



# EuropaInstitut

AN DER UNIVERSITÄT ZÜRICH

RECHT BERATUNG WEITERBILDUNG

## Introduction to US business law Contracts

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Prof. Dr. Andreas Kellerhals

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# Repetition – Last week (1)

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- > Civil Procedure
  - > Federal code of civil procedure
  - > Role of the judge
- > Federal / State Courts
  - > 35 states adopted federal rules
  - > differences
- > 4 stages of a civil procedure
  - > pleading
  - > Pre-trial
  - > Trial
  - > Post-trial

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# Repetition – Last week (1)

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- > Specialities civil procedure
  - > Extensive pretrial discovery
  - > Heavy reliance on live testimony (jury)
  - > Aggressive pretrial motions
    - > Summary judgment
    - > Settlement
  - > Class actions
  - > Punitive damages
  - > Lawyers fees (no „loser pays“ rule)

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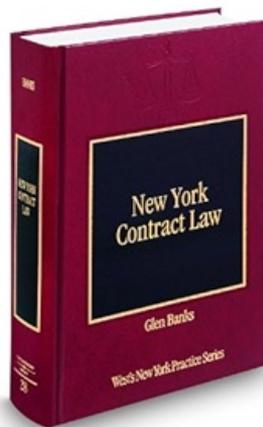
# Contracts - Basis (I)

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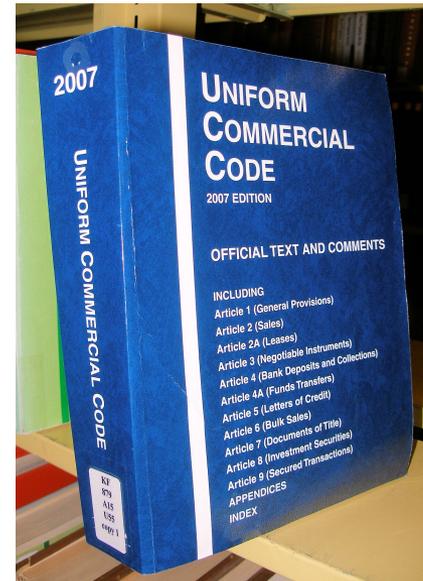
- > Common law (England)
  - > Basically till today
  - > Individual states have own contract law
    - > Contract law is state law
  - > Statutes
  - > Too many different regulations by the end of 19th century
  - > Harmonization movement
  - > National Conference of Commissioners on Uniform State Laws (NCCUSL)
  - > 1942 Uniform Commercial Code – **model law** (UCC)
    - > Esp. Sales contract (UCC Art. 2)
- > Freedom of contract = CH

# Contracts - Basis (II)

## > New York Contract Law



## UCC



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# Contract - Nature (I)

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- > Contract = agreement (promise) that the law will enforce
  - > Most contracts consists of mutual promises between two or more parties
- > Contract/agreement?
- > Content of a contract
  - > to create obligation to do or refrain from doing something
- > Initiated by the offer (offeror)
- > Acceptance by the offeree
- > Legally binding only if either
  - > Contract is formalized (speciality contracts) or
  - > Supported by consideration (simple or informal contracts)
  - > In exceptional cases: promissory estoppel (fairness)

## Contract - Nature (II)

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- > Simple contracts are either
  - > Unilateral or
    - > Posting a reward (bring back dog)
    - > Dog against money
  - > Bilateral
    - > F.e. selling goods

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# Contract - Nature (III)

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- > Sealed contract
- > Formalization consists of
  - > Contract signed
  - > Sealed (wax, sign)
  - > And delivered
  - > (witnessed)
    - > Most states got rid of sealed contracts
- > States know certain types of contracts that must be in writing
  - > Promise to pay debt for somebody else
  - > Promise to marry
  - > Agreements involving real estate
  - > Insurance contracts
  - > Sale of goods over US\$ 500

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# UCC (1)

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- > National Conference of Commissioners on Uniform State Laws (NCCUSL)
- > 1942 Uniform Commercial Code – **model law** (UCC)
- > a comprehensive set of laws governing all commercial transactions in the United States.
- > not a federal law, but a uniformly adopted state law.
- > Uniformity of law is essential in this area for the interstate transaction of business.
- > UCC has been called “the backbone of American commerce.”
- > Of special importance: Art 2 – sales of goods

