IT'S A DEAL! WHEN AN AGREEMENT IS AN AGREEMENT? ENGLISH RULE vs. THE RESTATEMENT (SECOND) OF CONTRACTS[+]

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I. INTRODUCTION: AGREEMENT AND HONOR

I try to live with honor, even if it costs me millions of dollars and takes a long time. It's very unusual in Hollywood. Few people are trustworthy - a handshake means nothing to them. They feel they're required to keep an agreement with you only if you're successful or they need you.[1]

> James Cameron (1954-) Academy Award and Golden Globe winning best movie director (e.g. films- *Titanic*, *The Terminator*, *Avatar*, *True Lies*)

Though negotiations are a rough game, you should never allow them to become a dirty game. Once you've agreed to a deal, don't back out of it unless the other party fails to deliver as promised. Your handshake is your bond. As far as I'm concerned a handshake is worth more than a signed contract. As an entrepreneur, a reputation for integrity is your most valuable commodity. If you try to put something over on someone, it will come back to haunt you.[2]

> Victor Kiam, (1926-2001), American Entrepreneur, Former owner New England Patriots Football Team and President of Remington Products.

The quotes from award winning, Hollywood director, James Cameron and the late entrepreneur, Victor Kiam, exemplify a long established and held tenet of contract law and agreement negotiation, honoring agreements and commitments. In American culture and many others even to this day-

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[1] James Cameron, BRAINY QUOTES, https://www.brainyquote.com/quotes/james_cameron_593971 (last visited Feb. 25, 2018).

[2] Victor Kiam, *Top 16 Quotes by Victor Kiam*, A-Z QUOTES, http://www.azquotes.com/author/7986-Victor_Kiam (last visited Feb. 25, 2018).

personal honor by way of a handshake or other personal act of trust is a bond to an agreement, the dignity and integrity of the parties on public display to honor commitments or face embarrassing public derision when not. Both men quoted encountered different industries, each challenged by these concepts. Cameron, works in a film industry, infamous for contract and non-contract promises of questionable enforcement. Cameron has succeeded in the dog-eat-dog environment of Hollywood, notorious for creative accounting and other forms of creative contract interpretation previously binding actors and actresses beyond the scope or intent of their contracts.[3] Kiam operated in the often tumultuous world of major league National Football League (NFL) sports where promises, even in writing might be fleeting, and, the often risky environment of entrepreneurial consumer manufacturing and marketing (Remington Products). Each's business milieu faced ethical challenges.

For thousands of years English Common law and its successors elsewhere attempted to codify and establish grounds for intended agreements and their performance through common law rules of contract, and, in other venues statutory rules such as the Uniform Commercial Code.[4] But what of good faith agreements, bargained for with mutual assent in which the parties *intend* to be bound and even engage in recognizable affirmative conduct/performance, *but* have not yet consummated the final deal in writing or other formality. Is there no enforceable agreement? Is there no enforceable contract? Do the parties have a voidable option to withdraw, or, is their intent and conduct under preliminary agreement sufficient for a court to hold the agreement is true and binding?

This paper examines the transactional environment created when two parties, operating in good faith, reach an agreement, engage in conduct or performance consistent with the agreement but for one reason or another have not fully executed all final forms or formalities for the bargain. Is there an intention to be bound? And if there is such an intention by preliminary agreement, is it enforceable in the absence of a signature or other provision aspect of an agreement?

Common law arriving in Colonial America from the 1600s, later and incorporated into state common law (after establishment of the United States

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[3] For example, the famous actor contract case, de Havilland v. Warner Brothers Pictures, 67 Cal. App. 2d 225, 153 P.2d 983 (1944), in which actress Olivia de Havilland prevailed in ending Hollywood's notorious contract system. Later the state enacted De Havilland's Law, CAL. LAB. CODE § 2858.

[4] U.C.C. (1946). Even here, the UCC recognizes that an express contract, in this case a warranty, can exist without the formality of words or even formal form. Section 2-313(2) of the U.C.C. similarly provides that it "is not necessary to the creation of an express warranty that the seller use formal words such as *warrant* or *guarantee* or that he have a specific intention to make a warranty."

of America) throughout addressed this question in what is known as the English Rule considered at the time black letter law. That common law rule stated:

> The English rule says that a contract exists only when the parties manifest an intent to be legally bound, that is, when a reasonable person in the parties' circumstances would have understood them to have such an intent. The parties' manifest intent is a question of fact, to be answered by looking at the totality of the circumstances. These circumstances can include the type of agreement, the completeness and specificity of the terms, the nature of the parties' relationship, as well as more general consideration of the parties' reasonable background beliefs.[5]

Over time, United States common law practice diverged from the pure English Rule into the definition established by the Restatement (Second) of Contracts Section 21: Intent to Contract [hereafter U.S. Rule].

II. RESTATEMENT OF CONTRACTS §21: INTENTION TO BE LEGALLY BOUND

"Neither real nor apparent intention that a promise be legally binding is essential to the formation of a contract, but a manifestation of intention that a promise shall not affect legal relations may prevent the formation of a contract."[6]

Both rules suggest agreements demonstrating intent to a promise may be legally enforceable. However, the U.S. Rule in practice has encountered a stricter interpretation than the common law English Rule. Now in a global context, with promises made over the Internet, by text, Twitter, social media and means other than a formal agreement, at what point would a trier of fact hold parties legally bound by their intentions in the absence of a formal executed agreement? Case law in the late 20th and early 21st centuries is relatively sparse, but portends potential conflicts in the future as agreements and bargains over electronic (E-Commerce) formats carried across international boundaries grow in use and in scope.

> As has been noted in many previous writings on agreements and contract law, contract law principles have remained relatively constant and stable for centuries, including fundamentals such as

[5] Gregory Klass, *Intent to Contract*, 95 VA. L. REV. 1437, 1454 (2009).
[6] RESTATEMENT (SECOND) OF CONTRACTS §21.

> the implied duty of good faith when bargaining and freedom of contract generally. One of the fundamental principles in contract law is whether or not a promise made to another is legally enforceable in the first place. An unenforceable promise made to another, whether in the employment context or other transaction, is characterized as being a *nudum pactum*, often referred to as a non-binding, gratuitous or illusory promise that lacks the element of consideration to form a contract. Put differently, there must be a "this for that" or *quid pro quo* between the promisor and the promisee.[7] On the other hand, once an enforceable promise has been established, thereby becoming the basis for an enforceable contract, it is generally not the role of courts to undo these agreements which are sometimes referred to as being sacred; *pacta sunt servanda* (*agreements must be respected*).[8]

Agreement ambiguity whether English Rule or U.S. Rule interpretation in effect is not an issue when dealing with agreements the law requires in writing under the Statute of Frauds.[9] In such cases, courts would adhere to the plain reading or "four corners doctrine" of the written and executed agreements as the sole basis for determining the intent and obligations of the parties.[10]

Ambiguity, issues of intent to contract and of mutual assent then arise when present in an agreement, typically an oral one, or, one in which the parties have arrived at a preliminary agreement [such as a memorandum of understanding] without formal finality in place. In such circumstances, the operative question is whether there is an enforceable agreement-in-fact based upon the manifest conduct and intent of the parties.

