*Chapter 8*

**Agreement and Consideration**

**in Contracts**

Answers to Learning Objectives/

Learning Objectives Check Questions

at the Beginning and the End of the Chapter

**Note that your students can find the answers to the even-numbered *Learning Objectives Check* questions in Appendix E at the end of the text. We repeat these answers here as a convenience to you.**

**1A.** ***What are the four basic elements necessary to the formation of a valid contract*?**The basic elements for the formation of a valid contract are an agreement, con­sid­eration, contractual capacity, and legality.

**2A.** ***How does a void contract differ from a voidable contract? What is an unenforceable contract?*** A void contract is not a valid contract—it is not a contract at all. A voidable con­tract is a valid contract, but one that can be avoided at the option of one or both of the parties.

An unenforceable contract is one that cannot be enforced because of certain legal defenses against it.

**3A.*****What are the elements that are necessary for an effective acceptance?*** An acceptance is a voluntary act on the part of the offeree that shows assent, or agreement, to the terms of an offer. The acceptance must be unequivocal and must be timely communicated to the offeror.

**4A.*****How do shrink-wrap and click-on agreements differ from other contracts? How have traditional laws been applied to these agreements?*** With a shrink-wrap agreement, the terms are expressed inside the box in which the goods are packaged. A click-on agreement arises when a buyer, completing a transaction on a computer, is required to indicate his or her assent to the terms by clicking on a button that says, for example, “I agree.”

Generally, courts have en­forced the terms of these agreements the same as the terms of other contracts, applying the traditional common law of contracts. Article 2 of the UCC provides that acceptance can be made by con­duct. The *Restatement (Second) of Contracts* has a similar provision. Under these provi­sions, a binding contract can be created by conduct, including con­duct accept­ing the terms in a shrink-wrap or click-on agreement.

**5A.*****What is consideration? What is required for consideration to be legally sufficient?*** Consideration is the value exchanged for a promise. To be legally sufficient, consideration must be “something of legal value.” This may include (1) a promise to do something that one has no prior legal duty to do, (2) the performance of an act that one is otherwise not obligated to do, or (3) the refraining from an act that one has a legal right to do.

Answer to Critical Thinking Question

**in the Feature**

# Adapting the Law to the Online Environment—Critical Thinking

***How can a company structure e-mail negotiations to avoid “accidentally” forming a contract?*** The company should make sure that all e-mail conversations explicitly indicate that they are subject to any relevant conditions and that they are subject to further review and comment by the senders’ clients or colleagues. All negotiations via e-mail should include appropriate disclaimers such as “This email is not an offer capable of acceptance.” or “This e-mail does not evidence an intention to enter into an agreement.” or “This e-mail has no operative effect until a definitive agreement is signed in writing by both parties.” Another possibility is to indicate that “No party should act in reliance on this e-mail until a definitive contract is signed in writing by both parties.”

Answers to Critical Thinking Questions

**in the Cases**

**Case 8.1—Critical Thinking—Economic Consideration**

***What did the amount of the jury’s award of $686,000 in damages represent? Explain.*** The amount of the jury's damages award on Vukanovich’s breach of contract claim reflects approximately that portion of the profits from the property to which Vukanovich would have been entitled if the property had been purchased jointly with Kine, according to the terms of their agreement. Of course, the jury based this amount on evidence presented at the trial.

**Case 8.2—What If the Facts Were Different?**

***Suppose that the day after Lucy signed the agreement, he decided that he did not want the farm after all, and that Zehmer sued Lucy to perform the contract. Would this change in the facts alter the court’s de­cision that Lucy and Zehmer had created an enforceable contract? Why or why not?*** No. In fact, this would likely support the court’s determination that there was an enforceable contract between the parties. In this circumstance, un­less Lucy attempted to void the contract on the ground of intoxication, the court might not have addressed the issue at all.

**Case 8.3—Critical Thinking—Economic Consideration**

***Why would any party agree to a covenant not to sue?*** The simple answer is money. When a party believes it to be an advantage to agree to a covenant not to sue, that party is most likely to agree. In the example in the text, the party whose car was damaged in the accident agrees not to sue if the other party will pay for the damage. This agreement saves the time and money that a suit for damages might require for both parties.

In the *Already* case, the covenant not to sue has similar advantages for the parties—both can continue to do business without changing their product lines and without the costs of trademark infringement or invalid trademark litigation.

Answers to Questions in the Reviewing Feature

at the End of the Chapter

**1A.** ***Requirements of a contract***

The four requirements for any contract to be valid are agreement, consideration, capacity, and legality.

