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Е. Г. Анисимова, С. В. Коростелёв

АНГЛИЙСКИЙ ЯЗЫК ДЛЯ ЮРИСТОВ

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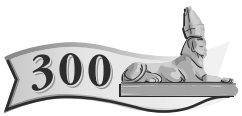

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Английский язык для юристов. Предпринимательское право

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Настоящее издание предназначено для лиц, желающих овладеть юридической лексикой в сфере международного предпринимательства. Правовая лексика вводится тематически, с использованием текстов, отражающих нормы ряда институтов международного предпринимательского права, и закрепляется в различных видах упражнений. В начало каждой дидактической единицы помещен краткий комментарий, который отсылает обучаемого к нормам сходного института российского гражданского законодательства, что способствует успешному овладению лексикой международного предпринимательского права.

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Содержание

Предисловие

Настоящее учебное пособие предназначено для овладения юридической терминологией в области предпринимательского права студентами гражданско-правовой специализации юридических вузов и студентами лингвистических вузов, изучающими юридическую лексику.

Особенностью данного пособия является обеспечение решения двуединой задачи обеспечения учебного процесса как студентов-лингвистов, так и студентов-юристов.

Во-первых, известно, что работа на международном рынке требует от юриста чрезвычайно высокого уровня подготовки. Данное пособие построено на использовании современных аутентичных иностранных юридических текстов государств системы общего права, и поэтому, оно может оказаться полезным для развития у студентов-юристов навыков сравнительно-правового толкования, дающего представление о том, как решаются сходные проблемы в государствах с различными правовыми системами.

Работая с данным пособием, студент сможет использовать свои знания, полученные в ходе изучения дисциплин гражданско-правового цикла, осуществляя внешнее синхронное микро- и макросравнение институтов права государств с рыночной системой хозяйствования на уровне материальных правовых норм. Полученные в ходе работы навыки функционального срав-

нения студент может применить при поиске метода (правовой нормы или института) с помощью которых может быть решена возникающая в сфере международного бизнеса проблема.

Во-вторых, пособие построено следующим образом: каждая дидактическая единица посвящена изучению норм одного из институтов предпринимательского права. В начало такой единицы помещен краткий комментарий, который отсылает обучаемого к нормам регулирующим сходный институт российского законодательства. Студент-лингвист перед началом работы над материалами дидактической единицы должен обратиться к указанным нормам, что поможет ему понять ее содержание и успешно овладеть лексикой данного института права. В ходе работы студентам-лингвистам, не знакомым с гражданским правом, рекомендуется обращаться к Гражданскому Кодексу Российской Федерации (предпочтительнее иметь под рукой любую из находящихся на рынке версий «Комментария к Гражданскому кодексу РФ»).

Правовая лексика вводится тематически, по разделам, отражающим нормы отдельных институтов предпринимательского права; и закрепляется в различных видах упражнений, находящих свое применение в таких речевых видах работы: монолог, диалог, дискуссия. Однако следует отметить, что структура пособия не является зеркальным и полным отражением структуры отрасли российского предпринимательского и коммерческого права. Авторами выбраны те институты права, которые представляются как наиболее полезные и интересные для достижения цели освоения студентами предпринимательской лексики.

Пособие не предусматривает обучение грамматике, поскольку его введение в учебный процесс предусматривается на старших курсах вузов, когда студентами уже освоены базовые курсы английского языка, гражданского права, и осуществляется изучение специальных дисциплин, входящих в гражданско-правовую специализацию подготовки юристов, а именно: предпринимательского и коммерческого права, страхования и т. д.

Студентам как юридического, так и лингвистического направлений подготовки при работе с данным пособием рекомендуется использовать наряду с общими словарями также и специальные словари, а именно: *Андрианов С. Н.*, *Бернсон А. С.* , *Никифоров А. С.* Англо-русский юридический словарь. М.: Русский язык, 1993, либо более поздние издания; *Кузнецов А.* Практический русско-английский юридический словарь. М.: Avers, 1995; электронные словари MULTILEX, LINGVO; онлайновый словари MULTITRAN (www.multitran.ru), Find Law for Legal Professionals (www.dictionary.lp.findlaw.com).

Unit 1

Tort Law

Деликтное право

Нормы института внедоговорных обязательств: «Обязательства вследствие причинения вреда» (глава 59 ГК РФ) определяют, что вред, причиненный личности или имуществу гражданина или юридического лица, подлежит возмещению в полном объеме лицом, причинившим вред. Устанавливаются ограничения по возмещению вреда причиненного несовершеннолетними и недееспособными гражданами. Возмещение вреда осуществляется либо в денежной, либо в натуральной форме. Законом, либо договором может быть установлена обязанность причинителя вреда выплатить потерпевшим компенсацию сверх возмещения вреда. Лицо, причинившее вред, освобождается от возмещения, если докажет, что вред причинен не по его вине. В возмещении вреда может быть отказано, если вред причинен по просьбе или с согласия потерпевшего, в состоянии необходимой обороны, в состоянии крайней необходимости, а действия причинителя не нарушают нравственные принципы общества.

List of key terms and word combinations:

actual malice	–	злой умысел, установленный по фактическим обстоятельствам дела
comparative negligence	–	относительная небрежность совместная вина
contributory negligence	–	небрежность (неосторожность) истца, вызвавшая несчастный случай; вина потерпевшего; небрежность, предполагающая возмещение доли ответственности
damage cap	–	предел возмещения
damages	–	возмещение вреда
defamation	–	разглашение правдивых сведений позорящих другое лицо
defective condition	–	юридически порочные условия
false imprisonment	–	неправомерное лишение свободы
infliction of emotional distress	–	причинение эмоционального расстройства
injunction	–	судебный запрет
interference with a contract	–	вмешательство в контракт
invasion of privacy	–	нарушение личной жизни
legal duty	–	правовая обязанность, договорная обязанность
libel	–	клевета письменно или через печать
misuse of legal procedure	–	злоупотребление судопроизводством
negligence	–	небрежность
nuisance	–	нарушение покоя, вред, источник вреда, «зловредность» (в частности, причинение собственнику недвижимости помех и неудобств в пользовании ею)
proximate cause	–	непосредственная причина
punitive damages	–	штрафные убытки, убытки, присуждаемые в порядке наказания

doctrine *respondeat superior*	–	доктрина «пусть принципал отвечает»
slander	–	устная клевета
strict liability	–	строгая ответственность; объективная ответственность (независимо от наличия вины)
survival statute	–	закон о признании основания иска действительным независимо от смерти стороны
tort	–	деликт, гражданское правонарушение
tortfeasor	–	причинитель вреда, делинквент; правонарушитель

A *tort* is a private wrong that injures another person's physical well-being, property, or reputation. A person who commits a tort is called a *tortfeasor*. The other party is alternately referred to as the injured party, the innocent party, or the victim. If a lawsuit has been filed, the injured party is called the *plaintiff* and the tortfeasor is called the *defendant*.

The primary purpose of *tort law* is to compensate the innocent party by making up for any loss suffered by that victim. Another objective is to protect potential victims by deterring future tortious behavior. Criminal law involves a public wrong, that is, a wrong that affects the entire society. When a crime is committed, government authorities begin legal actions designed to remove the offender from society. It is possible, however, for a single act to be both a tort and a crime.

Businesspeople must be especially aware of tort law because of the *doctrine of respondeat superior* (let the master respond). That doctrine may impose legal liability on employers and make them pay for the torts committed by their employees within the scope of the employer's business.

No legal liability can be imposed against an individual unless two elements are present: the first element is *duty*, which is an obligation placed on individuals because of the law; the second element is a *violation of that duty*. A duty can be violated *intentionally, through negligence,* or under the theory *of strict liability*.

Legal duties arise corresponding to each right within each member of our society.

Intentional violations of duty include a variety of *intentional torts*, all of which have their own individual elements. The principal intentional torts are assault, battery, false imprisonment, defamation, invasion of privacy, misuse of legal procedure, infliction of emotional distress, nuisance, and interference with a contract.

People and property are sometimes injured even when no one intends that the injury occur. Such an occurrence is usually labeled «an accident.» Justice demands that the injured party be compensated. That part of tort law that is concerned with the compensation of accident victims is called *negligence*.

Under what circumstances can the actions of an alleged *tortfeasor* be labeled negligent so that the tortfeasor will be held liable? Four elements must be present to establish negligence: (1) legal duty, (2) breach of duty through a failure to meet the appropriate standard of care, (3) proximate cause, and (4) actual injury.

A *breach of duty* owed to the victim occurs if the tortfeasor has not met the appropriate standard of care under the circumstances. To determine if the alleged tortfeasor has met the standard of care, the court uses the *reasonable person test*. This test compares the actions of the tortfeasor with those of a reasonable person in a similar situation. The reasonable person test is objective.

Determining this test may require the use of *expert witnesses* to testify as to the reasonable professional's conduct under the circumstances.

In order for the tortfeasor to be held liable, the unreasonable conduct must be the *proximate cause* of the victim's injuries. *Proximate cause* (sometimes referred to as *legal cause*) is the connection between the unreasonable conduct and the resulting harm.

The injured party in a lawsuit for negligence must show that *actual harm* was suffered. In most cases, the harm suffered is a physical injury or in a form of property damage, and is, therefore, visible. Harm suffered due to fright or humiliation is difficult to demonstrate.

Several defenses can be used by the defendant in a negligence case. These defenses include *contributory negligence, comparative negligence,* and *assumption of the risk*.

The *defense of contributory negligence* involves the failure of the injured party to be careful enough to ensure personal safety. Contributory negligence completely prevents recovery by the injured party. The injured party's defense to a charge of contributory negligence is called last clear chance. Under this doctrine, a tortfeasor may be held liable if the injured party can show that the tortfeasor had the last chance to avoid injury.

The doctrine of *comparative negligence* requires courts to weigh the relative degree of wrongdoing in awarding damages, and to assign damages according to the degree of fault of each party.

Another defense to negligence is *assumption of the risk*, which involves the voluntary exposure of the victim to a known risk.

Under the *doctrine of strict liability* or *absolute liability*, the court will hold a tortfeasor liable for injuries to a

victim even though the tortfeasor did not intend the harm and was not, in any way, negligent. Strict liability is generally applied when the harm results from an ultrahazardous or very dangerous activity.

Product liability is a legal theory that imposes liability on the manufacturer and seller of a product produced and sold in a defective condition (unreasonably dangerous to the user, to the consumer, or to property). Anyone who produces or sells a product in a defective condition is subject to liability for the physical or emotional injury to the ultimate consumer and for any physical harm to the user's property.

When a wrongdoer has injured another person by committing a tort, the victim can usually be compensated with monetary damages. *Damages* can include compensation for the repair or replacement of involved property, or for lost wages, medical bills, and any pain and suffering that the victim was forced to endure. If the tortfeasor's acts are notoriously willful and malicious, a court may impose *punitive damages* (*exemplary damages*), which are damages above and beyond those needed to compensate the injured party. Punitive damages are designed to punish the tortfeasor so that similar malicious actions are avoided by others.

If a tort involves a continuing problem the injured party may ask the court for an *injunction*. An injunction is a court order preventing someone from performing a particular act. If the company failed to satisfy an order, it would be in *contempt of court*. *Contempt of court* is a deliberate violation of the order of a judge that can result in a fine or in incarceration for the wrongdoer.

Exercise 1. Comprehension questions:

1. What are the kinds of violation of a duty?

2. What is done to determine if the alleged tortfeasor has met the standard of care?
3. What are the forms of the actual harm?
4. When do the courts deny damages in actions for negligence?
5. When is the strict liability applied?
6. What are the punitive damages designed for?
7. Explain what an injunction is.

Exercise 2. Find in the text English equivalents to the following:

Относительная небрежность; совместная вина; небрежность, предполагающая возмещение доли ответственности; предел возмещения; разглашение правдивых сведений позорящих другое лицо; юридически порочные условия; судебный запрет; вмешательство в контракт; нарушение личной жизни; правовая обязанность; клевета письменно или через печать; небрежность; источник вреда; непосредственная причина; убытки, присуждаемые в порядке наказания; устная клевета; объективная ответственность.

Exercise 3. Consult recommended dictionaries and give words or phrases to the following definitions:

Обязательства из причинения вреда; моральный вред; меры ответственности; вред причиненный источником повышенной опасности; вред причиненный актами власти; вред причиненный несовершеннолетними лицами; вред причиненный недееспособными лицами; вред причиненный жизни и здоровью гражданина; право регресса; способы и размеры компенсации вреда.

Exercise 4. Be ready to talk on one of the following topics:

1. Differentiate between the objectives of tort law and those of criminal law.

2. Discuss the element of duty and explain how duties relate to rights.
3. Identify the principal intentional torts and outline the elements of each.
4. Determine the four elements of negligence.
5. Contrast contributory negligence, comparative negligence, and assumption of the risk.

Exercise 5. Make up your own dialog on the case:

To prove that the plaintiff died of lung cancer caused by smoking the defendant's cigarettes or that plaintiff's scalp rash was caused by the defendant hair dye will often be a tricky and difficult task. Not only must the plaintiff disclose that the breach of warranty was the cause "in fact", but he must show, that the "breach of the warranty was the proximate cause of the loss sustained." The lawyer must prove a sufficiently close causal connection to convince the court that it ought to be defined as proximate.

Post hoc propter hoc is not normally enough; the plaintiff must show more that the goods injured the plaintiff in a certain way.

Unit 2

Characteristics, and Status of Contracts

Сущность, характеристика и статус договоров

Нормы общих положений гражданского права (раздел I ГК РФ, глава 9 «Сделки») и института обязательственного права (раздел III ГК РФ), а именно, нормы субинститута общих положений договора (главы 27, 28, 29 ГК РФ), определяют, что договор представляет собой соглашение двух или нескольких лиц об установлении, изменении или прекращении гражданских прав и обязанностей. Субъекты права свободны в определении условий, решении вопросов заключения договора и в выборе партнеров. Заключение договора проходит две стадии: 1) оферта (предложение заключить договор); 2) акцепт (согласие заключить договор). Договор может быть заключен в устной или письменной форме.

List of key terms and word combinations:

contract of record	–	договор, облеченный в публичный акт
executed contract	–	договор с исполнением в момент заключения
executory contract	–	договор с исполнением в будущем
express contract	–	явно выраженный договор
implied-in-fact contract	–	подразумеваемый договор
implied-in-law contract	–	квази-договор (вытекающий из предписаний закона)
obligee	–	лицо, по отношению к которому принято обязательство; кредитор по обязательству
obligor	–	лицо, принявшее на себя обязательство; должник по обязательству, дебитор
privity	–	имущественные отношения (основанные на договоре, правопреемстве и других личных отношениях)
promisee	–	кредитор по договору
promisor	–	должник по договору
quasi-contract	–	квазидоговор
unenforceable contract	–	договор, не могущий быть принудительно осуществленным в исковом порядке
unilateral contract	–	односторонняя сделка
valid contract	–	надлежаще оформленный, надлежаще совершенный договор
voidable contract	–	оспоримая сделка
void contract	–	не имеющая юридической силы, ничтожная сделка

A contract is an agreement based on mutual promises between two or more competent parties to do or to refrain from doing some particular thing that is neither illegal nor impossible. The agreement results in an obligation or a duty that can be enforced in a court of law.

The contracting party who makes a promise is known as the *promisor*; the one to whom the promise is made is the *promisee*. The party who is obligated to deliver on a promise or to undertake some act is called the *obligor*. The contracting party to whom the obligor owes an obligation is called the *obligee*.

A *legally complete contract* will arise between two parties when all six elements of a contract are present: offer, acceptance, mutual assent, capacity, consideration, and legality. If any one of the six elements is missing, the transaction is not a legally complete contract.

1. An *offer* is a proposal made by one party to another indicating a willingness to enter into a contract. The person who makes an offer is called the *offerer*. The person to whom the offer is made is the *offeree*. Making the offer is actually the first step in creating the contractual relationship between the two parties. The offer must be seriously intended, clear and definite, and communicated to the offeree.

2. In most cases, only the specifically identified offeree has the right to accept an offer. *Acceptance* means that the offeree agrees to be bound by the terms set up by the offerer in the offer. In many situations, if the offeree changes any of those terms, the acceptance is not really an acceptance but a *counteroffer*.

3. If a valid offer has been made by the offerer and a valid acceptance has been made by the offeree, then the parties have agreed to the terms, and *mutual assent* exists between them. Mutual assent is sometimes called a meeting of the minds.

4. *Capacity* is the legal ability to enter into a contractual relationship. The law has established a general presumption that anyone entering a contractual relationship has the legal capacity to do so.

5. *Consideration*, i.e. the mutual exchange of benefits and sacrifices, is the thing of value promised to one party in exchange for something else of value promised by the other party. This exchange of valued items or services binds the parties together. If no consideration passes between the parties, then no contract exists.

6. The final element of a binding contract is *legality*. Parties cannot be allowed to enforce a contract that involves doing something that is illegal. Some illegal contracts involve agreements to commit a crime or to perform a tort. Other activities that are neither crimes nor torts have been made illegal by specific statutes. Among these activities are usurious agreements, wagering agreements, unlicensed agreements, unconscionable agreements, etc.

All contracts are agreements, but not all agreements are contracts. An agreement may or may not be legally enforceable. For example, an agreement to take a friend to a football game would not be legally enforceable because the friend has not given anything in exchange for that promise. To be enforceable, an agreement must conform to the law of contracts.

The general rule of contract law is that the parties to a contract must stand in *privity* to one another. *Privity* means that both parties must have a legally recognized interest in the subject of the contract if they are to be bound by it. Outside parties who do not have such an interest in the subject matter of the contract may not be bound by it. Their right to sue in the event of breach (i.e., broken or violated) of contract would also be called into question. An exception to the general rule of privity exists in cases involving warranties and product liability.

Contractual characteristics are divided into four different categories:

- valid, void, voidable, and unenforceable;
- unilateral and bilateral;
- express and implied; and
- informal and formal.

Any given contract could be classifiable in all four ways. Thus, a single contract could be said to be valid, bilateral, express, and formal.

A *valid contract* is one that is legally binding and fully enforceable by the court. In contrast, a *void contract* is one that has no legal effect whatsoever. A contract to perform an illegal act would be void. A *voidable contract* is one that may be avoided or canceled by one of the parties. A contract made by minors and one that is induced by fraud or misrepresentation are examples of voidable contracts. An *unenforceable contract* is one that, because of some rule of law, cannot be upheld by a court of law. An unenforceable contract may have all the elements of a complete contract and still be unenforceable.

A *unilateral contract* is an agreement in which one party makes a promise to do something in return for an act of some sort. In contrast, a *bilateral contract* is one in which both parties make promises. A bilateral contract comes into existence the moment the two promises are made. A breach of contract occurs when one of the two parties fails to keep the promise.

A contract can be either *express* or *implied*. An *express contract* requires some sort of written or spoken expression that indicates the desire of the parties to enter the contractual relationship. An *implied contract* is created by the actions or gestures of the parties involved in the transaction.

In some situations, laws require certain types of contracts to be in writing. A *written contract* does not have

to be a long, formal, preprinted agreement. A written contract may take the form of a letter, sales slip and receipt, notation, or memorandum. A written contract may be typed, printed, scrawled, or written in beautiful penmanship.

One who knowingly accepts benefits from another person may be obligated for their payment, even though no express agreement has been made. Agreements of this type can be either *implied in fact* or *implied in law*.

Contracts implied by the direct or indirect acts of the parties are known as *implied-in-fact contracts*.

An *implied-in-law contract* can be imposed by a court applying reasons of justice and fairness when someone is unjustly enriched at the innocent expense of another. It is used when a contract cannot be enforced or when there is no actual written, oral, or implied-in-fact agreement. An implied-in-law contract is also called a *quasi-contract*. It does not result from the mutual assent of the parties such as an express or implied-in-fact contract.

Under common law principles, a *formal contract* differs from other types in that it has to be written; signed, witnessed, and placed under the seal of the parties; and delivered.

A special type of formal contract — *contract of record* — is not a contract in the true sense of the word because it is court created, and it does not have all the elements of a valid contract. Often, such a contract is one that has been confirmed by the court with an accompanying recorded judgment giving the successful litigant the right to demand satisfaction of the judgment.

An oral or written contract that is not under a seal or is not a contract of record is considered an *informal contract* (also known as a *simple contract*). An informal contract

generally has no requirements as to language, form, or construction. It comprises obligations entered into by parties whose promises are expressed in the simplest and, usually, most ordinary nonlegal language.

After a contract has been negotiated, all obligations must then be satisfactorily performed in order for the contract to be executed. A contract that has not yet been fully performed by the parties is called an *executory contract*. When a contract's terms have been completely and satisfactorily carried out by both parties, the contract becomes an *executed contract*. Such a contract is no longer an active agreement and is valuable only if a dispute about the agreement occurs.

Exercise 1. Comprehension questions:

1. How are the two contracting parties called?
2. What are the requirements of an offer?
3. Can it be called an acceptance when the offeree changes the terms?
4. What does the mutual assent suppose?
5. In what cases do people have the right to abandon their contracts?
6. What is a consideration and why is it an important element of a contract?
7. What makes the contract illegal?
8. Can quasi-contract be called a contract in the true sense of the word?
9. What is the contract of record?

Exercise 2. Find in the text English equivalents to the following:

Явно выраженный договор; подразумеваемый договор; лицо, по отношению к которому принято обязательство; кредитор по обязательству; лицо, принявшее

на себя обязательство; должник по обязательству, дебитор; кредитор по договору; должник по договору; договор, не могущий быть принудительно осуществленным в исковом порядке; оспоримая сделка; ничтожная сделка.

Exercise 3. Consult recommended dictionaries and give words or phrases to the following definitions:

Возмездный договор; безвозмездный договор; публичный договор; предварительный договор; договор в пользу третьего лица; толкование договора; простая письменная форма договора.

Exercise 4. Be ready to talk on one of the following topics:

1. Identify the six elements of a contract.
2. Distinguish contracts from other agreements made between different parties.
3. Explain the nature of valid, void, voidable, and unenforceable contracts.
4. Contrast unilateral and bilateral contractual arrangements.
5. Outline the difference between express and implied contracts.
6. Contrast the nature of a formal contract with that of an informal contract.
7. Explain how executory contracts differ from executed contracts.

Exercise 5. Make up your own dialog on the case:

In *Kunian v. Development Corp. of America*, the seller of plumbing and heating materials entered into an installment contract with the buyer. Several months later the buyer was $38,000 behind in payments for installments of goods delivered. After the seller demanded assurance

of performance from the buyer, the buyer promised that he would pay the outstanding indebtedness if the seller would continue his performance. When a month passed and the buyer had made no further payments, the seller informed the buyer that no further deliveries would be made unless the buyer deposited in escrow a sufficient amount of cash to pay for the delivered goods. The court held that the seller had "reasonable ground for insecurity" and that his suspension of performance was justified.

Exercise 6. Resume in industry buzz:

Types of Ks

1. Express or Implied
   a. Express is statemts of mutual assent; willingness to enter into a K
   b. Implied is no statements; conduct
2. Bilateral, Unilateral or Code
   a. Code is sale of goods & no bi/uni distinction
   b. Bilateral formed w/mutual promises of parties, perf. of both fully executory
   c. Unilateral promise 1 side & fully executed perf. the other (K no formed until fully executed 1 side)
3. Telling if Bilateral or Unilateral
   a. Unilateral if offer warns only accept by act or if public offer
   b. Bilateral always if asks for return promise
   c. Offer indifferent (can't tell if promise or perf. requested) MAJ it's bilateral

Unit 3

Offer and Acceptance

Оферта и акцепт

Офертой (глава 28 ГК РФ) признается такое предложение, которое: а) должно быть достаточно определенным и выражать явное намерение лица заключить договор; б) должно содержать все существенные условия договора; в) должно быть обращено к одному или нескольким конкретным лицам. Акцептом признается согласие лица, которому адресована оферта, принять это предложение, причем не любое согласие, а лишь такое, которое является полным и безоговорочным. Акцептом считается также совершение лицом, получившим оферту, в срок, установленный для акцепта, действий по выполнению указанных в ней условий договора. Будучи полученными, оферта и акцепт порождают юридические последствия для совершивших их лиц.

