

Table of Contents

<i>Preface</i>	<i>ix</i>
<i>About the Authors</i>	<i>xiii</i>
<i>Summary of Contents</i>	<i>xvii</i>

1	Twenty-first Century Sources of Contract Law— Common Law, Restatement, UCC, and CISG	1
1-1	Common Law, UCC, Restatement (Second) of Contracts	1
1-2	International Contracts for the Sale of Goods—CISG	3
1-3	Statute of Frauds.	4
1-4	Electronic Contracts—E-SIGN and UETA.	4
1-5	Leases and Computer Information Transactions	5
1-6	A Revised or Amended Article 2?	5
2	The Purpose of Contract Law	7
2-1	The “Evil” to be Avoided	7
2-2	Fulfilling Reasonable Expectations	7
2-3	Drafting Principles—Presentation	7
2-4	Post-formation Challenges	9
2-5	The Pennsylvania “Gist-of-the-Action” Doctrine	9
3	Promises the Law Will Enforce—Objective Theory of Contract—Contracts Implied in Fact and in Law	11
3-1	Intention to be Legally Bound	11
3-2	“Implied” Contracts: Fact and Law—Quasi Contract—Restitution	11
4	Preliminary Agreements: Agreements Not Intended to Reach the Ultimate Contractual Objective	13
4-1	Documents That Appear to Be “Preliminary” Can Be Final Contracts	13
4-2	When is a Document a “Final” Contract?	13
4-3	Tests to Determine Whether a Preliminary Agreement is Binding	14
4-3.1	Have the Essential Terms Been Agreed Upon?	15
4-3.2	Have the Parties Manifested Intent to Delay Contract Formation?	16
➤➤	When Parties Intend to Execute a More Formal Memorial of the Deal.	16
➤➤	Absence of Signatures on Document that Contains Signature Lines	17
4-4	Letters of Intent	18
4-4.1	Drafting the Letter of Intent and Other Preliminary Agreements	19

Table of Contents

4-5	Distinguishing Agreement to Negotiate in Good Faith	20
4-5.1	Drafting the Good-Faith Negotiation Agreement	20
5	The Agreement Process	23
5-1	What Is an “Offer”?	23
5-2	Insufficient Rationales	24
5-3	The Essential Distinction	24
5-4	The Glass Container Illustration	25
5-5	Buyer’s Assortment—UCC § 2-311	25
5-6	Who Is the Offeree?	26
5-7	Understanding the Slick Boilerplate to Identify the Offeree	26
5-8	Confusion About the Identity of the Offeror and Offeree	27
5-9	A Pennsylvania Court Provides the Correct Analysis	28
6	Drafting Offers—Controlling the Acceptance	31
6-1	Drafting Offers—Purpose	31
6-2	The Client as Controlling Offeree—Pennsylvania Alert	31
➤	Sign the Form	32
➤	Forms Requiring a Performance Acceptance	33
6-3	The Client as the Offeror	34
6-4	The “Reasonable Time” Implication Invites Litigation	34
➤	Drafting Time Limitations in the Offer—Pitfalls	35
6-5	Article 20(1) of CISG—Pitfall	35
➤	Drafting Time Limitations under Any Governing Law	36
7	Revocation of Offers	37
7-1	General Rule—Offers Are Revocable	37
7-2	Communication of Revocation	37
7-3	Indirect Revocation	38
8	Making Offers Irrevocable	39
8-1	Option Contract	39
8-2	Right of First Refusal Distinguished	39
8-3	Drafting the Right of First Refusal	40
8-4	Consideration and Option Contracts	41
➤	Avoiding Contests Over Consideration in Option Contracts	41
8-5	Worse—Failing to Pay the Recited Consideration	42
8-6	Pennsylvania and Other Minority Views Concerning Consideration in Option Contracts	42
9	Firm Offers Under the Uniform Commercial Code	45
9-1	Section 2-205	45
9-2	Merchant	45
9-3	Three-Month Limitation	46
9-4	Protection Against Inadvertent Firm Offers	46

