

# INTRODUCTION TO ENGLISH AND AMERICAN LAW

4th Edition

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## AMERICAN CONTRACT LAW

Inspired by common law, the foundations of American contract law are primarily to be found in the abundant case law of the courts.

However, it should be remembered that for the sake of efficiency in specific areas - and without abandoning the Uniform Commercial Code (UCC) adopted by forty-nine states, which we will return to - written law now occupies a place of choice.

As in labor law or in the field of securities trading. The classic definition of a contract in American law is not far from that retained in England or Wales: it is the commitment (or contractual promise) recognized by law and which gives rise to rights but also to duties (give rise to rights and obligations).

This definition has been the subject of numerous interpretations by American jurisdictions, both federal and state.

### Section 1 - Different Types of Contracts

American law, like French law, feels the need to enumerate the various types of contracts in order to better understand their nature and legal implications.

Table 3.1 Different contracts in American law

Main contracts	Observations
<b>Bilateral contract</b>	The parties have reciprocal obligations (synallagmatic contract): e.g. sales contract
<b>Unilateral contract</b>	Very different from the unilateral contract of French law (only one party has obligations towards the other); there is a search in American law for a particular performance
<b>Express contract</b>	Contract clearly negotiated between contracting parties, either in writing or orally (terms stated in words-orally or in writing – by the parties)
<b>Implied-in-fact contract</b>	Terms of the contract not clearly negotiated, but contract deduced by conduct or by previous business relations

Without truly denying them, American law does not attach importance to other contractual "compartments" of Romano-Germanic law (e.g. commutative contracts, for consideration or gratuitous, aleatory, instantaneous, mutual agreement, etc.), distinctions considered vain or of little use to the analysis of commitment.

### Section 2 - Rules of Contract Formation

Drawing inspiration from common law principles (e.g. reference to the man of ordinary behavior), American law attaches great importance to the explicit notion of meeting of minds of the parties.

The will must be commutative, reciprocal, and the contractual relationship is born from the meeting of wills expressed by the contracting parties. This is the famous "meeting of the minds," which presupposes an offer and an acceptance.

#### 1. The Offer

The offer results from the commitment to want to achieve a specific objective or, on the contrary, to prevent oneself from reaching it: to do or not to do.

From the affirmation of this rule, it follows that the offer must express a conviction, an intention:

- **Stable and firm**, therefore not susceptible in principle to modifications;
- **Precise and clear**, that is to say not subject to caution: the contract will include objective elements in sufficient number (e.g. identity of the parties, object of the contract, its price, its duration...);
- **Duly transmitted to the co-contractor** (offer made by the offeror to the offeree and the offer must be communicated to the offeree.)

Furthermore, American contract law relating to the effects of acceptance of the offer does not worry about knowing whether, as in French law, one theory prevails over another, by affirming quite simply that if the offeror revokes his offer (which is always possible), this decision will only produce its effects upon receipt of the offer by the recipient.

There also exists, in consensual matters, the notion of option contracts, according to which the offer is irrevocable for a certain specified period of time. From this important and frequent case, it follows:

- That an indefinite offer does not bind the offeror indefinitely, but only for a reasonable time (left to the appreciation of the courts);
- Conversely, that an offer made for a pre-defined period of time will no longer produce (contractual) effects beyond this deadline.

As in England, an offer no longer produces effects when one of the following cases occurs:

- Death, either of the promisor or of the recipient before acceptance;
- Rejection of the offer by the recipient;
- Revocation of the offer before any acceptance;
- Refusal to accept within the time period stipulated in the offer, or within a reasonable time (within reasonable time).

Would American law be simplistic (reference to the man in the street, solutions marked with the seal of common good sense)?

Certainly not, the clarity and simplicity of legal rules in contractual matters ensure jurisprudence great flexibility of interpretation and, above all, allow the litigant to somewhat unravel the skein of justice, which is theoretically rendered in his name.

## 2. Acceptance

In what ways should or can an offer be accepted in American law?

It is appropriate, first, to analyze the very terms of the offer to know the different possible forms of acceptance.

What if the offer contains no indication on the question? American law responds that acceptance can be transmitted to the offeror by all useful and reasonable means.

