

**ASSESSMENT OF THE DRAFT CONTRACT ACT FOR THE  
KINGDOM OF BHUTAN**

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## **Overview of Draft Comments**

This overview of the legislative assessment of the draft Contract act discusses the general structure and scope of the text as well as some specific recommendations. The bulk of comments have been left in their original context within each individual commentary so that they can best retain their meanings. Some recommendations should not be taken as criticisms as such, but rather differences of opinion which exist between two legally educated practitioners based upon available information.

In terms of general comments, many of the reviewers came to several shared conclusions. Given that the Act was drafted in English, several steps are recommended to ensure the best possible translation between this act and its official language (presumably Dzongkha) if it is other than, or coofficial with, English. It is also noted that several related Acts including the Commercial Sale of Good Act 2001 and Immovable property Act 1999 are referred to within the text of the law. Clarification is recommended on the instances in which the application of either law supersedes the use of the draft Contract Act. It is further suggested that attempts be made to harmonize the legal language used between this draft Act and the related Acts. In terms of the greater context it is recommended that the new constitution is considered especially in terms of the prescribed role of the judiciary and its discretion in deciding such disputes.

In terms of the purpose of the law, there were several questions raised. It is noted that the apparent primary role of the legislation is providing instruction to judges in how to rule of such disputes. It is therefore recommended that the Act focus upon providing more imperative instructions so as to be most useful. At the same time, it is noted that the law make significant use of American legal precedent. Though of the same legal system, the experiences and socioeconomic realities of Bhutan may require that some situations be handled in different ways. It is further noted that some presumptions of precedent within the American legal system may not even be valid in the Bhutan context and that generally it is best to consider all possible models within reason. This brings up the

general conclusion that adequate research should be conducted, if not yet, on the use and/or desire to use the court system to resolve these disputes, what behaviour the law will induce (rather than merely delineate what behaviour should be followed), and how the law will help realize the social goals of the drafters and the Tshogdu.

Several suggestions while specific are also broadly echoed and merit some mention here, though are spelled out further within the body of comments. Many commentors suggest the definition section found at the end of the act should be placed in the beginning. Doing so ensures that the reader knows what terms are strictly defined and what terms are subject to interpretation by the courts. Certain terms are also identified as too vague, such as the word “intoxicated”, and need to be further defined so as to avoid persons using it as an excuse to avoid a contract. Other terms are difficult to define, thus are suggested to be avoided or elaborated upon, such as “reasonable”, “wrongful”, “material reliance”, “special reasons”, “fair terms”, “unfair persuasion”. A savings clause is recommended to ensure that individuals provisions of the Act may be ruled invalid without voiding the entire law. Some comments also address the “state” or behaviour of parties which may affect the validity of the contract and should be further examined especially within the cultural and educational context of likely contracting parties. It is also recommended that further attention be paid to deciding what forms contracts can take so as to limit the possibly large number of cases which might arise out of incorrectly made contracts. In terms of the legal representation within a dispute, assessors recommend that the scope of legal authority to represent clients in making a settlement is more explicitly expressed. Finally, it is noted that tort is not always considered a crime and as such if a provision is meant to include a crime it should be listed in addition to a tort.

## Comments by Anna M. Han

### Short Title, Commencement and Extent

1. This Act shall:

- (a) be called the Contract Act for the Kingdom of Bhutan, 200...;
- (b) come into force on the .... Day, of .... Month of .... Year corresponding to the .... Day of the .... Month of 2004; and
- (c) Extend to the whole of the Kingdom of Bhutan.

### Application

2. This Act applies to all commercial transactions in the Kingdom of Bhutan except for those transactions subject to the Commercial Sale of Goods Act 2001, or to the Moveable and Immovable Property Act 1999.

### Repeal

3. Except as provided in Section 2 above, this Act prevails over all provisions of existing laws and regulations, including the Thrimzhung Chenmo of the Kingdom of Bhutan, which are inconsistent with this Act.

### Rule of Construction

4. In this Act, words of the masculine gender include the feminine and the neuter, and words of the neuter gender include the masculine and feminine.

## CHAPTER 1 RULES FOR FORMATION OF A CONTRACT

### Normal Contracts

5. A contract is formed normally in accordance with the provisions laid down in this Chapter, when an offer by one party is followed by an acceptance by the other party which together constitute (a) a

**Comment [SJ1]:** Why is there a special entry for *offer* in the Definitions section? Why is it not fully addressed here with acceptance? It would be easier to understand the concepts if offer and acceptance were both covered in the same place.

manifestation of mutual assent to an exchange of promises, an exchange of a promise for a performance, or an exchange of performances for (b) a consideration.

### **Special Contracts**

6. A contract is formed specially in accordance with the provisions of Chapter 2 or in accordance with other laws of the Kingdom of Bhutan for types of contracts not covered in this Chapter.

### **Parties and Capacity**

7. A contract must have at least two identifiable parties i.e. a promisor and a promisee.
8. A natural person has full legal capacity to incur contractual duties unless he has only the capacity to incur voidable contractual duties because he is:
- (a) Under a guardianship;
  - (b) a minor;
  - (c) mentally ill or defective; or
  - (d) intoxicated This needs further definition since the state of intoxication can vary. It can be used as an easy excuse to avoid a contract by an adult with full capacity.

**Comment [SJ2]:** Why allow these groups any capacity to create a contract and put the other party in a situation where they do not know if the partial capacity party will fulfill their promise unless there is an additional clause which allows for ratification of the contracts when the incapacity ends, such as when a minor becomes an adult.

### **Offer**

9. Even though a manifestation is intended to be understood as an offer, it is not an offer and its acceptance does not form a contract, unless, the terms of the manifestation provide a basis for determining the existence of a breach and for giving an appropriate remedy.

**Comment [SJ3]:** This seems a little too vague and could be interpreted to give effect to nearly all putative contracts. Perhaps language like: "are sufficiently concrete" or "contain sufficient terms to."

### **Acceptance**

10. An offer gives the offeree a continuing power to accept until termination of the power by:
- (a) rejection of the offer or counteroffer by the offeree;
  - (b) expiration of time specified in the offer or if no time is specified, on expiration of a reasonable time; (this should be deleted as there is no definition of "reasonable");
  - (c) revocation by the offeror received by the offeree before acceptance has been effected;
  - (d) non-occurrence of any condition for acceptance under the terms of the offer; or
  - (e) death of or loss of legal capacity by either the offeror or offeree.

11. Unless otherwise indicated by the language or the circumstances, an offer invites acceptance in any manner and by a medium used by the offeror in making the offer or one customary in similar transactions at the time and place the offer was received.

12. An offer may:

- (a) require acceptance by an affirmative answer in words or by performance or non-performance of an act; or
- (b) empower the offeree to accept by (i) promising performance or non-performance, (ii) performance, or (iii) non-performance of an act.

13. When an offeree fails to reply to an offer, his silence and inaction constitute acceptance when:

- (a) with reasonable opportunity to reject the offered services and reason to know that they were offered with the expectation of compensation, he takes the benefit of the offered services;
- (b) the offeror has stated or given the offeree reason to believe that assent may be manifested by silence or inaction and the offeree in remaining silent and inactive intends to accept the offer; or (how does one determine the intent? This is where the dispute will arise since there is no way to distinguish when silence is just that)
- (c) because of previous dealings or accepted business practice, it is reasonable that the offeree notify the offeror if he does not intend to accept.

**Comment [SJ4]:** Is there a more specific word to use here, something like practice or course of business?

14. An offeree who does any act inconsistent with the offeror's ownership of offered property, while the offeree retains the power of acceptance, is bound in accordance with the offered terms unless they are manifestly unreasonable.

**Comment [SJ5]:** Because of the lack of other criteria, it might be a good idea to hold this to a higher standard than reasonable.

- (a) If such act is wrongful (define) against the offeror, it constitutes acceptance only if ratified by the offeror.

15. Acceptance given by telephone or other medium of substantially instantaneous two-way communication is governed by the principles applicable to acceptance where the parties are in the presence of each other.

**Comment [SJ6]:** Would this supersede in writing requirements in certain instances?

16. An acceptance is effective as soon as it is conveyed by the offeree's while the offeree's power of acceptance is still valid:

- (a) whether or not it ever reaches the offeror, if made in a manner and by a medium
  - a. invited by the offer or
  - b. if no medium was specified,
    - i. used by the offeror,
    - ii. or one customary in similar transactions at the time and place the offer was received, if it has been properly addressed, and if such other precautions have

been taken as are ordinarily observed to insure safe transmission of similar messages; or

- (b) if received by the offeror by the time a properly dispatched acceptance would normally have arrived.

### **Consideration**

**17.** Except as provided in Section 21 or 22 a performance or promise of performance constitutes consideration if it is sought by the offeror in exchange for his promise and is given by the offeree in exchange for that promise.

**18.** A performance constituting consideration may consist of:

- (a) an act other than a promise;
- (b) a forbearance; or
- (c) the creation, modification, or destruction of a legal relationship.

**19.** The consideration may be given:

- (a) to the offeror or third party; or (use “third party” to include non-persons)
- (b) by the offeree or third party. A performance is not consideration if it is the forbearance to assert or the surrender of a claim or defense unless:
  - (a) the claim or defense is reasonably arguably (double adjective-which prevails?) valid;
  - (b) the forbearing or surrendering party honestly believes that the claim or defense may be fairly (use **reasonably** consistently) determined to be valid; or
- (c) a written instrument of forbearance or surrender is executed by one without a duty to execute it.

**Comment [SJ7]:** Does it refer to the duty or the forbearance?

**20.** A promise of performance is not consideration if:

- (a) it is conditional and the promisor knew when he made the promise that the condition could not occur;
- (b) it is conditional on a performance by the promisor unless he also promises the occurrence of the condition; or
- (c) the promisor reserves to himself a choice of alternative performances unless:

- i. each of the alternatives would have been consideration if it alone was sought by the offeror in exchange for his promise and is given by the offeree in exchange for that promise; or
- ii. one of the alternatives would have been consideration and there is or appears to the parties to be a substantial possibility that before the offeree exercises his choice events will eliminate the alternatives which would not have been consideration.

**Comment [SJ8]:** The “may” language is too lax. “Will” offers a stricter requirement of proof and discourages the possibility of accepting a promise that may not in fact be consideration.

21. A promise which the law renders voidable or unenforceable may constitute consideration. (what if it is unenforceable because it is illegal?)

**Comment [SJ9]:** Is this when the law comes into effect after the contract is entered into? When does this actually occur?

22. If consideration exists, there is no additional requirement of:

- (a) a gain, advantage or benefit to the promisor nor a loss, disadvantage or detriment to the promisee;
- (b) equivalence in the values exchanged; or
- (c) mutuality of obligation.

## **CHAPTER 2** **SPECIAL TYPES OF CONTRACTS**

### **Payment of indebtedness discharged by statute of limitations**

23. Unless other facts indicate differently, any of the following actions by the debtor constitutes a promise to pay all or part of an antecedent contractual or quasi-contractual indebtedness and such promise is binding if the indebtedness is still enforceable, or would be enforceable, except for the effect of a statute of limitation and if the debtor knew or had reason to know the essential facts of the transaction creating the prior indebtedness:

- (a) A voluntary acknowledgement to the current obligee admitting the present existence of the antecedent indebtedness;
- (b) A voluntary transfer of money, negotiable instrument, or other thing to the current obligee as interest on, partial payment of, or collateral security for the antecedent indebtedness; or
- (c) A statement to the current obligee that the statute of limitations will not be pleaded as a defense. (should this be in writing?)

### **Payment of indebtedness discharged in bankruptcy**

24. An express promise to pay all or part of an indebtedness of the promisor discharged or dischargeable in bankruptcy proceedings begun before the promise is made is binding.

### **Restitution for benefit received**

25. A promise to make restitution for a benefit previously received by the promisor from the promisee is binding to the extent necessary to prevent injustice. (would the courts decide what injustice means?)

### **Modification**

26. Unless otherwise provided in the contract, an **executory contract** may be modified:

**Comment [SJ10]:** What's an executory contract?

- (a) if the contract is in writing, by oral agreement of the parties if supported by new consideration or by written agreement of the parties;
- (b) if the contract is unwritten, by oral or written agreement of the parties (so no consideration necessary?).

### **Promise reasonably inducing action or forbearance**

27. A promise which the promisor should reasonably expect to induce action or forbearance by the promisee or a third person and which does induce such action or forbearance or is for a charitable subscription or marriage settlement is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

### **Judicial Stipulation**

28. A promise or agreement pursuant to a judicial proceeding made by a party to the proceeding or his duly authorized attorney is binding without consideration, provided that it complies with other applicable laws or rules of court of the Kingdom of Bhutan. ( This depends on the scope of authority given to an attorney. In some jurisdictions, settlements can not be made by attorneys unless specifically authorized by the client. What is the corresponding law in Bhutan?)

### **Created by Writing**

29. A promise is binding (but this this make it a contract? And does all the other elements of a contract, such as capacity need to be present?) without consideration if the promise or some memorandum or note thereof is in one or more writings made at any time to which both promisor and promisee manifest assent and which writings:

- (a) name the promisor and promisee or so describe them that they are capable of identification;

- (b) clearly indicate that the writings relate to the same transaction;
- (c) state with reasonable certainty the essential terms of the unperformed promise
- (d) are sufficient to indicate that a contract with respect to the transaction has been made between the parties or offered by the signer and delivered to the other party; (Does this then make it a contract? A quasi-contract? It does contradict the requirement of consideration to form a contract)
- (e) if evidencing a contract upon consideration of marriage are made as a memorandum of the contract; (is not the promise of marriage the consideration?)
- (f) are signed, with any symbol made or adopted with an intention, actual or apparent, to authenticate the writing as that of the maker or adopter of the symbol, at any time by the party to be charged or his authorized agent; and (if this is intended to allow marks to be as valid as signatures, then it should cover the entire law and not just be in this sub-section.)
- (g) comply with the Rules on Use of Judicial Stamps in Bhutan as amended; and be attested by two disinterested witnesses. (same comment as above)

**Comment [SJ11]:** Can you have a contract in this instance where there is no consideration on the part of one of the parties? Wouldn't this negate the duty requirement of the contract definition?

30. "Writing" and "signed" as used in this Act include data messages which meet the requirements of the Bhutan Information, Communications and Media Act, 2006.

**Comment [SJ12]:** Shouldn't this go in the definitions chapter?

### Writing required (Statute of Frauds)

31. Except as provided in Section 29, contracts of the following types may not be enforced, by an action, setoff, counterclaim, or defense, unless they or some memorandum or note thereof are in one or more writings which meet the requirements of Section 31:

- (a) a promise to the obligee by the executor or administrator of a decedent to answer personally for the duty of his decedent if a similar contract to answer for the duty of a living person would be governed by (b).
- (b) a promise to the obligee by the surety for the obligor to answer for an existing duty of the obligor if the obligee knows or has reason to know of the suretyship unless:
  - i. the consideration for the promise mainly benefits the surety rather than the obligor except when the consideration is merely a premium for insurance;
  - ii. the promises to the obligee by the obligor and the surety are in terms joint and do not create several duties or joint and several duties;

**Comment [SJ13]:** This seems to require that these contracts be in writing, a requirement which, under Created by writing above, exempts them from requiring consideration for the promise.

- iii. by the terms of the promise when it is made performance can involve only (A) application of funds or property held by the surety for that purpose; (B) performance another duty owed, by the surety to the obligee; (C) performance of a duty owed by the surety to the obligor or which the obligee reasonably believes to be so owed; or (D) a novation is accepted by the obligee in satisfaction of the obligor's duty.
- (c) a promise to sign a contract as a surety for the performance of a duty owed the promisee or to sign a negotiable instrument for the accommodation of someone other than the promisee;
- (d) made upon consideration of marriage except if it consists only of mutual promises to marry.
- (e) to transfer from anyone or to buy for anyone any right, privilege, power, or immunity, or combination thereof, which is an interest in land under the law of property (is there only one in Bhutan? Some countries have regional laws that treat property very differently from state to state or province to province) and is not defined as "goods" under the Commercial Sale of Goods Act except:
  - i. for leases and contracts for a term of less than a year; and
  - ii. that such a contract may be specifically enforced even if not in writing if it is established that the party seeking enforcement has, in reasonable reliance on the contract before repudiation by the party against whom enforcement is sought, so changed his position that injustice can be avoided only by specific enforcement
- (f) not to be performed within a year from the making, but if the parties make such a contract not in writing and one party to the contract has completed his performance, the promises of other parties may be enforced.

### **Surety or Guarantee**

32. Under a surety contract:

- (a) The liability of the surety is the same as that of the obligor unless otherwise provided in the contract. The surety is discharged:
  - i. by any discharge of the obligor's duties;
  - ii. by a modification in the duty of the obligor made between the obligee and the obligor without the surety's consent;
  - iii. if the obligor acts or fails to act in a way which is inconsistent with his duty to the surety and the surety's remedy against the obligor is thereby impaired; or

**Comment [SJ14]:** Is the entire surety discharged, or is does the surety remain as it was without these modifications?

iv. to the extent of the value of securities against the obligor, that the obligee held at the time the contract of surety was entered into, that the obligee has lost or disposed of without the consent of the surety.

- (b) Forbearance by the obligee to invoke a remedy against the obligor does not discharge the surety if the forbearance is not pursuant to an agreement with the obligor nor in contravention of any term of the contract of surety.
- (c) If two or more parties have each promised a third party the same performance under the same or different contracts, each promisor is a surety for the others and the liability of the promisors to the third party is not affected by any agreement among themselves purporting to fix their individual liabilities to the third party. Each promisor is liable as among themselves to pay an equal share of the undischarged duty of each in case of default by one of them unless the promisors have agreed among themselves that the maximum liability of each to the third party (should the third party be informed of this and consent to it?) shall be in different amounts, in which case each is liable as among themselves to pay an equal share up to but not exceeding his maximum amount agreed to. Release of one of the promisors by the third party discharges the others to the extent of any value received by the third party for the release.

### **Indemnity**

33. Under a contract of indemnity, the promisor promises to indemnify the promisee for loss caused by the conduct of the promisor or a third party.
34. When an obligor asks a party to be surety for his duty, he manifests a promise that he will indemnify the surety if the surety answers to the obligee for the obligor's duty. The surety may enforce the resulting contract of indemnity against the obligor.

### **Voidable for mistake**

35. When a mistake of both parties as to a basic assumption on which a contract was made has, taking into account the availability of relief by restitution or otherwise, a material effect on the agreed exchange of performances, the contract is voidable by an adversely affected party if he does not bear the risk of the mistake pursuant to Section 37.
36. When a mistake of one party as to a basic assumption on which the contract was formed he agreed to the contract has a material effect on the agreed exchange of performances that is adverse to him, the contract is voidable by him if he does not bear the risk of the mistake pursuant to Section 39 and if (a) the effect of the mistake is such that enforcement of the contract would be unconscionable or (b) the other party **knew** or should have known of the mistake or his fault caused the mistake.
37. A party bears the **risk of a mistake** if:

**Comment [SJ15]:** This seems a little lax to allow a party making the mistake to escape their responsibility. Perhaps "know", or "had reason to know and did not take steps to correct."

**Comment [SJ16]:** What happens when a party that bears the risk of mistake makes a mistake?

- (a) the risk of the mistake was allocated to him by the contract or is so allocated by a court on the ground that it is reasonable to do so; or
- (b) he was **aware** that he had only limited knowledge with respect to the facts but treated it as sufficient (this is a state of mind test and very hard to prove what “awareness” and “sufficient” is).

38. When a writing that evidences or embodies an agreement in whole or in part fails to express the agreement because of a mistake of both parties as to the contents or effect of the writing, a court may at the request of a party reform the writing to express the agreement except to the extent that rights of third parties, such as good faith purchasers for value, will be unfairly affected. Such reformation is not precluded by the fact that the contract is governed by Section 32.

39. A mistaken party’s fault in failing to know or discover the facts before making the contract does not bar him from avoidance or reformation unless his fault amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing.

### **Void or voidable for misrepresentation**

40. A misrepresentation by a person is:

- (a) an assertion not in accord with the facts;
- (b) an action likely to prevent another from learning of a fact; or
- (c) non-disclosure of a fact known to him.

41. A misrepresentation is fraudulent if the maker intends it to induce a party to manifest his assent based on the misrepresentation (this is the reliance aspect).

42. A misrepresentation is material if likely to induce a reasonable person or the recipient to manifest his assent. (does it need to be material to be fraudulent under 41?)

43. If a misrepresentation as to the very character or essential terms of a proposed contract induces conduct that appears to be a manifestation of assent by one who neither knows nor has reasonable opportunity to know of the very character or essential terms of the proposed contract, his conduct is not effective as a manifestation of assent, and there is, therefore, no contract. (Would this render the contract void or voidable?)

**Comment [SJ17]:** Is this really an issue of misrepresentation, or an issue of formation? Doesn't someone need to be aware of the very character of the terms of the proposed contract in order to be able to form a contract?

44. If a party’s manifestation of assent is induced by either a fraudulent or material misrepresentation:

- (a) by the other party to the transaction upon which the recipient is justified in relying, the contract is voidable by the recipient of the misrepresentation except as provided in Section 47; or

(b) by one who is not a party to the transaction upon which the recipient of the misrepresentation is justified in relying, except as provided in Section 47, the contract is voidable by the recipient unless the other party to the transaction in good faith and without reason to know of the misrepresentation either gives value or **relies materially** on the transaction. (this means that both the misrepresentation AND the reliance must be material. The term needs to be defined)

**Comment [SJ18]:** What constitutes material reliance?

45. If a contract is voidable because of a misrepresentation and, before notice is sent of an intention to avoid the contract, the facts come into accord with the misrepresentation, the contract is no longer voidable unless the recipient has been harmed by relying on the misrepresentation. (To be consistent, does this reliance need to be “material”?)

46. If a party’s manifestation of assent is induced by the other party’s fraudulent misrepresentation as to the contents or effect of a writing evidencing or embodying in whole or in part an agreement, a court at the request of the recipient may, if the recipient was justified in relying on the misrepresentation, reform the writing to express the terms of the agreement as misrepresented (? Why would a court give its approval to misrepresented information? Should it reform it to the actual facts ?)except to the extent that rights of third parties, such as good faith purchasers for value, would be unfairly affected.

47. An assertion is one of opinion if it expresses only a belief, without certainty, as to the existence of a fact or expresses only a judgment as to quality, value, authenticity or similar matters. If it is reasonable to do so, the recipient of an assertion of a person’s opinion as to facts not disclosed and not otherwise known to the recipient may properly interpret it as an assertion: (missing something “if”?)

(a) that the facts known to the person making the assertion are consistent with his opinion; or

(b) that the person making the assertion knows facts sufficient to justify his opinion.

48. To the extent that an assertion is one of opinion only, the recipient is not justified in relying on it unless the recipient:

(a) stands in such a relationship of trust and confidence to the person whose opinion is asserted that the recipient may reasonably rely on it;

(b) reasonably believes that, as compared with himself, the person whose opinion is asserted has special skill, judgment or objectivity (is “objectivity” the right word? Should it be “information “ or “knowledge”?) with respect to the subject matter; or

(c) is for **some other special reason**(needs defining) particularly susceptible to a misrepresentation of the type involved.

**Comment [SJ19]:** Is this in reference to sophistication of the parties? Or capacity?

### **Voidable for abuse by fiduciary**

49. A contract between a fiduciary and his beneficiary relating to matters within the scope of the fiduciary relationship is voidable by the beneficiary unless:

- (a) it is on fair terms; and
- (b) all parties beneficially interested manifest assent with full understanding of their legal rights and of all relevant facts that the fiduciary knows or should know.

**Comment [SJ20]:** This entire section will need to be defined at some point. What are fair terms? What is a full understanding? What are the relevant facts? What is the test for determining whether a fiduciary has met these requirements? What if the fiduciary is a legally trained individual? Is there a requirement of providing other legal representation for the beneficiaries?

### **Void or voidable for duress or undue influence**

50. If appearance of assent is obtained by physical force, there is no manifestation of assent and there is, therefore, no contract.

51. (really no treat is ever “proper”) perhaps “A threat voids assent” if:

**Comment [SJ21]:** Is there a proper threat?

- (a) what is threatened is a crime or a tort or the threat itself would be a crime or tort if it resulted in obtaining property;
- (b) what is threatened is a criminal prosecution;
- (c) what is threatened is the use of civil process and the threat is made in bad faith; or
- (d) the threat is a breach of the duty of good faith and fair dealing under a contract with the recipient.

52. A threat is improper if the resulting exchange is not on fair terms and:

**Comment [SJ22]:** What are fair terms?

- (a) the threatened act would harm the recipient and would not significantly benefit the party making the threat; (why require both parts?)
- (b) the effectiveness of the threat in inducing the manifestation of assent is significantly increased by an advantage gained by prior unfair dealing by the party making the threat; or
- (c) what is threatened is otherwise a use of power (define) for illegitimate ends.

53. If a party’s manifestation of assent is induced by an improper threat by:

- (a) the other party that leaves the victim no reasonable alternative then the contract is voidable by the victim.
- (b) one who is not a party to the transaction then the contract is voidable by the victim unless the other party to the transaction, in good faith and without reason to know of the threat, gives value or relies materially on the transaction.

**Comment [SJ23]:** See comment below.

**Comment [SJ24]:** Is the use of the word victim the best choice here? The consequences of the threat or undue influence are all contractual in nature and not criminal. Would it be better, perhaps to refer to the “victim” as the “threatened party” or the “influenced party?” Other uses of victim are highlighted in yellow.

54. Undue influence is unfair persuasion of a party who:

**Comment [SJ25]:** What’s unfair persuasion?

- (a) is under the domination of the person exercising the persuasion; or
- (b) by virtue of the relation with the person exercising the persuasion is justified in assuming that the person will not act in a manner inconsistent with the victim's welfare.

**Comment [SJ26]:** In what situations would domination apply? Employment, caretaking, education, etc.

**Comment [SJ27]:** Is this less than the standard of a fiduciary relationship?

55. If a party's manifestation of assent is induced by undue influence by:

- (a) the other party to the transaction then the contract is voidable by the victim.
- (b) one who is not a party to the transaction then the contract is voidable by the victim, unless the other party to the transaction, in good faith and without reason to know of the undue influence, gives value or relies materially on the transaction.

### **Unenforceable on grounds of public policy**

56. A promise or other term of an agreement is unenforceable on grounds of public policy if laws of the Kingdom of Bhutan provide that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such promise or other term.

**Comment [SJ28]:** This is an interesting standard of review.

57. A public policy against the enforcement of promises or other terms may be derived from:

- (a) other laws of the Kingdom of Bhutan relevant to such a policy; or
- (b) the need to protect some aspect of the public welfare.

58. The following are unenforceable:

- (a) a promise unreasonably in restraint of trade. A promise is in restraint of trade if its performance would limit competition in any business or restrict the promisor in the exercise of a gainful occupation.
- (b) a promise unreasonably in restraint of marriage.
- (c) a promise that would change some essential incident of the marital relationship in a way detrimental to the public interest in the marriage relationship.
- (d) a promise affecting the right of custody of a minor child inconsistent with the best interests of the child.
- (e) a promise to commit a tort or inducing the commission of a tort.
- (f) a promise by a fiduciary to violate his fiduciary duty or a promise inducing such a violation.

(g) a promise tortiously interfering with performance of a contract with a third person or a tortiously induced promise to breach a contract.

(h) a term exempting a party from tort liability for harm caused intentionally or recklessly.

(i) a term exempting a party from tort liability for harm caused negligently if it exempts:

i. an employer from liability to an employee for injury in the course of his employment;

ii. one with a duty of public service for compensation from liability for breach of that duty to one to whom that duty is owed; or

**Comment [SJ29]:** What exactly is this duty?

iii. a seller of a product from liability for physical harm to a user or consumer.

(j) a term unreasonably exempting a party from the legal consequences of a misrepresentation.

(k) a term in a contract fixing unreasonably large liquidated damages.

**59.** If the promisee has substantially performed his promise, enforcement of a promise is not precluded on grounds of public policy because of some improper use that the promisor intends to make of what he obtains unless the promisee:

(a) acted for the purpose of furthering the improper use; or

(b) knew of the use and the use involves grave social harm.

**Comment [SJ30]:** Are there finite instances of grave social harm such that enumeration would be impractical? Or is this designed to allow for a broad interpretation by the courts?

**60.** If less than all of an agreement is unenforceable under Section 58, 59, 60, or 61 and if the performance as to which the agreement is unenforceable is not an essential part of the agreed exchange, a court may enforce the rest of the agreement in favor of a party who obtained the enforceable promise in good faith and in accordance with reasonable standards of fair dealing and did not engage in serious misconduct.

## **Bailments and Pledges**

**61.** Absent agreement to the contrary, the following provisions govern bailments.

(a) Bailments are of the following types:

i. A bailment for reward is one pursuant to contract where the bailee provides services.

ii. A gratuitous bailment is one pursuant to contract where the bailee provides no services.

iii. An involuntary bailment is one imposed by law and not by voluntary agreement of the parties.

- iv. A Pledge is a special bailment for reward as security for payment of a loan, including interest, given by the pledgee (or bailee) to the pledgor (or bailor).
  
- (b) Under a bailment for reward, a bailor has a duty to disclose to the bailee faults which expose the bailee to substantial dangers or materially interfere with his use of the bailed items. Under a gratuitous bailment the bailor's duty is limited to faults of which he had knowledge.
- (c) A bailee for reward or a gratuitous bailee has a duty to the bailor to treat the bailed items with due care and diligence. An involuntary bailee has a duty only to treat the bailed items reasonably under the circumstances.
- (d) A bailee is responsible for loss or damage only if he violated his duty as specified in Subsection (c), (g), or (j) of this Section or if the loss or damage arose because he treated the bailed items in a manner inconsistent with the contract.
- (e) The bailor is obligated to reimburse the bailee for any necessary expenses incurred by him in performing the bailment plus, in case of a pledge, to repay the loan for which the pledge was made and pay the interest due thereon.
- (f) If the bailee mixes the bailed items with other items with the consent of the bailor, the bailor and bailee will have interests in the mixture in proportion to their respective contributions.
- (g) If the bailee mixes the bailed items with other items without the consent of the bailor:
  - i. and the items can be separated or divided without harm, the interests of the bailor and bailee in the items will not be altered, but the bailee will be liable for any expenses of separation or division and any damage caused by mixing.
  - ii. and the items cannot be separated or divided without harm, the bailee will be obligated to compensate the bailor for the loss of the bailed items.
- (h) A bailor under a gratuitous bailment may at any time require the return of the bailed items regardless of the contract. If the bailee acted or forbore reasonably in material reliance upon the contract, the bailor is obligated to compensate him for any loss, exceeding any benefit derived from the bailment, he suffered because of the premature return.
- (i) A pledgor in default may redeem the pledged items at any time before their sale pursuant to Subsection (k) of this Section by paying in full, the loan, interest thereon, and any expenses due to his default and pursuant to subsection (e) of this Section.
- (j) A bailee is obligated to transfer possession of the bailed items, including any increase therein or profit therefrom, back to the bailor upon expiration of the period of the bailment or upon completion of performance of the bailment except:

- i. that the bailee may retain possession of the bailed items until he receives payments pursuant to Subsection (e) of this Section;
- ii. that if the pledgor has defaulted in repayment of the loan and interest thereon and the pledgee has sued the pledgor therefor, the pledgee may retain the pledged items as collateral security; and
- iii. as provided in Subsection (k) of this Section.

(k) A bailee may not sell or otherwise dispose of the bailed items unless:

- i. the bailor under a voluntary bailment for reward or a gratuitous bailment has failed to resume possession of the items within a reasonable time after proffer by the bailee;
- ii. the items under an involuntary bailment have not been reclaimed by the bailor within a reasonable time; or
- iii. the pledgor has defaulted in repayment of the loan and the interest thereon and has not redeemed the pledged items by making such repayment in full plus any expenses due to his default and pursuant to subsection (e) of this Section ;

Provided further, that an appropriate advance notice of the intended sale or disposition has been given by the bailee.

A bailor may avoid a contract of bailment if the bailee acts with regard to the bailed items in a manner inconsistent with the contract.

### **Agency**

- 62.** Any person having capacity to contract may empower an agent and any person having such capacity may be an agent.
- 63.** Powers may be conferred upon an agent by a precedent authorization or a subsequent ratification. Consideration is not necessary for the authorization of an agent to be binding upon the principal. The principal may authorize his agent to do any act which the principal might lawfully do.
- 64.** Oral authorization is sufficient for any purpose except that authorization to enter into a contract required to be in writing may only be given in writing.
- 65.** Ratification of an agent's act must be made in the manner necessary to confer authorization originally for the act ratified. Acceptance or retention of the benefit of the act by the principal constitutes ratification.

**66.** Ratification of an act is not valid unless at the time of the purported ratification the principal had power to authorize such an act. No unauthorized act may be ratified retroactively without the consent of third persons prejudiced thereby.

**67.** Ratification of a part of an indivisible transaction constitutes ratification of the whole. Ratification may be rescinded if it was made on the basis of an imperfect knowledge of the material facts of the transaction ratified.

**Comment [SJ31]:** This could conceivably allow for any ratification to be rescinded.

**68.** An agent has such authority as the principal:

- (a) (i) intentionally confers upon him and (ii) intentionally, or by want of ordinary care, causes the agent reasonably to believe, has been conferred upon him; (either [i] or [ii] constitutes actual authority); and
- (b) intentionally, or by want of ordinary care, causes third persons reasonably to believe the agent possesses (which constitutes apparent authority) unless such third persons have actual or constructive notice that the agent does not possess such authority.

**69.** Any act which may be done by or to the principal may be done by or to the agent authorized with respect to such act.

**70.** Absent contrary limitation of his authority by his principal, an agent has authority to do everything necessary, and proper and usual in the ordinary course of the type of business concerned, for effecting the purpose of his appointment.

**Comment [SJ32]:** Is this authority granted to all agents, or should it be limited to certain types of agents? Can it be limited by contract?

**71.** When authorization is given partly in general and partly in specific terms, the general terms give no broader authority than the specific. An authority expressed in general terms does not authorize the agent to act in his own name unless it is usual in the ordinary course of the type of business concerned.

**72.** An agent has power, without express authorization, to do whatever may be reasonably necessary to protect the interests of his principal when there is no time to obtain express authorization from his principal.

**73.** An authorization to an agent to sell personal property includes authority to warrant the title of the principal and the quality and quantity of the property.

**74.** An authorization to an agent to sell and convey real property includes the authority to give the usual covenants of warranty.

