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New York's Requirements for Contractual Definiteness with Application to the Formation of Investment Vehicles

by

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Key Points

- A review of 82 modern New York cases reveals an unexpected frequency of authority requiring contractual definiteness as to what may reasonably appear to be minor terms.
- Illustrative are cases holding inadequately definite ordinary ways preliminary agreements may express compensation on a percentage of net basis. Other unexpected authority (i) is less willing than expected to allow subsequent actions to provide sufficient definiteness to initially indefinite agreements and (ii) denies the enforceability of confidentiality provisions and a right of first refusal.
- The survey includes some unexpected support for contracts specifying a plausibly material portion of the consideration with inadequate definiteness as also precluding recovery in restitution. That includes not giving effect to thoughtful drafting choices apparently designed to avoid that outcome.
- The survey gives rise to unease whether a court will find fatally indefinite an LLC operating agreement that grants one partner unfettered discretion in choice of section 704(c) method, if built-in-gain property is to be contributed. There is not authority directly addressing this issue. But the pattern of requiring excess specificity, coupled with authority addressing discretionary choices addressing circumstances that are not comparable, creates concern for this author.

I. INTRODUCTION

As part of a wider research project, eighty-two recent opinions addressing the required definiteness for an obligation to be enforceable in contract, in state and Federal courts in New York, were reviewed. This article examines some implications of the cases reviewed in that survey having particular application to the formation of investment vehicles under New York law.

A number of factors can contribute to participants opting to draft arrangements that may be at material risk for being unenforceable. For example, multiple members of the management team to be formed may be promised equity interests. But the details of the equity interests may depend on the details of the complete capital structure of the venture. And that capital structure may be subject to revision and full documentation until all the initial investors are signed-up.

This combination of circumstances gives rise to a pattern, not unique to investment vehicles, where key employees are brought onboard with vague promises of equity interests that may be unenforceable. This circumstance creates opportunities for opportunism if initial promises, having only the level of detail that can be practicably be included at the time key employees are brought onboard, are considered unenforceable. A review of the litigated cases reveals this type of opportunism.

This article summarizes a few recent cases that bear on the current approach taken in state and Federal courts in New York, illuminating how the principles these cases adopt may limit the enforceability of the arrangements.

II. GENERAL PRINCIPLES CONCERNING DEFINITENESS

A. Foundations of the Definiteness Requirement

The principles requiring a particular level of definiteness for a promise to be enforceable in contract promote two distinct concerns. One focuses on the practicability of judicial enforcement. According to the Restatement (Second) of Contracts, promises are not sufficiently definite to be enforceable in contract unless

“they provide a basis for determining the existence of a breach and for giving an appropriate remedy.”¹

There is less allure to this standard than may appear initially. New York courts allow restitution, to the extent of performance actually rendered, where the consideration to be paid was not stated with adequate specificity to be enforceable in contract. The compensation in such a case is the reasonable value of what was provided.² So, existing law contemplates courts determining the reasonable value of services in fact provided, to the extent performance has actually been rendered, even where rendered under promises of compensation that are determined insufficiently definite to be enforceable in contract.³

A second underlying concern involves notions of assent. To say that formation of a contract is voluntary indicates that a contractual duty should not be foisted on one involuntarily. A lack of definiteness may be an indicator that bargaining between the parties had not ripened into a circumstance where each may be fairly determined to have assented to assuming a contractual duty. These two concerns are identified in New York authority.⁴

In some cases, the standard the second concern urges will be less restrictive. Commencement of performance may manifest an intention to be obligated where the language alone does not.⁵

¹ RESTATEMENT (SECOND) OF CONTRACTS § 33(2) (1981).

² See *infra* note 59 and accompanying text.

³ But see *infra* note 36 and accompanying text (providing authority distinguishing between appraisal proceedings and assessments of definiteness in contract).

⁴ *E.g.*, *Cobble Hill Nursing Home, Inc. v. Henry & Warren Corp.*, 548 N.E.2d 203, 206 (1989). GLEN BANKS, NEW YORK PRACTICE SERIES—NEW YORK CONTRACT LAW § 2:30, n.18 (2d ed. Westlaw through July 2021), collects assorted cases finding promises too vague.

⁵ But see generally Alan Schwartz & Robert E. Scott, *Precontractual Liability and Preliminary Agreements*, 120 HARV. L. REV. 661, 664, 701–02 (2007) (stating as to what is generally described as a *Tribune Type II* agreement, see *Shann v. Dunk*, 84 F.3d 73, 77 (2d Cir. 1996), “[C]ourts generally find preliminary agreements when the parties have agreed on the nature of their project, on the nature of the investment actions that each is

Nevertheless, even if it is clear the parties intended to form an enforceable agreement, arrangements may not be sufficiently definite to be enforceable. One oft-repeating circumstance involves a commercial lease granting the tenant a right to extend the lease term on open (unspecified) economic terms. In a 1981 case, styled *Joseph Martin, Jr., Delicatessen, Inc. v. Schumacher*, New York’s highest court held unenforceable such a provision where the economic terms were to be “at annual rentals to be agreed upon.”⁶ Although that case manifestly involved a severable unenforceable arrangement, similar principles apply to promises that are not parts of pairs of performances that properly can be severed, leaving some enforceable obligations.⁷

One may encounter in other jurisdictions authority in tension with *Joseph Martin, Jr., Delicatessen*. For example, some authority in Missouri takes the rather startling approach that an agreement governed by the common law, involving construction work to mitigate flood damage, that lacked a price term was enforceable.⁸ Although recovery of reasonable compensation in restitution would be conventional, and thus the outcome is unsurprising, the conclusion an enforceable contract existed is unexpected. The court finds its outcome on the fact that “establishing a price in advance was impossible in the context of the complex flood mitigation project,”⁹ a principle that militates against the approach taken in *Joseph Martin, Jr., Delicatessen*.

committed to undertake, and on the order in which these actions are to be pursued. This baseline for finding an actionable commitment is independent of many of the factors that have been made doctrinally salient, such as the number of open terms and the extent of part performance.” (footnote omitted).

⁶ 417 N.E.2d 541, 542, 544 (N.Y. 1981).

⁷ *E.g.*, *Cooper Square Realty, Inc. v. A.R.S. Mgmt., Ltd.*, 581 N.Y.S.2d 50, 50 (App. Div. 1992) (addressing brokerage a agreement providing “a commission to be separately determined”).

⁸ *Michaud Mitigation, Inc. v. Beckett*, 630 S.W.3d 795, 799 (Mo. Ct. App. 2021), *transfer denied*, 2021 Mo. LEXIS 402 (Oct. 26, 2021) (relying on *Allied Disposal, Inc. v. Bob’s Home Serv., Inc.*, 595 S.W.2d 417 (Mo. Ct. App. 1980)).

⁹ *Id.* at 800.

New York authority of over a century ago, *Varney v. Ditmars*, indicates that, in the context of sale of goods, a phrase similar to “fair share,” “fair and reasonable value,” may be taken as “synonymous with ‘market value.’”¹⁰ That authority distinguishes the case where an employee is promised additional compensation consisting of “a fair share of my profits.” The court states:

The contract in question, so far as it relates to a share of the defendant’s profits, is not only uncertain, but it is necessarily affected by so many other facts that are in themselves indefinite and uncertain that the intention of the parties is pure conjecture. A fair share of the defendant’s profits may be any amount from a nominal sum to a material part according to the particular views of the person whose guess is considered. . . . The courts cannot aid parties in such a case when they are unable or unwilling to agree upon the terms of their own proposed contract.¹¹

Additionally, New York law provides that a subsequent agreement among the parties can render sufficiently definite an agreement that originally was inadequately definite to be enforceable.¹²

However, one occasionally encounters authority that validates agreements that would appear not to be adequately definite under the typical approach. *Bravia Capital Partners, Inc. v. Fike* is one such relatively modern apparent outlier. It involves an independent contractor providing services under a contract stating she “will be entitled to a bonus depending on [her] overall contribution to the Company.”¹³ The court denies a motion to dismiss a claim apparently seeking recovery in

¹⁰ *Varney v. Ditmars*, 111 N.E. 822, 824 (N.Y. 1916).

¹¹ *Id.* *But see* *Lawrence v. Saratoga Lake Ry.*, 43 Hun’s 467, 469–70, 472–73, 477 (N.Y. Gen. Term 1885) (HeinOnline, State Reports: A Historical Archive) (reversing dismissal of a complaint seeking specific performance of a railroad’s promises to “erect . . . a neat and tasteful station building”).

¹² *See infra* note 122 and accompanying text.

¹³ *Bravia Cap. Partners, Inc. v. Fike*, No. 09 Civ. 6375 (JFK), 2011 U.S. Dist. LEXIS 141013, at *2 (S.D.N.Y. Dec. 6, 2011) (alteration in original).

contract,¹⁴ stating, “Courts have identified several possible metrics for determining bonus amount, including bonus history, the employee’s profitability for the firm, and the firm’s overall profits.”¹⁵

B. Adequate Specification of “Material” Terms

A traditional statement is that an enforceable contract requires adequate specification of all “material” terms.¹⁶ Subject to some equivocation,¹⁷ New York authority appears to follow this principle. “Few principles are better settled in the law of contracts than the requirement of definiteness. If an agreement is not reasonably certain in its material terms, there can be no legally enforceable contract.”¹⁸

Some authority that addresses the standards for materiality uses vague language and avoids articulation of a useful standard.¹⁹ One example is the following: “In

¹⁴ The relevant claim, although not expressly styled breach of contract, states the recipient of the services “is obligated by the Agreement to pay [her] a non-discretionary bonus for her services” Amended Answer at 31, ¶ 227, *Bravia Capital Partners*, 2011 U.S. Dist. LEXIS 141013 (No. 09 Civ. 6375 (JFK)). It further alleges, “This non-discretionary bonus can be objectively determined by the finder of facts, based on the ‘contributions’ made by [her].” *Id.* at 31 ¶ 228.

¹⁵ *Bravia Capital Partners*, 2011 U.S. Dist. LEXIS 141013 at *14.

¹⁶ *Express Indus. & Terminal Corp. v. N.Y. State Dep’t of Transp.*, 715 N.E.2d 1050, 1053 (N.Y. 1999) (requiring “the parties are truly in agreement with respect to all material terms”); *Spectrum Rsch. Corp. v. Interscience Inc.*, 661 N.Y.S.2d 871, 872 (App. Div. 1997).

¹⁷ *Express Indus.*, 715 N.E.2d at 1053 (“While there are some instances where a party may agree to be bound to a contract even where a material term is left open (*see, e.g.*, UCC 2-305[1] . . .), there must be sufficient evidence that both parties intended that arrangement.”). *But see generally* *Armstrong v. Rohm & Haas Co.*, 349 F. Supp. 2d 71, 73, 75 (D. Mass. 2004) (treating as unenforceable—not as an enforceable common law analogue of output contracts under U.C.C. § 2-306(1) 1A U.L.A. 213 (2012)—a promise to employees (ceramic grinders) starting their own firm that the former employer would direct to the new venture “all the [outsourced grinding] work they could handle”).