10	Employment Contracts	49
10-1	At-Will Employment Contracts	49
10-2	Employee Handbooks—Generally	49
10-3	Employee Handbooks—Pennsylvania	50
11	Offers Irrevocable Through Reliance	53
11-1	Offers Are Revocable	53
11-2	Construction Contract Firm Offer by Subcontractor to a General Contractor	53
11-3	When Reliance Is Not Reasonable	54
➤➤	Protecting Subcontractor Offerors from Bid Chopping or Bid Shopping	55
➤➤	Protect General Contractors	55
➤➤	The Mistaken Offer	56
12	Irrevocable Offers Upon Part Performance—“Unilateral” vs. “Bilateral” Contracts	57
12-1	The “New” Contract Law Concerning “Bilateral” and “Unilateral” Contracts	57
12-2	Section 45 Theories	58
13	Rejection of Offers—Counteroffers	61
13-1	Rejection Eliminates the Offer—Communication—Death	61
13-2	Potentially Unwelcome Result of Rejection—Illustration	61
13-3	Typical Counteroffers—Rejection Plus	62
13-4	Counteroffers That Do Not Reject the Offer	62
➤➤	The Inadvertent Counteroffer	63
14	Acceptance of Offers	65
14-1	The Matching Acceptance (“Mirror Image”) Rule	65
14-2	Power of Acceptance Lodged Exclusively in the Offeree	65
14-3	Required Knowledge of Offer	66
14-4	Knowledge of Terms	66
14-5	Multiple Motivations	66
14-6	Volition	66
15	The Manner and Medium of Acceptance	69
15-1	UCC and Second Restatement	69
15-2	The Typical Indifferent Offer	69
➤➤	Major Change—Acceptance by Shipping Nonconforming Goods	70
15-3	The Medium of Acceptance—The “Mailbox Rule”	71
➤➤	Option Contract, Mailbox Rule—The Pennsylvania View	71
15-4	Interference With the Mailbox Rule	72

Table of Contents

15-5	Different Media of Acceptance—Instantaneous or Nearly Instantaneous Media	72
15-6	E-mail	73
16	The “Battle of the Forms”—Acceptance With Different or Additional Terms	75
16-1	The Challenge	75
16-2	Common-Law Analysis—Matching Acceptance—“Last Shot” Principle Prevails in the “Battle of the Forms”	76
16-3	Uniform Commercial Code—The Radical Change.	78
16-4	A “Definite Expression of Acceptance” Containing Additional or Different Terms?	78
➤➤	2-207 Analysis in Contracts Not for the Sale of Goods	79
16-5	Mystery: 2-207(2)—“Different” vs. “Additional” Terms	80
16-6	The “Knockout” View Prevails	81
16-7	Determining Which Terms Are Included under 2-207(2)—“Surprise” and “Hardship”.	82
16-8	Clauses Limiting Remedies and Choosing a Forum	83
16-9	Applying the “Surprise” and “Hardship” Criteria	84
16-10	Arbitration.	84
16-11	Controlling the Material Alteration Issue—2-207(2)(a) and (2)(c)	85
16-12	Drafting the 2-207(2)(a) and (c) Clauses	87
16-12.1	Distinguishing Modification Clauses.	87
16-13	2-207 Counteroffers	88
➤➤	Safe Harbor 2-207 Counteroffer Language	89
16-14	Effect of Counteroffer Terms—Shipping Goods Without a Contract	89
16-15	The Effect of Buyer’s Acceptance of the Goods.	90
16-16	Acceptance of the Goods Is Not Acceptance of the Counterofferor’s Terms.	90
16-17	2-207(3) Contract by Conduct	92
16-18	Is a “Battle of the Forms” Necessary under 2-207(1)? Confirmations—Single or Double—under 2-207	93
16-19	No “Battle”	94
➤➤	The Seller as Offeror under 2-207	94
➤➤	The Impregnable Purchase Order—The Buyer “Wins” Every Time.	95
17	The Radical “Rolling Contract” Theory—“Accept or Return”	99
17-1	Applying a 2-207 Analysis	99
17-2	The Radical Theory	100
17-3	2-207 Not Applicable?—Uncertainty	102
17-4	Precluding the “Rolling Contract” Analysis Where It Applies	103
17-5	The Counteroffer Defense	103
17-6	Electronic Forms	104
17-7	“Shrinkwrap” Licenses—“Clickwrap” vs. “Browsewrap”	104

