Statute of Frauds

• Contract for sale of land must be in writing (written “memorandum” of agreement), unless it is “taken out” of Statute of Frauds by partial performance
  – RSMo § 432.010: applies to “any contract for the sale of lands” or “any lease thereof, for a longer time than one year”
  – RSMo § 432.010: “no contract for the sale of lands made by an agent shall be binding upon the principal, unless such agent is authorized in writing to make said contract” (such written agreement is commonly referred to as a “power of attorney”)

Statute of Frauds

• RSMo § 432.010: contract, or “some memorandum or note thereof” must contain must be signed by party sought to be charged (e.g., by the defendant)
  – Some state SOFs require signature of both parties
• Judicial gloss: contract, or memorandum thereof, has to contain the “essential terms” (i.e., the price, the parties, the property)
  – Court may “gap-fill” to supply other “non-essential terms” not contained in the memorandum, but will not “gap-fill” as to an essential term of the agreement
Common Disputes

• Sufficiency of property description (see earlier deed material)
  – Some states require full legal description; MO courts have allowed street addresses or other extrinsic proof to show intended boundaries
• “Composite documents”: agreement can generally be found in multiple documents that collectively satisfy SOF memorandum requirement (even if each individual document does not), as long as each separate document is sufficiently authenticated
• What property is “included”?
  – Personal property: No, unless expressly included
  – Fixtures: Yes, unless expressly excluded

E-Sign and UETA [Note 2, Page 38]

• “Writings” sufficient to satisfy SOF can come from electronic forms of communication
  – E-Sign [15 USC § 7001]: pre-empts any state law that would refuse to enforce agreement because it was expressed in electronic form rather than paper
• Most states have enacted UETA, which validate agreements expressed in electronic form
**Johnston v. Curtis**

- The Johnstons signed a contract to buy a home for $114K
  - “[Buyers’ obligation was subject to their] ability to obtain a loan secured by the property in an amount no less than $102,600, with Jan Turbeville at Arkansas Fidelity Mortgage Co., payable over a period of not less than ___ Years, with interest not to exceed ___% per annum.”
- When the house appraised for $110K during the loan approval process, the Johnstons were rejected for the loan
- So how do they end up having the contract enforced?

After loan was initially denied, parties then orally agreed to reduce the price to $110K
- The Johnstons paid a $500 deposit and took possession
- Johnstons then got approved for a mortgage loan, but at a higher interest rate (10.75%) than the Johnstons wanted to pay

- Curtises then sued to enforce the oral agreement (i.e., to take the agreement “outside the Statute of Frauds”)
- Should the court have enforced the agreement, or should the Statute of Frauds prohibit its enforcement?
The Part Performance Doctrine

- Courts can enforce oral agreement, despite Statute of Frauds, in cases of “part performance” of the oral agreement
  - Rationale: acts of part performance provide objective confirmation of the parties’ oral agreement and thus justify its enforcement
- Part performance typically requires:
  - (1) Buyer pays part or all of purchase price, AND
  - (2) Either (a) Buyer goes into possession of land, or (b) Buyer makes substantial improvements to the land

- Pro: The Johnstons just got “buyer’s remorse” and are trying to renege on a proven oral agreement that they’ve partly performed (so enforcing the agreement essentially prevents a fraud)
- Critique: they had no professional advice/assistance
  - If they’d been advised, it’s more likely that the “blank” in the financing contingency would’ve been filled in, and their obligation would’ve been truly contingent
  - Part performance ends up binding the Buyers to an unfavorable agreement entered into without professional advice
- Query: what if Bank had only approved them a 30% loan?
Letters of Intent

• In commercial transactions, parties often execute a “Letter of Intent” (or “LOI”) at the onset of the transaction process
  – This document is sometimes called a “Term Sheet”
  – The LOI usually includes some of the terms of the anticipated agreement (which is usually signed later)

• What purposes does the Letter of Intent serve?
• Does the Letter of Intent create enforceable rights?

• LOIs often serve the role of signal to professionals (i.e., lawyers for the parties) to begin negotiating and drafting the final contract (and any other key transactional documents)
  – E.g., lawyers may use the LOI to “fill in some blanks” in a comprehensive purchase and sale agreement, which parties will then negotiate further, and perhaps modify to address key issues that are not specifically addressed in the LOI

• LOIs can streamline negotiations
  – LOI may identify some terms of the eventual agreement that the parties don’t expect to negotiate further (e.g., price)
Letter of Intent Problem

• Buffett and Bloomberg sign a “Letter of Intent” for the sale of Bloomberg Craft Brewery for a price of $3.2MM
• A few days later, Jay-Z offers Bloomberg $4MM; Bloomberg and Jay-Z execute a contract and Bloomberg refuses to negotiate further with Buffett
• Buffett sues Bloomberg for breach, claiming that the LOI created an enforceable agreement. Did it?