**2A.** ***Type of contract***

Yes, Duncan had a valid contract with Mitsui for employment as credit develop­ment officer. The contract was bilateral because it was a promise for a promise—to work in exchange for compensation. No performance was necessary. The con­tract existed as soon as the promises were exchanged. The contract was valid be­cause the parties had an agreement, consideration (employment in exchange for payment), capacity (presumed, especially with businesses and businesspersons), and the agreement was legal.

**3A.** ***Implied contract***

Implied contracts are contracts formed by the parties’ conduct rather than by their words. For an implied-in-fact contract to exist, the plaintiff must furnish some property or service to the defendant expecting to be paid, the defendant must know or should know that the plaintiff expects to be paid, and the defendant must have a chance to reject the property or service and does not.

**4A.** ***Employment manual and written compensation plan***

To establish an implied contract in these circumstances, the plaintiff must have furnished a service to the defendant expecting to be paid, the defendant must have known that the plaintiff expected to be paid, and the defendant must have had a chance to reject the service. Here, Duncan provided service as a credit development officer to Mitsui, who hired and agreed to pay him for this service and accepted the service as it was rendered. Presumably, the initial hiring and duties of the position were discussed between the parties, if not put in writing, and were thus express, not implied. But the terms set out in the employment manual and written compensation plan were clearly express, not implied, as indi­cated by the quote from the plan.

Answer to Debate This Question in the Reviewing Feature

at the End of the Chapter

***The terms and conditions in click-on agreements are so long and de­tailed that no one ever reads the agreements.  Therefore, the act of clicking “Yes, I agree.” is not really an acceptance.*** The terms and conditions included in click-on agreements have become so detailed, confusing, and most importantly, long, that no one would ever take the time to read one.  Knowing, though, that one is unable to purchase or license a product or service purchased on the Internet with­out clicking “yes” means that everyone just clicks “yes.”  That is far from what we normally believe is voluntary assent.  Indeed, the choice is all or nothing—accept all terms and conditions or do not buy from us.

There appears to be no acceptable alternative to click-on agreements when buying a good or service on the Internet.  No company would ever eliminate the click-on agreement from its e-commerce system because it would be exposing itself to even more potential lawsuits.  The reason such click-on terms and conditions are so numerous is specifically to avoid frivolous and expensive lawsuits.  As a re­sult, ultimately, overall costs are lower for e-commerce, and therefore consumers pay lower prices in general.

Answers to Issue Spotters

at the End of the Chapter

**1A.** ***Dyna tells Ed that she will pay him $1,000 to set fire to her store, so that she can collect under a fire insurance policy. Ed sets fire to the store but Dyna refuses to pay. Can Ed recover? Why or why not?*** No. This contract, although not fully executed, is for an ille­gal purpose and therefore is void. A void contract gives rise to no legal obligation on the part of any party. A contract that is void is no contract. There is nothing to enforce.

**2A.** ***In September, Sharyn agrees to work for Totem Productions, Inc., at $500 a week for a year beginning January 1. In October, Sharyn is offered the same work at $600 a week by Umber Shows, Ltd. When Sharyn tells Totem about the other offer, they tear up their contract and agree that Sharyn will be paid $575. Is the new contract binding? Explain.*** Yes. The original contract was ex­ecutory—that is, not yet performed by both parties. The parties rescinded the original contract and agreed to a new contract.

Answers to Questions and Case Problems

**at the End of the Chapter**

**Business Scenarios and Case Problems**

**8–1A** . ***Unilateral contract***

Yes, these parties had a contract. Contests, lotteries, and other competitions for prizes are offers for contracts. Here, the offer is phrased so that each competitor can accept only by completing the run. At that point, a contract is formed—a uni­lateral contract—binding its sponsor to perform as promised. Rocky did not breach the contract when the prize was changed. Under the rules, Rocky could change the terms at any time.

**8–2A. *Intention***

For an offer to exist, the offeror must show a definite intention to make and be bound by the offer. Invitations to trade or negotiate or mere statements of inten­tions to enter into a contract upon further bargaining do not constitute offers but are instead preliminary ne­gotiations. Thus, any attempted acceptance would not bind the parties to a contract as there is no offer in existence to be accepted. Sullivan stated only a price from which to bargain further, not an intention of a definite commitment to sell at $60,000. There is no contract between Sullivan and Ball.

**8–3A. *Contract classification***

Yes, Firestorm and Scott had a contract. The letter was a unilateral offer phrased so that the offeree could accept only by completing the required performance. The contract was formed when the performance was complete. This was a unilateral contract. Here, Scott accepted the offer by passing the medical exam. Firestorm breached the contract when the new crew chief rejected Scott, who had already received the offer and accepted it. The appropriate remedy would be to allow Scott to attend Firestorm’s training sessions.

**8–4A. Spotlight on Kansas City Chiefs—*Lack of consideration***

No, there was no consideration for the arbitration provision. Consideration is required to create a bilateral contract. Consideration is something of legally sufficient value given in return for a promise. The “something of legally sufficient value” may consist of either a promise to do or refrain from doing something or a transfer of something of value.