List of key terms and word combinations:

acceptance	–	акцепт, акцептование
cost-plus contract	–	договор на условиях оплаты фактических расходов с начислением определенного процента от этих расходов
counteroffer	–	встречное предложение; контроферта
current market price contract	–	договор на условиях оплаты по текущим рыночным ценам
firm offer	–	предложение товара или ценных бумаг по твердой цене; твердое предложение
invitation to trade	–	приглашение сделать оферту
mirror image rule	–	правило зеркального отображения
offer	–	предложение; оферта
offeree	–	адресат оферты; лицо, которому делается предложение
offerer	–	оферент; лицо, делающее предложение
option contract	–	опционный контракт
output contract	–	договор о продаже всей произведенной продукции
public offer	–	оферта, обращенная к неопределенному кругу лиц
rejection	–	отклонение, отказ
requirements contract	–	контракт «на все потребности покупателя» (предусматривающий закупку покупателем только у одного поставщика)
revocation	–	отмена, аннулирование; ревокация

The first element of a valid contract is the existence of an *offer*. An *offer* is a proposal made by one party to another indicating a willingness to enter into a contract. The person who makes an offer is called an *offeror*. The person to whom the offer is made is called the *offeree*. An offer is valid only if it has *serious intent*, has *clear and*

reasonably definite terms, and has been communicated to the offeree.

An offer is invalid if it is made as an obvious joke, during an emotional outburst of rage or anger, or under circumstances that might convey a lack of serious intent. The offerer's words or actions must give the offeree assurance that a binding agreement is intended. *Serious intent* is determined by the offerer's words and actions and by what the offeree believed was intended by those words and actions.

The offerer's words must give the offeree assurance that a binding agreement is intended.

The terms of an offer must be sufficiently clear to remove any doubt about the contractual intentions of the offerer.

The communicated terms of an offer must be sufficiently clear to remove any doubt about the contractual intentions of the offerer. No valid offer will exist when terms are indefinite, inadequate, vague, or confusing.

In general, an offer should include points similar to those covered in a newspaper story -who, what, when, where, and how [much] — if it is to be clear, definite, and certain. In other words, the offer should identify the parties involved in the contract, the goods or services that will be the subject matter of the contract, the price the offerer is willing to pay or receive, and the time required for the performance of the contract.

Sometimes laws permit offers to omit certain information. They can state that even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy. For example, cost-plus contracts, out-

put contracts, requirements contracts, and current market price contracts are enforceable even though they are not complete in certain matters. A *cost-plus contract* does not include a final price. Instead, that price is determined by the cost of labor and materials plus an agreed percentage markup. An *output contract* is an agreement in which one party consents to sell to the second party all the goods that party makes in a given period of time. A *requirements contract* is an agreement in which one party agrees to buy all of the goods it needs from the second party. Finally, a *current market price contract* is an agreement in which prices are determined with reference to the market price of the goods on a specified date.

An offer must be communicated to the offeree to be valid. The communication of the offerer's intentions may be by whatever means is convenient and desirable. It may be communicated orally or by letter, telegram, or any other means capable of transmitting the offerer's proposal. It may also be implied. Acts and conduct of the proposing party are, in many cases, successful in communicating an intention to make an offer to another party witnessing them. When acts and conduct are sufficient to convey an offerer's intentions, an implied offer results.

At times, an offer must be communicated to a party whose name, identity, or address is unknown. In such cases, a *public offer* is made. A *public offer* is made through the public media but is intended for only one person whose identity or address is unknown to the offerer. The classic example of a public offer is an advertisement in a lost-and-found column in a newspaper.

By contrast, *invitations to trade* are not offers. An *invitation to trade* is an announcement published for the purpose of creating interest and attracting a response by

many people. Newspaper and magazine advertisements, radio and television commercials, store window displays, price tags on merchandise, and prices in catalogs are included within this definition. In the case of an invitation to trade, no binding agreement develops until a responding party makes an offer that the advertiser accepts.

The second major element in a binding contract is *acceptance* of the offer. An a*cceptance* means that the offeree agrees to be bound by the terms set up by the offerer in the offer. Only the offeree, the one to whom the offer is made, has the right to accept an offer. If another party attempts to accept, that attempt would actually be a new and independent offer.

Unilateral contracts do not usually require oral or written communication of an acceptance. When the offerer makes a promise in a unilateral contract, the offerer expects an action, not another promise in return. Performance of the action requested within the time allowed by the offerer and with the offerer's knowledge creates the contract.

In bilateral contracts, unlike unilateral ones, the offeree must communicate acceptance to the offerer. Bilateral contracts consist of a promise by one party in return for a promise by the other. Until the offeree communicates a willingness to be bound by a promise, there is no valid acceptance.

An offer may be accepted by either express or implied means of communication. In an *express acceptance*, the offeree may choose any method of acceptance, unless the offer states that it must be made in a particular manner. A stipulation such as «reply by Federal Express» or «reply by certified mail» in the offer must be carried out to complete an acceptance.

To be effective, an acceptance must be *unequivocal*, which means that the acceptance must not change any of the terms stated in the offer. Under common law, this stipulation is known as the mirror image rule.

Under the mirror image rule, the terms stated in the acceptance must duplicate the terms in the offer. If the acceptance changes or qualifies the terms in the offer, it is not an acceptance but a *counteroffer*. A counteroffer is a response to an offer in which the terms of the original offer are changed. No agreement is reached unless the counteroffer is accepted by the original offerer.

In contracts for the sale of goods, as long as there is a definite expression of acceptance, a contract will result even though an acceptance has different or additional terms. If both parties are not merchants, the different or additional terms are treated as proposals for amendment to the contract. If the parties are both merchants, however, the different or additional terms become part of the contract unless (a) they make an important difference, (b) the offerer objects, or (c) the offerer limits acceptance to its terms.

Acceptance may result from the conduct of the offeree. Actions and gestures may indicate the offeree's willingness to enter into a binding agreement.

As a general rule, silence is not an acceptance. If, however, both parties agree that silence on the part of the offeree will signal acceptance, then such an acceptance is valid.

Another exception to the general rule occurs when the offeree has allowed silence to act as acceptance. The offerer cannot force the offeree into a contract by saying silence will mean acceptance. The offeree, however, can force the offerer into a contract if the offerer established the silence condition.

A *rejection* comes about when an offeree expresses or implies refusal to accept an offer. Rejection terminates an offer and all negotiations associated with it. Further negotiations could commence with a new offer by either party or a renewal of the original offer by the offerer. Rejection is usually achieved when communicated by the offeree.

A *revocation* is the calling back of the offer by the offerer. With the exception of an option contract and a firm offer, an offer may be revoked anytime before it has been accepted. The offerer has this right, despite what might appear to be a strong moral obligation to continue the offer. An offer may be revoked by communication, automatic revocation, passage of time, death or insanity of the offerer, destruction of the subject matter, or the subsequent illegality of the contract.

An offer may be *revoked* by the offerer communicating that intention to the offeree before the offer has been accepted. Revocation is ineffective if the acceptance has already been communicated, as by mailing the acceptance in response to a mailed offer. Direct communication of revocation is not required if the offeree knows about the offer's withdrawal by other means.

When the terms of an offer include a definite time limit for acceptance, the offer is automatically revoked at the expiration of the time stated.

An *option contract* is an agreement that binds an offerer to hold open an offer for a predetermined or reasonable length of time. In return for this agreement to hold the offer open, the offerer receives money or something else of value from the offeree. Parties to an option contract often agree that the consideration may be credited toward any indebtedness incurred by the offeree in the event that

the offer is accepted. Should the offeree fail to take up the option, however, the offerer is under no legal obligation to return the consideration.

Option contracts remove the possibility of revocation through death or insanity of the offerer. The offeree who holds an option contract may demand acceptance by giving written notice of acceptance to the executor or administrator of the deceased offerer's estate or to the offerer's legally appointed guardian.

A special rule has emerged in international law. This rule holds that no consideration is necessary when a merchant agrees in writing to hold an offer open. This is called a *firm offer*.

Exercise 1. Comprehension questions:

1. What is an offer?
2. What is to be done in order to remove any doubt about contractual intentions of the offer?
3. What information should the offer include?
4. What is a cost-plus contract?
5. What does a current market price contract suppose?
6. What are the ways to transmit the offerer's proposal?
7. What is a public offer?
8. In what cases are acts and conduct of the proposing successful?
9. Who has a right to accept an offer/ how is an offer rejected?

Exercise 2. Find in the text English equivalents to the following:

Договор на условиях оплаты фактических расходов с начислением определенного процента от этих расходов; договор на условиях оплаты по текущим рыночным це-

нам; предложение товара или ценных бумаг по твердой цене; приглашение сделать оферту; адресат оферты; оферент; оферта, обращенная к неопределенному кругу лиц; отклонение; аннулирование.

Exercise 3. Consult recommended dictionaries and give words or phrases to the following definitions:

Отзыв акцепта; публичная оферта; извещение об отзыве оферты; безотзывность оферты; приглашение делать оферту; акцепт, полученный с опозданием; отказ от акцепта.

Exercise 4. Be ready to talk on one of the following topics:

1. Identify the three requirements of a valid offer.
2. Differentiate between a public offer and an invitation to trade.
3. Explain acceptance of an offer in the cases of a unilateral contract and a bilateral contract.
4. Discuss the mirror image rule.
5. Relate the various means by which an offer can be revoked.
6. Explain what is meant by a firm offer.

Exercise 5. Make up your own dialog on the case:

In *Universal Oil Products. v. S.C.M. Corp.*, the seller sent a written offer to the buyer that did not contain a provision for arbitration of any disputes. The buyer responded with a written purchase order that did contain a provision for arbitration. The court treated the buyers order as a counteroffer, rather that as an acceptance with a proposal for additional terms. Since the seller shipped the goods pursuant to the buyers order, the court found that the seller thereby accepted the counteroffer and became bound to arbitrate.

Exercise 6. Resume in industry buzz:

Offer: commitment communicated to identified offeree & containing definite terms

1. Commitment: reas. person hearing words under these circum.

   believes speaker intends to enter into K (OBJECTIVE) (Public ad to identified offeree, 1st 10, is an offer)

   -> Code's way of objectively determining is course of dealing — worst is actual words used

2. Communicated to ID'd Offeree (ACTUAL KNOWLEDGE)

   -> Another can tell him; public offer accepts & is ID'd at same time

3. Containing Definite Terms: must address s/matter of K w/ certainty to be valid
   a. Real Estate (desc. & price)
   b. Goods (quantity, except offers for total requiremts based on past hx or offers for total outputs are based on last yr output or most mfrs)
   c. Services (term of e/mt by task or time, unless not stated then at will)

      -> All other material terms supplied by ct, but if offer tries to address material term, must do so w/certainty or offer is INVALID

4. Limits on Terminating Offers

a. Merchant Firm Offer Rule: Merchant who puts offer in writing & it says will hold open Xtime or indefinitely (Rrrevocable for time stated but not open more than 3 mos. w/o consideration

b. Option K (like a mini-K): consideration to hold open or consideration substitute; substitute when offeree

detrimentally, reas. & foreseeably relies on offer (sub bid) (detrimental reliance or prom. estoppel used)

c. Offer to Make Unilateral K: to give time to perform. Reasons can't terminate (best to worst) (1) stay open reas. time if perf. Begun (2) reliance by offeree — supplies (3) doctrine of divisibility — reas. time to complete any «in works» (4) implied bilateral prom. to complete by commencing perf.

5. Ways to Terminate b/4 Acceptance

a. Revocation by Offeror

(1) Express w/ ID'd offeree efftv when receives it (not read or actually knows of) w/ delivery to offeree, anyone offeree's control

Express w/ public offer revocation same or comparable medium as offer

(2) Implied when offeror does act preventing perf. and when offeree learns of act from reliable source

b. Rejection by Offeree (refusal or counteroffer)

(1) Express when offeror receives or anyone in his control (no actual knowledge); can never be revived

(2) Implied (conduct) letting offer lapse past time stated or reas. time

c. Operation of Law: s/matter destroyed b/4 accept; supervening illegality; death or incapacity of either offeror or offeree terminates OFFER

Unit 4

Mutual Assent and Defective Agreement

Обоюдное согласие и юридически дефектный договор

Для заключения договора необходимо выражение согласованной воли двух сторон (двустороння сделка) либо трех или более сторон (многосторонняя сделка) (раздел I ГК РФ, глава 9 «Сделки»). Сделка, совершенная под влиянием заблуждения, обмана, насилия, угрозы, злонамеренного соглашения представителя одной стороны, а также сделка, которую лицо было вынуждено совершить вследствие стечения обстоятельств на крайне невыгодных для себя условиях, или в тот момент, когда данное лицо не было способно понимать значение своих действий или руководить ими, может быть признана судом недействительной.

List of key terms and word combinations:

business compulsion	–	понуждение
concealment	–	сокрытие, укрывательство; утаивание, умалчивание
duress	–	принуждение
fiduciary relationship	–	фидуциарные отношения
fraud	–	обман; мошенничество
liable	–	подлежащий ответственности
material fact	–	существенный факт
misrepresentation	–	введение в заблуждение; искажение фактов
mutual assent	–	обоюдное согласие, совпадение намерений сторон
nondisclosure	–	неоглашение, нераскрытие
rescission	–	аннулирование, расторжение, прекращение
undue influence	–	злоупотребление влиянием; недолжное влияние

Each party to a contract is protected from the chicanery of the other or from certain mistakes that may have crept into their agreement and destroyed mutual assent. If mutual assent has been destroyed, the contract is said to be a defective agreement, and that party is no longer bound to the terms of the agreement. A defective agreement can arise as a result of *fraud, misrepresentation, mutual mistake, duress, or undue influence*.

A wrongful statement, action, or concealment pertinent to the subject matter of a contract knowingly made to damage the other party defines *fraud*. If proved, fraud destroys any contract and makes the wrongdoer liable (i.e., legally responsible) to the injured party for all losses that result.

To destroy mutual assent on a claim of *active* or *passive fraud*, the complaining, or innocent, party must prove the existence of five elements:

1. The complaining party has to show that the other party made a false representation about some material fact (i.e., an important fact, a fact of substance) involved in the contract. A material fact is very crucial to the terms of the contract.
2. It must be demonstrated that the other party made the representation knowing of its falsity.
3. It must be revealed that the false representation was intended to be relied upon by the innocent party.
4. The complaining party must demonstrate that there was a reasonable reliance on the false representation.
5. It must be shown that the innocent party actually suffered some loss by relying on the false representation after entering the contract.

When one party to a contract makes a false statement intended to deceive the other party and thus leads that party into a deceptively based agreement, *active fraud* occurs.

To be fraudulent, statements must involve facts.

In contrast, *passive fraud*, which is generally called concealment or nondisclosure, occurs when one party does not offer certain facts that he or she is under an obligation to reveal. If this passive conduct is intended to deceive and does, in fact, deceive the other party, fraud results.

A *fiduciary relationship* is a relationship based upon trust. Such a relationship exists between attorneys and clients, guardians and wards, trustees and beneficiaries, and directors and a corporation. If one party is in a fiduciary relationship with another party, then an obligation arises to reveal what otherwise might be withheld when the two parties enter an agreement.

A false statement made innocently with no intent to deceive is called *misrepresentation*. Innocent misrepresen-

tation makes an existing agreement voidable, and the complaining party may demand *rescission*. *Rescission* means that both parties are returned to their original positions before the contract was entered into. Unlike cases based on fraud, which allow rescission and damages, cases based on innocent misrepresentation allow only rescission and not money damages.

When there has been no real meeting of the minds because of a *mistake*, mutual assent was never achieved and the agreement may be rescinded. As in misrepresentation, *mistake* permits rescission.

Some *mutual mistakes* are universally accepted as grounds for rescission. Others can give rise to lawsuits but not in all courts or in all jurisdictions. Among them are:

1. Mistakes as to Description. When both parties are mistaken in the identification and description of subject matter, a mutual mistake exists, and rescission will be granted.
2. Mistakes as to Existence. Proof that the subject matter had been destroyed before agreement was made also gives grounds for rescission. The agreement would be voidable if it were proved that just before acceptance the subject matter had been destroyed.
3. Mistakes as to Value. When two parties agree on the value of the subject matter and later find that they were both mistaken, a mutual mistake of opinion, not of fact, has occurred. Mutual mistakes of opinion are not grounds for rescinding a contract.
4. Mistakes Through Failure to Read a Document. Failure to read a document or the negligent reading of a document does not excuse performance on the ground of a mistaken understanding of the document's contents.

5. Mistakes of Law. Misunderstandings of existing laws do not give grounds for rescission; in other words, ignorance of the law is no excuse. Rescission may be allowed, however, when mistakes have related to the law of another jurisdiction.

Duress and *undue influence* rob a person of the ability to make an independent, well-reasoned decision to enter a contractual relationship freely. *Duress* may be viewed as an action by one party that forces another party to do what need not otherwise be done. *Duress* forces a person into a contract through the use of physical, emotional, or economic threats. In contrast, *undue influence* involves only the use of excessive pressure, and also requires the existence of a *confidential relationship*. Undue influence should not be confused with persuasion or a subtle form of inducement.

Either violence or the threat of violence against an individual or that person's family, household, or property is *physical duress*. *Emotional duress* arises from acts or threats that would create emotional distress in the one on whom they are inflicted.

A threat of a business nature that forces another party without real consent to enter a commercial agreement is called *economic duress*, or *business compulsion*. The court will rule the contract voidable on grounds of economic duress if the plaintiff can prove the existence of three elements:

1. The complaining party must first show that the other party was responsible for placing the complainant in a precarious economic situation and that the other party acted wrongfully in doing so.
2. The complainant must also show that there was no alternative other than to submit to the wrongful contractual demands of the party.

3. The innocent party must also show that he or she acted reasonably in entering the contract.

Exercise 1. Comprehension questions:

1. In what cases the wrongful statement is not a fraud?
2. What is the main difference between active fraud and passive fraud?
3. What is fiduciary relationship?
4. What does rescission mean?
5. What are the kinds of mutual mistakes?
6. What is the difference between duress and undue influence?
7. What do duress and undue influence have in common?
8. What does undue influence require?
9. Are persuasion and subtle inducement considered to be undue influence?

Exercise 2. Find in the text English equivalents to the following:

Понуждение; укрывательство; принуждение; фидуциарные отношения; мошенничество; существенный факт; введение в заблуждение; искажение фактов; обоюдное согласие, совпадение намерений сторон; злоупотребление влиянием; недолжное влияние.

Exercise 3. Consult recommended dictionaries and give words or phrases to the following definitions:

Обоюдное согласие сторон; расторжение договора по обоюдному согласию; изменение отдельных пунктов договора; лицо, уполномоченное собственником; предусмотрены любые формы взаимозачетов; вправе изменить размер платы; критерии ничтожности и оспоримости сделок; заинтересованное лицо; отсутствие согласия; нарушение прав и законных интересов; отсутствие

вещных прав; неуполномоченное лицо; конклюдентные действия; распространяется на отношения; оспариваемый договор.

Exercise 4. Be ready to talk on one of the following topics:

1. List the elements that must be proved to establish fraud.
2. Identify situations that can give rise to claims of passive fraud.
3. Distinguish between fraud and misrepresentation.
4. Discuss the difference between unilateral and bilateral mistakes.
5. Judge which types of mistakes provide appropriate grounds for getting out of a contract.
6. Differentiate among physical, emotional, and economic duress.

Exercise 5. Make up your own dialog on the case:

In *Weaver v. American Oil Company*, the Indiana Supreme Court held that clauses exculpating an oil company from liability for its negligence and obligating the station operator to indemnify the oil company for damages attributable were unconscionable:

The facts reveal that Weaver had left high school after one and a half years and spent his time, prior to leasing the service station, working at various skilled and unskilled labor oriented jobs. He was not one who should be expected to know the law or understand the meaning of technical terms. The ceremonious activity of signing the lease consisted of nothing more than the agent of American Oil placing the lease in front of Mr. Weaver and saying “sign”, which Mr. Weaver did. There is nothing in the record to indicate that Weaver read the lease; that

the agent asked Weaver to read it; or that the agent, in any manner, attempted to call Weaver's attention to the "hold harmless" clause in the lease. Each year following, the procedure was the same. ...The evidence also reveals that *the clause was in fine* print and contained *no title heading* which would have identified it as an indemnity clause...

Unit 5

Contractual Capacity

Договорная правоспособность и дееспособность

Способность иметь гражданские права и нести обязанности (гражданская правоспособность) признается в равной мере за всеми гражданами. Правоспособность гражданина возникает в момент рождения и прекращается смертью. Способность гражданина своими действиями приобретать и осуществлять гражданские права, создавать для себя гражданские обязанности и исполнять их, определяется как гражданская дееспособность, которая возникает в полном объеме с наступлением совершеннолетия. Граждане могут совершать любые не противоречащие закону сделки и участвовать в обязательствах (глава 3 ГК РФ). Граждане могут быть ограничены в правоспособности и дееспособности только в случаях и в порядке, установленных законом.

List of key terms and word combinations:

abandon	–	отказываться (например, от права притязания)
affirmance	–	утверждение, подтверждение
capacity	–	правоспособность; дееспособность
disaffirm	–	отменять; отказывать в подтверждении
emancipated	–	эмансипированный
majority	–	совершеннолетие
minority	–	несовершеннолетие
necessaries	–	необходимые предметы или услуги
ratification	–	ратификация; последующее одобрение
rebuttable presumption	–	опровержимая презумпция

The law has established a general presumption that anyone entering into a contractual relationship has the legal capacity to do so. This statement means that someone enforcing an agreement does not have to prove that when the contract was entered into the other party had contractual capacity. However, this is a *rebuttable presumption*; that is, a defending party (a minor, mental incompetent, or intoxicated person) has the right to attack the presumption in order to rescind a contract. *Minors* are generally excused from contractual liability due to their incapacity; their contracts are voidable.

Under common law, the term *minority* described persons who had not reached the age of 18 or 21 depending on jurisdiction. Upon reaching that age, a person attained majority.

In some jurisdictions, minors who become emancipated and are no longer under the control of their parents are responsible for their contracts. Emancipated minors include those who are married and those who leave home

and give up all rights to parental support. These minors are said to have *abandoned* the usual protective shield given them.

Minors sometimes lie about their ages when making contracts. Despite the misrepresentation of age, most jurisdictions allow minors to *disaffirm* or void contracts. Executory contracts, those that have not been fully performed by both parties, may be repudiated by a minor at any time.

Goods and services that are essential to a minor's health and welfare are *necessaries*. Necessaries include food, clothing, shelter, and medical and dental services. In determining whether goods and services qualify as necessaries, the court inquires into the minor's family status, financial strength, and social standing or station in life. A minor's contract covering only the fair value of necessaries is enforceable against the minor.

An individual may disaffirm an agreement made during minority before or within a reasonable time after reaching adulthood. Failure to disaffirm within a reasonable period of time after reaching adulthood would imply that the contract had been ratified. The method of *disaffirmance* is fundamentally the same as that of *ratification*. Disaffirmance may be implied by the acts of the individual after achieving majority, as by a failure to make an installment payment.

Ratification, or *affirmance*, the willingness to abide by contractual obligations, may be implied by using the item purchased, making an installment payment, paying off the balance of money owed on a previously voidable contract, or continuing to accept goods and services provided under a contract after becoming of full age. Affirmation may also result from the person's oral or written declaration

to abide by the contract. These and other acts ratify an existing agreement and elevate it to the status of one that is enforceable against an adult.

Individuals who buy something from a minor have voidable ownership rights because the minor has the right to disaffirm the contract. The law permits a person having voidable ownership rights to transfer valid ownership rights to an innocent third-party purchaser of those goods. Thus, disaffirmance by a minor will not require the innocent purchaser to return the goods (real estate is an exception).

