Solution 1	Solution 2 (with variant)	Solution 3
	– Principles of European Contract Law (Art. 2:202(1) and (3); limitation: postal rule) **Consequences of an ineffective revocation of an offer** – Obligation to pay compensation (French law, Cour de Cass. 1972; TERRÉ, SIMLER, LEQUETTE no. 119 in *fine*) – Inadvertent revocation of an offer, contract is concluded by acceptance (e.g. Italian law, Art. 1329 CC; PECL)	

2. Further reading

HUGH BEALE, ARTHUR HARTKAMP, HEIN KÖTZ AND DENIS TALLON (eds), *Cases, Materials and Text on Contract Law* (Ius Commune Casebooks for the Common Law of Europe), Oxford: Hart Publishing, 2002, Ch. 2.1.2.C. Revocability of an offer, 194–206.

MELVIN A. EISENBERG, "The Revocation Of Offers", 2004 *Wis. L. Rev.* 271–308.

ALLAN FARNSWORTH, *Contracts*, 3rd edn, New York: Aspen Publishers, 2004, 152–55 (USA).

HEIN KÖTZ AND AXEL FLESSNER, *European Contract Law*, Vol. I (by Hein Kötz), Tübingen: Mohr Siebeck, 21–25.

CHARLES L. KNAPP, "An Offer You Can't Revoke", 2004 *Wis. L. Rev.* 309–22.

FILIPPO RANIERI, *Europäisches Obligationenrecht*, Wien/New York: Springer, 173 et seq.

VALERIE WATNICK, "The Electronic Formation of Contracts and the Common Law 'Mailbox Rule'", 56 (2004) *Baylor L. Rev.* 175–203.

Case 4: Modification of contracts – the free will of the parties or limits on the freedom to contract? ("*consideration*" revisited)

"It is not [...] surprising that a principle enunciated in relation to the rigours of seafaring life during the Napoleonic wars should be subjected during the succeeding 180 years to a process of refinement and limitation in its application in the present day."[1]

Scenario

Roffey Brothers, a construction company, enters into a contract to renovate 27 flats. The contract includes a penalty clause under which Roffey Brothers would incur liability to the other party if it was late in finishing the work.

Roffey Brothers sub-contracts to Williams, a carpenter, who committs to undertaking the carpentry work in the flats for £20,000. After completing some of the work, Williams runs into financial difficulties. He tells Roffey Brothers that the amount calculated for the carpentry work is too low and that it will not be possible for him to finish the work under such terms. In fact, the market price for such work is about £24,000.

At Roffey Brothers' request, the parties renegotiate the terms of the contract and provide for an increase in payment of £10,300, to be paid in instalments while the work is completed. Roffey Brothers has numerous aims in modifying the contract in such a way: (i) to get Williams to finish his work within the deadline; (ii) to avoid the application of the penalty clause in the contract[2]; and (iii) to avoid the problem and costs of finding and hiring a new carpenter.

Williams works again, but Roffey Brothers refuses to pay the extra money. Is the modification of the contract valid?

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1 *Glidewell*, L.J., in *Williams* v. *Roffey Bros and Nicholls (Contractors) Ltd.*, [1991] 1 QB 1, [1990] 1 All ER 512, at 522 (CA).

2 *Penalty clauses*, as opposed to *liquidated damages* clauses, are unenforceable under English law. A penalty clause serves to punish the party in breach and is unenforceable as such an aim is considered impermissible. A clause that stipulates an *excessive amount* of money to be paid in the event of a breach would be classified as a penalty clause. Even though they are unenforceable in English law, such a clause is not struck out of the contract, it is just not enforced by the courts beyond the actual loss of the party invoking it (*Jobson* v. *Johnson* [1989] 1 All ER 621). The party thus cannot recover the excessive amount but just the amount he lost. Liquidated damages clauses, on the other hand, are a *genuine* pre-estimate of the loss that would be suffered by the innocent party in the event of a breach of contract. Such a clause is enforceable. The *label* used by the parties *is not determinative*, and so courts may find that a clause labelled as a "penalty clause" in the contract is, in actual fact, not punitive and therefore a liquidated damages clause. For further information, see Ewan McKendrick, *Contract Law*, Basingstoke/New York: Palgrave Macmillan, 2007, pp. 438-45.

Questions

(1) The majority of European civil codes have the same conditions for the modification as for the conclusion of contracts, so do not expressly mention the modification of contracts in the code.[3] Other codes and regulations, such as the *Russian* Civil Code, the *Chinese* Civil Code, the Civil Code of *Louisiana*, the Vienna Convention and the UNIDROIT Principles,[4] on the contrary, expressly mention the modification of contracts. In the light of the materials given in Case 2, why is it a good idea that the Vienna Convention expressly mentions that "[a] contract may be modified or terminated by the mere agreement of the parties", and why is such a statement not necessary for the conclusion of a contract under this Convention?

(2) In *American* and *English* law, the modification of contracts, like the conclusion of contracts,[5] raises particular issues. What issue is raised by the above scenario in *English* law, and how was the problem resolved by the Court of Appeal? According to the materials that follow, how could the case be solved under *US* law? What role does *consideration* play in the modification of contracts according to:
   (a) the English decision in *Williams* v. *Roffey Bros*;
   (b) the Uniform Commercial Code (UCC);
   (c) the Restatement of Law Second; and
   (d) the US decision in *Angel* v. *Murray*?

(3) How would the validity of the modification of the contract in the above scenario be analysed according to the Principles of European Contract Law and the UNIDROIT Principles? How would you resolve the above scenario under these Principles?[6]

(4) How are the Uniform Commercial Code and the Restatement on Contracts used in the reasoning of the Supreme Court of Rhode Island in *Angel* v. *Murray*? Could the Principles of European Contract Law and the UNIDROIT Principles play the same role in European courts as the Restatement does in American law? Give reasons for your answer.

In the US, contract law is generally governed not by federal law but by State law. Why is US contract law nevertheless so remarkably uniform, particularly when compared to contract law in Europe?

[3] See the Code provisions cited above, **Case 2.**
[4] Art. 3.2, see above, **Case 2.**
[5] See above, **Case 2.**
[6] See the materials provided above, **Case 2.**

Table of contents

I. Different civil codes and the CISG

1. Гражданский кодекс Российской Федерации (*Civil Code of the Russian Federation*)

Статья 420. Понятие договора.
(1) Договором признается соглашение двух или нескольких лиц об установлении, изменении или прекращении гражданских прав и обязанностей.

[...]

Art. 420. The Concept of the Contract.
(1) The contract shall be recognized as the agreement, concluded by two or by several persons on the institution, modification or termination of the civil rights and duties.
[...]

Статья 432. Основные положения о заключении договора.
(1) Договор считается заключенным, если между сторонами, в требуемой в подлежащих случаях форме, достигнуто соглашение по всем существенным условиям договора. Существенными являются условия о предмете договора, условия, которые названы в законе или иных правовых актах как существенные или необходимые для договоров данного вида, а также все те условия, относительно которых по заявлению одной из сторон должно быть достигнуто соглашение.
(2) Договор заключается посредством направления оферты (предложения заключить договор) одной из сторон и ее акцепта (принятия предложения) другой стороной.

Art. 432. The Basic Provisions on the Conclusion of a Contract.
(1) The contract shall be regarded as concluded, if an agreement has been achieved between the parties on all its essential terms, in the form proper for the similar kind of contracts.
As essential shall be recognized the terms, dealing with the object of the contract, the terms, defined as essential or indispensable for the given kind of contracts in the law or in the other legal acts, and also all the terms, about which, by the statement of one of the parties, an accord shall be reached.
(2) The contract shall be concluded by way of forwarding the offer (the proposal to conclude the contract) by one of the parties and of its acceptance (the acceptance of the offer) by the other party.

2. 中华人民共和国合同法 (*Contract Law of the People's Republic of China*)

第一章 一般规定

Chapter One: General Provisions

为了保护合同当事人的合法权益，维护社会经济秩序，促进社会主义现代化建设，制定本法。

Art. 1. Purpose.
This Law is formulated in order to protect the lawful rights and interests of contract parties, to safeguard social and economic order, and to promote socialist modernization.