Scholars have pointed out that in essence, parties do not go into legitimate, intended enforceable agreements unless they have legitimate mutual intended interests and some value from the transaction.

> Whether or not the parties intended legal liability affects the incentives the law creates, for legal incentives have traction only on parties who expect legal liability. And the parties' intent to be legally bound is strong evidence of the efficiency of legal

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[7] Adam Epstein & Henry Lowenstein, *Promises to Keep? Coaches Tubby Smith, Jimmy Williams and Lessons Learned in 2012*, 24 S.L.J. 1, at 165-66. See reference in notes 1–6.

[8] *Id.*

[9] U.C.C. §2-201.

[10] Steven J. Burton, *A Lesson on Some Limits of Economic Analysis: Schwartz and Scott on Contract Interpretation*,
88 IND. L.J. 339 (2013) (observing courts in most jurisdictions adhere to a "Four Corners Rule" on contract interpretation that limits allowable parole evidence to written agreements).

> enforcement, since informed parties will choose enforcement only when it creates value for them.[11]

Thus, the *disputes* that would invoke either the English Rule or U.S. Rule (§21 Restatement) in almost every case involve an actual agreement in which both parties benefit but prior to some final execution, even one non-substantive, confront significant changed circumstances for which one party may be unduly enriched by repudiating the agreement, seeking to invoke such technicality to void the deal. Where this creates detriment to the other party, equitable relief may be sought in the courts. Enforcement of such a preliminary agreement preserves an important ethical and social benefit such that parties are held to their intent, their trust, reliability and integrity of the agreement/contracting process.[12]

III. THE ENGLISH RULE – U.S. RULE

A. *The English Rule*

Under the English Rule, the intent to contract of the parties is directly manifested in their conduct during and after the alleged (preliminary) agreement. Indeed, in Australia (an English Commonwealth nation), a handshake today still may legally evidence an enforceable agreement. It is accepted evidence for example in the New South Wales Civil and Administrative Tribunal (Small Claims Division).[13]

Klass articulates the English Rule more specifically as:

> The English rule says that a contract exists only when the parties manifest an intent to be legally bound, that is, when a reasonable person in the parties' circumstances would have understood them

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[11] Klass, *supra* note 5, at 1439.

[12] *Id*. at 1441. Klass's analysis emphasizes that enforcement "concerns a special advantage of sticky defaults in determining the conditions of contractual validity. This advantage is premised on the idea that there is sometimes a social interest in imposing duties on parties for reasons other than their antecedent choice or preference. Sticky defaults can serve that interest. Put another way, sticky enforcement defaults serve the duty-imposing function of contract law, while at the same time recognizing and enabling the purposive use of contract as a legal power. The last point concerns the costs of expressly opting-out of either an enforcement or a non-enforcement default. These include not only the out-of-pocket costs usually associated with contracting around a default, but in many transactions relational costs as well. Interpretive rules that require parties who want, or who do not want, legal liability expressly to say so can interfere with and erode extralegal forms of trust that otherwise create value in transactions."

[13] *A Handshake Can Legally Seal a Deal*, STACKS L. FIRM (Apr. 16, 2014), https://stacklaw.com.au.

> to have such an intent. The parties' manifest intent is a question of fact, to be answered by looking at the totality of the circumstances. These circumstances can include the type of agreement, the completeness and specificity of the terms, the nature of the parties' relationship, as well as more general consideration of the parties' reasonable background beliefs. When factfinders fully engage in this inquiry, however, the results can be difficult to predict.[14]

In the UK proper, unsigned agreements may still bind parties under the *English Rule*. For example, in *Reveille Independent,* the Commercial Court has ruled that a party had accepted the terms of an agreement by its conduct, even though it had not signed the agreement and the agreement purported to require the signatures of both parties to take effect.[15]

Under the English Rule, in commercial transaction disputes, the defendant has the duty and burden of proving a negative intent*,* that is, proof the parties never intended to be bound by their agreement or preliminary agreement. Moreover, British courts have adopted the precedent of reading any ambiguous evidence of intent as against the defendant (i.e. an interpretive consciousness of intent.)[16]

As will be discussed, in U.S. transactions the English Rule has been supplanted by §21 Reinstatement of Contracts (Second) (aka U.S. Rule). Nevertheless, in an increasing global environment, U.S. businesses will find themselves increasingly subject to a version of the English Rule in international transactions due to provisions of the United Nations Conventions on Contracts for Sale of Goods (CISG). These provisions were noted by Klass's research.

> While § 21 accurately represents the rule in almost all U.S. jurisdictions, the United States is a signatory to the United Nations Convention on Contracts for the International Sale of Goods (CISG). Article 14(1) of the CISG establishes something like the English rule for contracts for the international sale of goods: "A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it . . . indicates the intention of the offeror to be bound in case of acceptance." United Nations Convention on Contracts for the International Sale of Goods art. 14, Apr. 11, 1980, S. Treaty Doc. No. 98-9 (1980), 1489 U.N.T.S. 3.[17]

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[14] Klass, *supra* note 5, at 1437.
[15] Reveille Independent LLC v, Anotech International (UK) Ltd, [2015] EWHC 726 (Comm).
[16] Klass, *supra* note 5, at 1459.
[17] *Id*. at 1438 n.3.

B. *U.S. Rule: Restatement (Second) of Contracts §21*

A like situation of preliminary agreements or unsigned agreements has a somewhat different judicial approach in United States common law practice on contracts and agreements. Here, in U.S. practice a party must show a manifestation of intention that presumes or demonstrates the parties intended to be bound by their agreement.[18] Key here is conduct: "But where a bargain has been fully or partly performed on one side, a failure to perform on the other side may result in unjust enrichment, and the term may then be unenforceable as a provision for a penalty or forfeiture...."[19]

A first test of the parties' intent is to establish that Mutual Assent existed. Mutual Assent, an essential element to any enforceable agreement or contract is defined as: "The meeting of the minds of both or ail the parties to a contract; the fact that each agrees to all the terms and conditions, in the same sense and with the same meaning as the others."[20] Mutual assent is established by a two element test.