¹⁸ *Cobble Hill Nursing Home, Inc. v. Henry & Warren Corp.*, 548 N.E.2d 203, 206 (N.Y. 1989).

¹⁹ A recent article articulates the following standard: “[T]he missing or uncertain term is essential and goes to a party’s core performance duties under the contract.” Brian A. Blum, *The Protean*

determining whether the parties intended to enter a contract, and the nature of the contract’s material terms, we look to the ‘objective manifestations of the intent of the parties as gathered by their expressed words and deeds.’”²⁰

Some clarification can be realized by referencing application of one of the standards in individual cases. In one such case, New York’s highest court suggests that a material term need not be economically large, if it is “crucial to the financial viability” of the economic activity in question.²¹ One has to state the court “suggests” that, as opposed to holding that, because the opinion’s language reflects a casual style of detailing the analysis. The court holds the relevant terms are material.²² However, the court does not directly state the inadequately-addressed term is material simply because its resolution would be “crucial to the financial viability” of the undertaking for one party. Rather, the opinion is structured first to provide the conclusion and then to follow it with a recitation of facts supporting that conclusion.

A case from an intermediate appellate court states:

Essential terms that must be set forth in the written contract are “those terms customarily encountered in a particular transaction.” The issue is not whether the court could determine the omitted terms from an agreement, but, rather, whether the

Concept of Materiality in Contract Law, 2020 MICH. ST. L. REV. 643, 673 (2020).

²⁰ *Stonehill Cap. Mgmt. LLC v. Bank of the W.*, 68 N.E.3d 683, 689 (N.Y. 2016) (quoting *Brown Bros. Elec. Contractors, Inc. v. Beam Constr. Corp.*, 361 N.E.2d 999, 1001 (N.Y. 1977)). *See also Spectrum Rsch.*, 661 N.Y.S.2d at 872 (“Significantly, the contracts fail to delineate the precise nature of the work to be subcontracted, price and manner of payment and time of performance. While these omissions might not be material under some circumstances, given the complexity of the work . . . and the fact that the parties were unable to reach an agreement on these issues after extended negotiations, we conclude that the subject contract fails for indefiniteness.”).

²¹ *Express Indus.*, 715 N.E.2d at 1053.

²² *Id.*

parties had a meeting of the minds in the first place.²³

The first standard, and application of the second standard in some contexts, may suggest more must be specified than one might expect. This second standard would appear to invalidate many so-called *Tribune Type I* agreements.²⁴

Total Telcom Group Corp. v Kendal on Hudson,²⁵ a 2018 case, also suggests more certainty may be required than one may expect. The case affirms summary judgment dismissing a claim for breach of contract,²⁶ on indefiniteness grounds. The plaintiff alleged that, under the contract, it “sold, installed and maintained wiring equipment” for television and internet services to the premises.²⁷ The contract provided the plaintiff had “the exclusive license to be the only satellite and internet provider on the property,” described by the plaintiff as follows: “Plaintiff would receive ‘residuals’—in essence a commission—from the provider of satellite television service for each resident that received satellite television service. Additionally, with respect to internet service, plaintiff would resell to the residents of defendant’s facility ‘bandwidth’ that plaintiff in turn purchased from an internet service provider.”²⁸

The court held the contract “lacked a material term regarding the price or fees to be paid to the plaintiff for Internet-related service, and therefore constituted an unenforceable agreement to agree.”²⁹ In briefing, the plaintiff asserted that although the complaint did not

²³ McGowan v. Clarion Partners, LLC, No. 650710/2015, 2019 N.Y. Misc. LEXIS 3558, at *14–15 (Sup. Ct. July 1, 2019) (quoting Argent Acquisitions, LLC v. First Church of Religious Sci., 990 N.Y.S.2d 1, 4 (App. Div. 2014)), *aff’d*, 132 N.Y.S.3d 281 (App. Div. 2020), *appeal denied*, 37 N.Y.3d 903 (N.Y. 2021).

²⁴ See *infra* note 89 and accompanying text (defining this type of agreement).

²⁵ 68 N.Y.S.3d 491 (App. Div. 2018).

²⁶ *Id.* at 492.

²⁷ Complaint at 2, *Total Telcom*, 68 N.Y.S.3d 491 (No. 2016-04991).

²⁸ Affirmation in Opposition to Motion for Summary Judgment and Other Relief at 5, *Total Telcom*, 68 N.Y.S.3d 491 (No. 2016-04991).

²⁹ *Total Telcom*, 68 N.Y.S.3d at 493.

allege compensation to be paid by the defendant, that deficiency was not dispositive, because the plaintiff was to receive its compensation from the customers.³⁰

To this author, the plaintiff's argument seems persuasive. But that approach is rejected by the court. So, the decision provides further support for the notion that the scope of those terms that are "material," and on which agreement must be reached, is rather broad.

C. Vesting in One Party Specification of a Material Term

(1) General Principles

A third element of our introductory sketch of general principles imposing definiteness requirements involves agreements that vest in one party discretion to set a material term. Although the issue can be significant, it is not prominent in the recent New York authority identified below.

A contractual grant of discretion in one party to set one or more terms may give rise to questions of unenforceability. A standard solution is to restrict the exercise of discretion by a good faith requirement.³¹ However, a contract may purport to eliminate such a limit, by referencing the term being set in a party's sole and absolute discretion. Such a limit often which will be given effect.³²

In some contexts, a court may summarily conclude a good faith limit is not applicable, even absent language

³⁰ *Total Telcom*, Affirmation in Opposition to Motion for Summary Judgment and Other Relief at 6–7, 68 N.Y.S.3d 491 (No. 2016-04991).

³¹ *E.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 33, cmt. e (1981); *cf.*, *e.g.*, *Mickle v. Christie's, Inc.*, 207 F. Supp. 2d 237, 249 (S.D.N.Y. 2002) (addressing an auctioneer's right to rescind a transaction in its "sole discretion" as subject to good faith).

³² *LJL 33rd St. Assocs. v. Pitcairn Properties Inc.*, 725 F.3d 184, 195–96 (2d Cir. 2013) ("However, the implied covenant of good faith cannot create duties that negate explicit rights under a contract."); Brief for Plaintiff-Appellant Pitcairn Properties, Inc., at 22 n.11, *LJL 33rd St. Assocs., LLC*, 725 F.3d 184 (No. 12-1382) (referencing a New York LLC); *see also* *Tymshare, Inc. v. Covell*, 727 F.2d 1145, 1153–54 (D.C. Cir. 1984) (Scalia, J.) (distinguishing between sole and absolute discretion).

having the clarity necessary to eliminate good faith in other contexts. The following case suggests that is particularly likely to be the approach in employment contracts.

A 1997 intermediate appellate court opinion from New York, *Rosenbaum v. Premier Sydell, Ltd.*, involves an alleged promise to provide an employee a minority interest in the employer. The agreement is described by the court as follows: “[T]hey orally agreed that he would receive a minority interest therein, with the precise amount of the interest to be determined by the individual defendants in their discretion.”³³ It appears the employee was terminated many years thereafter.³⁴

The opinion does not use the words “sole” or “absolute” to describe how the parties vested discretion in the payor, nor does it reference “good faith”—those words do not appear in the opinion.

Many years of performance thereafter would indicate there was assent, insofar as such an agreement might manifest assent to an enforceable obligation. And note that the alleged agreement is summarized as referencing that “the *precise* amount” was to be determined, which seems qualitatively different from stating the amount, if any, would be so determined.

An objection to enforceability of that contract may be that it is that is impracticable for a court to enforce it.³⁵ Yet courts in other contexts value minority share interests—in appraisal proceedings, for example. It is practicable, then, for a court to receive evidence about this style of valuation and reach an outcome.³⁶

³³ *Rosenbaum v. Premier Sydell, Ltd.*, 659 N.Y.S.2d 52, 52 (App. Div. 1997).

³⁴ *Id.* at 52–53.

³⁵ *But see supra* notes 13–15 and accompanying text.

³⁶ *See generally* *Amaysing Techs. Corp. v. Cyberair Communs., Inc.*, Civ. A. No. 19890, 2004 Del. Ch. LEXIS 72, at *16–17 (Ch. May 28, 2004) (distinguishing between judicial decision-making in appraisal actions and proof of damages in breach of contract), *dismissed*, Civ. A. No. 19890-NC, 2005 Del. Ch. LEXIS 35 (Ch. Mar. 3, 2005).

A California court treated the issue of whether one party's discretion in setting the terms of the consideration renders the agreement unenforceable as founded on principles of unconscionability. It states, "But unless the consideration given was so one-sided as to create an issue of unconscionability, the courts are not in a position to decide whether legal consideration agreed to by the parties is or is not fair."³⁷ Framing the issue in that way is unlikely to result in a conclusion of unenforceability.³⁸

(2) Issues Specific to Entities to Be Treated as Partnerships for U.S. Tax Purposes

These principles give this author some unease as to the enforceability of what are apparently common terms in organic documents for limited liability companies to be treated as partnerships for U.S. tax law. Ordinary principles of contract law may invalidate limited liability company operating agreements. That was the case as to the Statute of Frauds, which invalidated some limited liability company agreements before a statutory change in Delaware.³⁹ Authority from the Southern District of New York invalidated an operating agreement for a Delaware limited liability company where the entity was formed for an illegal purpose.⁴⁰

In some contexts, the nature of the entity formed, and the business entity law applicable to that form of business, will be treated as negating application of ordinary contract principles to organic agreements.⁴¹

³⁷ *Third Story Music, Inc. v. Waits*, 48 Cal. Rptr. 2d 747, 753 n.5 (Cal. Ct. App. 1995).

³⁸ The most apt New York authority found is not particularly helpful. *Don King Prods., Inc. v. Douglas*, 742 F. Supp. 741, 762–63 (S.D.N.Y.), *on reargument*, 742 F. Supp. 786 (S.D.N.Y. 1990).

³⁹ *Olson v. Halvorsen*, 986 A.2d 1150, 1162 (Del. 2009) ("[T]he statute of frauds applies to LLC agreements."), *superseded by statute*, 2010 Delaware Laws Ch. 287 (H.B. 372).

⁴⁰ *Carruthers v. Flaum*, 365 F. Supp. 2d 448, 463 (S.D.N.Y. 2005) (addressing an illegal purpose consisting of engaging in illegal gaming operations on the lands of an unrecognized tribe), *further proceedings at* 388 F. Supp. 2d 360 (S.D.N.Y. 2005), *summary judgment granted*, 450 F. Supp. 2d 288, 294 (S.D.N.Y. 2006).