The problem of the silence of the offer recipient arises, as in Romano-Germanic law, for American judges. Does silence constitute consent, therefore acceptance of the offer?

In this case, a general principle of law applies: silence does not constitute consent. A contractual relationship arising from the silence of the recipient is possible, to the exclusion of all others, only in one case: previous and repeated business relations.

Furthermore, if the recipient modifies the terms of the offer in his acceptance in principle, this change is analyzed in common law as a counter-proposal, therefore a new contract subject this time to the agreement of the initial offeror.

But, the Uniform Commercial Code, in its article 2-207, allows the recipient to propose - within reasonable deadlines - amendments to the offer made to him, to which the original offeror can subscribe on condition, in principle, that this agreement is explicitly provided for (mirror image rule).

These additional clauses made in good faith (article 2-209) cannot, however, break or alter the general economy of the contract.

### 3. Consideration

Consideration or counterpart is, in the view of common law, an essential element in the formation of the contract. The foundation of this element is already very ancient; it was first issued in England in a case dating back to the 18th century (*Rann v. Hughes*, 1778).

American law has made this notion its own and has even clarified it (cf. the *Allegheny College v. National Chautauqua County Bank of Jamestown* case, 246 N.Y. 369 159 N.E. 173 [1927]).

The definition of consideration is close to that of English law: it is the commitment of a party, its promise to do or not to do something, even though the law does not oblige it to do so in any way.

Consideration has the following characteristics, all established by abundant and convergent case law:

- It may be insufficient (need not be adequate), but not insignificant or fictitious (these are specific cases);
- The counterpart or duty or promise that represents it must be contemporary with the proposal (besides the permissive rules of the UCC, minor modifications of the parties' obligations are, according to court jurisprudence, declared made with the original consideration);
- Consideration must not be vague and accompanied by conditions so important that the balance of the contract would be upset (notion of illusory promises).

Finally, we must observe another concept developed by American courts, whose purpose is to "save" the contract, but without stubbornness: the theory of promissory estoppel.

The idea is that the beneficiary of an offer may suffer unfortunate prejudice if the contract, which is moreover not contrary to law, were not executed.

This audacious analysis of disproportionate prejudice is also carried out on a case-by-case basis by American judges. It seems that in this circumstance the principles of equity have regained all their rights.

## Section 3 - Contractual Effects

American courts show great pragmatism, both in matters of interpretation of the parties' will and regarding defects in consent of a contractual commitment.

### 1. Interpretation and the Role of Judges

What is truly the field of investigation of judges faced with a contract that requires interpretation, either because the intention of the parties is imprecise, or because the terms of the contract do not receive, according to the parties in dispute, the same interpretation?

While once again making reference to the *bonus pater familias*, the courts have patiently developed a very useful rule, considered in the United States as the most efficient for probing the hearts and minds of contractors: the four corners test. This utilitarian instrument, whose objective is to allow the application of a contract by interpreting the will of the parties, is based on the following objective criteria:

- The written contract with precise and firm intentions, notion of integrated contract - is inviolable, oral evidence contrary to the written agreement is not admitted;
- The contract is considered as a whole and, consequently, must be interpreted in its entirety, from all four angles (e.g. all terms count, the genesis of the contract's development will be noted as well as established conditions or supposed conditions, etc.);
- When the judge has determined the important elements of the contract, he will interpret them in an ordinary way, stripping them of any sibylline technical meaning;
- Handwritten clauses of the contract, i.e. whose terms have been freely negotiated by the contractors, will always prevail over pre-printed commitments, of simple adhesion;
- All provisions specified in the contract, therefore specific to the cause, take precedence over more general provisions (for example drawn from neighboring contracts);
- It remains that, according to constant jurisprudence, the last version or draft of a contract, which by definition would include others but prior to the incriminated contract, is the only one that can be retained by the courts (parol evidence rule).

In practice, oral evidence, always delicate to administer, is exceptionally retained by courts only when it aims to remove any textual ambiguity.

## 2. Defects in Consent

American law recognizes three elements that can vitiate the consensual character of a contract.

### 2.1 Violence (duress or undue influence)

American law takes little interest in violence. It recognizes it easily, it is naturally denounced. This can be:

- **Physical** (use of force), we then speak of duress which is direct violence or even the threat of violence exercised on others (e.g. a relative);
- **Moral**, qualified as undue influence, such as intimidation or threats.