第 2 条
本法所称合同是平等主体的自然人、法人、其他组织之间设立、变更、终止民事权利义务关系的协议。

[...]

Art. 2. Definition of Contract; Exclusions.
For purposes of this Law, a contract is an agreement between natural persons, legal persons or other organizations with equal standing, for the purpose of establishing, altering, or discharging a relationship of civil rights and obligations.
[...]

3. Civil Code of Louisiana

Art. 1906
A contract is an agreement by two or more parties whereby obligations are created, modified or extinguished.

4. United Nations Convention on Contracts for the International Sale of Goods (CISG)

Art. 29
(1) A contract may be modified or terminated by the mere agreement of the parties.
(2) A contract in writing which contains a provision requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated by agreement. However, a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct.

II. England

1. Court of Appeal, *Williams* v. *Roffey* [1991] 1 QB 1, [1990] 1 All ER 512

Williams v Roffey Bros and Nicholls (Contractors) Ltd

COURT OF APPEAL, CIVIL DIVISION

[1991] 1 QB 1, [1990] 1 All ER 512, [1990] 2 WLR 1153, 48 Build LR 69, 10 Tr Law 12

HEARING-DATES: 2, 3, 23 NOVEMBER 1989

23 November 1989

[...]
GLIDEWELL LJ [...]

The facts

The plaintiff is a carpenter. The defendants are building contractors who in September 1985 had entered into a contract with Shepherd's Bush Housing Association Ltd to refurbish a block of flats called Twynholm Mansions, Lillie Road, London SW6. The defendants were the main contractors for the works. [T]he work of refurbishment was to be carried out in 27 of the flats.

The defendants engaged the plaintiff to carry out the carpentry work in the refurbishment of the 27 flats, including work to the structure of the roof. [T]he plaintiff was engaged [...] by a sub-contract in writing made on 21 January 1986 by which the plaintiff undertook to provide the labour for the carpentry work to the roof of the block and for the first and second fix carpentry work required in each of the 27 flats for a total price of £20,000. [...]

The plaintiff and his men began work on 10 October 1985. The judge found that by 9 April 1986 the plaintiff had completed the work to the roof, had carried out the first fix to all 27 flats and had substantially completed the second fix to 9 flats. By this date the defendants had made interim payments totalling £16,200.

It is common ground that by the end of March 1986 the plaintiff was in financial difficulty. The judge found that there were two reasons for this, namely: (i) that the agreed price of £20,000 was too low to enable the plaintiff to operate satisfactorily and at a profit. Mr Cottrell, a surveyor employed by the defendants, said in evidence that a reasonable price for the works would have been £23,783 (ii) [...]

The defendants, as they made clear, were concerned lest the plaintiff did not complete the carpentry work on time. The main contract contained a penalty clause. The judge found that on 9 April 1986 the defendants promised to pay the plaintiff the further sum of £10,300, in addition to the £20,000, to be paid at the rate of £575 for each flat in which the carpentry work was completed.

The plaintiff and his men continued work on the flats until the end of May 1986. By that date the defendants, after their promise on 9 April 1986, had made only one further payment of £1,500. At the end of May the plaintiff ceased work on the flats. [T]he defendants engaged other carpenters to complete the work, but in the result incurred one week's time penalty in their contract with the building owners.

The action

The plaintiff [...] claimed the sum of £10,847. [...]

The issues

Before us counsel for the defendants advances two arguments. His principal submission is that the defendants' admitted promise to pay an additional £10,300, at the rate of £575 per completed flat, is unenforceable since there was no consideration for it. [...]

Was there consideration for the defendants' promise made on 9 April 1986 to pay an additional price at the rate of £575 per completed flat?

The judge made the following findings of fact which are relevant on this issue. (i) The sub-contract price agreed was too low to enable the plaintiff to operate satisfactorily and at a profit. Mr Cottrell, the defendants' surveyor, agreed that this was so. (ii) Mr Roffey, the managing director of the defendants, was persuaded by Mr Cottrell that the defendants should pay a bonus to the plaintiff. The figure agreed at the meeting on 9 April 1986 was £10,300.

The judge quoted and accepted the evidence of Mr Cottrell to the effect that a main contractor who agrees too low a price with a sub-contractor is acting contrary to his own interests. He will never get the job finished without paying more money.

The judge therefore concluded:

> "In my view where the original sub-contract price is too low, and the parties subsequently agree that the additional moneys shall be paid to the sub-contractor, this agreement is in the interests of both parties. This is what happened in the present case, and in my opinion the agreement of 9 April 1986 does not fail for lack of consideration."

In his address to us counsel for the defendants outlined the benefits to the defendants which arose from their agreement to pay the additional £10,300 as (i) seeking to ensure that the plaintiff continued work and did not stop in breach of the sub-contract, (ii) avoiding the penalty for delay and (iii) avoiding the trouble and expense of engaging other people to complete the carpentry work.

However, counsel submits that, though the defendants may have derived, or hoped to derive, practical benefits from their agreement to pay the "bonus", they derived no benefit in law, since the plaintiff was promising to do no more than he was already bound to do by his sub-contract, *i.e.* continue with the carpentry work and complete it on time. Thus there was no consideration for the agreement.

Counsel for the defendants relies on the principle of law which, traditionally, is based on the decision in *Stilk* v. *Myrick* (1809) 2 Camp 317, 170 ER 1168. That was a decision at first instance of Lord Ellenborough CJ. On a voyage to the Baltic, two seamen deserted. The captain agreed with the rest of the crew that if they worked the ship back to London without the two seamen being replaced, he would divide between them the pay which would have been due to the two deserters. On arrival at London this extra pay was

refused, and the plaintiff's action to recover his extra pay was dismissed. Counsel for the defendant argued that such an agreement was contrary to public policy, but Lord Ellenborough CJ's judgment (as reported in Campbell's Reports) was based on lack of consideration. It reads (2 Camp 317 at 318 - 319, 170 ER 1168 at 1169):

> "I think *Harris* v. *Watson* ((1791) Peake 102, [1775–1802] All ER Rep 493) was rightly decided but I doubt whether the ground of public policy, upon which Lord Kenyon is stated to have proceeded, be the true principle on which the decision is to be supported. Here, I say the agreement is void for want of consideration. There was no consideration for the ulterior pay promised to the mariners who remained with the ship. Before they sailed from London they had undertaken to do all they could under the emergencies of the voyage. They had sold all their services till the voyage should be completed. [...] [T]he desertion of a part of the crew is to be considered an emergency of the voyage as much as their death and those who remain are bound by the terms of their original contract to exert themselves to the utmost to bring the ship in safety to her destined port. Therefore, without looking to the policy of this agreement, I think it is void for want of consideration [...]."

[...]

In *Ward* v. *Byham* [1956] 2 All ER 318, [1956] 1 WLR 496 the plaintiff and the defendant lived together unmarried for five years, during which time the plaintiff bore their child. After the parties ended their relationship, the defendant promised to pay the plaintiff £1 per week to maintain the child, provided that she was well looked after and happy. The defendant paid this sum for some months, but ceased to pay when the plaintiff married another man. On her suing for the amount due at £1 per week, he pleaded that there was no consideration for his agreement to pay for the plaintiff to maintain her child, since she was obliged by law to do so: see s 42 of the National Assistance Act 1948. The county court judge upheld the plaintiff mother's claim, and this court dismissed the defendant's appeal.