⁴¹ *Compare Est. of Kingston v. Kingston Farms P'ship*, 13 N.Y.S.3d 748, 750–51 (App. Div. 2015) (ordinary principles of contract, under which a written contract may be amended by conduct, apply to

However, *Spires v. Casterline* holds “no provision in the Limited Liability Company Law impos[es] any type of penalty or punishment for failing to adopt a written operating agreement.”⁴² So, there does not appear to be room for application of such a saving principle to make enforceable a New York limited liability company operating agreement that is unenforceable under ordinary contract principles.

The relevant nature of these provisions may be sketched briefly. An owner’s recognition of income for tax purposes on a partnership interest does not depend the owner’s receipt of income.⁴³ So, the owner’s actual return may be negative for many years, where the owner has to pay taxes on income the owner does not actually receive.

And the concerns may be exacerbated where partners have contributed non-cash property. U.S. partnership tax law affords the entity multiple ways to address anomalies arising from property contributed to an entity, treated as a partnership for U.S. tax purposes, with a market value in excess of the contributor’s basis.⁴⁴ That can include arrangements where one partner realizes income or gain in respect of a piece of property but another recognizes

amendments to general partnership agreements) *with* A & F Hamilton Heights Cluster, Inc. v. Urban Green Mgmt., Inc., 129 N.Y.S.3d 413, 418–19 (App. Div. 2020) (rejecting the argument that this authority extends to amendments to limited partnership agreements, noting the separate “detailed statutory scheme” applicable to limited partnerships), *appeal denied*, 168 N.E.3d 1150 (N.Y. 2021).

⁴² *Spires v. Casterline*, 778 N.Y.S.2d 259, 262 (Sup. Ct. 2004). *Cf. In re Fassa Corp.*, 924 N.Y.S.2d 736, 738 (Sup. Ct. 2011) (holding the exercise of a contractual right to terminate an operating agreement triggers the dissolution of the LLC, where the operating agreement is otherwise silent as to what triggers a dissolution).

⁴³ *See, e.g.*, EDWARD F. KOREN, *ESTATE, TAX AND PERSONAL FINANCIAL PLANNING* § 38:12 n.72 (Westlaw through Dec. 2021) (discussing “phantom income”).

⁴⁴ *See, e.g.*, LAURA E. CUNNINGHAM & NOEL B. CUNNINGHAM, *THE LOGIC OF SUBCHAPTER K: A CONCEPTUAL GUIDE TO THE TAXATION OF PARTNERSHIPS*, ch. 7 (6th ed. 2020) (discussing the traditional method, the traditional method with curative allocations and the remedial allocation method).

expense or loss.⁴⁵ And different approaches can be used for different pieces of contributed property, as long as the overall method is reasonable,⁴⁶ providing overwhelming flexibility.

We have above sketched some ordinary standards for assessing whether the scope of permitted discretion in one party to set terms, in a putative entire contract, is too broad to give rise to an enforceable contract. Those standards seem to contemplate the extent to which the disadvantaged party may have some minimum return. Application of those approaches is difficult where the range of possible outcomes is very broad and includes some that may be substantially negative.

Yet a form agreement in a leading treatise provides for one party having sole discretion in selecting the method or methods for addressing property contributed with a built-in gain.⁴⁷ One supposes that the scope of possible concern may not be as prominent because an understanding of the issue depends on knowledge of principles of both the law of contracts and partnership tax law, the latter being a notoriously opaque area of tax law.

Moreover, there is some relatively old authority, which may not have survived *Teachers Insurance & Annuity Ass'n of America v. Tribune Co.*,⁴⁸ that appears to require more specification than seems necessary. In *Allen & Co. v. Occidental Petroleum Corp.*, the court holds fatally indefinite⁴⁹ an alleged joint venture stating in relevant part: “[W]e agree to the same arrangements with you on the possible second concessions as on the first concessions, namely, Occidental will share on the basis of 75% for us and 25% for you on anything Ferdinand Gallic turns up.

⁴⁵ See, e.g., *id.* at 135 (discussing offsetting notional allocations under the remedial allocation method).

⁴⁶ 26 C.F.R. § 1.704-3(a)(2) (Westlaw through Dec. 17, 2021).

⁴⁷ It grants the general partner “sole and absolute discretion” as to certain matters “including the authority to make . . . any available tax elections.” ROBERT L. WHITMIRE ET AL., *STRUCTURING & DRAFTING PARTNERSHIP AGREEMENTS: INCLUDING LLC AGREEMENTS* app. A.27, § 6.3(a) (4th ed., Westlaw through Oct. 2021).

⁴⁸ 670 F. Supp. 491, 498 (S.D.N.Y. 1987).

⁴⁹ *Allen & Co. v. Occidental Petroleum Corp.*, 382 F. Supp. 1052, 1059 (S.D.N.Y. 1974), *aff'd*, 519 F.2d 788 (2d Cir. 1975).

This includes sharing costs to be mutually agreed upon and profits.”⁵⁰

This arrangement seems akin to a default for partnerships, in which ordinary costs require majority approval, although perhaps they intended this to be based on a majority in interest,⁵¹ with extraordinary acts requiring unanimous approval. And partnership law provides a wealth of background defaults that will apply, sufficient to make even the most rudimentary agreement of partnership enforceable. It bears mention, however, one may nevertheless encounter other authority finding agreements contemplating partnership insufficiently definite notwithstanding these background defaults.⁵²

D. Divisibility and Severing an Indefinite Term; Restitution as an Alternative

Issues of divisibility are often presented in cases involving one or more promises that are fatally indefinite. A related issue arises where there is an indefinite term, not part of a pair of equivalents, and whether that can or should be severed.

Sometimes the issue is expressly referenced, sometimes not. The seminal New York case of *Joseph Martin, Jr., Delicatessen, Inc. v. Schumacher*, which finds unenforceable a lease renewal provision at “rentals to be agreed upon,”⁵³ does not reference “severability” or “divisibility.” That arrangement—a fatally indefinite lease renewal—seems particularly likely to involve a divisible agreement, which may account for the opinion’s failure to address the issue. However, in other cases, a court’s simply severing an indefinite promise seems inapt

⁵⁰ *Id.* at 1056 (revised to include manually inserted addition).

⁵¹ The opinion notes: “[P]laintiff’s counsel, who . . . either authorized or approved the phrase ‘to be mutually agreed upon’ . . . testified that he understood the phrase to apply differently to the two phases of the proposed joint venture—as to the acquisition of the concessions, consent of the plaintiff to costs was required; however, once acquired, the defendant had absolute discretion to expend whatever sums it deemed necessary in exploiting the concessions.” *Id.* at 1059 (footnote omitted).

⁵² See *Cleland v. Thirion*, 704 N.Y.S.2d 316, 319 (App. Div. 2000).

⁵³ *Joseph Martin, Jr., Delicatessen, Inc. v. Schumacher*, 417 N.E.2d 541, 542, 544 (N.Y. 1981).

and, in some cases, to be the consequence of failure to grapple consciously with the issue of divisibility or severability.

(1) General Tests for Divisibility and Severing

Where an agreement is divisible, fatal indefiniteness as to a material promise in one of the pairs of reciprocal promises or performances will not render unenforceable pairs that are not indefinite.⁵⁴ The Minnesota Supreme Court, applying this principle in the context of indefiniteness, quotes with approval the following standard for divisibility:

A contract made at the same time for different articles at different prices is not an entire contract, unless the taking of the whole is essential from the character of the property, or is made so by the agreement of the parties, or unless it is of such a nature that a failure to obtain part of the articles would materially affect the object of the contract, and thus have influenced the sale had such a failure been anticipated.⁵⁵

There is some New York law that seems to find divisible a contract that does not seem so. One old case involves a contract for purchase of personal property as to which the buyer has a return right. The case holds the return rights divisible, where the repurchase price was “a stipulated price ‘against delivery, part cash and other terms to be agreed upon between the parties.’”⁵⁶ The opinion includes only conclusory discussion as to why the repurchase arrangement, found to be insufficiently definite, was severable.⁵⁷ On its face, a right of return, even if on indefinite terms, seems to this author not

⁵⁴ *E.g.*, *Wilhelm Lubrication Co. v. Bratrud*, 268 N.W. 634, 636 (Minn. 1936).

⁵⁵ *Id.* (quoting *McGrath v. Cannon*, 57 N.W. 150, 151 (Minn. 1893)).

⁵⁶ *Shur-On Standard Optical Co. v. Viopake Co.*, 223 N.Y.S. 157, 158–59 (App. Div. 1927).

⁵⁷ *Id.* at 159 (“But the provision for purchasing back goods sold, delivered, and on hand was separable from the rest of the contract, and was indefinite, as it seems, in the same way as was the contract in the *Ansorge Case*. While our defendant agreed to buy the goods back at a stated price, the terms of payment were indefinite.”).

inherently divisible. Rather, it seems to meet the standards for entire agreements referenced above—that failure of the repurchase promise “would materially affect the object of the contract” and would have “influenced the sale had such a failure been anticipated.”⁵⁸

Severing an Indefinite Term in an Entire Contract. Different options are available to a court where an indefinite provision is not part of a pair of corresponding divisible performances. The court may conclude this results in the contract being unenforceable. In such a case, a party who has performed should be able to recover in restitution to the extent of any enrichment in excess of any compensation previously paid.⁵⁹

Alternatively, the court may simply sever the indefinite provision and hold that the definite provisions constitute enforceable contractual terms between the parties. In the absence of a material breach, this would limit recovery by a party as contractually specified.

Consider for example, an employee promised fixed compensation and a fatally indefinite bonus. The court could find the agreement as a whole unenforceable, because a material term is not specified with adequate definiteness. That would allow the employee who had performed to recover in restitution.⁶⁰ In this style of the vignette, it is the employee taking the position that the

⁵⁸ See *supra* text accompanying note 55.

⁵⁹ *United Press v. N.Y. Press Co.*, 58 N.E. 527, 527–28 (N.Y. 1900) (discussing an express contract identifying merely a maximum price, which had been paid for some time; stating, “where work has been done, or articles have been furnished, a recovery may be based upon *quantum meruit* or *quantum valebant*”); *Plattenburg v. Briggs*, 151 N.Y.S. 925, 925–26 (App. Div. 1915) (entitlement to the fair value of services rendered under contract providing for care during the obligor’s lifetime of “six dollars per week, and if she shall remain with me during my lifetime to provide for a generous sum”); *Heller v. Kalisch*, 125 N.Y.S. 1057, 1058–59 (App. Div. 1910) (involving compensation for a lawyer successful in litigation, where a letter from the stated, “If we win, then I will leave it to you to determine the amount of compensation.”).

