

# Treaty Law, Contract Law and Their Functions for Dispute Settlement/Avoidance

**Kuen-chen FU / 傅崐成, LL.M.,SJD (Uva)**

- \* Prof. & Dean, South China Sea Institute, Xiamen Univ.
- \* State “One Thousand Elites Program” Expert
- \* Chief Editor, CHINA OCEANS LAW REVIEW





# Previously:

- Journalist, China Times, Taipei, and the UN, NYC.
- Professor, National Taiwan University Law School
- Advisor, Taiwan's Executive Yuan
- National Assemblyman, TAIWAN
- Legislator, Taiwan's Legislative Yuan
- Member of BOD, Overseas Fishery Development Council
- Head of Taiwan delegate to the SCS Workshops
- Arbitrator, Taiwan, Xiamen, Quanzhou, Wuhan, Shanghai, Russian Far East Region, CMAC, CIETAC



# LEAD:

- We chase for an international community of rule of law.
- We want to avoid/settle disputes. So we need evidences.
- We have agreements are written evidences. ... But,
- Can contracts and treaties be honoured when disputes arise?

# What is LAW?

- Origin of Law: *From fear to obedience*
- Purpose of LAW: *Social control*
- Law and Laws: *Living and dynamic*
- Hans Kelsen: *Ladder theory*
- *Law – Civil Law (International Law) – Law of Contracts (Law of Treaties) – Agreements – (Deals between persons or between States)*



# NOW

- ALWAYS THINK OF THE INTERNATIONAL COMMUNITY
- Statutes of ICJ, Article 38: sources of international law
  - I. treaties – customs – general principles of law – precedents and teachings and theories
  - II. *ex aequo et bono*

# What is EVIDENCE ?

- Purpose of evidence:

*Preventing Frauds and Perjuries*

- What is perjury:

*The deliberate, willful giving of false, misleading, or incomplete testimony under oath.*

- Statute of Frauds:

*The demand of writings for contractual enforcement*



**NOW**

- ALWAYS THINK OF THE LIMITS OF INTERNATIONAL LAW / INTERNATIONAL TRIBUNALS




## **CONTRACT LAW:**

### **What is PAROL EVIDENCE RULE ?**

#### **A. DEFINED**

**This substantive rule of law is based upon the assumption that parties who manifest their **agreement in a document** which has integrated all the terms and conditions of the contract want this document to be **the final word** on the meaning of their intent.**





**The rule thus disallows oral or written evidence of prior negotiations which add to or contradict the terms of the written agreement. The most reliable clue to the parties' intentions in a deliberately prepared and negotiated contract is **the language of the contract.** [\[1\]](#)**



**Professor Corbin defines the parol evidence rule as:**

**“When two parties have made a contract and have expressed it in writing to which they have both assented as the complete and accurate integration of that contract, evidence, whether parol or otherwise, of antecedent understandings and negotiations will not be admitted for the purpose of varying or contradicting the writing.” [2]**




**Professor Williston defines it as:**

**“Briefly stated, this rule requires, in the absence of fraud, duress, mutual mistake or something of the kind, the exclusion of extrinsic evidence, oral or written, when the parties have reduced their agreement to an integrated writing.”[\[3\]](#)**



## EXAMPLE:

P had signed a release of damage claim resulting from “personal injuries **and** damage to property” on the advice of his counsel. At trial, P attempted to show that the release was intended **only** to apply to damage to property. The court noted there was no mutual mistake or fraudulent misrepresentation. Thus, because of the parol evidence rule, it would not allow the substitution of “personal injury **or** property damage” because this was a clear contradiction of the existing terms.



**The same would be true with a written contract calling for a term of **one year** which could not be contradicted by oral testimony that it was really **terminable at will**.**

[1] Grant County Contractors v. E.V. Lane Corp., 77 Wash. 2d 110 (1969).

[2] 3 Corbin 573.


[3] 4 Williston 631.