Denning LJ said ([1956] 2 All ER 318 at 319, [1956] 1 WLR 496 at 498):

> "I approach the case, therefore, on the footing that, in looking after the child, the mother is only doing what she is legally bound to do. Even so, I think that there was sufficient consideration to support the promise. I have always thought that a promise to perform an existing duty, or the performance of it, should be regarded as good consideration, because it is a benefit to the person to whom it is given. Take this very case. It is as much a benefit for the father to have the child looked after by the mother as by a neighbour. If he gets the benefit for which he stipulated, he ought to honour his promise, and he ought not to avoid it by saying that the mother was herself under a duty to maintain the child. I regard the father's promise in this case as what is sometimes called a unilateral contract, a promise in return for an act, a promise by the father to pay £1 a week in return for the mother's looking after the child. Once the mother embarked on the task of looking after the child, there was a binding contract. So long as she looked after the child, she would be entitled to £1 a week. The case seems to me to be within the decision of *Hicks* v. *Gregory* (8 CB 378, 137 ER 556) on which the judge relied. I would dismiss the appeal."

However, Morris LJ put it rather differently. He said ([1956] 2 All ER 318 at 320, [1956] 1 WLR 496 at 498 499):

> "[...] It seems to me [...] that the father was saying, in effect: Irrespective of what may be the strict legal position, what I am asking is that you shall prove that the child will [illegible]

> after and happy, and also that you must agree that the child is to be allowed to decide for herself whether or not she wishes to come and live with you. If those conditions were fulfilled the father was agreeable to pay. On those terms, which in fact became operative, the father agreed to pay £1 a week. In my judgment, there was ample consideration there to be found for his promise, which I think was binding."

Parker LJ agreed. As I read the judgment of Morris LJ, he and Parker LJ held that, though in maintaining the child the plaintiff was doing no more than she was obliged to do by law, nevertheless her promise that the child would be well looked after and happy was a practical benefit to the father, which amounted to consideration for his promise.

[...]

There is, however, another legal concept of relatively recent development which is relevant, namely that of economic duress. Clearly, if a sub-contractor has agreed to undertake work at a fixed price, and before he has completed the work declines to continue with it unless the contractor agrees to pay an increased price, the sub-contractor may be held guilty of securing the contractor's promise by taking unfair advantage of the difficulties he will cause if he does not complete the work. In such a case an agreement to pay an increased price may well be voidable because it was entered into under duress. Thus this concept may provide another answer in law to the question of policy which has troubled the courts since before *Stilk* v. *Myrick* (1809) 2 Camp 317, 170 ER 1168, and no doubt led at the date of that decision to a rigid adherence to the doctrine of consideration.

[...]

[T]he present state of the law on this subject can be expressed in the following proposition: (i) if A has entered into a contract with B to do work for, or to supply goods or services to, B in return for payment by B and (ii) at some stage before A has completely performed his obligations under the contract B has reason to doubt whether A will, or will be able to, complete his side of the bargain and (iii) B thereupon promises A an additional payment in return for A's promise to perform his contractual obligations on time and (iv) as a result of giving his promise B obtains in practice a benefit, or obviates a disbenefit, and (v) B's promise is not given as a result of economic duress or fraud on the part of A, then (vi) the benefit to B is capable of being consideration for B's promise, so that the promise will be legally binding.

As I have said, counsel for the defendants accepts that in the present case by promising to pay the extra £10,300 the defendants secured benefits. There is no finding, and no suggestion, that in this case the promise was given as a result of fraud or duress.

If it be objected that the propositions above contravene the principle in *Stilk* v. *Myrick*, I answer that in my view they do not: they refine and limit the application of that principle, but they leave the principle unscathed, e.g. where B secures no benefit by his promise. It is not in my view surprising that a principle enunciated in relation to the rigours of seafaring life during the Napoleonic wars should be subjected during the succeeding 180 years to a process of refinement and limitation in its application in the present day.

It is therefore my opinion that on his findings of fact in the present case, the judge was entitled to hold, as he did, that the defendants' promise to pay the extra £10,300 was supported by valuable consideration, and thus constituted an enforceable agreement. [...]

For these reasons I would dismiss this appeal.

[...]

PURCHAS LJ. [...]

In my judgment [...] the rule in *Stilk* v. *Myrick* remains valid as a matter of principle, namely that a contract not under seal must be supported by consideration. Thus, where the agreement on which reliance is placed provides that an extra payment is to be made for work to be done by the payee which he is already obliged to perform, then unless some other consideration is detected to support the agreement to pay the extra sum that agreement will not be enforceable. *Harris* v. *Watson* and *Stilk* v. *Myrick* involved circumstances of a very special nature, namely the extraordinary conditions existing at the turn of the eighteenth century under which seamen had to serve their contracts of employment on the high seas. There were strong public policy grounds at that time to protect the master and owners of a ship from being held to ransom by disaffected crews. Thus, the decision that the promise to pay extra wages even in the circumstances established in those cases was not supported by consideration is readily understandable. Of course, conditions today on the high seas have changed dramatically and it is at least questionable, counsel for the plaintiff submitted, whether these cases might not well have been decided differently if they were tried today. The modern cases tend to depend more on the defence of duress in a commercial context rather than lack of consideration for the second agreement. In the present case, the question of duress does not arise. The initiative in coming to the agreement of 9 April came from Mr Cottrell and not from the plaintiff. It would not, therefore, lie in the defendants' mouth to assert a defence of duress. [...]

The question must be posed: what consideration has moved from the plaintiff to support the promise to pay the extra £10,300 added to the lump sum provision? In the particular circumstances which I have outlined above, there was clearly a commercial advantage to both sides from a pragmatic point of view in reaching the agreement of 9 April. The defendants were on risk that as a result of the bargain they had struck the plaintiff would not or indeed possibly could not comply with his existing obligations without further finance. As a result of the agreement the defendants secured their position commercially. There was, however, no obligation added to the contractual duties imposed on the plaintiff under the original contract. Prima facie this would appear to be a classic *Stilk* v. *Myrick* case. It was, however, open to the plaintiff to be in deliberate breach of the contract in order to "cut his losses" commercially. In normal circumstances the suggestion that a contracting party can rely on his own breach to establish consideration is distinctly unattractive. In many cases it obviously would be and if there was any element of duress brought on the other contracting party under the modern development of this branch of the law the proposed breaker of the contract would not benefit. With some hesitation [...] I consider that the modern approach to the question of consideration would be that where there were benefits derived by each party to a contract of variation even though one party did not suffer a detriment this would not be fatal to the establishing of sufficient consideration to support the agreement. If both parties benefit from an agreement it is not necessary that each also suffers a detriment. [...] For these reasons and for the reasons which have already been given by Glidewell LJ, I would dismiss this appeal.

Appeal dismissed. Leave to appeal to the House of Lords granted.

Solicitors: John Pearson, New Malden (for the defendants); Terence W. Lynch & Co. (for the plaintiff)

2. Roger Halson, "Sailors, Sub-Contractors and Consideration" (1990) 106 *LQR* 183–85

Notes

SAILORS, SUB-CONTRACTORS AND CONSIDERATION

EVERYONE will remember *Stilk* v. *Myrick* (1809) 2 Camp. 317 from their student days. The luckless sailors' claim for extra wages foundered on the rocks of the pre-existing duty doctrine of consideration; they did not furnish any additional consideration for the promise of more pay. However it seems that times have changed (a little anyway) with the Court of Appeal's decision in *Williams* v. *Roffey Bros & Nicholls (Contractors) Ltd* [1990] 1 All E.R. 512.

[...]

A distinction is often drawn between two different definitions of consideration; factual and legal. The factual definition emphasises the *fact* of benefit or detriment; the legal definition, for which *Stilk* v. *Myrick* is often cited, recognises as consideration only those acts which the promisor was not already under a *legal* obligation to perform (see further Treitel, *Law of Contract* (7th ed.), p. 54).

The consideration identified by Glidewell L.J. [in *Williams* v. *Roffey Bros & Nicholls*] comprised: the assurance that the plaintiff would continue working and not halt work in breach of contract, the avoidance of the penalty clause operating, and the avoidance of the expense of engaging different carpenters to complete the work. It is respectfully submitted that these benefits to the defendant can only amount to factual consideration and only then if they represent losses which would not be recoverable as damages in the event of breach (perhaps any penalty payment would be too remote?). The judgments of Russell and Purchas L.JJ. also appear to proceed upon a factual definition of consideration.