In this problem, the arbitration “agreement” contains promises made only by Sniezek. Only Sniezek agrees to comply at all times with and be bound by the constitution and bylaws of the National Football League (NFL). Only Sniezek agrees to refer all disputes to the NFL Commissioner for a binding decision. Only Sniezek agrees to release the Chiefs from any related claims on the Commissioner's decision. Nowhere in the document do the Chiefs agree to do anything. Thus, the document does not contain any promises by the Chiefs to constitute sufficient consideration for Sniezek's promise to forgo her right of access to the courts and arbitrate her claims against them.

The Chiefs might argue that the “agreement” was a condition of Sniezek's keeping her employment, which the Chiefs had already offered her and she had already accepted. But the document did not alter the nature of her employment relationship—no employment contract was created, no additional compensation or other benefit was offered. Consequently, allowing Sniezek to stay on the job was not sufficient consideration to support a promise to arbitrate.

In the actual case on which this problem is based, Sniezek filed a charge of age discrimination against the Chiefs in a Missouri state court, and the Chiefs filed a motion to compel arbitration. The court denied the motion, and a state intermediate appellate court affirmed the denial for the reasons stated above.

**8–5A. *Implied contracts***

Yes, Allstate was liable under the homeowner’s policy. A contract that is implied from the conduct of the parties. This type of contract differs from an express contract in that the conduct of the parties, rather than their words, creates and defines the terms of the contract. For an implied contract to exist, a party must furnish a service or property (which includes money), the party must expect to receive something in return for that property or service, and the other party must know or should know of that expectation and had a chance to reject the property or service but did not. Of course, a contract may be a mix of express and implied terms.

In this problem, the homeowner’s policy was a mix of express and implied terms. As for the elements showing the existence of the implied terms, the payments for the premiums on the policy continued after Ralph’s death, but the amounts were paid from Douglas’s account. Undoubtedly, Douglas expected to receive coverage under the policy in return for his payments. The insurer Allstate must have known that Douglas expected the coverage—insurance has long been Allstate’s business, and the company obviously understands the relationship between the payments of premiums and the expectation of insurance coverage. And Allstate had the opportunity to cancel the homeowner’s policy—as it had with Ralph’s auto insurance, which was canceled—but did not terminate it.

In the actual case on which this problem is based, the court issued a judgment in Allstate’s favor on the implied contract issue. The U.S. Court of Appeals for the Sixth Circuit reversed this judgment—“A reasonable fact-finder could determine that [Allstate’s] continuation of the premium payments constituted a contract implied in fact with Douglas.”

**8–6A . Business Case Problem with Sample Answer—*Consideration***

Citynet’s employee incentive plan was an offer for a unilateral contract. A Citynet employee who stayed on the job when he or she was under no obligation to do so could be considered to have accepted Citynet's offer and to have provided sufficient consideration to make the offer a binding and enforceable promise. Consideration has two elements—it must consist of something of legal value and must provide the basis for the bargain between the parties. A unilateral contract involves a promise in return for performance. The promisor becomes bound to the contract when the promisee performs, or in many cases begins to perform, the act. Both the promise and the performance have legal value.

Here, Citynet set up an employee incentive plan“to attract and retain experienced individuals.” The plan provided that a participant who left Citynet’s employ could “cash out” his or her entire vested balance. When Ray Toney terminated his employment and asked to redeem his vested balance, however, Citynet refused. But Toney had long stayed on the job when he did not have to. This was sufficient consideration to make Citynet’s offer under the incentive plan a binding and enforceable contract with Toney.

In the actual case on which this problem is based, a West Virginia state court issued a judgment in Toney’s favor. The West Virginia Supreme Court of Appeals affirmed, on the reasoning and principles stated above.

**8–7A. *Quasi contracts***

The appellate court reversed the lower court’s award to Clarke of $900,000 in damages on a quasi contract theory because the dispute fell under Draeger’s contract with Clarke. The doctrine of quasi contract generally does not apply when an existing contract covers the area in controversy. In that circumstance, the nonbreaching party can sue the breaching party for breach of the contract.

Here, Lawrence M. Clarke, Inc. was the general contractor for the construction of a portion of a sanitary sewer system. Kim Draeger proposed to do the work for a certain price, and Clarke accepted. Draeger arranged with two subcontractors to work on the project. But Draeger and the subcontractors provided less than perfect, competent, or complete work. Clarke filed a suit in against Draeger to recover damages on a theory of quasi contract. The court awarded Clarke damages on that theory. An appellate court reversed this award because all of the work and its disputed performance was covered by Draeger’s contract with Clarke.

