

Introduction

Contracts are everywhere. They govern large-scale transactions, like Microsoft's \$69 billion purchase of Activision, as well as highly personal agreements, such as surrogacy arrangements. But they also affect our everyday lives.

Take Alice, a law student, who takes the bus from her rented apartment to law school. Numerous contracts make this seemingly simple routine possible. Her lease with the landlord is a contract. She has entered another contract with the bus company for transportation. If she paid for her fare with a credit card, additional contracts come into play, including one between Alice and the credit card company and another between the credit card company and the bus company. The bus driver? He works under—yes, you guessed it—a contract with the bus company. And the bus company likely has multiple insurance contracts in place.

We could continue, but you get the idea: contracts are everywhere. They are the most common legal norm in existence, playing a vital role in many aspects of our lives, our economy, and—most importantly for us—the legal system. In this book, we take a deep dive into this essential area of law.

A. A Taste of Contract Law

At its core, contract law is designed to enforce agreements made between parties. Unlike other areas of law, such as criminal or property law, the key norms that govern behavior and liability are largely set by the parties themselves. But if the norms come from the parties, what is there to learn about contract law? Shouldn't the law simply follow whatever the parties agree upon?

It's not that simple. Contract law, though shaped by the parties' agreement, involves complex issues that can be grouped into three main areas. First, the law must determine whether a contract was formed in the first place. Second, if a contract exists, the law must interpret its terms, decide how it should be performed, and assess whether it has been breached. While it might be tempting just to state that "the contract's terms are whatever the parties agree to," this is a great oversimplification. Parties are often unclear or fail to specify all their understandings explicitly. Third, even if a contract was formed and breached, the law must decide how to address the situation and specifically what remedies should be awarded to the injured party.

The following case offers a glimpse into some of these issues.

Lucy v. Zehmer

196 Va. 493, 84 S.E.2d 516 (Supreme Court of Appeals of Virginia 1954)

BUCHANAN, J., delivered the opinion of the court.

This suit was instituted by W. O. Lucy and J. C. Lucy, complainants, against A. H. Zehmer and Ida S. Zehmer, his wife, defendants, to have specific performance of a contract by which it was alleged the Zehmers had sold to W. O. Lucy a tract of land owned by A. H. Zehmer in Dinwiddie county containing 471.6 acres, more or less, known as the Ferguson farm, for \$50,000. J. C. Lucy, the other complainant, is a brother of W. O. Lucy, to whom W. O. Lucy transferred a half interest in his alleged purchase.

The instrument sought to be enforced was written by A. H. Zehmer on December 20, 1952, in these words: 'We hereby agree to sell to W. O. Lucy the Ferguson Farm complete for \$50,000.00, title satisfactory to buyer,' and signed by the defendants, A. H. Zehmer and Ida S. Zehmer.

The answer of A. H. Zehmer admitted that at the time mentioned W. O. Lucy offered him \$50,000 cash for the farm, but that he, Zehmer, considered that the offer was made in jest; that so thinking, and both he and Lucy having had several drinks, he wrote out 'the memorandum' quoted above and induced his wife to sign it; that he did not deliver the memorandum to Lucy, but that Lucy picked it up, read it, put it in his pocket, attempted to offer Zehmer \$5 to bind the bargain, which Zehmer refused to accept, and realizing for the first time that Lucy was serious, Zehmer assured him that he had no intention of selling the farm and that the whole matter was a joke. Lucy left the premises insisting that he had purchased the farm.

Depositions were taken and the decree appealed from was entered holding that the complainants had failed to establish their right to specific performance, and dismissing their bill. The assignment of error is to this action of the court.

W. O. Lucy, a lumberman and farmer, thus testified in substance: He had known Zehmer for fifteen or twenty years and had been familiar with the Ferguson farm for ten years. Seven or eight years ago he had offered Zehmer \$20,000 for the farm which Zehmer had accepted, but the agreement was verbal and Zehmer backed out. On the night of December 20, 1952, around eight o'clock, he took an employee to McKenney, where Zehmer lived and operated a restaurant, filling station and motor court. While there he decided to see Zehmer and again try to buy the Ferguson farm. He entered the restaurant and talked to Mrs. Zehmer until Zehmer came in. He asked Zehmer if he had sold the Ferguson farm. Zehmer replied that he had not.

Lucy said, 'I bet you wouldn't take \$50,000.00 for that place.' Zehmer replied, 'Yes, I would too; you wouldn't give fifty.' Lucy said he would and told Zehmer to write up an agreement to that effect. Zehmer took a restaurant check and wrote on the back of it, 'I do hereby agree to sell to W. O. Lucy the Ferguson Farm for \$50,000 complete.' Lucy told him he had better change it to 'We' because Mrs. Zehmer would have to sign it too. Zehmer then tore up what he had written, wrote the agreement quoted above and asked Mrs. Zehmer, who was at the other end of the counter ten or twelve feet away, to sign it. Mrs. Zehmer said she would for \$50,000 and signed it. Zehmer brought it back and gave it to Lucy, who offered him \$5 which Zehmer refused, saying, 'You don't need to give me any money, you got the agreement there signed by both of us.'