[...]

The adoption in *Williams* v. *Roffey Bros.* of a factual, rather than a legal definition of consideration effects a subtle but significant change in the law relating to modification of contract. In so far as a test of factual consideration is more easily satisfied than one requiring legal consideration, it is the presence or absence of duress which will ultimately determine the enforceability of a modification. Thus, the principles of economic duress are pushed to the fore. This shift of emphasis is to be welcomed. When premised upon a legal definition of consideration the pre-existing duty doctrine was too blunt and indiscriminate. If strictly applied it would deny legal force to many freely negotiated modifications like that in *Williams* v. *Roffey Bros.* The principles of economic duress offer a more sophisticated means of distinguishing extorted and non-extorted modifications.

However, the lack of unanimity in the court's application of the factual definition of consideration may suggest that a bolder approach should have been taken. Perhaps a proper opportunity will arise [illegible]

agreements modifying existing contracts. Such an approach would relieve the courts of the need to search for a scintilla of factual consideration before they can give effect to an uncoerced modification.

[...]

III. USA

1. American Law Institute: Restatement of the Law Second, Contracts

FORMATION OF CONTRACTS – MUTUAL ASSENT

IN GENERAL

§ 17. Requirement of a Bargain.
(1) Except as stated in Subsection (2), the formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration.
[...]

FORMATION OF CONTRACTS – CONSIDERATION

THE REQUIREMENT OF CONSIDERATION

§ 71. Requirement of Exchange. Types of Exchange
(1) To constitute consideration, a performance or a return promise must be bargained for.
(2) A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.
(3) The performance may consist of
(a) an act other than a promise, or
(b) a forbearance, or
(c) the creation, modification, or destruction of a legal relation.
(4) The performance or return promise may be given to the promisor or to some other person. It may be given by the promisee or by some other person.

[...]

Illustrations:
1. [...]
2. A receives a gift from B of a book worth $10. Subsequently, A promises to pay B the value of the book. There is no consideration for A's promise. This is so even though B, at the time he makes the gift, secretly hopes that A will pay him for it. [...]
3. A promises to make a gift of $10 to B. In reliance on the promise B buys a book from C and promises to pay C $10 for it. There is no consideration for A's promise. [...]
4. A desires to make a binding promise to give $1000 to his son B. Being advised that a gratuitous promise is not binding, A writes out and signs a false recital that B has sold him a car for $1000 and a promise to pay that amount. There is no consideration for A's promise.

5. A desires to make a binding promise to give $1000 to his son B. Being advised that a gratuitous promise is not binding, A offers to buy from B for $1000 a book worth less than $1. B accepts the offer knowing that the purchase of the book is a mere pretence. There is no consideration for A's promise to pay $1000.

[...]

§ 73. Performance of Legal Duty.
Performance of a legal duty owed to a promisor which is neither doubtful nor the subject of honest dispute is not consideration; but a similar performance is consideration if it differs from what was required by the duty in a way which reflects more than a pretence of bargain.

§ 79. Adequacy of Consideration; Mutuality of Obligation.
If the requirement of consideration is met, there is no additional requirement of
(a) a gain, advantage, or benefit to the promisor or a loss, disadvantage, or detriment to the promisee; or
(b) equivalence in the values exchanged; or
(c) "mutuality of obligation."

Comment:
[...]
c. *Exchange of unequal values.* To the extent that the apportionment of productive energy and product in the economy are left to private action, the parties to transactions are free to fix their own valuations. [...] Valuation is left to private action in part because the parties are thought to be better able than others to evaluate the circumstances of particular transactions. [...] Ordinarily, therefore, courts do not inquire into the adequacy of consideration. [...] Gross inadequacy of consideration may be relevant to issues of capacity, fraud and the like, but the requirement of consideration is not a safeguard against imprudent and improvident contracts except in cases where it appears that there is no bargain in fact.

CONTRACTS WITHOUT CONSIDERATION

§ 89. Modification of Executory Contract.
A promise modifying a duty under a contract not fully performed on either side is binding
(a) if the modification is fair and equitable in view of circumstances not anticipated by the parties when the contract was made;

[...]

Comment:
a) Rationale. This Section relates primarily to adjustments in on-going business transactions.

[...]

b) Performance of legal duty. The rule of § 73 finds its modern justification in cases of promises made by mistake or induced by unfair pressure. Its application to cases where those elements are absent has been much criticized and is avoided if paragraph (a) of this

Section is applicable. The limitation to a modification which is "fair and equitable" goes beyond absence of coercion and requires an objectively demonstrable reason for seeking a modification. Compare Uniform Commercial Code § 2-209 Comment. [...]

Illustrations:
1. By a written contract A agrees to excavate a cellar for B for a stated price. Solid rock is unexpectedly encountered and A so notifies B. A and B then orally agree that A will remove the rock at a unit price which is reasonable but nine times that used in computing the original price, and A completes the job. B is bound to pay the increased amount.
2. A contracts with B to supply for $300 a laundry chute for a building B has contracted to build for the government for $150,000. Later, A discovers that he made an error as to the type of material to be used and should have bid $1,200. A offers to supply the chute for $1,000, eliminating overhead and profit. After ascertaining that other suppliers would charge more, B agrees. The new agreement is binding.
3. A is employed by B as a designer of coats at $90 a week for a year beginning November 1 under a written contract executed September 1. A is offered $115 a week by another employer and so informs B. A and B then agree that A will be paid $100 a week and in October execute a new written contract to that effect, simultaneously tearing up the prior contract. The new contract is binding.

[...]

2. Uniform Commercial Code

§ 2-209. Modification, Rescission and Waiver.
(1) An agreement modifying a contract within this Article[7] needs no consideration to be binding.
(2) [...]
(3) The requirement of the statute of fraud section of this Article (Section 2-201) must be satisfied if the contract as modified is within its provisions.
[...]

Official Comment

[...]

Purposes of Changes and New Matter:

1. This section seeks to protect and make effective all necessary and desirable modifications of sales contracts without regard to the technicalities which at present hamper such adjustments.
2. Subsection (1) provides that an agreement modifying a sales contract needs no consideration to be binding.

[7] *I.e.* a contract for the sale of goods (*note by the author*).

However, modifications made hereunder must meet the test of good faith imposed by this Act. The effective use of bad faith to escape performance on the original contract terms is barred, and the extortion of a "modification" without legitimate commercial reasons is ineffective as a violation of the duty of good faith. Nor can a mere technical consideration support a modification made in bad faith.

The test of "good faith" between merchants or as against merchants includes "observance of reasonable commercial standards of fair dealing in the trade" (Section 2-103), and may in some situations require an objectively demonstrable reason for seeking a modification. But such matters as a market shift which makes performance come to involve a loss may provide such a reason even though there is no such unforeseen difficulty as would make out a legal excuse from performance under Sections 2-615 and 2-616.

[...]

3. Supreme Court of Rhode Island, *Alfred L. Angel et al.* v. *John E. Murray, Jr, Director of Finance of the City of Newport et al.*, 113 R.I. 482

Alfred L. Angel et al. v. John E. Murray, Jr., Director of Finance of the City of Newport, et al.

Supreme Court of Rhode Island

113 R.I. 482; 322 A.2d 630; 1974 R.I. LEXIS 1202; 85 A.L.R.3d 248

July 22, 1974

[...]

ROBERTS C. J.:

This is a civil action brought by Alfred L. Angel and others against John E. Murray, Jr, Director of Finance of the City of Newport, the city of Newport, and James L. Maher, alleging that Maher had illegally been paid the sum of $20,000 by the Director of Finance and praying that the defendant Maher be ordered to repay the city such sum. [...]

The record discloses that Maher has provided the city of Newport with a refuse-collection service under a series of five-year contracts beginning in 1946. On March 12, 1964, Maher and the city entered into another such contract for a period of five years commencing on July 1, 1964, and terminating on June 30, 1969. The contract provided, among other things, that Maher would receive $137,000 per year in return for collecting and removing all combustible and noncombustible waste materials generated within the city.