## UCC (2)

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- > Art 1 – General provisions
- > Art 2 – sales
- > Art 3 – leases
- > Art 4 – funds transfers
- > Art 5 – letter of credit
- > Art 6 – bulk sales (Massenverkäufe)
- > Art 7 – documents of title
- > Art 8 – investment securities
- > Art 9 – secured transactions

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# UCC - Contract Formation (I)

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- > Issue: how does an agreement become an enforceable obligation in contract law?
- > UCC distinguishes between
  - > Agreement (parties bargain in fact)
    - > Not enforceable
  - > Contract (resulting legal obligation)

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# UCC - Contract Formation (II)

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- > A contract needs **3 elements: offer (1), acceptance (2) and consideration (3)**
  - > Offeror/offeree
  - > No fixed form required (writting, informal, conditional)
    - > Excp: „firm offer“ = binding
  - > Just „meeting of the minds“
  - > Basic test: whether the recipient could reasonably believe that he can conclude a contract by accepting the offer
  - > Expressis acceptance
    - > *Specht v. Netscape, 306 F.3d 17 (2d Cir.2002)* simply clicking download button does not indicate agreement to the terms of a contract if those terms were not consipicuous
  - > Or by any reasonable means
    - > Expl. Acting accordingly
  - > Informal approach except formality is required by law!

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# UCC - Contract Formation (III)

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- > Acceptance by common law needs:
  1. It must be made by a party to whom the offer is addressed
  2. it must be in the terms of the offer
  3. The offeree must know of the offer at the time he accepts, and
  4. The acceptance must be communicated to the offeror to be effective

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## Contract - Nature (IV)

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- > For an agreement to become a legally binding contract is needed:
  - > Offer
  - > Acceptance
  - > **Consideration (3)**  **Contract Components**
  - > Performance
  
- > By a reasonable person
- > Sufficient clear
- > Essential points
- > Able person (> 21, mostly 18) – otherwise impeachable, not void

# Consideration (I)

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- > Complex concept
- > Major difference common law/civil law
- > ~ mutually bargained-for exchange between the parties
- > Idea of «*do ut des*»
- > Each side has to receive something in exchange for what they give
- > Agreement without consideration = illusory, not binding
- > Some states today accept written contracts as consideration

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# Definition of consideration

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- > ***Currie v Misa*** (1875) LR 10 Ex 153; (1875–76) LR 1 App Cas 554, is an English contract law case, which in the Exchequer Chamber contains a famous statement by Lush J giving the definition of consideration in English law. Lush J said,
- > **A valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility, given, suffered, or undertaken by the other...**
- > Something of value

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## Consideration (II)

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- > A binding agreement generally requires „consideration“
  - > An exchange/or promise to exchange of something of value
  - > Consideration separates purely gratuitous promises
  - > Consideration = bargain for and given in exchange for performance or performance or a promise of performance by the offeree.
  - > To do something or promise to do something that he does not legally have to do or promise to forbear or forbear from doing something that he has the legal right to do
  - > Usually money for goods/services
  - > Mostly relevant for promises

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## Consideration (III)

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- > Each party of a contract must provide something of value that induces the other to enter the agreement
- > Value exchanged not equivalent
- > Expl. Car for not smoking for 5 years
- > Sufficient consideration?
  - > Courts typically focuses more on offeree
  - > Offeree has to suffer a „legal detriment“ = to give up a legal right

## Consideration (IV)

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Expl. (Bonfield)

- > Prof. Banks promises to give you an A on your exam
- > Prof. Banks promises to you an A if you always attend the class
- > If you get a D although attending the class can you sue Prof. Banks?
- > Only in second expl. is consideration
  - > More serious commitment
  - > Each side has undertaken to act in exchange

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## Consideration (V)

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- > Consideration can be **anything of value**
- > Each party has to agree to exchange if contract is to be valid
- > If only one party offers consideration, agreement is not a legally binding contract
- > „something must be given or promised in exchange or return for the promise“
  - > Also mutual promises
- > Without consideration, a agreement is not a legally enforceable contract

# Consideration (VI)

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- > Consideration does **not need to be adequate**
  - > To be „good“, consideration must be of some value, even minimal value
  - > Courts will not measure, that is up to the parties
  - > Consideration can be in any form
    - > Even a peppercorn would be sufficient
  - > Gross inadequacy of consideration may raise issues of capacity to enter the contract and of fraud

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## V. Consideration (VII)

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- > But: Consideration **must be sufficient** but not equal
  - > Not for a past event
  - > F.e. not for a meal already eaten
  - > *Case: Eastwood v. Kenyon*
    - > Guardian raised loan to educate young girl to improve her marriage prospects
    - > After marriage, husband promised to pay off loan
    - > Guardian could not enforce because past.