The discussion leading to the signing of the agreement, said Lucy, lasted thirty or forty minutes, during which Zehmer seemed to doubt that Lucy could raise \$50,000. Lucy suggested the provision for having the title examined and Zehmer made the suggestion that he would sell it 'complete, everything there,' and stated that all he had on the farm was three heifers.

Lucy took a partly filled bottle of whiskey into the restaurant with him for the purpose of giving Zehmer a drink if he wanted it. Zehmer did, and he and Lucy had one or two drinks together. Lucy said that while he felt the drinks he took he was not intoxicated, and from the way Zehmer handled the transaction he did not think he was either.

December 20 was on Saturday. Next day Lucy telephoned to J. C. Lucy and arranged with the latter to take a half interest in the purchase and pay half of the consideration. On Monday he engaged an attorney to examine the title. The attorney reported favorably on December 31 and on January 2 Lucy wrote Zehmer stating that the title was satisfactory, that he was ready to pay the purchase price in cash and asking when Zehmer would be ready to close the deal. Zehmer replied by letter, mailed on January 13, asserting that he had never agreed or intended to sell.

Mr. and Mrs. Zehmer were called by the complainants as adverse witnesses. Zehmer testified in substance as follows:

He bought this farm more than ten years ago for \$11,000. He had had twenty-five offers, more or less, to buy it, including several from Lucy, who had never offered any specific sum of money. He had given them all the same answer, that he was not interested in selling it. On this Saturday night before Christmas it looked like everybody and his brother came by there to have a drink. He took a good many drinks during the afternoon and had a pint of his own. When he entered the restaurant around eight-thirty Lucy was there and he could see that he

was ‘pretty high.’ He said to Lucy, ‘Boy, you got some good liquor, drinking, ain’t you?’ Lucy then offered him a drink. ‘I was already high as a Georgia pine, and didn’t have any more better sense than to pour another great big slug out and gulp it down, and he took one too.’

After they had talked a while Lucy asked whether he still had the Ferguson farm. He replied that he had not sold it and Lucy said, ‘I bet you wouldn’t take \$50,000.00 for it.’ Zehmer asked him if he would give \$50,000 and Lucy said yes. Zehmer replied, ‘You haven’t got \$50,000 in cash.’ Lucy said he did and Zehmer replied that he did not believe it. They argued ‘pro and con for a long time,’ mainly about ‘whether he had \$50,000 in cash that he could put up right then and buy that farm.’

Finally, said Zehmer, Lucy told him if he didn’t believe he had \$50,000, ‘you sign that piece of paper here and say you will take \$50,000.00 for the farm.’ He, Zehmer, ‘just grabbed the back off of a guest check there’ and wrote on the back of it. At that point in his testimony Zehmer asked to see what he had written to ‘see if I recognize my own handwriting.’ He examined the paper and exclaimed, ‘Great balls of fire, I got ‘Firgerson’ for Ferguson. I have got satisfactory spelled wrong. I don’t recognize that writing if I would see it, wouldn’t know it was mine.’

After Zehmer had, as he described it, ‘scribbled this thing off,’ Lucy said, ‘Get your wife to sign it.’ Zehmer walked over to where she was and she at first refused to sign but did so after he told her that he ‘was just needling him [Lucy], and didn’t mean a thing in the world, that I was not selling the farm.’ Zehmer then ‘took it back over there * * * and I was still looking at the dern thing. I had the drink right there by my hand, and I reached over to get a drink, and he said, ‘Let me see it.’ He reached and picked it up, and when I looked back again he had it in his pocket and he dropped a five dollar bill over there, and he said, ‘Here is five dollars payment on it.’ * * * I said, ‘Hell no, that is beer and liquor talking. I am not going to sell you the farm. I have told you that too many times before.’”

Mrs. Zehmer testified that when Lucy came into the restaurant he looked as if he had had a drink. When Zehmer came in he took a drink out of a bottle that Lucy handed him. She went back to help the waitress who was getting things ready for next day. Lucy and Zehmer were talking but she did not pay too much attention to what they were saying. She heard Lucy ask Zehmer if he had sold the Ferguson farm, and Zehmer replied that he had not and did not want to sell it. Lucy said, ‘I bet you wouldn’t take \$50,000 cash for that farm,’ and Zehmer replied, ‘You haven’t got \$50,000 cash.’ Lucy said, ‘I can get it.’ Zehmer said he might form a company and get it, ‘but you haven’t got \$50,000.00 cash to pay me tonight.’ Lucy asked him if he would put it in writing that he would sell him this farm. Zehmer then wrote on the back of a pad, ‘I agree to sell the Ferguson Place to W. O. Lucy for \$50,000.00 cash.’ Lucy said, ‘All

right, get your wife to sign it.’ Zehmer came back to where she was standing and said, ‘You want to put your name to this?’ She said ‘No,’ but he said in an undertone, ‘It is nothing but a joke,’ and she signed it.