In June of 1967 Maher requested an additional $10,000 per year from the city council because there had been a substantial increase in the cost of collection due to an unexpected and unanticipated increase of 400 new dwelling units. Maher's testimony, which is uncontradicted, indicates the 1964 contract had been predicated on the fact that since 1946 there had been an average increase of 20 to 25 new dwelling units per year.

After a public meeting of the city council where Maher explained in detail the reasons for his request and was questioned by members of the city council, the city council agreed to pay him an additional $10,000 for the year ending on June 30, 1968. Maher made a similar request again in June of 1968 for the same reasons, and the city council again agreed to pay an additional $10,000 for the year ending on June 30, 1969.

[...]

[W]e are [...] confronted with the question of whether the additional payments were illegal because they were not supported by consideration.

- A -

As previously stated, the city council made two $10,000 payments. The first was made in June of 1967 for the year beginning on July 1, 1967, and ending on June 30, 1968. Thus, by the time this action was commenced in October of 1968, the modification was completely executed. That is, the money had been paid by the city council, and Maher had collected all of the refuse. Since consideration is only a test of the enforceability of executory promises, the presence or absence of consideration for the first payment is unimportant because the city council's agreement to make the first payment was fully executed at the time of the commencement of this action. [...] However, since both payments were made under similar circumstances, our decision regarding the second payment (Part B, infra) is fully applicable to the first payment.

- B -

It is generally held that a modification of a contract is itself a contract, which is unenforceable unless supported by consideration. See Simpson, *Contracts* § 93. In *Rose* v. *Daniels, 8 R. I. 381 (1866)*, this court held that an agreement by a debtor with a creditor to discharge a debt for a sum of money less than the amount due is unenforceable because it was not supported by consideration.

Rose is a perfect example of the pre-existing duty rule. Under this rule an agreement modifying a contract is not supported by consideration if one of the parties to the agreement does or promises to do something that he is legally obligated to do or refrains or promises to refrain from doing something he is not legally privileged to do. *See* Calamari & Perillo, *Contracts* § 60 (1970); 1A Corbin, *Contracts* §§ 171–72 (1963); 1 Williston, *Contracts* § 130 Annot; *12 A.L.R. 2d 78* (1950). In *Rose* there was no consideration for the new agreement because the debtor was already legally obligated to repay the full amount of the debt.

Although the pre-existing duty rule is followed by most jurisdictions, a small minority of jurisdictions, Massachusetts, for example, find that there is consideration for a promise to perform what one is already legally obligated to do because the new promise is given in place of an action for damages to secure performance. *See Swartz* v. *Lieberman, 323 Mass. 109, 80 N.E.2d 5 (1948); Munroe* v. *Perkins, 26 Mass. (9 Pick.) 298 (1830). Swartz* is premised on the theory that a promisor's forbearance of the power to breach his original agreement and be sued in an action for damages is consideration for a subsequent agreement by the promisee to pay extra compensation. This rule, however, has been widely criticized as an anomaly. *See* Calamari & Perillo, *supra*, § 61; Annot., *12 A.L.R.2d 78, 85–90 (1950).*

The primary purpose of the pre-existing duty rule is to prevent what has been referred to as the "hold-up game." *See* 1A Corbin, *supra*, § 171. A classic example of the "hold-up

game" is found in *Alaska Packers' Ass'n* v. *Domenico, 117 F. 99 (9th Cir. 1902)*. There 21 seamen entered into a written contract with Domenico to sail from San Francisco to Pyramid Harbor, Alaska. They were to work as sailors and fishermen out of Pyramid Harbor during the fishing season of 1900. The contract specified that each man would be paid $50 plus two cents for each red salmon he caught. Subsequent to their arrival at Pyramid Harbor, the men stopped work and demanded an additional $50. They threatened to return to San Francisco if Domenico did not agree to their demand. Since it was impossible for Domenico to find other men, he agreed to pay the men an additional $50. After they returned to San Francisco, Domenico refused to pay the men an additional $50. The court found that the subsequent agreement to pay the men an additional $50 was not supported by consideration because the men had a pre-existing duty to work on the ship under the original contract, and thus the subsequent agreement was unenforceable.

Another example of the "hold-up game" is found in the area of construction contracts. Frequently, a contractor will refuse to complete work under an unprofitable contract unless he is awarded additional compensation. The courts have generally held that a subsequent agreement to award additional compensation is unenforceable if the contractor is only performing work which would have been required of him under the original contract. *See, e.g., Lingenfelder* v. *Wainwright Brewing Co., 103 Mo. 578, 15 S.W. 844 (1891)*, which is a leading case in this area. *See also* cases collected in Annot., *25 A.L.R.* 1450 (1923), supplemented by Annot., *55 A.L.R. 1333 (1928)*, and Annot., *138 A.L.R. 136 (1942)*; *cf. Ford & Denning* v. *Shepard Co., 36 R. I. 497, 90 A. 805 (1914)*.

These examples clearly illustrate that the courts will not enforce an agreement that has been procured by coercion or duress and will hold the parties to their original contract regardless of whether it is profitable or unprofitable. However, the courts have been reluctant to apply the pre-existing duty rule when a party to a contract encounters unanticipated difficulties and the other party, not influenced by coercion or duress, voluntarily agrees to pay additional compensation for work already required to be performed under the contract. For example, the courts have found that the original contract was rescinded, *Linz* v. *Schuck, 106 Md. 220, 67 A. 286 (1907)*; abandoned, *Connelly* v. *Devoe, 37 Conn. 570 (1871)*, or waived, *Michaud* v. *MacGregor, 61 Minn. 198, 63 N.W. 479 (1895)*.

Although the pre-existing duty rule has served a useful purpose insofar as it deters parties from using coercion and duress to obtain additional compensation, it has been widely criticized as a general rule of law. With regard to the pre-existing duty rule, one legal scholar has stated: "There has been a growing doubt as to the soundness of this doctrine as a matter of social policy. In certain classes of cases, this doubt has influenced courts to refuse to apply the rule, or to ignore it, in their actual decisions. Like other legal rules, this rule is in process of growth and change, the process being more active here than in most instances. The result of this is that a court should no longer accept this rule as fully established. It should never use it as the major premise of a decision, at least without giving careful thought to the circumstances of the particular case, to the moral deserts of the parties, and to the social feelings and interests that are involved. It is certain that the rule, stated in general and all-inclusive terms, is no longer so well-settled that a court must apply it though the heavens fall." 1A Corbin, *supra*, § 171; *see also* Calamari & Perillo, *supra*, § 61.

The modern trend appears to recognize the necessity that courts should enforce agreements modifying contracts when unexpected or unanticipated difficulties arise

during the course of the performance of a contract, even though there is no consideration for the modification, as long as the parties agree voluntarily.

Under the Uniform Commercial Code, § 2-209(1), which has been adopted by 49 states, "[an] agreement modifying a contract [for the sale of goods] needs no consideration to be binding." [...] Although at first blush this section appears to validate modifications obtained by coercion and duress, the comments to this section indicate that a modification under this section must meet the test of good faith imposed by the Code, and a modification obtained by extortion without a legitimate commercial reason is unenforceable.

The modern trend away from a rigid application of the pre-existing duty rule is reflected by § 89 of the American Law Institute's Restatement Second of the Law of Contracts which provides: "A promise modifying a duty under a contract not fully performed on either side is binding (a) if the modification is fair and equitable in view of circumstances not anticipated by the parties when the contract was made."

We believe that § 89 is the proper rule of law and find it applicable to the facts of this case. It not only prohibits modifications obtained by coercion, duress, or extortion but also fulfils society's expectation that agreements entered into voluntarily will be enforced by the courts [...] *See generally* Horwitz, *The Historical Foundations of Modern Contract Law, 87 Harv. L. Rev. 917 (1974)*. Section 89, of course, does not compel a modification of an unprofitable or unfair contract; it only enforces a modification if the parties voluntarily agree and if (1) the promise modifying the original contract was made before the contract was fully performed on either side, (2) the underlying circumstances which prompted the modification were unanticipated by the parties, and (3) the modification is fair and equitable.