However, hesitant jurisprudence seems to want to make a breakthrough in this area thanks to the fluctuating notion of abuse of power within the framework of relations.

Despite this, jurisdictions, in general, still repugn to raise this notion of intentional contractual influence in the name of triumphant economic liberalism.

### 2.2 Mistake

More seriously taken into account by American courts is mistake of fact. To be retained, the mistake must be shared by both parties (the mistake must be common to both parties): for example, common mistake about the object of the contract.

Also, the mistake of a single co-contractor is insufficient to annul the contract, the contract is always valid. The logic that governs this attitude, drawn from common law rules, is implacable: if one party has made an error of judgment, by what right and for what reasons would we go penalize the other party?

Among the mistakes of fact that the judge will retain, we can cite:

- Mistake about the object of the contract (mistake as to the identity of the subject-matter);
- Mistake about the existence of the thing envisaged by the contract;
- Mistake about the identity of the person of the co-contractor.

As for legal error, of law, it is indefensible in justice, according to the adage "ignorance of the law is no excuse."

### 2.3 Fraud

Fraud is a much more conflictual notion. Although the terms differ, American law takes as severe a view of fraudulent intent, the deception of one party against another, as English law.

Table 3.2 - Comparison of English and American law regarding fraud

English Law	American Law
<p><b>Misrepresentation includes:</b></p> <ul style="list-style-type: none"><li>• Innocent misrepresentation, which deals with false factual statements, but non-intentional;</li><li>• Fraudulent misrepresentation, which assumes dishonest, intentional statements, seeking to deceive the other party (statements made for the purpose of inducing persons to make contracts).</li></ul>	<p><b>Fraud is articulated in 2 elements:</b></p> <ul style="list-style-type: none"><li>• Fraud in factum which relates to the concrete, material elements of the contract: its object;</li><li>• Fraud in the inducement which concerns the malevolent circumstances having led a party to contract: fraudulent declarations or incitations.</li></ul>

Should one tell everything to the other party when seeking to establish a contract or can one conceal certain information relating to the execution of the contract?

The question arose acutely from the beginning of the 19th century in the United States, in a famous case, whose principles remain: *Laidlaw v. Organ*, 15 U.S. (2 Wheat.) 178, 4 L. Ed. 214 (1817).

In this case, the Supreme Court specified that a party is not obliged to disclose to its co-contractor all the information it holds (in the occurrence about tobacco speculation during the War of 1812).

Despite this silence, the contract is perfectly enforceable and certainly not tainted with a cause for nullity.

The presence of one of the exposed defects in consent will thus be sanctioned by the courts:

- The absence of contract or its nullity, by declaratory judgment;
- Rescission for injury suffered or modification of contractual prestations, if the contract is maintained by the judge;
- Restitution of any undue sum, representing unjust enrichment.

### 3. American Particularisms in Contractual Matters

American law has introduced a new concept which is not without recalling nevertheless the Romano-Germanic notion of "active" injury: unconscionability.

Under the terms of this concept, now erected to the rank of theory, a party cannot suffer injustice, which offends the conscience of men and, as such, must be sanctioned. This injustice, which would affect a party to a contract, is twofold.

It is first said to be procedural, when a contractor has not freely committed himself, not being provided with all the decision elements. The imbalance appears flagrant and draws its explanation from simple data.

Injustice can, in these circumstances, be induced from a manifest misunderstanding of the contract provisions due to lack of education or from a signature affixed hastily, due to minuscule, numerous and, so to speak, illegible characters.

Second, inequity is said to be substantial, when the terms of the contract injure one party for the benefit of another. Thus, we can note as edifying examples the following cases: renouncing to sue or limiting recourse to it, imposing unreasonable prices, providing for derisory compensation in case of dispute...

The abuse of rights that judges do not hesitate to retain must of course be important, characterized, unbalancing and prejudicial.

The other specificity of American contract law is the fate reserved for the Statute of Frauds of 1677 drawn from English law.

While they have practically disappeared in English common law, the provisions must be noted in writing in order to serve as evidence. Under this text of law, a contract does not have to be drafted in writing, only its existence.