She said that only one paper was written and it said: ‘I hereby agree to sell,’ but the ‘I’ had been changed to ‘We’. However, she said she read what she signed and was then asked, ‘When you read ‘We hereby agree to sell to W. O. Lucy,’ what did you interpret that to mean, that particular phrase?’ She said she thought that was a cash sale that night; but she also said that when she read that part about ‘title satisfactory to buyer’ she understood that if the title was good Lucy would pay \$50,000 but if the title was bad he would have a right to reject it, and that that was her understanding at the time she signed her name.

On examination by her own counsel she said that her husband laid this piece of paper down after it was signed; that Lucy said to let him see it, took it, folded it and put it in his wallet, then said to Zehmer, ‘Let me give you \$5.00,’ but Zehmer said, ‘No, this is liquor talking. I don’t want to sell the farm, I have told you that I want my son to have it. This is all a joke. ‘ Lucy then said at least twice, ‘Zehmer, you have sold your farm,’ wheeled around and started for the door. He paused at the door and said, ‘I will bring you \$50,000.00 tomorrow. * * * No, tomorrow is Sunday. I will bring it to you Monday.’ She said you could tell definitely that he was drinking and she said to her husband, ‘You should have taken him home,’ but he said, ‘Well, I am just about as bad off as he is.’ . . .

The defendants insist that the evidence was ample to support their contention that the writing sought to be enforced was prepared as a bluff or dare to force Lucy to admit that he did not have \$50,000; that the whole matter was a joke; that the writing was not delivered to Lucy and no binding contract was ever made between the parties.

It is an unusual, if not bizarre, defense. When made to the writing admittedly prepared by one of the defendants and signed by both, clear evidence is required to sustain it.

In his testimony Zehmer claimed that he ‘was high as a Georgia pine,’ and that the transaction ‘was just a bunch of two doggoned drunks bluffing to see who could talk the biggest and say the most.’ That claim is inconsistent with his attempt to testify in great detail as to what was said and what was done. It is contradicted by other evidence as to the condition of both parties, and rendered of no weight by the testimony of his wife that when Lucy left the restaurant she suggested that Zehmer drive him home. The record is convincing that Zehmer was not intoxicated to the extent of being unable to comprehend the nature and consequences of the instrument he executed, and hence that instrument is not to be invalidated on that ground. 17

C.J.S., Contracts, § 133 b., p. 483; *Taliaferro v. Emery*, 124 Va. 674, 98 S.E. 627. It was in fact conceded by defendants' counsel in oral argument that under the evidence Zehmer was not too drunk to make a valid contract.

The evidence is convincing also that Zehmer wrote two agreements, the first one beginning 'I hereby agree to sell.' Zehmer first said he could not remember about that, then that 'I don't think I wrote but one out.' Mrs. Zehmer said that what he wrote was 'I hereby agree,' but that the 'I' was changed to 'We' after that night. The agreement that was written and signed is in the record and indicates no such change. Neither are the mistakes in spelling that Zehmer sought to point out readily apparent.

The appearance of the contract, the fact that it was under discussion for forty minutes or more before it was signed; Lucy's objection to the first draft because it was written in the singular, and he wanted Mrs. Zehmer to sign it also; the rewriting to meet that objection and the signing by Mrs. Zehmer; the discussion of what was to be included in the sale, the provision for the examination of the title, the completeness of the instrument that was executed, the taking possession of it by Lucy with no request or suggestion by either of the defendants that he give it back, are facts which furnish persuasive evidence that the execution of the contract was a serious business transaction rather than a casual, jesting matter as defendants now contend....

If it be assumed, contrary to what we think the evidence shows, that Zehmer was jesting about selling his farm to Lucy and that the transaction was intended by him to be a joke, nevertheless the evidence shows that Lucy did not so understand it but considered it to be a serious business transaction and the contract to be binding on the Zehmers as well as on himself. The very next day he arranged with his brother to put up half the money and take a half interest in the land. The day after that he employed an attorney to examine the title. The next night, Tuesday, he was back at Zehmer's place and there Zehmer told him for the first time, Lucy said, that he wasn't going to sell and he told Zehmer, 'You know you sold that place fair and square.' After receiving the report from his attorney that the title was good he wrote to Zehmer that he was ready to close the deal.