Persons deprived of the mental ability to comprehend and understand contractual obligations have the right to disaffirm their contracts.

A contract made by a person who is mentally infirm or who suffers from mental illness may be valid, if the person's infirmity or illness is not severe enough to rob that person of the ability to understand the nature, purpose, and effect of that contract. Thus, mental retardation or mental illness does not necessarily reduce a person's ability to enter into contracts. The legal question to be answered is whether the mental problem is so serious that the person did not understand the nature of the contract. If that is the case, the mentally infirm or mentally ill person may disaffirm any contract except one for necessaries. The person judged incompetent must return all consideration received, if he or she still has it.

Persons declared to be insane by competent legal authority are denied the right to enter contracts. Any contractual relationship with others results in a void agreement. In most jurisdictions, persons who knowingly take advantage of someone who is declared insane are subject to criminal indictment and prosecution.

Contracts agreed to by persons under the influence of alcohol or drugs may be voidable. Incompetence related to either alcohol or drug use must be of such a degree that a contracting party would have lost the ability to comprehend or to be aware of obligations being accepted under the contract. Disaffirmance in such cases requires the return to the other party of all consideration that had been received. However, such a return may be refused if evidence indicates that one party took advantage of the other's drunken or weakened condition.

Exercise 1. Comprehension questions:

1. When a minor disaffirms a contract what is he entitled to?
2. Give definition of minority and majority.
3. In what cases are the minors liable on their contracts?
4. What privilege do the minors have?
5. Explain what necessaries are.
6. When are the parents liable for contracts executed by minors?
7. When may people ratify contracts made during minority?
8. What rights do people who suffer from mental illnesses have when they make a contract?

Exercise 2. Find in the text English equivalents to the following:

Отказываться; утверждение; правоспособность; дееспособность; отказывать в подтверждении; эмансипировать; ратификация; опровержимая презумпция; последующее одобрение.

Exercise 3. Consult recommended dictionaries and give words or phrases to the following definitions:

Правоспособность; дееспособность; имущественная ответственность гражданина; недопустимость лишения и ограничения правоспособности и дееспособности; опека; попечительство; распоряжение имуществом подопечного; юридическое лицо.

Exercise 4. Be ready to talk on one of the following topics:

1. Describe the general legal presumptions with regard to a party's capacity to create a contract.
2. Explain why the law allows minors to void contracts for anything other than necessaries.
3. Distinguish between emancipation and abandonment and explain the meaning of each concept.
4. Assess the potential liability of minors who lie about their age when entering into a contract.
5. Contrast the legal liability of minors in contracts involving necessaries with their legal liability in contracts that do not involve necessaries.
6. Identify types of contracts that the law may except from the general rule that contracts by minors are voidable by the minor.
7. Contrast the contractual capacity of persons declared legally insane with that of those not declared legally insane.
8. Discuss the contractual capacity of drugged or intoxicated persons.

Exercise 5. Make up your own dialog on the case:

In *Jefferson Credit Corp. v. Marcano*, a buyer who had "at best a sketchy knowledge of English language" signed an automobile installment sales contract which waived the implied warranties of merchantability and fitness for a particular purpose. The court found "it can be stated with

a fair degree of certainty" that the buyer neither knew nor understood that he had made such waivers, even though they were printed in large black type.

Thus, the assumption of consumer ignorance may, among other things, be based upon his proven inability to read the language, in which the contract was printed, his proven lack of education or upon his status as a poor person. Seller's guile often takes the form of a clause difficult to understand and placed in fine print on the rear of the contract. However, it may also take the form of fraud, sharp practice, high-pressure salesmanship, and so on.

Unit 6

Consideration

Встречное предоставление

В силу обязательств одно лицо (должник) обязано совершить в пользу другого лица (кредитора) определенное действие, либо воздержаться от определенного действия, как-то: передать имущество, выполнить работу, уплатить деньги и т. п., либо воздержаться от определенного действия, а кредитор имеет право требовать от должника исполнения его обязанности. Обязательства должны исполняться надлежащим образом в соответствии с условиями обязательства и требованиями закона, либо обычаев делового оборота или иными обычно предъявляемыми требованиями (главы 21–26 ГК РФ). Договор предполагается возмездным, то есть сторона должна получить плату или иное встречное представление за исполнение своих обязанностей. Если же одна сторона договора обязуется предоставить что-либо другой стороне без получения платы или иного встречного представления, такой договор признается безвозмездным (глава 27 ГК РФ).

List of key terms and word combinations:

accord	–	согласие; соглашение
consideration	–	встречное удовлетворение, предоставление; компенсация
detriment	–	ущерб, вред; невыгода
disputed amount	–	сумма иска, исковая сумма
forbearance	–	воздержание от действия; отказ от принятия мер
illusory promise	–	нереальное обещание
option	–	выбор; право выбора; опцион; дискреционное право
past consideration	–	предшествующее встречное удовлетворение
pledgee	–	залогодержатель
preexisting duties	–	ранее существовавшие обязательства
promissory estoppel	–	лишение права возражения на основании данного обещания
release	–	отказ от права; передача права другому лицу; документ об отказе от права или о передаче права
satisfaction	–	исполнение
statutes of limitations	–	закон об исковой давности;
unconscionable	–	недобросовестный
undisputed amount	–	неоспоримое, бесспорное количество

The mutual promise to exchange things of value is called *consideration*. It binds the parties together. If an agreement has no consideration, it is not a binding contract.

Consideration consists of a mutual exchange of benefits and sacrifices between contracting parties. In the exchange, what is a benefit to the offeree is, at the same time, a sacrifice to the offerer. Likewise, the benefit bargained for by the offerer results in a sacrifice by the of-

feree. The legal term used for this sacrifice is *detriment*. A detriment is any of the following: doing (or promising to do) something that one has a legal right not to do; giving up (or promising to give up) something that one has a legal right to keep; and refraining from doing (or promising not to do) something that one half a legal right to do. This last type of detriment is known as *forbearance*.

Consideration has three characteristics:

- promises made during bargaining are dependent on the consideration to be received;
- the consideration must involve something of value; and
- the benefits and detriments promised must be legal.

Unless an agreement has been bargained for, the law will not enforce it. An agreement involves a bargained-for exchange when a promise is made in exchange for another promise, a promise is made in exchange for an act, or a promise is made for a forbearance of an act. The concept of bargaining means that each party is hurt in some way if the other party fails to keep a promise. Conversely, each party gains something when the promises are kept and the exchange is made.

It is important only that the parties freely agree on the value and the price. There is, however, an exception to this rule. Courts, at times, give a party relief when the consideration is so outrageous that it shocks the conscience of the public. A court may refuse to enforce a contract or any clause of that contract if it is considered unconscionable, that is, ridiculously inadequate, for example, when bargaining power between the two parties is greatly unequal.

Consideration requires that the benefits and sacrifices promised between the parties be legal. Absence of *legality*

renders the consideration invalid. Thus, a party cannot agree to do or promise to do something that he or she does not have the legal right to do.

Most often, consideration takes the form of money, property, services, or benefits and sacrifices.

A *promise not to sue*, when there is the right to sue, is enforceable when supported by consideration. Promising not to sue is a *forbearance*. A promise not to sue, in exchange for an amount of money, is a customary way to settle a pending lawsuit. Settlements of this type are often preferred to expensive and time-consuming litigation.

Acceptance of an agreement not to sue, supported by consideration, terminates one's right to continue any lawsuit, at present or in the future, on the grounds described in the agreement. A promise not to sue is commonly called a *release*.

When *charitable pledges* are made to fund a specific project, the pledgee's sacrifice is carrying out that project. In this sense, pledges are considered unilateral agreements, enforceable only when accepted by commencement of the proposed project.

Problems may arise when the consideration involved in a contract is money and the parties disagree as to the amount of money that the debtor owes the creditor.

A *disputed amount*, or unliquidated amount, is one on which the parties never agreed. Final settlement of disputed claims may lead to misunderstanding, dispute, and lengthy negotiation. If a creditor accepts as full payment an amount that is less than the amount due, then the dispute has been settled by an *accord and satisfaction*. *Accord* is the implied or expressed acceptance of less than what has been billed the debtor. *Satisfaction* is the agreed-to settlement as contained in the accord. Only if the

dispute is honest, made in good faith, and not superficial or trivial will the courts entertain arguments based on accord and satisfaction.

An *undisputed amount*, or *liquidated amount*, is one on which the parties have mutually agreed. Although a party may have second thoughts about the amount promised for goods or services rendered, the amount that was agreed to by the parties when they made their contract remains an undisputed amount. A partial payment in lieu of full payment when accepted by a creditor will not cancel an undisputed debt.

As a general rule, a contract is not enforceable if it lacks consideration.

Some jurisdictions have eliminated the element of consideration in a few specifically named contracts. Typical agreements falling into this category include *promises bearing a seal, promises after discharge in bankruptcy, debts barred by the statute of limitations, promises enforced by promissory estoppel,* and *options* governed by national law.

Persons discharged from indebtedness through bankruptcy may reaffirm and resume their obligations, as prompted, perhaps, by moral compulsion. The bankruptcy court must hold a hearing when a reaffirmation is intended, informing the debtor that reaffirmation is optional, not required, and informing the debtor of the legal consequences of reactivating a debt.

Laws known as *statutes of limitations* restrict the time within which a party is allowed to bring suit.

Under the doctrine of *promissory estoppel*, a promise may be enforceable without consideration. This doctrine is used, on occasion, to prevent injustice when a person changes his or her position significantly in reliance on

another's promise and the promise is not fulfilled. The court will «estop» the person who made the promise from claiming that there was no consideration. Certain conditions must be met, however, before a court will apply this principle. First, the promise must be made to bring about action or forbearance by another person who gave no consideration. Second, the one who gave no consideration must have relied on the promise and must have changed his or her position in a significant way. Third, injustice can be avoided only by enforcing the promise.

An *option* is the giving of consideration to support an offerer's promise to hold an offer open for a stated or reasonable length of time. The modern trade law has made an exception to the rule requiring consideration when the offer is made by a merchant; in such cases, an offer in writing by a merchant, stating the time period during which the offer will remain open, is enforceable without consideration.

Certain promises, however, the courts do not enforce because they lack even the rudimentary qualities of valid consideration. Included in this category are illusory promises, promises of future gifts, promises of legacies, promises based on past consideration, and promises based on preexisting duties.

An illusory promise is one that does not obligate the promisor to anything. A party who makes an illusory promise is the only one with any right to determine whether the other party will be benefited in any way. An illusory promise fails to provide the mutuality of promises required in establishing consideration.

Exercise 1. Comprehension questions:

1. Explain the term detriment.
2. What does the concept of bargaining mean?

3. When aren't the parties free to negotiate privately the amount of money to be paid?
4. Which problems might arise with consideration?
5. What does statute of limitation suppose?
6. Explain the doctrine of promissory estoppel.
7. When are charitable pledges used as consideration?

Exercise 2. Find in the text English equivalents to the following:

Согласие; встречное удовлетворение; ущерб; воздержание от действия; нереальное обещание; дискреционное право; предшествующее встречное удовлетворение; залогодержатель; ранее существовавшие обязательства; лишение права возражения на основании данного обещания; отказ от права; передача права другому лицу; документ об отказе от права или о передаче права; исполнение; закон об исковой давности; недобросовестный.

Exercise 3. Consult recommended dictionaries and give words or phrases to the following definitions:

Встречное требование; зачет встречного требования; однородное требование; предпочтительное удовлетворение требований; встречное заявление; основное требование; встречное удовлетворение; удовлетворение в части; оставление без удовлетворения.

Exercise 4. Be ready to talk on one of the following topics:

1. Explain the term consideration and identify the characteristics necessary for valid consideration.
2. Describe the attitude of the court when dealing with questions that involve the adequacy of consideration.
3. Discuss the types of consideration that can be used to bind parties to one another in a contractual situation.

4. Outline the procedure that a debtor and creditor may use to settle a claim by means of accord and satisfaction.
5. Identify those agreements that may be enforceable by a court of law even though they lack consideration.

Exercise 5. Make up your own dialog on the case:

In *Hanna v. Perkins*, the buyer tendered a check with the notation "in full for labor and material to date." The seller indorsed the check "Deposited under Protest" and deposited it. Seller sued for the balance of the contract price and buyer moved for summary judgment on the ground of accord and satisfaction. The New York court held for the seller and said that the defendant failed to allege the existence of an honest dispute about the amount due and thus there was no accord and satisfaction. The court held:

If it were not that this court finds that triable issues of fact are present, this court would deny the motion by holding this particular section of the code would seem to favor plaintiff's overriding endorsement of "Deposited under protest" as a reservation of his right to collect payment of the balance.

Exercise 6. Resume in industry buzz:

Consideration (each party makes 1 consideratn supported prom.)

1. 3 Tests for Consideration:
   a. Prom. must induce current perf. in exchange (bargained for exchange).
   b. Detriment from Promisor (offering detriment).
   c. Promise binding, not illusory (mutuality of the prom.).
2. Promise Induced for Current Perf. in Exchange (giving $ or conduct):

a. Promises based on moral feelings FAIL.

b. Promises based on past acts & don't ask anything currently in exchange FAIL, EXCEPT:

(1) debt barred by technical defense, new written promise to revive enforceable (amt stated up to debt).

(2) Promisor requested act & promisee perf. w/ expectation of paymt, most enforce payment.

3. Detriment From Promisor (detriment to Promisee)

Doing something promisor not otherwise required to do or NOT doing something promisor has rt or good faith belief had rt to do (can be a legal disadv. — not smoking):

a. Signif. MIN says if no detriment from promisor look for benefit to promisee.

b. NOT a detriment if Promisor had PRE-EXISTING duty to do it.

EXCEPT:

(1) unforeseen difficulty so severe could walk away but promise to do anyway.

(2) Good faith exception to disputed duties (misunderstand & new prom. to compromise; bona fide good faith dispute).

4. Binding, Not Illusory Promise: can't have unrestricted or total discretion on whether to perform (mutuality of obligation):

a. NOTE: Requirement & Output promises look illusory but not b/c Doe imposes reas. quantity requirement, nor are satisfaction conditions b/c must be SUBJECTIVE good faith dissatisfaction.

5. Consideration Substitutes (MAKE SURE PROMISE DOESN'T ALREADY HAVE CONSIDERATION FIRST!):
   a. Code Consideration Substitutes
      -> Merchant's firm offer to keep open enforced up to 3 mos. unless consideration then for time stated.
      -> For CODE, don't need consideration for modificatn IF MADE IN GOOD FAITH.
   b. Common Law Consideration Substitutes:
      (1) MIN accept Ks under seal w/o consideration, or
      (2) Prom. Estoppel: if promisee detrimentally, reas. & foreseeably relies on promise, it's enforceable though no good consideration (buy car based on prom. to pay when your thumb smashed).
   -> Make sure not good consideration 1st b/4 you apply these

Unit 7

Legality

Действительность договора

Договор действителен, когда в нем отражены все существенные условия, предусмотренные законом, и условия на которых настаивает сторона договора. Сделка может быть признана судом недействительной, например, если она не соответствует закону или иным правовым актам, либо совершена с целью, заведомо противной основам правопорядка или нравственности (глава 9 ГК РФ).

List of key terms and word combinations:

conspiracy	–	сговор (о совершении преступления)
exculpatory agreement	–	оправдательное, оправдывающее соглашение
in pari delicto	–	равная вина
local option	–	право жителей округа контролировать или запрещать
public policy	–	публичный порядок
restraint of trade	–	ограничение свободы торговли
usury	–	ростовщичество

An agreement may involve a valid offer, an effective acceptance, mutual assent, competent parties, and valid consideration and still be void because of *illegality*. Parties cannot be allowed to enforce agreements that are contrary to the law. The most obvious type of illegal contract is one in which the parties agree to perform some unlawful activity.

Some activities that are neither crimes nor torts have been made illegal by specific statutory enactments. Chief among these activities are *usurious agreements*, *wagering agreements, unlicensed agreements, unconscionable agreements*.

The illegal practice of charging more than the amount of interest allowed by law is called *usury*. To protect borrowers from excessive interest charges, jurisdictions have passed laws that specify the rate of interest that may be charged in lending money.

Any agreement or promise concerning gambling or a *wager* is invalid and may not be enforced. States make exceptions when bets are placed in accordance with laws that permit horse racing, lotteries, church-related or

charitable games of bingo, and gambling casinos regulated by government authority.

Certain businesses and professions must be licensed before they are allowed to operate legally. One reason for requiring a license is to provide a source of revenue, part of which is used to supervise the business or profession being licensed. Another objective of licensing is to provide supervision and regulation of businesses and professions that might inflict harm on the public if they were allowed to operate without such controls. In this category are physicians, nurses, dentists, attorneys, engineers, architects, and others in public service who must be closely supervised for the protection of the public. Courts distinguish between a license for revenue and a license for protection of the public. If a license is required simply to raise revenue, the lack of a license will not necessarily void a contract. In contrast, if a licensing requirement is designed to protect the public, it is likely that unlicensed people will not be able to enforce their contracts.

A court is not required to enforce a contract or any part of a *contract* that it feels is *unconscionable*. An agreement is considered unconscionable if its terms are so grossly unfair that they shock the court's conscience. If the court so desires and if it can do so to avoid the unfair consequences, it can also limit how the unconscionable clause in an agreement is carried out.

The government has the power to regulate the health, safety, welfare, and morals of the public. Any action that tends to harm the health, safety, welfare, or morals of the people is said to violate public policy. Public policy is a general legal principle that says no one should be allowed to do anything that tends to injure the public at large. Agreements most commonly invalidated, as contrary to

public policy are those to *obstruct justice*, *interfere with public service, defraud creditors, escape liability,* and *restrain trade.*

Agreements to *obstruct justice* include agreements to protect someone from arrest, to suppress evidence, to encourage lawsuits, to give false testimony, and to bribe a juror. The category also includes a promise not to prosecute someone or not to serve as a witness in a trial. Any agreement promising to perform any of these activities would be void.

Agreements interfering with public service are illegal and void. Contracts in this group include agreements to bribe or interfere with public officials, obtain political preference in appointments to office, pay an officer for signing a pardon, or influence a legislature illegally for personal gain.

Agreements to defraud creditors, that is, those that may remove or weaken the rights of creditors, are void as contrary to public policy. Thus, a debtor's agreement to sell and transfer personal and real property to a friend or relative for far less than the actual value would be void if it were done for the purpose of hiding the debtor's assets from creditors who had a legal claim to them.

A basic policy of the law is that all parties should be liable for their own wrongdoing. Consequently, the law looks with disfavor on any agreement that allows a party to escape this responsibility. One device frequently used to escape legal responsibility is the *exculpatory agreement*. An exculpatory agreement is usually found as a clause in a longer, more complex contract or on the backs of tickets and parking stubs. The exculpatory clause states that one of the parties, generally the one who wrote the contract, is not liable for any economic loss or physical injury, even if that party caused the loss or injury.

The law tries to be a constant protector of the rights of persons to make a living and to do business freely in a competitive market. If persons enter into contracts that take away these rights, the law will restore the rights to them by declaring such contracts void. A *restraint of trade* is a limitation on the full exercise of doing business with others.

Agreements made with the intent to suppress competition, fix prices, and the like are void as illegal restraints of trade.

When the entire agreement is tainted with illegality, no valid contract results. Even though specific sections of the agreement may be legally enforceable if standing alone, illegality of any part of the entire contract renders it void.

When an agreement is divisible and the illegal promises and acts are completely segregated from other sections that are not tainted by illegality, courts may enforce those parts that are legal and rescind those parts ruled illegal and invalid. Enforcement of parts determined to be valid and enforceable, of course, is tempered by the extent of illegality of the other divisible parts.

When both parties to an illegal agreement are equally wrong in the knowledge of the operation and effect of their contract, they are said to be *in pari delicto* (in equal fault). In such cases, the court will not give aid to either party in an action against the other and will not award damages to either.

When the parties are not *in pari delicto*, relief will often be allowed if sought by the more innocent of the two. Although this rule is not applicable when one party may be less guilty of premeditation (plotting or planning an illegal act) and intent to achieve a gain through known

illegal acts, it may be applied when one party is unaware that a law is being broken and has no intent to do a wrong.

Exercise 1. Comprehension questions:

1. What is the most obvious type of illegal contract?
2. Explain the term usury.
3. What has been done to protect borrowers from excessive interest charges?
4. What are the objectives of licensing?
5. What does the term *in pari delicto* mean?
6. What does the exculpatory clause state?
7. What may be the consequences of illegal contracting?

Exercise 2. Find in the text English equivalents to the following:

Сговор; оправдывающее положение; равная вина; публичный порядок; ограничение свободы торговли; ростовщичество.

Exercise 3. Consult recommended dictionaries and give words or phrases to the following definitions:

Оспоримая сделка; притворная сделка; мнимая сделка; последствия недействительных сделок; двусторонняя реституция; сделка совершенная под влиянием заблуждения; сделка совершенная под влиянием обмана; сделка совершенная под влиянием угрозы; ограничение полномочий на совершение сделки; выход за пределы ограничений; пределы правоспособности; цель деятельности юридического лица; лицензия организации; недействительность по иску.

Exercise 4. Be ready to talk on one of the following topics:

1. Distinguish between licenses designed to raise revenue and those designed to provide supervision and regulation of a business or profession.

2. Determine the legal effect of a contract made by parties who are not licensed in a particular business or profession.
3. Describe when the courts might consider an agreement unconscionable and indicate how a party might defeat a claim of unconscionability.
4. Explain the legal principle of public policy and note how the courts usually treat agreements found contrary to public policy.
5. Distinguish between the application and effect of *in pari delicto* when an illegal contract is entire and indivisible and when it is divisible.

Exercise 5. Make up your own dialog on the case:

In *Toker v. Westerman*, the defendant had purchased a refrigerator-freezer for a cash price of $899.98. The total price including interest, insurance, etc. was $1,299.76. At trial, an appliance dealer had testified that the freezer in question was known in the trade as a "stripped unit" and that a reasonable price at the time of the sale would have been between $350.00 and $400.00. The holding of the court rests exclusively on excessiveness of the price, and it reads as follows:

Suffice it to say that in the instant case the court finds as shocking and therefore unconscionable, the sale of goods for approximately two and one-half times their reasonable retail value. This is particular so where, as here, the sale was made by a door-to-door salesman for a dealer who therefore would have less overhead expense than a dealer maintaining a store or showroom.

Unit 8

Form of the Agreement

Формы договоров

Сделки совершаются устно или в письменной форме (простой или нотариальной) (статьи 161, 162, 163, глава 27 ГК РФ). Сделка в письменной форме должна быть совершена путем составления документа, выражающего ее содержание и подписанного лицом или лицами, совершающими сделку, или должным образом уполномоченными ими лицами. Сделки юридических лиц между собой и с гражданами (в том числе, требующие нотариального удостоверения), за исключением сделок, которые могут быть совершены устно, а также сделки на сумму, превышающую не менее чем в 10 раз установленный законом минимальный размер оплаты труда, а также в случаях, предусмотренных законами, независимо от суммы, а именно: учредительные договоры, уставы, сделки связанные с продажей доли в праве собственности, соглашения о неустойке, залоге, поручитель-

стве, и т. д., должны заключаться в письменной форме. При любой форме и содержании договор должен обязательно иметь существенные условия: предмет договора, условия, существенные для договоров данного вида, а также условия, относительно которых по заявлению одной из сторон должно быть достигнуто соглашение, например, цена договора, порядок расчетов, и др.

