high school contract so as to give
Lundgren a sum, in addition to the basic bid price, for the sound system and lockers.

Article 3 of the high school contract reads:

"The Owner shall pay the Contractor for the performance of this Contract, subject to additions and
deductions as provided herein, in current funds as follows:

"The basic sum of nine hundred seventy five thousand, one hundred ($975,100.00) which is computed
as follows: Basic bid price of $994,500.00 less Alternate No. 1 at $6,800.00 and Alternate No. 2 at
$12,600.00 (Total deducted by Alternates $19,400.00). Basic sum includes unit price of $3,800.00 for
sound system and all corridor lockers at $14.95 installed."

The court found that the parties mutually intended that the basic sum did not include the price for sound system and
corridor lockers, and mistakenly recited the contrary. This finding was based on Lundgren's original bid (which was
not adopted) in which he specified that the unit price for sound system and lockers was not included, on the minutes
of a meeting of school district held just before execution of the high school contract, which indicated that Lundgren's
bid, even as amended, still did not include sound systems and lockers, and on the manner in which the contract was
drawn, including the method of arriving at a reduced price, contemplated by the bid and accomplished by accepting
two alternatives in the bid and making two change orders. Further, the architects, not the parties, drew up the written
agreement.

The Oregon rule is that a court may decree reformation of a written contract because of mutual mistake only if the
evidence of mistake is "full, clear, cogent, and decisive". (E.g., L. B. Menefee Lumber Co. v. Gamble, 1926, 119 Or.
224, 234, 242 P. 628, 631; Moyer v. Ramseyer, 1961, 226 Or. 122,359 P.2d 407); reformation may not be based on a
There was some evidence that there was, in fact, no mutual mistake, but we are satisfied that the trial court's finding is
supported by the evidence, viewed as a whole, and was not "clearly erroneous". We are bound by Rule 52(a) F.R.Civ.P;
Rule 52(a) should be construed to encourage appeals that are based on a conviction that the trial court's decision has

decisely issues of fact in the first instance, even where it considers itself as fully qualified as the trial judge to do so. Rule 52(a) should be construed to encourage appeals that are based on a conviction that the trial court's decision has
been unjust; it should not be construed to encourage appeals that are based on the hope that the appellate court will second-guess the trial court. (See Blume, at 72) Rule 52(a) explicitly clearly applies where the trial court has not had an opportunity to judge of the credibility of witnesses.


A recent Supreme Court case, Commissioner of Internal Revenue v. Duberstein, 1960, 363 U.S. 278, 80 S.Ct. 1190, 4 L.Ed.2d 1218, strongly suggests that the Clark view as to review of findings based on undisputed facts, is the correct one. The Supreme Court found that the question of whether there has been a gift, for income tax purposes, is a question of fact, and not a question of law; and the "clearly erroneous" test applies even though it seems the basic facts are undisputed (id. at 289-291, 80 S.Ct. 1190). A finding of fact, to which the clearly erroneous rule applies, is a finding based on the "fact-finding tribunal's experience with the mainsprings of human conduct". A conclusion of law would be a conclusion based on application of a legal standard. Many Ninth Circuit cases espousing the Frank view are explainable as applying the rule that courts of appeal need give no weight to a trial court's conclusions of law. Stevenot v. Norberg, 1954, 210 F.2d 615; see Kwikset Locks, Inc. v. Hillgren, 1954, 210 F.2d 483; Brown v. Cowden Livestock Co., 1951, 187 F.2d 1015, 1018; Plomb Tool Co. v. Sanger, 1951, 193 F.2d 260; Kemart Corp. v. Printing Arts Research Laboratories, 1953, 201 F.2d 624; Besig v. U.S., 1953, 208 F.2d 142, 144; National Lead Co. v. Wolfe, 1955, 223 F.2d 195, 204; One Incorporated v. Olesen, 1957, 241 F.2d 772, 774; Pacific Vegetable Oil Corp. v. Commissioner, 1957, 251 F.2d 682, 683; Furness Withy & Co. v. Carter, 1960, 281 F.2d 264, 266; Hycon Mfg. Co. v. H. Hoch & Sons, 1955, 219 F.2d 353. In all these cases the inferences drawn from the undisputed facts seem to have been inferences derived from application of a legal standard and not inferences derived from having had "experience with the mainsprings of human conduct."