Not only did Lucy actually believe, but the evidence shows he was warranted in believing, that the contract represented a serious business transaction and a good faith sale and purchase of the farm.

In the field of contracts, as generally elsewhere, 'We must look to the outward expression of a person as manifesting his intention rather than to his secret and unexpressed intention. 'The

law imputes to a person an intention corresponding to the reasonable meaning of his words and acts.” *First Nat. Bank v. Roanoke Oil Co.*, 169 Va. 99, 114, 192 S.E. 764, 770.

At no time prior to the execution of the contract had Zehmer indicated to Lucy by word or act that he was not in earnest about selling the farm. They had argued about it and discussed its terms, as Zehmer admitted, for a long time. Lucy testified that if there was any jesting it was about paying \$50,000 that night. The contract and the evidence show that he was not expected to pay the money that night. Zehmer said that after the writing was signed he laid it down on the counter in front of Lucy. Lucy said Zehmer handed it to him. In any event there had been what appeared to be a good faith offer and a good faith acceptance, followed by the execution and apparent delivery of a written contract. Both said that Lucy put the writing in his pocket and then offered Zehmer \$5 to seal the bargain. Not until then, even under the defendants’ evidence, was anything said or done to indicate that the matter was a joke. Both of the Zehmers testified that when Zehmer asked his wife to sign he whispered that it was a joke so Lucy wouldn’t hear and that it was not intended that he should hear.

The mental assent of the parties is not requisite for the formation of a contract. If the words or other acts of one of the parties have but one reasonable meaning, his undisclosed intention is immaterial except when an unreasonable meaning which he attaches to his manifestations is known to the other party. Restatement of the Law of Contracts, Vol. I, § 71, p. 74.

“* * * The law, therefore, judges of an agreement between two persons exclusively from those expressions of their intentions which are communicated between them. * * *.” Clark on Contracts, 4 ed., § 3, p. 4.

An agreement or mutual assent is of course essential to a valid contract but the law imputes to a person an intention corresponding to the reasonable meaning of his words and acts. If his words and acts, judged by a reasonable standard, manifest an intention to agree, it is immaterial what may be the real but unexpressed state of his mind. 17 C.J.S., Contracts, § 32, p. 361; 12 Am. Jur., Contracts, § 19, p. 515.

So a person cannot set up that he was merely jesting when his conduct and words would warrant a reasonable person in believing that he intended a real agreement, 17 C.J.S., Contracts, § 47, p. 390; Clark on Contracts, 4 ed., § 27, at p. 54.

Whether the writing signed by the defendants and now sought to be enforced by the complainants was the result of a serious offer by Lucy and a serious acceptance by the

defendants, or was a serious offer by Lucy and an acceptance in secret jest by the defendants, in either event it constituted a binding contract of sale between the parties.

Defendants contend further, however, that even though a contract was made, equity should decline to enforce it under the circumstances. These circumstances have been set forth in detail above. They disclose some drinking by the two parties but not to an extent that they were unable to understand fully what they were doing. There was no fraud, no misrepresentation, no sharp practice and no dealing between unequal parties. The farm had been bought for \$11,000 and was assessed for taxation at \$6,300. The purchase price was \$50,000. Zehmer admitted that it was a good price. There is in fact present in this case none of the grounds usually urged against specific performance.

Specific performance, it is true, is not a matter of absolute or arbitrary right, but is addressed to the reasonable and sound discretion of the court. *First Nat. Bank v. Roanoke Oil Co.*, supra, 169 Va. at p. 116, 192 S.E. at p. 771. But it is likewise true that the discretion which may be exercised is not an arbitrary or capricious one, but one which is controlled by the established doctrines and settled principles of equity; and, generally, where a contract is in its nature and circumstances unobjectionable, it is as much a matter of course for courts of equity to decree a specific performance of it as it is for a court of law to give damages for a breach of it. *Bond v. Crawford*, 193 Va. 437, 444, 69 S.E.(2d) 470, 475.

The complainants are entitled to have specific performance of the contracts sued on. The decree appealed from is therefore reversed and the cause is remanded for the entry of a proper decree requiring the defendants to perform the contract in accordance with the prayer of the bill.

Reversed and remanded.

Notes and Questions

1. The central issue in *Lucy v. Zehmer* revolves around contract formation. In such cases, the dispute typically concerns whether the parties reached an agreement. For a contract to be formed, the parties must agree on the essential terms, usually through the process of *offer and acceptance*.
2. Zehmer's main argument was that the entire situation was a joke. The court referred to this argument as "an unusual, if not bizarre, defense." The court not only disbelieved

Zehmer (do you?), but it also held that it is irrelevant because “[t]he law imputes to a person an intention corresponding to the reasonable meaning of his words and acts.”