⁶⁰ *E.g.*, *Buxbaum Holdings, Inc. v. Hagggar Clothing Co.*, No. 3:12-CV-2167-P, 2014 U.S. Dist. LEXIS 197549, at *9, *17–18 (N.D. Tex. Jan. 7, 2014). See also *infra* notes 77–78 and accompanying text.

indefinite provision is material, and the employer who would be arguing the other position.

The court could conclude that the indefinite portion is not of sufficient significance to prevent contract formation. In this case, the court may simply strike the indefinite promise, and enforce the remainder.⁶¹

The positions may be reversed. The employer may assert the indefinite term is material and, thus, a contract was not formed. That posture would be taken where the employer's definite contractual obligation is more than what the employer believes would be payable in restitution.

For example, a Georgia case, *Christensen v. Roberds of Atlanta, Inc.*, holds indefinite and unenforceable an alleged agreement in which "bonuses would be paid to [the employee] by [the employer] in addition to [the employee's] salary and that the amount of these bonuses would be \$7,000 to \$8,000 per year."⁶² The court holds "the oral contract . . . was legally unenforceable"⁶³ by virtue of lack of definiteness.

Such a contract might be treated as enforceable as to the alleged fixed (non-bonus) salary, with the bonus struck. The court appears not to take that position—it quoted prior authority to the effect that "until the parties have agreed upon a *definite amount* to be paid the contract is incomplete."⁶⁴ Where the fixed amount had already been paid, the outcome would be the same, one would think. The employer should not be able to recover in restitution non-bonus amounts previously paid. Their retention would not be unjust (or one might conclude their

⁶¹ *Id.* at *8, *13 (discussing a bonus "to be mutually agreed upon by the parties" and referencing leaving the "unsettled point . . . unperformed and the remainder of the contract . . . enforced" (quoting *City of Los Angeles v. Superior Ct.*, 333 P.2d 745, 750 (Cal. 1959)).

⁶² 375 S.E.2d 267, 270 (Ga. Ct. App. 1988).

⁶³ *Id.*

⁶⁴ *Id.* (emphasis in *Christensen*) (quoting *Weill v. Brown*, 29 S.E.2d 54, 57 (Ga. 1944)).

payment could not be recouped under the voluntary payment doctrine⁶⁵).

One can encounter a number of different tests as to whether an indefinite term ought to be severed with the remainder of the contract enforceable. In terms of taxonomy, the following statement is representative: “In Delaware, as in most jurisdictions, a court will not enforce a contract that is indefinite in any of its material and essential provisions. However, a court will enforce a contract with an indefinite provision if the provision is not a material or essential term.”⁶⁶

Authority indicates that whether the remainder ought to be enforced depends on the parties’ intent.⁶⁷ Perillo provides the following standard for assessing whether the remaining, definite provisions should be enforced: “The test is whether the parties would have entered into the agreement without the offending clauses.”⁶⁸

California’s Supreme Court focuses on the fairness of enforcement of the remainder, in the following language:

The enforceability of a contract containing a promise to agree depends upon the relative importance and the severability of the matter left to the future; it is a question of degree and may be settled by determining whether the indefinite promise is so essential to the bargain that inability to enforce that promise strictly according to its terms would make unfair the enforcement of the remainder of the agreement. Where the matters left for future

⁶⁵ *E.g.*, *Dillon v. U-A Columbia Cablevision of Westchester, Inc.*, 790 N.E.2d 1155, 1156 (N.Y. 2003) (“[The voluntary payment doctrine] bars recovery of payments voluntarily made with full knowledge of the facts, and in the absence of fraud or mistake of material fact or law.”). *See also, e.g.*, *Wurtz v. Rawlings Co., LLC*, No. 12-CV-1182 (JMA) (AKT), 2016 U.S. Dist. LEXIS 172680 (E.D.N.Y. Nov. 17, 2016).

⁶⁶ *Echols v. Pelullo*, 377 F.3d 272, 275 (3d Cir. 2004) (citation omitted).

⁶⁷ *VICI Racing, LLC v. T-Mobile USA, Inc.*, 763 F.3d 273, 285 (3d Cir. 2014).

⁶⁸ JOSEPH M. PERILLO, *CONTRACTS* 60 (7th ed. 2014). *See also* E. ALLAN FARNSWORTH, *FARNSWORTH ON CONTRACTS* § 3.39 (4th ed. VitalLaw through Dec. 2021).

agreement are unessential, each party will be forced to accept a reasonable determination of the unsettled point or if possible the unsettled point may be left unperformed and the remainder of the contract be enforced.⁶⁹

One court referencing this standard further opines, “Bonuses would typically be immaterial because they are usually optional payments, delegated to the discretion of one party.”⁷⁰

Express contractual language providing for severability may inform the determination⁷¹ but may not be determinative as applied to a particular context.⁷²

In *Christensen v. Roberds of Atlanta, Inc.*, discussed above,⁷³ we have a circumstance that brings to mind the “blue pencil” rule applicable to reforming overly broad non-competition agreements. Let us say that the parties in *Christensen* had instead bargained for compensation in the form of: “a salary of \$X,” where *X* was a stated figure, “plus a minimum bonus of \$7,000 and an additional bonus of up to \$1,000, with the additional bonus to be set by the employer”.

One supposes that the right answer would be to strike the additional bonus, and that the same result would obtain where the additional bonus was stated as something to be agreed between the parties. The magnitude of the additional bonus is so small that enforcement of the remainder would not be “unfair,” the test favored in California. And it would seem sufficiently minor that Perillo’s test, which addresses whether the parties would have entered the agreement without the offending indefinite provision, is also met.

⁶⁹ *City of Los Angeles v. Superior Ct. of Los Angeles Cty.*, 333 P.2d 745, 750 (Cal. 1959) (citation omitted).

⁷⁰ *Buxbaum Holdings, Inc. v. Haggard Clothing Co.*, No. 3:12-CV-2167-P, 2014 U.S. Dist. LEXIS 197549, at *16 (N.D. Tex. Jan. 7, 2014)

⁷¹ *VICI Racing*, 763 F.3d at 285.

⁷² *Eckles v. Sharman*, 548 F.2d 905, 909 (10th Cir. 1977) (referencing such a provision as an “aid to construction”).

⁷³ See *supra* notes 62–65 and accompanying text.

However, if the parties opt to communicate an economically identical arrangement using different words that does not separate the minimum portion, a court may be more inclined to strike the entire arrangement. That does not seem sensible, particularly where, as were the circumstances of *Christensen*,⁷⁴ the agreement is oral. Rather, it seems to reflect the excess formality reflected in the now-discredited blue pencil approach to addressing overbroad non-competition agreements.⁷⁵ More generally, one supposes an obligee/plaintiff expressly entitled to some adequately specified performance would not lose its contractual claim under an adequately definite obligation merely because it was also the beneficiary of a fatally indefinite obligation that it is willing to ignore.⁷⁶

Restitution Where Material. An “unreported” 2019 case from the Second Circuit, *Brook v. Simon & Partners LLP*, addresses availability of restitution where an employment contract contains a promised, indefinite bonus. It involves an allegation that an employer was to provide the employee a non-discretionary bonus, which was agreed to be fixed “mutually.”⁷⁷ The opinion states:

[The employee] may be able to plead that the total amount of his compensation was sufficiently material that its indeterminacy negated the existence of a contract. . . . Thus, additional

⁷⁴ *Christensen v. Roberds of Atlanta, Inc.*, 375 S.E.2d 267, 269 (Ga. Ct. App. 1988).

⁷⁵ See generally 15 TIMOTHY MURRAY, CORBIN ON CONTRACTS § 89.8 (LEXIS 2021) [hereinafter CORBIN ON CONTRACTS] (referencing “the much-maligned strict blue-pencil approach”).

⁷⁶ See Omri Ben-Shahar, “Agreeing to Disagree”: *Filling Gaps in Deliberately Incomplete Contracts*, 2004 WIS. L. REV. 389, 422 (asserting that in lieu of finding an agreement fatally indefinite, a court could formulate a remedy based on the least favorable to the claimant as among the available options; referencing a prior edition of CORBIN ON CONTRACTS, *supra* note 78, § 4.1, which currently states, “Where the parties intend to contract but defer agreement on certain essential terms until later, the gap can be cured if one of the parties offers to accept any reasonable proposal that the other may make.”).

⁷⁷ *Brook v. Simon & Partners LLP*, 783 F. App’x 13, 18 (2d Cir. 2019).

allegations may support [the employee's] entitlement to recover under a quasi-contract theory.⁷⁸

(2) Approach More Favorable to a Remedy

There is some Federal authority, potentially no longer valid, that may be understood as involving recovery on a hybrid basis in respect of an indefinitely stated promise in an entire contract. *Knapp v. McFarland*⁷⁹ states:

The New York cases reveal that (1) where parties enter into an agreement providing for certain immediate compensation to be paid and also provide for a subsequent upward adjustment of that compensation, to be determined at a later time, the contract is enforceable; and further (2) that if the parties fail to definitively reach an understanding as to what shall constitute the premium, the court will determine an appropriate bonus rather than deem the contract unenforceable.⁸⁰

(3) Inconsistent Treatment Concerning Services Contracts

As noted above, recent unreported Federal appellate authority in the Second Circuit indicates an employee can recover in restitution in respect of an apparently material, non-discretionary bonus where the amount was to be agreed between the parties.⁸¹ However, where a promise is indefinite because it grants unfettered discretion in one party to set compensation, the scope of the discretion may

⁷⁸ *Id.* at 19. One supposes the court in *Rosenbaum v. Premier Sydell, Ltd.*, discussed *supra* notes 33–36 and accompanying text, would have rejected a claim in restitution as well. One does not know for sure, because such a claim was not referenced in the opinion. *Rosenbaum v. Premier Sydell, Ltd.*, 659 N.Y.S.2d 52, 52 (App. Div. 1997) (referencing alleged claims of “breach of contract, breach of fiduciary duty, and fraud”).

⁷⁹ 344 F. Supp. 601 (S.D.N.Y. 1971), *aff'd in part and rev'd in part*, 457 F.2d 881 (2d Cir. 1972). *But see* *Canet v. Gooch Ware Travelstead*, 917 F. Supp. 969, 989 (E.D.N.Y. 1996) (discussing *Knapp* and stating, “The power of the court to set missing material terms was, however, limited by the decision of the New York Court of Appeals in *Joseph Martin, Jr., Delicatessen, Inc. v. Schumacher*, 417 N.E.2d 541 (N.Y. 1981)” (citation reformatted)).

⁸⁰ *Knapp*, 344 F. Supp. at 612.