**75.** Within the scope of his authority an agent represents his principal for all purposes. All the rights and liabilities which would accrue to the agent from authorized transactions had such transactions been entered into on his own account accrue to the principal.

76. As against the principal, both principal and agent are deemed to have notice of whatever either has notice of with respect to an authorized transaction and ought, in good faith and in the exercise of ordinary care and diligence, to communicate to the other.
77. When an agent exceeds his authority, his principal is bound by his authorized acts only to the extent that they can be clearly separated from those which were unauthorized.
78. A principal is bound by acts of his agent under apparent authority only to those persons, without actual or constructive notice that the agent does not possess actual authority, who have in good faith and with ordinary care incurred a liability or given value in reliance thereon.
79. A person who deals with an agent without knowing or having reason to believe that the agent is acting as such may set off against any claim of the principal arising out of the dealing all claims which he might have set off against the agent before notice of his agency. If the principal discloses himself before the deal is completed, the other person may refuse to complete the deal if he can show that, had he known that the agent was acting for a principal or who the principal was, he would not have entered into the deal.
80. A principal is responsible to third persons for the negligence and wrongful acts of his agent in authorized or ratified transactions.
81. An agent warrants to all who deal with him in that capacity that he has the authority which he claims to have.
82. An agent is responsible to third persons as a principal when:
- (a) with his consent, credit is given to him personally;
  - (b) he enters into a contract in the name of his principal without believing in good faith that he has authority to do so; or
  - (c) his acts are wrongful.
83. If an agent acting for his principal receives something which another person is entitled to, on demand of that person he must, after indemnification for any advance which he has in good faith made to his principal on account thereof, surrender it to such person. He is liable therefor if, after demand from such person, he delivers it to his principal.
84. Unless such delegation is explicitly authorized by the principal, an agent may not delegate his powers to another except as provided in section 87.
85. An agent may delegate his powers to another unless expressly prohibited by his principal:
- (a) when the act to be done is purely non-discretionary;
  - (b) when the act may not be done by the agent; or
  - (c) when the customary usage in the business concerned is to delegate such powers.

**Comment [SJ33]:** You can make a wrongful act without it being illegal.

**Comment [SJ34]:** Maybe: when the act may not be done by the agent for some reason ? but is required to accomplish the task assigned by the principal.

86. A subagent whose appointment is authorized pursuant to Section 87 represents the principal on the same basis as the original agent, and the original agent is not responsible to third persons for the acts of the subagent.

**Comment [SJ35]:** What if the agent, although meeting the criteria for delegation, hires the subagent knowing of a propensity for criminal activity, or some other behavior that would put the principal at risk of unreasonable liability? Is it fair to impose liability on the principal then?

87. If an agent in a case not authorized under Section 87 appoints a subagent, the former becomes the principal and the latter his agent.

88. An agent's authority is terminated by:

- (a) expiration of its term;
- (b) extinction of its subject;
- (c) revocation by the principal;
- (d) death of the principal;
- (e) the agent's renunciation of his powers of representation; or
- (f) death of the agent.

89. Notwithstanding Subsections 90 (a)-(e) a bonafide transaction entered into with a previously authorized agent qua agent by a person acting without actual knowledge of the termination of his authority shall be binding upon the principal and his heirs, devisees, legatees, and other successors in interest.

**Comment [SJ36]:** Even if the agent is acting purposefully knowing he does not have the authority to act any further on behalf of the principal?

### Quasi contracts

**Comment [SJ37]:** Shouldn't this go under Chapter 1 Parties and Capacities?

90. A person without capacity to contract is liable for the value of necessities furnished to him, or to those whom he is responsible for supporting, even though he made no promise in exchange for such necessities.

**Comment [SJ38]:** What are necessities?

**Comment [SJ39]:** Why is a person without the capacity to contract held to a higher accountability than a person with such capacity. If there is no promise, or consideration, there is no contract, and thus no enforceability.

## CHAPTER 3 CONSTRUING CONTRACTS

91. Ambiguities or inconsistencies are resolved:

- (a) against the drafter;
- (b) in favour of a meaning that serves the public interest; and
- (c) against standardized terms in favour of separately negotiated or added terms.

### Duty of good faith and fair dealing

92. Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.

**Comment [SJ40]:** What exactly is this duty? It has some definition in commonwealth caselaw, but is there any definition in Bhutan?

### **Unconscionable contract or provision**

93. If a court determines, after the parties have had an opportunity to present evidence, that a contract or provision was unconscionable when made, the court may:

**Comment [SJ41]:** Again, what does unconscionable mean in Bhutan?

- (a) refuse to enforce the contract;
- (b) enforce the contract without the unconscionable provision; or
- (c) limit the application of the provision so as to avoid an unconscionable result.

### **Supersession of prior agreements**

94. If a court determines, after the parties have had an opportunity to present evidence, that the parties have reduced to writing a final and complete expression of a binding contract, prior agreements are superseded to the extent that they are inconsistent with or within the scope of such contract.

**Comment [SJ42]:** What if they are consistent with the contract and are in fact intended to be binding despite the later contract?

## **CHAPTER 4** **PERFORMANCE**

### **Order of performances**

95. Absent contrary indication in the language or circumstances:

- (a) where all or part of the performances to be exchanged can be rendered simultaneously, they are to that extent due simultaneously; in that case a condition of each party's duty to render such performance is that the other party either render or, with manifested present ability to do so, offer his performance;
- (b) except to the extent stated in (a) above, where the performance of only one party requires a period of time to perform, his performance is due at an earlier time than that of the other.

**Comment [SJ43]:** How much earlier?

### **Repudiation**

96. Repudiation is:

- (a) a statement by the obligor to the obligee that the obligor will commit a breach that would give the obligee a claim for damages for breach;

(b) a voluntary act by the obligor which renders him unable or apparently unable to perform without a breach; or

(c) when reasonable grounds exist to believe that the obligor will commit a breach by non-performance that would give the obligee a claim for damages, a failure by the obligor, in response to a demand by the obligee, to provide within a reasonable time, an adequate assurance of performance. In case of such repudiation, the obligee may, if reasonable, suspend any performance for which he has not already received the agreed exchange until he receives such assurance.

**Comment [SJ44]:** What forms can the response take?

**Comment [SJ45]:** What forms can the demand take?

**Comment [SJ46]:** What is an adequate assurance?

### **Repudiation as a breach**

97. When an obligor repudiates a duty before he has committed a breach by non-performance and before he has received all of the agreed exchange for it, his repudiation alone gives rise to a claim for damages for breach.

**Comment [SJ47]:** Isn't this clear from the definition of repudiation? It follows, too, from that definition that you cannot have a repudiation without creating a breach. This section, therefore, seems redundant.

### **Nullification of repudiation**

98. A retraction of a statement constituting repudiation or the elimination of the event constituting or serving as a basis for repudiation nullifies the repudiation if it comes to the attention of the obligee before he has materially changed his position in reliance on the repudiation or has indicated to the obligor that he considers the repudiation final.

**Comment [SJ48]:** Might it also be prudent to consider a failure of nullification after a certain period of time. It seems almost too forgiving to allow a party to nullify a repudiation after so much time passes that it would, in effect, become a new contract rather than a nullification, even absent the other two factors.

### **Effect of performance and non-performance**

99. Full performance of a duty discharges that duty.

100. When performance is due, any non-performance is a breach.

101. A condition of each party's duty to perform is that there be no uncured material failure by the other party to render a performance due at an earlier time.

102. An un-nullified repudiation discharges the non-repudiating party's remaining duties to render performance.

103. Non-performance of a promise or contractual duty or breach of a contract in and of itself is not a criminal offence.

### **Non-occurrence of a condition**

**104.** Performance of a duty subject to a condition does not become due until the condition occurs or its non-occurrence is excused.

**Comment [SJ49]:** How does communication of an excused non-occurrence happen? Or is the party scheduled to act on a condition simply to interpret events and hope the non-occurrence will be found to be excused by a court?

**105.** Unless it has been excused, the non-occurrence of a condition discharges the duty when the condition can no longer occur.

**106.** Non-occurrence of a condition is not a breach by a party unless he has a duty to cause the condition to occur.

**107.** If the occurrence of a condition was not a material part of the agreed exchange, its non-occurrence:

(a) may be excused if a disproportionate forfeiture would otherwise result.

(b) is excused, if forfeiture would otherwise result, by impracticality sufficient to discharge a duty or prevent it from arising pursuant to Chapter 5.

**108.** When a party's repudiation contributes materially to the non-occurrence of a condition of his duty, the non-occurrence is excused.

### **Application of performances**

**109.** Except as provided in Section 114, as between two or more contractual duties owed to the same obligee, a performance is to be applied as directed by the obligor to the obligee at or before the time of performance.

**110.** Except as provided in Sections 113 and 114, if the obligor has not directed the application of a payment as between two or more debts which are due to the same obligee, the payment is to be applied as specified by the obligee provided the obligor has been so informed within a reasonable time.

**111.** The obligee may not apply such a payment to a debt if a forfeiture would result from a failure to apply it to another debt and the obligee knows or has reason to know this, or if the debt is disputed or is unenforceable on grounds of public policy.

**112.** If the obligee knows or has reason to know that the obligor owes a duty to a third person to devote a performance to the discharge of a particular duty that the obligor owes to the obligee, the obligor's performance is to be applied to that duty.

**113.** If neither the obligor nor the obligee has exercised his power to apply a payment as provided in Section 11\_ and 11\_, it is applied to debts which are due to which the obligee could have applied it with just regard to the interests of third persons, the obligor, and the obligee.

## **CHAPTER 5** **IMPRACTICALITY AND FRUSTRATION OF PURPOSE**

### **Discharge by supervening impracticality**

114. When, after a contract is made, a party's performance becomes impractical without his fault by the occurrence of an event, the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged unless the language or the circumstances indicate the contrary.

**Comment [SJ50]:** What does impractical mean?

### **Death or incapacity of person necessary for performance**

115. If the existence of a particular person is necessary for the performance of a duty, his death or such incapacity as makes performance impractical is an event the non-occurrence of which was a basic assumption on which the contract was made.

**Comment [SJ51]:** Same as above.

### **Destruction, deterioration, or failure to come into existence of a thing necessary for performance**

116. If the existence of a specific thing is necessary for the performance of a duty, its failure to come into existence or destruction or its deterioration such as makes performance impractical is an event the non-occurrence of which was a basic assumption on which the contract was made.

**Comment [SJ52]:** What if the party had the responsibility to create the item, or bring it into existence? Would that then be a condition which the party failed to meet? Wouldn't that put the party in breach?

**Comment [SJ53]:** Similarly, what if the party is responsible for the destruction or deterioration of the item? This seems to open a loophole for fraudulent escape from performance.

### **Prevention by government**

117. If the performance of a duty is made impractical by the necessity to comply with a law or government regulation or order that did not exist at the time the contract was made, that law or government regulation or order is an event the non-occurrence of which was a basic assumption on which the contract was made.

### **Partial impracticality**

118. Where only part of an obligor's performance is impractical, his duty to render the remaining part is unaffected if:

**Comment [SJ54]:** What is impractical?

- (a) it is still practical for him to render performance that is substantial, taking account of any reasonable substitute performance that he has a duty to render; or

- (b) the obligee, within a reasonable time, agrees to render in full any performance of his that remains and to allow the obligor to retain any performance that the obligee has already rendered.

### **Discharge by supervening frustration**

119. When, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged unless the language or the circumstances indicate the contrary.

**Comment [SJ55]:** What is "substantially frustrated?"

### **Existing impracticality or frustration**

120. Unless the language or circumstances indicate the contrary, when at the time a contract is made a party's:

- (a) performance under it is impractical without his fault because of a fact which he has no reason to know of and the non-existence of which is a basic assumption on which the contract is made, no duty to render that performance arises.

**Comment [SJ56]:** See comment above. What is impractical?

- (b) principal purpose is substantially frustrated without his fault by a fact which he has no reason to know of and the non-existence of which is a basic assumption on which the contract is made, no duty of that party to render performance arises.

**Comment [SJ57]:** See comment above. What is "substantially frustrated?"

### **Temporary impracticality or frustration**

121. Impracticality of performance by or frustration of purpose of a party that is only temporary suspends his duty to perform while the impracticality or frustration exists but does not discharge his duty or prevent it from arising unless his performance after the cessation of the impracticality or frustration would be materially more burdensome than had there been no impracticality or frustration.

**Comment [SJ58]:** What if, while the duty is suspended, the other party is unduly burdened by the frustrated party's failure to perform? What if there is no communication of the frustration or impracticality? Who bears the loss?

## **CHAPTER 6** **DISCHARGE BY ASSENT OR ALTERATION**

### **Necessity of consideration**

122. Except as stated in Section 12\_ and 12\_ an obligee's assent to discharge of a duty imposed by contract is not effective unless:

- (a) it is made for a consideration;

(b) it is made in circumstances in which a promise would be enforceable without consideration; or

(c) it has induced such action or forbearance as would make a promise enforceable.

### Nullification of writing

123. An obligee's cancellation, destruction, or surrender to the obligor of a writing of a type customarily accepted as a symbol or as evidence of the obligor's duty to the obligee discharges without consideration the obligor's duty if it is done with the manifested intention to discharge it.

**Comment [SJ59]:** Both this and the earlier writing requirements seem to allow for escape from the general requirements of consideration. It would also seem that these sections give broad allowances for escaping consideration requirements. It might be good to provide stricter criteria for allowing an escape from providing consideration in contracts as such lax allowances would make enforcement more difficult and create less predictability in the law of contracts.

### Renunciation

124. A written renunciation of his rights arising from breach of contract signed by the obligee discharges without consideration the duty of the obligor arising from the breach.

**Comment [SJ60]:** Although there may be protections against undue influence in such a situation, those protections still require a party to sue to enforce. It seems, then, that there is an entire branch of situations where the attempt, here, to limit court actions fails in that purpose by simply shifting the reason for the court action from breach to undue influence.

### Substituted performance or contract

125. If an obligee accepts in satisfaction of the obligor's duty a performance that differs from what is due or a substitute contract, the duty is discharged.

**Comment [SJ61]:** Again, what protections against undue influence? Does there need to be some kind of criteria that establish the substitute performance as similar in type or value to the promised performance?

### Contract not to sue

126. A contract not to sue is a contract under which the obligee promises:

- (a) not to ever sue the obligor or a third person to enforce a duty of the obligor and which discharges the duty; or
- (b) not for a limited time to sue the obligor or a third person to enforce a duty of the obligor and which bars an action to enforce the duty during that time.

**Comment [SJ62]:** Under the "created by writing" section above, this could become a contract without consideration, which would create the same problems as discussed in the last two comments.

If the contract is not to sue one co-obligor, levy of execution on his property is barred during the agreed time.

### Alteration by obligee discharges duty

127. If the obligee, without the assent of the obligor, alters a writing which is a necessary part of the obligation, the duty of the obligor is discharged if the alteration is fraudulent and would, if effective, vary his legal relations with the obligee or adversely affect his legal relations with a third person.

### Duty revived after alteration

128. If after an alteration the obligor asserts a right under, or otherwise manifests a willingness to remain subject to, the original contract, it is revived.

Comment [SJ63]: With or without the altered writing?

## CHAPTER 7 JOINT AND SEVERAL PARTIES

### Promises to the same promisee

129. Unless a contrary intention is manifested, a promise by two or more promisors to the same promisee in exchange for a single consideration is a promise that the same performance shall be given and each is bound for the whole performance. They incur only a joint and several duty unless a contrary intention is manifested.

Comment [SJ64]: This is redundant.

### Effect of performance on co-promisors

130. Full or partial performance or other satisfaction of the contractual duty of a promisor to an obligee or other discharge of that promisor by an obligee shall, unless the discharged promisor is a surety, discharge the duty to the obligee of each other promisor of the same performance to the extent of the amount or value received by the obligee from the promisor who rendered the duty.

### Promises to several obligees

131. Unless a contrary intention is manifested or the interests of the obligees in the performance or in the remedies for breach are distinct, the rights of obligees of the same performance are joint.

### Joinder of joint obligees

132. All surviving joint obligees must be joined to recover against the promisor of the same performance.

133. Unless limited by agreement, any joint obligee may sue in the name of all joint obligees for the enforcement of the same promise by a money judgment.

Comment [SJ65]: How would such an award be divided among the obligees?

Comment [SJ66]: If a single obligee can sue in the name of all the joint obligees, doesn't that create a situation where all of the obligees do not need to be joined to recover? This seems to create a situation where all of the obligees do not need to be a party to a suit for damages in breach.

### **Discharge by one joint obligee**

134. Unless limited by agreement, any joint obligee of the same performance has power to discharge the promisor by receipt of the promised performance, by release, or otherwise.
135. Tender of performance to one joint obligee constitutes tender to all.
136. A discharge of the promisor by an obligee in violation of his duty to a co-obligee of the same performance is voidable to the extent necessary to protect the co-obligee's interest in the performance, except to the extent that the promisor has given value or otherwise changed his position in good faith and without knowledge or reason to know of the violation.

**Comment [SJ67]:** Is this relationship between joint obligees a fiduciary relationship? If so, it should be expressly stated as such. If not, what are the duties one joint obligee owes to another?

## **CHAPTER 8** **BENEFICIARIES**

### **Intended and incidental beneficiaries**

137. Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right in the beneficiary to performance is appropriate to effectuate the intention of the parties and either:
- (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or
  - (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.
138. An incidental beneficiary is a person who will benefit from performance of a promise but is neither a promisee nor an intended beneficiary. An incidental beneficiary acquires no right against the promisor or promisee by virtue of the promise.

### **Conditional and unconditional promises**

139. This Chapter applies to both conditional and unconditional promises.

### **Creation of a duty to beneficiary**

140. A promise in a contract imposes a duty on the promisor to any intended beneficiary to perform the promise and the intended beneficiary may enforce the duty.

### **Overlapping duties to beneficiary and promisee**

141. A promise in a contract imposes a duty on the promisor to the promisee to perform the promise even though the promisor also has a similar duty to an intended beneficiary.
142. Whole or partial satisfaction of the promisor's duty to the beneficiary satisfies the promisor's duty to the promisee to extent of that satisfaction.

**Comment [SJ68]:** Does this mean that when the contract includes a promise to pay a third party beneficiary that promise is considered part of the duty to be rendered? This is unclear.

### **Rejection by a beneficiary**

143. A beneficiary who has not previously assented to the promise for his benefit may, in a reasonable time after learning of its existence and terms, render any duty to himself void from the beginning by a manifestation of rejection.

### **Specific performance**

144. Where specific performance is otherwise an appropriate remedy, either the promisee or the intended beneficiary may maintain a suit for specific enforcement of a duty owed to the beneficiary.

### **Identification of beneficiaries**

145. In order to have an enforceable right, an intended beneficiary need not be identified at the time a contract containing the promise is made.

### **Remedies of beneficiary and promisee's right to reimbursement**

146. When an intended beneficiary has an enforceable claim against a promisee, he may obtain a judgment or judgments against the promisee, the promisor, or both based on their respective duties to him. Satisfaction in whole or in part of either of these duties or of a judgment thereon satisfies to that extent the other duty or judgment, subject to the promisee's right of subrogation.
147. To the extent that the claim of an intended beneficiary is satisfied from the assets of a promisee, the promisee has a right of reimbursement from the promisor, which may be enforced directly and also, if the beneficiary's claim is fully satisfied, by subrogation to the claim of the beneficiary against the promisor, to any judgment thereon, and to any security therefor.

**Comment [SJ69]:** This is the first instance of this right?

### **Change in a duty to a beneficiary**

148. By conduct of the promisee or subsequent agreement with the promisor, the promisor and promisee retain power to discharge or modify a duty to an intended beneficiary absent a contrary term of the promise creating the duty.
149. When the beneficiary, before he receives notice of a discharge or modification pursuant to Section 148, materially changes his position in justifiable reliance on the promise creating the duty to him, brings suit on it, or manifests assent to it at the request of the promisor or promisee, such a power terminates.
150. If a promisee receives consideration for an attempted discharge or modification of his promisor's duty to a beneficiary which is ineffective against the beneficiary, the beneficiary can assert a right to the consideration received. In that case the promisor's duty is discharged to the extent of the amount received by the beneficiary.

**Comment [SJ70]:** The beneficiary just has to manifest assent to receipt of the benefit in order to prohibit the promisor and promisee from altering the benefit? This seems generous.

## **CHAPTER 9** **ASSIGNMENT AND DELEGATION**

### **Assignment of a right**

151. An assignment of a right is a manifestation of the assignor's intention that his right to performance by the promisor be extinguished in whole or in part and the assignee acquire the right to such performance.
152. A contractual right may be assigned unless:
- (a) the substitution of the right of the assignee for the right of the assignor would materially change the duty of the promisor under or increase the burden or risk imposed on him by his contract or materially impair the promisor's chance of obtaining or reduce the value to the promisor of the return performance;
  - (b) the assignment is forbidden by other laws of the Kingdom of Bhutan or is unenforceable on grounds of public policy; or
  - (c) a provision of the contract precludes the assignment.

### **Assignment of conditional rights**

153. The fact that a right is conditional does not prevent its assignment before the condition occurs.

### **Assignment of future rights**

154. Except as otherwise provided under other laws of the Kingdom of Bhutan, an assignment of a right to payment expected to arise out of an existing employment or other continuing business relationship is effective as though it were the assignment of an existing right.

### **Delegation of performance**

155. A person may delegate to another the performance of his duty or of a condition unless the delegation is contrary to public policy or the terms of his promise.

156. Unless otherwise agreed, a promise requires performance by a particular person only to the extent that the promisee has a substantial interest in that person performing or controlling the acts promised.

**Comment [SJ71]:** Even though the promisee may not have a substantial interest in that person, what about acts that are peculiar to that person, i.e., art, design, or music?

157. Unless the promisee agrees otherwise, neither delegation of performance nor a contract to assume the duty of performance made between the promisor and the person delegated discharges any duty of the promisor.

### **Contractual prohibition of assignment**

158. Unless the circumstances indicate the contrary, a contract term prohibiting assignment of a contract bars only the delegation to an assignee of the performance by the assignor of a duty or condition.

159. Unless a different intention is manifested, a contract term prohibiting assignment of rights under the contract:

- (a) does not forbid assignment of a right to damages for breach nor a right arising out of the assignor's completed performance of his entire obligation;
- (b) gives the promisor a right to damages for breach of the term forbidding assignment but does not render the assignment ineffective;
- (c) is for the benefit of the promisor and does not prevent (i) the assignee from acquiring rights against the assignor nor (ii) the promisor from discharging his duty as if there were no such prohibition.

### **Assent to assignment or delegation**

160. A term of a contract manifesting a promisor's assent to the future assignment of a right or a promisee's assent to the future delegation of the performance of a duty or condition is effective despite any subsequent objection.

**Comment [SJ72]:** Even though it meets the requirements of alteration?

161. A manifestation of such assent after the formation of a contract is similarly effective if made for consideration, if made in circumstances in which a promise would be binding without consideration, or if a material change of position takes place in reliance on the manifestation.

## **CHAPTER 10** **CONTRACTUAL REMEDIES**

### **Contractual Remedies**

162. Contractual remedies serve to protect one or more of the following interests of a promisee:

- (a) **Expectation interest**, which is his interest in obtaining the benefit of his contract by being put in as good a position as he would have been in had the contract been performed;
- (b) **Reliance interest**, which is his interest in being reimbursed for losses caused by reliance on the contract by being put in as good a position as he would have been in had the contract not been made; or
- (c) **Restitution interest**, which is his interest in having restored to him any benefit that he has conferred on the promisor.

## **CHAPTER 11** **DAMAGES**

### **Actual Damages**

163. The injured party has a right to damages as compensation for loss from any breach by a party against whom the contract is enforceable unless the claim for damages has been suspended or discharged.

Comment [SJ73]: Is this referring to Chapter 6?

164. A party's duty to pay damages for breach by repudiation is discharged if it appears after the breach that:

- (a) there would have been a total failure by the injured party to perform his return promise; or
- (b) the duty that he repudiated would have been discharged by impracticality or frustration before any breach by non-performance.

### **Nominal Damages**

165. If the breach caused no loss or if the amounts of the elements of the loss are not proved pursuant to the rules of this Chapter, a small sum fixed without regard to the amount of the loss will be awarded as nominal damages.

**Comment [SJ74]:** Is this in the best interests of judicial efficiency?

### **Damages based on expectation interest**

166. Subject to the limitations of Sections 17\_-7\_ the injured party has a right to damages based on his expectation interest equal to:

- (a) the loss in the value to him of the other party's performance caused by its failure or deficiency; plus
- (b) any other loss, including incidental or consequential loss, caused by the breach; less;
- (c) any cost or other loss that he has avoided by not having to perform.

### **Alternatives to loss in value of performance**

167. If a breach delays the use of property and the loss in value to the injured party is not proved with reasonable certainty, he may recover damages based on the rental value of the property or on interest on the value of the property.

168. If a breach results in defective or unfinished construction and the loss in value to the injured party is not proved with reasonable certainty, he may recover damages based on:

- (a) the diminution in the market price of the property caused by the breach; or
- (b) the reasonable cost of completing performance or of remedying the defects if that cost is not clearly disproportionate to the probable loss in value to him.

169. If a breach is of a promise conditioned on a fortuitous event and it is uncertain whether the event would have occurred had there been no breach, the injured party may recover damages based on the value of the conditional right at the time of breach.

### **Damages based on reliance interest**

170. As an alternative to the measure of damages stated in Section 16\_ the injured party has a right to damages based on his reliance interest, including expenditures made in preparation for performance or in performance less any loss that the party in breach can prove with reasonable certainty the injured party would have suffered had the contract been performed.

**Comment [SJ75]:** When does this alternative apply? What distinguishes this from expectation damages determinations?

### **Avoidability limiting damages**

171. Damages are not recoverable for a loss that the injured party could have avoided without undue risk, burden, or humiliation except to the extent that he has made reasonable but unsuccessful efforts to avoid the loss.

### **Unforeseeability limiting damages**

172. Damages are not recoverable for any loss that the promisor, at the time the contract was made, did not have reason to foresee would probably result from such a breach.

173. Loss may be foreseeable as a probable result of a breach because it would follow from the breach:

(a) in the ordinary course of events; or

(b) as a result of special circumstances that the party in breach knew or had reason to know.

174. A court may limit damages for foreseeable loss by excluding recovery for loss of profits, by allowing recovery only for loss incurred in reliance, or otherwise if it concludes that in the circumstances justice so requires to avoid disproportionate compensation.

### **Uncertainty limiting damages**

175. Damages are not recoverable for elements of loss beyond amounts that the evidence establishes with reasonable certainty.

Comment [SJ76]: What is "reasonable certainty?"

### **Loss due to emotional disturbance**

176. Recovery for emotional disturbance is excluded unless the breach also caused bodily harm or the contract or the breach was of such a kind that serious emotional disturbance was a particularly likely result.

Comment [SJ77]: What is "particularly likely?"

### **Interest**

177. If the breach consists of a failure to pay a definite sum of money or to render a performance with fixed or ascertainable monetary value, interest is recoverable, from the time when performance was due, on the amount due less all deductions to which the party in breach is entitled.

178. In any other case such interest may be allowed as justice requires on the amount that would have been just compensation had it been paid when performance was due.

### **Punitive Damages**

179. Except as may be otherwise provided by other laws of the Kingdom of Bhutan, punitive damages are not recoverable for a breach of contract unless the conduct constituting the breach is also a tort for which punitive damages are recoverable.

### **Liquidated Damages**

180. Damages for breach may be liquidated in the contract but only in an amount that is reasonable in relation to the anticipated or actual loss caused by the breach and the difficulties of proof of the loss.

Comment [SJ78]: What are these?

## **CHAPTER 12** **SPECIFIC PERFORMANCE AND INJUNCTION**

### **Availability**

181. Subject to the rules of this Chapter, against a party who has committed or is threatening to commit a breach of a contract duty, specific performance of the duty may be granted in the discretion of the court or an injunction against a breach of the duty may be granted in the discretion of the court if the duty is one (a) of forbearance or (b) to act and specific performance would be denied only for reasons that are inapplicable to an injunction.

### **Nature of Relief**

182. An order of specific performance or an injunction is to be so drawn as best to effectuate the purposes for which the contract was made and on such terms as justice requires. The performance that it requires need not be identical with that due under the contract, and it may be directed at the injured party as well as at the party in breach.

Comment [SJ79]: This allows broad judicial discretion. What criteria govern imposition of the injunction against the injured party?

183. If specific performance or an injunction is denied as to part of the performance that is due, it may nevertheless be granted as to the remainder.

184. In addition to specific performance or an injunction, damages and other relief may be awarded in the same proceeding and an indemnity against future harm may be required.

### Adequacy of damages or existence of another remedy

185. Specific performance or an injunction will not be granted if damages would be adequate to protect the expectation interest of the injured party. The following should be considered in determining the adequacy of damages:

- (a) the difficulty of proving the damages with reasonable certainty;
- (b) the difficulty of procuring a suitable substitute performance with money awarded as damages;  
and
- (c) the likelihood that an award of damages could not be collected.

186. Specific performance or an injunction may be granted even though the contract provides for liquidated damages.

187. Specific performance or an injunction may be granted even though there is a remedy for breach in addition to damages.

**Comment [SJ80]:** What governs when these awards may be granted? Justice? The previous section?

### Uncertainty of terms of contract

188. Specific performance or an injunction will not be granted unless the terms of the contract are sufficiently certain to provide a basis for an appropriate order.

**Comment [SJ81]:** Isn't this the same as saying that specific performance or an injunction will only be granted for contracts?

### Return duty unperformed

189. Specific performance or an injunction may be denied if a substantial part of the agreed exchange for the performance to be compelled is unperformed and its performance is not secured to the satisfaction of the court.

### Unfairness

190. Specific performance or an injunction may be refused if such relief would be unfair because:

- (a) the contract was induced by mistake or unfair practices;
- (b) the relief would cause unreasonable hardship or loss to the party in breach or to third persons;  
or
- (c) the exchange is grossly inadequate or the terms of the contract are otherwise unfair.

191. Specific performance or an injunction may be granted in spite of an unfair term of the contract if denial of such relief would cause unreasonable hardship or loss to the party seeking relief or to third persons.

### **Contrary to public policy**

192. Specific performance or an injunction will not be granted if the act or forbearance that would be compelled or the use of compulsion is contrary to public policy.

### **Difficulty in enforcement**

193. Performance of a contract duty will not be specifically enforced if the character and magnitude of the performance would impose on the court burdens in enforcement or supervision disproportionate to the advantages to be gained from enforcement and to the harm to be suffered from its denial.

Comment [SJ82]: Are there more specific criteria for this?

### **Personal service**

194. A promise to render personal service will not be specifically enforced.

195. A promise to render personal service exclusively for one employer will not be enforced by injunction against serving another if the probable result will be to compel a performance involving personal relations the enforced continuance of which is undesirable or will be to leave the employee without other reasonable means of making a living.

### **Power of termination**

196. Specific performance or an injunction will not be granted against a party who can substantially nullify the effect of the order by exercising a power of termination or avoidance.

197. Specific performance or an injunction may be granted even though the party seeking relief has a power to terminate or avoid his return performance unless the power could be used, in spite of the order, to deprive the other party of reasonable security for the return performance.

### **Breach by party seeking relief**

198. Specific performance or an injunction may be granted in spite of a breach by the party seeking relief unless the breach is serious enough to discharge the other party's remaining duties of performance.

## **CHAPTER 13**

### **RESTITUTION**

#### **Benefit must be conferred**

199. A party is entitled to restitution only to the extent that he has conferred a benefit on the other party by part performance, reliance or quasi contract.

#### **Measure of benefit**

200. If a sum of money is awarded to protect a party's restitution interest, it may, as justice requires, be measured by either:

- (a) the reasonable value to the other party of what he received in terms of what it would have cost him to obtain it from another person in the claimant's position; or
- (b) the extent to which the other party's property has been increased in value or his other interests advanced.

**Comment [SJ83]:** Is this akin to fair market value? If not, exactly what is this measurement?

#### **Specific restitution**

201. Specific restitution will be granted to a party who is entitled to restitution except that it:

- (a) may be refused if it would unduly interfere with the certainty of title to land or otherwise cause injustice; and
- (b) will not be granted in favour of a party in breach.

**Comment [SJ84]:** What if the original performance was the transfer of land? Wouldn't it be better to put a lien on the land and thus burden the certainty of title until the restitution is paid, or the land returned, than to allow the party to transfer the land to a different party in an attempt to escape payment on the property?

202. A decree of specific restitution may be made conditional on return of or compensation for anything that the party seeking restitution has received.

#### **Restitution against party in breach**

203. On a breach by non-performance that gives rise to a claim for damages or on a repudiation, the injured party is entitled to restitution for any benefit he has conferred on the other party by part performance or reliance unless he has performed all of his duties under the contract and no performance by the party in breach remains due other than payment of a definite sum of money.

**Comment [SJ85]:** This refers to the injured party?

**Comment [SJ86]:** Same comment.

#### **Restitution in favor of party in breach**

204. If a party justifiably refuses to perform on the ground that his remaining duties of performance have been discharged by the other party's breach, the party in breach is entitled to restitution for any benefit that he has conferred by part performance or reliance in excess of the loss that he has caused by his breach.

### **Restitution when contract not in writing**

205. A party who would otherwise have a claim for restitution under an unwritten contract is not barred from restitution because the contract is unenforceable by him pursuant to Section 32.

Comment [SJ87]: Doesn't this, then, work to negate the purpose of Section 32?

### **Restitution under avoided contract**

206. A party who has avoided a contract on the ground of lack of capacity, mistake, misrepresentation, duress, undue influence, or abuse of a fiduciary relationship is entitled to restitution for any benefit he has conferred on the other party by part performance or reliance.

### **Party seeking restitution must return benefit**

207. Except as stated in Section 208, a party will not be granted restitution unless:

- (a) he returns or offers to return, conditional on restitution, any interest in property that he has received under the contract in substantially as good condition as when it was received by him; or
- (b) the court can assure such return in connection with the relief granted.

208. The requirement of Section 20\_ does not apply to property:

- (a) that was worthless when received or that has been destroyed or lost by the other party or as a result of its own defects;
- (b) that either could not from the time of receipt have been returned or has been used or disposed of without knowledge that there would be grounds for restitution if justice requires that compensation be accepted in its place and payment of such compensation can be assured; or
- (c) as to which the contract apportions the price if that part of the price is not included in the claim.

### **Restitution by party whose duty is excused**

209. A party whose duty of performance does not arise or is discharged by impracticality of performance, frustration of purpose, non-occurrence of a condition, or rejection by a beneficiary is

entitled to restitution for any benefit he has conferred on the other party by part performance or reliance.