This principle, known as *the objective theory of contract law*, dominates much of American contract law. Judge Learned Hand, one of the most prominent jurists of the 20th century, described it vividly:

A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties. A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent. If, however, it were proved by twenty bishops that either party, when he used the words, intended something else than the usual meaning which the law imposes upon them, he would still be held, unless there were some mutual mistake, or something else of the sort. Of course, if it appear by other words, or acts, of the parties, that they attribute a peculiar meaning to such words as they use in the contract, that meaning will prevail, but only by virtue of the other words, and not because of their unexpressed intent.

Hotchkiss v. Nat'l City Bank of New York, 200 F. 287, 293 (S.D.N.Y. 1911).

In other words, even if Zehmer could prove he had an unusual sense of humor, it would not matter. The real question is whether a reasonable person would have understood that he was joking. What facts in this case suggest a reasonable person would see the transaction as a joke? What facts suggest the opposite?

3. Why does the law disregard Zehmer's actual intent in favor of a reasonable person standard? This is not a simple question. On the one hand, the law should respect individual preferences, even idiosyncratic ones. Contract law, in particular, allows people to shape their agreements based on their desires, regardless of what the average or reasonable person might choose. I can contract to buy a purple car and insist on its performance even if most people prefer a red car. On the other hand, a contract involves at least two parties, and it affects others, including courts that must enforce the agreement. If the law gave too much weight to one party's unspoken thoughts, it would hurt others, frustrate their expectations, and be challenging to manage. This tension between objective and subjective standards appears throughout contract law (and other legal areas). While objectivity and reasonableness dominate contract law,

there are islands of subjectivity within the law and sensitivity to idiosyncratic preferences. We will revisit this tension throughout this book.

4. The offer and acceptance process is crucial because American contract law views the moment of acceptance as a “magic moment.” Until that point, the parties have complete freedom to walk away from negotiations for any reason (or for no reason). However, once acceptance occurs, the parties are legally bound. In *Lucy v. Zehmer*, when exactly did acceptance occur? The parties debated Lucy’s offer to pay \$5 and Zehmer’s refusal to accept it. Didn’t this happen after the contract was already formed? If so, why did it matter?
5. In addition to offer and acceptance, the law typically requires *consideration*, meaning that both parties must make promises or take an act in exchange for the other party’s promise or act. What was the bargain in *Lucy v. Zehmer*? What did Zehmer give up? What did Lucy?

The law does not require the considerations to be of equal value—people can make bad deals, and courts generally will not question the fairness or adequacy of the exchange. Given this rule, why does the court in *Lucy v. Zehmer* imply that \$50,000 was a fair price, including by citing Zehmer’s statement that it was “a good price”?

6. Even if a contract is formed through offer and acceptance and is supported by consideration, it may be invalid or subject to termination under certain *formation defenses*. These defenses typically arise when the formation process is materially defective because of matters such as fraud, mistake, duress, or mental incapacity. Intoxication is also a formation defense. The law allows parties to avoid a contract if the other party has reason to know that “by reason of intoxication he is unable to understand in a reasonable manner the nature and consequences of the transaction.” Restatement (Second) Contracts § 16(a). Why didn’t this defense help Zehmer here?
7. Lucy testified that “[s]even or eight years ago he had offered Zehmer \$20,000 for the farm which Zehmer had accepted, but the agreement was verbal and Zehmer backed out.” This is a reference to another, somewhat unique, formation defense—the *statutes of frauds*—which requires some contract to be in writing. Unlike most contracts, which can be oral, a contract for the sale of land needs to be in writing and signed by the seller. Can you explain why the law might require some contracts to be in writing?

8. Once a contract is formed, the parties need to perform their contractual obligations. The terms of the contracts, however, can be ambiguous, which invites the parties, and eventually, the court, to use the rules of *contract interpretation* to ascertain the meaning of their obligations. Reread the language of the written agreement in *Lucy v. Zehmer*. Can you locate ambiguous terms, those that might be open to more than one reasonable interpretation, in that document? It might be worth noting that most sale of land agreements are significantly longer and more detailed than the one in *Lucy v. Zehmer*.
9. Contractual obligations can be rooted in the parties' explicit understanding or in terms that courts imply. In *Lucy v. Zehmer*, for example, the written document stated, "title satisfactory to buyer." What does that mean? Does it mean that Lucy has full discretion to reject Zehmer's title? If so, did Zehmer really get anything in return for his promise to sell the farm?

In this case, the law would likely imply limitations on Lucy's discretion. One such important implied term is *the duty to perform a contract in good faith*. While good faith is subjective, the law can imply an even higher standard and require Lucy to be reasonable, thus permitting him to reject the title only if a reasonable person would have done that. Yes, this is another place where contract law needs to balance subjective and objective rules.