The evidence, which is uncontradicted, reveals that in June of 1968 Maher requested the city council to pay him an additional $10,000 for the year beginning on July 1, 1968, and ending on June 30, 1969. This request was made at a public meeting of the city council, where Maher explained in detail his reasons for making the request. Thereafter, the city council voted to authorize the Mayor to sign an amendment to the 1954 contract which provided that Maher would receive an additional $10,000 per year for the duration of the contract. Under such circumstances we have no doubt that the city voluntarily agreed to modify the 1964 contract.

Having determined the voluntariness of this agreement, we turn our attention to the three criteria delineated above. First, the modification was made in June of 1968 at a time when the five-year contract which was made in 1964 had not been fully performed by either party. Second, although the 1964 contract provided that Maher collect all refuse generated within the city, it appears this contract was premised on Maher's past experience that the number of refuse-generating units would increase at a rate of 20 to 25 per year. Furthermore, the evidence is uncontradicted that the 1967–1968 increase of 400 units "went beyond any previous expectation." Clearly, the circumstances which prompted the city council to modify the 1964 contract were unanticipated. Third, although evidence does not indicate what proportion of the total this increase comprised, the evidence does indicate that it was a "substantial" increase. In light of this, we cannot say that the council's agreement to pay Maher the $10,000 increase was not fair and equitable in the circumstances.

The judgment appealed from is reversed, and the cause is remanded to the Superior Court for entry of judgment for the defendants.

4. MELVIN A. EISENBERG,[8] "Why is American Contract Law So Uniform? National Law in the United States", in Hans-Leo Weyers (ed.), *Europäisches Vertragsrecht*, 1997, pp. 23–43

I. *Introduction*

Contract law in the United States is generally governed by state law. Since there are fifty states, and the District of Columbia is like a state for these purposes, as a matter of legal theory there are fifty-one bodies of American contract law. Furthermore, American contract law is in large part governed by the common law, that is, by judge-made law. [...]

Given fifty-one bodies of law and a lack of official canonically stated rules, it might be expected that American contract law would be highly fractured. However, that is not the case. Rather, contract law in the United States is remarkably uniform, with one pointed exception: Louisiana, which was founded by France, and governed for a long time by Spain, retains a civil-law tradition. The question, how has the United States managed to achieve this relatively uniform body of contract law despite the presence of so many jurisdictions and the absence of official canonical rules, is important both in its own right and because it may bear on the unification of European contract law. The purpose of this paper is to consider that question.

Contract law is not the only body of American state law that is relatively uniform. Therefore, although contract law may be affected by some special elements, the question why contract law is relatively uniform must be considered as part of a wider inquiry into why various bodies of American state law are relatively uniform. I will begin that inquiry by defining terms and by drawing some preliminary distinctions. I will then develop a concept that I will call American national law, and examine the general forces that have produced that law. I will next consider certain special forces that have operated on contract law as a branch of American national law. Finally, I will consider some implications of the American experience for a harmonization of European law.

II. *Preliminary Distinctions*

[...] [T]he uniformity of contract law in the United States has been achieved by nonmandatory unification: Contract law is essentially state law, and only a few bits and pieces of contract law have been federalized [footnote 4: Among the areas of contract law that have been partly federalized are consumer warranties [...]; door-to-door sales contracts [...]; and unsolicited offers in the mail [...]). Thus the question addressed in this paper can be recast as: What nonmandatory elements have led to the uniformity of contract law in the United States?
[...]

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III. *Federal, Local, and National Law*

American law is conventionally divided into federal law and state law. I will refer to discourse about those two bodies of law as statements of federal law and statements of local law.

By *statements of federal law*, I mean statements that take the express or implied form "Based on official sources, it is a rule of federal law that R", where R is the stated rule. For example, the statements "Federal law prohibits certain kinds of labeling on alcoholic beverages" or "Free speech is guaranteed under the U.S. Constitution" are statements of federal law. [...]

By *statements of local law*, I mean statements that expressly or impliedly take the express or implied form "Based on official sources, it is a rule of State S that R", where State S is a designated state. (Of course, such rules may also be stated in the form "It is a rule of States S, T, and U that R"). For example, the statements, "Under New York law, contracts require consideration" and "In Pennsylvania and Ohio, an acceptance is effective on dispatch" are statements of local law.

Federal and local law might seem to exhaust the categories of law in the United States, because conventional jurisprudence normally conceives of law as the law of some jurisdiction. However, if you walk into almost any law school in America, or read almost any leading American legal treatise, you will find that many or most of the propositions that you hear or read are neither statements of federal law nor statements of local law. Rather, these propositions are statements of law in general terms, divorced from particular jurisdictions. Practicing lawyers will often talk in the same way.

A striking aspect of this method of discourse about law in America is that it is so fundamental and so ingrained that those who use this kind of discourse are scarcely conscious, if they are conscious at all, that what they are doing might seem relatively unusual from a jurisprudential point of view. Like Molière's bourgeois gentleman, who did not realize that he was speaking "prose", the American legal community does not realize, or realizes in only a limited way, that its everyday discourse reflects an unspoken fundamental premise about the nature of law that is in need of both explanation and examination.

To begin with, then, it is necessary to name this form of legal discourse, and the name I will give it is statements of American national law or, more simply, national law. By *statements of American national law* I mean statements, made in the context of the American legal system, that expressly or impliedly take the form "Rule R is law" and that are not expressly or impliedly statements of federal or local law – that is, are not expressly or impliedly statements that Rule R is established by official authorities as the law of the federal government or the law of one or more designated states. For example, the statements "Contracts require consideration" and "An acceptance is effective on dispatch", unaccompanied by supporting citations, are statements of national law. Correspondingly, by *American national law* I mean the body of legal rules that discourse of this kind describes.

Often, as in the examples just given, statements of American national law are unaccompanied by supporting citations to the law of particular jurisdictions. However, even statements of legal rules that are accompanied by such citations can be deemed statements of national law where the claim of the statement outruns the citations. On the one hand, the claim in the statement is categorical, like "Contracts require consideration".

On the other hand, the citations will typically be limited to cases from two or three states, and even when there are citations to more than two or three states, it is seldom if ever implied that the author of the statement warrants that every state has adopted the rule.

Indeed, it is not unusual for a rule to be described as law in the United States even though it has been adopted only by the courts of two or three states, or even though it has not been adopted by any court. For example, there is a well-accepted rule of American contract law that where an offer is made in a face-to-face or telephonic conversation, the offer lapses at the end of the conversation unless a contrary intention is indicated. This rule was stated, for example, in Williston's leading treatise, first published in the 1920s, and in Corbin's leading treatise, first published in the 1950s, and is stated as well in the *Restatement of Contracts* and in various modern treatises, including the current versions of Williston and Corbin. As originally published, the Williston treatise cited only two cases in support of the rule. The Corbin treatise cited no cases at all. Today, the two treatises cite only three additional cases. Even of these few cases, some are really not on point although they contain stray dicta that support the rule, and those that are on point are ambiguous. Many other well-established rules of "contract law" – that is, national contract law – also have extremely limited support in official sources.

Statements of American national law differ from statements of local or federal law in a fundamental respect: by their nature they purport to state the law, yet they do not purport to state the law of a jurisdiction. Of course, there are parallels to American national law elsewhere. The *Unidroit Principles of International Commercial Contracts* and the *Principles of European Contract Law* are prominent examples. Like statements of American national law, the *Unidroit Principles* and the *European Principles* purport to state law but do not purport to state the law of a particular jurisdiction. Other examples include the law merchant; the "general principles of law" sometimes specified by contract; and international law.