## **B. APPLICABLE TO FINAL AND COMPLETE WRITINGS**

**Before the parol evidence rule can be utilized defensibly, the party asserting it must:**

- 1. Establish that the writing was a “FINAL” agreement, i.e., did the parties intend it to be the final evidence of their agreement? Note it can be final without a signature, provided it does not run afoul of the statute of frauds. Parol evidence is admissible to show it was not final.**




**2. Establish that the final writing was **COMPLETE**. A simple memorandum of an agreement may be final, but is generally not complete, because the parties generally don't intend a memorandum to completely define the agreement.**




**“Where an agreement is partly oral and partly written, the writing is at most a partial integrated agreement.[\[1\]](#) In this situation, the best argument for the introduction of the oral statements is that the writing was not a **“TOTAL INTEGRATION” (COMPLETE)** of the agreement.**






**If the writing was not final, then the parol evidence rule does not apply. If it is final but not complete, then additional prior non-contradictory parol terms may be integrated into the writing to reveal the intent of the entire contract.**




However, if the writing was **both final and complete**, then the writing is the integrated agreement and the **parol evidence rule** will not permit a disgruntled party to add to, contradict, or supplement it.




**“...If it is reasonable to conclude from it that the parties have therein expressed their final intentions in regard to the matters within the scope of the writing, then it will be deemed a complete and unalterable exposition of such intention. If, on the other hand, the writing shows its informality on its face. Then there will be no presumption ... that it is not complete.”**

**[2]**




**If the disputed element of the contract is not covered in the contract or dealt with, nor implied by law from the facts, then the writing did not intend to cover the point, and as to that point the writing is un-integrated (not a final expression on that point) and parol evidence is admissible. [3]**




There are **two schools of thought** in determining whether the writing was fully integrated (**complete**):


1. Williston adopts a form approach by limiting the court to a review of **the face of the contract** to determine if the writing was intended to be a final memorial of the agreement, i.e., the court should exclude other relevant evidence of intent. [\[4\]](#)



2. Corbin takes **a broader approach**, also adopted by Restatement of Contracts 2d which allows a court to look at the writing as well as the facts and circumstances (**extrinsic evidence**) to determine if the intent of parties was to finally and completely integrate their agreement into the writing.




**Restatement 2d, Contracts 239, goes even further in siding with Corbin to allow the court to consider **all relevant and material intrinsic and extrinsic evidence**, even if there existed a **merger clause**".**



**If the parties insert a “merger clause,” then it implies that “[t] here are no promises, verbal understandings or agreements of any kind, pertaining to this contract other than specified herein” and this is usually clear evidence that the agreement is the final integration of the parties’ intent.**





**Note however, that **Restatement 2d** will allow additional consistent terms in, even when a merger clause exists, if the agreement is not totally integrated.**



[1] Restatement, Contracts, Second § 239,  
Comment a.

[2] Brady v. Central Excavation, Inc., 316  
Mich. 594 (1947).

[3] Cohn v. Dunn, 111 Conn. 342 (1930).


[4] Gianni v. Russel & Co., 281 Pa. 320 (1924)




## C. USE OF PAROL EVIDENCE

**The parties usually attempt to use parol evidence to:**

- 1. Substitute or vary terms – this would clearly violate the rule because it contradicts the express language of the writing.**



**Thus, when P sought to have a \$5,700 price term in the contract, this attempted variation was held to clearly contradict the writing and to violate the parol evidence rule.[\[1\]](#)**




**2. Establish side or collateral agreement not contained in the writing. Parol extrinsic evidence of the side agreement will be admissible if:**


**(a) It is truly collateral to the main agreement.**

**(b) It does not contradict the term of the main agreement.**


**(c) It would not ordinarily be put into the main agreement, but is the type of term which parties generally would put in a collateral contract.**



**If the side agreement is so clearly related to the main contract, the Court will not find it collateral if its terms normally would have been put into the main agreement. A merger clause will generally rule out any side agreements.**




**3. Explain ambiguities.** Whether the ambiguity is latent (arising out of the subject matter of the contract) or patent (appearing on the face of the contract itself), if the language because of the ambiguity is reasonably susceptible to more than one interpretation, then parol evidence may be used to explain the ambiguity.



**Thus, where goods were to be shipped to Bombay on the Ship “Peerless” and each party was intending the use of a different “Peerless”, then parol evidence was available to establish the ambiguity to prove the mutual mistake.**






**Parol evidence was allowed in another case to explain the clearly ambiguous term used in an employment contract for the employee to perform “ executive duties”.**




## **EXAMPLE:**


At the time, A was living with wife No. 2, but he had never divorced wife No. 1, and named in his life insurance policy “my wife” to have the \$100,000 policy, the court allowed parol evidence in to explain the subjective ambiguity.<sup>[2]</sup>




**Where buyer and seller entered a contract calling for “chicken” and seller meant stewing chickens and buyer meant broilers and fryers, the court held that the subjective intent of the parties was immaterial and both fall within the term “chicken”. The plaintiff has the burden to prove that his meaning was the objective meaning; parol evidence was allowed and the court held there was a mutual mistake here. [3]**



**4. Establish the meaning of the terms by custom and usage.** Frequently the contracting parties will fail to explicitly define their obligation because they have made certain assumptions based, for example, upon the course of dealing or upon usage of trade.