## **CHAPTER 14** **ELECTION OF REMEDIES**

### **Election as a bar**

**210.** If a party has more than one remedy under this Act, his manifestation of a choice of one of them by bringing suit or otherwise is not a bar to pursuing another remedy unless the remedies are inconsistent or the other party has materially changed his position in reliance on the manifestation.

### **Election to treat duties under aleatory contracts as discharged**

**211.** If a right or duty of the injured party is conditional on an event that is fortuitous or is supposed by the parties to be fortuitous, he cannot treat his remaining duties to render performance as discharged on the ground of the other party's breach by non-performance if he does not manifest to the other party his intention to do so before any adverse change in the situation of the injured party resulting from the occurrence of that event or a material change in the probability of its occurrence.

### **Exercise of power of avoidance**

**212.** A person may exercise a power of avoidance of a contract by:

- (a) a manifestation of avoidance communicated to the other party;
- (b) recovery of all or a substantial part of what he would be entitled to by restitution on avoidance;  
or
- (c) a final judgement of or based on avoidance.

### **Loss of power of avoidance by affirmance**

**213.** The power of a party to avoid a contract for incapacity, duress, undue influence, or abuse of a fiduciary relation is lost if, after the circumstances that made the contract voidable have ceased to exist, he manifests to the other party his intention to affirm it or acts with respect to anything that he has received in a manner inconsistent with disaffirmance.

**214.** The power of a party to avoid a contract for mistake or misrepresentation is lost if after he knows or has reason to know of the mistake or of the misrepresentation if it is non-fraudulent or knows of

the misrepresentation if it is fraudulent, he manifests to the other party his intention to affirm it or acts with respect to anything he has received in a manner inconsistent with disaffirmance.

### **Loss of power of avoidance by delay**

215. The power of a party to avoid a contract for incapacity, duress, undue influence, or abuse of a fiduciary relation is lost if, after the circumstances that made it voidable have ceased to exist, he does not within a reasonable time manifest to the other party his intention to avoid it.
216. The power of a party to avoid a contract for misrepresentation or mistake is lost if after he knows of a fraudulent misrepresentation or knows or has reason to know of a non-fraudulent misrepresentation or mistake, he does not within a reasonable time manifest to the other party his intention to avoid it. The power to avoid a contract for non-fraudulent misrepresentation or mistake is also lost if the contract has been so far performed or the circumstances have otherwise so changed that avoidance would be inequitable and damages will be adequate compensation.

### **Loss of power to affirm by prior avoidance**

217. If a party has effectively exercised his power of avoidance, a subsequent manifestation of intent to affirm is invalid unless the other party manifests his assent to affirmance.

## **CHAPTER 15** **DEFINITIONS**

218. In this Act:

- (a) **Agent** is a person empowered by another, the principal, to represent the principal in dealings with others.
- (b) **Alteration** is addition, deletion, substitution or insertion of something in a blank space.
- (c) **Bailment** is the temporary taking of possession of something by a bailee from a bailor for a purpose pursuant to a contract or legal obligation.
- (d) **Beneficiary** is a person other than the promisee who will benefit from performance of a promise.
- (e) **Contract** is one or more promises for:
  - i. the breach of which there is a remedy; or
  - ii. the performance of which there is a duty.

**Comment [SJ88]:** Might this not go better toward the beginning of the law?

Promises not satisfying (i) or (ii) above do not give rise to a contract and are void of legal effect.

- (f) **Forfeiture** is a denial of compensation resulting when an obligee loses his right to an agreed exchange after he has substantially relied on the expectation of that exchange by preparation or performance.
- (g) **Guarantor: see Surety.**
- (h) **Manifestation** may be made wholly or partly by written or spoken words, by other acts, or by failure to act.
  - i. **IMPLIED MANIFESTATION:** The conduct of a party is effective as a manifestation of an offer, promise, assent or rejection if he intends to engage in the conduct and knows or has reason to know that the other party may thereby infer that he offers, promises, assents or rejects.
  - ii. **INVALID MANIFESTATION:** A party may appear to manifest assent even though he does not in fact assent, in which case a resulting contract may be voidable because of fraud, duress, mistake, or other invalidating cause.
- (i) **Mistake** is a belief that is not in accord with reality.
- (j) **Novation** is substituted contract that includes as a party one who was neither the obligor nor the obligee of the original duty.
- (k) **Obligee** is a person to whom a duty is owed.
- (l) **Obligor** is a person owing a duty.
- (m) **Offer** is a manifestation of a willingness to enter into an exchange of promises, an exchange of a promise for a performance, or an exchange of performances and is so made as to justify another person in understanding that his assent to that exchange is invited and is intended to conclude a contract therefor.
- (n) **Principal** is the person empowering an agent to represent him in dealings with others.
- (o) **Promise** is a manifestation of intention to act or refrain from acting in a specified way which is so made as to justify a promisee in understanding that a commitment has been made.
- (p) **Promisee** is that person to whom a promise is made.
- (q) **Promisor** is the person making a promise.

Comment [SJ89]: What is willingness?

- (r) **Release** is a writing signed by the obligee providing that a duty owed to him is discharged immediately or on the occurrence of a condition.
- (s) **Rescission** is an agreement under which each party discharges all of the other party's remaining duties of performance under an existing contract.
- (t) **Surety** or **Guarantor** is one who promises an obligee to perform the duty of the obligor if the obligor defaults.
- (u) **Unenforceable contract** is a contract for the breach of which neither the remedy of damages nor of specific performance is available but which may be recognized in some other way as creating a duty of performance.
- (v) **Voidable contract** is a contract where one or more parties have the power by an election to do so to avoid the legal relations created by the contract or by affirmation to extinguish that power of avoidance.

**Comment [SJ90]:** Wouldn't this create a non-contract under the definition of a contract?

**Comment [SJ91]:** See comment above. This seems to allow a sophisticated party to contract an escape from the contract without consequences to the party.

## Comments by J E Hartz

PRELIMINARY

**Comment [JEH92]:** Note: many comments with respect to wording may stem from an inaccurate English translation of the original text.

### Short Title, Commencement and Extent

219. This Act shall:

- (a) be called the Contract Act for the Kingdom of Bhutan, 200...;
- (b) come into force on the .... Day, of .... Month of .... Year corresponding to the .... Day of the .... Month of 2004; and
- (c) Extend to the whole of the Kingdom of Bhutan.

### Application

220. This Act applies to all contracts in the Kingdom of Bhutan except for those relating to transactions subject to the Commercial Sale of Goods Act 2001, or to the Moveable and Immovable Property Act 1999 to the extent that those provisions or the provisions of any other contract are in conflict with the provisions of any other Act of this Kingdom .

**Comment [JEH93]:** The language "commercial transactions" creates ambiguity. What is a commercial transaction? It would be best to substitute "contracts" which is a defined term in Section 217(c). It would also avoid potential conflict with the language in Section 6 below. Why are transaction subject to the Commercial Sale of Goods and Moveable etc. Property excluded? Indeed, Section 32 seems to include the latter. It is understood that special rules may apply to such transactions, but presumably the formation of a contract (its necessary elements) would nonetheless be needed. There may still be "special" contracts (i.e., contracts to which special rules may apply with respect to certain particulars) under section 6 and Chapter 2. Note that Marriage Settlement contracts are mentioned under section 28 and contracts upon consideration of marriage in Section 30. Are they commercial contracts? If not, why are they mentioned at all in this Act if they are excluded? What rules apply to them? It would be better to make the Act applicable to all contracts except to the extent special or other rules of other Acts are applicable and specifically exclude only those things that are to be excluded in their entirety (few if any if a contract is involved). This would be better than limiting the scope of the Act and hence creating ambiguity with respect to all other contracts.

### Repeal

221. Except as provided in Section 2 above, this Act prevails over all provisions of existing laws and regulations, including the Thrimzhung Chenmo of the Kingdom of Bhutan, which are inconsistent with this Act.

### Rule of Construction

222. In this Act, words of the masculine, feminine or neuter gender include the masculine, feminine and neuter, genders.

## CHAPTER 1 RULES FOR FORMATION OF A CONTRACT

### Normal Contracts

**Comment [JEH94]:** Corporations are neither gender and although I suspect the feminine gender is not used in the Act, in the future this might be perceived as a slight to women.

223. A contract is formed normally in accordance with the provisions laid down in this Chapter, when an offer by one party is followed by an acceptance by the other party which together constitute manifestation of mutual assent, supported by consideration, to an exchange of promises, an exchange of a promise for a performance, or an exchange of performances.

**Comment [JEH95]:** Is the use of the modifying word, “normally” is appropriate? You have made provision for “special” contracts. Unless some other provision of this or some other Act expressly requires application of rules different from these, it would seem that these provisions should be applicable.

### **Special Contracts**

224. A contract is formed specially (a) in accordance with the provisions of Chapter 2 or (b) in accordance with other laws of the Kingdom of Bhutan.

**Comment [JEH96]:** The language here is quite confusing and seemingly requires consideration only where there is an exchange of performances. Normally each side in a contract must provide consideration, even if quite nominal. There may be exceptions, normally statutory ones, as you later provide. The American Restatement of contract law provides: “the formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration.”

### **Parties and Capacity**

225. A contract must have at least two identifiable parties i.e. a promisor and a promisee.

226. A natural person has full legal capacity to incur contractual duties unless he has only the capacity to incur voidable contractual duties because he is:

- (e) Under a guardianship;
- (f) a minor;
- (g) mentally ill or defective; or
- (h) intoxicated, under the influence of drugs or otherwise not fully in command of his mental facilities.

**Comment [JEH97]:** I believe this clarifies the intent. Again, it may not be wise to limit the applicability of this Act except to the extent it conflicts with other Acts. Indeed this text might be revised to read: “This Act is applicable to all contracts except to the extent the provisions hereof are modified or supplemented by the provisions of Chapter 2 or other Acts of this Kingdom.”

### **Offer**

227. Even though a manifestation is intended to be understood as an offer, its acceptance does not form a contract, unless, the terms of the putative contract provide a basis for determining the existence of a breach and for giving an appropriate remedy.

### **Acceptance**

228. An offer gives the offeree a continuing power to accept until termination of the power by:

- (f) rejection or counteroffer by the offeree;
- (g) lapse of time specified in the offer or if no time is specified, on expiration of a reasonable time;
- (h) revocation by the offeror received by the offeree before acceptance has been effected;
- (i) non-occurrence of any condition for acceptance under the terms of the offer; or

(j) death of or loss of legal capacity by either the offeror or offeree.

**229.** Unless otherwise indicated by the language or the circumstances, an offer invites acceptance in any manner and by a medium used by the offeror or one customary in similar transactions at the time and place the offer was received.

**230.** An offer may:

- (c) require acceptance by an affirmative answer in words or by performance or non-performance of an act; or
- (d) empower the offeree to accept by (i) promising performance or non-performance, (ii) performance, or (iii) non-performance of an act.

**231.** When an offeree fails to reply to an offer, his silence and inaction constitute acceptance when:

- (d) with reasonable opportunity to reject offered services and reason to know that they were offered with the expectation of compensation, he takes the benefit of the offered services;
- (e) the offeror has stated or given the offeree reason to believe that assent may be manifested by silence or inaction and the offeree in remaining silent and inactive intends to accept the offer; or
- (f) because of previous dealings or otherwise, it is reasonable that the offeree notify the offeror if he does not intend to accept.

**232.** An offeree who does any act inconsistent with the offeror's ownership of offered property is bound in accordance with the offered terms unless they are manifestly unreasonable, provided, however, that if such act is wrongful against the offeror, it constitutes acceptance only if ratified by the offeror.

**233.** Acceptance given by telephone or other medium of substantially instantaneous two-way communication is governed by the principles applicable to acceptance where the parties are in the presence of each other.

**234.** An acceptance is effective as soon as it is put out of the offeree's possession while the offeree's power of acceptance is still valid:

- (c) whether or not it ever reaches the offeror, if made in a manner and by a medium (i) invited by the offer or (ii) if no medium was specified, used by the offeror, or one customary in similar transactions at the time and place the offer was received, if it has been properly addressed, and if such other precautions have been taken as are ordinarily observed to insure safe transmission of similar messages; or

- (d) if received by the offeror by the time a properly dispatched acceptance would normally have arrived.

### **Consideration**

**235.** Except as provided in Section 20 or 21 a performance or promise of performance constitutes consideration if it is sought by the offeror in exchange for his promise and is given by the offeree in exchange for that promise.

**236.** A performance constituting consideration may consist of:

- (d) an act other than a promise;
- (e) a forbearance; or
- (f) the creation, modification, or destruction of a legal relationship.

**237.** The consideration may be given:

- (c) to the offeror or some other person; or
- (d) by the offeree or some other person.

**238.** A performance is not consideration if it is the forbearance to assert or the surrender of a claim or defense unless:

- (d) the claim or defense is arguably reasonably valid;
- (e) the forbearing or surrendering party honestly believes that the claim or defense may be fairly determined to be valid; or
- (f) a written instrument of forbearance or surrender is executed by one without a duty to execute it.

**239.** A promise of performance is not consideration if:

- (d) it is conditional and the promisor knew when he made the promise that the condition could not occur;
- (e) it is conditional on a performance by the promisor unless he also promises the occurrence of the condition; or
- (f) the promisor reserves to himself a choice of alternative performances unless:

- iii. each of the alternatives would have been consideration if it alone was sought by the offeror in exchange for his promise and is given by the offeree in exchange for that promise; or
- iv. one of the alternatives would have been consideration and there is or appears to the parties to be a substantial possibility that before the offeree exercises his choice events may eliminate the alternatives which would not have been consideration.

**240.** A promise which the law renders voidable or unenforceable may constitute consideration where not repudiated by a party and not contrary to public policy.

**Comment [JEH98]:** This section may raise more questions than it answers and might best be deleted.

**241.** If consideration exists, there is no additional requirement of:

- (d) a gain, advantage or benefit to the promisor nor a loss, disadvantage or detriment to the promisee;
- (e) equivalence in the values exchanged; or
- (f) mutuality of obligation.

## **CHAPTER 2** **SPECIAL TYPES OF CONTRACTS**

### **Payment of existing indebtedness**

**242.** Unless the facts indicate a different indication, any of the following actions by the debtor constitutes a promise to pay all or part of an antecedent contractual or quasi-contractual indebtedness and such promise is binding if the indebtedness is still enforceable or would be enforceable except for the effect of a statute of limitation and if the debtor knew or had reason to know the essential facts of the transaction creating the prior indebtedness and any defenses to payment:

- (d) A voluntary acknowledgement to the current obligee admitting the present existence of the antecedent indebtedness;
- (e) A voluntary transfer of money, negotiable instrument, or other thing to the current obligee as interest on, part payment of, or collateral security for the antecedent indebtedness; or
- (f) A voluntary statement to the current obligee that the statute of limitations will not be pleaded as a defense.

### **Payment of indebtedness discharged in bankruptcy**

243. A voluntary express promise to pay all or part of an indebtedness of the promisor discharged or dischargeable in bankruptcy proceedings begun before the promise is made is binding.

### **Restitution for benefit received**

244. A promise to make restitution for a benefit previously received by the promisor from the promisee is binding to the extent necessary to prevent injustice.

### **Modification**

245. Unless otherwise provided in the contract, an executory contract may be modified:

- (c) if the contract is in writing, by oral agreement of the parties if supported by new consideration or by written agreement of the parties;
- (d) if the contract is unwritten, by oral or written agreement of the parties.

### **Promise reasonably inducing action or forbearance**

246. A promise which the promisor should reasonably expect to induce action or forbearance by the promisee or a third person and which does induce such action or forbearance or is for a charitable subscription or marriage settlement is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

### **Judicial Stipulation**

247. A voluntary promise or agreement with reference to a judicial proceeding made by a party to the proceeding or his attorney is binding without consideration, provided that it complies with other applicable laws or rules of court of the Kingdom of Bhutan.

### **Created by Writing**

**248.** A promise is binding without consideration if the promise or some memorandum or note thereof is in one or more writings made at any time to which both promisor and promisee manifest assent and which writings:

- (h) name the promisor and promisee or so describe them that they are capable of identification;
- (i) clearly indicate that the writings relate to the same transaction;
- (j) state with reasonable certainty the essential terms of the unperformed promises
- (k) are sufficient to indicate that a contract with respect to the transaction has been made between the parties or offered by the signer and delivered to the other party;
- (l) if evidencing a contract upon consideration of marriage are made as a memorandum of the contract;
- (m) are signed, with any symbol made or adopted with an intention, actual or apparent, to authenticate the writing as that of the maker or adopter of the symbol, at any time by the party to be charged or his authorized agent; and
- (n) comply with the Rules on Use of Judicial Stamps in Bhutan as amended; and be attested by two disinterested witnesses.

**249.** “Writing” and “signed” as used in this Act include data messages which meet the requirements of the Bhutan Information, Communications and Media Act, 2006.

### **Writing required**

**250.** Except as provided in Section 28, contracts of the following types may not be enforced, by an action, setoff, counterclaim, or defense, unless they or some memorandum or note thereof are in one or more writings which meet the requirements of Section 30:

- (g) a promise to the obligee by the executor or administrator of a decedent to answer personally for a duty of his decedent if a similar contract to answer for the duty of a living person would be governed by (b).
- (h) a promise to the obligee by the surety for the obligor to answer for an existing duty of the obligor if the obligee knows or has reason to know of the suretyship unless:
  - i. the consideration for the promise mainly benefits the surety rather than the obligor except when the consideration is merely a premium for insurance;

- ii. the promises to the obligee by the obligor and the surety are in terms joint and do not create several duties or joint and several duties;
  - iii. by the terms of the promise when it is made performance can involve only (A) application of funds or property held by the surety for that purpose; (B) performance another duty owed, by the surety to the obligee; (C) performance of a duty owed by the surety to the obligor or which the obligee reasonably believes to be so owed; or (D) a novation is accepted by the obligee in satisfaction of the obligor's duty.
- (i) a promise to sign a contract as a surety for the performance of a duty owed the promisee or to sign a negotiable instrument for the accommodation of someone other than the promisee;
  - (j) made upon consideration of marriage except if it consists only of mutual promises to marry.
  - (k) to transfer from anyone or to buy for anyone any right, privilege, power, or immunity, or combination thereof, which is an interest in land under the law of property and is not defined as "goods" under the Commercial Sale of Goods Act except:
    - i. for leases and contracts for a term of less than a year; and
    - ii. that such a contract may be specifically enforced even if not in writing if it is established that the party seeking enforcement has, in reasonable reliance on the contract before repudiation by the party against whom enforcement is sought, so changed his position that injustice can be avoided only by specific enforcement
  - (l) not to be performed within a year from the making except that after one party to the contract has completed his performance, the promises of other parties may be enforced.

### **Surety or Guarantee**

**251.** Under a surety contract:

- (d) The liability of the surety is the same as that of the obligor unless otherwise provided in the contract. The surety is discharged:
  - i. by any discharge of the obligor;
  - ii. by a modification in the duty of the obligor made between the obligee and the obligor without the surety's consent;
  - iii. if the obligor acts or fails to act in a way which is inconsistent with his duty to the surety and the surety's remedy against the obligor is thereby impaired; or

- iv. to the extent of the value of securities against the obligor, that the obligee held at the time the contract of surety was entered into, that the obligee has lost or disposed of without the consent of the surety.
- (e) Forbearance by the obligee to invoke a remedy against the obligor does not discharge the surety if the forbearance is not pursuant to an agreement with the obligor nor in contravention of any term of the contract of surety.
- (f) If two or more parties have each promised a third party the same performance under the same or different contracts, each promisor is a surety for the others and the liability of the promisors to the third party is not affected by any agreement among themselves purporting to fix their individual liabilities to the third party. Each promisor is liable as among themselves to pay an equal share of the undischarged duty of each in case of default by one of them unless the promisors have agreed among themselves that the maximum liability of each to the third party shall be in different amounts, in which case each is liable as among themselves to pay an equal share up to but not exceeding his maximum amount. Release of one of the promisors by the third party discharges the others to the extent of any value received by the third party for the release.

### **Indemnity**

- 252.** Under a contract of indemnity, the promisor promises to indemnify the promisee for loss caused by the conduct of the promisor or a third person.
- 253.** When an obligor asks a party to be surety for his duty, he manifests a promise that he will indemnify the surety if the surety answers to the obligee for the obligor's duty. The surety may enforce the resulting contract of indemnity against the obligor.

### **Voidable for mistake**

- 254.** When a mistake of both parties as to a basic assumption on which a contract was made has, taking into account the availability of relief by restitution or otherwise, a material effect on the agreed exchange of performances, the contract is voidable by an adversely affected party if he does not bear the risk of the mistake pursuant to Section 38.
- 255.** When a mistake of one party as to a basic assumption on which he agreed to the contract has a material effect on the agreed exchange of performances that is adverse to him, the contract is voidable by him if he does not bear the risk of the mistake pursuant to Section 38 and if (a) the effect of the mistake is such that enforcement of the contract would be unconscionable or (b) the other party had reason to know of the mistake or his fault caused the mistake.

**256.** A party bears the risk of a mistake if:

- (c) the risk of the mistake was allocated to him by the contract or is so allocated by a court on the ground that it is reasonable to do so; or
- (d) he was aware that he had only limited knowledge with respect to the facts but treated it as sufficient.

**257.** When a writing that evidences or embodies an agreement in whole or in part fails to express the agreement because of a mistake of both parties as to the contents or effect of the writing, a court may at the request of a party reform the writing to express the agreement except to the extent that rights of third parties, such as good faith purchasers for value, will be unfairly affected. Such reformation is not precluded by the fact that the contract is governed by Section 32.

**258.** A mistaken party's fault in failing to know or discover the facts before making the contract does not bar him from avoidance or reformation unless his fault amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing.

### **Void or voidable for misrepresentation**

**259.** A misrepresentation by a person is:

- (d) an assertion not in accord with the facts;
- (e) an action likely to prevent another from learning of a fact; or
- (f) non-disclosure of a fact known to him.

**260.** A misrepresentation is fraudulent if the maker intends it to induce a party to manifest his assent.

**261.** A misrepresentation is material if likely to induce a reasonable person or the recipient to manifest his assent.

**262.** If a misrepresentation as to the very character or essential terms of a proposed contract induces conduct that appears to be a manifestation of assent by one who neither knows nor has reasonable opportunity to know of the very character or essential terms of the proposed contract, his conduct is not effective as a manifestation of assent, and there is, therefore, no contract.

**263.** If a party's manifestation of assent is induced by either a fraudulent or material misrepresentation:

(c) by the other party upon which the recipient is justified in relying, the contract is voidable by the recipient except as provided in Section 46; or

(d) by one who is not a party to the transaction upon which the recipient is justified in relying, except as provided in Section 46, the contract is voidable by the recipient unless the other party to the transaction in good faith and without reason to know of the misrepresentation either gives value or relies materially on the transaction.

**264.** If a contract is voidable because of a misrepresentation and, before notice is sent of an intention to avoid the contract, the facts come into accord with the misrepresentation, the contract is no longer voidable unless the recipient has been harmed by relying on the misrepresentation.

**265.** If a party's manifestation of assent is induced by the other party's fraudulent misrepresentation as to the contents or effect of a writing evidencing or embodying in whole or in part an agreement, a court at the request of the recipient may, if the recipient was justified in relying on the misrepresentation, reform the writing to express the terms of the agreement as misrepresented except to the extent that rights of third parties, such as good faith purchasers for value, would be unfairly affected.

**266.** An assertion is one of opinion if it expresses only a belief, without certainty, as to the existence of a fact or expresses only a judgement as to quality, value, authenticity or similar matters. If it is reasonable to do so, the recipient of an assertion of a person's opinion as to facts not disclosed and not otherwise known to the recipient may properly interpret it as an assertion:

(c) that the facts known to the person making the assertion are not incompatible with his opinion; or

(d) that the person making the assertion knows facts sufficient to justify his opinion.

**267.** To the extent that an assertion is one of opinion only, the recipient is not justified in relying on it unless the recipient:

(d) stands in such a relation of trust and confidence to the person whose opinion is asserted that the recipient may reasonably rely on it;

(e) reasonably believes that, as compared with himself, the person whose opinion is asserted has special skill, judgement or objectivity with respect to the subject matter; or

(f) is for some other special reason particularly susceptible to a misrepresentation of the type involved.

### **Voidable for abuse by fiduciary**

**268.** A contract between a fiduciary and his beneficiary relating to matters within the scope of the fiduciary relation is voidable by the beneficiary unless:

- (c) it is on fair terms; and
- (d) all parties beneficially interested manifest assent with full understanding of their legal rights and of all relevant facts that the fiduciary knows or should know.

### **Void or voidable for duress or undue influence**

**269.** If conduct that appears to be a manifestation of assent by a party is compelled by physical force, the conduct is not effective as a manifestation of assent and there is, therefore, no contract.

**270.** A threat is improper if:

- (e) what is threatened is a crime or a tort or the threat itself would be a crime or tort if it resulted in obtaining property;
- (f) what is threatened is a criminal prosecution;
- (g) what is threatened is the use of civil process and the threat is made in bad faith; or
- (h) the threat is a breach of the duty of good faith and fair dealing under a contract with the recipient.

**271.** A threat is improper if the resulting exchange is not on fair terms and:

- (d) the threatened act would harm the recipient and would not significantly benefit the party making the threat;
- (e) the effectiveness of the threat in inducing the manifestation of assent is significantly increased by an advantage gained by prior unfair dealing by the party making the threat; or
- (f) what is threatened is otherwise a use of power for illegitimate ends.

**272.** If a party's manifestation of assent is induced by an improper threat by:

- (c) the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim.

- (d) one who is not a party to the transaction, the contract is voidable by the victim unless the other party to the transaction, in good faith and without reason to know of the threat, gives value or relies materially on the transaction.

**273.** Undue influence is unfair persuasion of a party who:

- (c) is under the domination of the person exercising the persuasion; or
- (d) by virtue of the relation with the person exercising the persuasion is justified in assuming that the person will not act in a manner inconsistent with the victim's welfare.

**274.** If a party's manifestation of assent is induced by undue influence by:

- (c) the other party to the transaction, the contract is voidable by the victim.
- (d) one who is not a party to the transaction, the contract is voidable by the victim, unless the other party to the transaction, in good faith and without reason to know of the undue influence, gives value or relies materially on the transaction.

### **Unenforceable on grounds of public policy**

**275.** A promise or other term of an agreement is unenforceable on grounds of public policy if laws of the Kingdom of Bhutan provide that it is unenforceable, it would violate the criminal laws of the Kingdom of Bhutan, or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such promise or other term.

**276.** A public policy against the enforcement of promises or other terms may be derived from:

- (c) other laws of the Kingdom of Bhutan relevant to such a policy; or
- (d) the need to protect some aspect of the public welfare.

**277.** The following are unenforceable:

- (l) a promise unreasonably in restraint of trade. A promise is in restraint of trade if its performance would limit competition in any business or restrict the promisor in the exercise of a gainful occupation.
- (m) a promise unreasonably in restraint of marriage.
- (n) a promise that would change some essential incident of the marital relationship in a way detrimental to the public interest in the marriage relationship.
- (o) a promise affecting the right of custody of a minor child inconsistent with the best interests of the child.

**Comment [JEH99]:** While the last provision may cover the suggested insertion, it may be best to clarify for parties and courts some matters where a new statute comes into force covering an area not previously addressed.

**Comment [JEH100]:** Distribution of goods and high tech businesses often impose restrictions on employees after they leave their employment. These often generate bitter disputes. You may want to consider some additional criteria, e.g., no limitation on employment beyond a certain number of years, etc. Is there any Bhutan common law on the subject?

- (p) a promise to commit a tort or crime, or inducing the commission of a tort or crime.
- (q) a promise by a fiduciary to violate his fiduciary duty or a promise inducing such a violation.
- (r) a promise tortiously interfering with performance of a contract with a third person or a tortiously induced promise to breach a contract.
- (s) a term exempting a party from tort liability for harm caused intentionally or recklessly.
- (t) a term exempting a party from tort liability for harm caused negligently if it exempts:
- iv. an employer from liability to an employee for injury in the course of his employment;
  - v. one with a duty of public service for compensation from liability for breach of that duty to one to whom that duty is owed; or
  - vi. a seller of a product from liability for physical harm to a user or consumer.
- (u) a term unreasonably exempting a party from the legal consequences of a misrepresentation.
- (v) a term in a contract fixing unreasonably large liquidated damages.

**Comment [JEH101]:** Does Bhutan law consider the commission of a crime per se a tort?

**278.** If the promisee has substantially performed, enforcement of a promise is not precluded on grounds of public policy because of some improper use that the promisor intends to make of what he obtains unless the promisee:

- (c) acted for the purpose of furthering the improper use; or
- (d) knew of the use and the use involves a criminal act or grave social harm.

**279.** If less than all of an agreement is unenforceable under Section 57, 58, 59, or 60 and if the performance as to which the agreement is unenforceable is not an essential part of the agreed exchange, a court may enforce the rest of the agreement in favor of a party who obtained the enforceable promise in good faith and in accordance with reasonable standards of fair dealing and did not engage in a criminal act or serious misconduct.

### **Bailments and Pledges**

**280.** Absent agreement to the contrary, the following provisions govern bailments.

- (l) Bailments are of the following types:
- i. A bailment for reward is one pursuant to contract where the bailee provides services.
  - ii. A gratuitous bailment is one pursuant to contract where the bailee provides no services.
  - iii. An involuntary bailment is one imposed by law and not by voluntary agreement of the parties.
  - iv. A Pledge is a special bailment for reward as security for payment of a loan, including interest, given by the pledgee (or bailee) to the pledgor (or bailor).
- (m) Under a bailment for reward, a bailor has a duty to disclose to the bailee faults which expose the bailee to substantial dangers or materially interfere with his use of the bailed items. Under a gratuitous bailment the bailor's duty is limited to faults of which he had knowledge.
- (n) A bailee for reward or a gratuitous bailee has a duty to the bailor to treat the bailed items with due care and diligence. An involuntary bailee has a duty only to treat the bailed items reasonably under the circumstances.
- (o) A bailee is responsible for loss or damage only if he violated his duty as specified in Subsection (c), (g), or (j) of this Section or if the loss or damage arose because he treated the bailed items in a manner inconsistent with the contract.
- (p) The bailor is obligated to reimburse the bailee for any necessary expenses incurred by him in performing the bailment plus, in case of a pledge, to repay the loan for which the pledge was made and pay the interest due thereon.
- (q) If the bailee mixes the bailed items with other items with the consent of the bailor, the bailor and bailee will have interests in the mixture in proportion to their respective contributions.
- (r) If the bailee mixes the bailed items with other items without the consent of the bailor:
- iii. and the items can be separated or divided without harm, the interests of the bailor and bailee in the items will not be altered, but the bailee will be liable for any expenses of separation or division and any damage caused by mixing.
  - iv. and the items cannot be separated or divided without harm, the bailee will be obligated to compensate the bailor for the loss of the bailed items.
- (s) A bailor under a gratuitous bailment may at any time require the return of the bailed items regardless of the contract. If the bailee acted or forbore reasonably in material

reliance upon the contract, the bailor is obligated to compensate him for any loss, exceeding any benefit derived from the bailment, he suffered because of the premature return.

- (t) A pledgor in default may redeem the pledged items at any time before their sale pursuant to Subsection (k) of this Section by paying in full, the loan, interest thereon, and any expenses due to his default and pursuant to subsection (e) of this Section.
- (u) A bailee is obligated to transfer possession of the bailed items, including any increase therein or profit therefrom, back to the bailor upon expiration of the period of the bailment or upon completion of performance of the bailment except:
  - iv. that the bailee may retain possession of the bailed items until he receives payments pursuant to Subsection (e) of this Section;
  - v. that if the pledgor has defaulted in repayment of the loan and interest thereon and the pledgee has sued the pledgor therefor, the pledgee may retain the pledged items as collateral security; and
  - vi. as provided in Subsection (k) of this Section.
- (v) A bailee may not sell or otherwise dispose of the bailed items unless:
  - iv. the bailor under a voluntary bailment for reward or a gratuitous bailment has failed to resume possession of the items within a reasonable time after proffer by the bailee;
  - v. the items under an involuntary bailment have not been reclaimed by the bailor within a reasonable time; or
  - vi. the pledgor has defaulted in repayment of the loan and the interest thereon and has not redeemed the pledged items by making such repayment in full plus any expenses due to his default and pursuant to subsection (e) of this Section ;

Provided further, that an appropriate advance notice of the intended sale or disposition has been given by the bailee.

A bailor may avoid a contract of bailment if the bailee acts with regard to the bailed items in a manner inconsistent with the contract.

### **Agency**

- 281.** Any person having capacity to contract may empower an agent and any person having such capacity may be an agent.

- 282.** Powers may be conferred upon an agent by a precedent authorization or a subsequent ratification. Consideration is not necessary for the authorization of an agent to be binding upon the principal. The principal may authorize his agent to do any act which the principal might lawfully do.
- 283.** Oral authorization is sufficient for any purpose except that authorization to enter into a contract required to be in writing may only be given in writing.
- 284.** Ratification of an agent's act must be made in the manner necessary to confer authorization originally for the act ratified. Acceptance or retention of the benefit of the act by the principal constitutes ratification.
- 285.** Ratification of an act is not valid unless at the time of the purported ratification the principal had power to authorize such an act. No unauthorized act may be ratified retroactively without the consent of third persons prejudiced thereby.
- 286.** Ratification of a part of an indivisible transaction constitutes ratification of the whole. Ratification may be rescinded if it was made on the basis of an imperfect knowledge of the material facts of the transaction ratified.
- 287.** An agent has such authority as the principal:
- (c) (i) intentionally confers upon him and (ii) intentionally, or by want of ordinary care, causes the agent reasonably to believe, has been conferred upon him; (either [i] or [ii] constitutes actual authority); and
  - (d) intentionally, or by want of ordinary care, causes third persons reasonably to believe the agent possesses (which constitutes apparent authority) unless such third persons have actual or constructive notice that the agent does not possess such authority.
- 288.** Any act which may be done by or to the principal may be done by or to the agent authorized with respect to such act.
- 289.** Absent contrary limitation of his authority by his principal, an agent has authority to do everything necessary, proper and usual in the ordinary course of the type of business concerned, for effecting the purpose of his appointment.
- 290.** When authorization is given partly in general and partly in specific terms, the general terms give no broader authority than the specific in those areas covered by the specific. An authority expressed in general terms does not authorize the agent to act in his own name unless it is usual in the ordinary course of the type of business concerned.
- 291.** An agent has power, without express authorization, to do whatever may be reasonably necessary to protect the interests of his principal when there is no time to obtain express authorization from his principal.