In the principal case the finding of mutual mistake can be fairly said to be derived not solely from application of legal standards, but from the trial judge's experience with human affairs.

**B. The appeals of Lundgren**

1. The claim that additional issues remain between Lundgren and school district.

As for Lundgren's appeal from the order of December 15, 1958, decreeing that no further issue remained between him and school district, we agree that the arbitration award bars further proceedings. Because it depended upon "questions of law which [the] board [did] not feel competent to decide", the arbitrators purported to reserve for the district court, to adjudicate independently of the award, the question: "[whether] the defendant School District No. 5 breached its contracts with the plaintiff by terminating them on or about July 8, 1952, and if so, whether it is liable to the plaintiff for damages resulting therefrom, and if so, in what amount". Lundgren claims that he sustained special damages such as loss of reputation and loss of credit standing, and that he could not have recovered them in the arbitration proceedings because of the above express reservation. The short answer to this contention is that Lundgren never claimed such damages in his complaint against school district. The stipulation was to arbitrate "the issues between the parties". He claimed "an out-of-pocket loss in the performance of said contracts in a sum in excess of $100,000.00 in addition to
losing his normal builder's fee of $67,000.00". He also alleged nonpayment of the unpaid balances of the contract prices. His "builder's fee" is obviously included in the contract prices. The arbitrators' award, plus the court's judgment of reformation, gave him those prices, less certain offsets to school district. He also submitted his claims for extra costs to the arbitrators, who allowed some and disallowed others. The court's decision is correct.

2. The claim against architects.

In his complaint, Lundgren pleaded a separate cause of action against architects, in which he charged that they "wrongfully and willfully induced" a breach of the two contracts by school district, and that they "were motivated by a malicious and willful desire and intent to injure" him. He asked for the same damages as were asked from school district, and, in addition, for $150,000 damage to him "in his reputation as a building contractor and in his credit standing in the building industry", together with $50,000 punitive damages. In a pre-trial order relating to this question, Lundgren's claims are stated to be, among others, that breach by school district "was induced by... architects without justification", that they "intentionally interfered" with his business, and in so doing, "were motivated by a wilful and malicious desire to injure" him. He also claimed to be entitled to recover for their negligence.

Architects then moved for a summary judgment. Their grounds were two: (1) that Lundgren had elected his remedy by going to arbitration with school district, and (2) that it is undisputed that in all their actions, the architects were acting either as agents or as quasi-arbitrators under the two contracts, and are therefore immune, since they were expressly authorized by Lundgren to interfere with the contracts, and were privileged to do so. No affidavits were filed in support of the motion, reliance being upon the pleadings, judgments and orders in the case, answers to interrogatories, Lundgren's deposition, the arbitrators' decision and award, the record on appeal and the contracts. The motion was granted, "in accordance with their [architects'] theory". (See footnote 4, supra.)

Upon the record before us, it is clear that architects were acting in one of three capacities, either (1) as agents of school district, (2) as quasi-arbitrators, or (3) on their own, in the sense that they were not acting as agents for school district are provided for in a contract between them and school district, as well as in the latter's contracts with Lundgren. These contracts also provide for architects' duties as quasi-arbitrators.