> Mutual assent consists of two main elements, an offer and acceptance. [1] An offer is a promise to do something, or to refrain from doing something, in return for something of value. [2] Acceptance takes place when the other party agrees to the conditions made in the offer. Both the offer and acceptance must be stated in a way that makes it clear toanother reasonable person that the parties have reached an understanding as to the terms of the agreement.[21]

A third and essential element once the understanding or agreement has been reached is the manifest conduct of the parties addressed in Restatement §19.[22] It is useful to reprint it here verbatim along with the Restatement's own accompanying comment.

> § 19. Conduct as Manifestation of Assent
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> (1) The manifestation of assent may be made wholly or partly by written or spoken words or by other acts or by failure to act.

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[18] RESTATEMENT, *supra* note 6.
[19] *Id*. (under comments).
[20] *Mutual Assent*, BLACK'S LAW DICTIONARY (2d ed.) (citing Insurance Co. v. Young, 23 Wall. 107, 23 L. Ed. 152).
[21] *Mutual Assent*, LEGAL DICTIONARY, https://legaldictionary.net/mutual-assent/ (last visited Feb. 25, 2018).
[22] RESTATEMENT (SECOND) OF CONTRACTS § 19.

(2) The conduct of a party is not effective as a manifestation of his assent unless he intends to engage in the conduct and knows or has reason to know that the other party may infer from his conduct that he assents.

(3) The conduct of a party may manifest assent even though he does not in fact assent. In such cases a resulting contract may be voidable because of fraud, duress, mistake, or other invalidating cause.

Comment:

a. Conduct other than words. Words are not the only medium of expression. Conduct may often convey as clearly as words a promise or an assent to a proposed promise. See Comment *a* to §4 and Illustrations. Where no particular requirement of form is made by the law a condition of the validity or enforceability of a contract, there is no distinction in the effect of the promise whether it is expressed in writing, or orally, or in acts, or partly in one of these ways and partly in others. Purely negative conduct is sometimes, though not usually, a sufficient manifestation of assent. See §69.

Like words, non-verbal conduct often has different meanings to different people. Indeed, the meaning of conduct not used as a conventional symbol is more uncertain and more dependent on its setting than are words. A wide variety of elements of the total situation may be relevant to the interpretation of such conduct. The problem is illustrated in cases of claims against a decedent's estate for services rendered. *In such cases the line between a contractual claim based on agreement and a quasi-contractual claim based on unjust enrichment is often indistinct; on either basis a major question may be whether the services were rendered gratuitously, and the circumstances are often critical.*[23]

IV. ENFORCEABILITY – THE *TIAA* CASE

A. *Intent and Mutual Assent*

How do U.S. courts handle "intent to contract" disputes in light of two longstanding legal theories on the enforceability of preliminary or non-fully executed agreements? Relatively, few cases exist on point. Generally speaking it has been observed that when parties have reached agreement on

[23] *Id.* (emphasis added).

some but not all material terms, expect to continue negotiating, and, fill in the remaining open terms, something may happen to prevent the conclusion of the agreement. The question is then whether the partial (sic.: preliminary) agreement has created legal obligations. It is generally accepted preliminary agreements should be enforced only when the parties manifestly so intended. (Courts in multiple jurisdictions cite *TIAA*,[24] a U.S. district court case as precedent.)[25]TIAA, as a major institutional investor and lender filed suit against Tribune Co. (the borrower) for breach of agreement on a commitment letter for a $76 million loan, yielding 15.25% for 14 years.[26] The agreement stated that the parties had made a *binding agreement* subject to preparing and executing final documents. Material details impacting those final documents led Tribune Co. to withdraw prior to signing (in this case, a significant drop in market interest rates). TIAA alleged it suffered losses as interest rates declined. Judge Leval in his 28-page opinion broke through the lengthy recriminations of the parties to adduce the key issue; whether the commitment letter of agreement, though final executing documents were not completed or signed, nevertheless established enforceable obligations.[27]

The court noted preliminary agreement litigation is difficult to generalize as to its effect. These can come in various forms such as letters of intent, memoranda of understanding, binding preliminary commitments (such as interest locks for a mortgage) and the like.[28]The key significance as in contracts themselves is the intentions of the parties and to their manifestations of intent.[29] The court recognized that courts should avoid *trapping* parties in surprise unintended obligations.[30] That said, it equally noted the duty of courts to enforce and preserve agreements intended by the parties to be binding, notwithstanding the need for further documentation or negotiation.[31]

The court then firmly states, "Preliminary contracts (sic.: agreements) can be of at least two types. One occurs when the parties have reached complete agreement (including the agreement to be bound) on all the issues perceived to require negotiation. Such an agreement is preliminary only in form, only in the sense that the parties desire a more elaborate formalization

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[24] Teachers Insurance Annuity Association (TIAA) v. Tribune Co., 670 F. Supp. 491 (S.D.N.Y. 1987).
[25] Klass, *supra* note 5, at 1448-49.
[26] TIAA, *supra* note 17, at 491.
[27] *Id*. at 496.
[28] *Id.* at 497.
[29] *Id*.
[30] *Id*.
[31] *Id*. at 498.

of the agreement. The second stage is not necessary; it is merely considered desirable."[32]

The second type of preliminary agreement is one that demonstrates mutual commitment (Mutual Assent) to an agreement on major terms, while at the same time recognizing there may still be open terms to be negotiated. In this type of preliminary agreement, the parties' commitment is enforceable to continue negotiating open terms in good faith toward a final agreement or contract.[33] Such a legal obligation bars a party from renouncing the agreement, abandoning negotiations or insisting on conditions that do not conform to the preliminary agreement.[34]

> In seeking to determine whether such a preliminary commitment should be considered binding, a court's task is, once again, to determine the intentions of the parties at the time of their entry into the understanding, as well as their manifestations to one another by which the understanding was reached…. Nonetheless, if that is what the parties intended, courts should not frustrate their achieving that objective or disappoint legitimately bargained contract expectations.[35]

The court found that the parties had used the second method and that the intention to create a mutually binding contractual obligation was stated with *unmistakable clarity*.[36]

B. *Conduct and Consideration*

Having established intent and mutual assent, U.S. courts then look to additional factors that go beyond the classic English Rule. Specifically, courts examine the conduct (such as partial performance) of the parties and any elements of consideration that may have passed, even in a preliminary agreement or other agreement with remaining open terms to negotiate.In essence, if parties have an agreement, even preliminary, and by their affirmative conduct perform all the intended duties to each other, even in the absence of a completed agreement, the objective theory of contracts in concert with §21 Restatement would suggest a court would find a legally

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[32] *Id.* (citing V'Soske v. Barwick, 404 F.2d 495, 499 (2d Cir. 1969)). "The mere fact that the parties contemplate memorializing their agreement in a formal document does not prevent their informal agreement from taking effect prior to the event." *Id.*
[33] *Id*.
[34] *Id*.
[35] *Id.* at 499.
[36] *Id*. (citing Empro Manufacturing Co. v. Ball Co. Manufacturing, 870 F.2d. 423, 425, (7th Cir. 1989)).

enforceable agreement. Implied-In-Fact contracts, established by conduct of the parties, for example have always been recognized.