**Comment [JEH102]:** It appears that all 3 criteria are required and hence the and is not necessary.

- 292.** An authorization to an agent to sell personal property includes authority to warrant the title of the principal and the quality and quantity of the property.
- 293.** An authorization to an agent to sell and convey real property includes the authority to give the usual covenants of warranty.
- 294.** Within the scope of his authority an agent represents his principal for all purposes. All the rights and liabilities which would accrue to the agent from authorized transactions had such transactions been entered into on his own account accrue to the principal.
- 295.** As against the principal, both principal and agent are deemed to have notice of whatever either has notice of with respect to an authorized transaction and ought, in good faith and in the exercise of ordinary care and diligence, to communicate to the other.
- 296.** When an agent exceeds his authority, his principal is bound by his authorized acts only to the extent that they can be clearly separated from those which were unauthorized.
- 297.** A principal is bound by acts of his agent under apparent authority only to those persons, without actual or constructive notice that the agent does not possess actual authority, who have in good faith and with ordinary care incurred a liability or given value in reliance thereon.
- 298.** A person who deals with an agent without knowing or having reason to believe that the agent is acting as such may set off against any claim of the principal arising out of the dealing all claims which he might have set off against the agent before notice of his agency. If the principal discloses himself before the deal is completed, the other person may refuse to complete the deal if he can show that, had he known that the agent was acting for a principal or who the principal was, he would not have entered into the deal.
- 299.** A principal is responsible to third persons for the negligence and wrongful acts of his agent in authorized or ratified transactions.
- 300.** An agent warrants to all who deal with him in that capacity that he has the authority which he claims to have.
- 301.** An agent is responsible to third persons as a principal when:
- (d) with his consent, credit is given to him personally;
  - (e) he enters into a contract in the name of his principal without believing in good faith that he has authority to do so; or
  - (f) his acts are wrongful.
- 302.** If an agent acting for his principal receives something which another person is entitled to, on demand of that person he must, after indemnification for any advance which he has in

good faith made to his principal on account thereof, surrender it to such person. He is liable therefor if, after demand from such person, he delivers it to his principal.

**303.** Unless such delegation is explicitly authorized by the principal, an agent may not delegate his powers to another except as provided in the following sentence. He may, however, do so in the following cases unless expressly prohibited by his principal:

- (d) when the act to be done is purely non-discretionary;
- (e) when the act may not be done by the agent; or
- (f) when the customary usage in the business concerned is to delegate such powers.

**304.** A subagent whose appointment is authorized pursuant to Section 85 represents the principal on the same basis as the original agent, and the original agent is not responsible to third persons for the acts of the subagent.

**Comment [JEH103]:** It appears that the reference in Sections 86 and 87 should be to Section 85.

**305.** If an agent in a case not authorized under Section 85 appoints a subagent, the former becomes the principal and the latter his agent.

**306.** An agent's authority is terminated by:

- (g) expiration of its term;
- (h) extinction of its subject;
- (i) revocation by the principal;
- (j) death of the principal;
- (k) the agent's renunciation of his powers of representation; or
- (l) death of the agent.

**307.** Notwithstanding Subsections 88 (a)-(e) a bonafide transaction entered into with a previously authorized agent qua agent by a person acting without actual knowledge of the termination of his authority shall be binding upon the principal and his heirs, devisees, legatees, and other successors in interest.

### **Quasi contracts**

**308.** A person without capacity to contract is liable in restitution for the reasonable value of necessities furnished to him, or to those whom he is responsible for supporting, even though he made no promise in exchange for such necessities.

## **CHAPTER 3** **CONSTRUING CONTRACTS**

**309.** Ambiguities or inconsistencies are resolved:

- (d) against the drafter;
- (e) in favour of a meaning that serves the public interest; and
- (f) against standardized terms in favour of separately negotiated or added terms.

### **Duty of good faith and fair dealing**

**310.** Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.

### **Unconscionable contract or provision**

**311.** If a court determines, after the parties have had an opportunity to present evidence, that a contract or provision was unconscionable when made, the court may:

- (d) refuse to enforce the contract;
- (e) enforce the contract without the unconscionable provision; or
- (f) limit the application of the provision so as to avoid an unconscionable result.

### **Supersession of prior agreements**

**312.** If a court determines, after the parties have had an opportunity to present evidence, that the parties have reduced to writing a final and complete expression of a binding contract, prior agreements are superseded to the extent that they are inconsistent with or within the scope of such contract.

## **CHAPTER 4** **PERFORMANCE**

### **Order of performances**

**313.** Absent contrary indication in the language or circumstances:

- (c) where all or part of the performances to be exchanged can be rendered simultaneously, they are to that extent due simultaneously; in that case a condition of each party's duty to render such performance is that the other party either render or, with manifested present ability to do so, offer his performance;
- (d) except to the extent stated in (a) above, where the performance of only one party requires a period of time, his performance is due at an earlier time than that of the other.

## **Repudiation**

314. Repudiation is:

- (d) a statement by the obligor to the obligee that the obligor will commit a breach that would give the obligee a claim for damages for breach;
- (e) a voluntary act by the obligor which renders him unable or apparently unable to perform without a breach; or
- (f) when reasonable grounds exist to believe that the obligor will commit a breach by non-performance that would give the obligee a claim for damages, a failure by the obligor, in response to a demand by the obligee, to provide within a reasonable time, an adequate assurance of performance. In case of such repudiation, the obligee may, if reasonable, suspend any performance for which he has not already received the agreed exchange until he receives such assurance.

## **Repudiation as a breach**

315. When an obligor repudiates a duty before he has committed a breach by non-performance and before he has received all of the agreed exchange for it, his repudiation alone gives rise to a claim for damages for breach.

## **Nullification of repudiation**

316. A retraction of a statement constituting repudiation or the elimination of the event constituting or serving as a basis for repudiation nullifies the repudiation if it comes to the attention of the obligee before he has materially changed his position in reliance on the repudiation or has indicated to the obligor that he considers the repudiation final.

## **Effect of performance and non-performance**

317. Full performance of a duty discharges that duty.

318. When performance is due, any non-performance is a breach.

319. A condition of each party's duty to perform is that there be no uncured material failure by the other to render a performance due at an earlier time.

320. An un-nullified repudiation discharges the other party's remaining duties to render performance.
321. Non-performance of a promise or contractual duty or breach of a contract in and of itself is not a criminal offence.

### **Non-occurrence of a condition**

322. Performance of a duty subject to a condition does not become due until the condition occurs or its non-occurrence is excused.
323. Unless it has been excused, the non-occurrence of a condition discharges the duty when the condition can no longer occur.
324. Non-occurrence of a condition is not a breach by a party unless he has a duty to cause the condition to occur.
325. If the occurrence of a condition was not a material part of the agreed exchange, its non-occurrence:
- (c) may be excused if a disproportionate forfeiture would otherwise result.
  - (d) is excused, if forfeiture would otherwise result, by impracticality sufficient to discharge a duty or prevent it from arising pursuant to Chapter 5.
326. When a party's repudiation contributes materially to the non-occurrence of a condition of his duty, the non-occurrence is excused.

### **Application of performances**

327. Except as provided in Section 111, as between two or more contractual duties owed to the same obligee, a performance is to be applied as directed by the obligor to the obligee at or before the time of performance.
328. Except as provided in the next sentence and in Section 111, if the obligor has not directed the application of a payment as between two or more debts which are due to the same obligee, the payment is to be applied as specified by the obligee provided the obligor has been so informed within a reasonable time. The obligee may not apply such a payment to a debt if a forfeiture would result from a failure to apply it to another debt and the obligee knows or has reason to know this, or if the debt is disputed or is unenforceable on grounds of public policy.

**Comment [JEH104]:** Should this and perhaps the previous Section be prefaced with the words: "unless otherwise excused"? Needless to say, if the other party is in breach, the fact of the party's justifiable repudiation would not create a duty for him to perform.

329. If the obligee knows or has reason to know that the obligor owes a duty to a third person to devote a performance to the discharge of a particular duty that the obligor owes to the obligee, the obligor's performance is to be applied to that duty.
330. If neither the obligor nor the obligee has exercised his power to apply a payment as provided in Section 119 and 110, it is applied to debts which are due to which the obligee could have applied it with just regard to the interests of third persons, the obligor, and the obligee.

## **CHAPTER 5** **IMPRACTICALITY AND FRUSTRATION OF PURPOSE**

### **Discharge by supervening impracticality**

331. When, after a contract is made, a party's performance becomes impractical without his fault by the occurrence of an event, the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged unless the language or the circumstances indicate the contrary.

**Comment [JEH105]:** This would seem to mean the other party must then perform. Should this not render the contract voidable by either party? No doubt the other party can claim failure of consideration, but void or voidable would seem the more straight forward approach if codifying the matter by statute.

### **Death or incapacity of person necessary for performance**

332. If the existence of a particular person is necessary for the performance of a duty, his death or such incapacity as makes performance impractical is an event the non-occurrence of which was a basic assumption on which the contract was made.

### **Destruction, deterioration, or failure to come into existence of a thing necessary for performance**

333. If the existence of a specific thing is necessary for the performance of a duty, its failure to come into existence or destruction or its deterioration such as makes performance impractical is an event the non-occurrence of which was a basic assumption on which the contract was made.

### **Prevention by government**

334. If the performance of a duty is made impractical by the necessity to comply with a law or government regulation or order that did not exist at the time the contract was made, that

law or government regulation or order is an event the non-occurrence of which was a basic assumption on which the contract was made.

### **Partial impracticality**

335. Where only part of an obligor's performance is impractical, his duty to render the remaining part is unaffected if:

- (c) it is still practical for him to render performance that is substantial, taking account of any reasonable substitute performance that he has a duty to render; or
- (d) the obligee, within a reasonable time, agrees to render in full any performance of his that remains and to allow the obligor to retain any performance that the obligee has already rendered.

### **Discharge by supervening frustration**

336. When, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged unless the language or the circumstances indicate the contrary.

**Comment [JEH106]:** Again, rather than discharging the duty, it would appear that the contract should become either void or voidable.

### **Existing impracticality or frustration**

337. Unless the language or circumstances indicate the contrary, when at the time a contract is made a party's:

- (c) performance under it is impractical without his fault because of a fact which he has no reason to know of and the non-existence of which is a basic assumption on which the contract is made, no duty to render that performance arises.
- (d) principal purpose is substantially frustrated without his fault by a fact which he has no reason to know of and the non-existence of which is a basic assumption on which the contract is made, no duty of that party to render performance arises.

**Comment [JEH107]:** For the same reasons, the contract should become void or voidable.

### **Temporary impracticality or frustration**

338. Temporary impracticality of performance by or frustration of purpose of a party only suspends his duty to perform while the impracticality or frustration exists but does not discharge his duty or prevent it from arising unless his performance after the cessation of the impracticality or frustration would be materially more burdensome than had there been no impracticality or frustration.

**CHAPTER 6**  
**DISCHARGE BY ASSENT OR ALTERATION**

**Necessity of consideration**

339. Except as stated in Section 123 and 124 an obligee's assent to discharge of a duty imposed by contract is not effective unless:
- (d) it is made for a consideration;
  - (e) it is made in circumstances in which a promise would be enforceable without consideration; or
  - (f) it has induced such action or forbearance as would make a promise enforceable.

**Nullification of writing**

340. An obligee's cancellation, destruction, or surrender to the obligor of a writing of a type customarily accepted as a symbol or as evidence of the obligor's duty to the obligee discharges without consideration the obligor's duty if it is done with the manifested intention to discharge it.

**Renunciation**

341. A written renunciation of his rights arising from breach of contract signed by the obligee discharges without consideration the duty of the obligor arising from the breach.

**Substituted performance or contract**

342. If an obligee accepts in satisfaction of the obligor's duty a performance that differs from what is due or a substitute contract, the duty is discharged.

**Contract not to sue**

343. Contract not to sue is a contract under which the obligee promises:

- (c) not to ever sue the obligor or a third person to enforce a duty of the obligor and which discharges the duty; or
- (d) not for a limited time to sue the obligor or a third person to enforce a duty of the obligor and which bars an action to enforce the duty during that time.

If the contract is not to sue one co-obligor, levy of execution on his property is barred during the agreed time.

### **Alteration by obligee discharges duty**

344. If the obligee, without the assent of the obligor, alters a writing which is a necessary part of the obligation, the duty of the obligor is discharged if the alteration is fraudulent and would, if effective, adversely vary his legal relations with the obligee or adversely affect his legal relations with a third person.

**Comment [JEH108]:** Unless this is intended as a punitive punishment for such act, it would appear that such attempted change should be treated as simply void or voidable, particularly in light of Section 127.

### **Duty revived after alteration**

345. If after an alteration the obligor asserts a right under, or otherwise manifests a willingness to remain subject to, the original contract, it is revived.

## **CHAPTER 7** **JOINT AND SEVERAL PARTIES**

### **Promises to the same promisee**

346. Unless a contrary intention is manifested, a promise by two or more promisors to the same promisee is a promise that the same performance shall be given and each is bound for the whole performance. They incur a joint and several duty unless a contrary intention is manifested.

### **Effect of performance on co-promisors**

347. Full or partial performance or other satisfaction of the contractual duty of a promisor to an obligee or other discharge of that promisor by an obligee shall, unless the discharged promisor is a surety, discharge the duty to the obligee of each other promisor of the same performance to the extent of the amount or value received by the obligee from the promisor who rendered the duty.

### **Promises to several obligees**

348. Unless a contrary intention is manifested or the interests of the obligees in the performance or in the remedies for breach are distinct, the rights of obligees of the same performance are joint.

### **Joinder of joint obligees**

349. All surviving joint obligees must be joined to recover against the promisor of the same performance.

350. Unless limited by agreement, any joint obligee may sue in the name of all joint obligees for the enforcement of the same promise by a money judgment.

**Comment [JEH109]:** The relation of this Section to the previous Section 131 is not clear.

### **Discharge by one joint obligee**

351. Unless limited by agreement, any joint obligee of the same performance has power to discharge the promisor by receipt of the promised performance, by release, or otherwise.

352. Tender of performance to one joint obligee constitutes tender to all.

353. A discharge of the promisor by an obligee in violation of his duty to a co-obligee of the same performance is voidable to the extent necessary to protect the co-obligee's interest in the performance, except to the extent that the promisor has given value or otherwise changed his position in good faith and without knowledge or reason to know of the violation.

## **CHAPTER 8** **BENEFICIARIES**

### **Intended and incidental beneficiaries**

354. Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right in the beneficiary to performance is appropriate to effectuate the intention of the parties and either:

- (c) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or

(d) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.

355. An incidental beneficiary is a person who will benefit from performance of a promise but is neither a promisee nor an intended beneficiary. An incidental beneficiary acquires no right against the promisor or promisee by virtue of the promise.

### **Conditional and unconditional promises**

356. This Chapter applies to both conditional and unconditional promises.

### **Creation of a duty to beneficiary**

357. A promise in a contract imposes a duty on the promisor to any intended beneficiary to perform the promise and the intended beneficiary may enforce the duty.

### **Overlapping duties to beneficiary and promisee**

358. A promise in a contract imposes a duty on the promisor to the promisee to perform the promise even though the promisor also has a similar duty to an intended beneficiary.

359. Whole or partial satisfaction of the promisor's duty to the beneficiary satisfies the promisor's duty to the promisee to extent of that satisfaction.

### **Rejection by a beneficiary**

360. A beneficiary who has not previously assented to the promise for his benefit may, in a reasonable time after learning of its existence and terms, render any duty to himself void from the beginning by a manifestation of rejection.

### **Specific performance**

361. Where specific performance is otherwise an appropriate remedy, either the promisee or the intended beneficiary may maintain a suit for specific enforcement of a duty owed to the beneficiary.

### **Identification of beneficiaries**

362. In order to have an enforceable right, an intended beneficiary need not be identified at the time a contract containing the promise is made.

### **Remedies of beneficiary and promisee's right to reimbursement**

363. When an intended beneficiary has an enforceable claim against a promisee, he may obtain a judgment or judgments against the promisee, the promisor, or both based on their respective duties to him. Satisfaction in whole or in part of either of these duties or of a judgment thereon satisfies to that extent the other duty or judgment, subject to the promisee's right of subrogation.

364. To the extent that the claim of an intended beneficiary is satisfied from the assets of a promisee, the promisee has a right of reimbursement from the promisor, which may be enforced directly and also, if the beneficiary's claim is fully satisfied, by subrogation to the claim of the beneficiary against the promisor, to any judgment thereon, and to any security therefor.

### **Change in a duty to a beneficiary**

365. By conduct of the promisee or subsequent agreement with the promisor, the promisor and promisee retain power to discharge or modify a duty to an intended beneficiary absent a contrary term of the promise creating the duty.

366. When the beneficiary, before he receives notice of a discharge or modification pursuant to Section 148, materially changes his position in justifiable reliance on the promise creating the duty to him, brings suit on it, or manifests assent to it at the request of the promisor or promisee, such a power terminates.

367. If a promisee receives consideration for an attempted discharge or modification of his promisor's duty to a beneficiary which is ineffective against the beneficiary, the beneficiary can assert a right to the consideration received. In that case the promisor's duty is discharged to the extent of the amount received by the beneficiary.

## **CHAPTER 9** **ASSIGNMENT AND DELEGATION**

### **Assignment of a right**

368. An assignment of a right is a manifestation of the assignor's intention that his right to performance by the promisor be extinguished in whole or in part and the assignee acquire the right to such performance.

**369.** A contractual right may be assigned unless:

- (d) a.the substitution of the right of the assignee for the right of the assignor would materially change the duty of the promisor under or increase the burden or risk imposed on him by his contract or materially impair the promisor's chance of obtaining or reduce the value to the promisor of the return performance;
- (e) b.the assignment is forbidden by other laws of the Kingdom of Bhutan or is unenforceable on grounds of public policy; or
- (f) c.a provision of the contract precludes the assignment.

### **Assignment of conditional rights**

**370.** The fact that a right is conditional does not prevent its assignment before the condition occurs.

### **Assignment of future rights**

**371.** Except as otherwise provided under other laws of the Kingdom of Bhutan, an assignment of a right to payment expected to arise out of an existing employment or other continuing business relationship is effective as though it were the assignment of an existing right.

### **Delegation of performance**

**372.** A person may delegate to another the performance of his duty or of a condition unless the delegation is contrary to public policy or the terms of his promise.

**373.** Unless otherwise agreed, a promise requires performance by a particular person only to the extent that the promisee has a substantial interest in that person performing or controlling the acts promised.

**374.** Unless the promisee agrees otherwise, neither delegation of performance nor a contract to assume the duty of performance made between the promisor and the person delegated discharges any duty of the promisor.

### **Contractual prohibition of assignment**

**375.** Unless the circumstances indicate the contrary, a contract term prohibiting assignment of a contract bars only the delegation to an assignee of responsibility for the performance by the assignor of a duty or condition owed to the contract obligee.

**Comment [JEH110]:** This provision should be included as one of the subsections in the next section, 158.

376. Unless a different intention is manifested or circumstances indicate the contrary, a contract term prohibiting assignment of rights under the contract:

- (d) does not forbid assignment of a right to damages for breach nor a right arising out of the assignor's completed performance of his entire obligation;
- (e) gives the promisor a right to damages for breach of the term forbidding assignment but does not render the assignment ineffective;
- (f) is for the benefit of the promisor and does not prevent (i) the assignee from acquiring rights against the assignor nor (ii) the promisor from discharging his duty as if there were no such prohibition.

**Comment [JEH111]:** Sections 157 and 158 should be tested against prohibitions in leases, and other typical non-assignments situations. I assume that a provisions that does not allow any assignment without the written consent of the obligee expresses a "different intention" and would not be over-ridden by these provisions.

### Assent to assignment or delegation

377. A term of a contract manifesting a promisor's assent to the future assignment of a right or a promisee's assent to the future delegation of the performance of a duty or condition is effective despite any subsequent objection.

378. A manifestation of such assent after the formation of a contract is similarly effective if made for consideration, if made in circumstances in which a promise would be binding without consideration, or if a material change of position takes place in reliance on the manifestation.

## CHAPTER 10 CONTRACTUAL REMEDIES

### Contractual Remedies

379. Contractual remedies serve to protect one or more of the following interests of a promisee:

- (d) **Expectation interest**, which is his interest in obtaining the benefit of his contract by being put in as good a position as he would have been in had the contract been performed;
- (e) **Reliance interest**, which is his interest in being reimbursed for losses caused by reliance on the contract by being put in as good a position as he would have been in had the contract not been made; or
- (f) **Restitution interest**, which is his interest in having restored to him any benefit that he has conferred on the promisor.

## **CHAPTER 11** **DAMAGES**

### **Actual Damages**

- 380.** The injured party has a right to damages as compensation for loss from any breach by a party against whom the contract is enforceable unless the claim for damages has been suspended or discharged.
- 381.** A party's duty to pay damages for breach by repudiation is discharged if it appears after the breach that:
- (c) there would have been a total failure by the injured party to perform his return promise;  
or
  - (d) the duty that he repudiated would have been discharged by impracticality or frustration before any breach by non-performance.

### **Nominal Damages**

- 382.** If the breach caused no loss or if the amounts of the elements of the loss are not proved pursuant to the rules of this Chapter, a small sum fixed without regard to the amount of the loss will be awarded as nominal damages.

### **Damages based on expectation interest**

- 383.** Subject to the limitations of Sections 171-76 the injured party has a right to damages based on his expectation interest equal to:
- (d) the loss in the value to him of the other party's performance caused by its failure or deficiency; plus
  - (e) any other loss, including incidental or consequential loss, caused by the breach; less;
  - (f) any cost or other loss that he has avoided by not having to perform.

### **Alternatives to loss in value of performance**

**384.** If a breach delays the use of property and the loss in value to the injured party is not proved with reasonable certainty, he may recover damages based on the rental value of the property or on interest on the value of the property.

**385.** If a breach results in defective or unfinished construction and the loss in value to the injured party is not proved with reasonable certainty, he may recover damages based on:

(c) the diminution in the market price of the property caused by the breach; or

(d) the reasonable cost of completing performance or of remedying the defects if that cost is not clearly disproportionate to the probable loss in value to him.

**386.** If a breach is of a promise conditioned on a fortuitous event and it is uncertain whether the event would have occurred had there been no breach, the injured party may recover damages based on the value of the conditional right at the time of breach.

### **Damages based on reliance interest**

**387.** As an alternative to the measure of damages stated in Section 166 the injured party has a right to damages based on his reliance interest, including expenditures made in preparation for performance or in performance less any loss that the party in breach can prove with reasonable certainty the injured party would have suffered had the contract been performed.

**Comment [JEH112]:** Should the reference to Section 166 also include Section 167 as well?

### **Avoidability limiting damages**

**388.** Damages are not recoverable for a loss that the injured party could have avoided without undue risk, burden, or humiliation except to the extent that he has made reasonable but unsuccessful efforts to avoid the loss.

### **Unforeseeability limiting damages**

**389.** Damages are not recoverable for any loss that the promisor, at the time the contract was made, did not have reason to foresee would probably result from such a breach.

**390.** Loss may be foreseeable as a probable result of a breach because it would follow from the breach:

(c) in the ordinary course of events; or

(d) as a result of special circumstances that the party in breach had reason to know.

391. A court may limit damages for foreseeable loss by excluding recovery for loss of profits, by allowing recovery only for loss incurred in reliance, or otherwise if it concludes that in the circumstances justice so requires to avoid disproportionate compensation.

### **Uncertainty limiting damages**

392. Damages are not recoverable for elements of loss beyond amounts that the evidence establishes with reasonable certainty.

### **Loss due to emotional disturbance**

393. Recovery for emotional disturbance is excluded unless the breach also caused bodily harm or the contract or the breach was of such a kind that serious emotional disturbance was a particularly likely result.

### **Interest**

394. If the breach consists of a failure to pay a definite sum of money or to render a performance with fixed or ascertainable monetary value, interest is recoverable, from the time when performance was due, on the amount due less all deductions to which the party in breach is entitled.

395. In any other case such interest may be allowed as justice requires on the amount that would have been just compensation had it been paid when performance was due.

### **Punitive Damages**

396. Except as may be otherwise provided by other laws of the Kingdom of Bhutan, punitive damages are not recoverable for a breach of contract unless the conduct constituting the breach is also a tort for which punitive damages are recoverable.

### **Liquidated Damages**

397. Damages for breach may be liquidated in the contract but only in an amount that is reasonable in relation to the anticipated or actual loss caused by the breach and the difficulties of proof of the loss.

**CHAPTER 12**  
**SPECIFIC PERFORMANCE AND INJUNCTION**

**Availability**

398. Subject to the rules of this Chapter, against a party who has committed or is threatening to commit a breach of a contract duty, specific performance of the duty may be granted in the discretion of the court or an injunction against a breach of the duty may be granted in the discretion of the court if the duty is one (a) of forbearance or (b) to act and specific performance would be denied only for reasons that are inapplicable to an injunction.

**Nature of Relief**

399. An order of specific performance or an injunction is to be so drawn as best to effectuate the purposes for which the contract was made and on such terms as justice requires. The performance that it requires need not be identical with that due under the contract, and it may be directed at the injured party as well as at the party in breach.

400. If specific performance or an injunction is denied as to part of the performance that is due, it may nevertheless be granted as to the remainder.

401. In addition to specific performance or an injunction, damages and other relief may be awarded in the same proceeding and an indemnity against future harm may be required.

**Adequacy of damages or existence of another remedy**

402. Specific performance or an injunction will not be granted if damages would be adequate to protect the expectation interest of the injured party. The following should be considered in determining the adequacy of damages:

(d) the difficulty of proving the damages with reasonable certainty;

(e) the difficulty of procuring a suitable substitute performance with money awarded as damages; and

(f) the likelihood that an award of damages could not be collected.

403. Specific performance or an injunction may be granted even though the contract provides for liquidated damages.

404. Specific performance or an injunction may be granted even though there is a remedy for breach in addition to damages.

**Comment [JEH113]:** The (b) portion of the language of this Section is a bit confusing. I assume it means that a court can grant specific performance and should not refuse such grant on grounds that would be cause for denial of an injunction. I understand the problem. But for instance, an injunction might be denied for a number of reasons that would be equally applicable to specific performance. In light of the guidelines set forth in the following Sections, I wonder if "(b)" might read: "to act on grounds not inconsistent with other provisions of this Act."

### **Uncertainty of terms of contract**

405. Specific performance or an injunction will not be granted unless the terms of the contract are sufficiently certain to provide a basis for an appropriate order.

### **Return duty unperformed**

406. Specific performance or an injunction may be denied if a substantial part of the agreed exchange for the performance to be compelled is unperformed and its performance is not secured to the satisfaction of the court.

### **Unfairness**

407. Specific performance or an injunction may be refused if such relief would be unfair because:

(d) the contract was induced by mistake or unfair practices;

(e) the relief would cause unreasonable hardship or loss to the party in breach or to third persons; or

(f) the exchange is grossly inadequate or the terms of the contract are otherwise unfair.

408. Specific performance or an injunction may be granted in spite of an unfair term of the contract if denial of such relief would cause unreasonable hardship or loss to the party seeking relief or to third persons.

### **Contrary to public policy**

409. Specific performance or an injunction will not be granted if the act or forbearance that would be compelled or the use of compulsion is contrary to public policy.

### **Difficulty in enforcement**

410. Performance of a contract duty will not be specifically enforced if the character and magnitude of the performance would impose on the court burdens in enforcement or supervision disproportionate to the advantages to be gained from enforcement and to the harm to be suffered from its denial.

### **Personal service**

411. A promise to render personal service will not be specifically enforced.
412. A promise to render personal service exclusively for one employer will not be enforced by injunction against serving another if the probable result will be to compel a performance involving personal relations the enforced continuance of which is undesirable or will be to leave the employee without other reasonable means of making a living.

### **Power of termination**

413. Specific performance or an injunction will not be granted against a party who can substantially nullify the effect of the order by exercising a power of termination or avoidance.
414. Specific performance or an injunction may be granted even though the party seeking relief has a power to terminate or avoid his return performance unless the power could be used, in spite of the order, to deprive the other party of reasonable security for the return performance.

### **Breach by party seeking relief**

415. Specific performance or an injunction may be granted in spite of a breach by the party seeking relief unless the breach is serious enough to discharge the other party's remaining duties of performance.

## **CHAPTER 13** **RESTITUTION**

### **Benefit must be conferred**

416. A party is entitled to restitution only to the extent that he has conferred a benefit on the other party by part performance, reliance or quasi contract.

### **Measure of benefit**

417. If a sum of money is awarded to protect a party's restitution interest, it may, as justice requires, be measured by either:

- (c) the reasonable value to the other party of what he received in terms of what it would have cost him to obtain it from another person in the claimant's position; or
- (d) the extent to which the other party's property has been increased in value or his other interests advanced.

### **Specific restitution**

418. Specific restitution will be granted to a party who is entitled to restitution except that it:

- (c) may be refused if it would unduly interfere with the certainty of title to land or otherwise cause injustice; and
- (d) will not be granted in favour of a party in breach.

419. A decree of specific restitution may be made conditional on return of or compensation for anything that the party seeking restitution has received.

### **Restitution against party in breach**

420. On a breach by non-performance that gives rise to a claim for damages or on a repudiation, the injured party is entitled to restitution for any benefit he has conferred on the other party by part performance or reliance unless he has performed all of his duties under the contract and no performance by the party in breach remains due other than payment of a definite sum of money.

### **Restitution in favor of party in breach**

421. If a party justifiably refuses to perform on the ground that his remaining duties of performance have been discharged by the other party's breach, the party in breach is entitled to restitution for any benefit that he has conferred by part performance or reliance in excess of the loss that he has caused by his breach.

### **Restitution when contract not in writing**

422. A party who would otherwise have a claim for restitution under an unwritten contract is not barred from restitution because the contract is unenforceable by him pursuant to Section 32.

### **Restitution under avoided contract**

423. A party who has avoided a contract on the ground of lack of capacity, mistake, misrepresentation, duress, undue influence, or abuse of a fiduciary relationship is entitled to restitution for any benefit he has conferred on the other party by part performance or reliance.

**Party seeking restitution must return benefit**

424. Except as stated in Section 208, a party will not be granted restitution unless:

- (c) he returns or offers to return, conditional on restitution, any interest in property that he has received under the contract in substantially as good condition as when it was received by him; or
- (d) the court can assure such return in connection with the relief granted.

425. The requirement of Section 206 does not apply to property:

- (d) that was worthless when received, has been destroyed or lost by the other party, or rendered worthless as a result of its own defects;
- (e) that either could not from the time of receipt have been returned or has been used or disposed off without knowledge that there would be grounds for restitution if justice requires that compensation be accepted in its place and payment of such compensation can be assured; or
- (f) as to which the contract apportions the price if that part of the price is not included in the claim.

**Restitution by party whose duty is excused**

426. A party whose duty of performance does not arise or is discharged by impracticality of performance, frustration of purpose, non-occurrence of a condition, or rejection by a beneficiary is entitled to restitution for any benefit he has conferred on the other party by part performance or reliance.

**CHAPTER 14**  
**ELECTION OF REMEDIES**

**Election as a bar**

427. If a party has more than one remedy under this Act, his manifestation of a choice of one of them by bringing suit or otherwise is not a bar to pursuing another remedy unless the remedies are inconsistent or the other party has materially changed his position in reliance on the manifestation.

**Comment [JEH114]:** Does this prevent the pleading inconsistent remedies in Court? Hopefully not, as the facts may not be clear at the outset as to which remedy is best.

### **Election to treat duties under aleatory contracts as discharged**

428. If a right or duty of the injured party is conditional on an event that is fortuitous or is supposed by the parties to be fortuitous, he cannot treat his remaining duties to render performance as discharged on the ground of the other party's breach by non-performance if he does not manifest to the other party his intention to do so before any adverse change in the situation of the injured party resulting from the occurrence of that event or a material change in the probability of its occurrence.

### **Exercise of power of avoidance**

429. A person may exercise a power of avoidance of a contract by:

- (d) a manifestation of avoidance communicated to the other party;
- (e) recovery of all or a substantial part of what he would be entitled to by restitution on avoidance; or
- (f) a final judgement of or based on avoidance.

### **Loss of power of avoidance by affirmance**

430. The power of a party to avoid a contract for incapacity, duress, undue influence, or abuse of a fiduciary relation is lost if, after the circumstances that made the contract voidable have ceased to exist, he manifests to the other party his intention to affirm it or acts with respect to anything that he has received in a manner inconsistent with disaffirmance.

431. The power of a party to avoid a contract for mistake or misrepresentation is lost if after he knows or has reason to know of the mistake or of the misrepresentation if it is non-fraudulent or knows of the misrepresentation if it is fraudulent, he manifests to the other party his intention to affirm it or acts with respect to anything he has received in a manner inconsistent with disaffirmance.

### **Loss of power of avoidance by delay**

432. The power of a party to avoid a contract for incapacity, duress, undue influence, or abuse of a fiduciary relation is lost if, after the circumstances that made it voidable have ceased to

exist, he does not within a reasonable time manifest to the other party his intention to avoid it.

433. The power of a party to avoid a contract for misrepresentation or mistake is lost if after he knows of a fraudulent misrepresentation or knows or has reason to know of a non-fraudulent misrepresentation or mistake, he does not within a reasonable time manifest to the other party his intention to avoid it. The power to avoid a contract for non-fraudulent misrepresentation or mistake is also lost if the contract has been so far performed or the circumstances have otherwise so changed that avoidance would be inequitable and damages will be adequate compensation.

### **Loss of power to affirm by prior avoidance**

434. If a party has effectively exercised his power of avoidance, a subsequent manifestation of intent to affirm is invalid unless the other party manifests his assent to affirmance.

## **CHAPTER 15** **DEFINITIONS**

435. In this Act:

- (w) **Agent** is a person empowered by another, the principal, to represent the principal in dealings with others.
- (x) **Alteration** is addition, deletion, substitution or insertion of something in a blank space.
- (y) **Bailment** is the temporary taking of possession of something by a bailee from a bailor for a purpose pursuant to a contract or legal obligation.
- (z) **Beneficiary** is a person other than the promisee who will benefit from performance of a promise.
- (aa) **Contract** is one or more promises for:
- iii. the breach of which the law gives a remedy; or
  - iv. the performance of which the law recognizes a duty.

Promises not satisfying (i) or (ii) above do not give rise to a contract and are void of legal effect.