10. Once a contract was formed and breached—meaning that a party failed to perform its contractual obligations when they became due—the other party is entitled to remedies. Some of those remedies are considered "self-help." For example, if the breach is considered material, the breach-against party can stop performing its own obligations and, under some circumstances, terminate the contract.

However, the primary remedy for breach of contract is *expectation damages*, meant to give injured parties the full benefits of the contract and put them in a position equivalent to the one they would have been in if the contract were performed.

But in *Lucy v. Zehmer*, the breach-against party, Lucy, did not seek damages but instead asked the court to grant him *specific performance*. Specific performance is a court order forcing the breaching party, Zehmer here, to perform the contract. It is an unusual remedy in contract law, which is available when damages are inadequate. While specific performance is uncommon in most contract disputes, they are the standard remedy when it comes to the sale of land. Why do you think that is the case?

11. Zehmer argued that the court should deny specific performance because “even though a contract was made, equity should decline to enforce it under the circumstances.” This is a reference to the equitable nature of specific performance. Unpacking that claim requires a quick lesson in legal history.

The source of most American contract law can be traced back to English common law (we will discuss this in more detail shortly). Until the 19th century, England had two main legal systems: law and equity. The courts of law were responsible for enforcing the King’s law through a rigid system of writs—strictly formal causes of action. One aspect of this rigidity is that the only available remedy in courts of law was monetary damages.

Beginning in the 14th century, a competing system of equity began to develop. Many litigants could not meet the strict pleading requirements of the courts of law, so they sought alternative relief from the King’s Chancellor, who had greater freedom to administer justice. As the number of such claims increased, equity evolved into a separate court system, offering relief to petitioners who had no adequate remedy at law. When it comes to remedies, courts of equity granted injunctive relief, such as specific performance, requiring parties to undertake or refrain from certain actions.

While the vast majority of states merged the courts of law and the courts of equity into one system (as did England in 1873), the distinction between them continues to influence contract law (and other areas of the law) today. Rules rooted in equity tend to be more flexible and subject to much greater judicial discretion.

With this background in mind, Zehmer’s argument becomes clearer. Lucy sought specific performance, an *equitable remedy* (originally available only in equity, not in law). While damages—a remedy in law—are available as a matter of right to the non-breaching party, equitable remedies are discretionary. They depend on considerations of fairness and justice. Zehmer asked the court to use its discretion and refuse to grant specific performance. Why did the court reject this argument? Do you agree with its decision?

12. The day after the contract was formed, Lucy sold half of his interest in the Ferguson farm to his brother for half of the purchase price. While contracts primarily affect the parties who reached them, they often have implications for third parties. The most common ways to involve third parties in a contractual relationship are by making them beneficiaries of the contract, assigning contractual rights to them, or delegating to them

contractual duties. When these actions are permitted, the third party may acquire the right to sue to enforce the contract, as was the case with Lucy's brother in *Lucy v. Zehmer*.

13. Barak Richman and Dennis Schmelzer explored the circumstances surrounding the transaction *Lucy v. Zehmer*. Here are their conclusions:

Our findings suggest that the court misinterpreted the contractual setting surrounding that December evening in 1952. Our research uncovers several discoveries: (1) Lucy, acting as a middleman for southern Virginia's burgeoning pulp-and-paper industry, sought the Ferguson farm for its rich timber reserves; (2) Lucy was one of scores of aggressive timber middlemen in the region who eagerly sought valuable timberland and prompted a chaotic landgrab, leaving a wake of shady transactions and colorful litigation; and (3) within eight years of winning injunctive relief from the Virginia Supreme Court and purchasing the Ferguson farm from Zehmer for \$50,000, Lucy earned approximately \$142,000 from selling the land and its natural resources.

Barak Richman & Dennis Schmelzer, *When Money Grew on Trees: Lucy v. Zehmer and Contracting in A Boom Market*, 61 DUKE L.J. 1511, 1512 (2012)

If those additional facts were before the court, would that have changed the outcome of the case?

B. The Sources of Contract Law

The Common Law

The primary source of American contract law is the common law—the body of law based upon judicial decisions, administered by the courts of England since the Middle Ages and subsequently by American courts.

The principle force transforming individual decisions that resolve individual disputes into a cohesive body of law is the doctrine of *stare decisis*. *Stare decisis*, Latin for “to stand by things decided,” is a judicial doctrine under which a court follows its precedents when deciding cases with arguably similar facts. This doctrine encompasses both vertical and horizontal dimensions. Vertical *stare decisis* requires a court to *strictly* adhere to the decisions of higher courts within the same jurisdiction. Horizontal *stare decisis*, on the other hand, suggests that

a court should follow its own prior decisions unless there are compelling reasons to overrule them. As you can surely imagine, deciding what constitutes compelling reasons can be highly contentious, especially when it comes to difficult constitutional law questions.