List of key terms and word combinations:

acknowledgment	–	признание, подтверждение (например, получения документа)
best evidence rule	–	требование представления наилучших (первичных, подлинных) доказательств
condition precedent	–	предварительное условие
equal dignities rule	–	правило равного достоинства (акцепт должен быть осуществлен с помощью тех же самых средств, которые были использованы для производства оферты)
equitable estoppel	–	лишение стороны права возражения по причине ее предшествующего поведения
memorandum	–	памятная записка, меморандум, запись
parol evidence rule	–	правило, исключающее устные доказательства, изменяющие или дополняющие письменное соглашение
part performance	–	частичное исполнение

Some of the agreements are written, some are oral, and some are implied. The validity of the contracts did not always depend on their being in writing. It would be correct, therefore, to conclude that many contracts do not have to be in writing to be enforceable. In fact, the vast majority of contracts that are entered into every day are oral. Sometimes, of course, it is desirable to reduce a contract to writing so that the terms are clear to all parties. However, a writing is not usually required. There

is a law requiring certain contracts to be in writing to be enforceable.

According to laws applicable in most jurisdictions today, six types of contracts must be in writing to be enforceable:

- contracts not to be completed within one year,
- contracts for the sale of land,
- contracts for the sale of goods of a curtain sum or more,
- contracts of executors and administrators,
- a guaranty of debts or wrongdoing of another, and
- contracts in consideration of marriage.

Just what is meant when the statute states that «the agreement must be in writing»? The writing should be intelligible. It may be embodied in letters, memos, telegrams, invoices, and purchase orders sent between the parties. It may be written on any surface suitable for the purpose of recording the intention of the parties, as long as all the required elements are present.

To be absolutely complete, a written agreement, or memorandum, as it is often called, should contain the following elements:

- terms of the agreement,
- identification of the subject matter,
- statement of the consideration promised,
- names and identities of the persons to be obligated, and
- the signature of the party sought to be bound to the agreement.

A writing may be acceptable and enforced even though it omits or does not correctly state some material terms (price, terms, and place of payment; terms of delivery; and other factors) agreed upon by the contracting parties.

To be enforceable, only the following must be shown in a writing:

- proof of the contract intent,
- quantity ordered,
- names of parties, and
- the signature of the party sought to be bound to the agreement.

Throughout the years, the courts have developed certain rules that make the interpretation and enforcement of written contracts consistent and predictable. The three most important rules in this regard are the *parol evidence rule, the best evidence rule,* and *the equal dignities rule*. The parol evidence rule involves the interpretation of written contracts, while the equal dignities rule involves their enforcement.

Under the *parol evidence rule*, evidence of oral statements made before signing a written agreement is usually not admissible in court to change or to contradict the terms of a written agreement. Following oral discussion and negotiation, it is customary for parties to reduce their agreements to some written form. Of the terms, conditions, and promises discussed, only those included in a writing will be enforced. This provision is because the court presumes that the parties will have put everything they agreed to in writing.

The parol evidence rule will not apply when unfair and unjust decisions might result from its application. While many unjust situations can occur, they generally fall into one of five categories: incomplete, ambiguous, or erroneous agreements; void and voidable agreements; agreements based on a condition precedent; modified or rescinded agreements; or agreements involving past or usual commercial practice.

In cases in which a written agreement is incomplete, oral evidence may be used to supply the missing terms. In general, the courts allow a party to a written agreement to introduce oral testimony to show that the contract is void or voidable due to a lack of mutual assent or contractual capacity. The courts are willing to allow such testimony because it does not affect the terms of the agreement. Rather, it seeks to discredit the entire transaction. Thus, it is permissible to introduce oral evidence as to fraud, duress, misrepresentation, mistake, and undue influence. Similarly, it is appropriate to offer oral testimony as to a party's minority or mental incompetence.

If a written agreement is dependent upon some event before it becomes enforceable, then oral evidence may be offered concerning that *condition precedent*. A *condition precedent* is an act or promise that must take place or be fulfilled before the other party is obligated to perform his or her part of the agreement.

As a final exception to the parol evidence rule, some regulations allow oral testimony about how the parties have done business together over a long time period. These regulations make allowance for this type of testimony because, from a practical point of view, parties often get so used to dealing with each other in a particular way that they neglect to include certain terms in their written agreements. Similarly, some practices are so universal in a particular trade, business, or industry that the parties feel no need to include such universal practices in their written contracts. Accordingly, regulations allow oral testimony to supplement a written agreement as to these practices.

Under the *best evidence rule*, the courts generally accept into evidence only the original of a writing, not a copy.

Under this rule, a written instrument is regarded as the primary or best possible evidence. Thus, the best evidence rule concurs with and supports the parol evidence rule.

The *equal dignities rule* provides that when a party appoints an agent to negotiate an agreement that must be in writing, the appointment of the agent must also be in writing.

Certain formalities are usually followed in the formation of other than the simplest kinds of written agreements. While a law may necessitate nothing more than the briefest written disclosure of promises, conditions, and terms, plus the signature(s) of the obligated party or parties, usually contracts in general commercial and consumer use are carefully written, researched for legal compliance, and signed. Furthermore, leases and contracts for the sale of real property may have additional requirements of content and formality that extend beyond these formalities.

Written agreements should be, but need not be, signed by both parties. If signed by only one party, any obligation on the agreement would be limited to that party alone.

Witnesses are required in the signing of a will, but in most other documents their signatures are at the option of the contracting parties. To ensure that no misunderstanding will arise as to the acceptance and signing of a written agreement, the use of witnesses is advised. Certain official documents, such as a certificate of title to a motor vehicle, require the owner's signature and an acknowledgment by a notary public when transferring ownership. The notary witnesses the signing of the document and then acknowledges this act by signing the document and adding the official seal to it. A notary is not authorized to read the document being signed and may be prevented from

doing so. The notary's legal authority includes the act of acknowledging another's signature to be the result of this person's own free act and deed before the notary.

Some jurisdictions still make use of a seal when a formal contract is signed.

As a protection to lenders and to persons selling goods through installment contracts and the like, the law provides that certain documents be recorded in a public office for inspection by anyone wishing to know about them. For example, when money is loaned on a motor vehicle, the lender may record that transaction in the appropriate public office to protect his or her interest in the vehicle.

Exercise 1. Comprehension questions:

1. What are the forms of agreements?
2. What are the most important rules involving written contracts?
3. What are the exceptions to the parol evidence rule?
4. Explain what condition precedent is.
5. When is the use of witnesses advised?
6. When is acknowledgement by a notary public required and what for?

Exercise 2. Find in the text English equivalents to the following:

Подтверждение; попечитель над наследственным имуществом; требование представления наилучших доказательств; предварительное условие; правило равного достоинства; лишение стороны права возражения по причине ее предшествующего поведения; исполнитель завещания; правило, исключающее устные доказательства; частичное исполнение.

Exercise 3. Consult recommended dictionaries and give words or phrases to the following definitions:

Письменная форма договора; устная форма договора; простая письменная форма; государственная регистрация договора; нотариальная форма договора.

Exercise 4. Be ready to talk on one of the following topics:

1. Identify the types of agreements that must be in writing.
2. List the essential information that should be included in a written memorandum.
3. Explain what is meant by the parol evidence rule.
4. Compare the best evidence rule with the equal dignities rule.
5. Illustrate some methods of writing a signature and discuss the use of a seal.

Exercise 5. Make up your own dialog on the case:

In *American parts Co. v. American Arbitration Association*, the parties had initially reached an oral understanding. The seller had thereafter sent a conforming form which purportedly recited the contract terms (including quantity), added an arbitration clause, and provided that the entire form would become controlling if the "buyer accepts delivery of all or any part of the goods herein described." The buyer allegedly refused to accept some of the goods, and the seller then sought arbitration. The buyer sought a stay, and the seller moved for summary judgment. In denying summary judgment the court assumed that a conforming form can constitute an "acceptance" even where there has already been an oral offer and acceptance. As a corollary, certain additional terms in the confirmation may become (retroactively, as it were) a part of the original contract.

Unit 9

Third Parties in Contract Law

Третьи лица в договорном праве

Договором в пользу третьего лица признается договор, в котором стороны установили, что должник обязан произвести исполнение не кредитору, а указанному или не указанному в договоре третьему лицу, имеющему право требовать от должника исполнения обязательства в свою пользу (статья 430 ГК РФ).

List of key terms and word combinations:

assignee	–	правопреемник; цессионарий, уполномоченный; агент; назначенное лицо
assignment	–	передача права; уступка требования; цессия; перевод долга; отчуждение, ассигнование; предназначение, назначение
assignor	–	лицо, совершающее передачу (вещи, права); цедент
beneficiary	–	лицо, в интересах которого осуществляется доверительная собственность; бенефициарий; выгодоприобретатель
creditor beneficiary	–	бенефициар-кредитор
delegation	–	передача, делегирование (полномочий), перевод долга
donee beneficiary	–	дарополучатель, лицо, распределяющее наследственное имущество по доверенности
incidental beneficiary	–	случайный бенефициар
intended beneficiary	–	намеренный; умышленный бенефициар
novation	–	новация; перевод долга; цессия прав по обязательству
obligor	–	лицо, принявшее на себя обязательство; должник по обязательству, дебитор
warranty	–	гарантия, ручательство

A third party is a person who may, in some way, be affected by a contract but who is not one of the contracting parties. A third party, also known as an outside party, is at times given benefits from a contract made between two other parties. A third party receiving benefits from a contract made by others is known as a *beneficiary*. Although not obligated by the agreement made between those in privity, third parties may have the legal right to enforce the benefits given them by such agreements.

A beneficiary in whose favor a contract is made is an *intended beneficiary*. With exceptions in some jurisdictions, an intended beneficiary can enforce the contract made by those in privity of contract. Those who are most frequently recognized to be intended beneficiaries and who have the right to demand and enforce the benefits promised are *creditor beneficiaries, donee beneficiaries,* and *insurance beneficiaries.*

A *creditor beneficiary* is an outside third party to whom one or both contracting parties owe a continuing debt of obligation arising from a contract. Frequently, the obligation results from the failure of the contracting party or parties to pay for goods delivered or services rendered by the third party at some time in the past.

A third party who provides no consideration for the benefits received and who owes the contracting parties no legal duty is known as a *donee beneficiary*. However, the contracting parties owe the donee beneficiary the act promised; if it is not forthcoming, the donee beneficiary may bring suit. The consideration that supports this type of agreement is the consideration exchanged by the parties in privity to the contract.

An individual named as the beneficiary of an insurance policy is usually considered a donee beneficiary. The beneficiary does not have to furnish the insured with consideration to enforce payment of the policy. In some cases, an *insurance beneficiary* may also be a creditor beneficiary. This situation occurs in consumer or mortgage loans when the creditor requires the debtor to furnish a life-term insurance policy naming the creditor as the beneficiary. The policy will pay the debt if the debtor dies before the loan has been repaid.

An *incidental beneficiary* is an outside party for whose benefit a contract was not made but who would substantially benefit if the agreement were performed according to its terms and conditions. An incidental beneficiary, in contrast to an intended beneficiary, has no legal grounds for enforcing the contract made by those in privity of contract.

When people enter into contracts, they receive rights and they incur duties that may be transferred to others. An *assignment* is a transfer of a contract right. A *delegation* is a transfer of a contract duty.

Three parties are associated with any assignment. Two of the parties are the ones who entered the original agreement. The party who assigns rights or delegates duties is the *assignor*. The outside third party to whom the assignment is made is the *assignee*. The remaining party to the original agreement is the *obligor*.

Consideration is not required in the creation of an assignment. When there is no supporting consideration, however, the assignor may repudiate the assignment at any time prior to its execution.

To be valid, an assignment must follow certain accepted procedures designed to protect all of the parties. *Form of assignment, notice of assignment,* and *the rights of parties* in successive or subsequent assignments must conform to practices established by case law and statutes.

An assignment is valid at the time it is made. As a mean of protection against subsequent assignments, the assignee should give *notice of assignment* to the obligor. This is an obligation of the assignee, not the assignor. If notice is not given, it would be normal practice for the obligor to render performance to the other original contracting party, in this case, the assignor. If due notice

has been given and the obligor makes payment to the assignor, the obligor is not excused from making payment to the assignee.

The rights and duties of the assignee are the same as those previously held by the assignor under the original contract. Claims the assignor may have had against the obligor now belong to the assignee. In addition, defenses the obligor may have had against the assignor's claims may now be used against the assignee.

The assignee's duty in an assignment is to give notice of the assignment to the obligor. The obligor is allowed a reasonable time to seek assurance that an assignment has been truly made. Making the assignment in writing reduces the possibility of one's fraudulent representation as an assignee.

The assignor is obligated to any express and implied warranties that serve to protect either the assignee or the obligor. A *warranty* is a promise, statement, or other representation that a thing has certain qualities.

The assignor is bound by an implied warranty that the obligor will respect the assignment and will make performance as required by the original agreement between the assignor and the obligor.

If the assignor delegates to an assignee duties owed the obligor, there is an implied warranty that the duties delegated will be carried out in a complete and satisfactory manner.

Parties to a contract may include a condition that will not allow its assignment.

If all three parties agree, however, the assignor can be released from liability at the time of the assignment, and privity of contract can exist between the assignee and the

obligor. Such an arrangement is called a novation, which is a substitution, by mutual agreement, of a new party for one of the original parties to a contract.

Exercise 1. Comprehension questions:

1. Give definition of a third party and identify what rights it has.
2. What are the types of intended beneficiaries?
3. Explain who creditor beneficiaries are.
4. What do the contracting parties owe the donee beneficiary?
5. Why is consideration important in creation of an agreement?
6. What are the forms of assignment?
7. Which of the two assignees has a superior right and claim against the obligor?
8. Explain the term warranty.

Exercise 2. Find in the text English equivalents to the following:

Правопреемник; лицо, совершающее передачу (вещи, права); лицо, в интересах которого осуществляется доверительная собственность; перевод долга; дарополучатель; новация; цессия прав по обязательству; лицо, принявшее на себя обязательство; должник по обязательству, дебитор; ручательство.

Exercise 3. Consult recommended dictionaries and give words or phrases to the following definitions:

Владение третьего лица; получение от третьего лица; оплата третьим лицом; договор с третьим лицом; произведенная третьим лицом; в качестве третьего лица; противоправные действия третьих лиц.

Exercise 4. Be ready to talk on one of the following topics:

1. Differentiate between the legal rights accorded to intended beneficiaries and those accorded to incidental beneficiaries to a contract.
2. Contrast assignment with delegation.
3. Identify the three parties that are associated with any contractual assignment.
4. Indicate who is responsible for giving notice of an assignment.
5. Explain the obligations of the assignor, the assignee, and the obligor after an assignment has been made.
6. Distinguish between a novation and an assignment in contract law.

Exercise 5. Make up your own dialog on the case:

In *Beneficial Finance Co. v. Colonial Trading Co.*, the secured party brought an action in assumpsit against the purchaser of collateral from a defaulting debtor. The court said:

Where a debtor sells collateral subject to a perfected security agreement, the secured party may proceed (1) against the debtor (a) to collect the debt on the original instrument, or (b) to assert his rights under the security agreement against any identifiable proceeds in the hands of the debtor, or (2) against the purchaser (a) by a repossession of the purchased goods in person or by an action in replevin or (b) by an action in trespass for conversion of the collateral. However, once the purchaser has himself resold the goods, the secured party has no right of action in assumpsit against the purchaser, either for the original debt of for the proceeds of resale.

Exercise 6. Resume in industry buzz:

Non-Party Rights (3P Ben'y/Assignmts/Delegation)

1. General:

-> non-party time formed is 3P ben'y; non-party later is assignmt or delegation

-> NON-PARTY RTS ALWAYS DERIVED SO DEFENSES OK

2. 3P Beneficiary (look a promise at a time) (3P ben'y of which promise?) 5 RULES:

a. Intended or Incidental Ben'y

(1) Incidental no rights, just benefit

(2) Intended gets rights; intended b/c ID'd in promise, perf. runs to you & ben'y/promisee relationship supportg intention to benefit

b. Donee or Creditor Ben'y

(1) Donee gets as gift

(2) Creditor when promisee owed debt & using promisor's perf. to satisfy

c. Ben'y can enforce promise way it existed when rts vested

-> Promisor/ee can change, or rescind promise until vests

-> Vests when ben'y learns & assents (words/conduct), but promise can reserve power in promisee

d. Promisee can also enforce promise against promisor (MAJ)

e. Creditor ben'y can sue promisee on underlying obligation or Promisor on 3P promise

3. Assignment (if assign whole K, that's assignmt of rts & delegation of duties)

-> Obligor (owes perf.), Assignor, Assignee

a. Is it Assignable? Not if:

(1) K prohibits EXCEPT privilege, not power to assign destroyed so assignmt valid, but Assignor breached and totally enforceable under Code (no breach)

(2) Law Prohibits (make sure it's an ASSIGNMENT 1st!)

(3) Pers. Services K where assignmt = substn'l change in perf., or

(4) Substant'l change in perf. b/c of assignment (requirements Ks

suspect or change in time/place of perf.)

b. Was it Properly Assigned?

-> Need desc. of rt assigned & words of present transfer (even if perf. for future)

-> Warranting to assignee assignable & enforceable (Assignee can sue for W breach)

c. Obligor must perform to Assignee, Assignee can enforce, Assignor no rt anymore

d. Problems:

(1) Assignor dealing w/ Obligor

-> if b/4 Obligor gets notice, assignee v. assignor for breach W

-> if after notice, assignee v. Obligor, whose stuck paying twice

(2) Assignor multiple assignments

(a) Are any Gratuitous (automatically revoked unless writing delivered, token chose, or estoppel (detrimentally, reas. & foreseeably relied)

(b) Otherwise 1st w/ valid unrevoked assignment unless subsequent w/o knowledge of others gets 1) pd, 2) judgment, 3) token chose from Obligor or works 4) novation w/ Obligor (4 «horsemen» of assignment)

4. Delegations (of duty)

Delegator (of duty), Delegate (does duty), Obligee (gets perf.)

a. Is it Delegable? NOT IF:

(1) K prohibits (works here!)

(2) Prohibited by law

(3) Pers. Services (unless routine)

(4) Substantially changes char. of perf. (output Ks or time/place change)

b. No particular form for delegation (unlike assignment)

c. If delegate for consideration, Obligee can force delegate to perform (delegate makes promise to Delegator to perf. to original Obligee & Obligee now 3P ben'y of their K)

Unit 10

Discharge and Remedies

Исполнение обязательств и средства их обеспечения

Исполнение обязательств может обеспечиваться неустойкой, залогом, удержанием имущества должника, поручительством, банковской гарантией, задатком и другими способами (главы 21–26 ГК РФ).

List of key terms and word combinations:

actual damages	–	фактический, реальный ущерб
anticipatory breach	–	прекращение (договора) до наступления срока исполнения
compensatory damages	–	компенсаторные, реальные, фактические убытки
complete performance	–	оконченное исполнение; совершение
condition concurrent	–	взаимозависимые условия (подлежащие одновременному исполнению)
condition precedent	–	предварительное условие
condition subsequent	–	последующее, резолютивное, отменительное условие
consequential damages	–	косвенные убытки
general release	–	отказ от настоящих и будущих притязаний, общий отказ
incidental damages	–	побочные, случайные убытки
injunction	–	судебный запрет
liquidated damages	–	заранее оцененные убытки; оценочная неустойка; ликвидные убытки
mutual rescission	–	взаимное аннулирование, прекращение
nominal damages	–	номинальные убытки; номинальное возмещение, имеющее символическое значение
performance	–	исполнение; совершение
punitive damages	–	убытки присуждаемые в качестве наказания
reasonable time	–	разумно необходимый срок
satisfactory performance	–	достаточное, убедительное исполнение
specific performance	–	исполнение в натуре, реальное исполнение
speculative damages	–	предполагаемые убытки
substantial performance	–	исполнение всех существенных условий договора
tender of payment	–	предложение платежа
tender of performance	–	предложение исполнения
termination by waiver	–	отказ правообладателя от чего-либо

Most contracts are discharged by performance, which means that the parties do what they agreed to do under the terms of the contract. When performance occurs, the obligations of the parties end. Sometimes, however, the parties do not perform in a timely or satisfactory manner. At other times, they perform partially but not completely. At still other times, they do not perform at all.

When the time for performance is not stated in the contract, the contract must be performed within a reasonable time. A reasonable time is the time that may fairly, properly, and conveniently be required to do the task that is to be done, with regard to attending circumstances.

When either personal taste or objective standards have determined that the contracting parties have performed their contractual duties according to the agreement, *satisfactory performance* exists. Satisfactory performance is either an express or implied condition of every contract.

When both parties fully accomplish every term, condition, and promise to which they agreed, *complete performance* occurs. When a party, in good faith, executes all promised terms and conditions with the exception of minor details that do not affect the real intent of their agreement, *substantial performance* occurs. Complete performance terminates an agreement, discharging the parties of any further obligation to one another. Ordinarily, substantial performance also serves to discharge the agreement but with a difference. A party, who complains that performance has been substantial, but not complete, has the right to demand reimbursement from the offending party to correct those details that prevented complete performance.

Failing to fulfill or accomplish a promise, contract, or obligation according to its terms defines *nonperformance*.

Parties to a contract may stipulate the time and conditions for termination and discharge as part of their agreement. They also may subsequently agree not to do what they had originally promised. The latter is the case when there is a *mutual rescission* of the contract, a *waiver of performance* by one or more of the parties, a n*ovation*, or an *accord and satisfaction* to liquidate an outstanding debt or obligation.

During contract negotiation, parties may agree to certain terms that provide for automatic termination upon the occurrence or nonoccurrence of stated events. These terms are categorized as *conditions subsequent*.

Contracting parties may, either before or after performance commences, rescind their contract as a result of further negotiation and by their mutual assent. *Mutual rescission* requires both parties to return to the other any consideration already received or to pay for any services or materials already entered.

When a party with the right to complain of the other party's unsatisfactory performance or nonperformance fails to complain, *termination by waiver* occurs. It is a voluntary relinquishing (waiver) of one's rights to demand performance. A waiver differs from a discharge by mutual rescission in that a waiver entails no obligation by the parties to return any consideration that may have been exchanged up to the moment of rescission. Discharge by waiver, when made, is complete in itself.

By *novation*, the parties to a contract mutually agree to replace one of the parties with a new party. The former, original, party is released from liability under the contract.

An *accord and satisfaction* is a resulting new agreement arising from a *bona fide* dispute between the parties as to the terms of their original agreement. The mutual agreement to the new terms is the *accord*; performance of the accord is the *satisfaction*. The accord, although agreed to, is not a binding agreement until the satisfaction has been made. The original agreement is not discharged, therefore, until the performance or satisfaction has been provided as promised.

A *general release* is a document expressing the intent of a creditor to release a debtor from obligations on an existing and valid debt. A general release terminates a debt and excuses the debtor of any future payment without the usual requirement that consideration be given in return.

Occasionally, it becomes impossible to perform a contract. Conditions that arise subsequent to the making of a contract may either void the agreement or make it voidable by one of the parties. *Discharge through impossibility* of performance may, in some situations, be allowed only if the specific and anticipated impossibility has been made a condition to the agreement.

The performance of a promised act may be *discharged by operation of law*. Some law that causes the parties to be discharged from their obligations, such as *bankruptcy* or the *statute of limitations*, comes into play.

A *discharge in bankruptcy* from a court will be allowed as a defense against the collection of most, but not all, debts of the bankrupt. Therefore, most contractual obligations to pay money come to an end when a party files for bankruptcy.

Statutes providing time limits within which suits may be brought are known as *statutes of limitations*. The statute

of limitations does not technically void the debt, but it gives the debtor a defense against any demand for collection.

When contractual obligations terminate by agreement or by operation of law, no liability falls to either party. When one of the parties fails to carry out the terms of a contract, a *breach of contract occurs* and liability falls to the party who has not done what was promised. Breach of contract comes from negligent or intentionally wrongful performance, expressed repudiation of contractual obligations, or an abandonment of performance sometimes after performance has begun. When there is a breach of contract, the injured party has the right to a remedy in court.

Wrongful performance or nonperformance discharges the other party from further obligation and permits that party to bring suit to rescind the contract or to recover money to compensate that party for any loss sustained. Such compensation is known as *damages*.

An *anticipatory breach* (also called *constructive breach*) occurs when a party to a contract either expresses or clearly implies an intention not to perform the contract even before being required to act. The *repudiation* must be clear and absolute. It must also indicate a deliberate and complete refusal to perform according to the terms of the contract. Injured parties may seek *damages* by showing that by relying on the contract.