**Comment [JEH115]:** American Restatement of Contracts, section 1.

- (bb) **Forfeiture** is a denial of compensation resulting when an obligee loses his right to an agreed exchange after he has substantially relied on the expectation of that exchange by preparation or performance.
- (cc) **Manifestation** may be made wholly or partly by written or spoken words, by other acts, or by failure to act.
- i. The conduct of a party is effective as a manifestation of an offer, promise, assent or rejection if he intends to engage in the conduct and knows or has reason to know that the other party may thereby infer that he offers, promises, assents or rejects.
  - ii. A party may apparently manifest assent even though he does not in fact assent, in which case a resulting contract may be voidable because of fraud, duress, mistake, or other invalidating cause.
- (dd) **Mistake** is a belief that is not in accord with reality.
- (ee) **Novation** is substituted contract that includes as a party one who was neither the obligor nor the obligee of the original duty.
- (ff) **Obligee** is a person to whom a duty is owed.
- (gg) **Obligor** is a person owing a duty.
- (hh) **Offer** is a manifestation of a willingness to enter into an exchange of promises, an exchange of a promise for a performance, or an exchange of performances and is so made as to justify another person in understanding that his assent to that exchange is invited and is intended to conclude a contract therefor.
- (ii) **Principal** is the person empowering an agent to represent him in dealings with others.
- (jj) **Promise** is a manifestation of intention to act or refrain from acting in a specified way which is so made as to justify a promisee in understanding that a commitment has been made.
- (kk) **Promisee** is that person to whom a promise is made.
- (ll) **Promisor** is the person making a promise.
- (mm) **Release** is a writing signed by the obligee providing that a duty owed to him is discharged immediately or on the occurrence of a condition.
- (nn) **Rescission** is an agreement under which each party discharges all of the other party's remaining duties of performance under an existing contract.
- (oo) **Surety** or **Guarantor** is one who promises an obligee to perform the duty of the obligor if the obligor defaults.

(pp) **Unenforceable contract** is a contract for the breach of which neither the remedy of damages nor of specific performance is available but which may be recognized in some other way as creating a duty of performance.

(qq) **Voidable contract** is a contract where one or more parties have the power by an election to do so to avoid the legal relations created by the contract or by affirmation to extinguish that power of avoidance.

## **Comments by Stephen H. Mackenzie**

### **Short Title, Commencement and Extent**

436. This Act shall:

- (a) be called the Contract Act for the Kingdom of Bhutan, 200...;
- (b) come into force on the .... Day, of .... Month of .... Year corresponding to the .... Day of the .... Month of 2004; and
- (c) Extend to the whole of the Kingdom of Bhutan.

### **Application**

437. This Act applies to all commercial transactions in the Kingdom of Bhutan except for those transactions subject to the Commercial Sale of Goods Act 2001, or to the Moveable and Immovable Property Act 1999.

### **Repeal**

438. Except as provided in Section 2 above, this Act prevails over all provisions of existing laws and regulations, including the Thrimzhung Chenmo of the Kingdom of Bhutan, which are inconsistent with this Act.

### **Rule of Construction**

439. In this Act, words of the masculine gender include the feminine and the neuter, and words of the neuter gender include the masculine and feminine.

## **CHAPTER 1** **RULES FOR FORMATION OF A CONTRACT**

### **Normal Contracts**

440. A contract is formed normally in accordance with the provisions laid down in this Chapter, when an offer by one party is followed by an acceptance by the other party which

together constitute (a) a manifestation of mutual assent to an exchange of promises, an exchange of a promise for a performance, or an exchange of performances for (b) a consideration.

### **Special Contracts**

441. A contract is formed specially in accordance with the provisions of Chapter 2 or in accordance with other laws of the Kingdom of Bhutan for types of contracts not covered in this Act.

### **Parties and Capacity**

442. A contract must have at least two identifiable parties i.e. a promisor and a promisee.

443. A natural person has full legal capacity to incur contractual duties unless he has only the capacity to incur voidable contractual duties because he is:

- (i) Under a guardianship;
- (j) a minor;
- (k) mentally ill or defective; or
- (l) intoxicated

### **Offer**

444. Even though a manifestation is intended to be understood as an offer, its acceptance does not form a contract, unless, the terms of the putative contract provide a basis for determining the existence of a breach and for giving an appropriate remedy.

### **Acceptance**

445. An offer gives the offeree a continuing power to accept until termination of the power by:

- (k) rejection or counteroffer by the offeree;
- (l) lapse of time specified in the offer or if no time is specified, on expiration of a reasonable time;
- (m) revocation by the offeror received by the offeree before acceptance has been effected;
- (n) non-occurrence of any condition for acceptance under the terms of the offer; or
- (o) death of or loss of legal capacity by either the offeror or offeree

(p) **any incident or event beyond either of the parties control which makes completion of the contract impossible**

446. Unless otherwise indicated by the language or the circumstances, an offer invites acceptance in any manner and by a medium used by the offeror or one customary in similar transactions at the time and place the offer was received.

447. An offer may:

(e) require acceptance by an affirmative answer in words or by performance or non-performance of an act; or

(f) empower the offeree to accept by (i) promising performance or non-performance, (ii) performance, or (iii) non-performance of an act.

448. When an offeree fails to reply to an offer, his silence and inaction **may** constitute acceptance when:

(g) with reasonable opportunity to reject offered services and reason to know that they were offered with the expectation of compensation, he takes the benefit of the offered services;  
**or**

(h) the offeror has stated or given the offeree reason to believe that assent may be manifested by silence or inaction and the offeree in remaining silent and inactive intends to accept the offer, **and gains the intended benefit therefrom**; or

(i) because of previous dealings or otherwise, it is reasonable that the offeree notify the offeror if he does not intend to accept.

449. An offeree who does any act inconsistent with the offeror's ownership of offered property is bound in accordance with the offered terms unless they are manifestly unreasonable, provided, however, that if such act is wrongful against the offeror, it constitutes acceptance only if ratified by the offeror.

450. Acceptance given by telephone or other medium of substantially instantaneous two-way communication is governed by the principles applicable to acceptance where the parties are in the presence of each other.

451. An acceptance is effective as soon as it is put out of the offeree's possession while the offeree's power of acceptance is still valid:

(e) whether or not it ever reaches the offeror, if made in a manner and by a medium (i) invited by the offer or (ii) if no medium was specified, used by the offeror, or one customary in similar transactions at the time and place the offer was received, if it has

been properly addressed, and if such other precautions have been taken as are ordinarily observed to insure safe transmission of similar messages; or

- (f) if received by the offeror by the time a properly dispatched acceptance would normally have arrived.

### **Consideration**

**452.** Except as provided in Section 20 or 21 a performance or promise of performance constitutes consideration if it is sought by the offeror in exchange for his promise and is given by the offeree in exchange for that promise.

**453.** A performance constituting consideration may consist of:

- (g) an act other than a promise;
- (h) a forbearance; or
- (i) the creation, modification, or destruction of a legal relationship.

**454.** The consideration may be given:

- (e) to the offeror or some other person; or
- (f) by the offeree or some other person.

**455.** A performance is not consideration if it is the forbearance to assert or the surrender of a claim or defense unless:

- (g) the claim or defense is reasonably arguably valid;
- (h) the forbearing or surrendering party honestly believes that the claim or defense may be fairly determined to be valid; or
- (i) a written instrument of forbearance or surrender is executed by one without a duty to execute it.

**456.** A promise of performance is not consideration if:

- (g) it is conditional and the promisor knew when he made the promise that the condition could not occur;
- (h) it is conditional on a performance by the promisor unless he also promises the occurrence of the condition; or

- (i) the promisor reserves to himself a choice of alternative performances unless:
  - v. each of the alternatives would have been consideration if it alone was sought by the offeror in exchange for his promise and is given by the offeree in exchange for that promise; or
  - vi. one of the alternatives would have been consideration and there is or appears to the parties to be a substantial possibility that before the offeree exercises his choice events may eliminate the alternatives which would not have been consideration.

**457.** A promise which the law renders voidable or unenforceable may **not** constitute consideration.

**458.** If consideration exists, there is no additional requirement of:

- (g) a gain, advantage or benefit to the promisor nor a loss, disadvantage or detriment to the promisee;
- (h) equivalence in the values exchanged; or
- (i) mutuality of obligation.

## **CHAPTER 2** **SPECIAL TYPES OF CONTRACTS**

### **Payment of existing indebtedness**

**459.** Unless other facts indicate a different indication, any of the following actions by the debtor constitutes a promise to pay all or part of an antecedent contractual or quasi-contractual indebtedness and such promise is binding if the indebtedness is still enforceable or would be enforceable except for the effect of a statute of limitation and if the debtor knew or had reason to know the essential facts of the transaction creating the prior indebtedness:

- (g) A voluntary acknowledgement to the current obligee admitting the present existence of the antecedent indebtedness;
- (h) A voluntary transfer of money, negotiable instrument, or other thing to the current obligee as interest on, part payment of, or collateral security for the antecedent indebtedness; or
- (i) A statement to the current obligee that the statute of limitations will not be pleaded as a defense.

### **Payment of indebtedness discharged in bankruptcy**

460. An express promise to pay all or part of an indebtedness of the promisor discharged or dischargeable in bankruptcy proceedings begun before the promise is made is binding.

### **Restitution for benefit received**

461. A promise to make restitution for a benefit previously received by the promisor from the promisee is binding to the extent necessary to prevent injustice.

### **Modification**

462. Unless otherwise provided in the contract, an executory contract may be modified:

- (e) if the contract is in writing, by oral agreement of the parties if supported by new consideration or by written agreement of the parties;
- (f) if the contract is unwritten, by oral or written agreement of the parties.
- (g) **I suggest something along the lines of the ‘statute of frauds’ be established which requires all contracts or modifications over a certain amount (\$10,000 in the US) be in writing**

### **Promise reasonably inducing action or forbearance**

463. A promise which the promisor should reasonably expect to induce action or forbearance by the promisee or a third person and which does induce such action or forbearance or is for a charitable subscription or marriage settlement is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

### **Judicial Stipulation**

464. A promise or agreement with reference to a judicial proceeding made by a party to the proceeding or his attorney is binding without consideration, provided that it complies with other applicable laws or rules of court of the Kingdom of Bhutan, **or traditional custom, tradition or values.**

### **Created by Writing**

**465.** A promise is binding without consideration if the promise or some memorandum or note thereof is in one or more writings made at any time to which both promisor and promisee manifest assent and which writings:

- (o) name the promisor and promisee or so describe them that they are capable of identification;
- (p) clearly indicate that the writings relate to the same transaction;
- (q) state with reasonable certainty the essential terms of the unperformed promises
- (r) are sufficient to indicate that a contract with respect to the transaction has been made between the parties or offered by the signer and delivered to the other party;
- (s) if evidencing a contract upon consideration of marriage are made as a memorandum of the contract;
- (t) are signed, with any symbol made or adopted with an intention, actual or apparent, to authenticate the writing as that of the maker or adopter of the symbol, at any time by the party to be charged or his authorized agent; and
- (u) comply with the Rules on Use of Judicial Stamps in Bhutan as amended; and be attested by two disinterested witnesses.

**466.** “Writing” and “signed” as used in this Act include data messages which meet the requirements of the Bhutan Information, Communications and Media Act, 2006.

### **Writing required**

**467.** Except as provided in Section 28, contracts of the following types may not be enforced, by an action, setoff, counterclaim, or defense, unless they or some memorandum or note thereof are in one or more writings which meet the requirements of Section 30:

- (m) a promise to the obligee by the executor or administrator of a decedent to answer personally for a duty of his decedent if a similar contract to answer for the duty of a living person would be governed by (b).
- (n) a promise to the obligee by the surety for the obligor to answer for an existing duty of the obligor if the obligee knows or has reason to know of the suretyship unless:

- i. the consideration for the promise mainly benefits the surety rather than the obligor except when the consideration is merely a premium for insurance;
  - ii. the promises to the obligee by the obligor and the surety are in terms joint and do not create several duties or joint and several duties;
  - iii. by the terms of the promise when it is made performance can involve only (A) application of funds or property held by the surety for that purpose; (B) performance another duty owed, by the surety to the obligee; (C) performance of a duty owed by the surety to the obligor or which the obligee reasonably believes to be so owed; or (D) a novation is accepted by the obligee in satisfaction of the obligor's duty.
- (o) a promise to sign a contract as a surety for the performance of a duty owed the promisee or to sign a negotiable instrument for the accommodation of someone other than the promisee;
- (p) made upon consideration of marriage except if it consists only of mutual promises to marry.
- (q) to transfer from anyone or to buy for anyone any right, privilege, power, or immunity, or combination thereof, which is an interest in land under the law of property and is not defined as "goods" under the Commercial Sale of Goods Act except:
- i. for leases and contracts for a term of less than a year; and
  - ii. that such a contract may be specifically enforced even if not in writing if it is established that the party seeking enforcement has, in reasonable reliance on the contract before repudiation by the party against whom enforcement is sought, so changed his position that injustice can be avoided only by specific enforcement
- (r) not to be performed within a year from the making except that after one party to the contract has completed his performance, the promises of other parties may be enforced.

### **Surety or Guarantee**

**468.** Under a surety contract:

- (g) The liability of the surety is the same as that of the obligor unless otherwise provided in the contract. The surety is discharged:
  - i. by any discharge of the obligor;

- ii. by a modification in the duty of the obligor made between the obligee and the obligor without the surety's consent, **unless otherwise agreed upon**;
  - iii. if the obligor acts or fails to act in a way which is inconsistent with his duty to the surety and the surety's remedy against the obligor is thereby impaired; or
  - iv. to the extent of the value of securities against the obligor, that the obligee held at the time the contract of surety was entered into, that the obligee has lost or disposed of without the consent of the surety.
- (h) Forbearance by the obligee to invoke a remedy against the obligor does not discharge the surety if the forbearance is not pursuant to an agreement with the obligor nor in contravention of any term of the contract of surety.
- (i) If two or more parties have each promised a third party the same performance under the same or different contracts, each promisor is a surety for the others and the liability of the promisors to the third party is not affected by any agreement among themselves purporting to fix their individual liabilities to the third party. Each promisor is liable as among themselves to pay an equal share of the undischarged duty of each in case of default by one of them unless the promisors have agreed among themselves that the maximum liability of each to the third party shall be in different amounts, in which case each is liable as among themselves to pay an equal share up to but not exceeding his maximum amount. Release of one of the promisors by the third party discharges the others to the extent of any value received by the third party for the release.

### **Indemnity**

- 469.** Under a contract of indemnity, the promisor promises to indemnify the promisee for loss caused by the conduct of the promisor or a third person.
- 470.** When an obligor asks a party to be surety for his duty, he manifests a promise that he will indemnify the surety if the surety answers to the obligee for the obligor's duty. The surety may enforce the resulting contract of indemnity against the obligor.

### **Voidable for mistake**

- 471.** When a mistake of both parties as to a basic assumption on which a contract was made has, taking into account the availability of relief by restitution or otherwise, a material effect on the agreed exchange of performances, the contract is voidable by an adversely affected party if he does not bear the risk of the mistake pursuant to Section 38.

**472.** When a mistake of one party as to a basic assumption on which he agreed to the contract has a material effect on the agreed exchange of performances that is adverse to him, the contract is voidable by him if he does not bear the risk of the mistake pursuant to Section 38 and if (a) the effect of the mistake is such that enforcement of the contract would be unconscionable or (b) the other party had reason to know of the mistake or his fault caused the mistake.

**473.** A party bears the risk of a mistake if:

(e) the risk of the mistake was allocated to him by the contract or is so allocated by a court on the ground that it is reasonable to do so; or

(f) he was aware that he had only limited knowledge with respect to the facts but treated it as sufficient.

**474.** When a writing that evidences or embodies an agreement in whole or in part fails to express the agreement because of a mistake of both parties as to the contents or effect of the writing, a court may at the request of a party reform the writing to express the agreement except to the extent that rights of third parties, such as good faith purchasers for value, will be unfairly affected. Such reformation is not precluded by the fact that the contract is governed by Section 32.

**475.** A mistaken party's fault in failing to know or discover the facts before making the contract does not bar him from avoidance or reformation unless his fault amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing.

### **Void or voidable for misrepresentation**

**476.** A misrepresentation by a person is:

(g) an assertion not in accord with the facts;

(h) an action likely to prevent another from learning of a fact; or

(i) non-disclosure of a fact known to him.

**477.** A misrepresentation is fraudulent if the maker intends it to induce a party to manifest his assent.

**478.** A misrepresentation is material if likely to induce a reasonable person or the recipient to manifest his assent.

**479.** If a misrepresentation as to the very character or essential terms of a proposed contract induces conduct that appears to be a manifestation of assent by one who neither knows nor

has reasonable opportunity to know of the very character or essential terms of the proposed contract, his conduct is not effective as a manifestation of assent, and there is, therefore, no contract.

**480.** If a party's manifestation of assent is induced by either a fraudulent or material misrepresentation:

- (e) by the other party upon which the recipient is justified in relying, the contract is voidable by the recipient except as provided in Section 46; or
- (f) by one who is not a party to the transaction upon which the recipient is justified in relying, except as provided in Section 46, the contract is voidable by the recipient unless the other party to the transaction in good faith and without reason to know of the misrepresentation either gives value or relies materially on the transaction.

**481.** If a contract is voidable because of a misrepresentation and, before notice is sent of an intention to avoid the contract, the facts come into accord with the misrepresentation, the contract is no longer voidable unless the recipient has been harmed by relying on the misrepresentation.

**482.** If a party's manifestation of assent is induced by the other party's fraudulent misrepresentation as to the contents or effect of a writing evidencing or embodying in whole or in part an agreement, a court at the request of the recipient may, if the recipient was justified in relying on the misrepresentation, reform the writing to express the terms of the agreement as misrepresented except to the extent that rights of third parties, such as good faith purchasers for value, would be unfairly affected.

**483.** An assertion is one of opinion if it expresses only a belief, without certainty, as to the existence of a fact or expresses only a judgement as to quality, value, authenticity or similar matters. If it is reasonable to do so, the recipient of an assertion of a person's opinion as to facts not disclosed and not otherwise known to the recipient may properly interpret it as an assertion:

- (e) that the facts known to the person making the assertion are not incompatible with his opinion; or
- (f) that the person making the assertion knows facts sufficient to justify his opinion.

**484.** To the extent that an assertion is one of opinion only, the recipient is not justified in relying on it unless the recipient:

- (g) stands in such a relation of trust and confidence to the person whose opinion is asserted that the recipient may reasonably rely on it;

- (h) reasonably believes that, as compared with himself, the person whose opinion is asserted has special skill, judgement or objectivity with respect to the subject matter; or
- (i) is for some other special reason particularly susceptible to a misrepresentation of the type involved.

### **Voidable for abuse by fiduciary**

**485.** A contract between a fiduciary and his beneficiary relating to matters within the scope of the fiduciary relation is voidable by the beneficiary unless:

- (e) it is on fair terms; and
- (f) all parties beneficially interested manifest assent with full understanding of their legal rights and of all relevant facts that the fiduciary knows or should know.

### **Void or voidable for duress or undue influence**

**486.** If conduct that appears to be a manifestation of assent by a party is compelled by physical force, **or the threat thereof**, the conduct is not effective as a manifestation of assent and there is, therefore, no contract.

**487.** A threat is improper if:

- (i) what is threatened is a crime or a tort or the threat itself would be a crime or tort if it resulted in obtaining property;
- (j) what is threatened is a criminal prosecution;
- (k) what is threatened is the use of civil process and the threat is made in bad faith; or
- (l) the threat is a breach of the duty of good faith and fair dealing under a contract with the recipient.

**488.** A threat is improper if the resulting exchange is not on fair terms and:

- (g) the threatened act would harm the recipient and would not significantly benefit the party making the threat;
- (h) the effectiveness of the threat in inducing the manifestation of assent is significantly increased by an advantage gained by prior unfair dealing by the party making the threat; or
- (i) what is threatened is otherwise a use of power for illegitimate ends.

**489.** If a party's manifestation of assent is induced by an improper threat by:

- (e) the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim.
- (f) one who is not a party to the transaction, the contract is voidable by the victim unless the other party to the transaction, in good faith and without reason to know of the threat, gives value or relies materially on the transaction.

**490.** Undue influence is unfair persuasion of a party who:

- (e) is under the domination of the person exercising the persuasion; or
- (f) by virtue of the relation with the person exercising the persuasion is justified in assuming that the person will not act in a manner inconsistent with the victim's welfare.

**491.** If a party's manifestation of assent is induced by undue influence by:

- (e) the other party to the transaction, the contract is voidable by the victim.
- (f) one who is not a party to the transaction, the contract is voidable by the victim, unless the other party to the transaction, in good faith and without reason to know of the undue influence, gives value or relies materially on the transaction.

### **Unenforceable on grounds of public policy**

**492.** A promise or other term of an agreement is unenforceable on grounds of public policy if laws of the Kingdom of Bhutan provide that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such promise or other term.

**493.** A public policy against the enforcement of promises or other terms may be derived from:

- (e) other laws of the Kingdom of Bhutan relevant to such a policy; or
- (f) the need to protect some aspect of the public welfare.

**494.** The following are unenforceable:

- (w) a promise unreasonably in restraint of trade. A promise is in restraint of trade if its performance would limit competition in any business or restrict the promisor in the exercise of a gainful occupation.

- (x) a promise unreasonably in restraint of marriage, **or which compels marriage against the will of either party.**
- (y) a promise that would change some essential incident of the marital relationship in a way detrimental to the public interest in the marriage relationship.
- (z) a promise affecting the right of custody of a minor child inconsistent with the best interests of the child.
- (aa) a promise to commit a tort **or crime** or inducing the commission of a tort **or crime.**
- (bb) a promise by a fiduciary to violate his fiduciary duty or a promise inducing such a violation.
- (cc) a promise tortiously interfering with performance of a contract with a third person or a tortiously induced promise to breach a contract.
- (dd) a term exempting a party from tort liability for harm caused intentionally or recklessly.
- (ee) a term exempting a party from tort liability for harm caused negligently if it exempts:
  - vii. an employer from liability to an employee for injury in the course of his employment;
  - viii. one with a duty of public service for compensation from liability for breach of that duty to one to whom that duty is owed; or
  - ix. a seller of a product from liability for physical harm to a user or consumer.
- (ff) a term unreasonably exempting a party from the legal consequences of a misrepresentation.
- (gg) a term in a contract fixing unreasonably large liquidated damages.

**495.** If the promisee has substantially performed, enforcement of a promise is not precluded on grounds of public policy because of some improper use that the promisor intends to make of what he obtains unless the promisee:

- (e) acted for the purpose of furthering the improper use; or
- (f) knew of the use and the use involves grave social harm.

**496.** If less than all of an agreement is unenforceable under Section 57, 58, 59, or 60 and if the performance as to which the agreement is unenforceable is not an essential part of the agreed exchange, a court may enforce the rest of the agreement in favor of a party who obtained the enforceable promise in good faith and in accordance with reasonable standards of fair dealing and did not engage in serious misconduct.

### **Bailments and Pledges**

**497.** Absent agreement to the contrary, the following provisions govern bailments.

(w) Bailments are of the following types:

- i. A bailment for reward is one pursuant to contract where the bailee provides services.
- ii. A gratuitous bailment is one pursuant to contract where the bailee provides no services.
- iii. An involuntary bailment is one imposed by law and not by voluntary agreement of the parties.
- iv. A Pledge is a special bailment for reward as security for payment of a loan, including interest, given by the pledgee (or bailee) to the pledgor (or bailor).

(x) Under a bailment for reward, a bailor has a duty to disclose to the bailee faults which expose the bailee to substantial dangers or materially interfere with his use of the bailed items. Under a gratuitous bailment the bailor's duty is limited to faults of which he had knowledge.

(y) A bailee for reward or a gratuitous bailee has a duty to the bailor to treat the bailed items with due care and diligence. An involuntary bailee has a duty only to treat the bailed items reasonably under the circumstances.

(z) A bailee is responsible for loss or damage only if he violated his duty as specified in Subsection (c), (g), or (j) of this Section or if the loss or damage arose because he treated the bailed items in a manner inconsistent with the contract.

(aa) The bailor is obligated to reimburse the bailee for any necessary expenses incurred by him in performing the bailment plus, in case of a pledge, to repay the loan for which the pledge was made and pay the interest due thereon.

(bb) If the bailee mixes the bailed items with other items with the consent of the bailor, the bailor and bailee will have interests in the mixture in proportion to their respective contributions.

- (cc) If the bailee mixes the bailed items with other items without the consent of the bailor:
- v. and the items can be separated or divided without harm, the interests of the bailor and bailee in the items will not be altered, but the bailee will be liable for any expenses of separation or division and any damage caused by mixing.
  - vi. and the items cannot be separated or divided without harm, the bailee will be obligated to compensate the bailor for the loss of the bailed items.
- (dd) A bailor under a gratuitous bailment may at any time require the return of the bailed items regardless of the contract. If the bailee acted or forbore reasonably in material reliance upon the contract, the bailor is obligated to compensate him for any loss, exceeding any benefit derived from the bailment, he suffered because of the premature return.
- (ee) A pledgor in default may redeem the pledged items at any time before their sale pursuant to Subsection (k) of this Section by paying in full, the loan, interest thereon, and any expenses due to his default and pursuant to subsection (e) of this Section.
- (ff) A bailee is obligated to transfer possession of the bailed items, including any increase therein or profit therefrom, back to the bailor upon expiration of the period of the bailment or upon completion of performance of the bailment except:
- vii. that the bailee may retain possession of the bailed items until he receives payments pursuant to Subsection (e) of this Section;
  - viii. that if the pledgor has defaulted in repayment of the loan and interest thereon and the pledgee has sued the pledgor therefor, the pledgee may retain the pledged items as collateral security; and
  - ix. as provided in Subsection (k) of this Section.
- (gg) A bailee may not sell or otherwise dispose of the bailed items unless:
- vii. the bailor under a voluntary bailment for reward or a gratuitous bailment has failed to resume possession of the items within a reasonable time after proffer by the bailee;
  - viii. the items under an involuntary bailment have not been reclaimed by the bailor within a reasonable time; or
  - ix. the pledgor has defaulted in repayment of the loan and the interest thereon and has not redeemed the pledged items by making such repayment in full plus any expenses due to his default and pursuant to subsection (e) of this Section ;

Provided further, that an appropriate advance notice of the intended sale or disposition has been given by the bailee.

A bailor may avoid a contract of bailment if the bailee acts with regard to the bailed items in a manner inconsistent with the contract.

### **Agency**

- 498.** Any person having capacity to contract may empower an agent and any person having such capacity may be an agent.
- 499.** Powers may be conferred upon an agent by a precedent authorization or a subsequent ratification. Consideration is not necessary for the authorization of an agent to be binding upon the principal. The principal may authorize his agent to do any act which the principal might lawfully do.
- 500.** Oral authorization is sufficient for any purpose except that authorization to enter into a contract required to be in writing may only be given in writing.
- 501.** Ratification of an agent's act must be made in the manner necessary to confer authorization originally for the act ratified. Acceptance or retention of the benefit of the act by the principal constitutes ratification.
- 502.** Ratification of an act is not valid unless at the time of the purported ratification the principal had power to authorize such an act. No unauthorized act may be ratified retroactively without the consent of third persons prejudiced thereby.
- 503.** Ratification of a part of an indivisible transaction constitutes ratification of the whole. Ratification may be rescinded if it was made on the basis of an imperfect knowledge of the material facts of the transaction ratified.
- 504.** An agent has such authority as the principal:
- (e) (i) intentionally confers upon him and (ii) intentionally, or by want of ordinary care, causes the agent reasonably to believe, has been conferred upon him; (either [i] or [ii] constitutes actual authority); and
  - (f) intentionally, or by want of ordinary care, causes third persons reasonably to believe the agent possesses (which constitutes apparent authority) unless such third persons have actual or constructive notice that the agent does not possess such authority.
- 505.** Any act which may be done by or to the principal may be done by or to the agent authorized with respect to such act.

- 506.** Absent contrary limitation of his authority by his principal, an agent has authority to do everything necessary, and proper and usual in the ordinary course of the type of business concerned, for effecting the purpose of his appointment.
- 507.** When authorization is given partly in general and partly in specific terms, the general terms give no broader authority than the specific. An authority expressed in general terms does not authorize the agent to act in his own name unless it is usual in the ordinary course of the type of business concerned.
- 508.** An agent has power, without express authorization, to do whatever may be reasonably necessary to protect the interests of his principal when there is no time to obtain express authorization from his principal.
- 509.** An authorization to an agent to sell personal property includes authority to warrant the title of the principal and the quality and quantity of the property.
- 510.** An authorization to an agent to sell and convey real property includes the authority to give the usual covenants of warranty.
- 511.** Within the scope of his authority an agent represents his principal for all purposes. All the rights and liabilities which would accrue to the agent from authorized transactions had such transactions been entered into on his own account accrue to the principal.
- 512.** As against the principal, both principal and agent are deemed to have notice of whatever either has notice of with respect to an authorized transaction and ought, in good faith and in the exercise of ordinary care and diligence, to communicate to the other.
- 513.** When an agent exceeds his authority, his principal is bound by his authorized acts only to the extent that they can be clearly separated from those which were unauthorized.
- 514.** A principal is bound by acts of his agent under apparent authority only to those persons, without actual or constructive notice that the agent does not possess actual authority, who have in good faith and with ordinary care incurred a liability or given value in reliance thereon.
- 515.** A person who deals with an agent without knowing or having reason to believe that the agent is acting as such may set off against any claim of the principal arising out of the dealing all claims which he might have set off against the agent before notice of his agency. If the principal discloses himself before the deal is completed, the other person may refuse to complete the deal if he can show that, had he known that the agent was acting for a principal or who the principal was, he would not have entered into the deal.
- 516.** A principal is responsible to third persons for the negligence and wrongful acts of his agent in authorized or ratified transactions.

- 517.** An agent warrants to all who deal with him in that capacity that he has the authority which he claims to have.
- 518.** An agent is responsible to third persons as a principal when:
- (g) with his consent, credit is given to him personally;
  - (h) he enters into a contract in the name of his principal without believing in good faith that he has authority to do so; or
  - (i) his acts are wrongful.
- 519.** If an agent acting for his principal receives something which another person is entitled to, on demand of that person he must, after indemnification for any advance which he has in good faith made to his principal on account thereof, surrender it to such person. He is liable therefor if, after demand from such person, he delivers it to his principal.
- 520.** Unless such delegation is explicitly authorized by the principal, an agent may not delegate his powers to another except as provided in the following sentence. He may, however, do so in the following cases unless expressly prohibited by his principal:
- (g) when the act to be done is purely non-discretionary;
  - (h) when the act may not be done by the agent; or
  - (i) when the customary usage in the business concerned is to delegate such powers.
- 521.** A subagent whose appointment is authorized pursuant to Section 86 represents the principal on the same basis as the original agent, and the original agent is not responsible to third persons for the acts of the subagent.
- 522.** If an agent in a case not authorized under Section 86 appoints a subagent, the former becomes the principal and the latter his agent.
- 523.** An agent's authority is terminated by:
- (m) expiration of its term;
  - (n) extinction of its subject;
  - (o) revocation by the principal;
  - (p) death of the principal;
  - (q) the agent's renunciation of his powers of representation; or
  - (r) death of the agent.
- 524.** Notwithstanding Subsections 88 (a)-(e) a bonafide transaction entered into with a previously authorized agent qua agent by a person acting without actual knowledge of the termination of his authority shall be binding upon the principal and his heirs, devisees, legatees, and other successors in interest.

### Quasi contracts

525. A person without capacity to contract is liable in restitution for the value of necessities furnished to him, or to those whom he is responsible for supporting, even though he made no promise in exchange for such necessities.

## CHAPTER 3 CONSTRUING CONTRACTS

526. Ambiguities or inconsistencies are resolved:

- (g) against the drafter;
- (h) in favour of a meaning that serves the public interest; and
- (i) against standardized terms in favour of separately negotiated or added terms.
- (j) **In a manner generally understood in the context in which it is being construed.**

### Duty of good faith and fair dealing

527. Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.

### Unconscionable contract or provision

528. If a court determines, after the parties have had an opportunity to present evidence, that a contract or provision was unconscionable **illegal or against other public policy** when made, the court shall either:

- (g) refuse to enforce the contract;
- (h) enforce the contract **without the offending** provision; or
- (i) limit the application of the provision so as to avoid an unconscionable **or otherwise illegal** result.

### Supersession of prior agreements

529. If a court determines, after the parties have had an opportunity to present evidence, that the parties have reduced to writing a final and complete expression of a binding contract, prior agreements are superseded to the extent that they are inconsistent with or within the scope of such contract.

#### **CHAPTER 4** **PERFORMANCE**

##### **Order of performances**

530. Absent contrary indication in the language or circumstances:

- (e) where all or part of the performances to be exchanged can be rendered simultaneously, they are to that extent due simultaneously; in that case a condition of each party's duty to render such performance is that the other party either render or, with manifested present ability to do so, offer his performance;
- (f) except to the extent stated in (a) above, where the performance of only one party requires a period of time, his/**her** performance is due at an earlier time than that of the other.

##### **Repudiation**

531. Repudiation is:

- (g) .a statement by the obligor to the obligee that the obligor will commit a breach that would give the obligee a claim for damages for breach;
- (h) .a voluntary act by the obligor which renders him unable or apparently unable to perform without a breach; or
- (i) .when reasonable grounds exist to believe that the obligor will commit a breach by non-performance that would give the obligee a claim for damages, a failure by the obligor, in response to a demand by the obligee, to provide within a reasonable time, an adequate assurance of performance. In case of such repudiation, the obligee may, if reasonable, suspend any performance for which he has not already received the agreed exchange until he receives such assurance.

##### **Repudiation as a breach**

532. When an obligor repudiates a duty before he has committed a breach by non-performance and before he has received all of the agreed exchange for it, his repudiation alone gives rise to a claim for damages for breach.

### **Nullification of repudiation**

533. A retraction of a statement constituting repudiation or the elimination of the event constituting or serving as a basis for repudiation nullifies the repudiation if it comes to the attention of the obligee before he has materially changed his position in reliance on the repudiation or has indicated to the obligor that he considers the repudiation final.

### **Effect of performance and non-performance**

534. Full performance of a duty discharges that duty.

535. When performance is due, any **material** non-performance is a breach **if it diminishes in any way the value or originally anticipated benefit or result.**

536. A condition of each party's duty to perform is that there be no uncured material failure by the other to render a performance due at an earlier time.

537. An un-nullified repudiation discharges the other party's remaining duties to render performance.

538. Non-performance of a promise or contractual duty or breach of a contract in and of itself is not a criminal offence.