> Implied-in-fact contract is a contract that the parties presumably intended as their tacit understanding, as inferred from their conduct and other circumstances. An implied-in-fact contract is also termed contract implied in fact. An implied-in-fact contract is a contract agreed by non-verbal conduct, rather than by explicit words. Such contracts are automatically created when a party tacitly accepts a benefit at a time when it is possible to reject it.[37]

V. THE $11 BILLION INTENTION TO BE BOUND: *PENNZOIL V. TEXACO*

Perhaps no greater example of the application of the U.S. Rule may be found than the infamous case of *Texaco v. Pennzoil*,[38] the Texas battle over the acquisition of the Getty Oil Company. Following the death of founder, J. Paul Getty, his sibling heirs lacking interest in running the oil company, ultimately headed by son Gordon Getty, decided to sell off Getty Oil.The Chairman of Pennzoil, Hugh Liedke at the end of December, 1983, began a process of negotiation with Getty's two primary shareholders, Gordon Getty (also representing the Sara Getty Trust) and The Getty Museum to purchase 16 million Getty shares of common stock at $100 per share, by way of private or public tender offer. Therein began intense business negotiations with The Getty's.[39] Management and legal teams worked around the clock through that Christmas holiday season at rapid pace.

On January 2, 1984, at an emergency Board of Director's meeting, the Pennzoil offer now sweetened to $110 a share was presented by way of a five-page Memorandum of Agreement signed that day by Pennzoil's Liedke and Gordon Getty. The Getty Board of Directors approved and ratified the memorandum.[40] As with all such complex documents, not every detailed aspect of the agreement had been concluded and thus was subject to working out many final details necessary to complete such a large corporate

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[37] *Implied-in-Fact Contract Law and Definition*, USLEGAL.COM, https://definitions.uslegal.com/i/implied-in-fact-contract/ (last visited Mar. 5, 2018) [hereinafter Implied-in-Fact].

[38] 729 S.W.2nd 768 (Tex. Ct. App. 1987).

[39] THOMAS PETZINGER, JR., OIL & HONOR: THE TEXACO-PENNZOIL WARS (1987), at 157-70. This book provides comprehensive detail on the events leading up to and the ultimate case and decision itself.

[40] *Id*. at 190-91.

transaction. Yet both the documents, the Board approvals and statements of the parties clearly evidenced Intention to Be Bound by its terms.[41]

Pennzoil and Getty issued a proud press release of the deal (including required U.S. Security and Exchange Commission notices). Thus by January 4, 1984, it was public knowledge Pennzoil and Getty had agreed to the purchase even though not all final detailed terms were in place.[42] At the same time Pennzoil and Getty were negotiating the final terms of the agreement memorandum, and other implementation documents, Texaco, one of the seven largest oil companies in the world was developing its own offer ($125 a share) to prevent the smaller Pennzoil from acquiring Getty Oil.

Texaco, notwithstanding knowledge of the formal agreement, within three days of conclusion of the Pennzoil signed agreement, proceeded to intensely lobby Gordon Getty and the Getty Board to breach the Pennzoil Memorandum of Agreement. By January 6, 1984, Texaco had convinced Getty and its Board to renege on the Pennzoil agreement and accept Texaco's enhanced offer.[43] This set off the breach of agreement lawsuit of the century. On January 10, 1984, Pennzoil filed suit for *tortious interference* in a business agreement against defendants, Getty Oil, Gordon Getty, Getty Museum and Texaco.[44]

The key element crux of the case hinged on establishing that Pennzoil had an enforceable agreement; the parties exhibiting *an intention to be bound*. As with the case of *TIAA*, *Pennzoil-Getty* was a complex merger secured through a definitive Memorandum of Agreement. Was this enforceable? Was the U.S. Rule operative? The parties, intending to be bound, heavily invested in the agreement, and with Pennzoil facing potential damage from non-performance by Getty, breaching the agreement to jump to another suitor (Texaco). As author Petzinger noted, Texas had a long history of considering a person's word as their bond, an agreement holding a particular place of honor in its commercial-societal environment.

> A contract can be two things. A sheaf of papers stapled together with signatures at the bottom and the word *contract* typed on top is a contract. But in the eyes of the law, a contract can also be a state of mind, something that may come into existence without paperwork and without lawyers. The main requirement, put simply, is the parties achieve a *meeting of the minds* on the essential terms

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[41] Pennzoil-Getty Memorandum of Agreement (Jan. 2, 1984) (public record). *See* CONSTANCE E. BAGLEY, MANAGERS AND THE LEGAL ENVIRONMENT 189 (9th ed. 2019) (reproducing the agreement).

[42] Texaco v. Pennzoil, *supra* note 38, at 198.

[43] *Id*. at 235.

[44] *Id*. at 275-95. The remainder of the book summarizes details of the case and ultimate decision.

> of the deal. In addition, they must demonstrate their *intent to be bound*, perhaps by shaking hands, by putting up earnest money, by hoisting a glass of champagne or—as in the case of the Hassidic diamond merchant of Forty-seventh Street—by uttering *mazel un broche*. Yiddish for luck (for the seller), blessing (for the buyer).[45]

Over four months of trial, a Texas jury awarded Pennzoil total damages against Texaco of $11 billion. (The judgment sustained on appeal led to the bankruptcy filing by Texaco and its ultimate acquisition by Standard Oil of California.)[46] As with the trial judge, the Texas Court of Appeals found that the intention to be bound creates an enforceable agreement, even where all aspects of the agreement are not fully concluded or executed.

> Under New York Law, of parties do not intend to be bound to an agreement until it is reduced to writing and signed by both parties, then there is no contract until that event occurs. If there is no understanding that a signed writing is necessary before the parties will be bound, and, the parties have agreed upon all substantial terms, then an informal agreement can be binding, even though the parties contemplate evidencing their agreement in a formal document later.…
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> To determine intent, a court must examine the words and deeds of the parties, because these constitute the objective signs of such intent. Only the outward expressions of intent are considered-secret or subjective intent is immaterial to the question of whether the parties were bound.[47]

Both in *TIAA* and in *Pennzoil-Texaco*, we have seen courts uphold the U.S. Rule in matters of large and small corporate transactions. Fast forward to 2018, will the courts uphold the U.S. Rule in like circumstances among individuals, particularly where both embarrassing publicity, privacy and politics revolve around a detailed confidentiality agreement?