**Additionally, parol evidence can be used to show the meaning (technical terms or custom and usage) in which the contradicting parties used the language in the written document.**



**The courts have held that parol evidence can even be used **to show that ordinary words have a special meaning in the trade.** Bear in mind that when the parol evidence rule is not violated, or when one of the exceptions arise, then the fact that the prior negotiations or antecedent understandings are admitted in before the trier if the fact is not conclusive on that issue, but is merely one element of evidence in deciding the parties true intent.**



[1] Restatement, Contracts, Second § 236 & 240

Restatement, Contracts, Second § 242(e)

[2] Brady v. Black Mountain Inv. Co., 105 Ariz. 87 (1969).

[3] Cochran v. Whitley, 196 Minn. 60.



## Please think of :

- The Boundaries Case, *Belgium v. The Netherlands* (1957).
- The 1843 Boundary Treaty prevails.





# What is FRAUDS ?


- 欺诈 (诈欺) worse than cheating (欺骗)
- The dark side of human nature
- Damage to the Society
- *“Act for Prevention of Fraud and Perjuries” (1677)*




# What is STATUTE OF FRAUDS

## A. DEFINED

The **Parol Evidence Rule** speaks of an existing writing with an attempt to orally add to it; whereas, the **Statute of Frauds** speaks of an oral contract which cannot be enforced because it is not in writing.




**The Statute of Frauds** requires that, for certain contracts to be enforceable, they must be put into a writing or memorandum signed by the party to be charged (defendant) or his agent. The following contracts must be in writing:



**1. A promise to answer for another's debts (surety contract).**

**2. A promise by an executor or administrator to personally satisfy an estate debt.**

**3. A promise to settle money or property upon another in return for a promise to marry or for marriage.**




**4. A promise which is incapable of performance within one year from its making. (GOL 5-701 also adds that written contracts are required for contracts not capable of performance within one year or contracts calling for a performance which is not to be completed before the end of a lifetime, e.g. work for me for the rest of my life and I will purchase an annuity for you).**




**5. A promise involving a transfer of an interest in realty.**

**6. A promise for the sale of “goods” exceeding \$500.**



**New York's G.O.L 5-701 also requires a subsequent or a new promise to be in writing by **one who was discharged in a bankruptcy proceeding to now pay the debt that was discharged in bankruptcy.** Writing is also required on a promise to bequeath property or to make a testamentary provision of any kind. [\[1\]](#)**



**The purpose of the Statute of Frauds is to prevent fraudulent claims and perjured testimony. A writing reduces the risk of such acts even at the expense of voiding an existing valid oral contract.**

**In most jurisdictions, the Statute of Frauds must be pleaded and proved by the party asserting it.**






## **B. SURETY CONTRACTS**


**Most states statute, including the original “Act for Prevention of Fraud and Perjuries” (1677) requires a writing for a contract which calls for one to answer for the “debt, default of miscarriage of another.”**

**The surety relationship involves at least three persons:**


- 1. The principal debtor**
- 2. The creditor**
- 3. The surety**




**A contract of surety is a promise to answer for the debt of another (to pay it he does not ) made to a creditor by one who has no personal concern in the debt to pay the debt out of his own funds.**




**When one acts as a surety for an antecedent debt, then such a contract must generally be supported by new consideration. However, when the surety contract is executed simultaneously with the debtor's contract, then the consideration flowing to and supporting the debtor's contract will likewise support the surety contract.**



**For the surety relationship to exist, the creditor must be aware that the promisor is acting as a surety.**



**The concept “debt, default or miscarriage” applies both to another’s tort liability, as well as to his contract obligation. However, under the doctrine of *strictissimi juris* (strict construction) surety contracts are strictly construed and thus, any alteration of the principal debtor’s contract will release the surety.**



**Restatement 2d, contracts 180** speaks of answering for the “duty” of another: make sure that the “duty” is the principal and enforceable obligation of another or there is not the true tripartite surety relationship and thus, the promise need not be in writing.



**EXAMPLE:**

X saw a rare urn and knew that his friend F would like it. He told the seller, S, to “send this to F and if he does not pay you, I will”.