Form #2, ¶ 8: “The provisions of this Letter of Intent are subject to the execution of a formal agreement by the parties within a specified time in Paragraph 5 above and this Letter of Intent shall not be binding on Buyer or Seller until complete execution of such Purchase and Sale Agreement by the parties, which Purchase and Sale Agreement shall embody the above provisions and contain acceptable covenants and agreements regarding title, survey, closing procedures and expenses, notice, remedies, and such other items as may be deemed necessary or appropriate.”
Letters of Intent

• What’s the point of including the “nonbinding” disclaimer language? Is it effective?
• If an LOI is “nonbinding,” then what’s the point of executing it?

• Generally, courts treat LOIs containing provisions like ¶ 8 as nonbinding
  – Rationale: many matters that may not be “essential” within the meaning of Statute of Frauds case law may be nevertheless be “essential” to the parties
  – E.g., scope of representations and warranties to be made by the parties, title matters, time periods for diligence review
  – This reflects parties’ expectation not to be bound until a comprehensive PSA has been executed
Letter of Intent (Form 1)

• Note that Form #1 does not have ¶ 8 in it (no “disclaimer”)
• How would this impact the analysis of whether the LOI created a binding obligation on Bloomberg?

• On the one hand, even w/out the disclaimer, commercial parties don’t expect to be bound until they’ve executed a full PSA (for same reasons one/both might have insisted on a disclaimer)
• On the other hand, there is some risk, b/c:
  – LOI contains the “essential terms” (price, parties, property)
  – ¶ 5 says parties “will” execute a formal PSA within 10 days of LOI’s acceptance (which may support argument by Buyer that parties had reached agreement)
  – A court probably would not, but could, say this is memorandum satisfying SOF and reflecting intent to be bound
  – That could give Buffett enough “cover” to litigate with a view toward at least forcing/encouraging a settlement with Bloomberg
Letters of Intent

• If the LOI is truly “nonbinding” on the parties, then what’s the point of executing it (besides signaling the lawyers to get started documenting the “possible” deal)?
• Why don’t we see LOIs in residential transactions?

• Standard PSA forms customarily in use in residential transactions obviate the need for parties to use “letter of intent”
  – Typical Seller wants Buyer to be conditionally bound at agreed price
  – Form typically allows Buyer to cancel/rescind if due diligence doesn’t justify conclusion to perform (i.e., if title is unmarketable, or financing can’t be obtained, or property flunks inspection)
  – In typical residential transaction, the parties wouldn’t expect significant negotiation over the content of standard form language (and lawyers are unlikely to be involved, in many states)
• By contrast, if commercial Seller enters a contingent PSA, this may hinder the Seller’s efforts to market the property to others, because other buyers may be practically “discouraged” by prior PSA (in a way they would not by a nonbinding LOI)
  – Cost of negotiations (e.g., due diligence costs, attorney fees)
  – Risk of liability for intentional interference w/contractual relations
• Nonbinding LOI may thus allow Seller opportunity for more robust marketing efforts

Letter of Intent
• If LOI contains broad disclaimer that it creates no binding obligation prior to execution of PSA, what risks does the Buyer face, and how can Buyer address or avoid them?
Buyer Concerns with Nonbinding LOI?

• Buyer may be reluctant to incur major transaction costs if Seller is also marketing land to others (Buyer doesn’t want to be a “stalking horse”)
• Thus, Buyer may prefer an exclusivity period for negotiations, or a prohibition on Seller marketing activities
  – E.g., “Exclusivity. For [45 days], these negotiations shall be exclusive and neither party shall negotiate with any other counterparty.”

“Option” Contract

• Sometimes, Buyer will ask for an “Option” PSA, where Buyer makes no deposit, or a minimal deposit, and is not fully bound, until Buyer completes its due diligence to Buyer’s satisfaction
  – Under this approach, Buyer has “option” to perform the agreement during the option (due diligence) period
  – Now, if Seller tried to sell to another party during that period, Buyer’s option would give Buyer a superior right
Steiner v. Thexton (Cal. 2010)

- Buyer executed PSA with an “option” right
  - Under PSA, Buyer not obligated to make a “deposit” until due diligence period ended and buyer was deemed satisfied with property
- During that period, Seller got a better offer, and sued for a declaration that the “option” was not legally binding b/c it was not supported by separate consideration
- How would you rule?

- CA Court of Appeals held PSA created only an option that was unenforceable for lack of consideration
- CA Supreme Court reversed, holding that Buyer’s contemplated due diligence efforts during that period were sufficient consideration for the option, or that they at least estopped Seller from rescinding PSA
- Still, it is common to see PSA agreements in which the Buyer makes a separate “option” payment of some amount [as negotiated by parties] as an independent, nonrefundable consideration for entering into the PSA