18	Arbitration In the 21st Century	107
18-1	History—The Federal Arbitration Act	107
18-2	To Arbitrate or Not—Vacating Awards.	108
18-3	Attacks on Arbitration Agreements—Unconscionability	110
18-4	Class Action Waivers— <i>AT&T v. Concepcion</i>	111
18-5	Aftermath of <i>Concepcion</i>	115
19	CISG—Major Differences from U.S. Law	119
19-1	CISG: International Contract Law	119
19-2	No Statute of Frauds	119
➤	Article 96 Declaration	120
19-3	Subjective Intent	121
19-3.1	On “Subjective Intent,” Is the CISG Really That Different?.	122
19-4	Parol Evidence Rule	123
19-5	CISG Firm Offers	125
19-6	No Mailbox Rule	125
19-7	Specific Performance Not a Secondary Remedy	126
19-8	“Battle of the Forms”	126
19-9	Opting Out of the CISG.	128
20	The Validation Process—Seal, Uniform Written Obligations Act, Consideration, Promissory Estoppel, Illusory Promises, Requirements, Output, and Exclusive Dealing Contracts	131
20-1	Seal—Formal Validation Devices	131
20-2	The Basic Effect of the Seal—Law vs. Equity—Distinguishing Want of Consideration from Failure of Consideration	132
20-3	The Seal and Recital Clauses.	133
20-4	Critical Effect of the Seal—Statute of Limitations	133
20-5	Pennsylvania’s Unique Uniform Written Obligations Act— Noncompetes	134
20-6	Distinction—Want of Consideration—Failure of Consideration under UWOA.	135
20-7	Consideration—The Dominant Validation Device	135
20-8	Modern Consideration Doctrine in Pennsylvania	135
20-9	Adequacy of Consideration.	137
20-10	Moral Obligation as “Consideration”—Promises to Pay Debts Barred by the Statute of Limitations or Discharged in Bankruptcy	137
20-11	Promissory Estoppel—Distinguished from Consideration.	138
20-12	Promissory Estoppel—Section 90 of the Restatements—Pennsylvania	139
20-13	Promissory Estoppel Remedy—Reliance Interest	139
20-14	A Cause of Action Based on Promissory Estoppel— Statute of Limitations.	141
20-15	Elements of Promissory Estoppel	141

Table of Contents

20-16	Equitable Estoppel and Promissory Estoppel—Burden of Proof	143
20-17	At-Will Employment Contracts—Promissory Estoppel	144
20-18	Drafting Employee Handbooks.	144
20-19	Employee Handbooks—Pennsylvania	145
20-20	Illusory Promises	146
20-21	Requirements and Output Contracts	147
20-21.1	Requirements and Output Contracts, and Estimates	147
20-21.2	Exclusive Dealing Arrangements	151
21	Statute of Frauds	153
21-1	Criticism—One-Year Provision—Pennsylvania	153
21-2	Sufficient Memorandum—Terms—General—UCC—Electronic.	153
21-3	The Single (Unsigned) Writing Exception—UCC	154
21-4	UCC Frugal Writing Requirement.	155
21-5	CISG	155
21-6	Suretyship Contracts—Leading Object Rule	156
21-7	Exceptions to the Application of the Statute of Frauds— Part Performance	157
21-7.1	Contracts for the Sale of Land	157
21-7.2	Contracts for the Sale of Goods—UCC	158
21-7.3	Admissions—Pleadings—General	158
21-7.4	Admission—UCC	159
21-7.5	Promissory Estoppel	159
21-8	Estoppel Exception in Pennsylvania	160
22	Contract Modifications.	161
22-1	Modification Distinguished from Substituted Contracts	161
22-2	Modifications Without Consideration	161
22-3	Modifications and the Statute of Frauds—NOM Clauses	162
22-4	Modifications—UCC Statute of Frauds and NOM Clauses under § 2-209.	163
23	Interpretation.	167
23-1	Metaphors—Intention of the Parties.	167
23-2	Ascertaining the Intention of the Parties.	168
23-3	Purpose—Preambles—Whereas Clauses—“All of the Surrounding Circumstances” (Contextual)— Whole Transaction	168
23-4	Canons of Construction—Interpretation	169
23-4.1	<i>Ejusdem Generis</i> —Drafting	169
23-4.2	<i>Expressio Unius est Exclusio Alterius</i> —Example: Drafting Consent to Jurisdiction and Choice-of-Law Clauses	170