⁸¹ *See supra* notes 77–78 and accompanying text.

additionally prevent recovery in restitution. *Davis v. General Foods Corp.* involves a promise by the food manufacturer, in connection with delivery to it of a recipe, “that the use to be made of it [the recipe] by us, and the compensation, if any, to be paid therefor, are matters resting solely in our discretion.”⁸² The court holds that information and services provided in reply to the statement involve “no misreliance upon a supposed contract, and consequently no legal obligation whatever.”⁸³

An unexpectedly restrictive assessment of the availability of restitution is recently provided by *Foros Advisors LLC v. Digital Globe, Inc.*⁸⁴ It addresses, on a motion to dismiss under Rule 12(b)(6), an ancillary undertaking in an agreement engaging an investment bank.⁸⁵ The court concludes the ancillary agreement is not enforceable—neither as a substantive bargain nor as a binding agreement to negotiate in good faith.⁸⁶ This provision was included in an engagement letter in which the bank provided other strategic services, for which it was to receive a retainer and a specified fee per quarter. The essence of the relevant provision stated the client “will offer [the bank] the opportunity to act as a financial advisor to the company in connection” with “any acquisitions or other strategic transactions as a result of this engagement” and that the bank “agrees to consider acting in such capacity.”⁸⁷

In a transaction that was allegedly within this provision’s scope, the client engaged two other investment banks, paying them \$36 million and \$18 million.⁸⁸ In concluding the provision is not enforceable as a substantive bargain (i.e., a *Tribune Type I* agreement⁸⁹),

⁸² *Davis v. Gen. Foods Corp.*, 21 F. Supp. 445, 446 (S.D.N.Y. 1937).

⁸³ *Id.*

⁸⁴ 333 F. Supp. 3d 354 (S.D.N.Y. 2018).

⁸⁵ *Id.* at 357–58.

⁸⁶ *Id.* at 361, 363.

⁸⁷ *Id.* at 358 (quoting the complaint).

⁸⁸ *Id.* at 359.

⁸⁹ See *Shann v. Dunk*, 84 F.3d 73, 77 (2d Cir. 1996) (“Type I is where all essential terms have been agreed upon in the preliminary contract . . .”).

the court notes that the provision does not specify “type of financial advisor, the scope of services, and the compensation.”⁹⁰ In light of the differing levels of compensation ultimately paid in the transaction to two other advisors, which the court references,⁹¹ that specific determination seems justifiable. The circumstances as they actually developed demonstrate a range of qualitatively different possible activities for which the plaintiff could have been engaged.

Further analysis provided by the court is more dubious. The court concludes that a claim in restitution (quantum meruit) is not available because the claim would be within what is covered by the engagement letter.⁹² The court states:

Because the Engagement Letter covers the work that was done and for which [the bank] received compensation, [the bank] cannot sue in quasi-contract for additional compensation beyond what it negotiated for in the Engagement Letter. [The bank’s] quasi-contract claims for quantum meruit and unjust enrichment must be dismissed.⁹³

The court asserts that “the Offer Clause here does not purport to provide compensation for the work [the bank] actually performed under the contract.”⁹⁴ The opinion continues:

Foros[, the bank,] has not shown that it performed any additional services that were “so distinct from” its contractual duties that “it would be unreasonable for [the client] to assume that they were rendered without expectation of further pay.” Indeed, the work Foros performed was exactly that which the Engagement Letter explicitly required of it, and for which the specific amount of compensation is also set forth in the Engagement Letter. The fact that the Offer Clause is unenforceable does not provide Foros

⁹⁰ *Foros*, 333 F. Supp. 3d. at 361.

⁹¹ *Id.*

⁹² *Id.* at 366.

⁹³ *Id.* at 366.

⁹⁴ *Id.* at 365.

the ability to renegotiate the rate for the work that it performed pursuant to the Engagement Letter.⁹⁵

The opinion does not adequately discuss divisibility, beyond its conclusory reference to what it might not have been unreasonable for the client to have assumed. A Westlaw electronic search shows the word “entire” and words with the stem of “divisib!” and “sever!” only appear in one place, in the phrase “[d]uring the several months”.⁹⁶

The implicit standard this court appears to implement is as follows: whether it would be unreasonable for the person against whom the claim was made to assume further pay was not expected.

This standard is more generous to the alleged obligor’s position than other authority would suggest. The Federal Third Circuit has expressly referenced *both parties’* intentions in this context.⁹⁷ The Minnesota Supreme Court founded divisibility (under which an indefinite pair of performances could be severed) on the materiality of the potentially severed pairs of promises and whether it would have “influenced” the bargain.⁹⁸

The claimant alleged “the compensation for the work it performed was paid at a reduced rate because of its expectation to receive payment for future advisory services that it did not get.”⁹⁹ The procedural posture required this allegation be accepted as true.¹⁰⁰ This allegation would seem sufficient to meet the standard that a failure to obtain consideration of additional

⁹⁵ *Id.* at 366 (citations omitted) (quoting *Mid-Hudson Catskill Rural Migrant Ministry, Inc. v. Fine Host Corp.*, 418 F.3d 168, 175–76 (2d Cir. 2005)).

⁹⁶ *Id.* at 358.

⁹⁷ *VICI Racing, LLC v. T-Mobile USA, Inc.*, 763 F.3d 273, 285 (3d Cir. 2014) (“The inquiry turns on the parties’ intentions. *Orenstein v. Kahn*, 119 A. 444, 445 (Del.1922) (noting that whether a contract is severable is a question of the intent of the parties).”).

⁹⁸ *See supra* note 55 and accompanying text.

⁹⁹ *Foros*, 333 F. Supp. 3d at 364.

¹⁰⁰ *Id.* at 357.

employment would have influenced the terms for the work that was performed.¹⁰¹

This opinion represents an extreme approach to ascertaining what promises are severable and is inconsistent with the dictates of the “unreported” opinion in *Brook v. Simon & Partners LLP*,¹⁰² discussed above.¹⁰³

(4) Conclusion

New York caselaw is inconsistent as to treatment of divisibility in the context of an agreement containing an indefinite promise. Some old authority treats as divisible arrangements that seem entire (not divisible).¹⁰⁴ Yet there is contemporary authority in the banking context that appears to err in the opposite direction: treating as divisible arrangements that don’t seem necessarily so. And that modern authority does so without adequate explanation.¹⁰⁵

The interaction with restitution is also inconsistent. Some Second Circuit authority will allow restitution, based on the value of the services as a whole, where there is an apparently non-divisible promise for a non-discretionary bonus to be agreed.¹⁰⁶ Yet older authority in the Second Circuit (which may not have survived *Joseph Martin, Jr., Delicatessen, Inc. v. Schumacher*¹⁰⁷) allows restitution based on a non-divisible but indefinite component of promised compensation for services. On the other hand, recent district court authority denies restitution where there was not performance of what, at least to this author, appears to have been a material, indefinite promise that should not have been severable.¹⁰⁸

¹⁰¹ Compare *supra* text accompanying note 55.

¹⁰² 783 F. App’x 13, 16 (2d Cir. 2019) (citing *Gray v. Lurie*, 162 N.Y.S. 2d 278, 280 (App. Div. 1957)). See *supra* notes 77–78 and accompanying text.

¹⁰³ See *supra* notes 77–78 and accompanying text.

¹⁰⁴ *Shur-On Standard Optical Co. v. Viopake Co.*, 223 N.Y.S. 157, 159 (App. Div. 1927).

¹⁰⁵ *Foros*, 333 F. Supp. 3d 354 (discussed *supra* notes 92–101 and accompanying text).

¹⁰⁶ See *supra* note 77–78 and accompanying text.

¹⁰⁷ 417 N.E.2d 541 (N.Y. 1981).

¹⁰⁸ See *supra* note 93.

III. RECENT NEW YORK AUTHORITY

New York's requirement for definiteness, as interpreted by the courts, may unexpectedly render unenforceable preliminary agreements that are intended to be binding (*e.g.*, some types of term sheets). This section provides some illustrations.

A. Fractional Economic Interest; Computation of Profits

(1) 20% of GP Inc

One category of recent cases involves inadequacies in specifying an interest in a venture. Some recent illustrations find the following insufficiently definite:

- An agreement providing a party “20% of GP inc,” apparently referencing the general partner’s income;
- An agreement that did “not include provisions regarding . . . how profit is calculated;”¹⁰⁹
- An alleged agreement that failed to detail the meaning of “carried interest,” where a separate document did so; and
- A term sheet specifying an equity percentage where “[t]he structure of this economic interest is to be determined, and likely be provided in the form of equity or income units and performance units.”¹¹⁰

Each of these (in the last case, in the light of the remedy sought being money damages, where the complaint references amounts in reliance as well as the value of the interest) seems adequately specified for purposes of ascertaining whether there was a breach and computing a remedy. Each, then, in light of the relevant standard seems to require more specificity than one would expect to be required.

¹⁰⁹ *Herman v. Duncan*, No. 17 Civ. 3325 (PGG), 2019 U.S. Dist. LEXIS 83009, at *6 (S.D.N.Y. May 16, 2019).

¹¹⁰ *McGowan v. Clarion Partners, LLC*, No. 650710/2015, 2019 N.Y. Misc. LEXIS 3558, at *4 (Sup. Ct. July 1, 2019), *aff'd*, 132 N.Y.S.3d 281 (App. Div. 2020), *appeal denied*, 37 N.Y.3d 903 (N.Y. 2021).

(1) *20% of GP Inc*

*Weisenfeld v. Iskander*¹¹¹ involves an alleged agreement specifying percentage compensation—in that case, memorialized in notes stating “20% of GP inc to me,” and apparently referencing twenty percent of a general partner’s income—a few months before a limited partnership agreement was signed.¹¹² The notes also included other compensation, one percent of “rents collected,”¹¹³ which was paid.¹¹⁴

The court concludes the reference to a percentage of “GP inc” is inadequately definite to give rise to an enforceable obligation, stating:

In the instant case, the Notes do not indicate a present intent to be bound. There is nothing in the Notes to show the parties agreed to the material terms, including the identity of the party or parties to be bound. Also, the Notes are too vague to ascertain what was promised in order for the court to enforce it. For example, the court cannot determine from the Notes what the parties attending the dinner actually agreed to with regard to the critical words “GP inc.” Accordingly, the alleged contract fails for lack of definiteness. “GP inc” is not defined and cannot be ascertained from extraneous sources. Even assuming “inc” refers to “income,” that term was not defined. It has multiple meanings.”¹¹⁵

The opinion has a lengthy discussion of alternative meanings of the term “income,” including reference under partnership tax law that would list income and gain separately.¹¹⁶ The court relies, inter alia, on deposition testimony of Noel Cunningham, a co-author of an excellent text used in law schools on partnership taxation, to the effect that “the term income has a broad array of meanings in accounting and financial circumstances, and

¹¹¹ No. 651436/2016, 2019 N.Y. Misc. LEXIS 2104 (Sup. Ct. Apr. 16, 2019), *aff'd*, 130 N.Y.S.3d 299 (App. Div. 2020).

¹¹² *Id.* at *4–5.

¹¹³ *Id.* at *3–4.

¹¹⁴ *Id.* at *12.