Damages describe money awarded to parties who have been victimized or have suffered injury to their legal rights by others. Damages are of different kinds, and the nature of a claim usually determines what type of damages will apply.

A sum of money equal to the real financial loss suffered by the injured party defines *actual damages*. Since they are intended to compensate the injured party, actual

damages are also called *compensatory damages*. Thus, damages awarded for nondelivery of promised goods or services would be an amount equal to the difference between the price stated in the contract and what the promisee would have to pay elsewhere.

Incidental damages and *consequential damages* are awarded for losses indirectly, but closely, attributable to a breach. *Incidental damages* cover any expenses paid out by the innocent party to prevent further loss. *Consequential damages* result indirectly from the breach because of special circumstances that exist with a particular contract. To recover consequential damages, the injured party must show that such losses were foreseeable when the contract was first made.

Damages awarded in excess of actual, incidental, or inconsequential damages where it is shown that the wrongful party acted with malicious intent and willful disregard for the rights of the injured party are punitive damages, also called exemplary damages.

Token damages awarded to parties who have experienced an injury to their legal rights but no actual loss are nominal damages. In today's practice, the award is usually one dollar.

Speculative damages are computed on losses that have not actually been suffered and that cannot be proved; they are damages based entirely on an expectation of losses that might be suffered from a breach. They differ from future damages in that speculative damages are not founded on fact but only on hope or expectation.

A decree of specific performance is a court order calling for the breaching party to do what he or she promised to do under the original contract of the unique subject matter.

An injunction is an order issued by a court directing that a party do or refrain from doing something. An injunction may be either temporary or permanent.

Exercise 1. Comprehension questions:

1. In what terms must be the contract performed when the time is not stated in the contract?
2. How is satisfactory performance of the contract determined?
3. How may be the contractual conditions classified?
4. What does a condition precedent require?
5. Explain what is a condition concurrent.
6. Think of examples of conditions subsequent.
7. What does tender of performance mean?
8. What does mutual rescission require?
9. Contrast termination by waiver and mutual rescission.

Exercise 2. Find in the text English equivalents to the following:

Прекращение договора до наступления срока исполнения; компенсаторные убытки; оконченное исполнение; взаимозависимые условия; предварительное условие; общий отказ; побочные, случайные убытки; оценочная неустойка; номинальное возмещение; исполнение; убытки, присуждаемые в качестве наказания; разумно необходимый срок; достаточное исполнение; реальное исполнение; исполнение всех существенных условий договора; предложение платежа; предложение исполнения; отказ правообладателя от чего-либо.

Exercise 3. Consult recommended dictionaries and give words or phrases to the following definitions:

Исполнение обязательств надлежащему лицу; исполнение обязательств третьим лицом; исполнение альтернативного обязательства; солидарные обязательства; встречное исполнение обязательства; исполнение обязательств по частям; валюта денежных средств; признание права; взыскание убытков; присуждение к исполнению обязанностей в натуре.

Exercise 4. Be ready to talk on one of the following topics:

1. Compare the different ways the court enforces performance of a contract.
2. Describe the standards that are used to determine whether or not the performance of a contract is satisfactory.
3. Contrast complete performance with substantial performance.
4. Discuss the ways that contracts are discharged.
5. Identify the remedies that are available to an injured party when a contract is breached.

Exercise 5. Make up your own dialog on the case:

In *Grandi v. LeSage*, the buyer purchased a racehorse for breeding purposes. The seller had represented the horse to be a stallion; in fact, the horse was a gelding. The buyer revoked acceptance and brought suit to recover purchase price and incidental damages. The final award included incidental damages for the care, feeding, and maintenance of the horse for about three month at $1.50 per day.

Unit 11

Nature and Kinds of Commercial Paper

Сущность и виды оборотных документов

К ценным бумагам относятся документы, удостоверяющие с помощью установленной формы и обязательных реквизитов имущественные права, осуществление или передача которых только при их предъявлении (глава 7 ГК РФ). Права, удостоверенные ценной бумагой, могут принадлежать предъявителю ценной бумаги, либо названному в ценной бумаге лицу, либо названному в ценной бумаге лицу, которое может само осуществить эти права, либо назначить своим распоряжением другое управомоченное лицо. К ценным бумагам относятся: государственная облигация, облигация, вексель, чек, депозитный и сберегательный сертификат, банковская сберегательная книжка на предъявителя, коносамент, акция, и др.

List of key terms and word combinations:

acceptor	–	акцептант
bill of exchange	–	переводной вексель, тратта
certificate of deposit	–	депозитный (вкладной) сертификат
comakers	–	лицо, берущее на себя обязательство уплатить долг в случае несостоятельности должника
demand note	–	простой вексель, срочный по предъявлении
discounting	–	дисконт, операции по дисконту, учет (векселей), ставка учета, дисконтирование
draft	–	переводный вексель, тратта, чек
drawee	–	трассат (лицо, на которое выставлена тратта)
drawer	–	трассант, векселедатель, чекодатель
holder	–	держатель; владелец; предъявитель (например чека)
endorsee	–	индоссат, жират (лицо, в пользу которого сделана передаточная надпись)
endorser	–	индоссант, жирант (лицо, делающее передаточную надпись, например, на обороте векселя)
maker	–	векселедатель, трассант
negotiable instrument	–	оборотный документ
note	–	извещение; авизо, кредитный билет; банковый билет; банкнота, счет, простой вексель; долговая расписка
payee	–	лицо, получающее платеж; ремитент; векселедержатель
sight draft	–	тратта, срочная по предъявлении
time draft	–	срочная тратта (платежом через определенный срок после предъявления)
trade acceptance	–	акцептованный торговый вексель

A negotiable instrument is a written document that is signed by the maker or drawer and that contains an unconditional promise or order to pay a certain sum of mon-

ey on delivery or at a definite time to the bearer or to order. The concept of negotiability of commercial paper is simple: When an instrument is transferred by negotiation, the person receiving the instrument is provided with more protection than was available to the person from whom it was received. The person receiving the instrument is able, in many instances, to recover money on the instrument even when the person from whom the instrument was received could not have done so.

There are three basic kinds of negotiable instruments: *drafts* (including checks), *notes*, and *certificates of deposit*.

A *draft* (also known as a *bill of exchange*) is an instrument by which the party creating it orders another party to pay money to a third party. The one who draws the draft (that is, the one who orders money to be paid) is called the *drawer*. The one who is requested to pay the money is called the *drawee*. The one who is to receive the money is known as the *payee*.

Drafts may be presented to the drawee for payment, or for acceptance. When a draft is presented for acceptance, the drawee is requested to become liable on the instrument. To accept a draft, the drawee writes «accepted» across the face of the instrument and dates and signs it. By doing this, the drawee agrees to pay the instrument at a later date when it becomes due. An acceptance must be written on the draft, but it may consist of the drawee's signature alone.

A *check* is a special kind of draft that is drawn on a bank and is payable on demand. A check is also the most common type of draft.

A *sight draft* is payable as soon as it is presented to the drawee for payment. A *time draft* is not payable until the lapse of a particular time period stated on the draft.

A *trade acceptance* is a draft used by a seller of goods to receive payment and also to extend credit. It is often used in combination with a bill of lading, which is a receipt given by a freight company to someone who ships goods. If it is a sight draft, the buyer must pay the draft immediately to receive the bill of lading from the bank. If it is a *time draft*, the buyer must accept the draft to receive the bill of lading from the bank. The freight company will not release the goods to the buyer unless the buyer has the bill of lading.

Discounting means that the bank will buy the instrument at a price below its face amount with the aim of ultimately collecting the face amount.

A *domestic bill of exchange* is a draft that is drawn and payable in the country of origin. A draft that is drawn in one country but is payable in another is called an *international bill of exchange*, or *foreign draft*.

A *note* (often called a *promissory note*) is a written promise by one party, called the maker, to pay money to the order of another party, called the payee. In contrast with drafts, notes are promise instruments rather than order instruments, and they involve only two parties instead of three. They are used by people who loan money or extend credit as evidence of debt. When two or more parties sign a note, they are called *comakers*.

A *demand note* is payable whenever the payee demands payment. A *time note*, on the other hand, is payable at some future time, on a definite date named in the instrument. Unless a note is payable in installments, the principal (face value) of the note plus interest must be paid on the date that it is due. In an *installment note*, the principal together with interest on the unpaid balance is payable in installments (series of payments) at specified times.

A *certificate of deposit* is an acknowledgment by a bank of the receipt of money and promise to pay the money back on the due date, usually with interest.

In addition to drawers of drafts and checks, makers of notes, and payees of both types of instruments, there are other parties to commercial paper. They are the bearer, the holder, the holder in due course, the endorser, the endorsee, and the acceptor.

A bearer is a person who is in possession of a negotiable instrument that is payable to bearer or to cash. A person who is in possession of an instrument that has been indorsed in blank (by the payee's signature alone) is also a bearer. A holder is a person who is in possession of a negotiable instrument that is issued or indorsed to that person's order or to bearer. One who is a bearer is always a holder; however, one who is a holder may or may not be a bearer. A holder in due course is a holder of a negotiable instrument who is treated as favored and is given immunity from certain defenses.

An endorser is a person who indorses a negotiable instrument. This is done in most cases by signing one's name on the back of the paper.

An endorsee is a person to whom a draft, note, or other negotiable instrument is transferred by endorsement. An acceptor is a drawee of a draft who has promised to honor the draft as presented by signing it on its face.

To be negotiable, an instrument must be signed by the maker or drawer, and must contain no conditions that might in any way affect its payment.

An instrument is conditional, and thus not negotiable, if it states that it is subject to any other agreement; paid only out of a particular fund; charged to a particular account. An instrument may state that it «arises out of» another agreement without being conditional.

In addition to being unconditional, a negotiable instrument must contain a promise to pay (as in a note) or an order to pay (as in a draft).

A negotiable instrument must be payable in a fixed (clearly known) amount of money even though it is to be paid with stated interest or by stated installments; with stated different rates of interest before and after default or a specified date; with a stated discount or addition, if paid before or after the date fixed for payment; with exchange or less exchange, whether at a fixed rate or at the current rate; or with costs of collection, an attorney's fee, or both upon default.

Negotiable instruments must be made payable on *demand* or at a *definite time*. This requirement makes it possible to determine when the debtor or *promisor* can be compelled to pay. Without this information, the present value of an instrument cannot be determined.

Demand Paper is an instrument is payable *on demand* when it so states, or when it is payable «on sight» or «on presentation.» The key characteristic of demand instruments is that the holder can require payment at any time by making the demand upon the person who is obligated to pay.

Certainty as to the time of payment of an instrument is satisfied if it is payable on or before a definite date. Instruments payable at a fixed period after a stated date or at a fixed period after sight are also considered to be *payable at a definite time papers*.

An *acceleration* clause on the face of an instrument hastens the maturity date. One such example reads, «In case of default in payments of interest (or of an installment of the principal), the entire note shall become due and payable.»

Extension clauses give the maker of a note the opportunity to extend the payment date to a further definite time. For example, a maker may make a note payable in six months but may include the right to extend it to one year without loss of negotiability.

The chief characteristic of a negotiable instrument is its capacity to circulate freely as an instrument of credit. This function is achieved and the intention of the maker (i.e., ease of transferability and payment of the amount indicated to a holder) is expressed by the words *to the order of or to bearer*. They are called the words of negotiability. Except for checks, instruments not payable to order or to bearer are not negotiable. Law allows checks (but not other instruments) that are not payable to order or to bearer to be negotiable.

An instrument is *payable to order* when it states that it is payable to the order of any person, i.e., the maker or drawer; the drawee; a payee who is not the maker, drawer, or drawee; two or more payees; an estate, trust, or fund; an office or officer by title; or a partnership or unincorporated association, with reasonable certainty.

An instrument is *payable to bearer* when it states that it is payable to bearer or the order of bearer, a specified person or bearer, cash or the order of cash, or any other indication that does not designate a specific payee.

Any instrument lacking one or more elements of negotiability, however, cannot be enforced until it is completed. Handwritten terms control typewritten and printed terms, and typewritten terms control printed terms. Words control figures, except where words are ambiguous (capable of being understood in more than one way). The numbering of, or the failure to number, an instrument does not affect its negotiability.

Exercise 1. Comprehension questions:

1. Identify the purpose of commercial paper.
2. Explain the concept of negotiability.
3. What are the types of negotiable instruments?
4. Give definition of a draft.
5. How are the parties, relating to a draft, called?
6. Identify different kinds of drafts.
7. Explain what a certificate of deposit means.
8. What are the requirements for negotiable instruments?
9. What elements of negotiable instruments may be omitted?

Exercise 2. Find in the text English equivalents to the following:

Акцептант; переводной вексель; вкладной сертификат; лицо, берущее на себя обязательство уплатить долг в случае несостоятельности должника; простой вексель; дисконт; переводный вексель; лицо, на которое выставлена тратта; векселедатель; лицо, в пользу которого сделана передаточная надпись; лицо, делающее передаточную надпись; оборотный документ; извещение; долговая расписка.

Exercise 3. Consult recommended dictionaries and give words or phrases to the following definitions:

Простой вексель; переводной вексель; оплата по предъявлении; подлежит оплате по приказу; коносамент; акцептированная банковская тратта; обеспеченный вексель; обыкновенный вексель; облигации на предъявителя; депозитный сертификат; банковский чек; банковский индоссамент; передаточная надпись; условие о сокращении срока исполнения обязательства; форма подписи; подпись торгового агента; безусловное

обещание; определенная сумма; точно определенный срок.

Exercise 4. Be ready to talk on one of the following topics:

1. State the purpose of commercial paper.
2. Explain the concept of negotiability.
3. Identify the three kinds of negotiable instruments.
4. Name the parties to each kindof negotiable instrument.
5. Describe the effect of dates on negotiable instruments and determine which words control.

Exercise 5. Make up your own dialog on the case:

In *Banco Espanol De Credito v. State Street Bank & Trust Co.*, the correspondent bank-plaintiff credited "the amounts specified in the letters of credit against debts" owed it by two beneficiaries under the letter of credit. The plaintiff then forwarded the draft to a Boston bank, which was obliged to pay under the letter of credit, and the Boston bank refused to pay on the ground that there was fraud in the transaction. Banco Espanol responded that it was a holder in due course and that fraud could not be raised against it. The district court, in an opinion affirmed by the First Circuit, found that Banco Espanol had in fact given value, was a holder in due course and was entitled to recover from the Boston bank. The lower court held that the Spanish bank had given value because the credit given was not subject to revocation under the terms of the agreement between the Spanish bank and its Spanish customers. The appellate court affirmed on this ground and on the alternate that Banco Espanol gave "value" "even if the credit were revocable."

Unit 12

Negotiation of Commercial Paper

Учет оборотных документов

Права по ценной бумаге передаются вручением данной ценной бумаги (если она является бумагой на предъявителя), в порядке цессии (если бумага именная), путем совершения индоссамента (в случае ордерной ценной бумаги) (глава 7 ГК РФ).

List of key terms and word combinations:

accommodation party	–	лицо, выписавшее (индоссировавшее или акцептовавшее) дружеский вексель
allonge	–	аллонж (листок, прилагаемый к векселю для дополнительных индоссаментов)
assignment	–	передача, переуступка (имущества, права); уступка требования; цессия
bearer paper	–	бумага на предъявителя
blank endorsement	–	бланковый индоссамент (без указания лица, которому переуступается документ)
conditional endorsement	–	индоссамент, содержащий определенное условие (по выполнении которого может производиться платеж)
dishonor	–	отказывать в акцепте или оплате векселя
endorsement in full	–	полный индоссамент (с указанием лица, которому производится платеж)
negotiation	–	передача, переуступка; продажа, учет (векселя), выплата (по чеку, по векселю)
order	–	требование
qualified endorsement	–	передаточная надпись, содержащая специальное условие
restrictive endorsement	–	ограниченный индоссамент
special endorsement	–	именная передаточная надпись

Commercial paper that does not meet all of the requirements of negotiability cannot be negotiated. It can only be transferred by assignment, which is governed by the ordinary principles of contract law. People who receive instruments by assignment are not given the special protection provided those who receive instruments by negotiation.

An *assignment* is the transfer of a contract right from one person to another. Commercial paper is assigned either

when a person whose endorsement is required on an instrument transfers it without indorsing it or when it is transferred to another person and does not meet the requirements of negotiability. In all such transfers, the transferee has only the rights of an assignee and is subject to all defenses existing against the assignor.

An assignment of commercial paper also occurs by operation of law when the holder of an instrument dies or becomes bankrupt. In such cases, title to the instrument vests in the personal representative of the estate or the trustee in bankruptcy.

Negotiation is the transfer of an instrument in such form that the transferee becomes a holder. A holder is a person who is in possession of an instrument issued or indorsed to that person, to that person's order, to bearer, or in blank.

If an instrument is payable to order, such as «pay to the order of,» it is known as order paper. To be negotiated, order paper must be indorsed by the payee and delivered to the party to whom it is transferred. If an instrument is payable to bearer or cash, it is called bearer paper and may be negotiated by delivery alone, without an endorsement. When order paper is indorsed with a blank endorsement (defined as follows), it is turned into bearer paper and may be further negotiated by delivery alone.

An instrument is indorsed when the holder signs it, thereby indicating the intent to transfer ownership to another. Endorsements may be written in ink, typewritten, or stamped with a rubber stamp. They may be written on a separate paper (rider, or *allonge)* as long as the separate paper is so firmly affixed to the instrument that it becomes part of it. For convenience purposes endorsements are usually placed on the back of the instrument.

Anyone who gives value for an instrument has the right to have the unqualified endorsement of the person who transferred it unless it is payable to bearer.

The back of a check is divided into specific sections designed to protect the endorsement of the depository bank (the bank of first deposit). The first one-and-one-half inches from the trailing edge of the check is reserved for the payee's endorsement. Subsequent banks that handle the check after the depository bank should limit their endorsements to the three-inch space beginning at the opposite end (leading edge) of the check. The section between the payee's endorsement section and the subsequent banks' endorsement section must be reserved for the depository bank's endorsement. In addition, purple ink can be used only by the depository bank.

There are four commonly used types of endorsements: *blank endorsements*, *special endorsements, restrictive endorsements*, and *qualified endorsements*.

A *blank endorsement* consists of the signature alone written on the instrument. No particular endorsee (person to whom an instrument is indorsed) is named. When an instrument is indorsed in blank, it becomes payable to bearer and may be transferred by delivery alone. If the instrument is lost or stolen and gets into the hands of another holder, the new holder can recover its face value by delivery alone. For this reason, a blank endorsement should be used only in limited situations, such as at a bank teller's window.

When an instrument is made payable to a person under a misspelled name or a name other than that person's own, the payee may indorse in the incorrect name, in the correct name, or in both. Signatures in both names may be required by a person paying or giving value for the instrument.

A *special endorsement* (also called an e*ndorsement in full*) is made by writing the words *pay to the order of* or *pay to* followed by the name of the person to whom it is to be transferred (the endorsee) and the signature of the endorser. When indorsed in this manner, the instrument remains an order instrument and must be indorsed by the endorsee before it can be further negotiated.

The holder of an instrument may convert a blank endorsement into a special endorsement by writing the same words *(pay to the order of* or *pay to)* over the endorser's signature.

A *restrictive endorsement* limits the rights of the endorsee in some manner in order to protect the rights of the endorser. An endorsement is restrictive if it is conditional, purports to prohibit further transfer of the instrument, includes the words *for collection, for deposit, pay any bank,* or like terms signifying a purpose of deposit or collection, or otherwise states that it is for the benefit or use of the endorser or of another person.

A *conditional endorsement*, a type of restrictive endorsement, makes the rights of the endorsee subject to the happening of a certain event or condition.

Endorsements for deposit or *collection* are designed to get an instrument into the banking system for the purpose of deposit or collection. When a check is indorsed «for deposit only» the amount of the instrument is credited to the endorser's account before it is negotiated further. Retail stores often stamp each check «for deposit only» when it is received. This wording provides protection in the event the check is stolen. Checks mailed to the bank for deposit should always be indorsed in this way.

A restrictive endorsement limits the subsequent use of the instrument. An endorsement that purports to prohib-

it further transfer, such as «pay John Doe only,» may be further negotiated after the directions in the endorsement are carried out. Thus, after John Doe is paid, any holder of the instrument may continue to negotiate it. A restrictive endorsement does not prevent further transfer or negotiation of the instrument.

A *qualified endorsement* is one in which words have been added to the signature that limit the liability of the endorser. By adding the words *without recourse* to the endorsement, the endorser is not liable in the event the instrument is dishonored, that is, not paid by the maker or drawer.

An *accommodation party* is one who signs an instrument in any capacity for the purpose of lending his or her name to another party to the instrument.

Thus, an accommodation party who signs on the front of a promissory note below the signature of the maker assumes the same liability as the maker. On the other hand, an accommodation party who signs on the back of the instrument assumes the same liability as an endorser. An accommodation party is not liable to the party accommodated. The party accommodated, however, is liable to the accommodation party if the latter pays the instrument.

If an instrument is payable to either of two payees, the endorsement of only one of the payees is necessary to negotiate it. On the other hand, if an instrument is payable to both of two payees, the endorsement of both payees is necessary for a proper negotiation.

A depository bank that has taken in an item for collection may supply any endorsement of the customer that is necessary to title. This rule is designed to speed up bank collections by eliminating the necessity to return to

a depositor any items that were not indorsed. Such an endorsement may not be supplied by a bank, however, if the instrument contains the words *payee's endorsement required.*

Exercise 1. Comprehension questions:

1. In what case is an instrument indorsed?
2. When does an assignment of commercial paper occur?
3. What are the standards for check endorsements?
4. What are the cases when a blank endorsement should be used?
5. How can be a blank endorsement converted into a special one?
6. What does a restrictive endorsement suppose?
7. Explain what an accommodation party is.
8. When is the endorsement of both payees required and when not?

Exercise 2. Find in the text English equivalents to the following:

Лицо, выписавшее дружеский вексель; листок, прилагаемый к векселю для дополнительных индоссаментов; переуступка; бумага на предъявителя; бланковый индоссамент; индоссамент, содержащий определенное условие; отказывать в акцепте или оплате векселя; полный индоссамент; учет векселя; передаточная надпись, содержащая специальное условие; ограниченный индоссамент; именная передаточная надпись.

Exercise 3. Consult recommended dictionaries and give words or phrases to the following definitions:

Простой вексель; переводной вексель; оплата по предъявлении; подлежит оплате по приказу; коносамент; акцептированная банковская тратта; обеспечен-

ный вексель; обыкновенный вексель; облигации на предъявителя; депозитный сертификат; банковский чек; банковский индоссамент; передаточная надпись; условие о сокращении срока исполнения обязательства; форма подписи; подпись торгового агента; безусловное обещание; определенная сумма; точно определенный срок.

Exercise 4. Be ready to talk on one of the following topics:

1. Differentiate between an assignment and a negotiation of commercial paper.
2. Name and describe four kinds of endorsements.
3. Identify the implied warranties that are made when people indorse negotiable instruments.
4. Explain the contract that is made when people indorse negotiable instruments.
5. Determine the endorsements required on instruments with more than one payee.

Exercise 5. Make up your own dialog on the case:

In *Riegler v. Riegler*, husband and wife both signed as makers of a note and were subsequently divorced. When the payee secured judgment against both parties, the husband sued his ex-wife for contribution. The wife argued that she only signed as an accommodation party and was not liable. The trail court found for the husband, because the wife had received benefits from the proceeds of the note. On appeal, the Arkansas Supreme Court affirmed on the basis of the wife's testimony that the proceeds of the note were used to build a house in which she had a half interest.

Unit 13

Holders in Due Course, Defenses, and Liabilities

Добросовестное владение и обстоятельства, освобождающие от ответственности

Добросовестность владения определяется тем, что владелец не знает и не должен знать о незаконности своего владения, при этом, возможно, и осознавая, что собственником соответствующей вещи он не является. Поэтому установление добросовестности зависит от оснований завладения вещью (статья 10 ГК РФ).