As agents, architects are not here liable for decisions made by them, acting within their powers as agents, because Lundgren has elected his remedy. It is generally held that a plaintiff who has had the existence or extent of a wrong litigated in an action against the principal may not thereafter have the same matters litigated as to the agent. (See 31 A.L.R. 194-97; 30A American Jurisprudence, Judgments, SS 429-30). The better rule seems to be that a plaintiff who litigated in an action against the principal may not thereafter have the same matters litigated as to the agent. (See 31

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9. "The architects agree to perform all professional services... for the construction, erecting, equipping and furnishing of buildings and grounds on any or all projects in said building and development program as and when authorized by the Owner and to furnish architectural supervision therefor... [The] parties hereto agree to the following conditions:

"1. The Architects' Services. The Architects' professional service shall consist of the necessary conferences, the preparation of preliminary sketches, working drawings, specifications, large scale and full size detail drawings; the drafting of forms of proposals and contracts; the issuance of certificates of payment; the keeping of accounts, the general administration of the business, and the supervision of the work...."

"5. Supervision of the Work. The Architects will endeavor to guard the Owner against defects and deficiencies in the work of the contractors and workmen, but they do not guarantee the performance of the Contracts...."

10. "The Architect shall have general supervision and direction of the work. He is the agent of the Owner only to the extent provided in the Contract Documents and when in special instances he is authorized by the Owner so to act, and in such instances he shall, upon request, show the Contractor written authority. He has authority to stop the work whenever such stoppage may be necessary to insure the proper execution of the Contract."

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has recovered against a principal may sue the agent for the balance of an unsatisfied judgment against the principal. (30A Am.Jur., "Judgments", S 430; see 1 Freeman on Judgments, 1034-35 (5th ed., 1925); see McNamara v. Chapman, 1923, 81 N.H. 169, 123 A. 229, 31 A.L.R. 188, 193). This, however, is not such an action. A widely held view is that by suing the principal, the plaintiff has elected to rely on the principal's financial resources, evidently on the reasoning that the agent should not be sued twice - once by the principal for the amount of the judgment the principal has paid, and again by the plaintiff. (See 1 Freeman on Judgments, 1034-35 (5th ed., 1925). The Oregon courts do not seem to have passed on the subject. We think that, in this particular case, Lundgren made an election on the contracts. They expressly provide that architects' decisions are subject to arbitration, and the arbitration is between Lundgren and school district. (Footnote 2, supra.) It is clearly contemplated that architects may make erroneous decisions, and a means of rectifying them is provided. We see no reason for adding another remedy against architects, at least where the judgment against school district is not uncollectible. This rule, we think, applies whether architects' actions were intentional, negligent or merely erroneous.

What we have said applies equally to acts done by architects as quasi-arbitrators. There is a further reason why they should be protected when so acting. If their decisions can thereafter be questioned in suits brought against them by either party, there is a real possibility that their decisions will be governed more by the fear of such suits than by their own unfettered judgment as to the merits of the matter they must decide. It is for this reason that architects, acting as quasi-arbitrators, have been held immune from suit. (Wilder v. Crook, 1948, 250 Ala. 424, 34 So.2d 832, 834 (dictum)); see Bever v. Brown, 1881, 56 Iowa 565, 9 N.W. 911; Jones v. Brown, 1880, 54 Iowa 74, 6 N.W. 140; Hoosac Tunnel Dock & Elevator Co. v. O'Brien, 1884, 137 Mass. 424, 50 Am.Rep. 323; but see Hutchins v. Merrill, 1912, 109 Me. 313, 84 A. 412, 42 L.R.A., N.S., 277 (dictum). An architect acts as a "quasi-arbiter" within this rule when, using the contract as a guideline, he resolves disputes between owner and contractor. (See Craviolini v. Scholer & Fuller Associated Architects, 1961, 89 Ariz. 24, 357 P.2d 611; cf. 43 A.L.R. 2d1122, 1127 and cases therein cited). Thus in some instances the architect, as quasi-arbiter, may have to re-examine positions taken by himself as the owner's agent. Oregon immunizes state officials acting in a judicial capacity from suit, if they are acting within their jurisdiction, in order to prevent fear of suit from influencing their decisions. (Clifton v. Hawkins, 1959, 218 Or. 368, 345 P.2d 255; Shaw v. Moon, 1926, 117 Or. 558, 245 P. 318, 45 A.L.R. 600; [*118] Wright v. White, 1941, 166 Or. 136 110 P.2d 948, 135 A.L.R. 1; De Marais v. Stricker, 1936, 152 Or. 362, 53 P.2d 715). We presume that this policy extends to private persons acting in a quasi-judicial capacity within jurisdiction established by private agreement.