These aspects of the doctrine are designed to bring stability and predictability to the law. Thanks to this principle, a well-defined body of legal rules has emerged over centuries. It is the driving force of American contract law and the focus of this book.

Most norms of contract law are governed by state laws, which means that each state may have its own distinguished rules. However, despite some variations (which we will explore in this book), contract law is more similar than dissimilar across states. There are significant advantages to minimizing variations between jurisdictions, especially regarding rules that govern commerce and broad sections of the national and global economy. Some forces help maintain this relative uniformity. We have already noted the common law tradition, which is shared across all U.S. jurisdictions (except Louisiana, whose contract law is primarily derived from French law). Other factors contributing to the uniformity of contract law include the Restatements of Contracts and the Uniform Commercial Code.

The First and Second Restatements

In the early 1920s, a prominent group of American judges, lawyers, and law professors formed the “Committee on the Establishment of a Permanent Organization for the Improvement of the Law.” This Committee reported widespread dissatisfaction within the legal profession, attributing it to the law’s unnecessary complexity and uncertainty. They identified a lack of consensus on the fundamental principles of common law and numerous variations across jurisdictions as key issues.

To address these problems, the Committee proposed the creation of The American Law Institute (ALI) to “promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice, and to encourage scholarly and scientific legal work.” Following this recommendation, the ALI was incorporated in 1923. That year, work began on the first four Restatements of the law, including one of contracts.

Professor Samuel Williston served as the Reporter (meaning the principal drafter), assisted by Professor Arthur Corbin, who crafted the section on remedies. This “First Restatement,” as it is now known, was approved in 1932 and quickly gained enormous influence, including by being cited in thousands of judicial opinions (including, we hope you noticed, in *Lucy v.*

Zehmer). In the early 1960s, work began on the Second Restatement of Contracts with Robert Braucher as the Reporter until 1971 (when he was appointed to the Supreme Judicial Court of Massachusetts) and then succeeded by Professor Allan Farnsworth. Adopted by the ALI in 1979 and published in 1981, the Second Restatement continued to exert a strong influence and is frequently cited by judges.

Since their inception, Restatements have been trying to achieve two goals, which are somewhat in tension. When the Committee on the Establishment of a Permanent Organization for the Improvement of the Law first proposed establishing the ALI and creating Restatements, it noted that they “should not only be to help make certain much that is now uncertain and to simplify unnecessary complexities, but also to promote those changes which will tend better to adapt the laws to the needs of life.” Those two motivations drive many Restatements, including the two dealing with contract law. Both of them primarily restated and organized the law as it was but also included legal innovations that, at the time, were not broadly supported by judicial opinions.

This aspect of the Restatements has been controversial. Consider the following two perspectives. The first is by Judge Herbert Goodrich, the former director of ALI:

If an advocate thinks the Restatement was wrong as applied to his case, he can urge the court not to follow it, but to apply some other rule. If the court agrees, it will do so, but it will so do with the knowledge that the rule which it rejects has been written by the people who by training and reputation are supposed to be eminently learned in the particular subject and that the specialist's conclusions have been discussed and defended before a body of very able critics. The presumption is in favor of the Restatement.

Restatement and Codification, in *CENTENARY ESSAYS CELEBRATING ONE HUNDRED YEARS OF LEGAL REFORM* (1949).

Compare with the view of Justice Antonin Scalia, one of the most influential jurists in modern American law:

I write separately to note that modern Restatements . . . are of questionable value, and must be used with caution. The object of the original Restatements was “to present an orderly statement of the general common law.” Restatement of Conflict of Laws, Introduction, p. viii (1934). Over time, the Restatements' authors have abandoned the mission of describing the law, and have chosen instead to set forth their aspirations for what the law ought to be. . . . Section

39 of the Third Restatement of Restitution and Unjust Enrichment is illustrative . . . it constitutes a novel extension of the law that finds little if any support in case law. Restatement sections such as that should be given no weight whatever as to the current state of the law, and no more weight regarding what the law ought to be than the recommendations of any respected lawyer or scholar. And it cannot safely be assumed, without further inquiry, that a Restatement provision describes rather than revises current law.

Kansas v. Nebraska, 135 S. Ct. 1042, 1064 (2015) (Scalia, J., concurring in part and dissenting in part).

Despite these controversies, many suggestions from the Restatements have been adopted by courts. Moreover, the Restatements often provide clear and well-drafted statements of legal rules, which is why they will be extensively referenced throughout this book, albeit with notes on instances where their positions were not widely accepted or explicitly rejected.

The Uniform Commercial Code

The Uniform Law Commission (ULC, also known as the National Conference of Commissioners on Uniform State Laws), established in 1892, aims to provide states with non-partisan, meticulously drafted legislation that enhances clarity and stability in critical areas of state statutory law. The proposals from the ULC are recommendations, becoming law once enacted by state legislatures.