23-4.3	<i>Noscitur A Sociis</i> —Words Are Known By the Company They Keep	170
23-4.4	<i>Contra Proferentem</i> —Construction Against the Drafter	171
23-5	The Critical Importance of Course of Performance, Course of Dealing, and Usage of Trade	171
23-6	The “Plain Meaning” Rule—Corbin Critique	172
23-7	Five Illustrations	173
23-8	Searching for Meaning	175
23-9	The Insight of Justice Holmes	176
23-10	Pennsylvania Confusion	176
23-11	Understanding the “Good-Faith” Concept in Pennsylvania	178
24	The Enigmatic Parol Evidence Rule	181
24-1	Neither “Parol” nor “Evidence” nor “Rule”	181
24-2	Confusion—Parol Evidence and Interpretation	182
24-3	Distinguishing the Parol Evidence Rule and Interpretation	182
24-4	Integration	183
24-5	UCC Parol Evidence Rule	183
24-6	Admissibility Tests	184
24-7	Merger Clauses and How to Draft Them	185
24-8	Supplementary Terms: Trade Usage, Course of Dealing, and Course of Performance	186
24-8.1	Illustration	187
24-8.2	Illustration	187
24-9	Drafting a Careful Negation of Trade Usage or Course of Dealing	189
24-10	The “Fraud” Exception—Reformation	192
24-11	Parol Evidence Condition to Existence of the Contract	193
24-12	CISG and the Parol Evidence Rule	193
25	Conditions in the Law of Contracts	195
25-1	Meaning of “Condition” in the Law of Contracts	195
25-2	Promises vs. Conditions—Express vs. Constructive Conditions—Promissory Conditions	195
25-2.1	Express vs. Constructive Conditions	196
25-2.2	Promissory Condition	197
25-3	Conditions Precedent and Conditions Subsequent—Form and Substance—Needless Confusion	197
25-4	Burden of Proving the Occurrence of the Condition	198
25-5	Pleading the Breach of a Conditional Contract	199
25-6	Drafting Conditions—Avoiding the “Precedent”/“Subsequent” Debacle	200
25-7	Drafting Conditions in General—Strict Construction—Presumption of Promise—Avoiding Forfeitures	200
25-8	Avoiding Forfeitures	201
25-9	Drafting “Pay-When-Paid” vs. “Pay-If-Paid” Contracts	202
25-10	Excused Conditions	205

26	Unconscionability	207
26-1	Meaning of “Unconscionability”	207
26-2	“Procedural” and “Substantive” Unconscionability	209
26-3	Are Both “Procedural” and “Substantive” Unconscionability Necessary?—The New View of “Contracts of Adhesion”	210
26-4	What We Think We Know for Sure About Unconscionability	211
26-5	Unconscionability and Arbitration Clauses	211
26-6	Drafting the Arbitration Agreement to Avoid Unconscionability	213
27	Third-Party Beneficiaries	217
27-1	History—The Challenge	217
27-2	Unearthing the Underlying Principle—New York	217
27-3	Pennsylvania, Massachusetts, and England	218
27-4	First Restatement Analysis	219
27-5	Second Restatement Analysis	219
	>> The Pennsylvania Construction of Section 2-302	221
	>> Vesting of Beneficiary Rights—The Pennsylvania View	223
	>> Drafting Third-Party Intended Beneficiary Contracts—Pennsylvania	224
	>> Drafting in the Light of Vesting in Pennsylvania	225
27-6	UCC Third-Party Beneficiaries—Vertical and Horizontal Privity— Pennsylvania	225
	27-6.1 Horizontal Privity—Who Can Sue?	226
	27-6.2 Vertical Privity—Who Can Be Sued?	226
	27-6.3 Pennsylvania Solution	227
28	Assignments and Delegation	229
28-1	History—Concept of Assignment	229
28-2	Preliminary Analysis—Assignment Is Not a Contract	229
28-3	Effect of Assignment and Delegation	230
28-4	Free Assignability and Delegation	230
28-5	Drafting Assignments and Delegations	230
	>> Drafting Clauses Prohibiting Assignments	231
	>> UCC—Unenforceable Anti-assignment Clauses in Some Transactions	232
28-6	Notice of Assignment	233
28-7	Priorities Between Successive Assignees—Common Law—UCC	233
	28-7.1 Common Law	233
	28-7.2 UCC	234
29	Joint and Several Contracts	235
29-1	Common Law—Statutory Changes	235
29-2	Pennsylvania	236
29-3	Release from Liability—Pennsylvania	236