### **Non-occurrence of a condition**

539. Performance of a duty subject to a condition does not become due until the condition occurs or its non-occurrence is excused.

540. Unless it has been excused, the non-occurrence of a condition discharges the duty when the condition can no longer occur.

541. Non-occurrence of a condition is not a breach by a party unless he has a duty to cause the condition to occur.

542. If the occurrence of a condition was not a material part of the agreed exchange, its non-occurrence:

(e) may be excused if a disproportionate forfeiture would otherwise result.

(f) is excused, if forfeiture would otherwise result, by impracticality sufficient to discharge a duty or prevent it from arising pursuant to Chapter 5.

543. When a party's repudiation contributes materially to the non-occurrence of a condition of his duty, the non-occurrence is excused.

### **Application of performances**

544. Except as provided in Section 111, as between two or more contractual duties owed to the same obligee, a performance is to be applied as directed by the obligor to the obligee at or before the time of performance.
545. Except as provided in the next sentence and in Section 111, if the obligor has not directed the application of a payment as between two or more debts which are due to the same obligee, the payment is to be applied as specified by the obligee provided the obligor has been so informed within a reasonable time. The obligee may not apply such a payment to a debt if a forfeiture would result from a failure to apply it to another debt and the obligee knows or has reason to know this, or if the debt is disputed or is unenforceable on grounds of public policy.
546. If the obligee knows or has reason to know that the obligor owes a duty to a third person to devote a performance to the discharge of a particular duty that the obligor owes to the obligee, the obligor's performance is to be applied to that duty.
547. If neither the obligor nor the obligee has exercised his power to apply a payment as provided in Section 119 and 110, it is applied to debts which are due to which the obligee could have applied it with just regard to the interests of third persons, the obligor, and the obligee.

## **CHAPTER 5** **IMPRACTICALITY AND FRUSTRATION OF PURPOSE**

### **Discharge by supervening impracticality**

548. When, after a contract is made, a party's performance becomes impractical without his fault by the occurrence of an event, the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged unless the language or the circumstances indicate the contrary.

### **Death or incapacity of person necessary for performance**

549. If the existence of a particular person is necessary for the performance of a duty, his death or such incapacity as makes performance impractical is an event the non-occurrence of which was a basic assumption on which the contract was made.

**Destruction, deterioration, or failure to come into existence of a thing necessary for performance**

550. If the existence of a specific thing is necessary for the performance of a duty, its failure to come into existence or destruction or its deterioration such as makes performance impractical is an event the non-occurrence of which was a basic assumption on which the contract was made.

**Prevention by government**

551. If the performance of a duty is made impractical by the necessity to comply with a law or government regulation or order that did not exist at the time the contract was made, that law or government regulation or order is an event the non-occurrence of which was a basic assumption on which the contract was made.

**Partial impracticality**

552. Where only part of an obligor's performance is impractical, his duty to render the remaining part is unaffected if:

- (e) it is still practical for him to render performance that is substantial, taking account of any reasonable substitute performance that he has a duty to render; or
- (f) the obligee, within a reasonable time, agrees to render in full any performance of his that remains and to allow the obligor to retain any performance that the obligee has already rendered.

**Discharge by supervening frustration**

553. When, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged unless the language or the circumstances indicate the contrary.

**Existing impracticality or frustration**

554. Unless the language or circumstances indicate the contrary, when at the time a contract is made a party's:

- (e) performance under it is impractical without his fault because of a fact which he has no reason to know of and the non-existence of which is a basic assumption on which the contract is made, no duty to render that performance arises.
- (f) principal purpose is substantially frustrated without his fault by a fact which he has no reason to know of and the non-existence of which is a basic assumption on which the contract is made, no duty of that party to render performance arises.

### **Temporary impracticality or frustration**

**555.** Impracticality of performance by or frustration of purpose of a party that is only temporary suspends his duty to perform while the impracticality or frustration exists but does not discharge his duty or prevent it from arising unless his performance after the cessation of the impracticality or frustration would be materially more burdensome than had there been no impracticality or frustration.

## **CHAPTER 6** **DISCHARGE BY ASSENT OR ALTERATION**

### **Necessity of consideration**

**556.** Except as stated in Section 123 and 124 an obligee's assent to discharge of a duty imposed by contract is not effective unless:

- (g) it is made for a consideration;
- (h) it is made in circumstances in which a promise would be enforceable without consideration; or
- (i) it has induced such action or forbearance as would make a promise enforceable.

### **Nullification of writing**

**557.** An obligee's cancellation, destruction, or surrender to the obligor of a writing of a type customarily accepted as a symbol or as evidence of the obligor's duty to the obligee discharges without consideration the obligor's duty if it is done with the manifested intention to discharge it.

### **Renunciation**

558. A written renunciation of his rights arising from breach of contract signed by the obligee discharges without consideration the duty of the obligor arising from the breach.

### **Substituted performance or contract**

559. If an obligee accepts in satisfaction of the obligor's duty a performance that differs from what is due or a substitute contract, the duty is discharged.

### **Contract not to sue**

560. Contract not to sue is a contract under which the obligee promises:

- (e) not to ever sue the obligor or a third person to enforce a duty of the obligor and which discharges the duty; or
- (f) not for a limited time to sue the obligor or a third person to enforce a duty of the obligor and which bars an action to enforce the duty during that time.

If the contract is not to sue one co-obligor, levy of execution on his property is barred during the agreed time.

### **Alteration by obligee discharges duty**

561. If the obligee, without the assent of the obligor, alters a writing which is a necessary part of the obligation, the duty of the obligor is discharged if the alteration is fraudulent and would, if effective, vary his legal relations with the obligee or adversely affect his legal relations with a third person.

### **Duty revived after alteration**

562. If after an alteration the obligor asserts a right under, or otherwise manifests a willingness to remain subject to, the original contract, it is revived.

**CHAPTER 7**  
**JOINT AND SEVERAL PARTIES**

**Promises to the same promisee**

**563.** Unless a contrary intention is manifested, a promise by two or more promisors to the same promisee is a promise that the same performance shall be given and each is bound for the whole performance. They incur only a joint and several duty unless a contrary intention is manifested.

**Effect of performance on co-promisors**

**564.** Full or partial performance or other satisfaction of the contractual duty of a promisor to an obligee or other discharge of that promisor by an obligee shall, unless the discharged promisor is a surety, discharge the duty to the obligee of each other promisor of the same performance to the extent of the amount or value received by the obligee from the promisor who rendered the duty.

**Promises to several obligees**

**565.** Unless a contrary intention is manifested or the interests of the obligees in the performance or in the remedies for breach are distinct, the rights of obligees of the same performance are joint.

**Joinder of joint obligees**

**566.** All surviving joint obligees must be joined to recover against the promisor of the same performance.

**567.** Unless limited by agreement, any joint obligee may sue in the name of all joint obligees for the enforcement of the same promise by a money judgment.

**Discharge by one joint obligee**

**568.** Unless limited by agreement, any joint obligee of the same performance has power to discharge the promisor by receipt of the promised performance, by release, or otherwise.

**569.** Tender of performance to one joint obligee constitutes tender to all.

570. A discharge of the promisor by an obligee in violation of his duty to a co-obligee of the same performance is voidable to the extent necessary to protect the co-obligee's interest in the performance, except to the extent that the promisor has given value or otherwise changed his position in good faith and without knowledge or reason to know of the violation.

## **CHAPTER 8** **BENEFICIARIES**

### **Intended and incidental beneficiaries**

571. Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right in the beneficiary to performance is appropriate to effectuate the intention of the parties and either:

- (e) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or
- (f) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.

572. An incidental beneficiary is a person who will benefit from performance of a promise but is neither a promisee nor an intended beneficiary. An incidental beneficiary acquires no right against the promisor or promisee by virtue of the promise.

### **Conditional and unconditional promises**

573. This Chapter applies to both conditional and unconditional promises.

### **Creation of a duty to beneficiary**

574. A promise in a contract imposes a duty on the promisor to any intended beneficiary to perform the promise and the intended beneficiary may enforce the duty.

### **Overlapping duties to beneficiary and promisee**

575. A promise in a contract imposes a duty on the promisor to the promisee to perform the promise even though the promisor also has a similar duty to an intended beneficiary.

576. Whole or partial satisfaction of the promisor's duty to the beneficiary satisfies the promisor's duty to the promisee to extent of that satisfaction.

### **Rejection by a beneficiary**

577. A beneficiary who has not previously assented to the promise for his benefit may, in a reasonable time after learning of its existence and terms, render any duty to himself void from the beginning by a manifestation of rejection.

### **Specific performance**

578. Where specific performance is otherwise an appropriate remedy, either the promisee or the intended beneficiary may maintain a suit for specific enforcement of a duty owed to the beneficiary.

### **Identification of beneficiaries**

579. In order to have an enforceable right, an intended beneficiary need not be identified at the time a contract containing the promise is made.

### **Remedies of beneficiary and promisee's right to reimbursement**

580. When an intended beneficiary has an enforceable claim against a promisee, he may obtain a judgment or judgments against the promisee, the promisor, or both based on their respective duties to him. Satisfaction in whole or in part of either of these duties or of a judgment thereon satisfies to that extent the other duty or judgment, subject to the promisee's right of subrogation.

581. To the extent that the claim of an intended beneficiary is satisfied from the assets of a promisee, the promisee has a right of reimbursement from the promisor, which may be enforced directly and also, if the beneficiary's claim is fully satisfied, by subrogation to the claim of the beneficiary against the promisor, to any judgment thereon, and to any security therefor.

### **Change in a duty to a beneficiary**

582. By conduct of the promisee or subsequent agreement with the promisor, the promisor and promisee retain power to discharge or modify a duty to an intended beneficiary absent a contrary term of the promise creating the duty.

583. When the beneficiary, before he receives notice of a discharge or modification pursuant to Section 148, materially changes his position in justifiable reliance on the promise creating the duty to him, brings suit on it, or manifests assent to it at the request of the promisor or promisee, such a power terminates.
584. If a promisee receives consideration for an attempted discharge or modification of his promisor's duty to a beneficiary which is ineffective against the beneficiary, the beneficiary can assert a right to the consideration received. In that case the promisor's duty is discharged to the extent of the amount received by the beneficiary.

## **CHAPTER 9** **ASSIGNMENT AND DELEGATION**

### **Assignment of a right**

585. An assignment of a right is a manifestation of the assignor's intention that his right to performance by the promisor be extinguished in whole or in part and the assignee acquire the right to such performance.
586. A contractual right may be assigned unless:
- (g) a. the substitution of the right of the assignee for the right of the assignor would materially change the duty of the promisor under or increase the burden or risk imposed on him by his contract or materially impair the promisor's chance of obtaining or reduce the value to the promisor of the return performance;
  - (h) b. the assignment is forbidden by other laws of the Kingdom of Bhutan or is unenforceable on grounds of public policy; or
  - (i) c. a provision of the contract precludes the assignment.

### **Assignment of conditional rights**

587. The fact that a right is conditional does not prevent its assignment before the condition occurs.

### **Assignment of future rights**

588. Except as otherwise provided under other laws of the Kingdom of Bhutan, an assignment of a right to payment expected to arise out of an existing employment or other continuing business relationship is effective as though it were the assignment of an existing right.

### **Delegation of performance**

- 589.** A person may delegate to another the performance of his duty or of a condition unless the delegation is contrary to public policy or the terms of his promise.
- 590.** Unless otherwise agreed, a promise requires performance by a particular person only to the extent that the promisee has a substantial interest in that person performing or controlling the acts promised.
- 591.** Unless the promisee agrees otherwise, neither delegation of performance nor a contract to assume the duty of performance made between the promisor and the person delegated discharges any duty of the promisor.

### **Contractual prohibition of assignment**

- 592.** Unless the circumstances indicate the contrary, a contract term prohibiting assignment of the contract bars only the delegation to an assignee of the performance by the assignor of a duty or condition.
- 593.** Unless a different intention is manifested, a contract term prohibiting assignment of rights under the contract:
- (g) does not forbid assignment of a right to damages for breach nor a right arising out of the assignor's completed performance of his entire obligation;
  - (h) gives the promisor a right to damages for breach of the term forbidding assignment but does not render the assignment ineffective;
  - (i) is for the benefit of the promisor and does not prevent (i) the assignee from acquiring rights against the assignor nor (ii) the promisor from discharging his duty as if there were no such prohibition.

### **Assent to assignment or delegation**

- 594.** A term of a contract manifesting a promisor's assent to the future assignment of a right or a promisee's assent to the future delegation of the performance of a duty or condition is effective despite any subsequent objection.
- 595.** A manifestation of such assent after the formation of a contract is similarly effective if made for consideration, if made in circumstances in which a promise would be binding without consideration, or if a material change of position takes place in reliance on the manifestation.

**CHAPTER 10**  
**CONTRACTUAL REMEDIES**

**Contractual Remedies**

596. Contractual remedies serve to protect one or more of the following interests of a promisee:
- (g) **Expectation interest**, which is his interest in obtaining the benefit of his contract by being put in as good a position as he would have been in had the contract been performed;
  - (h) **Reliance interest**, which is his interest in being reimbursed for losses caused by reliance on the contract by being put in as good a position as he would have been in had the contract not been made; or
  - (i) **Restitution interest**, which is his interest in having restored to him any benefit that he has conferred on the promisor.

**CHAPTER 11**  
**DAMAGES**

**Actual Damages**

597. The injured party has a right to damages as compensation for loss from any breach by a party against whom the contract is enforceable unless the claim for damages has been suspended or discharged.
598. A party's duty to pay damages for breach by repudiation is discharged if it appears after the breach that:
- (e) there would have been a total failure by the injured party to perform his return promise;  
or
  - (f) the duty that he repudiated would have been discharged by impracticality or frustration before any breach by non-performance.

**Nominal Damages**

599. If the breach caused no loss or if the amounts of the elements of the loss are not proved pursuant to the rules of this Chapter, a small sum fixed without regard to the amount of the loss will be awarded as nominal damages.

### **Damages based on expectation interest**

600. Subject to the limitations of Sections 171-76 the injured party has a right to damages based on his expectation interest equal to:

(g) the loss in the value to him of the other party's performance caused by its failure or deficiency; plus

(h) any other loss, including incidental or consequential loss, caused by the breach; less;

(i) any cost or other loss that he has avoided by not having to perform.

### **Alternatives to loss in value of performance**

601. If a breach delays the use of property and the loss in value to the injured party is not proved with reasonable certainty, he may recover damages based on the rental value of the property or on interest on the value of the property.

602. If a breach results in defective or unfinished construction and the loss in value to the injured party is not proved with reasonable certainty, he may recover damages based on:

(e) the diminution in the market price of the property caused by the breach; or

(f) the reasonable cost of completing performance or of remedying the defects if that cost is not clearly disproportionate to the probable loss in value to him.

603. If a breach is of a promise conditioned on a fortuitous event and it is uncertain whether the event would have occurred had there been no breach, the injured party may recover damages based on the value of the conditional right at the time of breach.

### **Damages based on reliance interest**

604. As an alternative to the measure of damages stated in Section 166 the injured party has a right to damages based on his reliance interest, including expenditures made in preparation for performance or in performance less any loss that the party in breach can prove with reasonable certainty the injured party would have suffered had the contract been performed.

### **Avoidability limiting damages**

**605.** Damages are not recoverable for a loss that the injured party could have avoided without undue risk, burden, or humiliation except to the extent that he has made reasonable but unsuccessful efforts to avoid the loss.

### **Unforeseeability limiting damages**

**606.** Damages are not recoverable for any loss that the promisor, at the time the contract was made, did not have reason to foresee would probably result from such a breach.

**607.** Loss may be foreseeable as a probable result of a breach because it would follow from the breach:

(e) in the ordinary course of events; or

(f) as a result of special circumstances that the party in breach had reason to know.

**608.** A court may limit damages for foreseeable loss by excluding recovery for loss of profits, by allowing recovery only for loss incurred in reliance, or otherwise if it concludes that in the circumstances justice so requires to avoid disproportionate compensation.

### **Uncertainty limiting damages**

**609.** Damages are not recoverable for elements of loss beyond amounts that the evidence establishes with reasonable certainty.

### **Loss due to emotional disturbance**

**610.** Recovery for emotional disturbance is excluded unless the breach also caused bodily harm or the contract or the breach was of such a kind that serious emotional disturbance was a particularly likely result.

### **Interest**

**611.** If the breach consists of a failure to pay a definite sum of money or to render a performance with fixed or ascertainable monetary value, interest is recoverable, from the time when

performance was due, on the amount due less all deductions to which the party in breach is entitled.

612. In any other case such interest may be allowed as justice requires on the amount that would have been just compensation had it been paid when performance was due.

### **Punitive Damages**

613. Except as may be otherwise provided by other laws of the Kingdom of Bhutan, punitive damages are not recoverable for a breach of contract unless the conduct constituting the breach is also a tort for which punitive damages are recoverable.

### **Liquidated Damages**

614. Damages for breach may be liquidated in the contract but only in an amount that is reasonable in relation to the anticipated or actual loss caused by the breach and the difficulties of proof of the loss.

## **CHAPTER 12** **SPECIFIC PERFORMANCE AND INJUNCTION**

### **Availability**

615. Subject to the rules of this Chapter, against a party who has committed or is threatening to commit a breach of a contract duty, specific performance of the duty may be granted in the discretion of the court or an injunction against a breach of the duty may be granted in the discretion of the court if the duty is one (a) of forbearance or (b) to act and specific performance would be denied only for reasons that are inapplicable to an injunction.

### **Nature of Relief**

616. An order of specific performance or an injunction is to be so drawn as best to effectuate the purposes for which the contract was made and on such terms as justice requires. The performance that it requires need not be identical with that due under the contract, and it may be directed at the injured party as well as at the party in breach.
617. If specific performance or an injunction is denied as to part of the performance that is due, it may nevertheless be granted as to the remainder.

**618.** In addition to specific performance or an injunction, damages and other relief may be awarded in the same proceeding and an indemnity against future harm may be required.

#### **Adequacy of damages or existence of another remedy**

**619.** Specific performance or an injunction will not be granted if damages would be adequate to protect the expectation interest of the injured party. The following should be considered in determining the adequacy of damages:

(g) the difficulty of proving the damages with reasonable certainty;

(h) the difficulty of procuring a suitable substitute performance with money awarded as damages; and

(i) the likelihood that an award of damages could not be collected.

**620.** Specific performance or an injunction may be granted even though the contract provides for liquidated damages.

**621.** Specific performance or an injunction may be granted even though there is a remedy for breach in addition to damages.

#### **Uncertainty of terms of contract**

**622.** Specific performance or an injunction will not be granted unless the terms of the contract are sufficiently certain to provide a basis for an appropriate order.

#### **Return duty unperformed**

**623.** Specific performance or an injunction may be denied if a substantial part of the agreed exchange for the performance to be compelled is unperformed and its performance is not secured to the satisfaction of the court.

#### **Unfairness**

**624.** Specific performance or an injunction may be refused if such relief would be unfair because:

(g) the contract was induced by mistake or unfair practices;

(h) the relief would cause unreasonable hardship or loss to the party in breach or to third persons; or

(i) the exchange is grossly inadequate or the terms of the contract are otherwise unfair.

**625.** Specific performance or an injunction may be granted in spite of an unfair term of the contract if denial of such relief would cause unreasonable hardship or loss to the party seeking relief or to third persons.

### **Contrary to public policy**

**626.** Specific performance or an injunction will not be granted if the act or forbearance that would be compelled or the use of compulsion is contrary to public policy.

### **Difficulty in enforcement**

**627.** Performance of a contract duty will not be specifically enforced if the character and magnitude of the performance would impose on the court burdens in enforcement or supervision disproportionate to the advantages to be gained from enforcement and to the harm to be suffered from its denial.

### **Personal service**

**628.** A promise to render personal service will not be specifically enforced.

**629.** A promise to render personal service exclusively for one employer will not be enforced by injunction against serving another if the probable result will be to compel a performance involving personal relations the enforced continuance of which is undesirable or will be to leave the employee without other reasonable means of making a living.

### **Power of termination**

**630.** Specific performance or an injunction will not be granted against a party who can substantially nullify the effect of the order by exercising a power of termination or avoidance.

**631.** Specific performance or an injunction may be granted even though the party seeking relief has a power to terminate or avoid his return performance unless the power could be used, in spite of the order, to deprive the other party of reasonable security for the return performance.

### **Breach by party seeking relief**

632. Specific performance or an injunction may be granted in spite of a breach by the party seeking relief unless the breach is serious enough to discharge the other party's remaining duties of performance.

### **CHAPTER 13** **RESTITUTION**

#### **Benefit must be conferred**

633. A party is entitled to restitution only to the extent that he has conferred a benefit on the other party by part performance, reliance or quasi contract.

#### **Measure of benefit**

634. If a sum of money is awarded to protect a party's restitution interest, it may, as justice requires, be measured by either:

- (e) the reasonable value to the other party of what he received in terms of what it would have cost him to obtain it from another person in the claimant's position; or
- (f) the extent to which the other party's property has been increased in value or his other interests advanced.

#### **Specific restitution**

635. Specific restitution will be granted to a party who is entitled to restitution except that it:

- (e) may be refused if it would unduly interfere with the certainty of title to land or otherwise cause injustice; and
- (f) will not be granted in favour of a party in breach.

636. A decree of specific restitution may be made conditional on return of or compensation for anything that the party seeking restitution has received.

#### **Restitution against party in breach**

637. On a breach by non-performance that gives rise to a claim for damages or on a repudiation, the injured party is entitled to restitution for any benefit he has conferred on the other party by part performance or reliance unless he has performed all of his duties under the contract and no performance by the party in breach remains due other than payment of a definite sum of money.

### **Restitution in favor of party in breach**

638. If a party justifiably refuses to perform on the ground that his remaining duties of performance have been discharged by the other party's breach, the party in breach is entitled to restitution for any benefit that he has conferred by part performance or reliance in excess of the loss that he has caused by his breach.

### **Restitution when contract not in writing**

639. A party who would otherwise have a claim for restitution under an unwritten contract is not barred from restitution because the contract is unenforceable by him pursuant to Section 32.

### **Restitution under avoided contract**

640. A party who has avoided a contract on the ground of lack of capacity, mistake, misrepresentation, duress, undue influence, or abuse of a fiduciary relationship is entitled to restitution for any benefit he has conferred on the other party by part performance or reliance.

### **Party seeking restitution must return benefit**

641. Except as stated in Section 208, a party will not be granted restitution unless:

- (e) he returns or offers to return, conditional on restitution, any interest in property that he has received under the contract in substantially as good condition as when it was received by him; or
- (f) the court can assure such return in connection with the relief granted.

642. The requirement of Section 207 does not apply to property:

- (g) that was worthless when received or that has been destroyed or lost by the other party or as a result of its own defects;
- (h) that either could not from the time of receipt have been returned or has been used or disposed off without knowledge that there would be grounds for restitution if justice requires that compensation be accepted in its place and payment of such compensation can be assured; or

- (i) as to which the contract apportions the price if that part of the price is not included in the claim.

### **Restitution by party whose duty is excused**

643. A party whose duty of performance does not arise or is discharged by impracticality of performance, frustration of purpose, non-occurrence of a condition, or rejection by a beneficiary is entitled to restitution for any benefit he has conferred on the other party by part performance or reliance.

## **CHAPTER 14** **ELECTION OF REMEDIES**

### **Election as a bar**

644. If a party has more than one remedy under this Act, his manifestation of a choice of one of them by bringing suit or otherwise is not a bar to pursuing another remedy unless the remedies are inconsistent or the other party has materially changed his position in reliance on the manifestation.

### **Election to treat duties under aleatory contracts as discharged**

645. If a right or duty of the injured party is conditional on an event that is fortuitous or is supposed by the parties to be fortuitous, he cannot treat his remaining duties to render performance as discharged on the ground of the other party's breach by non-performance if he does not manifest to the other party his intention to do so before any adverse change in the situation of the injured party resulting from the occurrence of that event or a material change in the probability of its occurrence.

### **Exercise of power of avoidance**

646. A person may exercise a power of avoidance of a contract by:
- (g) a manifestation of avoidance communicated to the other party;
  - (h) recovery of all or a substantial part of what he would be entitled to by restitution on avoidance; or
  - (i) a final judgement of or based on avoidance.

### **Loss of power of avoidance by affirmance**

647. The power of a party to avoid a contract for incapacity, duress, undue influence, or abuse of a fiduciary relation is lost if, after the circumstances that made the contract voidable have ceased to exist, he manifests to the other party his intention to affirm it or acts with respect to anything that he has received in a manner inconsistent with disaffirmance.
648. The power of a party to avoid a contract for mistake or misrepresentation is lost if after he knows or has reason to know of the mistake or of the misrepresentation if it is non-fraudulent or knows of the misrepresentation if it is fraudulent, he manifests to the other party his intention to affirm it or acts with respect to anything he has received in a manner inconsistent with disaffirmance.

### **Loss of power of avoidance by delay**

649. The power of a party to avoid a contract for incapacity, duress, undue influence, or abuse of a fiduciary relation is lost if, after the circumstances that made it voidable have ceased to exist, he does not within a reasonable time manifest to the other party his intention to avoid it.
650. The power of a party to avoid a contract for misrepresentation or mistake is lost if after he knows of a fraudulent misrepresentation or knows or has reason to know of a non-fraudulent misrepresentation or mistake, he does not within a reasonable time manifest to the other party his intention to avoid it. The power to avoid a contract for non-fraudulent misrepresentation or mistake is also lost if the contract has been so far performed or the circumstances have otherwise so changed that avoidance would be inequitable and damages will be adequate compensation.

### **Loss of power to affirm by prior avoidance**

651. If a party has effectively exercised his power of avoidance, a subsequent manifestation of intent to affirm is invalid unless the other party manifests his assent to affirmance.

## **CHAPTER 15** **DEFINITIONS**

652. In this Act:

(rr) **Agent** is a person empowered by another, the principal, to represent the principal in dealings with others.

(ss) **Alteration** is addition, deletion, substitution or insertion of something in a blank space.

(tt) **Bailment** is the temporary taking of possession of something by a bailee from a bailor for a purpose pursuant to a contract or legal obligation.

(uu) **Beneficiary** is a person other than the promisee who will benefit from performance of a promise.

(vv) **Contract** is one or more promises for:

- v. the breach of which there is a remedy; or
- vi. the performance of which there is a duty.

Promises not satisfying (i) or (ii) above do not give rise to a contract and are void of legal effect.

(ww) **Forfeiture** is a denial of compensation resulting when an obligee loses his right to an agreed exchange after he has substantially relied on the expectation of that exchange by preparation or performance.

(xx) **Manifestation** may be made wholly or partly by written or spoken words, by other acts, or by failure to act.

i. The conduct of a party is effective as a manifestation of an offer, promise, assent or rejection if he intends to engage in the conduct and knows or has reason to know that the other party may thereby infer that he offers, promises, assents or rejects.

ii. A party may apparently manifest assent even though he does not in fact assent, in which case a resulting contract may be voidable because of fraud, duress, mistake, or other invalidating cause.

(yy) **Mistake** is a belief that is not in accord with reality.

(zz) **Novation** is substituted contract that includes as a party one who was neither the obligor nor the obligee of the original duty.

(aaa) **Obligee** is a person to whom a duty is owed.

(bbb) **Obligor** is a person owing a duty.

(ccc) **Offer** is a manifestation of a willingness to enter into an exchange of promises, an exchange of a promise for a performance, or an exchange of performances and is so made as to justify another person in understanding that his assent to that exchange is invited and is intended to conclude a contract therefor.

(ddd) **Principal** is the person empowering an agent to represent him in dealings with others.

- (eee) **Promise** is a manifestation of intention to act or refrain from acting in a specified way which is so made as to justify a promisee in understanding that a commitment has been made.
- (fff) **Promisee** is that person to whom a promise is made.
- (ggg) **Promisor** is the person making a promise.
- (hhh) **Release** is a writing signed by the obligee providing that a duty owed to him is discharged immediately or on the occurrence of a condition.
- (iii)**Rescission** is an agreement under which each party discharges all of the other party's remaining duties of performance under an existing contract.
- (jjj)**Surety** or **Guarantor** is one who promises an obligee to perform the duty of the obligor if the obligor defaults.
- (kkk) **Unenforceable contract** is a contract for the breach of which neither the remedy of damages nor of specific performance is available but which may be recognized in some other way as creating a duty of performance.
- (lll)**Voidable contract** is a contract where one or more parties have the power by an election to do so to avoid the legal relations created by the contract or by affirmation to extinguish that power of avoidance.

## Comments by Brian C. Murphy

Comments of Brian C. Murphy on the Draft Contract Law of Bhutan

January 10, 2007

Please Note: In general I do not address matters of punctuation, unless an error distorts the intended meaning of the language used

Introduction: At the outset, I would note that this is a very comprehensive, well-written draft that is largely complete. While I have not compared it line-by-line with such standards as Grismore on Contracts, I do believe that it measures up to a high qualitative level

Specific Comments: In the Table of Contents, there is no mention of a Savings Clause [which would preserve the validity of the remainder of the provisions, even if one or more were deemed to be void or voidable].

Page 1, Short Title, Section 1. (b): “Month of 2004” should be updated to the current year.

Page 1, Application, Section 2: delete “e” from “Movable.”

Page 1, Repeal, Section 3: I presume that the “Thrimzhung Chenmo” is sufficiently well-known as to obviate the usual need for legal citation.

Page 4, Section 20 (a): Suggest inserting “and” between “reasonably” and “arguably,” for clarity.

Page 5, Section 24: substitute a word like “suggest” for “indicate” to avoid redundancy with “indication.”

Page 8, Section 32 (b) iii: On Line 3, add “of” after “performance.”

... (e): On Line 3, change interrogatory symbols [“?”] surrounding “goods” to quotation marks [“goods”].

Page 32, Contractual Prohibition of Assignment, Section 157: Remove interrogatory marks around “?the contract?”

Page 33, Section 158 (a): substitute “assignor’s” for assignor<s.”

Page 42, Election to treat duties under aleatory contracts as discharged, and Page 44, Definitions: Suggest expressly defining the term “aleatory” [relates to a contractual right or duty that is conditional on an event that is fortuitous].

## Comments By Aaron Schildhaus

### Memorandum

Date: 12 January 2007  
From: Aaron Schildhaus  
Subject: United Nations Development Programme (UNDP)  
Legislative Assessment of the Draft Contracts Law – Bhutan

#### I. BACKGROUND

I have been asked by the UNDP to review the draft contracts law for Bhutan, drawing on my own experience over the past 35+ years. In the cover letter from the UNDP, the following is stated (emphasis supplied):

“Please find attached the draft Contract Act of Bhutan. The 45-page act is intended as a comprehensive law to formalize various types of contracts in a system that previously relied upon informal agreements. *Unfortunately, because this will be the first such law, no background materials are available.* A brief description of the Bhutanese legal system follows to help reviewers to orient themselves.

The legal system is based on English common law and Indian law. Bhutan's civil and criminal codes are based on the Tsa Yig, a code established by the *shabdrung* in the seventeenth century. The Tsa Yig was revised in 1957 and ostensibly replaced with a new code in 1965. The 1965 code, however, retained most of the spirit and substance of the seventeenth-century code. Questions of family law are governed by traditional Buddhist or Hindu law. Minor offenses are generally adjudicated by village headmen. Criminal defendants have no right to court appointment of an attorney and no right to a jury trial. In keeping with the policies of modernization being pursued in Bhutan, the government formed a special committee in 1998 to review the country's laws and propose changes in the legal system. One of these changes saw the creation, in April 2000, of a Department of Legal Affairs to investigate and prosecute criminal and civil cases against civil servants. This may well turn out to be the forerunner of a fully fledged Attorney-General's Office or a Department of Justice. In 2001, a Civil and Criminal Procedure Code was enacted by the National Assembly, as a way of strengthening and reforming the legal system. The country is currently in the process of adopting a Constitution and is expected to hold national elections sometime in 2008, with the king remaining head of state, but accountable to the legislature.

This draft Law is to be submitted for the consideration of the National Assembly in February of 2007. Comments on the structure and scope of the law are especially appreciated, as are related experiences from other countries in implementing similar legislation.”

**Background provided in the UNDP Terms of Reference is as follows (emphasis supplied):**

According to the Terms of Reference, the “UNDP/Bhutan is assisting the government in its efforts to establish a sound legal framework in the country. In particular, the government has made the enactment of a law on contracts a legislative priority. The law, the first ever legal instrument in this field for the country, will comprehensively cover commercial transactions ranging from ordinary purchases to major infrastructure projects. The draft law was finished in November and is expected to be finalized early this year at the latest in order to be considered for enactment that year. *UNDP seeks, through the ABA-UNDP International Legal Resource Center (ILRC), the input of international experts in the form of written comments based on the legal, social, and commercial aspects of the draft law in the context of Bhutan and similar countries.* Expert comments and suggestions based on international experience will be used to support the Office of Legal Affairs and the drafting consultant in the formulation of the ‘final draft’ revision of the law that will be submitted to the National Assembly for appraisal by February 2007. Comments are sought on the structure and scope of the law as well as the experiences of other countries.”

**II. SPECIFIC OBSERVATIONS AND COMMENTS RE EXISTING DRAFT – BASES OF APPLICATION**

Short Title

- (a) insert “2007
- (b) insert “2007” instead of 2004

Application; Repeal

- 2. It is stated that the exceptions to the application of this proposed legislation are the Commercial Sale of Goods Act 2001 and the Moveable and Immovable Property Act 1999.
- 3. It is stated: “Except as provided in Section 2 above, this Act prevails over all provisions of existing laws and regulations ... which are inconsistent with this Act.”

**III. SUMMARY CONCLUSION AND RECOMMENDATIONS**

It was emphasized above in I. Background, that “... there is no background material available.” Actually available, however, on-line, is the text of the Commercial Sale of Goods Act 2001 and the Moveable and Immovable Property Act 1999, which, according to the present draft Contract Law provisions for Application and Repeal, found immediately above in Sections 2 and 3, in fact, take precedence. In other words, virtually all contracts, except, perhaps, for

some relating only to personal services, would be covered by the existing legislation, and would not come under the purview of the new law.

On its own, the proposed draft law is very comprehensive and generally quite good; however, it would be of very little utility if the two Acts cited above were not to be subjugated to the provisions of the draft Contract Law, either in toto, or by a review of the specific provisions, comparing each to the other and determining by specific language, the cases where one would supersede the other.

#### Recommendation 1:

My first recommendation is that the various laws be reconciled.