This promise need not be in writing to be enforced against X because F has no duty to S, because F never obligated himself to S.

[1] EPTL 13-2.1



## **C. MAIN PURPOSE RULE**


**If a promise is made to answer for another's debts, but the primary benefit of that promise runs to the one so promising, then such a promise does not have to be in writing to be enforceable.**





## **EXAMPLE:**

R, a racing car driver, about to enter a race at Watkins Glen, was to be arrested because of nonpayment of his former wife's alimony. The Sheriff was about to seize R when his manager and sponsor, who had a substantial financial interest in having him race the next day, went to W and told her, "Let him race and if he does not pay you, we'll pay the alimony arrears."



HELD: The promise is enforceable even though it was oral because this promise to discharge another's previously existing duty was chiefly or entirely for the third person's own material benefit rather than the primary intent to benefit W or R.

**Look to the intent of the surety; if it appears to be mainly for his own “economic advantage” then it is not within the Statute of Frauds.**

## **D. NOVATION vs SURETY**

**The student should be careful to distinguish a surety relationship from a novation. A novation is an entirely new contract which has extinguished the debtor's old obligation and the new party supplants the former party as debtor. The creditor's consent for this change in the debtor relationships is essential. Note, that a novation is not subject to the statute of frauds requirement.**



## **EXMAPLE:**

D owes C \$10,000, and D wants to buy a house and can't get a mortgage from a bank because of this existing debt. D's father, F, went to C and said, "Release D from the debt and I'll pay you." C orally agreed and subsequently sues F for the \$10,000. Can F successfully assert the S/F as a defense? No-because this is not a surety contract but rather a true novation.



## **E. ASSIGNMENT**

**A promise by an assignor to an assignee for consideration of a right that the obligor will pay or perform his duty can be oral because this promise, although answering for the debt, default, or miscarriage of another, (the obligor), is made for consideration and for his own pecuniary benefit to induce the assignee to purchase the right.**



## **F. EXECUTOR'S OR ADMINISTRATOR'S PROMISE TO PERSONALLY PAY AN ESTATE DEBT**

**This is a hybrid type of surety contract which was recognized at common law and continues to be recognized in most states. It simply requires a writing whenever an estate's administrator or executor promises to pay for an estate debt or obligation created by the decedent personally.**



**For such a promise to be enforceable against the executor or administrator**

**1. the obligation or debt must have existed before death or been brought about by the decedent;**


**2. it must be in writing signed by the executor or administrator.**



## **EXAMPLE:**

If an executor orally personally guarantees payment for embalming or for religious services to be performed after death, then this debt is not deemed to have been incurred by the decedent but by his executor and the executor will not have the Statute of Frauds as a defense.






**The key to the executor-administrator rule is that, if the debt was incurred after the death, then the promise by the executor-administrator does not have to be evidenced by a signed writing but, if the debt or obligation existed at the time of death, then the executor's promise must be in writing.**




## **G. MARRIAGE PROMISES**

**A promise to convey property or a right to another or both upon consideration for a promise to marry or for marriage is unenforceable unless contained in a signed writing. However, mutual promises by the man and woman to marry do not fall within the Statute of Frauds and are not required to be in writing.**



**New York does not recognize the heart balm statutes (alienation of affections or criminal conversation) but New York will enforce a sister state judgment on these grounds (full faith and credit) because the tort merges into the judgment.**




**Note, that the part performance (the marriage itself) will not take the promise out of the Statute of Frauds.**




## **H. TRANSFERS OF INTERESTS IN REAL ESTATE**


**Any contract to transfer an interest in realty must be in a signed writing to be enforceable. Real property contracts, deeds, leases, easements, and covenants must be in a signed writing.**



**New York's GOL states that only leases for longer than one year in duration need be evidenced by a signed writing by the party to be charged or his agent whose authority must be in writing.**




**Easements** must be in writing; an oral easement over another's land results in a mere license revocable at the grantor's whim.