List of key terms and word combinations:

failure (want) of consideration	–	отпадение встречного удовлетворения, отпадение основания договора
holder	–	держатель; владелец; предъявитель
holder in due course	–	законный владелец, держатель
lack of consideration	–	недостаточность возмещения
personal (limited) defense	–	правовая защита против ограниченного круга держателей ценных бумаг
presentment	–	предъявление векселя к акцепту или оплате
primary liability	–	первичное обязательство
protest	–	протест, опротестование (векселя) ‖ опротестовывать (вексель)
real (universal) defense	–	универсальная защита против неограниченного круга держателей ценных бумаг
secondary liability	–	акцессорная ответственность; субсидиарная ответственность

A *holder in due course* is a holder who takes the instrument for value, in good faith, without notice that it is overdue or has been dishonored and without notice of any defenses against it or claim to it. Holders in due course receive more rights in negotiable instruments than their transferors had. Largely for this reason, negotiable instruments are passed freely from one person to another almost in the same way as money. A payee may be a holder in due course.

A holder in due course takes an instrument free from all claims to it on the part of any person and free from all *personal defenses* of any party with whom the holder has not dealt. Personal defenses (sometimes called *limited defenses*) can be used against a holder, but not a holder in due course, of a negotiable instrument. When an instru-

ment is negotiated to a holder in due course, personal defenses cannot be used against a holder in due course unless one has first dealt with the holder in due course. The most common personal defenses are *breach of contract, lack or failure of consideration, fraud in the inducement, lack of delivery,* and *payment*.

Lack of consideration is a defense that may be used by a maker or drawer of an instrument when no consideration existed in the underlying contract for which the instrument was issued. The ordinary rules of contract law are followed to determine the presence or absence of consideration in such a case.

Failure (want) of consideration is different. It is a defense that the maker or drawer has available when the party dealt with breaches of the contract by not furnishing the agreed consideration.

Both lack of consideration and failure of consideration are limited defenses. They may not be used against a holder in due course.

Some defenses can be used against everyone, including holders in due course. These defenses are known as *real*, or *universal*, defenses. No one is required to pay an instrument when they have a real defense. *Real defenses* include infancy and mental incompetence, illegality and duress, fraud as to the essential nature of the transaction, bankruptcy, unauthorized signature, and alteration.

There are two kinds of fraud: *fraud in the inducement* and *fraud as to the essential nature of the transaction*. The first is a personal defense; the second is a real defense. When someone is induced by a fraudulent statement or act to enter into a contract, that person may have the contract rescinded. Likewise, the defense of fraud in the inducement may be used against a holder of a negotiable

instrument that is issued as part of the transaction. Since the defense is limited, it may not be used against a holder in due course.

Every commercial instrument may be revoked by its maker or drawer until it has been delivered to the payee. *Delivery* is the transfer of possession from one person to another. If the transfer of possession is not intended to give the transferee rights, delivery is made in a physical sense, but the instrument has not been «issued.» Thus, in the event a payee forcibly, unlawfully, or conditionally takes an instrument from a drawer, the drawer has the defense of *conditional delivery*. The payee therefore may be denied the right to collect on the instrument. If the payee negotiates the instrument to a holder in due course, however, this defense is cut off.

Payment of an instrument by a maker or drawee usually ends the obligations of the parties. However, if a negotiable instrument is negotiated to a holder in due course after it has been paid, it will have to be paid again. This rule is because payment is a personal defense, which cannot be used against a holder in due course. Because of this rule, anyone who pays a demand instrument should have it marked «paid» and take possession of it. This requirement is not as important with a time instrument, unless it is paid before its due date, because no one can be a holder in due course of a past-due instrument.

No person is liable on an instrument unless that person's signature or the signature of an authorized agent appears on the instrument. Parties to negotiable instruments are either *primarily* or *secondarily* liable.

An *absolute liability* to pay is a *primary liability*. A party with primary liability promises to pay the instrument without reservations of any kind. Two parties have

primary liability: the maker of a promissory note and the acceptor, if any, of a draft.

A liability to pay only after certain conditions have been met is a *secondary liability*. Two types of parties are secondarily liable on negotiable instruments: the drawer of a draft (a check is the most common kind of draft) and the endorsers of either a note or a draft. The conditions that must be met are as follows: The instrument must be properly presented to the primary party or drawee and payment must be demanded; the instrument must be dishonored, that is, payment refused; and notice of the dishonor must be given to the secondary party within the time and in the manner prescribed by the law. If all three of the above conditions are not met, endorsers are discharged from their obligations. If the drawee cannot pay because of insolvency and all three conditions are not met, the drawer is discharged from all obligations.

To be sure that a secondary party (drawer or endorser) will be liable on an instrument, the holder must make proper presentment for payment unless excused. In other words, the holder must *present* the instrument to the maker or drawer and ask for payment. *Presentment* must be made on the date that the instrument is due.

If no due date is stated on the instrument, presentment must be made within a reasonable time after the maker or drawee becomes liable on it. The definition of a reasonable time for instruments other than checks will vary, depending on the circumstances and banking and trade practices.

When the date that an instrument is payable is not a full business day for either person making the presentment or the party paying, presentment is due on the next full business day for both parties. To be

sufficient, presentment must be made at a reasonable hour. If presentment is made at a bank, it must take place during the banking day.

The party from whom payment is demanded can request to see the instrument. If payment is made, the instrument must be handed over then and there. This transaction is important because if the party paying does not get the instrument back, it might show up later in the hands of a holder of due course, and the paying party would have to pay it again.

A draft may be presented to the drawee for acceptance as well as for payment. This flexibility is particularly important when a draft is not yet due. The holder is given the opportunity to test the drawee's willingness to honor the instrument. When a draft is *presented for acceptance*, the drawee is asked to become primarily liable on the instrument. The drawee is asked to agree now to pay the amount of the draft when it is presented for payment at a later date. To accept a draft, the drawee signs the instrument (usually perpendicularly) across its face. It is customary, also, to write the word *accepted* and the date along with the drawee's signature. When a drawee bank accepts a check, it stamps the word *certified* across the face of the instrument and signs it. This instrument is known as a certified check.

Although, in most cases, a draft may be presented for either payment or acceptance, there are three situations in which a draft *must* be presented for acceptance:

- where the draft states that it must be presented for acceptance,
- where the draft is payable elsewhere than at the residence or place of business of the drawee, and

- where the date of payment depends upon presentment, for example, when the draft contains a statement like: «Thirty days after sight pay to the order of … .»

Dishonor means to refuse to pay a negotiable instrument when it is due or to refuse to accept it when asked to do so. An instrument is dishonored when proper presentment is made and acceptance or payment is refused. Dishonor also occurs when presentment is excused and the instrument is past due and unpaid. The presenting party has recourse against endorsers or other secondary parties after notice of dishonor has been given.

If an instrument has been dishonored, the holder must give *notice of the dishonor* to the drawer and to the endorsers before midnight of the third full business day after the date of dishonor. Unless notice is excused, any endorser who is not given notice within the specified time is discharged. A drawer who is not given notice within the specified time is discharged if the drawee cannot pay because of insolvency. Notice of dishonor may be given, by or on behalf of the holder, to any person who may be liable.

Unless excused, protest of any dishonor is necessary to charge the drawer and endorsers of any draft that on its face appears to be drawn or payable outside the jurisdiction A *protest* is a certificate of dishonor that states that a draft was presented for acceptance or payment and was dishonored. It also states the reasons given for refusal to accept or pay. It is required for drafts drawn or payable outside the state and optional in all other cases with the holder. A protest is made under the hand and seal of a state consul or vice-consul or of a notary public or other person authorized to certify dishonor by the law where dishonor occurs.

Endorsers who write *demand and notice waived* or *protest waived* above their endorsements or across the face of an instrument are liable for payment without subsequent presentment or notice of dishonor. Prior endorsers are excused from their liability to such endorsers.

If a waiver of notice or protest is stated on the face of the instrument, it is binding upon all parties; when written above the signature of an endorser, it binds only the endorser.

Exercise 1. Comprehension questions:

1. What is a shelter provision designed for?
2. When can be personal defence used?
3. In what way may be the contract breached?
4. When does the holder have notice of a claim or defence?
5. What is the difference between lack of consideration and failure of consideration?
6. What are the kinds of frauds?
7. When does the drawer have the defence of conditional delivery?
8. In what case a person is not liable on negotiable instrument?
9. What should be done to be sure that a drawer would be liable on an instrument?

Exercise 2. Find in the text English equivalents to the following:

Отпадение основания договора; законный владелец; недостаточность возмещения; правовая защита против ограниченного круга держателей ценных бумаг; предъявление векселя к акцепту или оплате; первичное обязательство; опротестовывать вексель; универ-

сальная защита против неограниченного круга держателей ценных бумаг; субсидиарная ответственность.

Exercise 3. Consult recommended dictionaries and give words or phrases to the following definitions:

Приобретательная давность; непрерывно владеть; давность владения; течение срока; истечение срока; наличие вины; непреодолимая сила; чрезвычайные и непреодолимые обстоятельства.

Exercise 4. Be ready to talk on one of the following topics:

1. Describe the special protection given to a holder in due course.
2. Name six personal defenses.
3. Explain the significance of a real defense.
4. Name six real defenses.
5. Differentiate between primary liability and secondary liability.

Exercise 5. Make up your own dialog on the case:

In *Norman v. World Distributors, Inc.*, the court stressed that the purchaser of the note "knew enough of the seller's referral plan to require it to inquire further" and secondly that he knew that the seller had been doing business under three different names during the year in which the note was transferred. Those two facts in addition to a substantial discount led the court to find the purchaser was not a holder in due course.

Unit 14

Checks and Bank Collections

Чеки и инкассирование

Чеком признается ценная бумага, содержащая ничем не обусловленное распоряжение чекодателя банку произвести платеж указанной в нем суммы чекодержателю (п. 1 ст. 877 ГК).

Законодательство и практика чекового обращения знает несколько разновидностей чеков: по субъектам различаются чеки предъявительские, ордерные и именные; с точки зрения инкассации (получения денег) чеки подразделяются на кассовые, расчетные и кроссированные.

Участниками отношений по чеку являются чекодатель, чекодержатель и плательщик. Чекодателем считается лицо, выписавшее чек; чекодержателем — лицо, являющееся владельцем выписанного чека. Плательщиком по чеку является банк, где чекодатель

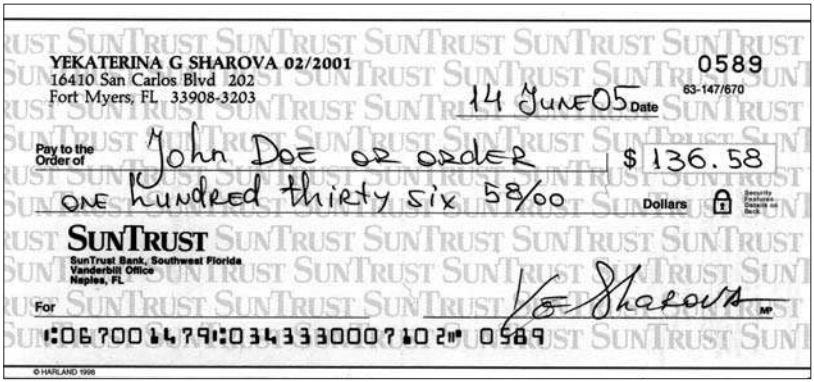
имеет средства, которыми он вправе распоряжаться путем выставления чеков (это могут быть деньги, находящиеся на банковском счете, учтенный вексель, даже открытый кредит). Использование чеков в качестве инструмента безналичных расчетов должно основываться на чековом договоре между плательщиком и его банком, а также между банками — участниками чековых расчетов.

List of key terms and word combinations:

bank draft	–	тратта, выставленная одним банком на другой
cashier's check	–	чек, выписанный банком на себя
certified check	–	удостоверенный чек (с надписью банка о принятии к платежу)
collecting bank	–	банк-инкассатор
depositary bank	–	банк- депозитарий
electronic fund transfers (EFTs)	–	система электронного перевода платежей
forgery	–	подлог или подделка документа
intermediary bank	–	банк-посредник
overdraft	–	овердрафт (сумма, получаемая по чеку сверх остатка на текущем счете); превышение кредита (в банке)
payor bank	–	банк-плательщик
presenting bank	–	банк-представитель
remitting bank	–	банк, переводящий средства
stale check	–	просроченный чек
subrogation	–	суброгация; замена одного кредитора другим
teller's check	–	чек, выписанный банком на другой банк и подписанный кассиром банка, выписавшего чек
traveler's check	–	дорожный чек
uttering	–	переуступка; выпуск в обращение; сбыт

A *check* is a draft drawn on a bank and payable on demand. It is the most common form of a draft. It is drawn on a bank by a drawer who has an account with the bank to the order of a specified person or business named on the check or to the bearer. A check is a safe means of transferring money, and it serves as a receipt after it has been paid and canceled by the bank.

In the check shown in *Figure 1*, Ms. Sharova is the drawer; she has an account in the Sun Trust Bank. John Doe is the payee. Sun Trust Bank, on which the check is drawn, is the drawee.



Ownership of a check may be transferred to another person by endorsement by the payee. In this manner, a check may circulate among several parties, taking the place of money. A bank must honor a check when it is properly drawn against a credit balance of the drawer. Failure to do so would make the bank liable to the drawer for resulting damages.

Special types of checks have been developed for use in particular situations. These checks include bank drafts, traveler's checks, and cashier's checks.

A *bank draft*, sometimes called a teller's check, or *treasurer's check,* is a check drawn by one bank on another bank in which it has funds on deposit in favor of a third person, the payee. Many banks deposit money in banks in other areas for the convenience of depositors who depend upon the transfer of funds when transacting business in distant places. When the buyer is unknown to the seller, such checks are more acceptable than personal checks.

A *cashier's check* is a check drawn by a bank upon itself. The bank, in effect, lends its credit to the purchaser of the check. People who will not accept personal checks will often accept cashier's checks. Such a check may be made payable either to the depositor, who purchases it from the bank, or to the person who is to cash it. If the check is made payable to the depositor, it must be indorsed to the person to whom it is transferred.

A *traveler's check* is similar to a cashier's check in that the issuing financial institution is both the drawer and the drawee. The purchaser signs the checks in the presence of the issuer when they are purchased. To cash a check, the purchaser writes the name of the payee in the space provided and countersigns it in the payee's presence. Only the purchaser can negotiate traveler's checks, and they are easily replaced by the issuing bank if they are stolen.

A *certified check* is a check that is guaranteed by the bank. At the request of either the depositor or the holder, the bank acknowledges and guarantees that sufficient funds will be withheld from the drawer's account to pay the amount stated on the check. A prudent person would request a certified check when involved in a business transaction with a stranger rather than accept a personal check.

A check may be *postdated* when the drawer has insufficient funds in the bank at the time the check is drawn but

expects to have sufficient funds to cover the amount of the check at a future date. Postdating is also practiced when some act or performance is to be completed before the date for payment of the check. Such a check, at the time it is drawn, has the effect of turning a demand instrument into a time instrument because it is an order to pay a specified amount of money at the future date stated.

A popular method of banking, known as *electronic fund transfers (EFTs)*, uses computers and electronic technology as a substitute for checks and other banking methods.

During the bank collection process, banks are described by different terms, depending on their particular function in a transaction. The different terms that are used to describe banks and their meanings are as follows: *Depositary bank* is the first bank to which an item is transferred for collection even though it is also the *payor bank*. *Payor bank* describes a bank by which an item is payable as drawn or accepted. It includes a *drawee bank*. *Intermediary bank* defines any bank to which an item is transferred in the course of collection except the depositary or payor bank. *Collecting bank* means any bank handling the item for collection except the payor bank. *Presenting bank* is any bank presenting an item except a payor bank. *Remitting bank* describes any payor or intermediary bank remitting for an item.

The life cycle of a check begins when the drawer writes a check and delivers it to the payee. The payee may take the check directly to the payor bank (the bank on which it was drawn) for payment. If that bank pays the check in cash, its payment is final, and the check is returned to the drawer with the next bank statement. However, it is more likely that the check will be deposited in the payee's

own account in another bank. That bank, known as the depositary bank, acts as its customer's agent to collect the money from the payor bank. Any settlement given by the depositary bank in this case is *provisional* (not final). It may be revoked if the check is later dishonored. The check is sent (sometimes through an intermediary bank) to a collecting bank, which presents the check to the payor bank for payment. If it is honored by the payor bank, the amount will be deducted from the drawer's account and the check will be returned to the drawer with the next bank statement. If the check is dishonored for any reason, it will be returned to the payee via the same route that it was sent and all credits given for the item will be revoked.

The relationship between the drawee bank and its customer is that of both debtor and creditor and agent and principal. The relationship arises out of the express or implied contract that occurs when the customer opens a checking account with the bank. The bank becomes a debtor when money is deposited in the bank by the customer. At this time, the customer is owed money by the bank and is, therefore, a creditor. When an *overdraft* occurs, that is, when the bank pays out more than the customer has on deposit, the debtor-creditor role reverses, and the bank becomes the creditor. The bank acts as the customer's agent when it collects or attempts to collect checks or other negotiable instruments made payable to the customer.

The drawee bank is under a duty to honor all checks drawn by its customers when there are sufficient funds on deposit in the customer's account. If there are insufficient funds on deposit, the bank may charge the customer's account even if it creates an overdraft.

A bank is under no obligation to a customer to pay a *stale check* unless it is certified. A stale check is a check

that is presented for payment more than six months after its date. A bank, however, may honor a stale check without liability to its customer if it acts in good faith.

A *forgery* is the fraudulent making or alteration of a writing. A forgery is committed when a person fraudulently writes or alters a check or other form of commercial paper to the injury of another. The commission of forgery is a crime, subject to a fine and imprisonment. The offering of a forged instrument to another person when the offerer knows it to be forged is also a crime, known as uttering. If a bank, in good faith, pays the altered amount of a check to a holder, it may deduct from the drawer's account only the amount of the check as it was originally written.

The depositor is also protected against a signature being forged. When a checking account is opened, the depositor must fill out a signature card, which is permanently filed at the bank. Thereafter, the bank is held to know the depositor's signature. The bank is liable to the depositor if it pays any check on which the depositor's signature has been forged.

Payor banks are required to either settle or return checks quickly. If they do not do so, they are responsible for paying them. If the payor bank is not the depositary bank, it must settle for an item by *midnight* of the banking day of receipt.

If the payor bank is also the depositary bank, it must either pay or return the check or send notice of its dishonor on or before its midnight deadline. In this case, the bank's midnight deadline is midnight of the next banking day following the banking day on which it receives the relevant item.

Depositors, in general, owe a duty to the banks in which they have checking accounts to have sufficient funds on

deposit to cover checks that they write. They must also examine their bank statements and canceled checks promptly and with reasonable care and notify the bank quickly of any discrepancies.

Many banks now offer overdraft protection service to their depositors, which cover small overdrafts that are usually caused by the mistake of the drawer in balancing the checkbook. With this service, the bank honors small overdrafts and charges the depositor's account. This service saves the drawer the inconvenience and embarrassment of having a check returned to a holder marked «insufficient funds.»

Depositor has a duty to examine their bank statements and canceled checks promptly and with reasonable care when they are received from the bank. They must report promptly to the bank any forged or altered checks. If they do not do so, depositors cannot hold the bank responsible for losses due to the bank's payment of a forged or altered instrument.

Drawers may order a bank to stop payment on any item payable on their account. If a bank fails to stop payment on a check, it is responsible for any loss suffered by the drawer who ordered the payment stopped. The bank, however, may take the place of any holder, holder in due course, payee, or drawer who has rights against others on the underlying obligation. This right to be substituted for another is known as the bank's right of *subrogation*. It is designed to prevent loss to the bank and unjust enrichment to other parties.

Exercise 1. Comprehension questions:

1. Give definition of a check.
2. Identify special types of checks.
3. Identify the parties relating to a check.

4. What do the cashier's check and traveler's check have in common?
5. What are the requirements for traveler's check?
6. Explain what a certified check is.
7. In what situation postdating is practiced?
8. What are the benefits of electronic fund transfers?

Exercise 2. Find in the text English equivalents to the following:

Тратта, выставленная одним банком на другой; чек — выписанный банком на себя; чек с надписью банка о принятии к платежу; банк-инкассатор; банк-депозитарий; подлог; банк-посредник; превышение кредита; банк-плательщик; банк-представитель; банк, переводящий средства; просроченный чек; замена одного кредитора другим; чек, выписанный банком на другой банк и подписанный кассиром банка, выписавшего чек; переуступка

Exercise 3. Consult recommended dictionaries and give words or phrases to the following definitions:

Чекодержатели; выставление чеков; выдача чеков; отзыв чека; реквизиты чека; оплата чека; депонирование средств; индоссированный чек; утраченный чек; подложный чек; передача прав по чеку; переводной чек; инкассирование чека; аваль чека; операции по счету; кредитование счета; оплата услуг банка; банковская комиссия; списание денежных средств со счета.

Exercise 4. Be ready to talk on one of the following topics:

1. Explain the form necessary for an instrument to be a check.
2. Differentiate between a bank draft and a cashier's check.

3. Compare the liability of parties to a check certified by the drawer with that of a check certified by the payee.
4. Outline a check's life cycle.
5. Explain the duties of a depositor relative to bad checks and examining accounts.

Exercise 5. Make up your own dialog on the case:

In *Cambridge Trust Co. v. Carney*, defendant was a cosignatory with her husband on his business account in order to "insure" payment pursuant to a preliminary support agreement. After receiving an initial payment of $38,000, defendant neither deposited money in, withdrew money from nor received any statement from the bank regarding the joint account. Three month after the initial payment, defendant's husband deposited worthless check for $7,100, drew $6,000 against it, and disappeared into the gloaming. Bank sued defendant on the$5,902.88 overdraft. The New Hampshire Supreme Court held that since defendant neither participated in the transaction creating the overdraft nor received funds as a result of it, she could not be held liable for payment of it.

Unit 15

The Nature of the Insurance Contract

Сущность договора страхования

Страхование осуществляется на основании договоров имущественного или личного страхования, заключаемых гражданином или юридическим лицом (страхователем) со страховой организацией (страховщиком) (глава 48 ГК РФ).

По договору страхования одна сторона (страховщик) обязуется за обусловленную договором плату (страховую премию) при наступлении предусмотренного в договоре события (страхового случая) возместить другой стороне (страхователю) или иному лицу, в пользу которого заключен договор (выгодоприобретателю), причиненные вследствие этого события убытки (выплатить страховое возмещение) в пределах определенной договором суммы (страховой суммы).

List of key terms and word combinations:

beneficiary	–	бенефициарий; выгодоприобретатель
binder	–	временный страховой документ (до оформления полиса)
comprehensive coverage	–	страхование нескольких видов (например, имущества) по одному договору
concealment	–	сокрытие, укрывательство; утаивание, умалчивание
double indemnity	–	выплата страховой суммы в двойном размере (если смерть застрахованного наступила в результате несчастного случая)
estoppel	–	лишение права возражения, лишение стороны права ссылаться на какие-либо факты или оспаривать какие-либо факты
indemnify	–	гарантировать возмещение вреда, ущерба
insurable interest	–	страховой интерес
insurance	–	страхование, страховая премия, страховой полис
insured	–	страхователь || застрахованный
insurer	–	страховщик
misrepresentations	–	введение в заблуждение; искажение фактов
no-fault insurance	–	страхование от вреда, наступающего без вины страхователя
policy	–	полис (страховой)
premium	–	страховая премия, страховой взнос
underwriter	–	поручитель-гарант, страховщик
waiver	–	отказ (от права, от претензии), изъятие (из общих правил); отступление; исключение; освобождение (от обязательств)
waiver of premium	–	освобождение от уплаты страховых взносов
warranty	–	гарантия; поручительство, ручательство; оговорка

The principal protection against losses from hazards is insurance. Insurance is a transfer of the risk of economic

loss from the buyer to the seller, or the insurance company. The principle underlying insurance is the distribution of risk — which holds that small contributions made by a large number of individuals can provide sufficient money to cover the losses suffered by a few as they occur each year. The function of insurance is to distribute each person's risk among all others who may or may not experience losses.