VI. TRUMPING A *STORMY* INTENTION TO BE BOUND

A recent notorious case in the press demonstrates again the potential application of the U.S. Rule to a detailed agreement between parties in which

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[45] *Id*. at 157.
[46] Michael Arndt, *Texaco Files for Bankruptcy*, CHICAGO TRIBUNE (Apr. 13, 1987), http://articles.chicagotribune.com/1987-04-13/news/8701280088_1_joe-jamail-pennzoil-billion-plus-interest.
[47] Implied-in-Fact, *supra* note 37; *see also* quoted in Bagley, *supra* note 40, at 191.

final details or complete execution may remain incomplete. Here the instant case involves a confidentiality agreement, also known as a Non-Disclosure Agreement (NDA); a standard practice used in commercial transactions, employment law and civil tort settlements.[48] Often these forms of contracts are used to "hush" one or more parties from embarrassing disclosures.

Such is the case in the headline news pending California lawsuit of Stephanie Clifford (aka Stormy Daniels) v. Donald Trump (aka David Dennison).[49] Both the contract and the legal complaint are instructive examples for students and legal scholars of yet another agreement dispute in which, no doubt, the U.S. Rule of the Restatement of Contracts may come to bear. Our discussion here is to demonstrate the rule application, as in the objective theory of contracts and will avoid the salacious, lurid and political hot potato implications that the case raises as it proceeds through the legal process and public, political aspects of its actors. These summary allegations are taken directly from Daniel's complaint.

In 2006 Ms. Daniels began an (alleged) intimate relationship with Mr. Trump (the lurid details of which are not disclosed).[50] The event was a single consensual one. Nothing more was said about it at the time, Mr. Trump was then a TV star with his NBC program, *The Apprentice*, executive of the Trump Organization and given his reputation, not remarkable that he would have relationships with other women. However, once Mr. Trump became the nominee for President of the United States, Ms. Daniels sought to "cash in" with media outlets to tell her story of the alleged affair and make substantial monies from the notoriety, regardless of its deleterious effect on the other party (Trump).[51]

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[48] A *Non-Disclosure Agreement (NDA)* is a binding agreement between persons or entities where either one party or all parties agree not to disclose information that may be exchanged between the parties that is confidential in nature and to treat specific information as a trade secret. Nondisclosure agreements are frequently used when parties discuss a potential business relationship that includes development, marketing, evaluation or securing financing. The information that is confidential is required not to be disclosed without authorization, disclosed internally only on a need to know basis and contains specific limited circumstances where the information may be disclosed, for example, pursuant to a court order. The Non-Disclosure Agreement, commonly known as an NDA, may be in a separate standalone agreement or may be a clause within a larger contract or binding legal agreement. BLACK'S LAW DICTIONARY (2d ed.) https://dictionary.thelaw.com/nondisclosure-agreement-nda/.

[49] *Complaint for Declaratory Relief*, Clifford v. Trump, Case No. BC696568 (C.D. Cal. Mar. 6, 2018). [hereinafter Complaint]. (For purposes of this article we will use the parties most known names Stormy Daniels and Donald Trump rather than the many aliases or pseudonyms listed in the complaint.) At the time of this writing, a motion was pending to remove the case to the U.S. District Court for Central California as a Diversity of Citizenship case pursuant to among others, 28 U.S.C. § 1441.

[50] *Id*. ¶ 9, at 3.

[51] *Id*. ¶ 14, at 3.

Trump's attorney and *de facto* agent, Michael Cohen of New York sought out Ms. Daniels to reach an NDA agreement to silence her on personal details of the alleged relationship and any notes, recordings or media related to same. This led to negotiations with Ms. Daniel's representatives, substantial legal team in its own right, and, Mr. Cohen with his LLC to effect a written Non-Disclosure Agreement (Hush Agreement).[52]

On October 28, 2016, the parties reached an agreement in which Ms. Daniels agreed to not disclose the details of her relationship with Mr. Trump, turn over and keep confidential any material or media arising from the event. In consideration of this agreement she accepted by wire transfer $130,000 in cash funds personally from Mr. Cohen to Daniels attorney's trust account.[53] Notwithstanding full execution of all terms of the substantial, detailed written agreement, all parties signed the document though Mr. Trump (through his alias) did not.[54] By January 2018, news media investigators reported they had uncovered the existence of the agreement. By February 13, 2018, under continuing public pressure Mr. Cohen acknowledged it existed but gave no further details.[55]

Now with Mr. Trump elected and sworn in as President of the United States, and, significant individuals determined to oppose and undermine his administration,[56] major public notoriety, many lucrative media offers and opportunities flowed to Ms. Daniels a famous porn star if she could only act on the publicity and potential personal financial gain and advancement of her career. Ms. Daniels could only realize such fame and fortune by intentionally breaching the agreement, or, attempting to claim that some technicality made the agreement void, in this case, the lack of final signature by Donald Trump, himself (although signed by his agent in fact).

Daniels alleges since Mr. Trump never signed the agreement, the agreement is legally *null and void*.[57] However, at no time in the complaint had Daniels or her attorney offered to return or actually returned the $130,000 with or without interest; still retaining and using the funds she accepted. Only far later in the process did she claim to do so, not mutually accepted by the other side. Her lawsuit sought a declaratory court order to void the agreement.

The NDA, however, anticipating such a situation at time of negotiation contained an extensive, detailed alternative dispute resolution section including specific agreed remedies against Daniels should she breach the

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[52] *Id*. ¶ 15, at 3.
[53] *Id*. ¶ 22, at 4.
[54] *Id*. ¶ 23, at 5.
[55] *Id*. ¶ 26, at 5.
[56] Author Note: These are generally referred to as *Never Trumpers* including, Democrats, anti-Trump Republicans and independents among others.
[57] *Id*. ¶ 21, at 4.

agreement including among others, disgorgement of monies, liquidated damages, injunctive relief and arbitration clause (final and binding).[58] Subsequently, Mr. Cohen invoked the arbitration clause. The arbitrator ruled in favor of Mr. Cohen against Daniels. While the arbitration is confidential, it does evidence by its being held that the arbitrator found the conduct of the parties and agreement in full force and effect.[59] This is precisely the key element of enforceability found by the Texas court in *Pennzoil-Texaco* and is final and binding in arbitration.

Daniels seeks to challenge the arbitration as being "invalid" because of her claim there is no agreement absent signature.[60] But a binding arbitration precludes such appeal. The U.S. Supreme Court has been assiduous in past years that arbitration agreements are to be enforced in accordance with the Federal Arbitration Act.[61] Moreover the Supreme Court has rejected attempts by California law (where Daniels brought her action) to abrogate arbitration agreements.[62] Daniels ignoring the terms (it is alleged by Cohen) had over twenty documented breaches of the agreement invoking a liquidated damage clause that provided for $1 million for each offense. A breach of agreement suit against Daniels for $20 million is pending.