Because the validity of the existing laws and that of the proposed law are based, not on the English-language versions, but on the local language, the provisions need to be clarified. Neither the two existing Acts, nor the draft Contract Law are easy to understand in English. Therefore, it will be immeasurably difficult to understand them in the local language unless there is greater clarity in the English versions to begin with. Therefore, it is my second recommendation that the reconciliation and finalized drafting of the laws first be done in English.

#### Recommendation 2:

It is my Second recommendation that the English versions then be translated into the local language, and that they then be re-translated back into English and reviewed. This will highlight the areas which may not be totally understood, and will enable a drafting committee to clarify the intended effect in discussions and meetings with bi-lingual jurists in Bhutan.

#### Recommendation 3:

My third recommendation is that this particular draft contract law be modified for simplified understanding.

Examples of simplification and typos follow:

- The following provisions should be rephrased in order to provide more clarity and comprehension: Paragraphs 5, 8, 22, 25.
- Paragraph 30 refers to the Rules on Use of Judicial Stamps in Bhutan as amended, but that needs to be reviewed for consistency with the idea of even having a contracts law such as that proposed. In a similar way, the Bhutan Information, Communications and Media Act, 2006, referenced in Paragraph 31 should be reviewed for consistency.
- Paragraph 52 (c) refers to “bad faith”, but there needs to be a linkage in the legal system to determine bad faith, as it is ultimately a justiciable issue.

See footnote 1 below for Recommendation 4.<sup>1</sup>

Paragraph 58 (b) states that public policy against the enforcement of promises may be derived from “the need to protect public welfare”. Again, the link to judicial and/or statutory determination of “public welfare” needs to be clear.

Paragraph 77, line 2, “ought” should be changed to “presumed”.

Paragraph 86 and 87 appear to have a typographical error when it refers to Section 86. I believe that should read “Section 85”.

Paragraph 96 has extra “a”, “b” and “c” to be deleted.

#### Recommendation 5.

Once the drafts have been correlated and understood in both languages, it is recommended that they be reviewed by an expert in conjunction with appropriate representatives from the office of the Chief Justice so as to understand the cultural and historical context of the country and to review the constitutional provisions for consistency, and to incorporate any changes in the textual language or approach that would be appropriate.

#### SUMMARY

It is not realistic to enact laws without a close working understanding of the cultural, linguistic and historic realities of a country. Moreover, the importance of the legal and constitutional framework and the legal traditions in the country cannot be minimized. That having been said, it is completely feasible to draft new and improved laws that take these aforesaid realities into proper consideration. If this is not done carefully, there will be laws on the books that will not be understood or complied with by the populace. Therefore, it is critical that the drafters of these laws remain conscious of how they will mesh with the constitutional bases of the country and into the culture and politics so that the citizens will understand and incorporate their behaviour patterns in ways that make the new laws practical and viable.

Respectfully submitted,

Aaron Schildhaus  
Vice Chair  
ABA International

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<sup>1</sup> The preceding mention leads me to also suggest Recommendation 4: The proposed constitution should be examined in the context of this review to be sure that an independent judiciary can make the necessary determinations relative to disputes arising under any of the relevant Acts, once in force.



## Comments by Ann & Robert Seidman

January 13, 2007

### COMMENTS ON THE PROPOSED BHUTANESE LAW ON CONTRACTS

Ann Seidman and Robert B. Seidman

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#### INTRODUCTION

These comments address the proposed Law on Contracts for the Kingdom of Bhutan.<sup>1</sup> That bill comes to the Tshogdu on its bare face, without explanation or other supporting documentation.

That lack of information lies at the core of this Comment's critique. Law invariably aims to induce desired behaviors. To assess a proposed new law's prospective consequences requires a *prediction* of the *behaviors* that the new law will likely induce. How people will behave in the face of a law depends not merely on the wording of the law. It depends as well on the various *non-legal* constraints and resources in the actor's surround. This Comment strongly urges that the Tshogdu defer action on the bill at this time. Instead, it should ask the bill's proponents for an adequate research report detailing the evidence and logic that persuades those proponents that the bill will serve Bhutan's public interest. Only if it has before it those facts and that logic can the Tshogdu confidently predict the bill's probable consequences. Only so can it assess whether enactment of the bill will further Bhutan's public interest.

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<sup>1</sup> These comments draw heavily, without further attribution, on our book, Seidman, Seidman and Abeysekere, *Drafting for Democratic Social Change: A Manual for Drafters* (Kluwer Law International, 2001), available on the Web at [www.iclad-law.org](http://www.iclad-law.org). In general, we have not had time further to attribute to their authors many of the ideas in this paper. In the result, we make no claim to originality; many of the ideas in this paper have their origins in other scholarship.

This Comment assesses this bill primarily in terms of its utility in Bhutan's efforts to achieve 'development.' By that term we mean the deliberate effort by Bhutanese to transform the institutions that create and maintain the three-pronged overarching social problems of the poor countries of the world: Poverty, vulnerability to natural and man-made disasters, and poor governance. This Introduction describes the uses of law in the development project.

What constitutes the 'law-job'<sup>2</sup> in conditions of development? People propose a new law because they perceive a social problem that they believe the law will help resolve. We assume that this contract law, too, aims at a social problem. Almost everywhere in the developing world, people face the pervasive problems of development: Relative poverty, vulnerability to natural and human disaster, and poor governance (low transparency of governmental institutions, lack of accountability, poor participation, ineffective utilization of governmental resources for development). Our (brief) experience in Bhutan suggests that, to one degree or another, Bhutan, too, faces those problems.<sup>3</sup>

What constitutes the law-job in the attempt to ameliorate or resolve those manifold problems of development? By 'development' we mean the transformation of a country's economic and governmental institutions. Economic institutions must change to become institutions that increase specialization and exchange, thus to foster the new technologies likely to grow productivity, and thus to reduce poverty. Governmental institutions must change to

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<sup>2</sup> K.N. **Llewellyn**, 'The Normative, the Legal and the Law-Jobs' (1940) 49 Yale Law J. 1355.

<sup>3</sup> This discussion rests largely upon the authors' experience in working on issues of law and development since 1962, in some twenty-odd countries. See Seidman, Seidman and Abeysekere, *Legislative Drafting for Democratic Social Change: A Manual for Drafters* (London: Kluwer Law International, 2001) Those consultancies, some ten years past, included two two-week consultancies in Bhutan. Bhutanese legislators and officials must of course determine to what extent this description applies to Bhutan.

increase transparency, accountability, participation in governmental decision-making, and the capacity to manage development programs.

Governments may deliberately foster that transformation. They can ‘develop’ by identifying urgent social problems, whether in the economy, government or otherwise. How does government address a social problem? It has small choice but to utilize the law *instrumentally* to transform the problematic institutions that constitute the identified social problem. The argument goes like this:

1. A *social* problem always consists of repetitive patterns of problematic social behaviors.

2. An institution consists of a set of repetitive patterns of behaviors.

3. It follows that a social problem always involves a problematic *institution*.

4. Within “the limits of law,”<sup>4</sup> government can use law and the legal order to change behaviors, and therefore the institutions that those behaviors comprise.

5. The key question becomes: How does law influence behavior?

6. Effective implementation requires appropriate behaviors by two sets of actors: Those of the primary actors, whose behaviors comprise the targeted social problem, and those of the agency officials responsible for implementing measures designed to induce conforming behavior by primary actors.

7. For a law effectively to change their behaviors, these two sets of actors must easily use and understand how its prescriptions require them to behave.

8. *Ergo*, one should assess a proposed law along two dimensions:

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<sup>4</sup> The phrase derives from Roscoe Pound, “The Limits of Law,”....

(a). Will it likely change behaviors of both primary actor and implementing agency in ways that will transform the problematic institution at issue in desirable ways?

(b). As a necessary condition to transforming the problematic behaviors that constitute the problematic institution at issue, will the new law prove accessible (that is, will it prove understandable to its users) and readily usable? (Unless its addressees can readily read and understand the new law, and use it easily, they will not likely understand it or act upon it intelligently.)

In this Comment, we assume that Bhutan seeks to use the law instrumentally to conquer poverty, vulnerability, and poor governance – in short, to increase what the government terms ‘Gross National Happiness.’

This Comment has three main Parts. Part One considers the draft bill on its face. From that examination, it infers the specific social problem that the bill aims to overcome: That to decide a contract case in Bhutan today, a judge has no clear set of rules of contract law on which to base decision. This bill constitutes a proposed Contract law, modeled on the U.S. *Restatement of Contracts (Second)*. Part Two of this Comment discusses the information that the Tshogdu properly requires to make an intelligent assessment of the proposed law’s potential social impact. Part Three recommends institutionalized procedures by which the Tshogdu might acquire the necessary information -- but that lies in future.

To assess this bill requires an estimate of its *behavioral* consequences. Absent a report advising the Tshogdu of the facts and logic on which the bill rests, of necessity this Comment begins by examining the bill on its face.

**PART ONE**  
**THE BILL CONSIDERED ON ITS FACE**

This bill comes to the Tshogdu unsupported by justification, explanation, or other documentation. To comment on the bill, therefore, we begin by considering it on its face. That calls for a procedure akin to peeling an onion. This Part works its way from the bill's surface appearance towards the bill's core meaning – that is, the difficulty that it defines as the social problem of concern, and the means it adopts to overcome that social problem. This Comment therefore assesses the Contracts bill primarily in terms of *its probable effectiveness as an instrument of social change*.

Consistently with analyzing and assessing this bill *on its face*, this Part first reviews a melange of drafting anomalies. From its style of drafting and from the obvious fact that this bill largely tracks the American *Restatement of Contracts (Second)*, this Part then infers the social problem that this law seems to address. It concludes by asking, why *this* bill at *this* time?

#### **A. Some Drafting Anomalies.**

The draft contains a number of drafting anomalies, too many to discuss them all in this Comment. Here, in no particular order, we mention only a few examples of the sort of drafting errors that, on a redraft, the Tshogdu may want to see remedied.

1. The draft uses the passive form of the verb at least as often as it uses the active form. For example, Art. 5 (“A contract *is formed* normally in accordance with the provisions laid down in this Chapter, when an offer by one party *is followed* by an acceptance...”). Like every law, this law can only exercise its instrumental task by seeking to change the problematic behaviors of specific actors – that is, to change existing problematic institutions. To do that, it must rigidly specify *who* does *what*. That implies that a drafter should use the active, not the passive, voice. (The active voice necessarily specifies the actor. Typically, the passive voice does not.)

2. In a number of places, the draft misuses the verb 'shall' (sometimes, instead of 'shall', it misuses 'must'). See, e.g., Art. 89:

“89. Notwithstanding Subsections 88 (a)-(e), a bonafide transaction entered into with a previously authorized agent qua agent by a person acting without actual knowledge of the termination of his authority *shall* be binding upon the principal and his heirs, devisees, legatees, and other successors in interest.” [emphasis supplied]

A drafter should use the verb 'shall' only to give a commando a specified *person capable of acting on that command*. This section purports to give a command (“shall be binding”) not to a person, but to “a bona fide transaction” (Some call that misuse of 'shall' a 'false imperative'.)

Incidentally, the last phrase in the Article (“his heirs, devisees, legatees and other successors in interest” violates a rule that cautions a drafter to beware a list of specific words followed by a general word. Too easily, a court, citing the *eiusdem generis* rule, can hold that the general word (here, “successors in interest”) refers only to instances with the characteristics of the specific words that precede the general word.

See, e.g., also, Art. 7:

“A contract must have at least two identifiable parties i.e. a promisor and a promisee.”

(Is this section giving a command to “a contract”?)

3. The draft contains an occasional internal contradiction. Compare, e.g., Art. 9:

“Unless otherwise indicated by the language or the circumstances, an offer invites acceptance in any manner and by a medium used by the offeror or one customary in similar transactions at the time and place the offer was received.”

with Art. 14(a)

“An acceptance is effective as soon as it is put out of the offeree’s possession while the offeree’s power of acceptance is still valid: (a) whether or not it ever reaches the offeror, if made in a manner and by a medium (i) invited by the offer or (ii) if no medium was specified, used by the offeror, or one customary in similar transactions at the time and place the offer was received, if it has been

properly addressed, and if such other precautions have been taken as are ordinarily observed to insure safe transmission of similar messages....”

(As written, if an offer does not specify ‘the manner’ of an acceptance, in terms of Art. 9, the offeree may accept in “any manner”. In terms of Art. 14(e), however, the offeree must accept such an offer in a manner “invited by the offer” or one “used by the offeror or one customary in similar transactions....” Art. 9 obviously permits some ways of accepting an offer that Art. 14 prohibits.)

4. The kinds of contracts to which the proposed law applies seems unclear. Article 2 provides as follows:

This Act applies to all *commercial* transactions in the Kingdom  
of  
Bhutan except for those transactions subject to the Commercial  
Sale of Goods Act 2001, or to the Moveable and Immovable Property  
Act 1999.” [Emphasis supplied].

This raises three issues. First, the bill nowhere defines the term ‘commercial.’ Second, the section seems to contradict other articles in the text of the new Act. For example, Art. 23 reads as follows:

“A promise which the promisor should reasonably expect to induce action or forbearance by the promisee or a third person and which does induce such action or forbearance or is *for a charitable subscription or marriage settlement* is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.” [emphasis supplied].

It seems hard to subsume a marriage contract or a promise for a charitable subscription under the phrase, ‘commercial transaction’.

Third, what categories of contracts fall under this new law? The Commercial Sales of Goods Act covers sales contracts – by far the largest single category of contractual relationships. The

Moveable and Immoveable Property Act covers all transactions purporting to create a security interest – mortgages, pledges, and the like.<sup>5</sup> Presumably Bhutan has a law covering labor contracts – most countries do. The Tenancy Act covers most aspects of leasing contracts. What categories of commercial contracts remain to which this law will apply?

5. A drafter should endeavor to reduce the confusion and difficulty that a new law may cause. To that end, a drafter should either use the same vocabulary as existing law touching on the subject, or else amend existing law to coincide with the vocabulary in the new law. In the case at hand, the proposed new law defines ‘contract’ as follows:

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<sup>5</sup> Cf. Moveable and Immovable Property Act 1999, Art. 4(1).

- “212(e). Contract** is one or more promises for:
- (b) the breach of which there is a remedy; or  
the performance of which there is a duty.

“Promises not satisfying (i) or (ii) above do not give rise to a contract and are void of legal effect.”

Bhutan’s Commercial Sales of Goods Act, defined that word differently:

" 9(vii). ‘Contract’ means the total legal obligation that results from the parties' agreement as affected by this Act and any other applicable rules of law.”

It seems likely to cause confusion, if what counts as a binding promise under the Contracts Law does not count as a contract under the Sale of Goods Act. (More time to prepare this Comment would permit a broader catalogue of these sorts of discrepancies.)

6. Some articles violate several drafting rules. Consider Art. 14 of the Bill:

“An offeree who does any act inconsistent with the offeror’s ownership of offered property is bound in accordance with the offered terms unless they are manifestly unreasonable, provided, however, that if such act is wrongful against the offeror, it constitutes acceptance only if ratified by the offeror.”

That violates several drafting rules, as follows:

(1) Avoid the use of ‘each’ ‘any’ ‘every’ and ‘all’ – as here, these rarely add meaning to a sentence. (Here, the sentence would mean exactly what in now means if it read in part, “an offeree who does ~~any~~ AN act inconsistent with....[etc.]” If a word adds nothing to a sentence’s meaning, a drafter ought to omit that word.

(2) Avoid the use of the verb ‘to be’; it has little meaning and frequently opens the door to ambiguity and misunderstanding. Redrafted, that phrase might read thus:

“...in accordance with the offered terms unless they ~~are~~ APPEAR manifestly unreasonable...[etc].

(2) “is bound” uses the passive voice. Much more effective to use the active voice, using the auxiliary verb ‘shall’ to give a command, as follows:

“An offeree who does an act inconsistent with the offeror’s ownership of offered property ~~is bound~~ SHALL PERFORM in accordance with the offered terms ....[etc.]”

(3) Never use a proviso. “Provided that....” constitutes ‘legalese’ at its worst.

Here, the drafter apparently means to state an exception to the general rule. The drafter should so word the Article.

“An offeree who does ~~any~~ AN act inconsistent with the offeror’s ownership of offered property ~~is bound~~ SHALL PERFORM in accordance with the offered terms unless they ~~are~~ SEEM manifestly unreasonable, ~~provided, however, that~~ EXCEPT THAT, if . . . .[etc.]”

(5). Avoid using legalistic words like ‘such.’ Here, instead of ‘such’, the drafter might use the more common and understandable ‘that’. (This Article also uses the verb ‘to be’ in the proviso clause:

“...if ~~such~~ THAT act ~~is wrongful against~~ DOES HARM TO the offeror, ...[etc.]”

Examples might be multiplied.

**Summary:** The technical drafting of the bill fails in a several respects, and merits careful review.

Drafting errors may seem ‘technical’ and unimportant, but they easily give rise to disputes and too often, expensive litigation. A drafter or the deputies should try to catch drafting errors *before* a law’s enactment.

The following section discusses the more serious issue suggested by the bill’s drafting style: The social problem that the bill addresses.

## **B. The social problem that this bill addresses: Learning from the bill's text**

To assess a bill, the Tshogdu must ascertain what social problem the bill addresses, and then assess whether its detailed provisions will likely ameliorate that problem.

For two reasons, it seems clear that this bill aims to instruct judges how they should decide a contracts case: (1) The style of drafting, and (2) the bill's apparent lineal descent from the *Restatement of Contracts (Second)*. This section first examines the adequacy of the present bill as a remedy for the apparent social problem and the behaviors that seem to comprise it.

This Part first asks, what can we learn from the face of the bill and other easily available evidence concerning the social problem addressed?

### **1. *The draft bill aims to provide rules that a judge should follow in deciding a contracts case.***

#### **a. The bill on its face.**

The first criterion of a properly drafted law holds that the bill must be drafted in a way that clearly, precisely and accessibly tells the addressee what the law expects the addressee to do.

The present bill directly hardly tells anyone to do anything. To channel behaviors in desired ways, a law properly consists mainly of commands, permissions and prohibitions. (One estimate holds that 95% of the sentences in a properly drafted bill that, like all bills, aims primarily to change behaviors, must consist of commands, prohibitions or permissions.)

A central rule for drafting says, 'same word, same concept; different words, different concepts.'

By convention, a competent drafter gives a command by using the word 'shall' (in some jurisdictions, 'must'); to give permission, the word 'may'; to prohibit, 'may not' (in some jurisdictions, 'shall not'). Some 95% of the sentences in a bill, therefore, should contain one or another of these words.

Very few of the provisions of the present draft contracts bill contain words of command, prohibition or permission. Instead they contain rather abstract doctrinal propositions, of the sort that lawyers and judges use in discussing issues of law.

Consider, for example, section 8:

“An offer gives the offeree a continuing power to accept until termination of the power by:

(a) rejection or counteroffer by the offeree. . . “

How might this provision affect behavior? Suppose negotiations looking to a contract between a private party and a building contractor to construct an additional room on a home in Thimpu.

The contractor quotes a price. The owner says, “Can’t you sharpen your pencil a little?” – i.e., he asks the contractor to lower the price. The contractor shakes his head. The owner thinks a moment and says, O.K., I’ll take it at your price. The contractor shakes his head and mentions a higher price. The owner brings a suit for damages because the contractor refused to do the work at the price first quoted.

Had the parties reached contract on the original quoted price? Assume that the owner knew the words of the law, but had no formal legal training. Would such a person likely know that, as stated in Art. 8, by asking for a lower price he terminated the “continuing power to accept”?

Would either party in the hypothetical likely understand what, in practical terms, Article 8's Delphic statement means? In terms, Article 8 gives no command, prohibition or permission. If the actor wishes to accept an offer, the actor must puzzle out what the law tells the actor to do – with precious little help from the text of the law..

The drafters might have worded the same provisions as follows:

“8. (1). In this Act, ‘to accept’ an offer means that the offeree signals to the offeror that the offeree agrees to be bound by the terms of the offer.

(2) Subject to Article 8(A), if the offeree unconditionally accepts an offer, the offeror and the offeree shall carry out the terms of the offer.

“8A. Notwithstanding Article 8, if, prior to accepting an offer, the offeree signals to the offeror that the offeree does not unconditionally accept the offer, the offeree may not thereafter accept that offer.”

The Contracts bill states the rules concerning acceptance as abstract legal propositions. The redrafted Article 8 restates those rules as commands and permissions, addressed to specific categories of persons (here, ‘offerors’ and ‘offerees’)

The bill’s use of impersonal forms can lead to changed behavior by offerors and offerees – the ‘primary actors’ in this contracts bill – only by an indirect process. These primary actors must first learn the law that judges will apply if a dispute arises on a contract. They then must try to change their behaviors so that, in the event of a dispute that gets to court, they will prevail. (That does seem rather convoluted. What percentage of contracts in Bhutan ever end up in court, even where disputes do occur?). Norms that aim at changing behaviors ought to appear clearly stated as commands, permissions or prohibitions addressed to the specific categories of actors involved. Anything less invites confusion and misunderstandings.

On their face, few of the rules articulated in this draft contracts bill seemingly address a specific social actor. Instead, they seem to constitute the black-letter texts in a textbook on contract law. Therein lies a clue about this law’s anticipated function.

For two reasons, the bill’s relatively abstract rules seem to constitute a set of instructions to judges about how to decide a case concerning a claim on a contract. First, the discourse in court typically speaks – as does this bill – in legal doctrine. Judges write opinions using the same form

of discourse. This bill might well serve as the black-letter head notes for a textbook on Bhutanese contract law

A drafter might expect judges and lawyers to understand the language and concepts used in this bill. Others may not. The bill does not speak in a language that most social actors readily understand.

An additional reason argues that these rules aim primarily at judges, instructing them how to decide a contracts case.

b. Tracking the *Restatement of Contracts (Second)*.

In fact, the present draft draws heavily on the *Restatement of Contracts (Second)*, written initially for judges in the United States. Borrowings from the *Restatement* appear on almost every page of the draft bill. The nature of those borrowings suggest two significant implications. First, that the present bill uses the same style of drafting as used in the *Restatement* implies that the authors of this bill sought to achieve the same purpose as did those of the *Restatement*. (Part Two of this Comment discusses the second implication: That Bhutan can reliably assume that whatever behaviors the *Restatement* induced in America, the new law will replicate in Bhutan – that is, the problem of ‘legal transplants’.)

i. Preliminarily: how the draft tracks the *Restatement of Contracts (Second)*.

Preliminarily, this section presents a few samples of the way in which this draft apes the *Restatement (Second)*:

(1) *From the present draft:*

“212(9)(e). **Contract** is one or more promises for:

- (a) the breach of which there is a remedy; or
- (b) the performance of which there is a duty.

Promises not satisfying (i) or (ii) above do not give rise to a contract and are void of legal effect.”

*From the Restatement (Second):*

**“§1. CONTRACT DEFINED**

A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.”

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(2) *From the present draft:*

“9. Unless otherwise indicated by the language or the circumstances, an offer invites acceptance in any manner and by a medium used by the offeror or one customary in similar transactions at the time and place the offer was received.

*From the Restatement (Second):*

“30(2). Unless otherwise indicated by the language or the circumstances, an offer invites acceptance in any manner and by any medium reasonable in the circumstances.”

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(3) *From the present draft:*

“18. If consideration exists, there is no additional requirement of:  
(a) a gain, advantage or benefit to the promisor nor a loss, disadvantage or detriment to the promisee;  
(b) equivalence in the values exchanged; or  
(c) “mutuality of obligation.”

*From the Restatement (Second):*

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

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(4) *From the present draft:*

“23. A promise which the promisor should reasonably expect to induce action or forbearance by the promisee or a third person and which does induce such action or forbearance or is for a charitable subscription or marriage settlement is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.”

*From the Restatement (Second):*

**‘90. PROMISE REASONABLY INDUCING ACTION OR FORBEARANCE**

(1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

(2) A charitable subscription or a marriage settlement is binding under Subsection (1) without proof that the promise induced action or forbearance.

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(5) *From the present draft:*

“87. Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.”

*From the Restatement (Second):*

**“§205. DUTY OF GOOD FAITH AND FAIR DEALING**

“Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.”

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(6) *From the present draft:*

“88. If a court determines, after the parties have had an opportunity to present evidence, that a contract or provision was unconscionable when made, the court may:

- (a) refuse to enforce the contract;
- (b) enforce the contract without the unconscionable provision; or
- (c) limit the application of the provision so as to avoid an unconscionable result.”

*From the Restatement (Second):*

**“§208. UNCONSCIONABLE CONTRACT OR TERM**

If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.”

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(7) *From the Restatement (Second):*

: “36 -- Methods of Termination of the Power of Acceptance

- (1) An offeree's power of acceptance may be terminated by
  - (a) rejection or counter-offer by the offeree, or
  - (b) lapse of time, or
  - (c) revocation by the offeror, or
  - (d) death or incapacity of the offeror or offeree.
- (2) In addition, an occurrence of any condition of acceptance under the terms of the offer”

*From the present draft:*

- “8. An offer gives the offeree a continuing power to accept until termination of the power by:
  - (a) rejection or counteroffer by the offeree;
  - (b) lapse of time specified in the offer or if no time is specified, on expiration of a reasonable time;
  - (c) revocation by the offeror received by the offeree before acceptance has been effected;
  - (d) non-occurrence of any condition for acceptance under the terms of the offer; or
  - (e) death or loss of legal capacity by either the offeror or offeree.”

(8) *From the present draft:*

- “11. When an offeree fails to reply to an offer, his silence and inaction constitute acceptance when:
  - (a) with reasonable opportunity to reject offered services and reason to know that they were offered with the expectation of compensation, he takes the benefit of the offered services;
  - (b) the offeror has stated or given the offeree reason to believe that assent may be manifested by silence or inaction and the offeree in remaining silent and inactive intends to accept the offer; or
  - (c) because of previous dealings or otherwise, it is reasonable that the offeree notify the offeror if he does not intend to accept.”

From the *Restatement (Second)*:

**“ 69 -- Acceptance by Silence or Exercise of Dominion**

- (1) Where an offeree fails to reply to an offer, his silence and inaction operate as an acceptance in the following cases only:
  - (a) Where an offeree takes the benefit of offered services with reasonable opportunity to reject them and reason to know that they were offered with the expectation of compensation.
  - (b) Where the offeror has stated or given the offeree reason to understand that assent may be manifested by silence or inaction, and the offeree in remaining silent and inactive intends to accept the offer.
  - (c) Where because of previous dealings or otherwise, it is reasonable that the offeree should notify the offeror if the offeree does not intend to accept.”

Again, one could multiply these examples almost endlessly. That this law tracks the *Restatement* seems clear.

ii. Why the authors of the *Restatement* employed this particular drafting style.

American lawyers began the *Restatement of Contracts* in the 1920s. At that time (and still today) contract law in the United States found expression not so much in sweeping legislation, as in the opinions of judges in the several states. . The American Law Institute ('ALI'), a group of distinguished American lawyers and judges, produced the first *Restatement*. The authors believed that, not only judges, but businessmen and the population generally, required a clear, simple restatement of the holdings of those cases. The very notion of a *Restatement* implied that it 'restated' what these lawyers and judges concluded comprised the law as it presently stands. In mid-century, as contract law as expressed in judicial opinions changed with time, ALI began work on the *Restatement (Second)*, completed in 1979

The *Restatement* has never formed part of the law of any U.S. jurisdiction. Yet, for two reasons, judges cite it as persuasive authority: One, by analogy to the judicial opinions that the

*Restatement* summarizes, and, second, by analogy to the (limited) deference that judges pay to textbooks on the law.

First, from the beginning, its authors designed the *Restatement* to summarize the rules of contract law as construed in the manifold opinions of the judges of the (U.S.) state and federal courts. In the common law tradition, the law stated in an opinion of a higher court in the same jurisdiction counts as ‘binding’ precedent. That same law stated by a court outside the hierarchy of one’s own jurisdiction counts only as ‘persuasive’ precedent. Judges pay deference to a ‘persuasive’ precedent partly because of the persuasiveness of the arguments in the opinion, and partly because of the eminence of the author of the persuasive precedent. For the same reasons, judges in the United States cite the *Restatement (Second)* as persuasive authority.

Second, opinions of United States judges, faced by a contested issue of law, not infrequently refer to authoritative textbooks on the subject. The *Restatement* as published in the United States took the form of a textbook. After each black-letter text, there appears a discussion, in length usually many more pages than that occupied by the black-letter text. The *Restatement* in the United States in effect takes the dual form of a highly respected restatement of the common law of contracts as it appears in the judicial opinions of the several states, and an equally highly respected textbook concerning the common law of contracts as stated in the law reports of the several states. That this bill so closely tracks the *Restatement* speaks loudly that it has the same purpose: To ‘restate’ the rules of contract law, assuming that judges will follow them in deciding contract cases.

In short, the style of drafting of Bhutan’s draft contract law, and its similarity to the *Restatement (Second)*, suggest that judges who must decide contract cases (and presumably

lawyers who must argue those cases) constitute its primary expected audience. That raises a question: Why *this* bill at *this* time?

**C. Why *this* bill at *this* time?**

Contract law generally, and specifically this bill and the *Restatement*, embody in every rule a choice among competing alternatives found in contract law around the world. Consider, for example, the doctrine of ‘consideration’. As noted above, in the proposed law as in the *Restatement*, consideration constitutes an essential element in the formation of a contract. The *Restatement* defines ‘consideration’ as follows:

**“Restatement (Second) Section 71 – Requirement of Exchange; Types of Exchange**

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

The present draft of the Bhutan Contract Act tracks that definition:

“17 Except as provided in Section 20 or 21 a performance or promise of performance constitutes consideration if it is sought by the offeror in exchange for his promise and is given by the offeree in exchange for that promise.”

“18. A performance constituting consideration may consist of:

1. an act other than a promise;
2. a forbearance; or
3. the creation, modification, or destruction of a legal relationship.

“19. The consideration may be given:

1. to the offeror or some other person; or

2. by the offeree or some other person”

The contract codes of many, probably most other nations, however, omit the requirement of consideration. The European civil codes do not include it. Consider specifically the European ‘Principles of Contract Law’.<sup>6</sup> Just as American lawyers wrote the Restatement in an effort to reduce the variant laws of a large number of States to a preferred set which, it was hoped, most could agree, so the European Union sought to develop a Code to which its member states might conform their laws. Most of those countries follow the civil, law. The ‘Principles’ therefore state:

**“Article 2:101: Conditions for the Conclusion of a Contract**

- (1) A contract is concluded if:
  - (a) the parties intend to be legally bound, and
  - (b) they reach a sufficient agreement without any further requirement.”

Why does the American *Restatement* include the doctrine of consideration, whereas the European Code does not? This seemingly constitutes a case of path dependency: All the American states, following and changing the earlier English precedents, enshrined the doctrine in one or another of its variant forms. The American scholars might – and did – choose among those variant forms, and they all included consideration as an essential element of a contract. The U.K. courts had earlier decided that consideration constituted an essential element of a contract. Following precedent, the U.S. courts also included consideration in their definition of ‘contract’. The *Restatement* followed suit. To this date, however, no member country of the

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<sup>6</sup> That we mention the European Principles of Contract does not at all mean that we favor adoption of a law modeled on that law. We use it here only as an example of a law that the Tshogdu might consider as an alternative to the present draft. As we argue below, Bhutan should not blindly copy *any* law.

European Union (save the UK) contains that element in its contract law. In consequence, the European 'Principles' do not incorporate the doctrines of consideration.

Why did the European 'Principles,' itself also a Restatement of the law of its constituent states, omit that doctrine? One useful scholarly article states that "In short, the Commission [for drafting the European 'Principles'] has tried to establish those principles which it believed to be best *under the existing economic and social conditions in Europe.*"<sup>7</sup> So did the American scholars who drafted the *Restatement*: They made choices between the precedents on offer that reflected their understanding of what would best serve the public interest under existing economic and social conditions in the United States. (For example, the Second Restatement arose in part because the scholars involved believed that the requirements of the Restatement in its first version inappropriately excluded all the cases where consideration as defined above did not exist. Especially, the framers of the *Restatement (Second)* believed that the consideration requirement produced unfair results in the case where no consideration of the sort defined in the first Restatement existed, but in which one party had changed his or her position substantially in reliance on the naked promise of the other party.)

By adopting the present draft, with few exceptions, the Tshogdu will inevitably determine that in future Bhutan will require 'consideration' as an element of a binding contract. Under the European doctrine, *per contra*, a plaintiff can prove by any available evidence that the defendant made the promise the plaintiff seeks to enforce with intent to create a binding legal obligation. How has the consideration doctrine worked in the United States and the UK? How has the *absence* of consideration as a necessary element of a contract worked in the civil law

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<sup>7</sup>The Commission on European Contract Law, "The Principles of European Contract Law", at [http://frontpage.cbs.dk/law/commission\\_on\\_european\\_contract\\_law/survey\\_pecl.htm](http://frontpage.cbs.dk/law/commission_on_european_contract_law/survey_pecl.htm) (emphasis supplied)

countries? Especially, how might either work under the specific *Bhutanese* conditions? Until the Tshogdu knows the answers to these questions – and especially, the question of the law’s probable consequences *for Bhutan* -- how can the Tshogdu responsibly decide whether to enact this law?

In short, the doctrine of consideration as set out in this bill the rules result from a whole cascade of choices that began in the Middle Ages when English courts began to develop contract law, and carried down through the opinions of judges in the 50 U.S. states and the federal government as well. What holds for the doctrine of consideration holds for every rule in this bill. For the Tshogdu to approve this bill in its present state, without considering the alternatives and the arguments for and against them, effectively turns over the legislative power to the consultant who elected to follow the *Restatement* rather than another model. On its face, the bill provides not an inkling as to why the consultant made that decision. To copy the *Restatement* without a prediction of what behaviors it will induce in the relevant actors in Bhutan effectively turns over the Tshogdu’s legislative power to these unknown experts in the law of some countries (but probably not Bhutan, and certainly not experts about the Bhutanese circumstances.)

In sum: The drafting style its drafters chose for this bill, and the bill’s provenance in the *Restatement (Second)*, combine, in the first instance, to suggest this bill’s purpose: To guide judges in deciding contract cases. What constitute the likely consequences of this attempted ‘legal transplant’?

## **PART TWO THE CONSEQUENCES OF A LEGAL TRANSPLANT**

‘Legal transplants’ – copying laws of other countries – constitutes a widespread

phenomenon. This Part discusses, first, why drafters so often do copy the law of another country; second, why relevant social actors may behave differently in a legal transplant's new home than do those in the law's country of origin; and, third, the risk that, in Bhutan's very different socio-economic context, the resulting differing behaviors may incur a negative social impact.

