

Sales and Leases
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Spring 2011

Sales Contract Enforceability

I. Statutes of Frauds

A. Common Law Statutes of Frauds: A Brief Review

1. **Basics:** To be enforceable *as a contract*, one or more writings, signed by the party against whom enforcement is sought or by her authorized agent, must evidence certain types of agreements. R2 § 110.
 - a. **Content:** The writing(s) must
 - i. reasonably identify the contract's **subject matter**,
 - ii. sufficiently indicate that the parties made a **contract** regarding that subject matter, and
 - iii. state the contract's **essential terms** with reasonable certainty. R2 § 131.
 - b. **Composite Document Rule:** More than one writing may suffice, as long as at least one of them is signed and the circumstances indicate that they are related to one another. R2 § 132.
 - c. **Purpose:** As a general rule, the writing(s) used to satisfy the SOF need not have been created for that purpose. R2 § 133.
 - d. **Signature:** “[A]ny symbol made or adopted with an intention, actual or apparent, to authenticate the writing ...” R2 § 134.
 - ◆ **Not Signed by All Parties:** Only the party against whom enforcement is sought must sign. R2 § 135.
 - e. **Time:** The writing(s) may be made or signed at any time before or after the contract is formed. R2 § 136.
 - f. **Spoliation:** The loss or destruction of a writing does not negate its effect. R2 § 137.

2. **Application:** Common law requires one or more writings, signed by the party against whom enforcement is sought or by her authorized agent, in order to enforce, *inter alia*, any contract that cannot be fully performed within **one year**. R2 §§ 110(1)(e) & 130.

B. UCC Article 2 Statute of Frauds: Requisites

1. A party cannot enforce, by way of action or defense, a **contract**
2. for the **sale of goods**
3. in the amount of **\$500 or more**
4. unless there is some **writing** that
 - a. indicates that the **parties have contracted** for the sale of goods,
 - b. identifies the **quantity of goods** to be bought and sold, and
 - ◆ If the writing misidentifies the quantity of goods to be sold, it can only be enforced up to the amount of goods stated.
 - c. is **signed** by the **party against whom enforcement is sought** or by his **authorized agent**. § 2-201(1).

C. UCC Article 2 Statute of Frauds: Exceptions

1. **“Between Merchants”:** A prior oral agreement between two merchants may be enforced, notwithstanding the statute of frauds, if
 - a. within a **reasonable period of time**,
 - b. one merchant sends to the other a **written confirmation**,
 - c. the terms and import of which the receiving merchant has **reason to know**, and
 - d. the receiving merchant **fails to object in writing within 10 days** of receiving the purported confirmation. § 2-201(2).
2. **Specially Manufactured Goods:** An agreement that does not otherwise satisfy the statute of frauds may be enforced if
 - a. the seller **specially manufactured** (or obtained) the goods in question for the buyer,
 - b. the goods are **not suitable for sale to others** in the ordinary course of the seller’s business, and

- c. the seller either **substantially began their manufacture** or **made commitments** for their procurement,
 - i. **before receiving notice** of the buyer’s repudiation, and
 - ii. under circumstances which reasonably indicate the goods are for the buyer. § 2-201(3)(a).
 - 3. **“Judicial Admission”**: An oral or written agreement that does not otherwise satisfy the statute of frauds may be enforced, notwithstanding the statute of frauds,
 - a. if the party against whom enforcement is sought **admits the existence of the contract** in her pleadings, testimony, or otherwise in court, but
 - b. only to the extent of the **quantity admitted** by the party against whom enforcement is sought. § 2-201(3)(b).
 - 4. **Partial Performance**: An oral or written agreement that does not otherwise satisfy the statute of frauds may be enforced, notwithstanding the statute of frauds, with respect to goods
 - a. which have been **received and accepted** by the buyer, § 2-201(3)(c), or
 - b. for which the buyer has made and the seller has accepted payment, § 2-201(3)(c).
- D. **The Statute of Frauds and the CISG**: Article 11 dispenses with any writing requirement, providing, in relevant part, that “[a] contract for sale need not be concluded in or evidenced by a writing”
- ◆ Several Contracting States have retained a statute of frauds in contracts otherwise within the CISG’s scope by filing an Article 96 reservation.
- E. **UETA (and E-SIGN) and the Statute of Frauds**
- 1. **Formation**: “A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation.” UETA § 7(b); *accord* E-SIGN § 7001(a)(2).
 - 2. **Formality**: “A record or signature may not be denied legal effect or enforceability solely because it is in electronic form.” UETA § 7(a); *accord* E-SIGN § 7001(a)(1).

- a. Any law requiring a record to be in writing may be satisfied by an electronic record. UETA § 7(c); *accord* E-SIGN § 7001(a)(1).
 - b. An electronic signature may satisfy any law requiring a signature to be in writing. UETA § 7(d); *accord* E-SIGN § 7001(a)(1).
3. **Attribution:** “An electronic record or signature is attributable to a person if it was the act of the person.” UETA § 9(a).

II. Unconscionability

- A. **Procedural Unconscionability:** Arises when one party to the contract lacks or is deprived of any meaningful choice regarding the terms of the contract due to
 1. **inconspicuous** print,
 2. **unintelligible** language,
 3. lack of opportunity to **read the contract** before signing, or
 4. lack of **bargaining power**.
- B. **Substantive Unconscionability:** Arises when the terms of the contract substantially deprive one party of the benefit of its bargain or of any meaningful remedy for breach by the other party. Put another way, the terms of the contract are so grossly unfair as to “shock the conscience” of the court.
- C. Courts generally require both substantive and procedural unconscionability; however, some courts have refused to enforce a contract based solely on substantive unconscionability.
- D. Unconscionability is tested when the contract is formed. UCC § 2-302(1).
- E. If a court determines the contract was unconscionable when made, it may
 1. **refuse** to enforce the contract *in its entirety*,
 2. **sever** the unconscionable clause and enforce the remainder, or
 3. permit the unconscionable clause to be applied only if its **effect** is not unconscionable. *Id.*
- F. The doctrine is designed to prevent oppression and unfair surprise, not to disturb the parties’ allocation of risks due to superior bargaining power. *See id.* cmt. 1.
- G. Unconscionability is a question of law for the court, *see id.* cmt. 3, but can usually only be decided after the jury has made findings of fact.