The parties to an insurance contract are the *insurer*, or *underwriter*; the *insured*; and the *beneficiary*. The *insurer* accepts the risk of loss in return for a premium (the consideration paid for a policy) and agrees to *indemnify*, or compensate, the insured against the loss specified in the contract. The *insured* is the party (or parties) protected by the insurance contract. The contract of insurance is called the policy. The period of time during which the insurer assumes the risk of loss is known as the life of the policy. A third party, to whom payment of compensation is sometimes provided by the contract, is called the *beneficiary*.

Insurance policies, like other contracts, require offer, acceptance, mutual assent, capable parties, consideration, and legally valid subject matter. For either type of insurance to be effective, the *beneficiary* (a person or business applying for insurance) must have an *insurable interest* in the person or property insured (i.e. the subject matter of the policy).

An *insurable interest* is the financial interest that a policyholder has in the person or property that is insured. In general, an insurable interest will exist if the insured has a financial interest in the insured person or property. The nature and duration of insurable interests vary with the type of insurance purchased.

An individual has an insurable interest in the life of another if a financial loss will occur if the insured dies. An insurable interest exists if the person who buys the insurance is dependent on the insured for education, support, business (partners), or debt collection. A life insurance policy will remain valid and enforceable even if the insurable interest terminates. It is necessary only that the insurable interest exists at the time the policy was issued.

To establish the existence of an insurable interest in property, the insured must demonstrate a monetary interest in the property. This monetary interest means that the insured will suffer a financial loss if the property is damaged or destroyed. Unlike life insurance, this insurable interest must exist when the loss occurs.

Life insurance policies have many optional provisions that may be purchased by the insured. Three popular options are double indemnity, waiver of premium, and guaranteed insurability.

For an additional premium, the insured may purchase a benefit known as *double indemnity*, or accidental death benefit. This option provides that if the insured dies from accidental causes the insurer will pay double the amount of the policy to the beneficiary.

The *waiver-of-premium* option excuses the insured from paying premiums if he or she becomes disabled.

A *guaranteed-insurability* option allows the insured to pay an extra premium initially in exchange for a guaranteed option to buy more insurance at certain specified times later on.

Property insurance can be purchased to protect both real and personal property. Some property insurance policies protect the insured against a specific danger, as in the

case of fire insurance. Other policies are designed to protect certain items of property against a variety of losses. Such is the case with fire, homeowner's, and automobile insurance.

The first step in obtaining an insurance policy is to fill in an application. The application is an offer made by the applicant to the insurance company. As with any offer, the offeree, in this case the insurance company, may accept or reject the offer.

The waiting period between the offer and the acceptance opens the insured to potential risk. To avoid this risk, the insured can arrange to have the insurer issue a *binder*. A *binder*, or *binding slip*, will provide temporary insurance coverage until the policy is formally accepted. The binder will include all of the usual terms that would be included in the actual policy to be issued.

An insurance contract differs from most other contracts in that it requires the payment of premiums. The amount of the premium is determined by the nature and character of the risk and by how likely the risk is to occur. The premium increases as the chance of loss increases.

When the insured stops paying premiums, an insurance contract is said to *lapse*. This does not mean, however, that the contract will terminate automatically on the date that the last premium is paid. It will also not lapse automatically if the insured makes a delayed payment. Most contracts allow for a grace period of 30 or 31 days in which the insured may make payments to keep the policy in force. Beyond this period, however, the insurance contract will lapse and the policy will terminate.

Under certain conditions, the insurer is given a legal right to forfeit, or cancel, an insurance policy. Proof of a forfeiture permits cancellation either before a loss or at

the time the claim is made on a policy. Among grounds permitting forfeiture are the breach of warranty and the concealment or misrepresentation of a material fact by the insured. Neither the insured nor the insurer may deny statements or acts previously made or committed that might affect the validity of the policy.

A *warranty* is an insured's promise to abide by restrictions, especially those written into a policy. An insurance company has the burden of proof in establishing that a warranty has been breached (broken) by the insured. If this is proved, the insurer may cancel the contract or refuse payment of loss to the insured or to a beneficiary.

Fraudulent concealment is any intentional withholding of a fact that would be of material importance to the insurer's decision to issue a policy. The applicant need only give answers to questions asked. However, the insured may not conceal facts that would be material in acceptance of a risk.

If an insured party gives false answers, or *misrepresentations*, to questions in an insurance application that materially affect the risk undertaken by the insurer, the contract is voidable by the insurer.

An insurer may not deny acts, statements, or promises that are relevant and material to the validity of an insurance contract. This bar to denial is called an *estoppel*. When an insurer has given up the right to cancel a policy under certain circumstances by granting the insured a special dispensation, the insurer cannot deny that dispensation when the chance to cancel or deny liability arises.

When the insurance company gives up one of its rights in order to help the insured, the company has made a *waiver*. A *waiver*, which is actually a form of estoppel,

can be implied from the conduct of the insurance company. For example, when an insurance company cashes the check of a lapsed policy, it has, in effect, given up or waived its right to cancel that policy. Once a right has been waived, the insurer may not later deny its waiver.

Exercise 1. Comprehension questions:

1. What are the functions of insurance?
2. Identify the parties to insurance.
3. What is necessary to have mutual assent of the parties?
4. What are the types of insurance?
5. Explain what an insurable interest means.
6. In what case may the insurer cancel the contract or refuse payment of loss?
7. How can misrepresentation or false answers affect the contract?
8. When does an insurance contract lapse?
9. What does the amount of the premium depend on?

Exercise 2. Find in the text English equivalents to the following:

Сокрытие; временный страховой документ; страхование нескольких видов (например, имущества) по одному договору; лишение права возражения; гарантировать возмещение вреда; страховой интерес; страховая премия; застрахованный; страховщик; введение в заблуждение; страхование от вреда, наступающего без вины страхователя; страховая премия; поручитель-гарант; страховщик; освобождение от обязательств; освобождение от уплаты страховых взносов; поручительство.

Exercise 3. Consult recommended dictionaries and give words or phrases to the following definitions:

Страхование имущества; страхование ответственности за причиненный вред; страхование ответственности по договору; страхование предпринимательского риска; договор личного страхования; договор имущественного страхования; генеральный полис; правила страхования; страховая сумма; страховая стоимость имущества; страховой риск; страховая премия; страховые взносы; замена выгодоприобретателя.

Exercise 4. Be ready to talk on one of the following topics:

1. Identify the contractual elements that are necessary to make an insurance agreement binding.
2. Contrast the requirements for an insurable interest for life insurance with that for property insurance.
3. Determine whether a beneficiary may or may not receive benefits under a life insurance policy involving exemptions from risks.
4. List the steps to be followed in applying for, obtaining, and maintaining an insurance policy.
5. Judge whether an insurance policy can be canceled in given situations.

Exercise 5. Make up your own dialog on the case:

In *Home Insurance Co. v. Bishop*, the court concluded that the insurance company was "substituted for the mortgagee and in legal effect has purchased its rights." After the debtor destroyed the insured automobile, the court authorized the insurance company of the creditor to be subrogated to the creditor-insured's rights on the buyer's note.

Unit 16

Security Devices

Способы обеспечения обязательств

Исполнение обязательств (глава 23 ГК РФ) может обеспечиваться неустойкой, залогом, удержанием имущества должника, поручительством, банковской гарантией, задатком и другими способами, предусмотренными законом или договором.

List of key terms and word combinations:

acceleration	–	сокращение срока платежа для приобретения права (как санкция за неуплату в срок процента или части долга)
assume the mortgage	–	принимать на себя залог
attachment	–	скрепление (печатью, подписью); наступление (ответственности, риска, обязанности и т. д.); судебный приказ о наложении ареста на имущество
balloon-payment mortgage	–	большой одноразовый платеж в погашение долга

collateral	–	обеспечение; залог; дополнительное обеспечение
conventional mortgage	–	обычная ипотека (не гарантированная государством)
deed of trust	–	документ об учреждении доверительной собственности
flexible-rate mortgage	–	ипотека с плавающей процентной ставкой
foreclosure	–	лишение права выкупа заложенного имущества, переход заложенной недвижимости в собственность залогодержателя
graduated-payment mortgage	–	закладная с возрастающей суммой выплат в счет погашения (первые взносы невелики и возрастают по согласованной схеме)
mortgage	–	ипотечный залог
mortgagee	–	кредитор по закладной (получающий права на заложенное имущество)
mortgagor	–	должник по ипотечному залогу, залогодатель
perfected	–	законченный, завершенный, окончательный, оформленный
purchase money security interest	–	обеспечительный интерес при покупке в рассрочку
secured loan	–	обеспеченная ссуда
secured party	–	обеспеченная; гарантированная сторона
security agreement	–	соглашение о предоставлении обеспечения
security interest	–	обеспечительный интерес; право кредитора вступить во владение собственностью, предложенной в качестве обеспечения; проценты, обеспеченные товарными документами
subject to the mortgage	–	являющийся предметом залога
unsecured loan	–	необеспеченный заем
variable-rate mortgage	–	закладная с изменяющейся ставкой процента

Security is the assurance that a creditor will be paid back for any money loaned or for credit extended to a debtor. Debts are said to be secured when creditors know that somehow they will be able to recover their money. Lenders of money and people who extend credit often require a security device to protect their financial interests. A security device is a way for creditors to get their money back in case the borrower or debtor does not pay. A secured loan is one in which creditors have something of value, usually called collateral, from which they can be paid if the debtor does not pay. In general, if creditors aren't paid the debt owed to them, they can legally gain possession of the collateral. The collateral is then sold, and the money is used to pay the debt. The right to use the collateral to recover a debt is called the creditor's security interest. If creditors lend money but do not require collateral, they have made an unsecured loan. An unsecured loan is one in which creditors have nothing of value that they can repossess and sell to recover the money owed to them by the debtor. Both real property and personal property can be used to secure a debt.

A *mortgage* is a transfer of an interest in property for the purpose of creating a security for a debt. The one who borrows the money (the *mortgagor*) conveys all or part of his or her interest in the property to the lender (the *mortgagee*) while at the same time retaining possession of the property. A mortgage on real estate creates a legal claim to the property. This legal claim, also called a *lien*, gives the lender the right to have the property sold if the debt is not paid. Once the land is sold and the debt is satisfied, the mortgagor's obligation to the mortgagee is over. However, if the sale of the property does not satisfy the whole debt, the mortgagor will still owe the balance.

Some of the most common mortgages are the conventional, the variable-rate, the graduated-payment, the balloon-payment, and deeds of trust.

A *conventional mortgage* involves the loan made by private lenders, and the risks of loss are borne exclusively by them. In the past, conventional mortgages had fixed interest rates that stayed the same during the life of the mortgage regardless of fluctuations in the economy.

A *variable- or flexible-rate mortgage* has a rate of interest that changes according to fluctuations in the index to which it is tied.

A *graduated-payment mortgage* has a fixed interest rate during the life of the mortgage; however, the monthly payments made by the mortgagor gradually increase over the term of the loan, usually reaching a plateau at which the payments remain fixed.

A *balloon-payment mortgage* has relatively low fixed payments during the life of the mortgage followed by one large final (balloon) payment.

Under a *deed of trust*, the mortgagor conveys his or her interest in the property to a disinterested third party, known as a *trustee*. The mortgagor remains on the property, but the trustee holds certain rights to that property as security for the mortgagor's creditors. If the debtor defaults, the trustee can sell the property for the benefit of those creditors

By law and by agreement, the mortgagor has certain rights and certain duties in conjunction with the mortgage. First, under the rule followed by a majority of jurisdictions, the mortgagor has the right to possess the property. The mortgagor holds title to the property despite the financial interest of the mortgagee. In jurisdictions following the old common law rule, the mortgagee has title to the premises but the mortgagor retains possession.

Second, the mortgagor has the right to any income produced by the property. Of course, the mortgagor could also assign this right to the mortgagee as a condition to executing the original mortgage agreement.

Third, the mortgagor has the right to use the property for a second or third mortgage.

Finally, the mortgagor has the right of redemption, that is, the right to pay off the mortgage in full, including interest, and to thus discharge the debt in total.

Chief among duties of the mortgagor is to pay installment payments on time. Mortgagors must also preserve and maintain the mortgaged property for the benefit of the mortgagee's interest and security, and insure the property for the benefit of the mortgagee to the amount of the mortgaged debt.

The mortgagor must pay all taxes and assessments that may be levied against the property.

The mortgagee has the unrestricted right to sell, assign, or transfer the mortgage to a third party. Whatever rights the mortgagee had in the mortgage are then the rights of the *assignee*. The only way the mortgagor could stop the mortgagee from assigning the mortgage is to pay the mortgagee everything owed on the mortgage.

Sometimes, the property may be sold with the mortgage remaining on it. In such *takeovers*, the transfer of title to a new buyer is subject to the buyer's payment of the seller's mortgage at the existing rate of interest.

In purchasing a property already mortgaged, the buyer will either assume the mortgage or take the property subject to the mortgage. When buyers decide to assume the mortgage, they agree to pay it. When they take the property subject to a mortgage, the seller agrees to continue paying the debt.

The property that is subject to the security interest is called *collateral*. A security interest is created by a written agreement, called a security agreement, which identifies the goods and is signed by the debtor. The lender or seller who holds the security interest is known as the secured party. A security interest is said to attach when the secured party has a legally enforceable right to take that property and sell it to satisfy the debt. It is said to be *perfected* when the secured party has done everything that the law requires to give the secured party greater rights to the goods than others have.

A *security agreement* is an agreement that creates a security interest. It must be in writing, signed by the debtor, and contain a description of the collateral that is used for security.

To be effective, a security interest must be legally enforceable against the debtor. This is known as *attachment*. *Attachment* occurs when three conditions are met. First, the debtor has some ownership or possessive rights in the collateral. Second, the secured party (or creditor) transfers something of value, such as money, to the debtor. Third, the secured party takes possession of the collateral or signs a security agreement that describes the collateral.

When a security interest attaches, it is effective only between debtor and creditor. Such creditors, however, will want to make certain that no one else can claim that collateral before they do, if the debtors fail to pay them back. To preserve the right to first claim on the collateral, creditors must *perfect* their interest. A security interest can be perfected in one of three ways: *by attachment alone, by possession of the collateral,* or *by filing a financial statement* in the appropriate government office.

Perfection by attachment alone means that, in limited situations, a security interest is perfected the moment it attaches, that is, as soon as the security interest becomes legally enforceable. One situation in which this type of perfection occurs is when someone lends money to a consumer and then takes a security interest in the goods that the consumer buys. This is called a purchase money security interest and applies only to consumer goods.

Perfection by possession means that a security interest may be perfected when the secured party (the creditor) takes *possession of the collateral*. This is called a *pledge*. The borrower, or debtor, who gives up the property, is the *pledger*. The secured party, or creditor, is the *pledgee*. A secured party who has possession of the collateral must take reasonable care of the property. The debtor must reimburse the secured party for any money spent to take care of the property. The debtor assumes the risk of accidental loss beyond any insurance coverage.

Perfection by filing means that security interests in most kinds of personal property are perfected by filing a financial statement in a public office.

Exercise 1. Comprehension questions:

1. What kinds of property can be used to secure a debt?
2. Give definition of a mortgage.
3. When is the mortgagor's obligation to the mortgage over?
4. Who bears the risk of loss in conventional mortgage?
5. What does a deed of trust suppose?
6. What are the requirements to a mortgage?
7. What is the role of the third party in a mortgage?
8. In what case does an attachment occur?

Exercise 2. Find in the text English equivalents to the following:

Сокращение срока платежа для приобретения права; принимать на себя залог; наступление ответственности; судебный приказ о наложении ареста на имущество; обычная ипотека; документ об учреждении доверительной собственности; собственность залогодержателя; ипотечный залог; кредитор по закладной; должник по ипотечному залогу; завершенный; обеспечительный интерес; обеспеченная ссуда; гарантированная сторона; соглашение о предоставлении обеспечения.

Exercise 3. Consult recommended dictionaries and give words or phrases to the following definitions:

Основания удержания; уменьшение неустойки; залог земельного участка; распоряжение предметом залога; прекращение поручительства.

Exercise 4. Be ready to talk on one of the following topics:

1. Differentiate between a secured and an unsecured loan.
2. Identify six types of mortgages.
3. Describe and distinguish between the rights and duties of the mortgagor and the rights and duties of the mortgagee.
4. Decide whether security interests are perfected in cases involving various kinds of collateral.
5. Discuss what rights a secured party has when a debtor defaults by failing to make payments when due.

Exercise 5. Make up your own dialog on the case:

In *In re Manuel*, buyer bought a television set and seller claimed a purchase money security interest in the television set and in several items previously purchased. The Fifth Circuit, reasoning that to have a purchase money security interest the collateral must secure its own

price, held that the seller did not have a purchase money security interest in the previously purchased items. The court expressly left open the question whether the seller had a purchase money security interest in the television.

Unit 17

Partnership

Товарищество

Хозяйственными товариществами и обществами (глава 4 ГК РФ) признаются коммерческие организации с разделенным на доли (вклады) учредителей (участников) уставным (складочным) капиталом. Имущество, созданное за счет вкладов учредителей (участников), а также произведенное и приобретенное хозяйственным товариществом или обществом в процессе его деятельности, принадлежит ему на праве собственности. Прибыль и убытки полного товарищества распределяются между его участниками пропорционально их долям в складочном капитале, если иное не предусмотрено учредительным договором или иным соглашением участников.

List of key terms and word combinations:

annuity	–	аннуитет; ежегодная выплата, установленная договором, завещанием или другим актом
articles of partnership	–	договор об учреждении товарищества
assigned	–	правопреемник, цессионарий
assign	–	передавать; переуступать; цедировать; отчуждать
capital contributions	–	взнос в уставный капитал; возмещение доли ответственности
fiduciary	–	доверенное лицо, фидуциарий || основанный на доверии, фидуциарный
general partner	–	член полного товарищества
goodwill	–	стоимость «фирмы» (репутация и деловые связи фирмы, нематериальные элементы фирмы, включающие наименование фирмы, товарные знаки, клиентуру)
limited liability	–	ограниченная ответственность
limited partners	–	компаньон-вкладчик, компаньон с ограниченной ответственностью
limited partnership	–	коммандитное товарищество, товарищество на вере
partnership at will	–	бессрочное товарищество
partnership by estoppel	–	товарищество в силу неопровержимой правовой презумпции (когда товарищ лишен права отрицать наличие представительства в силу характера своих действий)
prima facie evidence	–	доказательство, достаточное при отсутствии опровержения; первичное доказательство; презумпция доказательства
surplus	–	активное сальдо (торгового или платежного баланса); активный торговый или платежный баланс
tenancy in partnership	–	совладение (преимущественно недвижимостью)

There are the two essential elements of a partnership. First, partnerships must involve at least two persons. (Note that the term *person* include corporations and other legally created organizations.) Second, a partnership must involve a sharing of profits and sharing losses equally by the partners. This point is so crucial that the sharing of profits and losses is considered *prima facie* (sufficient) evidence of the existence of a partnership. *Prima facie* evidence in this context means that the law presumes, in the absence of evidence to the contrary, that an individual receiving profits and sharing losses is a partner.

Unlimited liability (the most unattractive feature of a partnership) places the partner's own property at risk, which means that the partner's nonpartnership property can be used to satisfy debts owed by the partnership. In general, a partner's individual nonpartnership property cannot be tapped until the partnership runs out of assets. It is also possible to stipulate in a given contract that nonpartnership property will never be used to satisfy a debt arising out of that agreement. Finally, partners can take out insurance to protect themselves against the loss of individual property due to partnership indebtedness.

A partnership can be formed by contract, by proof of existence, or by estoppel.

The written agreement that establishes a partnership is called the partnership agreement, or *articles of partnership*. In addition to the date of formation, the identity of the parties, and the purpose of the partnership, the agreement generally includes the name and duration of the partnership, amount of capital (net assets) each partner contributed to the partnership, amount of reserve funds (retained earnings) from profits to be accumulated, location and withdrawal procedure for all partnership

funds, duties of partners, location and accessibility of a full and accurate account of partnership transactions, the times and amounts each partner is entitled to withdraw from partnership earnings, provision for the preparation of an annual balance sheet and income statement and the distribution of net profits or net losses between partners, limitations on partners, and termination notice procedure.

Sometimes a partnership will be created simply on the basis of the way in which people do business with one another. If one party claims that a partnership exists and the other party denies its existence, the court will look at the sharing of profits. However, a person may receive a share of the profits and avoid the label «partner» if the share is paid as repayment of a debt, as wages to an employee or rent to a landlord, as an *annuity* (i.e., a guaranteed retirement income), as interest on a loan, or as consideration for the sale of *goodwill* (i.e., the expected continuance of public patronage).

When an individual says or does something that leads a third party to the reasonable belief that a partnership exists, *partnership by estoppel* occurs. Partnership by estoppel does not create a true partnership.

The capital contributions of all partners are considered to be the property of the partnership. *Capital contributions* are sums that are contributed by the partners as permanent investments and that the partners are entitled to have returned when the partnership is dissolved. In contrast, loans or later advances that partners make to the partnership and accumulated but undivided profits belong to the partners on an individual basis.

Each partner has a property interest in specific terms of partnership property, making him or her a co-owner of that property. This form of ownership is known as *tenancy*

in partnership. A tenancy in partnership has the following characteristics: A partner has an equal right with partners to possess and use specific partnership property for partnership purposes, but not for that partner's personal use; a partner's interest in partnership property may not be assigned (i.e., transferred by sale, mortgage, pledge, or otherwise) to a nonpartner, unless the other partners agree to the transfer; partners' rights in partnership property are not subject to attachment (i.e., taking a person's property and bringing it into the custody of the law) for personal debts or claims against the partners themselves; a deceased partner's interest in real property held by the partnership passes to the surviving partners; and partners' rights in specific partnership property are not subject to any allowances or rights to widows, heirs, or next of kin.

A *partner's interest in the partnership* is his or her share of profits and *surplus*. *Surplus* includes any funds that remain after a partnership has been dissolved and all other debts and prior obligations have been settled. Partners share profits and surplus equally, unless the articles of partnership specify otherwise.

All partners have equal rights in the management of partnership business. Participating is not limited by the proportional value of the partner's contribution. Any differences arising as to ordinary matters connected with the business may be decided by a majority vote of the partners.

A *fiduciary* is a person who has a duty to act for the benefit of another. Because of their joint undertaking, partners are fiduciaries to one another. As a fiduciary, each partner has a duty to act in the highest good faith, fairness, and trust when conducting partnership business.

Partners are jointly liable on all contractual obligations of the partnership. This means that in a suit brought jointly against all partners, each partner is a defendant. A judgment must be against all or none of the partners, and a release of one partner releases all of them.

A partnership comes to an end by way of a two-part process: *dissolution* and *winding up*. *Dissolution* of a partnership as a change in the relation of the partners caused by any partner ceasing to be associated in the carrying on of the business. Dissolution is to be distinguished from the *winding up* and termination of the partnerships, which effectively puts it out of business. Winding up involves completing all ongoing business and selling the partnership property to obtain cash to satisfy all debts owed by the firm. If anything is left, it is distributed to the partners according to the partnership agreement or the rules set down by regulations.

In general, partnerships dissolve by the acts of the partners, by operation of law, and by court decree.

Limited partnerships are defined as a partnership formed by two or more persons ... having one or more general partners and one or more limited partners. General partners take an active part in the management of the firm and have unlimited liability for the firm's debts. Limited partners are nonparticipating investors. They contribute cash, property, or services to the partnership but do not take part in the management of the firm.