In general, however, these bodies of rules are parallels to, rather than exact counterparts of, American national law. The *Unidroit Principles* and the *European Principles* are very new and their legal authority remains to be determined by the test of time. Furthermore, the Preamble to the *Unidroit Principles* strongly emphasizes contractual adoption, either directly or by reference to "general principles of law" or the like, although the Preamble does also contemplate judicial application even in the absence of contractual adoption.

The Preamble and Article 1:101 of the *Principles of European Contract Law* take a similar approach.

The legal status of the law merchant as a freestanding body of law is unclear. Certainly, in the United States it is not today recognized as a body of independent law. The legal status of "general principles of law" adopted by agreement is also unclear. [...] Moreover, neither the law merchant nor general principles of law have been highly elaborated, indeed, one stated reason for the Unidroit and European *Principles* is to supply clear rules where the parties agree that their contract will be governed by general principles of law. Perhaps the closest historical parallel to American national law was Digest-based law in Europe in the Middle Ages. [...]

IV. *Elements of Nonmandatory Harmonization in the United States*

I turn now to the issue, what nonmandatory elements have led to the harmonization of law in the United States through the development of American national law.

A. *The Economic Element*

One obvious answer is that it is economically advantageous to have uniform law throughout the country, particularly in the areas of commercial law. There is no doubt that this economic element is important, and I will return later to ways in which this element has been doctrinally played out, but nevertheless this answer is insufficient. It would also be economically advantageous to have uniform law throughout North America, but that has not occurred. It would be economically advantageous to have uniform law throughout Europe, but even today the realization of that objective is in a stage of infancy. It would be economically advantageous to have a uniform international commercial law, but the Convention for the International Sale of Goods has come into being only recently, and a number of national states have yet to adopt it. As important as the economic element is, other kinds of social and doctrinal elements must also be at play to explain the existence of American national law.

B. *Legal Scholarship*

One of these elements is the nature of legal scholarship in the United States. It is only a slight oversimplification to say that most prestigious American legal scholars cast most of their legal work in terms of either pure-theory, federal law, or national law. As a corollary, virtually all the non-federal, non-pure-theory legal scholarship that is widely admired in the United States, and widely familiar to scholars, judges, and practitioners, takes the form of national law.

Why should this be so? One reason is that the American scholarly community tends to award recognition and prestige for theoretical and normative work, as opposed to descriptive and positive work. In principle, it may be as easy to do theoretical and normative analysis of local law as of national law. In practice, however, this tends not to be the case. Generally speaking, consumers of work on local law are interested primarily, and often almost exclusively, in descriptive and positive analysis. Scholars who work on local law must therefore pitch their scholarship in those terms if they are to have an audience. Furthermore, as a practical matter it is often easier to analyze national law in theoretical and normative terms than to analyze local law in this manner. The spread of legal data-points on the national landscape invites a creative integration of the points into a clear line. The process of creative integration, in turn, invites a theoretical and normative enterprise. The lesser number of data-points in local law works in the opposite direction. Furthermore, once the prestige system starts it is self-perpetuating. Because recognition and prestige goes to scholars who work on pure theory, federal law, and national law, scholars who seek recognition and prestige will gravitate toward these fields, not to local law.

Other factors, perhaps more important, are also at work. For one thing, there is an issue of audience. The audience for pure theory, federal law, and national law is nationwide, because an article or book cast in pure, federal, or national terms is potentially of interest to everyone in the American legal community with an interest in the subject-matter. In contrast, the audience for local law is normally confined to the members of the legal community of a single state and those practicing lawyers outside the state who happen to have an interest in the law of the state.

[...] A scholar who believes he has something important to say, as most good scholars do, will prefer national law to local law because national law will give him the widest possible audience. A scholar who wants to generalize and theorize, as most good scholars

do, will prefer national law over local law because national-law data is a better source for generalization and the construction of theories.

C. *Legal Education*

Perhaps even more important than legal scholarship, as a harmonizing force in the United States, is legal education. All the leading law schools in the United States – and probably the bulk of all law schools – teach exclusively, or almost exclusively, pure theory, federal law, and national law. Every leading casebook in the United States is either a federal-law casebook or a national-law casebook.

These elements are related both to each other and to the elements that influence legal scholarship. Casebooks are a form of scholarship, and the factors that apply to traditional scholarship apply to casebooks as well. For example, writing a casebook in local-law terms would severely restrict the audience for the casebook, and most law-school teachers aspire to be analytical in their teaching and to teach analytical skills, not merely to describe the law. Furthermore, because many points in every body of state law are unsettled by the courts of a given state, it would often be difficult to find sufficient materials to write a local-law casebook, except perhaps in the very largest states.

In addition, the leading law schools in the United States have long aspired to be, and held themselves out to be, national schools, with national student bodies. Teaching local law, which might be useful only in the state in which the school was located, would be inconsistent with this aspiration. What is true of the leading law schools is true of virtually all law schools, because virtually all law schools consider themselves to be, aspire to be, or emulate leading law schools. (An illuminating aspect of the national character of American legal education is the irrelevance of the state in which an academic received his legal education and passed the bar. If an American legal educator in, say, Iowa was asked whether it mattered that an applicant for a faculty position had been educated in a New York law school, he would think that the person who posed the question must be from another planet.)

D. *Bar Examinations*

Just as legal scholarship and legal education focus on national law, so too do most bar examinations, even though these examinations are administered separately by each state, and passage of any single examination confers admission only to the bar of the relevant state. In part, the focus of state bar examinations on national rather than local law is due to the fact that the bar examiners themselves reflect the American legal culture. In addition, a focus on local law would be out of synchronization with the education given to students who take the bar.

The national-law orientation of state bar examinations reinforces the importance of national law. It also provides support to teaching national law, because it relieves the law schools from the pressure to teach local law that might exist if the bar examinations were oriented to local law.

E. *Legal History*

Another critical element in the development of American national law lies in American legal history. Although the precise details varied from state to state, generally speaking

English common law was officially or unofficially made the law of the original thirteen and other early states. [...]

With the exception of Louisiana, the newer states, one way or another, followed the original thirteen states. [...]

This common origin of American state law had three kinds of effects. First, even where state-law doctrines developed differently, they developed from the same conceptual basis, and to the extent different states developed different doctrines, the doctrines would be more likely to look like fraternal twins than members of different species. Second, Americans were trained from the beginning to think they had a national law, that is, English law. Third, as a result of this history, together with their subsequent legal education, American lawyers have a common vocabulary and a common doctrinal base. The significance of this history is brought home by the experience in Louisiana, whose early law was based on the civil law, and which has on the whole continued to go its own doctrinal way in Code areas like contracts and property.

F. *The Methodology of American Common Law*

Contract law is in large part a matter of common law, that is, judge-made law. Although it might seem that this condition would lead to a fracturing of contract law, in fact it has contributed to the uniformity of contract law. To see why this is so, it is necessary to begin with the methodology of the common law, and more particularly, American common law.

[...]

The most basic method of reasoning in the common law is reasoning from precedent.

[...]

Reasoning from precedent normally begins with precedents that were handed down in the deciding court's jurisdiction and are binding on the deciding court. Call these local precedents. Two other methods of reasoning in the common law, reasoning by analogy and reasoning from principle, also normally or frequently begin with local precedents. Often, however, the courts reason from doctrines found in texts that are not binding on the deciding court, but that are nevertheless generally recognized by the profession as authoritative legal sources. These texts include sources that are official in the deciding court's jurisdiction but are not binding on the deciding court, such as cases decided by lower courts; sources that are official only in other jurisdictions, such as cases decided by courts outside the deciding court's jurisdiction; and secondary sources authored by members or students of the profession, such as *Restatements*, treatises, and law review articles. I shall refer to these nonbinding texts individually as *professional sources* and collectively as the *professional literature*. The significance of this literature is suggested by a study of opinions in sixteen American state supreme courts during 1940–1970, which found that citations to out-of-state cases accounted for about one-fourth of all citations to state cases, and that secondary sources were cited in almost half the opinions. Anecdotally, a Justice of the United States Supreme Court, Stephen Breyer, was recently quoted as having said that "most lawyers would rather have the support of two paragraphs of Areeda on antitrust [a leading American treatise] than four courts of appeals and three Supreme Court Justices."