Some of the cases cited go so far as to hold (or say) that the immunity extends to fraudulent action by architects, or to action taken with wilful and malicious intent to injure one of the parties. With this we cannot agree. The dual position of the architect, as agent of the owner and quasi-arbitrator, is an anomalous one. It differentiates him, we think, from the judge or other public official who acts judicially or quasi-judicially, and from the ordinary impartial arbitrator. The architect is employed and paid by the owner, and he is often called upon to pass upon the sufficiency, accuracy, and adequacy of his own plans and specifications. There are thus strong pressures pushing him in the direction to being unfair to the contractor. We think he should be protected when he acts in good faith, however erroneously, and that such protection is enough. If he acts fraudulently, or with wilful and malicious intent to injure the contractor, he should be liable. (See: Craviolini v. Scholer & Fuller Associated Architects, supra, 1961, 89 Ariz. 24, 357 P.2d 611; Witterspoon, When Is An Architect Liable, 48 A.B.A. Jnl. 321, April, 1962).

We cannot say, on the record before us, that there is no issue of fact as to whether some of the actions of architects were wilful and malicious as charged. Moreover, architects may have done things that were harmful to Lundgren and that were outside the scope of their powers as agents or quasi-arbitrators. In that case, architects would be liable for wilful and malicious inducement of breach of contract. Oregon recognizes such an action. (Sloan v. Journal Publishing Co., 1958, 213 Or. 324, 324 P.2d 449; Ringler v. Ruby, 1926, 117 Or. 455, 244 P. 509, 46 A.L.R. 245; see Bliss v. Southern Pac. Co., 1958, 212 Or. 634, 321 P.2d 324). The action may be based on the defendant's intentionally rendering the plaintiff's performance to a third party valueless or more burdensome to the plaintiff. (See Ringler v. Ruby, supra, 1926, 117 Or. 455, 244 P. 509; see generally Carpenter, "Interference with Contract Relations", 41 Harv.L.R. 728-32). However, Oregon appears to recognize that an interference may be privileged and therefore not actionable. (See Gaddis v. Great Northern Railway Co., D.C.1959, 187 F.Supp. 918, aff'd 9 Cir; 284 F.2d 524; Sloan v. Journal Publishing Co; 1958, 213 Or. 324,324 P.2d 449,465). Under the contracts, such privilege exists as to action taken by architects in good
faith, either as agents or quasi-arbitrators. But we think the privilege qualified, not absolute; it will not protect architects against actions taken in bad faith and with intent to injure Lundgren.

The record does present a triable issue of fact as to whether architects acted with such a wrongful purpose, and whether any such action was outside of their authority as agents or quasi-arbitrators. Although the conclusory statements in Lundgren's complaint and his list of contentions in the pre-trial order are not evidence on a motion for summary judgment, (see Hardcastle v. Western Greyhound Lines, 9 Cir., 1962, 303 F.2d 182) Lundgren's answers to interrogatories and his deposition do raise a triable issue. In the latter Lundgren alleges acts by architects and circumstances from which it is reasonable to infer a wrongful purpose, i.e., past poor relations between Lundgren and one member of the architectural firm, their cutting down Lundgren's estimates "too much", their ordering needless expenditures in completing the high school after Lundgren's employment was terminated, various allegedly untrue assertions by them and an inspector employed by them at the special meeting in which school district decided to terminate Lundgren's employment, their ordering Lundgren to redo work allegedly done strictly according to the plans and specifications, their telling subcontractors that they would be paid by school district and not by Lundgren, and their demanding that Lundgren pay subcontractors before payment was due them. Lundgren offered no direct evidence that there in fact was a wrongful purpose. But we think that he presented evidence from which that purpose can be inferred, and architects made no affirmative showing of their own good faith. They were the moving parties.