¹¹⁵ *Id.* at *16–17 (citations omitted).

¹¹⁶ *See id.* at *17–20.

that gross income, net income, and taxable income are all possible meanings.”¹¹⁷

The analysis seems ill-advised. That an agreement is ambiguous is not by itself sufficient to conclude there was not assent. Schwartz and Scott assert, “Contract interpretation remains the largest single source of contract litigation between business firms.”¹¹⁸ Courts often construe ambiguous agreements—the existence of ambiguity does not inherently result in the term being struck.

Separately, reliance on the meaning for tax purposes in interpreting nontax terms does not seem apt. A partnership agreement often will be drafted with separate provisions governing the meaning of terms for federal income tax purposes.¹¹⁹ One cannot take for granted that a general business (non-tax) lawyer will necessarily even understand the tax-driven allocation provisions that are ultimately in LLC operating agreements or limited partnership agreements. The agreement itself may expressly reference a difference in usage of terms between amounts computed for book purposes, which represent the pre-tax economics of the deal, and for tax purposes.¹²⁰ That a term has a particular usage in an idiosyncratic context, i.e., for tax purposes, does not mean the same term is used with the same meaning in a general context.

The court also references the language of the separate, subsequently-adopted limited partnership agreement.¹²¹ The partnership will ultimately determine its income, on a book and on a tax basis. Definiteness is not properly tested in the abstract, *ex ante*. Rather, the parties’ subsequent actions can clarify, and render enforceable,

¹¹⁷ *Id.* at *19.

¹¹⁸ Alan Schwartz & Robert E. Scott, *Contract Interpretation Redux*, 119 YALE L.J. 926, 926 (2010) (book review).

¹¹⁹ *E.g.*, WHITMIRE ET AL., *supra* note 47, app. A.27, § 4.1(e) (a form operating agreement beginning a provision concerning allocations of tax attributes with the phrase, “Solely for Federal income tax purposes”).

¹²⁰ *Id.*

¹²¹ *Weisenfeld*, 2019 N.Y. Misc. LEXIS 2104, at *20.

arrangements containing terms that, upon adoption, are vague.¹²²

As is often the case, there is a confounding circumstance. The claimant was successor-in-interest to a lawyer who was counsel for the individual defendants.¹²³ Although the language of the opinion would indicate the promise was not sufficiently definite without reference to that circumstance, one could certainly endeavor to distinguish the case in litigation were one to wish to do so.

(2) Failure to Specify How Profit Calculated

Herman v. Duncan involves a signed document that the court concludes is not enforceable. One of the relevant factors the court identifies is that the signed document did “not include provisions regarding . . . how profit is calculated.”¹²⁴ This part of the opinion apparently references a buyout provision in the signed document, which specifies a price derived from (specified multiples of annual averages of) the venture’s “profit.”¹²⁵

Indeed, assorted accounting choices may influence determination of profits. However, at least to this author, it seems unexpected that the failure to specify those details should determine whether an agreement containing a buyout based on profits is sufficiently definite to be enforceable. That seems particularly the case where the parties operated the venture’s business for two years,¹²⁶ which will have necessitated computation of profit for accounting and tax purposes. Authority is clear that an agreement is not fatally indefinite where the

¹²² *Rubin v. Dairymen’s League Co-op. Ass’n*, 29 N.E.2d 458, 460–61 (N.Y. 1940).

¹²³ *Weisenfeld*, 2019 N.Y. Misc. LEXIS 2104, at *20.

¹²⁴ *Herman v. Duncan*, No. 17 Civ. 3325 (PGG), 2019 U.S. Dist. LEXIS 83009, at *29 (S.D.N.Y. May 16, 2019).

¹²⁵ The opinion cites parts of the plaintiff’s statement of uncontested facts, which references the “[d]efinition of ‘profit’ for the purposes of calculating any buy-out.” *Id.* at *6 (citing Plaintiff’s Local Civil Rule 56.1 Statement of Uncontested Facts, ¶ 19, *Herman*, 2019 U.S. Dist. LEXIS 83009 (No. 17 Civ. 3325 (PGG))).

¹²⁶ Plaintiff’s Local Civil Rule 56.1 Statement of Uncontested Facts ¶ 14, *Herman*, 2019 U.S. Dist. LEXIS 83009 (No. 17 Civ. 3325 (PGG)).

indefinite provisions are clarified by subsequent acts of the parties.¹²⁷

(3) Failure to Detail “Carried Interest,” Although Defined in a Separate Document

Wilson v. Dantas finds unenforceable for want of definiteness an alleged side agreement, allegedly memorialized in part in a 2007 letter, concerning compensation for employment by the general partner in a limited partnership investment vehicle.¹²⁸ The appellate opinion’s discussion as to this issue is conclusory (other issues providing alternative bases for the outcome that are discussed in more detail). Presentation of the context is necessary to understand the alleged agreement and the judicial analysis.

The claim involves compensation allegedly owed an employee of the general partner in connection with the funding of an investment vehicle to invest in recently privatized Brazilian businesses.¹²⁹ By a series of communications spanning a decade, the claimant sought to have the employer confirm an equity interest as part of his compensation. The plaintiff/employee sent a letter dated July 1997 to the defendant memorializing the terms of employment, which the defendant never signed.¹³⁰ An attachment to the letter referenced the plaintiff’s compensation with the general partner included the employee having a “CARRIED INTEREST” of “1 Point,” noted the point “will carry no vesting requirement,” with “[a]ny Points subsequently allocated” to be “subject to a five year vesting period of 20% per year.”¹³¹ A footnote to “CARRIED INTEREST” states, “1 Point out of 20 Points (or 5%) of the General Partner’s carried interest.”¹³²

¹²⁷ See *supra* note 122 and accompanying text.

¹²⁸ 103 N.Y.S.3d 381, 383 (App. Div. 2019), *appeal denied*, 34 N.Y.3d 909 (N.Y. 2020).

¹²⁹ *Wilson v. Dantas*, No. 650915/12, 2018 N.Y. Misc. LEXIS 133, at *1 (Sup. Ct. Jan. 11, 2018), *aff’d*, 103 N.Y.S.3d 381, *appeal denied*, 34 N.Y.3d 909 (N.Y. 2020).

¹³⁰ *Id.* at *9.

¹³¹ Affirmation of Paul Fattaruso in Support of Defendants’ Motion for Summary Judgment, exhibit 8, at 2, *Dantas*, 2018 N.Y. Misc. LEXIS 133 (No. 650915/12), NYSCEF Doc. No. 289.

¹³² *Id.*

The limited partnership agreement dated December 1997 provided the general partner would in fact have a 20% interest in amounts distributed by the partnership, defined as a “Carried Interest.” The partnership agreement executed later in the year, as would be expected, provides excruciating detail concerning computation of the Carried Interest.¹³³ The residual (final) tranche provides, as to allocation of available amounts, twenty percent to the general partner and eighty percent to the limited partners.¹³⁴

In a 2007 communication, by which the employee consented to the transfer of an interest, the employee also referenced the equity interest. He wrote in pertinent part: “I am complying with your request subject to a full and fair resolution of the contractual arrangements between us, specifically and including my carried interest of 5%, which was established by contract in July of 1997.”¹³⁵

There are, of course, a number of issues as to whether this communication can adequately memorialize an agreement. One party’s sending a communication does not inherently give rise to the other’s assent. For our purposes, the relevant part of the opinion is that it expressly holds the language is not sufficiently definite to be enforceable.

The appellate court’s discussion of the pertinent issue of definiteness is, in whole: “Moreover, the terms of the 2007 letter are insufficiently definite, reflecting a mere agreement to agree.”¹³⁶

¹³³ The partnership agreement expressly defined “Carried Interest” as “the General Partner’s share of the Partnership’s profit allocated pursuant to [specified sections of the partnership agreement].” Affirmation of Paul Fattaruso in Support of Defendants’ Motion for Summary Judgment, exhibit 10, at I-4 (Amended and Restated Limited Partnership Agreement of CVC/Opportunity Equity Partners, L.P.), *Dantas*, 2018 N.Y. Misc. LEXIS 133 (No. 650915/12), NYSCEF Doc. No. 291.

¹³⁴ *Id.* at 24–25, I-2.

¹³⁵ Affirmation of Paul Fattaruso in Support of Defendants’ Motion for Summary Judgment, exhibit 21, n.p., *Dantas*, 2018 N.Y. Misc. LEXIS 133 (No. 650915/12), NYSCEF Doc. No. 302.

¹³⁶ *Wilson v. Dantas*, 103 N.Y.S.3d 381, 383 (App. Div. 2019), *appeal denied*, 34 N.Y.3d 909 (N.Y. 2020).

One might attempt to glean an understanding of the analysis by referencing the trial court's opinion. The trial court's opinion states in pertinent part, "the letter otherwise does not specify how the term 'Carried Interest 1 point ... 1 Point out of 20 Points (or 5%) of the General Partner's carried interest,' was to be calculated, made or paid."¹³⁷ A scattershot discussion of various principles of contract law, including this reference to potential indefiniteness, precedes a conclusion the dismissing the contract claim.¹³⁸

In sum, the appellate opinion indicates the terms set forth in the above-quoted letter are not sufficiently definite. This conclusion is dubious. It is not clear to this author precisely what the letter means. It appears to reference some investors whose investments may have been separate and potentially outside the scope of those interests as to which the employee was expected to have a one-twentieth interest in the general partner's twenty percent carried interest.¹³⁹ But insofar as any compensation received by the general partner in respect of those other investors' interests was not adequately proved, the solution is not to strike the plaintiff's carried interest in whole. Rather, a more suitable alternative would be to strike the inadequately specified portion.¹⁴⁰

(4) Specified Equity Percentage Where Structure to Be Determined

McGowan v. Clarion Partners, LLC,¹⁴¹ involves a term sheet for a new real estate investment management

¹³⁷ *Dantas*, 2018 N.Y. Misc. LEXIS 133 at *9.

¹³⁸ *Id.* at *13–17.

¹³⁹ There was evidently some dispute arising from the fact that there were various ancillary types of investment vehicles that might make investments to support part of the venture. And a disagreement evidently involved the extent to which the employee's alleged interest included a part of the return funded by those ancillary investments. Affirmation of Paul Fattaruso in Support of Defendants' Motion for Summary Judgment, exhibit 21, n.p., *Dantas*, 2018 N.Y. Misc. LEXIS 133 (No. 650915/12), NYSCEF Doc. No. 302.

¹⁴⁰ See *supra* notes 66–76 and accompanying text.