# Consideration (VIII)

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- > Illusory consideration
  - > Must be some kind of connection between a promise and consideration
  - > No consideration is to „refrain from a conduct which was never intended to pursue“

## Consideration (IX)

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- > Certainty
  - > Consideration is good where it can be expressed in economic terms
  - > Court held: promise to stop complaining about something has no economic value
- > Promise to perform an existing duty to the other party is not good
  - > But ok to third party

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# Consideration (X)

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- > Substitutes for consideration:
  - > **Seal**
    - > Under common law if a contract was under seal the seal served as a substitute for consideration
    - > Today most states have abolished any difference between sealed and unsealed contracts
  - > **Promissory estoppel**
    - > Allows for the enforcement of promises which are not supported by consideration
    - > If otherwise there is injustice

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# Promissory Estoppel

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- > Reasonable reliance on otherwise (non enforceable) promise
  - > A promise on which someone reasonably can rely
- > Fairness
- > Paying for goods that someone did not order but is using
- > Needs interpretation of contract
  - > An example of promissory estoppel is where A promises B that he would not enforce his legal rights and B acted and relied on it without giving any consideration, equity would not allow A to renege on his promise to B.
- > More recent: concept of unjust enrichment

# Unjust enrichment

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- > Unjust enrichment is an equitable doctrine that requires a party to make restitution to another if they have been enriched at the other party's expense.
- > **Court Opinions:** The doctrine applies when there is no adequate remedy at law and there is no contract between the parties.
- > Unjust enrichment may be referred to as a “**quasi-contract**” or “implied contract” claim
- > it provides equitable relief in the absence of an enforceable contract.

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# Enforceability of a promise

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> Promises may be enforceable on four basic grounds:

1. The promise was supported by consideration
2. There was reliance on the promise by the promisee (offeree)
3. The promise was in writing and sealed, or
4. There was unjust enrichment of a party

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# Interpretation

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- > When interpreting a contract, assess what the parties intended
- > Factors:
  - > Terms of contract
  - > Course of performance
  - > Course of dealing
  - > Trade usage
- > Ambiguity: such terms will be interpreted in favor of the party who had less reason to know of the ambiguity
- > All contracts are assumed to include a term requiring performance in good faith

# Form

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- > Generally no specific form needed
- > Some contracts need written form
  - > Promise to marry
  - > Bailment (Bürgschaft)
  - > Real estate (rights for longer than a year)
  
- > *Case Buffaloe v. Hart, 114 N.C. App. 52 (1994)* regarding formality and part performance
  - > Sales of goods exceeding \$500 is governed by the UCC
  - > UCC calls for a written agreement

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# Breach of Contract (1)

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- > Unjustifiable failure to perform a contractual duty
  - > Also only partially
- > Defenses
  - > No valid contract
  - > Lack of capacity (drunk)
  - > Mistake (mutual/unilateral)
  - > Changed circumstances
  - > Fraud
  - > Duress/intoxication
  - > Public policy

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# Breach of Contract (2)

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- > Remedies
  - > General damages = Money damages
    - > Including consequential damages
    - > Sometimes punitive damages
  - > Restitution (f.e. overshoot of house)
  - > Specific performance (duty to perform)
    - > Only when monetary damages do not adequately redress the injury
    - > Exception, specially for unique goods – f.e. selling antiques, realestate)
  - > Liquidated damages
    - > Damages specified in the contract by agreement

## conclusion

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- > US contract law not very different from European concept
- > Harmonized state law
- > Based on common law, less statutory regulations
- > Main difference: Consideration
- > Most relevant in cases with promise to do something in the futur

# Drafting US Contracts (1)

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- > Fact: longer than continental European ones
- > Why?

# Next time – after Easter break

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**Torts**