With the preceding in mind, we examine Lundgren's claim against architects for damage to reputation and credit standing. Much of this cause rests on architects' advising school district at its special meeting of June 26, 1952 to terminate Lundgren's employment. We think there is a triable issue of fact as to whether architects acted as agents of school district or as quasi-arbitrators. (It was at the special meeting that architects made the alleged untrue assertions to school district about the quality of Lundgren's work). One factor suggesting that architects acted as quasi-arbitrators is that they acted pursuant to Article 19, the termination for breach provision. (See footnote 1, supra). However, prior to the meeting of June 26, neither school district nor architects as its agent, appear to have informed Lundgren that they thought the job he was doing was inadequate under the contract. There appear to have been only vague threats by architects and a refusal by them to prepare a "final list". Evidently Lundgren was not even informed at the special meeting that termination of his employment was in the offing. Further, it was after termination that architects hired the firm of Messrs. Faye & Associates, Inc. to prepare a survey report on the job done by Lundgren. Like the issue of wrongful purpose, we feel that the issue as to the existence of quasi-arbitrators' qualified immunity is a question of fact. The architects are immune only if they were actually acting in a judicial capacity within their jurisdiction.

To summarize, we hold that, insofar as architects acted as agents or quasi-arbitrators, Lundgren has elected his remedy and cannot now recover from them any of the damages passed upon by the arbitrators, whether allowed or disallowed by them. If Lundgren asserts that the judgment against school district is uncollectible, he can then recover only that part of the damages involved in the arbitration that he can prove to be the result of wilful and intentional misconduct by architects, which is enough if architects were acting as agents, or were also intended to injure him, which is required if architects were acting as quasi-arbitrators. If Lundgren can prove that architects did anything to his damage that was not within the scope of their authority as agents or quasi-arbitrators, he can recover such damages as naturally flow from that action. As to such action, he need only show that it was wilful and intentional; he need not show a specific intent to injure him. Loss of credit standing and damage to his reputation as a builder may be within the damages recoverable, if it can fairly be said that, under the circumstances, such damages were reasonably foreseeable. If requisite malice is shown, punitive damages may follow.11

While the case is not one in which it was appropriate to enter a summary judgment for architects, it may well be one in which the type of order contemplated by Rule 56(d), F.R.Civ.P. could be entered, thereby very substantially narrowing the issues to be tried. (See discussion, 29 F.R.D. 307-310).

11. Although Oregon allows recovery for exemplary damages, recovery is limited to cases where there is so great an element of malice, fraud, or gross negligence that the court feels the offender should be assessed additional damages by way of punishment and as a warning to others. (Martin v. Cambas, 1930, 134 Or. 257, 293 P. 601; Cays v. McDaniel, 1955, 204 Or. 449, 283 P.2d 658). Exemplary damages, however, can never constitute the basis of a cause of action. (Martin v. Cambas, supra, 1930, 134 Or. 257, 293 P. 601; Weaver v. Austin, 1948, 184 Or. 586, 200 P.2d 593.)
The order of December 15, 1958, from which Lundgren appeals, is affirmed. The judgments from which school district appeals (June 17, 1954, as revised March 21, 1957, and April 22, 1957) are each affirmed, except those portions thereof relating to interest thereon, which portions are reversed. The summary judgment in favor of architects (November 7, 1960), is reversed. The matters reversed are remanded for further proceedings not inconsistent with this opinion.