¹⁴¹ No. 650710/2015, 2019 N.Y. Misc. LEXIS 3558 (Sup. Ct. July 1, 2019), *aff'd*, 132 N.Y.S.3d 281 (App. Div. 2020), *appeal denied*, 37 N.Y.3d 903 (2021).

business¹⁴² that the court on summary judgment¹⁴³ determines is not sufficiently definite as to financial arrangements to be enforceable.¹⁴⁴ A management team was to have an economic interest in the venture of thirty percent, although the precise terms were not settled. In particular, the term sheet stated, “The structure of this economic interest is to be determined, and likely be provided in the form of equity or income units and performance units.”¹⁴⁵ In addition to referencing other considerations, the court expressly states that this language makes the purported agreement insufficiently definite.¹⁴⁶

The opinion also denigrates the definiteness of other aspects of the proposed equity interest using language that elides what, to this author, seem significant clarifications in the term sheet itself. The opinion, referencing the term sheet, states, “It further indicates that the management team would have vesting and repurchase options but does not indicate what those options are or how they work.”¹⁴⁷ The opinion is here referencing limits on the management team’s equity interests. Omitted from the court’s summary is the term sheet’s cabining of these limits being triggered by a resignation “without good reason.”¹⁴⁸ So, although there

¹⁴² *Id.* at *1.

¹⁴³ *Id.* at *26.

¹⁴⁴ *Id.* at *18–19.

The opinion also grants summary judgement against a claim that the term sheet gave rise to an enforceable agreement to negotiate that was breached. *Id.* at *22, *24, *26.

¹⁴⁵ *Id.* at *4.

¹⁴⁶ *Id.* at *17 (“The Term Sheet clearly stated that the ‘*structure of this economic interest is to be determined*, and likely to be provided in the form of equity or income units and performance units’ (Term Sheet at 1). The precise form of this economic interest is material and would customarily be included in this type of transaction. Where an agreement fails to indicate the nature of the equity consideration given to one party, it fails for lack of definiteness.” (emphasis in original) (citation omitted)).

¹⁴⁷ *Id.* at *4.

¹⁴⁸ Affirmation of Richard T. Maronney in Support of Defendant’s Motion for Summary Judgment, exhibit 20, n.p., *McGowan*, 2019 N.Y. Misc. LEXIS 3558 (No. 650710/2015) (“The management team equity will have vesting and repurchase options by CPE[, the venture itself.]

were vesting requirements and repurchase rights that were not fully detailed, they would only be triggered by an employee's resignation without good reason.

The remedy sought on the claim alleging breach of contract was money damages.¹⁴⁹ Specific alleged amounts that, if proved, could have been used to ascertain those money damages included, inter alia, the lost value of the interest, relocation (moving) costs and profit on opportunities foregone.¹⁵⁰

To this author, a promise of a thirty percent equity interest is sufficiently definite for purposes of ascertaining the amount of money damages, if the value of the business enterprise itself can be proved with sufficient definiteness. One might find support in a case familiar to many U.S. lawyers from law school: *Lefkowitz v. Great Minneapolis Surplus Store, Inc.*¹⁵¹ In that case, the court finds sufficiently definite to constitute an offer an advertisement, at a price of \$1, of "1 Black Lapin Stole Beautiful, worth \$139.50,"¹⁵² affirming a judgment of \$138.50. That disagreements can be expected as to the amount of a minority discount and any impact of possible limits on participation in decision-making seems qualitatively similar to the types of uncertainties generally inherent in proof of lost profits.

More concern arises for this author from condition as to vesting limits and repurchase rights. The complaint sought money damages for breach of contract, not specific performance.¹⁵³ The appellate court, which affirmed, however, does not even reference vesting. And one supposes that because the allegations included that the defendant "refused to honor any of its contractual obligations,"¹⁵⁴ the vesting limits involve conditions that

on any vested equity should a management team member resign from the firm without good reason.").

¹⁴⁹ Amended Complaint at 11, *McGowan*, 2019 N.Y. Misc. LEXIS 3558 (No. 650710/2015).

¹⁵⁰ *Id.* at 7–8, ¶¶ 38–40.

¹⁵¹ 86 N.W.2d 689 (Minn. 1957).

¹⁵² *Id.* at 189, 192.

¹⁵³ Amended Complaint, at 8 ¶ 41, 11, *McGowan*, 2019 N.Y. Misc. LEXIS 3558 (No. 650710/2015).

¹⁵⁴ *Id.* ¶ 36.

could be deemed satisfied by the defendant's failure to proceed.¹⁵⁵

An alternative basis, referenced by both the trial court and the intermediate appellate court, provides a stronger footing. Immediately before the signatures, the document states, "Agreed amongst the parties but subject to signed documentations."¹⁵⁶ However, the significance of the case, from the perspective of this article, is that courts indicate, with varying levels of specificity, that the terms were insufficiently definite to be enforceable in contract, separate from consideration of this putative condition.

B. Confidentiality Provisions in Term Sheets, etc.

*JTS Trading Ltd. v Trinity White City Ventures Ltd.*¹⁵⁷ determines, on a motion to dismiss a complaint for failure to state a claim,¹⁵⁸ that a memorandum of understanding concerning the formation of a real estate investment fund is insufficiently definite to be enforceable.¹⁵⁹ As is often the case, this preliminary agreement includes some terms that are too vague to be enforceable, as to the substance of the proposed transaction. However, it also includes promises such as agreements to maintain confidentiality of information and a promise of exclusivity in discussions for a specified time,¹⁶⁰ which can be¹⁶¹ and in this case are

¹⁵⁵ *E.g.* *Doherty v. Am. Home Prods. Corp.*, No. 99-9533, 2000 U.S. App. LEXIS 14166, at *5 (2d Cir. June 15, 2000) (summarizing *Haft v. Dart Group Corp.*, 877 F. Supp. 896, 903 (D. Del. 1995), as follows: "applying prevention doctrine when employer wrongfully dismissed fixed-term contract employee without cause").

¹⁵⁶ *McGowan*, 2019 N.Y. Misc. LEXIS 3558, at *15.

¹⁵⁷ No. 651936/2015, 2017 N.Y. Misc. LEXIS 1423 (Sup. Ct. Apr. 17, 2017).

¹⁵⁸ *Id.* at *1.

¹⁵⁹ *Id.* at *1-2, *10-11.

¹⁶⁰ Affirmation of Tammy L. Roy in Support of Defendant UBS Financial Services, Inc.'s Motion to Stay the Proceedings or, in the Alternative, Dismiss the Complaint with Prejudice, exhibit 2, ¶¶ 14-15, 17, *JTS Trading*, 2017 N.Y. Misc. LEXIS 1423 (No. 651936/2015), NYSCEF Doc. No. 104 (including, inter alia, paragraphs titled, "Confidentiality," "Non Circumvention" and "Exclusivity"). The memorandum states in part:

You appoint us as exclusive arranger of the Fund. You agree not to appoint any other institution in connection with the arranging of the Fund or capitalization of an Acquisition or to award any institution any title, role, fees or other

sufficiently definite to be enforceable. The claims dismissed include an alleged breach arising from discussions not permitted by the memorandum.¹⁶² So, the treatment of the confidentiality provision is not dicta.

The court opines:

An agreement that leaves material terms to be worked out in later negotiations and memorialized in other agreements is merely an agreement to agree rather than a contract.

Here, the specific language of the MOU provides ample evidence that the parties did not intend to be bound contractually to each other in a partnership relationship until more formal contracts were executed.¹⁶³

It surely is better practice for an agreement of this type, containing both precatory statements and provisions intended to be binding, such as confidentiality and no-talk agreements, to specify expressly which are binding and which are not. But there is not a reason why the failure to do so necessarily requires a court to conclude all parts of the agreement are unenforceable.¹⁶⁴ Of course, *Joseph Martin, Jr., Delicatessen, Inc. v. Schumacher*,¹⁶⁵ would be inconsistent with the view that the specification of a promise to negotiate as to some terms, insufficiently

compensation, except as expressly provided for in the MOU, without our prior written consent for a period of 120 calendar days from the date all information requested in [sic] delivered to [the plaintiff].

Id. ¶ 17.

¹⁶¹ *E.g.*, *Channel Home Centers, Div. of Grace Retail Corp. v. Grossman*, 795 F.2d 291, 293, 300 (3d Cir. 1986).

¹⁶² *JTS Trading*, 2017 N.Y. Misc. LEXIS 1423, at *9 (“engaging in separate discussions with Sahara regarding financing for the Target Properties”).

¹⁶³ *Id.* at *9–10 (citations omitted).

¹⁶⁴ *See, e.g.*, *NRE Cap. Partners, LLC v. Harker*, No. 651792/2018, 2020 N.Y. Misc. LEXIS 151 at *4, *10–11 (Sup. Ct. Jan. 6, 2020) (referencing a binding “break-up fee” in a letter of intent concerning a loan where the lender was not obligated to extend credit). Whether there is consideration is a separate matter that can arise in connection with this type of arrangement.

¹⁶⁵ 417 N.E.2d 541 (N.Y. 1981).

definite to be enforceable, gives rise to the entire arrangement being unenforceable.

C. Right of First Refusal

*Doller v. Prescott*¹⁶⁶ also appears to involve an excessively restrictive understanding of the definiteness requirements. It appears an employee, named Doller, had bargained for some equity interest. A review of the memorandum of understanding indicates that, at the time it was formed, it appeared there was some likelihood shares in the employer owned by a co-owner and firm president would become available following anticipated resolution of pending litigation. The complaint recites, “it was expected that the shares would soon become available for Mr. Doller to purchase.”¹⁶⁷ And the memorandum references a right of first refusal being one mechanism by which that interest might be conveyed. That memorandum of understanding provided:

Doller shall be given a right of first refusal for Equity. This shall include, but not be limited to, the right of first refusal to acquire the Ryan Trust Shares should they become available and/or equity grants or an equity earn in. However, the precise manner in which this Equity is offered shall be determined subsequent to the End of Litigation or circumstances deemed mutually sufficient by both Prescott and Doller. It is understood, acknowledged and agreed that the offer of Equity is a material inducement to Doller entering into this Agreement.¹⁶⁸

This provision is one of three provisions in a section that begins, “The parties hereby understand and acknowledge that while the Litigation remains pending the transactions contemplated herein will be held in abeyance. Upon the End of Litigation or circumstances deemed mutually sufficient by both Prescott and Doller, the parties will proceed diligently with a view toward the

¹⁶⁶ 91 N.Y.S.3d 533 (App. Div. 2018).

¹⁶⁷ Verified Complaint at 5, ¶ 9, *Doller v. Prescott*, No. 906846-16, 2017 N.Y. Misc. LEXIS 2495 (Sup. Ct. June 26, 2017), *aff'd*, 91 N.Y.S.3d 533.