The general partner can accumulate additional capital without admitting another general partner who would be entitled to management rights. Thus, the general partner maintains control while strengthening the firm's treasury. Limited partnership means limited liability, which in its turn means that the limited partner's

nonpartnership property cannot be used to satisfy any debts owed by the partnership. Thus, limited partners receive a return on their investment while risking only that original investment.

Exercise 1. Comprehension questions:

1. Explain the term partnership.
2. Identify the essential elements of a partnership.
3. How are the profits and losses shared between the parties?
4. Explain why unlimited liability is perhaps the most unattractive feature f a partnership.
5. What may protect the partners against loss of nonpartnership property?
6. How can be partnership formed?
7. What are the requirements for partnership agreements?
8. Explain the term capital contribution.
9. What are the ways of partnership's dissolution?

Exercise 2. Find in the text English equivalents to the following:

Ежегодная выплата; цессионарий; переуступать; доверенное лицо; стоимость «фирмы»; компаньон-вкладчик, компаньон с ограниченной ответственностью; товарищество на вере; бессрочное товарищество; активное сальдо; совладение.

Exercise 3. Consult recommended dictionaries and give words or phrases to the following definitions:

Полное товарищество; товарищество на вере; учредительный договор; преобразование хозяйственных товариществ; складочный капитал; ответственность участников; внесение вкладов; ведение дел товарищества; изменение состава участников; передача доли участника.

Exercise 4. Be ready to talk on one of the following topics:

Describe the evidence used by the courts to determine whether a partnership exists.

1. Distinguish between property belonging to the partnership and property belonging to the individual partners.
2. Outline the various rights, duties, and liabilities of partners.
3. Determine the ranking of partnership liabilities in settling accounts after the dissolution of a partnership.
4. Compare the advantages of a limited partner in a limited partnership to those of a general partner.

Exercise 5. Make up your own dialog on the case:

A partnership, Hartigan and Dwyer, operates a department store in Troy, New York, while a partnership, Hartigan, Dwyer, and O'Brien, operates a department store in Albany, New York. An insurance company issued a policy in the name of "Hartigan and Dwyer, department store merchant, Troy, New York" insuring against liabilities arising from the operation of a delivery truck. The truck, while being used for deliveries from Albany store operated by Hartigan, Dwyer, and O'Brien, strikes and kills a child. If Hartigan and Dwyer are called upon individually to pay a tort judgment, are they protected by the policy?

Unit 18

Corporation

Акционерное общество

Акционерным обществом (глава 4 ГК РФ) признается общество, уставный капитал которого разделен на определенное число акций; участники акционерного общества (акционеры) не отвечают по его обязательствам и несут риск убытков, связанных с деятельностью общества, в пределах стоимости принадлежащих им акций. Отличительными чертами акционерного общества (далее — АО) являются: 1) деление уставного капитала на доли (вклады) участников (акционеров) равного размера; 2) доли участия в уставном капитале воплощаются в специальные ценные бумаги — акции, из номинальной стоимости которых составляется этот капитал; 3) ограниченность для акционеров риска убытков, связанных с деятельностью АО, стоимостью принадлежащих им акций.

List of key terms and word combinations:

articles of incorporation	–	договор об учреждении корпорации
bylaws	–	правила внутреннего распорядка (принимаемые правлением фирмы)
cash dividend	–	дивиденд, выплаченный наличными
certificate of authority	–	документ, удостоверяющий какое-либо право
certificate of incorporation	–	разрешение (государственного органа) на создание корпорации
close corporation	–	закрытая акционерная корпорация (с ограниченным числом участников, не имеющих права продавать свои акции без согласия других акционеров)
common stock	–	обычные (обыкновенные) акции
corporation by estoppel	–	корпорация, существование которой подтверждено судом на основании неопровержимых фактов
dividends	–	дивиденды
incorporators	–	учредители
novation	–	новация; перевод долга; цессия прав по обязательству
preferred stock	–	привилегированные акции
private corporation	–	частно-правовая корпорация
quasi-public corporations	–	квазигосударственная корпорация (действует как частное предприятие, но имеет от государства привилегии)
statutory agent	–	представитель в силу закона
stock certificate	–	сертификат о праве собственности на акции
stock dividend	–	дивиденд в форме акций

A *corporation* is a legal entity (or a legal person) created by a federal statute authorizing individuals to operate an enterprise. The corporation offers a convenient and

efficient way to finance a large-scale business operation by dividing its ownership into many units; these units can be sold easily to a large number of investors. The corporate form also offers limited liability to those who share its ownership. In this way, the personal assets of the corporation's owners cannot be taken if the corporation defaults on its obligations or commits a tort or a crime. Unlike the legal status of the partnership, the legal status of the corporation is not affected by the death, incapacity, or bankruptcy of an officer or shareholder.

A *private corporation* is a corporation formed by private persons to accomplish a task best undertaken by an entity that can raise large amounts of capital quickly or that can grant the protection of limited liability. If the corporation is organized for profit-making purposes, those profits may be distributed to the shareholders in the form of dividends. *Dividends* are the net profits, or surplus, set aside for the shareholders. Shareholders (or stockholders) are the persons who own units of interest (shares of stock) in a corporation.

The term *public corporation* is properly used to describe a corporation created by a government for governmental purposes. The term includes incorporated cities, sanitation districts, school districts, transit districts, and so on.

Corporations that are privately organized for profit but also provide a service upon which the public is dependent are generally referred to as *quasi-public corporations*. In most instances, they are public utilities, which provide the public with such essentials as water, gas, and electricity.

A business corporation may be designated as a *close corporation* when the outstanding shares of stock and managerial control are closely held by fewer than 50 shareholders.

The people who want to begin a new corporation or who want to incorporate an existing business are called *promoters*. These people do the actual day-to-day work involved in the incorporation process. Promoters occupy a fiduciary relationship with the nonexistent corporation and its future shareholders, which means that the promoter must act in the best interests of the new corporation and its shareholders. *Incorporators* are the people who prepare, actually sign the *articles of incorporation*, and submit them to the appropriate government office.

The *articles of incorporation* are the written application to the government body for permission to incorporate. The articles, together with the status of incorporation, represent the legal boundaries within which a corporation must conduct its business.

The articles of incorporation *must* include the corporation name; the duration of the corporation; the purpose(s) of the corporation; the number and classes of shares; the shareholders' rights in relation to shares, classes of shares, and special shares; the shareholders' right to buy new shares; the addresses of its original registered (statutory) office and its original registered (statutory) agent; the number of directors plus the names and addresses of the initial directors; and each incorporator's name and address.

Once satisfied that all legal formalities have been met, the appropriate government officer will issue the *corporation's charter,* or *certificate of incorporation*. The *charter, or certificate of incorporation*, is the corporation's official authorization to do business in the state. After the charter is issued, the corporation then becomes a fully and legally incorporated entity. The work of the promoters and incorporators ends, unless they become directors or officers of the corporation.

The first order of business upon incorporation is the holding of an organizational meeting. The meeting must be run by the initial directors designated in the articles, or by the incorporators. The first order of business at an incorporator-run meeting is to elect the directors.

In addition to the appointment of the first directors, the adoption of *bylaws*, or regulations, also occurs at the organizational meeting. *Bylaws*, or regulations, are the rules that guide the corporation's day-to-day internal affairs. Bylaw provisions usually stipulate the time and place of shareholders' and directors' meetings, quorum requirements, qualifications and duties of directors and officers, and procedures for filling board vacancies.

For various liability reasons, the courts may be called upon to decide whether a business entity is a *de jure* corporation, a *de facto* corporation, or a *corporation by estoppel*.

A corporation whose existence is the result of the incorporators having fully or substantially complied with the relevant corporation statutes is a *de jure* corporation. Its status as a corporation cannot be challenged by private citizens or the state.

Sometimes an error is made in the incorporation process, and the corporation does not exist legally. Nevertheless, as long as the following conditions have been met, a *de facto* corporation (a corporation in fact) will exist: a valid state incorporation statute must be in effect, the parties must have made a *bona fide* (good faith) attempt to follow the statute's requirements for incorporation, and the business must have acted as if it were a corporation. Only the state can directly challenge the existence of a *de facto* corporation. Thus, a *de facto* corporation has the same rights, privileges, and duties as a *de jure* corporation as far as anyone other than the state is concerned.

In some jurisdictions, if a group of people act as if they are a corporation when in fact and in law they are not, any parties who have accepted that counterfeit corporation's existence will not be allowed to deny that acceptance. Similarly, individuals who acted as if they were a corporation will not be able to deny that the corporation exists. This doctrine has been labeled *corporation by estoppel*, which is a legal fiction used by the courts on a case-by-case basis to prevent injustice.

Sometimes, the court will disregard corporate status to impose personal liability on those who have used the corporation to commit fraud or crimes or to harm the public. In such cases, the court will *pierce the corporate veil* and hold the wrongdoers (usually the controlling shareholders) personally liable for activities committed in the corporation's name.

Corporate financing begins when the original investments are made to set up the corporation. Once the corporation is operating, additional corporate financing may be obtained from earnings, loans, and the issuance of additional shares of stock. The issuing and selling of shares of stock in order to raise capital is known as *equity financing*, and the *equity securities* give their owners a legal interest in the assets, earnings, and control of the corporation. The part of a corporation's net profits or surplus that is set aside for the shareholders is known as dividends.

The number of shares and classes of stock that a corporation is authorized to issue are established in its certificate of incorporation. A shareholder who purchases corporate stock invests money or property in the corporation and receives a *stock certificate*. A *stock certificate* is written evidence of ownership of a unit of interest in the corporation.

The most common type of dividend is the cash dividend declared and paid out of current corporate earnings or accumulated surplus at regular intervals. A corporation's board of directors has the sole authority to determine the amount, time, place, and manner of dividend payment. In a few instances, a distribution of earnings is made in shares of capital stock. This is called a stock dividend.

The most usual type of corporate stock is *common stock*. Common stock carries with it all the risks of the business, inasmuch as it does not guarantee its holder the right to profits. The holders of common stock are paid dividends when the corporation elects to make such a distribution.

Classes of stock that have rights or preferences over other classes of stock are known as *preferred stock*. These preferences generally involve the payment of dividends and/or the distribution of assets on the dissolution of the corporation. Preferred stock may be either cumulative or noncumulative. In general, dividends on cumulative preferred stock are paid every year, or in later years, if any dividends at all are paid by the corporation. Dividends of noncumulative preferred stock are also usually paid each year. However, with noncumulative preferred stock, dividends that are not paid in one year are lost forever. Participating preferred stock is stock that gives its holders a priority on a certain stated amount or percentage of dividends. After a prescribed dividend is paid to the participating preferred shareholders and the common stock shareholders, both participating preferred and common stock shareholders share in any surplus. The holders of nonparticipating preferred stock are not entitled to any distribution of surplus dividends along with common stock shareholders. The rights that preferred shareholders enjoy in regard to dividends do not

include the inherent right to receive them. They are merely superior rights to dividends over common stock shareholders, when and if dividends are declared by the corporation's board of directors.

Par value is the value that is placed on the shares of stock at incorporation. This value, which is the same for each share of stock of the same issue, is stated on the corporation's certificate of incorporation. In the case of par value shares, the amount of the capital stock or stated capital is the total par value of all of the issued stock. *No par value* stock is corporate stock that is issued without any stated price.

Exercise 1. Comprehension questions:

1. Explain the term corporation.
2. Identify the difference between the legal status of the partnership and the legal status of corporation.
3. How is the corporation taxed?
4. What may be the purposes of private corporations?
5. What rights do shareholders have?
6. What is the purpose of corporation by estoppel?
7. What are the duties of promoters?
8. Explain the term novation.

Exercise 2. Find in the text English equivalents to the following:

Правила внутреннего распорядка; дивиденд, выплаченный наличными; разрешение на создание корпорации; закрытая акционерная корпорация; обыкновенные акции; дивиденды; учредители; цессия прав по обязательству; привилегированные акции; частно-правовая корпорация; представитель в силу закона; сертификат о праве собственности на акции; дивиденд в форме акций.

Exercise 3. Consult recommended dictionaries and give words or phrases to the following definitions:

Закрытое акционерное общество; открытое акционерное общество; уставный капитал; дочерние и зависимые общества; цена размещения акции; бюллетень для голосования; выплата дивидендов.

Exercise 4. Be ready to talk on one of the following topics:

1. Distinguish by their characteristics the major forms of business incorporations.
2. Relate how state incorporation statutes, articles of incorporation, initial organizational meetings, and corporation bylaws each serve to define the legal boundaries within which a corporation may conduct its business.
3. Differentiate among *de jure corporation*, *de facto corporation*, and *corporation by estoppel*.
4. Explain the activities that would cause courts to go behind the legal status of a corporate entity to pierce the corporate veil.
5. Distinguish between common and preferred stock and between *par value* and *no par value stock*.

Exercise 5. Make up your own dialog on the case:

Instead of forming the corporation before engaging in any promotional activities, a promoter may enter into all contracts and commitments in his own name without referring to a "corporation to be formed", and thereafter assign all his rights and duties to the corporation. If a promoter does so, what are his liabilities under the contracts after they are assigned to the corporation? What problems may the corporation face if it seeks to enforce such a contract against the other party?

Unit 19

Corporate Management and Shareholder Control

Управление корпорацией и акционерный контроль

Высшим органом управления акционерным обществом является общее собрание его акционеров (глава 4 ГК РФ). К исключительной компетенции общего собрания акционеров относятся: 1) изменение устава общества, в том числе изменение размера его уставного капитала; 2) избрание членов совета директоров (наблюдательного совета) и ревизионной комиссии (ревизора) общества и досрочное прекращение их полномочий; 3) образование исполнительных органов общества и досрочное прекращение их полномочий, если уставом общества решение этих вопросов не отнесено к компетенции совета директоров (наблюдательного совета); 4) утверждение годовых отчетов, бухгалтерских балансов, счетов прибылей и убытков общества и распределение его прибылей и убытков; 5) решение о реорганизации или ликвидации общества.

В обществе с числом акционеров более пятидесяти создается совет директоров (наблюдательный совет).

Исполнительный орган общества может быть коллегиальным (правление, дирекция) и (или) единоличным (директор, генеральный директор). Он осуществляет текущее руководство деятельностью общества и подотчетен совету директоров (наблюдательному совету) и общему собранию акционеров.

List of key terms and word combinations:

cumulative voting	–	метод голосования акционеров путем сложения голосов по акциям
derivative suit	–	производный иск
direct suit	–	прямой, непосредственный иск
insider trading	–	продажа акций лицами и учреждениями, располагающими конфиденциальной информацией
managerial control	–	контроль менеджеров над компанией
pooling agreements	–	объединение (напр. прибылей)
preemptive right	–	преимущественное право покупки
proxy	–	представитель; доверенный; полномочие; доверенность; голос держателя акции, поданный по доверенности или через уполномоченного представителя
proxy solicitation	–	ходатайство о представлении доверенности на голосование
shareholder of record	–	владелец именной акции, зарегистрированный в книгах компании
trustee	–	доверительный собственник; лицо, распоряжающееся имуществом на началах доверительной собственности
voting trust	–	аккумуляция в одних руках акций различных лиц на началах доверительной собственности для распоряжения голосами в целях установления контроля над делами компании

The business affairs of a corporation are managed by a board of directors that is elected by the shareholders. The board's responsibility is to take whatever actions are appropriate, in keeping with the corporation's rules and regulations, to further the corporation's business. Individual board members are supposed to use their own judgment in the corporate decision-making process.

Law and corporate rules establish the qualifications that a person must have to be a corporate director.

In general, directors are elected at the annual meeting of the shareholders. The directors of most large corporations meet on a regular basis at a time and place of their choosing. The directors of many smaller corporations meet only when specific items are to be considered. Small corporations having few shareholders can eliminate the board of directors entirely, as long as someone is assigned the duties that the board would have performed.

Directors have the authority to appoint officers and agents to run the day-to-day affairs of the corporation. By statute, the usual officers are a president, several vice-presidents, a secretary, and a treasurer. Other officers, such as a comptroller, cashier, and general counsel are often provided. The bylaws of the corporation describe the duties of each officer. Officers have the authority of general agents for the operation of the normal business of the corporation. They, in turn, delegate duties to various department heads. Although the roles of directors and officers differ, they are frequently assumed by the same people. An individual may be both chief executive officer and chairman of the board of the same corporation.

When the court hears a case challenging a manager's decision, it will turn to one of two rules in judging that

conduct: the *business judgment rule* or the *fairness rule*. Other areas of managerial responsibility are found in the *insider trading rule* and *the corporate opportunity rule*.

Under *the business judgment rule*, the court will not interfere with most business decisions. The rule protects managers who act with due care and in good faith, as long as their decisions are lawful and are in the best interests of the corporation. The rule results from the common sense belief that, based on their education, experience, and knowledge, managers are in the best position to run the corporation. In contrast, shareholders and judges are far removed from the day-to-day operation of the business and should not be allowed to second-guess most management decisions. Protecting directors and officers in this way encourages people to become corporate managers and reassures them that they will be protected when making difficult business decisions.

The *business judgment rule* assumes that managers do not personally profit from business decisions. To fulfill a duty of loyalty to the corporation, managers must place the corporation's interests above their own. When managers enter contracts with the corporation or when they are on the boards of two corporations that deal with each other, a different standard is used to judge their conduct. This standard, known as the *fairness rule*, requires managers to be fair to the corporation when they personally benefit from their business decisions. Managers who benefit from their own decisions are said to be self-dealing. The fairness rule does not automatically declare managers disloyal if they profit from a corporate decision: at a minimum, it requires corporate managers to disclose all crucial information when they enter contracts with the corporation.

Two rules that give the courts specific ways to measure a corporate manager's fairness in certain types of situations are the *insider trading rule* and the *corporate opportunity rule*.

According to the *insider trading rule*, when managers possess important inside information, they are obligated to reveal that information before using it in a transaction. The rule also states that when inside information cannot be revealed, the managers must not use that information when trading with the corporation or with those outside the corporation.

Under the *corporate opportunity rule*, corporate managers cannot take a business opportunity for themselves if they know that the corporation would be interested in that opportunity as well. Before taking the opportunity, managers must first offer it to the corporation by informing the other managers and shareholders. If the corporation rejects it, the managers are then free to take the opportunity.

The shareholders are the primary reason a corporation exists. They contribute their money to the corporation in the hope of a return on their investment. As owners of the corporation, shareholders can influence corporate decision making through their voting powers (*managerial control*) and through their right to initiate a lawsuit against managers (*corporate democracy*).

Shareholders usually receive one vote per share of common stock held. Those who are dissatisfied with management can attempt to buy more shares to increase their voting power and influence the election of the board of directors. However, shareholders are not always able to buy more shares of the corporation either because they cannot afford them or because the other shareholders are

not willing to sell. In such cases, shareholders can resort to one of the other voting methods available: *cumulative voting, proxy solicitation, voting trusts, pooling agreements,* and *shareholder proposals*.

The system of *cumulative voting* allows minority shareholders to multiply the number of their voting shares by the number of directors to be elected. All of these votes may be cast for one candidate or may be distributed among several candidates.

A *proxy* is the authority given to one shareholder to cast another shareholder's votes. *Proxy solicitation* is the process by which one shareholder asks another for his or her voting right. Proxy solicitation also refers to the document that is actually used to request the right to vote the other shareholders' votes. The minority shareholder's voting power increases as the number of proxies accumulate. Since majority shareholders, including management, can also solicit proxies, a struggle between the two groups, known as a proxy contest, often results.

A *voting trust* is an agreement among shareholders to transfer their voting rights to a trustee. A *trustee* is a person who is entrusted with the management and control of another's property or the rights associated with that property. The trustee votes those shares at the annual shareholders' meeting at the direction of the shareholders. Shareholders surrender only their voting rights. All other rights, including the right to receive profits, remain with them.

Sometimes, shareholders join together in a temporary arrangement (known as *pooling agreement*, *shareholder agreement, voting agreement*) agreeing to vote the same way on a particular issue. They differ from proxies and voting trusts because the shareholders retain control of

their own votes. In this sense, pooling agreements are also the weakest voting arrangement because shareholders can change their votes at the last minute.

Shareholders can sue management to compel a change in direction or to force management to overturn a decision. The two types of suits available to shareholders are direct suits and derivative suits.

A direct suit is brought by shareholders who have been deprived of a right that belongs to them as shareholders to make up for any loss that they have suffered. These rights include the right to vote, the right to receive dividends, the right to transfer shares, the right to purchase newly issued stock, and the right to examine corporate books and records.

A derivative suit allows shareholders to sue corporate management on behalf of the corporation. Unlike a direct suit, a derivative suit is based on an injury to the corporation.

To bring a derivative suit, shareholders must exhaust all internal remedies. Before bringing suit, the shareholder must attempt to solve the problem by communicating with the board of directors and with other shareholders. In addition, in order to bring a derivative suit, a shareholder must own stock at the time of the injury and at the time of the suit. This is known as the rule of contemporary ownership.

The stock certificate is written evidence of ownership in shares in a corporation. A shareholder must have possession of the certificate and must sign and deliver it to the person to whom title is transferred (the transferee, who in turn becomes a shareholder of record) when selling or pledging shares. Loss of a certificate does not take away the owner's title to the shares of stock represented by the certificate. Shareholders' names and addresses are

shown on the books of the corporation, and they receive dividends, notices of meetings, and any distribution of shareholder reports.

A shareholder's right by statute to *inspect the records* of the corporation is usually limited to inspections for proper purposes at an appropriate time and place.

Shareholders have the right to share in *dividends* after they have been declared by the board of directors. Once declared, a dividend becomes a debt of the corporation and enforceable by law, as is any other debt.

Unless the right is denied or limited by corporate charter or by state law, shareholders have the right to purchase a proportionate share of every new offering of stock by the corporation. This entitlement is known as the shareholder's *preemptive right*. This right prevents management from depriving shareholders of their proportionate control of a corporation simply by increasing the number of shares in the corporation.

Exercise 1. Comprehension questions:

1. How are the directors elected?
2. What are the requirements to meeting of the directors?
3. Explain the insider trading rule and the corporate rule.
4. Explain the theory of managerial control.
5. Explain the theory of corporate democracy.
6. How can the shareholders influence the elections of the board of directors?
7. Explain the term proxy solicitation.
8. What do shareholder's preemptive rights include?

Exercise 2. Find in the text English equivalents to the following:

Метод голосования акционеров путем сложения голосов по акциям; производный иск; продажа акций лицами и учреждениями, располагающими конфиденциальной информацией; преимущественное право покупки; доверенность; голос держателя акции, поданный по доверенности или через уполномоченного представителя; владелец именной акции, зарегистрированный в книгах компании; доверительный собственник; аккумуляция в одних руках акций различных лиц на началах доверительной собственности.

Exercise 3. Consult recommended dictionaries and give words or phrases to the following definitions:

Исполнительный орган общества; раскрытие информации; одобрение крупной сделки; ревизионная комиссия; аудитор общества; бухгалтерская и финансовая отчетность; совет директоров; общее собрание акционеров; информация об аффилированных лицах.

Exercise 4. Be ready to talk on one of the following topics:

1. Describe the functions of the board of directors and officers of the corporation with regard to the control of corporate affairs.

2. Distinguish between circumstances that call for the application of the business judgment rule and those that call for the fairness rule in the evaluation of management decisions.

3. Judge whether a corporate manager may or may not use inside information in a particular situation.

4. Determine the voting rights of shareholders regarding proxy solicitations, voting trusts, pooling agreements, and shareholder proposals.

5. Contrast shareholder direct suits with shareholder derivative suits and explain the prerequisites for each.

Exercise 5. Make up your own dialog on the case:

In one case poor management by the president resulted in the steady decline of sales and profits in a once-profitable and distinguished company. There were seven outside board members on a board of sixteen, and although there was mounting evidence that the president was incapable of leading the enterprise, no action was initiated by the board members. Finally, after a succession of three loss years, a vice president of the principal lending bank, and not a director of the company, asked to meet with the board, and stated that unless a change was made, the bank loans would not be renewed. With this leverage from the bank, the outside directors made the decision to ask the president to resign.

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