[...]

If, in a common-law area, a doctrine is supported in the professional literature, the courts are likely at least to take the doctrine seriously. If a doctrine is *established* in the professional literature, and there is no applicable local precedent, the doctrine will normally be treated as law in virtually the same way as local precedents would be. [...]

Indeed, doctrines established in the professional literature will often be treated as law even if they lead to a result different from that suggested by local precedent, as long as local precedent is not squarely contradictory. For example, if local precedent establishes the rule that a donative promise is unenforceable, courts will nevertheless characteristically employ the rule, established in the professional literature, that a donative promise is enforceable if relied upon.

The practice of treating doctrines established in the professional literature as law also both nourishes and draws on the concept of national law. It nourishes the concept, because it is partly due to the practice that American legal scholars can write about and teach national law with confidence that it is a meaningful body of law. It draws on the concept, because it is in the professional literature that national law is to be found, and because when law students who have been educated in national law become practicing lawyers and judges, they will have internalized both the national doctrines they have learned in law school and the institutional principle that doctrines established in the professional literature can, should, and typically will be treated as law.

G. *A Look Back*

I started this paper by observing that it might be expected that American contract law would be highly fractured [...] It can now be seen that the opposite is true. [...] The common law methodology gives heavy weight to the standard of social congruence. Doctrines that are determined to be socially congruent by the courts of one state are likely to be found socially congruent by other courts. Doctrines that are determined to be socially incongruent by the courts of one state are likely to be found socially incongruent by other courts. Such convergence will occur not just spontaneously, but because under the practice of reasoning from the professional literature, what courts do in one state becomes relevant to determining the law of other states. In contrast, American state legislatures, although also affected by social propositions, may be somewhat more likely than American state courts to shape local legislation partly on the basis of local political pressures.

V. Special Elements in the Harmonization of Contract Law

[...] The central position of national law in American contract law [...] was [...] reinforced by four great works of scholarship: a treatise on contract law by Samuel Williston, one of the leading figures in classical contract law, first published in 1921; a treatise on contract law by Arthur Corbin, a founder of modern American contract law, first published in 1951; the *Restatement of Contracts*, of which Williston was the Chief Reporter, published in 1932; and Article 2 of the Uniform Commercial Code ("UCC"), of which Karl Llewellyn, another leading contracts scholar, was Chief Reporter, published in 1952.

Influential treatises are not unique to the United States, but the influence of the Williston and Corbin treatises is nevertheless striking. For a long time, it was virtually de rigueur to cite one or both treatises in any opinion on an issue of contract law that was not firmly settled by local binding precedents. Because both treatises – like virtually

every leading American treatise – were written in sweeping national-law terms, the enormous authority of these treatises gave a further push to national contract law.

The *Restatement of Contracts* is a more indigenous American product. The Restatement was a product of the American Law Institute ("ALI"). The ALI is an organization composed of lawyers, judges, and legal academics. The ALI's objective is to promote the clarification and simplification of the law, and its better adaptation to social needs. The ALI has sought to achieve this objective in part by preparing Restatements of various branches of the common law, including [...] Contracts.

The theory of the Restatements has changed somewhat over time. The introduction to the original *Restatement of Contracts* stated that "The function of the Institute is to state clearly and precisely in the light of the [courts'] decisions the principles and rules of the common law". The present theory is that the ALI "should feel obligated in [its] deliberations to give weight to all of the considerations that the courts, under a proper view of the judicial function, deem it right to weigh in theirs". Many of the original Restatements, including the *Restatement of Contracts*, were eventually superseded by revisions known as *Restatement Seconds*. The *Restatement Second of Contracts* was published in 1981. To a significant extent, the differences in approach between Williston and Corbin are paralleled by differences in approach between *Restatement First* and *Restatement Second*, and *Restatement Second* marks a considerable advance over *Restatement First*.

It sometimes seems to be thought that the uniformity of certain bodies of American law, such as contracts, is a result of the Restatements. However, although the Restatements have contributed to the harmonization process in the United States, they are more effect than cause. The underlying concept of a Restatement reflects, rather than generates, the concept of American national law. It is only because there was already a culture of American national law that the Restatements were conceived, and were so successful.

Uniform Acts are somewhat less indigenous to the United States than Restatements. However, it seems likely that few if any countries have carried out the concept of such acts as systematically as American states. Most Uniform Acts are the product of the National Conference of Commissioners on Uniform State Laws ("NCCUSL"), which consists of commissioners appointed by each state. NCCUSL has the power to recommend legislation to the states on subjects in which uniformity of law among the states is thought to be desirable, but has no power to require the adoption of such legislation. A few Uniform Acts, including the UCC, are the joint products of NCCUSL and the ALI.

Uniform Acts do not involve mandatory harmonization, like EC Regulations or Directives. Each state has a free choice whether to adopt a proposed Uniform Act and, for that matter, whether to adopt a Uniform Act in its pristine form or with local amendments. Some Uniform Acts have been adopted by less than substantially all the states – indeed, some have been adopted by only a handful of states. Other Uniform Acts have been adopted by all or substantially all the states. The UCC, which has been adopted by every state except Louisiana is an example.

Many provisions of the UCC are of major importance in contracts. Most of these provisions are in Article 2 (Sales). The direct applicability of that Article is set out in UCC § 2-102, which provides that "Unless the context otherwise requires, this Article applies to transactions in goods".

Because Article 2 in terms governs only contracts for the sale of goods, it might be thought that Article 2 would have served to fracture American contract law, by breaking out an important part of contracts for special treatment. In fact, however, Article 2 has generally had a unifying influence on American contract law. It was drafted under the leadership of a great contract law scholar. It reflected many advanced contract-law ideas. Many of its provisions are set out in very general terms. It builds on rather than replaces general contract law; for example, Article 2 does not define offers. Finally, reasoning from statutes (including the UCC) by analogy is a long-standing practice in common-law methodology. The unifying effect of Article 2 on contract law is reflected in the fact that a major reason for the promulgation of the *Restatement Second of Contracts* was to incorporate UCC concepts in the *Restatement*. And, of course, Article 2 fully harmonizes the contract law of every state in regard to an extremely important part of contract law.

VI. *Implications for the Integration of European Law*

In this Part, I will touch briefly on the implications of the American experience for European contract law. In one sense these implications are limited. There are many ways to harmonize law, and the elements of harmonization in American contract law are not exclusive. Accordingly, European contract law may be successfully integrated without regard to those elements. Nevertheless, the American experience suggests the importance of sociological elements in the harmonization of law. Indeed, the significance of such elements is reflected in the timing of the *Unidroit Principles* and the *European Principles*. Surely it is no accident that lawyers are beginning to work on unifying European contract law just when, for the first time in history, many people are beginning to think that they can be not only English or German, but European.

Given the importance of sociological elements, it may be desirable, for those interested in the harmonization of European law, to focus not only on doctrinal unification but on institutional design. At least four institutional measures could be taken to facilitate that harmonization.

One measure would be to partly denationalize law-school curricula. Under one model, the teaching of law-school subjects would be *Europeanized*. In a Europeanized model, each subject would be taught with the comparative law of other European nations in mind. Under an alternative model, legal education would be *generalized*. In a generalized model, as each new issue arose in a course the initial focus would be the problems raised by that issue – the problems raised, for example, by mistake, interpretation, or remedies – and only then would attention be turned to the particular solution of the local national system. The solutions of other national systems, whether European or not, would be considered, not necessarily or not only for their own sake, but to instantiate the general problems raised by the relevant issue and the possible lines of solution.

A second measure would be the Europeanization or generalization of bar examinations. Indeed, without this element a change in legal education might not be feasible.

A third measure would be the Europeanization, or the further Europeanization, of legal scholarship.

A fourth measure would be the Europeanization or generalization of judicial citation practices, so that European courts could and would make use of extranational material in the same way that American courts make use of the professional literature.

[...]

IV. Further reading

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