**A mortgage interest must be created by a writing, but an assignment of a mortgage need not be in writing because it is really considered a transfer, not of realty, but of a debt (the bond or note), together with a security interest (the mortgage) in the realty.**






**Contracts involving improvements (driveways, construction, additions to existing structures) are not considered affecting an interest in realty and thus, do not require a signed writing to be binding because they are thought of primarily as contracts for labor and services.**



**If the contract involves the sale of minerals (oil and gas) or a building structure, then the classification depends upon who is to remove the property from the realty.**

**1. They are goods (UCC Article 2) if they are to be removed or severed from the land by the seller and no writing is required until their value reaches \$500.**




**When the seller of realty has conveyed title to the buyer and is suing for the price, the law generally does not consider this now to be within the Statute of Frauds (no writing required) because the action will not affect the ownership, use or possession of the property.**

**[1]** Barron v. Edwards, 45 Mich. App. 210 (1973).



## **I. ONE YEAR**

**A bilateral oral contract, which cannot be fully performed within one year from the making thereof, is in violation of the Statute of Frauds and not enforceable. If the contract may be performed within one year (is capable of performance) then the agreement does not fall within the Statute of Frauds; it does not, however, mean that the contract must be performed within one year.**



**The oral agreement is valid even though it may be capable of indefinite continuance; even if it is improbable that performance would be completed within one year, the Statute of Frauds does not come into play (it is not applicable) because the one year Statute of Frauds requirement speaks of performance NOT AT ALL CAPABLE OF COMPLETION WITHIN ONE YEAR.**




**EXAMPLE:**

If X and Y enter an oral agreement on January 1, 1984, to perform services from May 1, 1984 to April 30, 1985, then this contract falls within the Statute of Frauds requirement for a writing because its performance is more than one year from the making thereof.




**EXAMPLE:**

X agrees to maintain a railroad switch for the railroad “for as long as it ships good over that track”. The railroad has been doing so with X’s assistance for 15 years. Does this contract need to be in writing? No, because the railroad could possibly (although not probably) have stopped shipping over that line within one year and thus, the contract could have been fully performed within one year.[\[1\]](#)




**If the agreement cannot be completed within one year from the making thereof, the fact that the agreement may terminate by the death of one of the contracting parties or one of the parties has an option to terminate the contract within the one-year period, does not relieve the agreement from satisfying the writing requirement: [2]**







**If the promisor has one of two alternatives for performance by one party (one within the Statute of Frauds and one without the Statute of Frauds), then the law does not require a writing.**



**The majority rule in this country and the one asserted in the Restatement, follows the English rule that when one party to a contract has completed his performance, the “one-year” provision of the Statute of Frauds does not prevent enforcement of the promise of the other party.**



**New York does not follow the majority rule that full performance by the plaintiff takes the oral contract out of the statute of frauds. New York's position is "What difference does it make that one party can, while the other cannot, complete the contract within a year?" [3]**




**Note, for this exception to come into play, full performance must have occurred; if only part performance was undertaken, then only restitution will exist in quasi contract.**

- 
- [1] Warner v. Texas & Pacific Ry. Co., 164 U.S. 418 91896); Coinmatch Industries v. Domnitch, 37 N.Y. 2d 899 (1975).
- [2] cf. D.&N. Boening, Inc. v. Kirsh Beverages, Inc. 63 N.Y. 449 (1984).
- [3] Montgomery v. Futuristic foods, 66 App. Div. 2d 64 (2nd Dep't 1978).



## J. THE WRITTEN MEMORANDUM

A writing to satisfy **the Statute of Frauds** is **far less** than what is needed to establish a “complete final and integrated writing,” to invoke the **parol evidence rule**.



**To satisfy the signature requirement, the party to be charged under the contract (usually the defendant) needs to have put down his signature, initials or mark.**

**To satisfy the Statute of Frauds the writing must**

- 1. Identify the parties to the agreement**
- 2. Describe the subject matter of the agreement**
- 3. Detail in some degree the terms (price) and conditions of the transaction.**



**EXAMPLE:**

“A frame residence in Walnut, Ill ...” was held to be an insufficient identification of the subject matter of the contract.<sup>[1]</sup> A different result may have been reached if the writing said “my frame residence in Walnut, Ill.,” and he owned only one residence there.







**EXAMPLE:**

“As soon as I can get my work organized and have a little breathing spell, I will give some time to writing up our working agreement.”

[2] This was held to be an insufficient memo because it lacked any of the terms and conditions.