30	Breach, Material Breach, Effects, and Decision— Criteria—Substantial Performance	239
30-1	Breach of Contract	239
30-2	Effects and Decision	239
30-3	Material Breach—Criteria to Determine Materiality	240
30-4	Substantial Performance	242
31	UCC—“Perfect Tender” Rule—Rejection—Cure— Revocation of Acceptance—Notice of Breach	245
31-1	Substantial Performance Does Not Apply	245
31-2	Effects of Acceptance of Goods	246
➤	Confusion—Cure and UCC Notice of Breach	246
➤	Draconian UCC Notice Provision—Counseling Points	247
32	Anticipatory Repudiation—Demanding Adequate Assurances	249
32-1	Origins—Common-Law Test vs. UCC Test—Pennsylvania	249
32-2	Effect of Anticipatory Repudiation	251
32-3	Retraction of Repudiation	251
32-4	Demanding Adequate Assurances—The UCC Innovation	252
➤	Drafting the Demand for Adequate Assurances	253
33	“Force Majeure”—Impossibility—Commercial Impracticability	255
33-1	Origins—Narrow Exceptions—The Advent of Force-Majeure Clauses.	255
33-2	Commercial Impracticability and Frustration of Purpose.	256
33-3	The Modern Doctrine of Commercial Impracticability— UCC and Restatement (Second) of Contracts	257
33-3.1	Restatement (Second) of Contracts	257
33-3.2	Uniform Commercial Code	257
33-4	Case-Law Construction—Elements	258
33-4.1	Excessive Burdens	258
33-4.2	Basic Assumption—“Foreseeable”	258
33-4.3	Without Fault—Beyond Control	259
33-4.4	Allocating Risks by Contract—Force-Majeure Clauses	259
33-5	Drafting Force-Majeure Clauses—Are They Necessary or Desirable?.	260
33-6	Drafting a Risk Management Clause	261
34	Remedies—Expectation, Reliance, and Restitution Interests in Common Law and the UCC	263
34-1	Compensation—The Three Interests	263
34-2	Restitution for Breach of Contract.	265
34-3	Quasi Contract	265
34-4	“Reliance”—“Restitution” Confusion in Pennsylvania Precedent	266

Table of Contents

34-5 Limitation on Contract Damages—Foreseeability—
Hadley v. Baxendale. 266

34-6 The “Tacit Agreement” Test 267

34-7 The Modern View of “Foreseeability” 268

34-8 More Limitations on Contract Damages—Proximate Causation
and Reasonable Certainty—The “New Business” Rule 268

34-9 Final Limitation on Contract Damages—Mitigation—UCC. 270

35 Uniform Commercial Code Remedies 273

35-1 General Purpose of Contract Remedies Unchanged. 273

35-2 UCC Seller Remedies 273

35-3 “Lost Volume” and Similar Sellers 274

 >> Pennsylvania Rejects the “Lost Volume Seller” for Contracts
 Outside the UCC 275

35-4 Seller’s Action for the Price—“Specific Performance”—
Wrongful but Effective Rejection 277

35-5 UCC Buyer’s Remedies 277

35-6 “Learned of the Breach”—Anticipatory Repudiation. 278

35-7 Buyer’s Damages for Breach in Accepted Goods 279

35-8 Buyer’s Right to Specific Performance 280

35-9 “General,” “Special,” and “Consequential” Damages 281

 >> UCC—Only Buyers Recover Consequential Damages 283

35-10 Excluding Consequential Damages—Failure of Essential Purpose. 283

35-11 The Presumption of Cumulative Remedies 285

 >> Drafting Substituted Remedies Clauses. 288

 >> Sole and Exclusive Remedy. 289

35-12 Incidental Damages 289

35-13 Liquidated Damages—UCC Changes 290

36 Contract Drafting Land Mines 291

36-1 Traps for the Unwary Drafter 291

36-2 General Drafting Principles 291

36-3 Anatomy of a Contract 293

 >> Title of the Contract 293

 >> Effective Date. 293

 >> Recitals 295

 >> Consideration 296

 >> Time Is of the Essence 297

 >> Characterizing the Contract as One for the Sale of Goods 298

 >> Pricing and Price Adjustments Section 2.1 299

 >> Pricing and Price Adjustments Section 2.3 and Alternative
 Clause to Pricing and Price Adjustments Section 2.3 301

 >> Delivery Performance. 303

 >> Rejection and Revocation of Acceptance. 304

 >> Warranty. 306

➤➤ Alternative Clause to Warranties	307
➤➤ General Points About Warranties	307
➤➤ Limitation of Liability	311
➤➤ Risk Management	313
➤➤ Laws Incorporated	314
➤➤ Anti-assignment	314
➤➤ Choice of Law	315
➤➤ Integrated Agreement	317
➤➤ NOM Clause	318
➤➤ Third-Party Beneficiaries	318
➤➤ Modifying Limitations Periods	319
➤➤ Anti-waiver Clauses	321
➤➤ Survival Clauses	322
Table of Cases	325
Statutory Index	367
Subject Index	371