A. *Application of U.S. Rule: Objective Theory of Agreements*[63]

Using our prior discussion of the U.S. Rule and prior cases we may observe that the Daniels case and recitals in her complaint appear to fit well into a §21 Restatement (U.S. Rule) analysis. First, the issue of mutual assent is clear. Both parties, even reverting to pseudonyms to further protect their personal privacy, identities and images, entered the negotiations and agreement in good faith. Mutual assent and its manifestations of conduct meet the standard of §19 Restatement. The nature of the agreement also would appear to invoke §90 Restatement, promise reasonably inducing

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[58] Peterson & Dennison (aliases), *Confidential Settlement Agreement and Mutual Release, Assignment of Copyright and Non-Disparagement Agreemen*t, October 26, 2016. §5.0 at 9-11.
[59] Michael Rothfeld & Joe Palazzolo, *Trump Lawyer Won Order to Silence Stormy Daniels*, WALL ST. J. (Mar. 8, 2018), https://www.wsj.com/articles/trump-lawyer-won-order-to-silence-stormy-daniels-1520471627.
[60] Complaint, *supra* note 49, ¶¶ 30, 33, at 6.
[61] Pub. L. No. 68-401, 43 Stat. 883 (1925), codified as 9 U.S.C. § 1.
[62] AT&T v. Concepcion, 563 U.S. 333 (2011). *See also* Kindred Healthcare Centers v. Clark, 137 S.Ct. 1421 (2017).
[63] ROGER LEROY MILLER, BUSINESS LAW TODAY 208-09 (11th ed. 2017) ("In determining whether a contract has been formed, the element of intent is of prime importance. In contract law, intent is determined by what is referred to as the objective theory of contracts [sic. agreements]. Under the theory a party's intention to enter into a contract is judged by outward, objective facts as interpreted by a reasonable person, rather than by the party's secret, subjective intentions….").

action or forbearance as enforceable.[64] This type of personal agreement also does not come under the provisions of the Statute of Frauds.

The second prong of test of the U.S. Rule also appears clear. The agreement contains very detailed terms and conditions all within public policy in which Daniels was represented by significant consultants and legal counsel. Cohen, representing Trump either directly or with apparent authority negotiated the same terms for his client. Both parties were on relatively equal footing regarding representation and public image. Both parties are wealthy in their own right, thus on comparable economic footing and each stood to lose substantial money and personal damages from a breach of the NDA, again anticipated within the agreement.

Third prong, and quite importantly, consideration passed. Daniels by her agents accepted $130,000 cash by wire transfer. At no time within her complaint was an offer made to return the money. The acceptance of substantial value and the conduct of both sides up to the point of the complaint affirmatively performing the agreement terms evidences, in the words of §21, *An intent of the parties to be bound*.[65] Given the outcome of past cases a declaratory judgment proves problematic other than a potential order that defendant, Trump, sign the agreement document. But, the agreement would appear to be in full force and effect; as intended by the parties.

A further point here involves the question of equity from which party benefits from a breach at the expense of the other. In the instant case, clearly Daniels has tremendous monetary and promotional incentive to renounce the NDA as void based on an alleged technicality. Already during the few months of the news story, in the face of litigation, Ms. Daniels has made multiple TV appearances, adult film, club and venue appearances around the nation for profit in what she calls her, *Make America Horney Again Tour*.[66] Ms. Daniels continues to escalate her NDA breaches, just recently Penthouse magazine announcing bankrolling her appearance on its magazine, provocatively nude wrapped in an American flag.[67]

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[64] RESTATEMENT (SECOND) OF CONTRACTS §90.

[65] It is unknown at this point in time how the press found the agreement since it was allegedly kept confidential by all parties. There is a presumption that Daniels leaked it as she stood to benefit but that fact may only be found by a trier of fact, should the matter actually go to trial.

[66] Bob Fredericks, *Stormy Daniels launches 'Make America Horny Again' Tour*, N.Y. POST (Jan. 19, 2018), https://nypost.com/2018/01/19/stormy-daniels-launches-make-america-horny-again-tour/. (Note each act is alleged by Cohen to constitute a separate $1 million breach under the NDA liquidated damage clause.)

[67] Jacqueline Thomson*, Stormy Daniels to donate to Planned Parenthood in Trump and Cohen's names if she wins case: report*, THE HILL (Apr. 18, 2018), https://www.msn.com/en-us/news/politics/stormy-daniels-to-donate-to-planned-parenthood-in-trump-and-cohens-names-if-she-wins-case-report/ar-AAvZCuB.

As a pornographic movie star, Daniels perhaps has little reputation in polite society to protect a socially acceptable image. On the other hand, Daniels actions seek to embarrass, to undermine and even interfere with Mr. Trump's effective stewardship as President of the United States, thus not only providing potential harm to him but consequential collateral damage to the country as a whole. Because the parties going into and within the NDA admitted the difficulty of determining exact damages upon a breach of agreement, they mutually agreed that $1 million damage figure per breach would be sufficient to cover the harm caused.[68]

As a result, one party is placed at a differential disadvantage to the other by non-adherence to the agreement. This was precisely the type situation the U.S. Rule was established to prevent. Ultimately, the dispute will work its way over time in the U.S. courts, perhaps for years. The ultimate decision remains to be seen, but one may opine that if the U.S. Rule is truly enforced, so will be the agreement.

B. *Statute of Frauds – State Exceptions*

The Statue of Frauds in most cases precludes the type of disputes witnessed in our discussion of the *U.S. Rule*. This would certainly be the case for contract agreements in real property, collateral promises, sales of goods over $500, contracts in contemplation of marriage executor agreements, and contracts executed over one year.[69]

However, a host of "agreements" of significant nature exist outside the requirements of form set by specific categories of the Statue of Frauds. The *Daniels-Trump* agreement represents one such personal agreement. Here California's Civil Code, though requiring an agreement covering more than one year in writing, nevertheless, recognizes that one party ratification of an unsigned agreement can be an exception.[70]

Each state, therefore, addresses oral representations and incomplete agreements differently by the interpretation of its courts. Though the Statue of Frauds normally covers only those enumerated categories, South Carolina, for example, has a statutory provision that would appear to cover *all* categories of preliminary agreements whether covered by the normal statutory categories or not.

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[68] Complaint, *supra* note 49, Section 5.0 Remedies, 5.1.1 Disgorgement of Monies, 5.1.2 Liquidated Damages.