**The signed writing which identifies the parties and the subject matter of the transactions and its terms, need not be addressed to the repudiation of the oral contract and even if the writing is lost if its existence is established, its content may be established by parol evidence.**



**The memorandum of the agreement may be contained in several writings and not all of them need to be signed, if the unsigned writing**

**1. is attached to the signed writing,**



**2. is impliedly or expressly referred to by the signed writing. New York has held that signed corporate board of directors minutes referring to an unsigned realty contract, which approved the terms of that contract, satisfied the memorandum requirement of the Statute of Frauds. [1]**

**[1]** D.F.I. v. Greenberg, 41 N.Y.2d 602 (1977).




## **K. ORAL VARIATION**

**A written signed contract which falls within the Statute of Frauds requirements may nevertheless be varied orally, unless the terms of the variation fall within the Statute of Frauds.**



**EXAMPLE:**

Written employment contract No. 1 to employ E for 5 year. An oral employment contract No. 2, that the period will only be for six months (assuming it is supported by consideration), is a valid contract.



**Note if the modified period was for 2 years then there would need to be a writing because the modified terms fall within the Statute of Frauds.**

**An oral modification of the contract after its breach, is an Accord and Satisfaction (see *infra*).**

**Remember a subsequent oral modification does not fall within the Parol Evidence Rule (only prior or contemporaneous negotiations, i.e., oral modifications).**



## **L. VIOLATION OF THE STATUTE OF FRAUDS**

**As a general rule, the failure to comply with the Statute of Frauds results in a contract at will which either party can reject by asserting the Statute of Frauds as a successful defense.<sup>[1]</sup>**


**The one asserting the Statute of Frauds generally has the burden of pleading and proving the Statute of Frauds as defense.**







## **M. EXCEPTIONS TO THE STATUTE OF FRAUDS**

**Notwithstanding the absence of a requisite writing and the resulting violation of the Statute of Frauds, the law will enforce an oral contract via the following rules:**


- 
1. **Full performance** --Full performance by one party will take the contract out of the Statute of Frauds---part performance will not defeat the Statute of Frauds as a defense, **but if he can show he was not in breach, then he has a cause of action for restitution in quasi contract for the value of his part performance, for the value of the benefit conferred upon the party asserting the Statute of Frauds (but generally only to the extent that such performance has benefited the defendant and not for the plaintiff's loss. See Equitable Estoppel infra. )**




**(Quantum meruit for the value of services furnished, quantum valebant for the value of goods delivered or replevin to recover the goods themselves).[\[2\]](#)**




**2. Constructive Trust** -this is defined as an oral contract arising in **equity** against a person who, by breach of a fiduciary relationship, either obtained or holds the legal title to realty or personalty (money or chattel) which in equity and good conscience he ought not to hold and enjoy. **The elements of a constructive trust are:**


- 
- (a) confidential or fiduciary relationship (husband and wife ,attorney and client, partner in a partnership);**
  - (b) procured not by fraud, duress, mistake, undue influence,**
  - (c) transfer was for security only;**
  - (d) no unjust enrichment**



**3. Promissory Estoppel** -substantial reliance upon an oral promise with a resulting change in position. (Promissory estoppel is used frequently as a substitute for consideration to make gratuitous promises enforceable). However, the “requirement of consideration is more easily displaced than the requirement of writing.”




**In a recent case a landlord, based on a tenant's oral promise of a 10-year lease, completed expedited substantial renovations on the leasehold. The landlord's cause of action, based on contract, was dismissed because of the statute of frauds, but the landlord's separate quasi contract action, based on reliance to recover the value of work performed (\$400,000), was sustained.**




**Although a cause of action in restitution looks to recover only those amounts expended conferring an actual benefit on the defendant, a cause of action in “reliance” allows the plaintiff to recover the fair value of the cost of performance. [4]**





**4. Equitable Estoppel** -similar to the rationale of part performance, but **it requires misrepresentation or concealment.**<sup>[5]</sup> The purpose of invoking the doctrine of equitable estoppel is to prevent the infliction of unconscionable injury or loss upon one who has relied on the promise of another.<sup>[6]</sup>




**Estoppel** is either “**equitable**” (speaks of misrepresentation or concealment of an existing material fact which is relied upon by the plaintiff) or “**promissory**” (a verbal promise concerning intent in the future where in justice can only be avoided by enforcing the contract notwithstanding its violation of the Statute of Frauds, i.e., where restitution would not begin to compensate one of the parties for his change in position and estoppel prevents one (estops him) from using the Statute of Frauds as a defense.




## **EXAMPLE:**


L, a promising law student, was promised orally by his grandfather, G, that if he stayed home on the farm after graduating from law school and looked out for G, that G would convey a half interest in the \$500,000 farm to L. As a consequence, L gave up a lucrative Wall Street offer and, after the four years, G conveyed the farm away and L now sues. G was estopped (because of his promise) from asserting the Statute of Frauds as a defense. Promissory estoppel comes into play.