### **A. Why legal transplants?**

Drafters copy law for either of three reasons. First, the world around, drafters face impossible demands. They must produce complex bills on difficult issues. Given an assignment on Friday, too often, it seems, the drafter must have the bill on the Minister's desk by Monday. Supposedly, that bill must actually induce the behaviors prescribed, prescriptions which, if obeyed, supposedly will ameliorate the identified social problem. Faced by seemingly impossible time constraints, drafters almost instinctively reach for something to copy.

Second, how should a drafter actually go about drafting a complex bill in the few days before placing it on the Minister's desk? Here we focus on the drafter's responsibility to supply the bill's substantive details in the course of drafting a bill. How does a drafter *design* the details of a bill?

Almost no drafter that we have met has a theory or methodology to guide the drafter in designing a bill likely to induce the desired changed behaviors. Absent such a guide, inevitably most drafters fall back on either of four 'seat-of-the pants' methodologies: Copy other countries' law (international 'best practice'); compromise between competing interest group claims; criminalize undesired behavior indiscriminately; or draft in broad, general terms, hoping that the Minister will make

subordinate legislation (or ‘regulations’) to give the new legislation much-needed specificity. None require a detailed study of the conditions in which the new law will function.

As third reason, drafters tend to copy a ‘developed’ country’s laws because that methodology resonates with the idea of ‘modernization’ -- a seemingly popular subset of development theory which, on the surface, seemingly agrees with the proposition that we earlier advanced: A country suffers the ills of underdevelopment because of its problematic *institutions*. Modernization theorists, however, then draw an inference: By copying the laws that shape a ‘developed’ country’s institutions, you, too, can instantly become ‘developed.’

Modernization theory omits a significant step: That an institution consists of the *behaviors* that constitute it. Those behaviors define how an institution functions. To repair a dysfunctional institution through law requires a law that *in the specific conditions in which the law functions* will likely induce the desired behaviors – not merely a law that shouts that people *should* behave in a certain way.

Every developing country uses state power in aid of development, some wisely, some less so. To use state power *effectively* in aid of development largely depends upon predicting the *behavioral* consequences of a law. Whether this contract law will advance Bhutan’s development project, or merely add another ineffective law to clutter the statute books, depends upon the accuracy of that prediction. How can a member of the Tshogdu predict the consequences of this law? That requires a theory to advise what categories of facts count as relevant, and some device by which the deputies can learn about those facts.

## **B. Why do people behave as they do in the face of a rule of law?**

How to predict the consequences of a proposed law? What information should the Tshogdu have in order confidently to make such a prediction? This section describes a legislative theory that purports to guide a drafter or a legislator in answering that question.

Successfully to enact law in aid of development requires that Bhutan's law-making institutions have some capacity to *predict* the sorts of behavior that a new law will induce. To suggest the categories of data that such an assessment entails, we quote from our text, *Assessing Legislation: A Manual for Legislators*, (available for downloading at [www.iclad-law.org](http://www.iclad-law.org), pp. 26-27):

“To assess how a bill will likely ‘work’ in your country’s unique circumstances, you should demand evidence relating to two sets of questions: will the bill’s details induce the behaviors prescribed? Will those behaviors likely ameliorate the identified social problem, at not too great socio-economic costs?

“To answer these questions you need to understand *why people behave as they do in the face of the existing rule of law*. Only if you can give a tenable answer to that question can you confidently assert that government can use law to transform society. . . .

“Unless you can estimate a law’s potential real-world outcomes, you cannot use law to induce deliberate social, political and economic change. Without more or less reliable predication of outcomes, *purpose* becomes impossible. (Because we can predict the consequences, [to grow a tree] we plant seeds, not stones.) To estimate a new law’s probable outcomes, you must investigate the law’s potential impact on society.

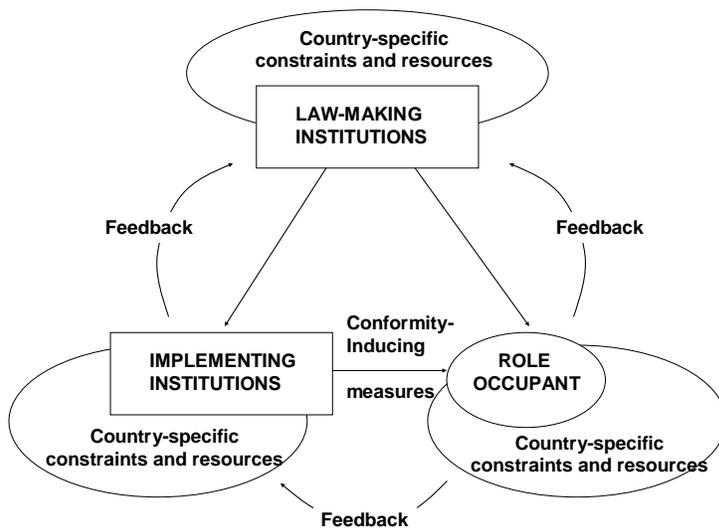
“‘Out there,’ in the real world, lie uncountable ‘facts.’ To assess a new law’s probable social impact, which should you examine? Save with respect of the simplest bills, without a guide about what facts to investigate – that is, *what detailed questions to ask* – you cannot know where to begin.

“Legislative theory holds that, confronted by a law, social actors behave within time- and place-specific constraints and resources of the environment within which they live and work. Among these the law (and its threats of punishment and promises of rewards) constitute only one.

“Legislative theory’s model of the legal system (see Figure 1) shows that, faced by a rule of the law, a person – a ‘role occupant’ – behaves in response to (1) the rule’s words, (2) the relevant implementing agency’s expected behavior, and (3) all the non-legal constraints and resources that characterize that person’s specific environment. . . . By investigating those three categories, you can make a more or less reliable prediction of a law’s social consequences.

“That is the necessary predicate for using law as an instrument of social change. *Learning to use legislative theory and methodology becomes a condition for using the legislative power wisely in the public interest – and thus for winning the fatal race.*”

Figure 1:  
**MODEL: THE LAW-MAKING PROCESS**



By the ‘fatal race’ we mean the ‘race’ between the invariably populist leaders of an anti-colonial or modernizing regime, and the existing, colonialist or anti-democratic institutions whose existence incited the regime change. Which will change the other first? Will the populist governors use state power constructively to change the old institutions –

or will the old institutions sooner coopt the new governors? World-wide, lacking capacity to use law as an instrument of social change, the new leaders largely failed to transform the old institutions. In time, those new leaders grew content with their pre-eminent posts in the new order. Surprisingly quickly, they came to accept the inherited institutions, and the Mercedes Benzes, large houses, high salaries, and the other perks that their positions entailed. They settled down to feathering their own nests – legally or illegally.

To avoid that result, Bhutan must design laws likely to shape new *institutions* that make less likely the loss of the Fatal Race. To change behaviors so that those new institutions become reality, Bhutan's drafters, the deputies, and others in the law-making process must have the capacity to predict how a law's addressees will respond to a new law.

### **C. Predicting the behavior that a law will induce.**

Figure 1 teaches that an actor responds to a rule of law by choosing how to behave in the light of much more than merely the words of the rule. A person chooses how to behave taking into account not only the rule, but also the expected behaviors of the relevant implementing agencies, and the 'non-legal' constraints and resources of the actor's environment. (Those latter constraints and resources include what goes on in the actor's head – 'values', 'ideology', 'incentives' and the like – and all the other 'objective' constraints and resources of the actor's circumstances).

That implies that even if the words of the rule in Country A copy verbatim the rule in Country B, the behavior of the implementing agency and the 'non-legal' constraints and resources of the environment in Country A almost never prove the same as in Country B. Faced by laws with practically identical wording, the behavior of actors in seemingly similar situations

in different countries will therefore likely nevertheless end up completely different. (Call that “the Law of Non-Transferability of Law.”)

The Law of Non-Transferability of Law teaches that a deputy cannot assume that a law copied from another country will induce similar behavior in Bhutan as it did in its original home. That does not mean at all that one cannot learn from studying foreign law. Of course one can, provided that one studies not only the face of the bill, but also the behavior the law induces in the home country. We can learn from human experience wherever it occurs. “*From comparative law there is nothing to copy but much to learn.*”

That implies that to assess the proposed Contracts bill, a deputy must know and understand a great deal more than its wording. The deputy must have considerable knowledge about the probable behavior of a Bhutanese court faced by a contract case in which the rules of the new law ought to control decision. The deputy must also have some knowledge of the relevant constraints and resources in the environment of those likely to make contracts to which the new law will apply – that is, the relevant economic actors – as they exist *in Bhutan*.

This Contract bill apparently aims its rules at Bhutan’s judges who decide cases under that country’s existing contract rules. Presumably, for one reason or another, the bill’s advocates do not believe Bhutan’s existing contract rules suffice. Indeed, nowadays, the world around, multinational institutions (IMF, World Bank) and major aid institutions (e.g., USAID, UNDP) and many, perhaps most, academic experts exhort newly developing nations to focus law-making efforts on achieving two related ends: To provide an hospitable climate for foreign investment, and to channel the behaviors of local businessmen into forms appropriate for a market-driven economy. A market economy, these advocates hold, requires transparent rules to

define the sorts of behaviors likely to ensure binding contracts in which each party understands its respective obligations.

In that context, proponents of this Contract law apparently perceive the courts' behaviors in dealing with contract disputes as comprising a significant social problem. They seem to expect this new law will guide the courts in deciding contract disputes in more appropriate ways – at least, in ways that more closely resemble how judges in the United States decide contract cases. Apparently, as elsewhere, they also anticipate that the new rules, by making known in advance how judges and other officials will treat a foreign firm's investment, will help to attract more foreign investors.

That seems a somewhat impoverished perception of a new contract law for Bhutan. If Bhutan seriously proposes to transform its economy into one with the high degree of specialization and exchange required of a market economy, it must not only provide new substantive rules to govern judges' behaviors in contract cases. It must also seek to change the *behaviors* of entrepreneurs, both foreign and domestic, and workers, shopkeepers, farmers, and many others – every set of social actors who must play a role in hoped-for expanding market transactions. In other words, the new law ought to foster the growth of appropriate new, increasingly market-oriented *institutions* in the Bhutanese context.

To accomplish that latter, larger aim, almost every section of this bill seems ineptly drafted. Instead of adopting a form likely to induce changed behaviors by all the potential market actors, it merely announces the rules that courts must follow in deciding in ill-defined contract cases.

Development requires *institutional* – that is, *behavioral* – change. That requirement holds for institutions of the different sorts that together constitute a polity: not only institutions

that one might easily characterize as ‘economic’, like this proposed Contract law, but also governmental and social institutions of all sorts.

In this case, the bill at hand seems unlikely to induce the necessary behavioral changes of all the potential market actors. At best, in contract cases it likely will change only the judges’ behaviors. In time that may lead to a change in entrepreneurial behaviors. As a minimum, the Tshogdu should call for a redraft of the bill to make it more probable that it will actually appropriately change the behaviors not only of judges, but also of market actors.

#### **D. Bhutan’s environment varies dramatically from that of the United States**

For a contract law to foster effective economic, political and social development to improve the quality of life of the Bhutanese people – i.e., to increase ‘Gross National Happiness’ -- institutionalist legislative theory underscores the necessity of grounding it on evidence relating to Bhutan’s unique realities. These prove fundamentally different from the United States circumstances within which, after decades of continuing debates, a non-governmental panel of lawyers produced the *Restatement of Contracts (Second)*. The environment of the relevant Bhutanese actors obviously differs widely from that of actors superficially similarly situated in the United States.

In today’s world, transnational corporations rooted in the world’s most developed industrial countries (including the United States) dominate an increasingly globalized economy. Bhutan – like most developing countries – does not enjoy the ‘free, competitive market conditions’ which most neo-liberal economists consider essential.<sup>8</sup> Implicitly, the international

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7. Neoliberal economic theory of ‘free competition’ requires the following conditions: (1) the units of the commodity dealt with remain homogeneous, regardless of the seller; (2) so many buyers and sellers operate in the market that no one of them can influence the supply or demand; (3) every buyer and seller has complete information about available supplies in relation to existing demand; (4) no discrimination exists between buyers and sellers; and

agencies urge developing countries to adopt contract and other commercial codes in the belief that with adequate laws the institutions of the free market will develop, bringing with them all the market benefits predicted by neo-liberal economists. That prediction rests on the assumption that if the judges decide contract cases by clear-cut rules, all market actors will behave in ways assumed as essential for free market development. Bhutan's circumstances differ very widely indeed from those, not only of the United States, but those required for a fully free market (see footnote 7).

The UNDP has estimated that the last half century of expanded international markets, far from fostering poor countries' development, has aggravated a growing inequality between them and the world's most industrialized countries. Today, a fifth of the global population capture about four-fifths of the world's total output, while 80 percent of the world's inhabitants, living in less developed countries like Bhutan, receive only about 20 percent of global production.

Nestled high in the Himalayas, governed by a Buddhist monarchy established a century ago, Bhutan remains a tiny country – half the size of the U.S. state of Indiana. Its population, smaller than that of the U.S. city of Boston, remains predominantly characterized by semi-subsistence agricultural production. Its average per capita income hovers among the world's lowest. Nevertheless, Bhutan's government has proclaimed a philosophy of 'Gross National Happiness' that prioritizes cultural promotion and good governance to improve all Bhutanese citizens' quality of life.<sup>8</sup>

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(4) market participants can easily transport commodities from one to another, more favorable market (see e.g. Paul Samuelson, *Foundations of Economic Analysis*, (Cambridge, MA: Harvard U. Press) 1963. None of these elements typically characterize developing country markets – especially small developing countries.

<sup>8</sup> See 'Accountability and Gross National Happiness' by Dasho Meghraj Gurung, Bhutan Post, ([http://www.bhutanstudies.org.bt/publications/gnh/GNH\\_ch9\\_maghraj.pdf](http://www.bhutanstudies.org.bt/publications/gnh/GNH_ch9_maghraj.pdf))

Bhutan's law-makers recognize the need to use law to create the conditions necessary to provide increasingly productive employment opportunities, rising incomes, better governmental institutions -- in short, to improve all Bhutanese' quality of life. That undoubtedly does requires legislation likely to foster the import of new technologies to stimulate balanced, integrated industrial and agricultural growth. What kinds of laws seem best suited to do that in the context of Bhutan's historically-shaped realities?

Today, in Bhutan, almost half the labor force remains illiterate, perpetuating a severe shortage of skilled labor essential for taking advantage of new technologies. Over 90 percent of Bhutan's labor force still works in semi-subsistent agriculture. Although only two percent of the labor force works in industry, and five percent in services, those two sectors alone produce over two thirds of the country's estimated GDP.<sup>9</sup> Nevertheless, appropriate institutions could facilitate Bhutan's participation in rapidly expanding global specialization and exchange, increasing acquisition of revolutionizing new technologies needed to open increasingly productive employment opportunities and improving the incomes and the life quality of all Bhutanese.

To realize this potential, Bhutan's government has already begun to play a major role.<sup>10</sup> Few if any private Bhutanese entrepreneurs seem likely to have the education, experience or resources required bargain as equal partners with the managers of the giant transnational firms that dominate international manufacturing, trade and finance. Few Bhutanese private entrepreneurs have the capacity or the capital to produce and sell their country's predominantly

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<sup>9</sup> <https://www.cia.gov/cia/publications/factbook/print/bt.html>: Excerpts from CIA, World Fact Book, updated Dec. 19, 2006

<sup>10</sup> <http://www.photius.com/countries/bhutan/economy/index.html>

crude material exports, or to purchase and import the modern technologies they need to jump-start their country's development.

In sum, the environment that historically has shaped Bhutan's economic actors' behaviors (its institutions) obviously differs widely from that in the United States. So also with implementing agencies: The context within which Bhutanese judges 'behave', for example, appears markedly different from that prevailing in the U.S..

In general, therefore, U.S. laws, copied in Bhutan, no matter their subject matter, will in almost every case produce at least somewhat different (usually radically different) behaviors in Bhutan than those which the same laws produce in the United States. For Bhutan to copy U.S. law without examining the specific Bhutanese environment within which the addressees of the new law will function makes it highly likely that the new law will induce in Bhutan at least a certain amount of completely unexpected behaviors.

In few Southeast Asian countries – among them Taiwan, Indonesia, Japan, Korea, and Thailand --did market behaviors parallel those assumed by neo-liberal economists. Several authors have labeled their economies, 'crony capitalism.' Never mind whether crony capitalism serves as an adequate form of economic development in those countries. For our purposes here, it suffices to point out that the behavior in those countries' markets – that is, the contract-making and contract-performing behaviors of market actors -- did not in the least resemble the economic behaviors of analogous actors in the United States.

To assess the proposed contract law's effect in Bhutan, the Tshogdu must try to predict at least whether the proposed Contract law will likely induce a truly competitive market, or instead result in the growing inequalities characteristic of many other developing countries. That

requires research into the probable consequences of the law, taking into account the specific Bhutanese environment.

In sum: Legal transplants will reproduce in Bhutan the behaviors that those laws induce in their countries of origin only if the non-legal factors in the environment prove similar in Bhutan to those in the new laws' countries of origin. A contract law that in its 'home' country produces benign results too easily may produce adverse results in Bhutan's current situation.

Patently, Bhutan differs from the United States in myriad of ways. Before voting on the proposed Contract law, the deputies in the Tshogdu must have access to well-researched evidence that demonstrates that it will succeed in promoting 'development' in Bhutan. That underscores the argument, made below, that the Tshogdu should insist that the sponsors of a bill supply a research report *justifying* the proposed bill in terms of the facts and the logic on which it rests.

### **PART THREE THE PROCESS OF ASSESSING A BILL: THE FUNCTION OF A RESEARCH REPORT**

The Constitution assigns to the Tshogdu the power to enact legislation that will advance the public interest. How to decide whether a bill will do that?

Only if a bill advances the interest, not of a narrow powerful group, but the *public* interest can its proponents justify it by arguments that reasonably expect to find a consensus among the deputies. If a substantial consensus, reflecting all sides of the political spectrum, agree that a bill will probably increase 'gross national happiness,' that surely comes as close as possible to demonstrating that the proposed bill lies in the *public* interest.

The only arguments that reliably can appeal to all sides of the debate consist of those that appeal to the listeners' reasoning facilities. Those comprise the arguments that reasonably should persuade a 'rational skeptic.' By 'rational skeptic' we mean the sort of person who doubts whether a bill will further the public interest, but remains willing consider reasoned arguments grounded on the relevant facts. Only arguments grounded on 'reason informed by experience' will likely appeal to the rational skeptic. To demonstrate that a proposed law will likely advance the *public* interest, the proponent of a law must show by facts and logic that the proposed law results from a ***process of reasoned choice***, that is, by what the philosopher John Rawls termed "public reasons."

*Assessing Legislation: A Manual for Legislators* explains how a research report, tracking the four steps of legislative theory's problem-solving methodology, can provide the relevant available evidence to demonstrate that a bill's detailed provisions will likely prove effectively implemented to achieve the desired social impact:

"Just as a court must ***justify*** its judicial decisions by stating the reasons that underpin them, so you [the legislators] might consider a rule to require sponsors of an important bill to provide a written ***justification*** for its detailed provisions. To ensure the adequacy of that justification, you could require the bill's sponsors to structure their justification by organizing the available evidence logically:

- "1. Describe the social problem, and whose and what behaviors comprise it (including those of the responsible implementing agency;
- "2. explain the legal and non-legal causes of those behaviors [for a guide, see Figure 1];
- "3. show –
  - (a). the alternative solutions considered;
  - (b). that the bill's detailed provisions seem likely to overcome the identified causes; and
  - (c). that the bill's economic and social benefits will likely outweigh its costs; and

- “4. ensure that a responsible agency will monitor and evaluate the bill’s implementation and social consequences.

\* \* \* \*

“Merely by reading the face of any but the simplest of bills, nobody can judge whether it will resolve the social problem it purports to address. Nor can anyone assess a bill merely by consulting personal values. To assess a bill in the public interest requires facts and logic. . . . [Legislative theory and methodology] provide the logic necessary to . . . design a law’s detailed provisions and to estimate their likely social impact. The entire law-making process would benefit if proponents of an important bill accompanied it with a research report that justified its detailed provisions on the grounds of facts and logic.”

For a simple bill – for example, a bill forbidding spitting on the sidewalk in downtown Thimpu, the deputies do not need a research report. A citizen living in Thimpu knows from his or her own experience whether a law will likely change such common behavior as spitting on the sidewalk. For a law as complex as this proposed contracts law, however, the deputies need many facts beyond their own experience. For such a bill, it seems indispensable that the proponents of the bill furnish the deputies with an adequate research report justifying the bill in terms of facts and logic.

Such a research report, justifying this proposed Contract Law in terms of facts and logic, would give the Tshogdu the necessary basis for making an informed decision about whether to adopt the bill as written, amend it, or send it back to the sponsors with instructions to rewrite it. Unless that kind of report accompanies the bill, the Tshogdu must, as it were, fly blind. Before deciding on the proposed Contract Law – or any other important bill -- the Tshogdu should require its proponents to supply an adequate research report.

#### **PART FOUR**

## SUMMARY AND CONCLUSION

To summarize:

1. As we understand the processes of development, law can play a role in repairing dysfunctional institutions. To do so, its detailed provisions must seek to induce new behaviors designed to replace the existing problematic behaviors that comprise dysfunctional institutions.

2. Drafting for development (and, it turns out, to solve a social problem in developed countries as well) requires drafting norms, addressed to the relevant actors in the form of commands, permissions or prohibitions. The draft Contract law does precious little of that. Instead, it seems primarily to consist of rules purportedly designed to assist judges in deciding contract cases. It seems likely to affect contracting parties' behaviors, if at all, only by a somewhat circuitous path, trusting that participants will behave differently when they understand that, in future, Bhutan's judges will decide cases by these rules. Throughout the world, drafters have come to realize that a legislature more effectively enacts laws that state commands, permissions and prohibitions. Those commands, permissions and prohibitions, if stated in precise terms, can limit the primary social actors' and implementing officials' discretion, thus reducing the potential for arbitrary decision-making and corruption..

3. In addition, the draft Contract law requires editing to ensure that it conforms to established rules of drafting.

4. In particular, the Tshogdu should ask the bill's sponsors what they mean by 'commercial' transactions, to which Article 2 of the bill would confine the law's scope.

5. The bill copies many provisions of the United States's *Restatement of the Law of Contract (Second)*. It seems highly unlikely, however, that this law will induce in Bhutan the same sorts of behaviors it induces in the United States. The Tshogdu should insist on research to estimate the bill's probable social and economic consequences.

6. The bill represents a highly selective choice among many different sorts of contract laws. Its sponsors should *justify* drawing inspiration from this United States text -- (re)designed by lawyers and judges seeking, in the Common Law tradition, to summarize the judicial interpretations of many different US states -- instead of considering other possibilities, such as the European Principles of Contract.

7. The Tshogdu should require the sponsors of this bill (and, indeed, of every important bill that it considers) to justify its detailed provisions in terms of relevant evidence about Bhutan's unique circumstances, preferably in the form of a logically organized research report.

## **Comments by Eduardo Buisson Loureiro**

Macau, January 15, 2007

### **I**

#### **The draft law in general**

The draft law is, on the whole, a fairly detailed and well written document that follows the several steps in the life of a contract.

The major issue here is that the transactions subject to the *Commercial Sale of Goods Act 2001* and to the *Moveable and Immovable Property Act 1999* are excluded from the scope of the draft law, which seems to undermine its importance.

In order to put the draft law at the center of its rightly position in the legal system, Section 2 should be redrafted to reflect the idea that it will work as the principal legislation ruling contracts in Bhutan, serving as subsidiary legislation in everything that is not specifically ruled by the above mentioned two acts.

Another way is to incorporate and consolidate in the draft law all the sections on those two acts that cover contracts, in order to have a unified and consolidated approach in this important area of law.

In Section 3, there is a repeal formula that often creates conflicts of interpretation “prevails over all provisions of existing laws and regulations...which are inconsistent with this Act”. In our opinion, it’s better to refer specifically the laws and regulations involved.

## II

### Analysis in detail of some sections

#### Chapter 1

1. **Normal contracts** – It’s preferable to use the expression “common” instead of “normal”, since it’s more in line with the other type of contracts, the “special contracts” of Section 6.

#### Chapter 2

2. **Section 5** – the connection between (a) and of (b) is not clear, and (a) should be separated into three sub- subsections.

3. **Section 9** – “putative contract” probably needs a definition in order to be fully understood.

4. **Section 13 (b)** – the value of silence as stated in this sub-section has been found problematic in some Asian societies. It’s recommended that this rule is subject to careful consideration by the legislator weighting advantages and disadvantages.

5. **Section 15** – the meaning and operation of this section needs some redrafting, since similar wording in legislation has proved confusing and prone to conflicting interpretation.

6. **Section 20** – the content of subsections (a) and (b) may be somewhat conflicting with Section 29.

7. **Section 22** – In some Asian societies, specially Confucian ones, this section would be very difficult to understand and apply. It's recommended here that its inclusion in the draft is given careful thought.

8. **Section 24** – “Unless other facts indicate a different indication...”

We suggest the use of the wording “Unless other facts lead to a different conclusion...” to avoid the current tautology which can be difficult for the translation.

9. **Section 28** – “The remedy granted for breach may be limited as justice requires.”

According to the best practices and methods in legislative drafting, we recommend that a section or sub-section contains only an idea, for better clarity and ease of reading.

10. **Section 29** – Please cfr. comment to Section 20.

11. **Section 30, (g)** – “Rules on Use of Judicial Stamps in Bhutan as amended”

In our opinion, it's not necessary to use the wording “as amended” since the applicable law will always be the law effective at the moment, unless expressly said otherwise.

12. **Section 33, (c)** –

This sub-section is too long for an easy understanding of its meaning. We recommend that it is further subdivided from “Each promisor...”.

13. **Section 41** – Misrepresentation by a person

In this particular section, of utmost importance in Contract Law, we recommend the use of a general definition covering the following ideas<sup>3</sup>:

- A false statement which misrepresents an existing material fact;
- Which is made before the conclusion of a contract with a view to inducing another to enter that contract;
- Which is made with intention that the person to whom it is addressed shall act on it;
- Which is acted on, having induced the contract;
- Which is not merely advertising.

14. **Section 42** – Definition of fraudulent misrepresentation

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<sup>3</sup> In Curzon, L.B., Dictionary of Law, sixth ed. 2002, Longman, England, pp 273-274.

In our view, the above mentioned definition should be rewritten in the following way:

“A misrepresentation is fraudulent when a false representation is made by a person knowingly or without belief in its truth or recklessly, careless whether it to be true or false.<sup>4</sup>”

15. **Section 48** – Extension

We suggest that this section be divided into two, from “It is reasonable to do so...”.

16. “**Void or voidable for duress...**”

We found that *duress* is not defined in the the draft, but *undue influence* is (Section 55). For ease of interpretation we recommend that duress is also defined.

17. **Sections 52, 53 and 54** – “threat”

We recommend that the above mentioned legal concept be defined in the draft.

Moreover, there seems to be no exact connection between that concept and the wording of the previous section but is not clear, since a threat is somewhat different from physical force.

18. **Section 59 (a)** – Definition of promise in restraint of trade

The definition should be integrated with the previous phrase, or divided into a sub-sub section.

19. **Section 59 (b)** – Promise in restraint of marriage

Comparing with the previous subsection, a definition is lacking here and is of utmost importance, specially in Asian societies.

20. **Section 60, (b)** – “grave social harm”

A definition would be useful here.

21. **Section 62, (b)** – Extension

It’s recommended that this sub-section be divided from “Under a gratuitous bailment...”.

22. **Section 62, (c)** – Extension

It’s recommended that this sub-section be divided from “An involuntary bailee...”.

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<sup>4</sup> Based in Curzon, op cit, p. 274.

23. **Section 62, (h)** – Extension

It's recommended that this sub-section be divided from "If the bailee acted..."

24. **Section 64** – Extension

It's recommended that this section be divided from "Consideration..." and also from "The principal...".

25. **Section 66** – Extension

It's recommended that this section be divided from "Acceptance..."

26. **Section 67** – Extension

It's recommended that this section be divided from "No unauthorized..."

27. **Section 67** – Extension

It's recommended that this section be divided from "Ratification may be rescinded..."

28. **Section 72** – Extension

It's recommended that this section be divided from "An authority..."

29. **Section 76** - Extension

It's recommended that this section be divided from "All the rights and liabilities..."

30. **Section 80** – Extension

It's recommended that this section be divided from "If the principal discloses..."

31. **Section 84** – Extension

It's recommended that this section be divided from "He is liable..."

32. **Section 85** – Extension

It's recommended that this section be divided from "He may..."

33. **Section 86** – "pursuant to section 86"

It's not clear if the reference to section 86 is correct.

34. **Section 87** - “under section 86”

It’s not clear if the reference to section 86 is correct.

### **Chapter 3**

35. **Section 91** –

We found this section to be particularly well written, and worth mentioning.

### **Chapter 4**

36. **Section 96, (c)** – Extension

It’s recommended that this section be divided from “In case of such repudiation...”

37. **Section 101**

This section was found to be not clear in its meaning.

38. **Section 110** – Extension

It’s recommended that this section be divided from “The oblige...”.

39. **Section 112** – “Section 119 and 110”

The order of the references should be reversed.

Another aspect is that the use of double references and cross references should be avoided because it usually leads to highly conflicting interpretation.

### **Chapter 5**

40. **Sections 113 and 118**

The difference between the above mentioned sections is not clear.

41. **Section 116** – “law or government regulation or order”

If there are other types of legislation – broad sense – in Bhutan, they should also be included or the term legislation may serve to include all. In this particular, we don’t have data to base our opinion.

## Chapter 8

### 42. **Section 137** – Extension

It's recommended that this section be divided from "An incidental..."

### 43. **Section 145** – Extension

It's recommended that this section be divided from "Satisfaction in whole..."

### 44. **Section 148** – "pursuant to section 148"

It's not clear whether the reference is correct.

### 45. **Section 149** – Extension

It's recommended that this section be divided from "In that case..."

## Chapter 12

### 46. **Section 181** – Extension

It's recommended that this section be divided from "The performance..."

### 47. **Section 184** – Extension

It's recommended that this section be divided from "The following..."

### 48. **Section 193** –

The reason behind the rule is not clear, but that rule probably is included because of specific conditions of the country.

## Chapter 13

### 49. **Section 207** – "The requirement of Section 207..."

From the wording and since we are in Section 207, it seems that the reference to Section 207 might be incorrect.

## Chapter 14

### 50. **Section 215** – Extension

It's recommended that this section be divided from "The power to avoid...".

### **Chapter 15**

51. **Section 217, (e)** – "Promises not satisfying (i) or (ii) above do not give rise to a contract and are void of legal effect".

Comparing with other definitions in this chapter, we think that the above mentioned part should not be included in this chapter.

### **Comments by Jason P. Matechak**

**Comment 1.** As noted above, it is not clear to me as to what is excluded from the Contract Act by the Commercial Sale of Goods Act (presumably shop sales) and the Moveable and Immovable Property (presumably real estate and encumbered assets) Acts cited in ¶2 and the Thrimzhung Chenmo cited in ¶3. My comments to the drafters would

be to clarify the scope of the draft Contract Act and to make sure that the Acts laws and regulations effective in the Kingdom of Bhutan are internally consistent.

**Comment 2.** As to offer and acceptance in ¶¶9-16, the provisions on “offer” appear to be less robust in general than the provisions on “acceptance.” The drafters may wish to revisit these sections and may wish to review similar laws such as the U.S. Uniform Commercial Code (“UCC”) or even the United Nations Convention for the International Sale of Goods (“CISG”). With respect to the CISG, please see Comment 1 above and the exclusion of contracts subject to the Commercial Sale of Goods Act. There may be some unnecessary exclusion here.

**Comment 3.** For the sections on Consideration, especially ¶21, the drafters may want to consider some notion of unconscionability here or perhaps cross reference that notion in the later section on public policy. See ¶93.

**Comment 4.** Chapter 2 is entitled “Special Types of Contracts.” However, the header before ¶6 refers to “Special Contracts” that are exempt from the Contract Act. This may need to be clarified. Also, in ¶29, the drafters may want to consider an affirmative statement that contracts ending contractual disputes or perhaps contracts to arbitrate are enforceable.

**Comment 5.** For the writing requirement, under the common law statute of frauds there is often a currency value associated with the writing requirement that the drafters may want to consider.

**Comment 6.** In the sections dealing with mistake, the drafters may consider reordering ¶39 to be before ¶37 so that the mutual mistake provisions are together.

**Comment 7.** It is not clear to me that the paragraphs dealing with the voidable abuse by a fiduciary cover the situation in which an authorized agent enters into an unauthorized contract on behalf of the principal. The drafters may wish to consider whether such an agreement is voidable. See ¶¶78-79.

**Comment 8.** For duress or undue influence, I am not sure if the release of scandalous information would fall under the enumerated criteria of ¶52. The drafters

may wish to consider if such a situation would fall under the breach of duty of good faith and fair dealing suggested in ¶52(d). See ¶92.

**Comment 9.** For the public policy grounds listed in ¶59, the drafters may wish to make this an illustrative list rather than a definitive list.

**Comment 10.** For Chapter 5, the drafters may wish to consider the notion of commercial impracticability and the remedies that would stem there from. The drafters may also wish to consider force majeure and include an illustrative listing of applicable force majeure events.

**Comment 11.** For Chapter 6, the drafters set forth when an obligation may be discharged but they may also wish to incorporate and/or cross reference what remedies may be available or what procedures may need to be taken to effectuate the discharge.

**Comment 12.** For Chapter 7, the drafters may wish to consider the responsibilities of joint obligators and whether the obligee may discharge one joint-obligator.

**Comment 13.** For Chapter 8, the drafters may wish to consider when a beneficiary is created by operation of law.

**Comment 14.** For Chapter 9, the drafters may wish to consider whether the assent to a request for assignment or delegation or subcontracting can be withheld for an unreasonable or improper purpose or whether assent must be reasonably provided.

**Comment 15.** For Chapter 12, with respect to adequacy of damages in lieu of injunctive relief, the drafters may wish to consider whether damages will actually remedy the harm or whether the harm will not be repaired by the payment of damages.

**Comment 16.** For ¶¶193-194, the drafters may wish to consider what restraints on competition in general may be placed on one party under contractual terms. Specifically the drafters may wish to consider whether terms limiting competition should be limited temporally, geographically, etc.

**Comment 17.** For Chapter 13, the drafters may wish to consider whether restitution would be available under contracts implied by fact or implied in law.



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