[69] *Statue of Frauds*, THE FREE DICTIONARY, https://legal-dictionary.thefreedictionary.com/Statute+of+Frauds (last visited Oct. 11, 2018); *see also* BROWNE CAUSTEN, A TREATISE ON THE CONSTRUCTION OF THE STATUTE OF FRAUDS, AS IN FORCE IN ENGLAND AND THE UNITED STATES (1997).

[70] CAL. CIV. CODE § 1624(a)(1).

SECTION 32-3-20.

> Action on representation as to character will lie only where representation is in writing and signed.
>
> No action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade or dealings of any person to the intent or purpose that such other person may obtain credit, money or goods thereon unless such representation or assurance be made in writing, signed by the party to be charged therewith or by some person thereunto by him legally authorized.[71]

While South Carolina and like jurisdictions may have specific statutes or court interpretations that effectively limit causes of action under the U.S. Rule, they do not address the host of ambiguities presented to courts nationwide. These run the gamut from oral promises and incomplete agreements in small claims courts to, as we have seen, major financial disputes in federal courts. Here each case is judged on its own merits by the circumstantial evidence, and the conduct of the parties. One major area ripe for disputes is employment law. Here, the Statue of Frauds does not normally require employment contracts to be in writing, and, for the most part each state operates on an employment-at-will basis.[72]

EMPLOYMENT CONTRACTS raise exceptional concerns, but the basics remain just that basic. Any contract question can be analyzed by reference to the following six inquiries:

- Was a contract formed?
- If a contract was formed, what are its terms?
- Did a duty of performance arise?
- Are there any defenses to enforcement?
- Was the contract breached?
- If the contract was breached, what is the appropriate remedy?[73]

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[71] S.C. CODE ANN. § 32-3-20.

[72] Note: S.C. CODE ANN. § 41-1-110 (2003). South Carolina recognizes only employment agreements in writing, all other employment is at will. Montana is the only U.S. state that by statute does not recognize employment at will. (*See*, for example MSA § 39-2-804 and § 39-2-903.)

[73] Christine Godsil Cooper, *The Basics of Employment Contracts*, 3 A.B.A. GP-SOLO LAW TRENDS & NEWS 1 (May 2007), https://www.americanbar.org/content/dam/aba/publishing/law_trends_news_practice_area_enewsletter/ lawtrends0705.authcheckdam.pdf.

Here, too, courts are reluctant to enforce agreements or promises in employment that appear to be mere naked or gratuitous promises. More solid evidence of mutual assent and intention to be bound must be shown to establish a true enforceable agreement, even if incomplete. These factors would include:

- Consideration (the bargained-for exchange, the mutual inducement, the price of the promise);
- Promissory estoppel (reasonable reliance on a promise where the reliance was foreseeable to the promisor, and an injustice would result if the promise were not enforced);
- Promise to pay for an antecedent material benefit where moral obligation substitutes for consideration; and
- Formality, such as a writing.[74]

One additional factor impacting enforceability of preliminary agreements are material acts of negligent misrepresentation, particularly where one of the parties reasonably relying on the other suffers detrimental reliance.[75] This, too, has arisen in apparent employment agreements. In *Griesi v. Atlantic General Hospital Corp*., Griesi had engaged in pre-employment negotiations with the hospital's CEO. Offered the job by the CEO on agreed terms Griesi later discovered the CEO had misrepresented his authority. The Maryland Court of Appeals held that the hospital owed a duty of care in part due to the bond between parties during preliminary employment negotiations.[76]

Negligent misrepresentation also was central to the initial trial court victory of James Williams, an assistant basketball coach, induced away from his current employer (Oklahoma State University) to University of Minnesota by then famous basketball coach Orlando "Tubby" Smith. Smith, had no authority to hire and Smith arriving in Minneapolis found as a result he incurred moving expenses other consequential damages as well as then, no job. In the ensuing case, the trial court found for Williams on negligent

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[74] *Id*.

[75] For example: Under Nevada law, *negligent misrepresentation* is defined as: One who, in the course of his business, profession or employment, or in any other action in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information. Majestic Star Casino, LLC v. Trustmark Ins. Co., 667 F. Supp. 2d 809 (N.D. Ill. 2009).

[76] 756 A.2d, 554-56 (Md. 2000).

misrepresentation, though the case was ultimately overturned on other technical grounds.[77]

VII. SUMMARY AND CONCLUSIONS

The long held legal definition of a contract has been: 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.[78] Though a simple statement, complexities arise in many cases when preliminary agreements, memoranda of understanding and the like, are made in good faith, though not fully executed by formal documents. In fact agreements, even oral ones, may find the parties honoring their terms, establishing effectively implied agreements or contracts-in fact by their affirmative, implementing conduct.

When disputes arise in such circumstances can a preliminary or incomplete agreement be enforced? Historically, such disputes were resolved by the ancient implementation of the English Rule, effectively establishing that one's word was their bond, a societal recognized mark of ethics and honor; a handshake is as good as a contract. In the U.S., however, a more defined guidance was established by the Restatement of Contracts §21 Intention to Be Legally Bound.

In this article, we have demonstrated how §21 (U.S. Rule) comes to play in establishing criteria for which a trier of fact may adduce parties entered an enforceable agreement a court will recognize. These standards include a demonstration of mutual assent (Restatement §19), promises that a reasonable person would be induced to action and forbearance (Restatement §90), consideration passing, and manifestations of conduct that demonstrate the parties' *intent to be bound* and expectation to adhere to the agreement, even when final details or documents to execute are incomplete. The courts are then challenged to decide at what point preliminary agreements or agreements lacking final signature are enforceable.

Each situation is case specific. Such disputes occur daily in courts around the nation. Indeed, the recent notorious lawsuit of *Daniels v. Trump* outlined within presents a case in point ripe for application of the U.S. Rule. Its outcome, notwithstanding a politically charged environment, at its base level situation remains a mutual agreement on which both parties expected to rely. Final judicial outcomes remain to be seen.

For hundreds of years common law has established rules and guidelines for when agreements are truly agreements. On sales and related business

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[77] 820 N.W.2d at 810 (Minn. 2012) (case overturned by Minn. Sup. Ct.). For complete discussion *see* Epstein, *supra* note 7, complete article.

[78] RESTATEMENT (SECOND) OF CONTRACTS §1.

transactions these are incorporated into U.C.C. Article 2. In other cases, states may have particular statutes that narrow the opportunity for enforcing incomplete agreements. Nevertheless, we live in a world in which people make promises every day on which others in good faith rely. When not fulfilled, damages arise and lawsuits ensue.