In the actual case on which this problem is based, in Clarke’s action against Draeger, the court chose to decide the case under the theory of quasi contract. A state intermediate appellate reversed the decision on the ground stated above.

**8–8A. *Requirements of the offer***

No, TCP is not correct—the bonus plan was not too indefinite to be an offer. One of the requirements for an effective offer is that its terms must be reasonably definite. This is so a court can determine whether a breach has occurred and award an appropriate remedy. Generally, these terms include an identification of the parties and the object or subject of the contract, the consideration to be paid, and the time of performance.

In this problem, TCP provided its employees, including Bahr, with the details of a bonus plan. A district sales manager such as Bahr who achieved 100 percent year-over-year sales growth and a 42 percent gross margin would earn 200 percent of their base salary. TCP added that it retained absolute discretion to modify the plan. Bahr exceeded the goal and expected a bonus commensurate with her performance. TCP paid her less than half what its plan promised, however. In the ensuing litigation, TCP claimed that the bonus plan was too indefinite to constitute an offer, but this was not in fact the case. Clear criteria applied to determine an employee’s eligibility for a certain amount within a specific deadline. A court asked to apply the plan would have little or no doubt as to the amount an employee would be entitled to. The term that reserved discretion to TCP to modify the plan did not sufficiently undercut the clarity of the offer to prevent the formation of a contract.

In the actual case on which this problem is based, the court concluded that the reservation of discretion to revoke a plan makes an offer too indefinite and issued a judgment in TCP’s favor. A state intermediate appellate court reversed this judgment, holding that TCP’s plan was a sufficiently definite offer.

**8–9A. A Question of Ethics—*Dispute-settlement provisions***

**1.** The court held that the arbitration clause was not a part of the con­tract between Dell and the plaintiffs, and that if the clause were a part of the con­tract, it would be unenforceable because it was unconscionable. Dell appealed to a state intermediate appellate court, which reversed the lower court’s holding and remanded the case. The appellate court held that the plain­tiffs were bound by Dell’s terms, including the arbitration clause.

The appellate court emphasized in part that the blue hyperlink entitled “Terms and Conditions of Sale” appeared on many of the Web pages completed in the ordering process. A statement on three of those pages explained that sales were subject to those terms. The court reasoned that these statements placed a reasonable person on notice that there were terms attached to a pur­chase and that the hyperlink's contrasting blue type made it conspicuous. The court also found that these particular purchasers were not novices with re­spect to comput­ers, as shown by their ability to configure their own computers before making their purchases and to distinguish the speeds among different types of processors.

**2.** Arguments for and against these terms are discussed in the text. As long as shrink-wrap, click-on, and browse-wrap terms are fair and reason­able, it could be maintained that they do not impose too great a burden on pur­chasers, even though most of whom are individual consumers. Without such terms, a mer­chant might find itself embroiled in numerous lawsuits in far-flung locales over relatively small sums and thus might be less willing to do business, or would only agree to do business limited in some other way. This would work to the advantage of almost no one.

When such terms are too one-sided, or oth­erwise unfair, however, it could be argued that the burden on consumers is too great, especially if the un­fair terms are enforced. In those cases, to avoid an on­erous burden, a consumer might need to read the terms intelligently and to have them considered by an attorney. This would also seem to work to no one’s ad­vantage.

**3.** Sometimes, it is asserted that most buyers, especially individual con­sumers, do not read shrink-wrap, click-on, or browse-wrap terms. The law does provide ways to avoid these terms for consumers who have been taken ad­vantage of by a clause in “fine print” or “legalese” that the consumers may not have read and may not even have known about. These avenues include protec­tion against fraud, unconscionability, and adhesion contracts, as well as con­sumer protection statutes.

It could be argued, however, that a party should be held to the terms of a contract whether or not he or she has read them, be­cause a claim not to have read a particular term is a subjective asser­tion too easy to make. Allowing such claims would undercut the careful nego­tiation and drafting of contracts, the basic free­dom to contract, and the law’s principle of enforcing the contracts that parties have made.

**Critical Thinking and Writing Assignments**

**8–10A. Business Law Critical Thinking Group Assignment**

**1.** Terms that most likely favor the business that created them include forum-selection, dispute-resolution, limited liability, disclaimer, and remedies provisions. Other favorable terms might include agreements to receive notices, ads, and “member” e-mail electronically. The details of the object or subject matter of the contract, including performance and payment provisions, might also favor the party that drafted the terms.

**2.** A privacy statement of terms most likely benefits the individual user or consumer. Other terms can also favor the individual—a provided remedy might be more suitable, for example, or a selected forum might be more convenient, than other, unspecified options.

**3.** Any terms that are onerous, burdensome, or unconscionable from the individual user’s point of view would favor the company too much. A disclaimer of liability for any injury or damage, whatever its cause, would most likely be unconscionable, for example.