Any document allowing to attest that a contract has been concluded between two parties is therefore sufficient to demonstrate its existence. Consequently, written evidence capable of corroborating the conclusion of a contract will be retained by judges.

Also, by an irony of history, the Statute of Frauds imported as such to the United States receives a fairly faithful application of legal principles established in a totally different context, more than three centuries ago.

### 4. American Contracts and Their Different Conditions

A contract can be subject to conditions: its entry into force, the order of obligations covered by the contract, etc. American law recognizes the validity of these conditional clauses. They take distinct forms, among the most common, we note:

- **Express condition** or explicit condition, suffering no contestation;
- **Precedent condition**, suspended on the realization or occurrence or non-occurrence of a pre-defined event;
- **Constructive condition**, arising from law.

## Section 4 - Sanctions for Non-Performance of Contract

A party to a contract always has the possibility of invoking force majeure to free itself from its conventional obligations.

American judges do not easily admit the insurmountable and unforeseeable event, they thus join their Romano-Germanic law colleagues, but take as reference the same refrain: the reasonable man.

Would the latter, placed in the same circumstances, have acted in the same way? There ends the analysis of courts to recognize the merits of the request for exoneration or to reject it.

Apart from the duty, relating to limiting possible prejudice, that every contractor must fulfill, the injured party will do its best to restrict the damage suffered.

The "victim," by its conduct, will not add negative elements to the faulty non-performance of the co-contractor (notion of mitigation of damages).

Deemed injured by the non-performance of a contract (breach of contract), a party is able to receive damages, at the end of an action for damages. The objective of the legal claim is to obtain compensation, in view of the prejudice suffered.

Just as for fraudulent intent, American jurists resort to terminology different from that borrowed by English law, but whose effects are similar:

**Table 3.3 - Comparison of English and American Damages**

<b>English Law</b>	<b>American Law</b>
<p><b>English law envisages several kinds of damages:</b></p> <ul style="list-style-type: none"> <li>• General damages: financial compensation</li> <li>• Special damages: loss of gain, medical expenses (they must be proven)</li> <li>• Nominal damages: symbolic euro (1£)</li> <li>• Contemptuous damages: plaintiff receives only a penny for abusive claim</li> <li>• Exemplary damages: due to blameworthy conduct of defendant</li> <li>• Liquidated damages: compensation corresponding to amount initially provided in contract</li> <li>• Unliquidated damages: in view of circumstances, compensation is allocated to plaintiff by court</li> </ul>	<p><b>American law is more concise, retaining only three types of damages:</b></p> <ul style="list-style-type: none"> <li>• Expectancy damages: compensation aimed at repairing damage suffered by a party due to non-performance of contract (amount is often that provided in contract)</li> <li>• Reliance damages, which globally equals special damages of English law</li> <li>• Restitution damages compensate the supposed gain or enrichment lost by the party having suffered contract breach</li> </ul>

In practice, a judge can also order specific performance for things having certain body, but not for fungible things (or of kind), that is to say interchangeable.

It therefore appears evident that American contract law, derived in its quintessence from common law and equity rules, is a very pragmatic and non-dogmatic law.

This law of jurisprudential essence somewhat faded and freed in relation to English law seeks, systematically, when the cause requires it, to apply the contract.

This judicial propensity to respect "the law of the parties" is realized without however neglecting the legitimate rights of the defendant and, without injuring - a fortiori - such or such normative principle of the Law of Contracts.

This concept of flexibility, strongly tinted with consensualism, is so anchored in American law that it constitutes an important part of the first-year law program in American universities.

In other words, the future American jurist quickly learns that contractual commitment is at the heart of the legal system of the United States of America and that it represents the best vector of the dominant liberal-capitalist doctrine.

*\* Except for the law of the State of Louisiana, which draws its principles from the general theory of obligations, as it is determined in Romano-Germanic law.*

*\*\* This Uniform Commercial Code (UCC) – adopted by all federated states, except Louisiana which nevertheless applies most of the code's provisions – is the joint work of the American Law Institute and the Commissioners on Uniform State Law, under the direction of Professor Llewellyn. Completed in 1952, this code comprises 11 articles and its content, very complex, includes sections and subsections.*