The most significant legislative contribution from the ULC is the Uniform Commercial Code (UCC), comprising several Articles that address diverse aspects of commercial law, including the sales of goods (Article 2), leases of goods (Article 2A), negotiable instruments (Article 3), bank deposits and collections (Article 4), funds transfers (Article 4A), letters of credit (Article 5), documents of title (Article 7), investment securities (Article 8), and secured transactions (Article 9). Pertinent to contract law are Articles 1 and 2, with the former outlining general provisions applicable to all transactions under the UCC and the latter specifically governing the sales of goods.

The development of the Code commenced in the early 1940s under the joint sponsorship of the ULC and the ALI. The first edition was approved in 1952. Following the initial rejection of the 1952 version by the New York legislature, revisions were made, leading to the 1958 Official Text with Comments. After New York adopted this revised version, many other states followed suit. Today, all states, except Louisiana, have adopted the UCC.

The primary architect behind the Code was Professor Karl Llewellyn, a prominent figure in the American legal realist movement. Llewellyn and his team did not strictly adhere to existing law, allowing the UCC to often deviate from traditional common law practices. As we will explore in later chapters, while UCC statutes primarily regulate sales of goods, some of the Code's innovative principles have been adopted by courts in cases involving other types of contracts.

The Scope of the UCC

Article 2 of the UCC does not supersede the entire law of contracts. It explicitly states that “unless displaced by the particular provisions of the Uniform Commercial Code, the principles of law and equity . . . supplement its provisions.” UCC § 1-103(b). For instance, the UCC does not define consideration, which means that the common law definition applies whether or not the transaction is within the scope of the UCC.

However, as noted above, the UCC deviates from common law on multiple topics, many of which are covered in this book. It is thus crucial to know when it applies. The UCC governs “transactions in goods” UCC § 2-102. It defines goods as “things...which are movable.” UCC § 2-105(1). Therefore, the UCC does not apply to other transactions, including sales of land, sales or licenses of intangible goods, and service agreements.

Transactions often include a mix of components—some involving the sale of goods and others not. For example, a promise to build a house entails the sale of goods (such as lumber and light fixtures) and services (the construction). Similarly, ordering a laptop on Amazon typically involves the sale of a good (the laptop), a license for the software installed, a delivery service, and a service plan. Does the UCC govern these hybrid transactions?

Until recently, courts used the “predominant factor” test, as explained by the Eighth Circuit:

The test for inclusion or exclusion is...whether their predominant factor, their thrust, their purpose, reasonably stated, is the rendition of service, with goods incidentally involved (e.g., contract with an artist for a painting) or is a transaction of sale, with labor incidentally involved (e.g., installation of a water heater in a bathroom).

Bonebrake v. Cox, 499 F.2d 951, 960 (8th Cir. 1974)

In 2022, however, the ULC approved an amendment to the UCC, adding section 2-102(2), which codifies a test for hybrid transactions:

(2) In a hybrid transaction:

(a) If the sale-of-goods aspects do not predominate, only the provisions of this Article which relate primarily to the sale-of-goods aspects of the transaction apply, and the provisions that relate primarily to the transaction as a whole do not apply.

(b) If the sale-of-goods aspects predominate, this Article applies to the transaction but does not preclude application in appropriate circumstances of other law to aspects of the transaction which do not relate to the sale of goods.

As of fall 2024, about half of the states have enacted the 2022 amendment, with several additional state legislatures in the process of adoption.

The CISG

This book focuses on domestic U.S. contract law but occasionally references the laws of other countries or international transaction laws. An important treaty in this context is the United Nations Convention on Contracts for the International Sale of Goods (CISG). This multilateral treaty establishes a uniform framework for international commerce. As of fall 2024, it has been ratified by 97 countries, including most of the world's largest economies—such as the United States, China, Germany, Japan, France, Italy, and Canada—but not all (India and the United Kingdom, for example, have not adopted it). The CISG applies to contracts for the sale of goods between parties who are based in different countries when both countries have ratified the Convention, and it supersedes domestic laws.

Notes and Questions

1. Which of the following disputes is primarily governed by the UCC under the predominant factor test? Which of them are governed by the UCC under new section 2–102(2)?
 - a. A painter and a farmer negotiate a contract to paint a barn and agree that as part of the deal, the painter will provide the paint to perform the job. The painter argues that her offer was accepted, but the farmer claims it was not.
 - b. A handyman enters a contract with a landlord to renovate the landlord's bathroom, including installing a new toilet. The contract provides that

the handyman will provide all the materials for the job. The handyman performs this, but the landlord argues that the new toilet that was installed is defective.

- c. A consumer buys a smartphone. The transaction includes a one-year service and a license for the use of the software installed on the phone. The buyer wants to cancel the contract, claiming he was heavily intoxicated when it was completed.