Today cases such as *TIAA, Texaco-Pennzoil,* and others asserting the U.S. Rule may be scarce, but the possibility of such cases invoking §21 remain a high business and personal risk in an era of instant communication with actions and transactions of a moment's notice. In the age of Internet/E-Commerce, Twitter, Email and Social Media promises may be made and acted upon quickly on which good faith reasonable people may rely where rapid time is of the essence. Financial transactions such on stock exchanges operate today in milliseconds.[79]

Such transactional opportunities may not wait or even be available for a traditional formal executed document. As in an oral agreement, the mere text of a text message, tweet or pressing of an "I agree" button on-line may be all that is sufficient to establish an intent of parties to be bound and conduct to ratify such an agreement, even in the absence of form or executed document. Buyer's remorse attempts to reverse original mutual intent after the fact could disrupt an entire economic system. Such agreements would lie incomplete, preliminary but under the U.S. Rule be potentially enforceable. Granted, each situation is case specific. When performance agreed fails, the invocation of §21 may well come into play.

The decision of parties to withdraw or *opt-out* from an *Intent to Be Bound* agreement ultimately is an economic decision in which the legal costs incurred are a cost of doing business. Here, it is a tactical (though ethically questionable) decision akin to deliberately fouling a player in a basketball game. It seeks to achieve a result even if intentionally breaking the rules. But the rules are broken at significant cost.

When economic conditions are stable, the business environment would tend to make an opt-out more expensive from a legal transaction cost basis since the stability of a relationship, at least economically was foreseeable and not unstable at the time. Here, "the adverse effects on the spirit of trust, confidence, and cooperation between the parties, which may be essential to the success of the enterprise."[80] What cost and consequence of public embarrassment or derision may come to play as well.

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[79] A millisecond is 1/1000th of a second. For further insight into this impact, *see* MICHAEL LEWIS, FLASH BOYS (2015).

[80] Eyal Zamir, *The Inverted Hierarchy of Contract Interpretation and Supplementation*, 97 COLUM. L. REV. 1710,
1738–53, 1755–58 (1997) (as quoted by Klass, *supra* note 5, at 1471).

Conversely, where economic conditions are unstable (e.g. rapidly rising interest rates, prices and supply shortages), large economic incentives may manifest to one or more parties to "abrogate" their preliminary agreement, even one that has been implemented in good faith other than some mere formality. *TIAA* provided such a case in point where during an era of rapidly declining interest rates, Tribune Co. had a substantial economic incentive to "opt-out" of its preliminary agreement, even to the detriment of millions of dollars to TIAA. As discussed, the courts held against Tribune's attempt. Likewise, even in the recent modern era, we saw a very private Non-Disclosure agreement in *Daniels*, attempt an opt-out when the potential value to Daniels of voiding a detailed agreement on a mere technicality would bring her substantial fame and fortune to the detriment of an individual now President of the United States.

The clear rules of contract in the United States and its constitutional protection of Privity of Contract[81] provides great international and national stability of wealth investment and management. Foreign investors who witness in their nations and others lack of contract enforcement or even *takings* without due process invest in the United States with confidence that an agreement made will be an agreement enforced. Examples abound, including Argentina's attempted default of bond contracts made in the United States estopped by the U.S. Supreme Court.[82]

As noted by analysts at the U.S. Federal Reserve Bank of St. Louis, "Well-established and high-quality institutions that lay down the rules, procedures and guidelines for trade in a clear and transparent manner, as well as institutions that protect traders from predation, are now viewed to be essential requirements for prosperous trade."[83] Specifically to the role of contract and contract enforcement, a 2007 study by Harvard economist Nathan Nunn analyzed judicial quality's impact on the global trading patterns and found that countries with high contract-enforcement quality have a comparative advantage in industries in which relationship-specific investments are important.[84]

Consequently, enforcing intents to contract and intents to be bound be it the English Rule or the U.S. Rule are more than a theoretical legal construct. The ability to compel parties of mutual intent to live by their word, handshake or preliminary agreement represent not only a moral-ethical imperative in business, but a necessary condition to the operation of efficient

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[81] U.S. CONST. art.1, § 10, cl. 1. (protection via the "Takings Clause," U.S. CONST. amend. V.).
[82] Republic of Argentina v. Weltover, 504 U.S. 607 (1992).
[83] Subhayu Bandyopadhyay, et al., Contract Enforcement, Corruption Controls and Other Institutions Affect Trade, Too., FED. RES. BANK OF ST. LOUIS, https://www.stlouisfed.org/publications/regional-economist/april-2015/contract-enforcement-corruption-controls-and-other-institutions-affect-trade-too (last visited Mar. 6, 2018).
[84] *Id.*

markets. Absent such a condition transactional risks would increase passed on in the price of goods and services and impediments to all forms of trade and transactions.[85]

The U.S. Rule (Reinstatement (Second) of Contracts §21) works as an important safety valve to good faith preliminary agreements lacking some unfulfilled factor of form or agreement execution in which one party for its own avoidance or enrichment reasons seeks to abrogate. In international transactions, the English Rule, with its high evidentiary bar is still in full force and implementation in the European and U.N. contractual environment. Resolving such matters is why judges in courts in the U.S. and elsewhere are challenged every day to apply reasonable standards of good judgment to unreasonable disputes of parties; a key role of the judiciary in an effective business transaction and effective economic system.

Ultimately, the best defense to the true intent of parties is a fully written and executed agreement. Perhaps this is why Restatement §21 has generated relatively few (but significant) cases at bar. But interesting past cases, the impact of technology and increased globalization foreshadows potential future cases and the challenge once again of the Reinstatement (Second) of Contracts §21: Intent to Be Bound.

At the end of the day, commerce and business transactions between individuals and entities can only succeed based upon a firm set of rules and societal norms. An environment in which one party can make an agreement and renege at their whim without consequence is a prescription for commercial chaos; an increase in risk that inures higher costs of business and ultimately higher prices to consumers. At the end of the day when parties negotiate in good faith, with intent to be bound … A Deal must be A Deal.

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[85] *Contract Enforcement and Dispute Resolution*, OECD, https://www.oecd.org/investment/toolkit/policyareas/investmentpolicy/contractenforcementanddisputeresolution.htm (last visited March 6, 2018).
The ability to make and enforce contracts and resolve disputes is fundamental if markets are to function properly. Good enforcement procedures enhance predictability in commercial relationships and reduce uncertainty by assuring investors that their contractual rights will be upheld promptly by local courts. When procedures for enforcing commercial transactions are bureaucratic and cumbersome or when contractual disputes cannot be resolved in a timely and cost effective manner, economies rely on less efficient commercial practices. Traders depend more heavily on personal and family contacts; banks reduce the amount of lending because they cannot be assured of the ability to collect on debts or obtain control of property pledged as collateral to secure loans; and transactions tend to be conducted on a cash-only basis. This limits the funding available for business expansion and slows down trade, investment, economic growth and development.