¹⁶⁸ *Id.*, exhibit B, at 3.

following”¹⁶⁹ The other provisions involve appointing the employee to the company’s board and as president, and increasing his salary by amending an existing employment arrangement.¹⁷⁰

The memorandum further indicates the employee contemporaneously entered into a separate employment agreement, specifying a title at that time as a Vice President.¹⁷¹

The contract strikes this author as the product of someone clearly conscious of the issue of severability, intending to make the right of first refusal not something that could be simply severed as fatally indefinite with no compensation available even in restitution. These words seem fully to communicate that failure to benefit from the right of first refusal would “materially affect the object of the contract, and thus . . . influence . . . [the other contractual terms].”¹⁷²

The opinion indicates the employee was fired two years later, when he provided notice of a desire to exercise the right of first refusal on the referenced shares, which the defendant Prescott stated he would purchase for himself.¹⁷³

The appellate court affirms the lower court’s determination that the agreement is unenforceable for want of definiteness and as an agreement to agree.¹⁷⁴ The appellate court also dismisses a claim in restitution (styled as “unjust enrichment”), concluding it was “duplicative” of the claim on contract.¹⁷⁵ In concluding the contract was fatally indefinite, the appellate court references authority founding the definiteness

¹⁶⁹ *Id.* at 2.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 3.

¹⁷² *See supra* note 55 and accompanying text (discussing Minnesota’s standard for divisibility). The agreement does not have an express severability provision.

¹⁷³ *Doller v. Prescott*, 91 N.Y.S.3d 533, 536 (App. Div. 2018).

¹⁷⁴ *Id.* at 537.

¹⁷⁵ *Id.* at 538.

requirement on assuring the parties have in fact assented.¹⁷⁶

The better way to conceptualize this arrangement, in deciding whether it is sufficiently definite, is simply to strike the reference to “or circumstances deemed mutually sufficient by both [parties].” Consent of both parties is required if the relevant time is to be something other than—one supposes earlier than—the “End of Litigation” (a term defined in the memorandum). That is, this language simply makes explicit an inherent part of all contracts—that the parties can thereafter collectively agree to some other arrangement.

Referencing this alternative as a basis to make the agreement unenforceable is inconsistent with the express understanding that the provision is intended to be a material inducement to the employee. And, in any case, the alternative timing requires both parties consent. So, relying on that provision in finding the agreement indefinite has the perverse outcome of rendering unenforceable an obligation because the obligation can be changed but only with the obligor’s assent (as well as the other party’s). And it is inconsistent with the notion of cure by concession.¹⁷⁷

We are then left with whether a right of first refusal is unenforceable because it appertains to property that the grantor of the right does not yet own but has some likelihood of acquiring, based on ongoing litigation. In substance, the memorandum of understanding provides the employee with a right of first refusal on any acquisition of the covered shares. But it also lays down a potentially unenforceable marker: should the right on those shares not be triggered, it is contemplated the employee will have some other equity stake subject to negotiation.

To say this right of first refusal is too indefinite for it to be practicable for judicial enforcement is to say that rights of first refusal are generally unenforceable, which is not supportable, because the initially unspecified terms

¹⁷⁶ *Id.* at 537.

¹⁷⁷ *See supra* note 76.

are supplied by subsequent events.¹⁷⁸ The substantive terms are whatever terms the writer of the right bargains-for. Details such as the amount of time to exercise the right, on notice that the right has been triggered, are matters that parties may spend some time bargaining about. But they are not qualitatively different from terms that courts often supply where a contract does not address the matter, such as the closing date for real property.¹⁷⁹ That term is not of such significance that one can say failure to specify the detail is inherently inconsistent with intending to assent.

And the uncertainty was moot in the case—the litigation was triggered by the shares apparently becoming available¹⁸⁰ and the writer of the option refusing, stating he intended to purchase the equity for himself.¹⁸¹ That is, the uncertain alternative arrangements for granting an equity interest became moot by factual developments. Referencing indefiniteness of a moot alternative as a basis to strike enforceability of the other alternative is contrary to the principle that subsequent events can clarify an agreement that is problematically indefinite at initial formation.¹⁸²

The court, in striking the reference equity interest, is part of a peculiar mosaic. Some courts will strike compensation not specified with adequate definiteness, leaving the claimant with only the portion of the compensation specified with adequate definiteness. And such a court may also deny recovery in restitution¹⁸³ (although others will not¹⁸⁴).

¹⁷⁸ See *supra* note 122 and accompanying text.

¹⁷⁹ *E.g.*, *N.E.D. Holding Co. v. McKinley*, 157 N.E. 923, 924 (N.Y. 1927).

¹⁸⁰ Verified Complaint, at 6, *Doller*, 2017 N.Y. Misc. LEXIS 2495 (No. 906846-16).

¹⁸¹ *Doller*, 91 N.Y.S.2d at 536.

¹⁸² See *supra* note 122 and accompanying text; see also *supra* note 69 and accompanying text (referencing “each party will be forced to accept a reasonable determination of the unsettled point”).

¹⁸³ See *Foros Advisors LLC v. Digit. Globe, Inc.*, 333 F. Supp. 3d 354 (S.D.N.Y. 2018) (discussed in pertinent part *supra* notes 92–101 and accompanying text).

¹⁸⁴ See *Brook v. Simon & Partners LLP*, 783 F. App’x 13 (2d Cir. 2019) (discussed *supra* notes 77–78 and accompanying text).

In *Doller*, the rationale is couched in terms of assuring the parties are not bound to arrangements as to which they cannot reasonably be considered to have assented.¹⁸⁵ Yet the opinion's analysis instead operates to deprive an employee of a bargained-for right, on which the employee relied in connection with entering employment, merely because either some details of the right of first refusal were not specified or the employee at the time wanted to preserve a negotiation stance in the counter-factual circumstance in which the right would not have been triggered.

The stream of authority, in this author's view, simply facilitates opportunism by employers. It facilitates a process in which employers, and others seeking services, secure services and underpay for them.

D. Thoughtful Avoidance of the Problem

Completeness commends reference to a very thoughtful way in which one firm structured an arrangement containing an agreement to agree so as to create enforceable rights. A structured finance advisory firm proposed a possible style of transaction, designed to take aggressive advantage of an interpretation of tax law, to financial institution. The thrust of the agreement underlying the litigation was to limit the extent to which the large financial institution could acquire information about how to structure the transactions and thereafter do transactions, cutting-out the advisory firm.

The agreement included an undertaking to negotiate a "market based fee arrangement" upon entering into transactions using the structure. Such an undertaking by itself may have been insufficiently definite to be enforceable on the substantive transaction terms. That problem was mitigated by the financial institution further agreeing not to participate in any covered transaction unless it had entered into such a fee agreement.¹⁸⁶

¹⁸⁵ See *supra* note 176.

¹⁸⁶ In particular, the agreement provided:

[Commerzbank] undertakes to enter into a written fee agreement with SCS ("Fee Agreement") prior to it effecting any Transaction for itself or on behalf of an unrelated party. Such

E. More Lenient Approaches

Contextualizing our preceding discussion requires mention of other cases that are more willing to find arrangements enforceable, in contexts where finding an enforceable obligation seems subject to reasonable disagreement.

One illustration, within the surveyed recent cases,¹⁸⁷ of a court finding enforceable a contract that seems not is *Sustainable PTE Ltd. v Peak Venture Partners LLC*.¹⁸⁸ The opinion determines that a contractual undertaking to provide “asset management services” is sufficiently definite to be enforceable.¹⁸⁹ As to a crucial element, the opinion merely provides a conclusion the agreement “identifies the services to be provided” without presenting the relevant language.¹⁹⁰ A review of the actual agreement reveals the conclusion is unfounded. The relevant provision involves one party’s being “appoint[ed] . . . to provide the Asset Management Services,” with the sole detail of scope of the asset management services set forth in the following definition: “Asset Management Services’ means the provision of asset management services in relation to the Aman Hotels.”¹⁹¹

fee agreement will be negotiated in good faith and contain a market based fee arrangement which will provide for fee(s) to be paid to SCS by [Commerzbank] upon [Commerzbank] entering into a Transaction. For the avoidance of doubt, [Commerzbank] cannot use any Confidential Information or proceed with, or participate in, a Transaction unless [Commerzbank] has entered into a Fee Agreement with SCS....
Structured Cap. Sols., LLC v. Commerzbank AG, 177 F. Supp. 3d 816, 823 (S.D.N.Y. 2016) (alterations in original) (quoting the agreement).

The agreement at issue in *Doller v. Prescott*, 91 N.Y.S.3d 533 (App. Div. 2018), seems also to reflect a conscious endeavor to preserve a recovery in restitution. *See supra* note 168 and accompanying text.

¹⁸⁷ Other recent authority of less note for our purposes includes *Suckling v Iu*, 54 N.Y.S.3d 585, 586 (App. Div. 2017) (holding an arbitration provision’s failure to specify the arbitration procedure does not render it unenforceable).

¹⁸⁸ 56 N.Y.S.3d 44 (App. Div. 2017).

¹⁸⁹ *Id.* at 46.

¹⁹⁰ *Id.*

¹⁹¹ Affirmation of Robert Knuts in Support of Plaintiffs’ Application for Entry of Default Judgment, exhibit 3, §§ 1, 3(a)

This description of services seems wholly inadequate to give rise to an obligation enforceable in contract. It does not identify the types of assets to be managed (other than they are related to the hotels) or whether all management of the assets is to be done by the party (i.e., whether it is to have full and exclusive responsibility for managing the hotels), nor does it specify means that would allow one to identify what activity would or would not be in breach.

(6) Conclusion

The collection of recent cases examined above reveals a number of circumstances of potential in which contemporary courts may find a material term specified with insufficient definiteness of particular application to investment vehicles in their formative stages. At that time, the parties may not be able to detail fully the nature of compensation to be based on profits. Yet agreements reflecting incorporating type of information that one may have available at the preliminary stages may be considered insufficiently definite. Additionally, the authority does not appear to pay careful attention to expounding on and applying principles governing divisibility or severability.

IV. CONCLUSION

This article selects from thoughts gleaned by reviewing over eighty recent cases construing New York law on definiteness requirements those most salient as to formation of investment vehicles. This author's general sense is that courts frequently (but not always) required more definiteness than he had expected (more definiteness than seems suitable). Some of the salient illustrations are summarized above. They seem likely to frustrate the efforts of draftsmen who intend (or purport to intend) to create binding obligations but whose efforts are inhibited by the fact that contracting is sequenced, with employees brought onboard before the venture's economics are finalized. The authority seems to reflect an

(emphasis removed), NYSCEF No. 167, *Sustainable PTE Ltd. v. Peak Venture Partners LLC*, No. 650340 (N.Y. Sup. Ct. County N.Y. Dec. 10, 2015), *modified*, 56 N.Y.S.3d 44.

unwarranted judicial impediment to forming contracts in these contexts.

Additionally, the authority seems not to grapple adequately with developing and applying principles of divisibility and severability. Provisions designed to assure at least recovery in restitution, reflecting what appears to be a thoughtful approach to drafting, are present in some of the cases—sometimes with success, sometimes not.