**“...If the unconscionable injury that would result from denying enforcement of the contract, after one party has been induced by the other seriously to change his position in reliance on the contract, or in the unjust enrichment that would result if the party who received the benefit of the other’s performance were allowed to rely upon the statute.” [7]**



**5. “Main Purpose” Doctrine** – used against an oral surety who derives economic benefit as the main purpose of his promise to pay off another’s debts.



**6. Novation** – This is an exception to the surety writing requirement because this involves a new contract and need not be in writing.




**7. Statutory Exceptions** – in New York, a contract to pay compensation to an attorney or a real estate broker for negotiating an interest in a business (finder's fee) is specifically excluded from the Statute of Frauds.[\[8\]](#)




## **N. EMPLOYMENT CONTRACTS – A Matter of Human Rights**

**In New York and most jurisdictions, an oral contract for permanent or lifetime employment is unenforceable under the Statute of Frauds.<sup>[9]</sup> Such contracts result in “employment at will”, where the employer could fire the employee with no reason.<sup>[10]</sup>**






**Many jurisdictions imply an element of **good faith** into this kind of contract. In other words, if an employer fires an employee with malice or retaliation in mind, there is a breach of the contract. [\[11\]](#)**



Many states permit **a tort of “abusive discharge”** in this situation. New York does not recognize the tort of abusive discharge of an employee and thus one hired without a definite term can be fire for any reason or no reason. [\[12\]](#)

- 
- [1] N.Y. CPLR 3015 & 3211(a)(8).
  - [2] 2 Corbin 327; 3 Williston 536.
  - [3] *Simonds v. Simonds*, 45 N.Y.2d 233 (1978).
  - [4] *Farosh v. Sykes Datatronics*, 59 N.Y. 2d 500 (1983).
  - [5] 3 Williston 3d ed. 533 A, P. 805.
  - [6] *American Bartenders School v. 105 Madison Co.*, 59 N.Y. 2d 716 (1983).
  - [7] *Monarco v. Lo Greco*, 35 Cal. 2d 621, 626 (1950).
  - [8] G.O.L. 5-701(10).
  - [9] *Savodnick v. Korvettes, Inc.*, 488 F. Supp. 822 (1980).
  - [10] 9 Williston, Contracts, Sec. 1017 (Jaeger Ed. 1967).
  - [11] *Monge v. Bebe Rubber*, 114 N.H. 130 (1974).
  - [12] *Murphy v. Amer. Home Prod. Corp.*, 58 N.Y.2d 293 (1983).



# **Now – TREATIES**

## **A Case Study on Cairo Declaration as Treaty Evidence**

- 2013-5-29, Shanghai, A Public Dialogue with Prof. Jaques deLisle of UPenn at SJTU Law School.
- Prof. deLisle: “Cairo Declaration is NOT a treaty.”
- FU: Cairo Declaration is absolutely a binding treaty.




# Elements of **TREATY**: based on the 1969 Vienna Convention on Law of Treaties


- **Competency of representatives (Art.7)**
- **Rights and duties created substantially**
- **Subjective intent**
  
- \* **Art. 47: no error, fraud, mistake or coercion**
  
- **Title/name of the agreement ? (Art.11)**
  - never an essential element for being a treaty
- charter, constitution, statutes, convention, covenant, protocol, compact, treaty, agreement, declaration, proclamation, communique, e.o.n., e.o.l., memo, minutes, records, process verbal, ... etc.



# Cairo Declaration, 1943-12-1

- Governments of United States, China and United Kingdom
- President Roosevelt, Generalissimo Chiang Kai-shek and Prime Minister Mr. Churchill, together with their respective military and diplomatic advisers, have completed a conference in North Africa. The following general statement was issued:
  - 
  - "The several military missions have agreed upon future military operations against Japan. The Three Great Allies expressed their resolve to bring unrelenting pressure against their brutal enemies by sea, land, and air. This pressure is already rising.
  -

- 
- "The Three Great Allies are fighting this war to restrain and punish the aggression of Japan. They covet no gain for themselves and have no thought of territorial expansion.
  - 
  - It is their purpose that Japan shall be stripped of all the islands in the Pacific which she has seized or occupied since the beginning of the first World War in 1914, and that all the territories Japan has stolen from the Chinese, such as Manchuria, Formosa, and The Pescadores, shall be restored to the Republic of China.
  - 
  - Japan will also be expelled from all other territories which she has taken by violence and greed.

- 
- - The aforesaid three great powers, mindful of the enslavement of the people of Korea, are determined that **in due course Korea shall become free and independent.**
  - 
  - "With these objects in view the three Allies, in harmony with those of the United Nations at war with Japan, **will continue to persevere in the serious and prolonged operations necessary to procure the unconditional surrender of Japan.**"






## Review the 1943 Cairo Declaration:

- **Competency:** the highest leader of 3 States
- **Rights and duties created:** most substantial
- **Subjective intent:** item by item implemented together with the 1945 -7-26 Potsdam Proclamation.
  
- 1945-8-14, The Japanese Emperor accepted the Potsdam Proclamation and issued the Decree of Surrender without Condition.



## Art.26: Pacta sunt servanda

- The 1945 Potsdam Proclamation which concluded the Potsdam conference by Truman, Churchill and Stalin in July 1945 after the defeat of Nazi Germany, demanded that:  
“The terms of the Cairo Declaration shall be carried out, and Japanese sovereignty shall be limited to the islands of Honshu, Hokkaido, Kyushu, Shikoku, and such minor islands as “WE” determine.”
- .



# Why the US does not take it as treaty?

- Art.27: May not invoke internal law for its failure to perform treaty.
- The US State Department statement:



For Japan:

Art.36: Treaty providing for third state → third state assents or contrary not indicated....

- 第三十六条 为第三国规定权利之条约
- 一、如条约当事国有意以条约之一项规定对一第三国或其所属一组国家或所有国家给予一项权利，而该第三国对此表示同意，则该第三国即因此项规定而享有该项权利。该第三国倘无相反之表示，应推定其表示同意，但条约另有规定者不在此限。
- 二、依第一项行使权利之国家应遵守条约所规定或依照条约所确定之条件行使该项权利。




## Breaking Factor -- Cold war and San Francisco Peace Treaty

- ---- Only after less than 7 years ...
- In April 1952, the United States and Japan signed the *San Francisco Peace Treaty*, which is a very pro-Japan peace treaty without the participation of the Republic of China, the People's Republic of China or the Soviet Union.

# The 1952 San Francisco Peace Treaty:

- This treaty's Article 3 states "Japan will concur in any proposal of the United States to the United Nations to place under its trusteeship system, with the United States as the sole administering authority, Nansei Shoto south of 29deg. north latitude (including the Ryukyu Islands and the Daito Islands), Nanpo Shoto south of Sofu Gan (including the Bonin Islands, Rosario Island and the Volcano Islands) and Parece Vela and Marcus Island. Pending the making of such a proposal and affirmative action thereon, the United States will have the right to exercise all and any powers of administration, legislation and jurisdiction over the territory and inhabitants of these islands, including their territorial waters."

- 
- In short, the Ryukyu islands were put under the United States administration pending proposal to become a United Nations trusteeship.
  - Ryukyu was relieved from Japan's cruel occupation as a result of Japan's defeat by China, the United States and the Soviet Union at the end of WWII.
  - Nonetheless, Ryukyu was returned to Japan by the United States as Nixon's gift **without any treaty involving the agreement of China or the Soviet Union**. This was despite the fact that China fought Japan for the longest time and sacrificed the most in WWII.




# Some Conclusions:

- **The 1943 Cairo Declaration is a strictly defined treaty.**
- The optimum choice of public policy of the USA -- its attitude to international treaties
  - as the/a leader? ----with mutual trust
  - as a betrayer of her allies and the statutory international law? ----with tricks and cheatings
  - The USA should also face up to history ---- Pearl Harbor
- A more realistic China? -- a dancing/attacking elephant ?

with/without respect



- 
- *“Treaties are like roses and young girls  
-- they last while they last.”*

*-- Charles De Gaulle*

- The Chinese people have learnt it and are ready to face the change of the tide... if (sadly) it is really necessary.
- **BUT....**



# Two last questions:

- 1) Should this be the last rule for our international community -- a lawless wild international jungle?  
---- *Cairo Declaration* is the real test for all !
- 2) Are continuity and consistency of international law more important than renovation of the rules?  
---- The US, Japan and the RP insist that China wants to change the rule of games. (This is illogical.)
- ---- The answer is clear: A balanced attitude. Some basic value must be preserved: peace, fair treatment, equitable legal principles and justice.



# THANK YOU!

Kuen-chen FU / 傅崐成 教授

[kuenchen\\_fu@163.com](mailto:kuenchen_fu@163.com)