

Introduction to Contracts

Measures of Damages

Restitution: D in position he would have been in had contract not been made (disgorge the benefit). The goal is to prevent unjust enrichment at the expense of P.

Reliance: Position P would have been in had contract not been made.

Expectation: Position P would have been in had contract been performed (giving P the benefit of the bargain).

- Remedial cost (cost of fixing): Get P to expected position
- Loss in Value: Value of what promised v. what P got
- *Expectations primary measure of damages in contract case (Goal of awarding damages is to rectify the wrong. Expectations damages is the best way to rectify the wrong.)*

The Concept of “Efficient Breach”

Efficient Breach: Given: S is selling widgets
B agrees to buy for \$10 (contract price)
T values widget at \$15

- Selling the widget to the person who values the most and paying expectancy damages is an efficient breach
- Assumes accurate measure of damages and that B is paid off at \$0 transaction cost.

Coase Theorem: In a world with perfect information and no transaction costs, it doesn't matter who we assign entitlements to for efficiency purposes; resources will make it to the best use.

- Person who wants it the most will end up with it.
- Disproves value of the efficient breach. Person who wants product the most will get it, even if we enforce the contract.

Assent to Contract

Objective Theory of Assent

Standard: Would a reasonable person have thought there was a contract? Factors:

- **Facts and circumstances** surrounding K (*what was said, course of dealings, etc.*).
- Lack of important terms (**indefiniteness**).
- Subjective intent may be important to the degree it affects parties' behavior (Kabil)
- Did both parties intend to be bound (if promisee does not intend to bind the promisor, then there may be no contract)

Exceptions/Refinements on Objective Theory of Assent

| <i>P's view</i> | <i>D's view</i> | <i>Objective view</i> | <i>Law's view</i> | <i>Example</i> |
|-----------------|-------------------------------|-----------------------|-------------------|-------------------------|
| Contract | No Contract | Contract | Contract | <u>Hawkins v. McGee</u> |
| No Contract | No Contract | Contract | No Contract | <u>NY Trust</u> |
| No Contract | Contract (but knows P's view) | Contract | No Contract | <u>Sly Dog</u> |

Indefiniteness

Indefiniteness may be indicative of a lack of assent to a contract

- *UCC §2-204(3)* Contract doesn't fail for indefiniteness if **parties intended to make a contract** and there is a **reasonably certain basis for remedy**
- *Rstmt §33 p. 350*. If party manifests intent and makes an offer, it can't be accepted unless terms are reasonably certain (i.e. basis for determining breach/remedy). Open terms may indicate lack of intent.
- Courts vary one how much indefiniteness will kill the K.
 - *Texas: if even a little indefinite, the K is void.*
 - *UCC: indefiniteness won't kill K right away – fills in some open terms: §2-305: open price term/sale of goods; §2-308 place of delivery; §2-309 time for shipment or delivery; §2-310: imply payment on delivery if payment terms omitted*

Overcoming lack of definiteness

- Promissory estoppel/partial performance (Rstmt §34(2))
- Parol evidence is admissible to clarify – agreement is plainly not integrated.

Lack of Mutuality

Lack of mutuality creates a consideration problem. Ways “bound” party may overcome:

- **Reliance**
- **Alternative consideration** (Rstmt §77 p. 298 Alternative promises binding if either constitutes consideration or if non-binding one eliminated before promisor chooses)
- **Later assent**
- **Find consideration** in whatever commitment is made, **no matter how small**
- Find consideration by **implying an obligation**

- **Recast K as an option** by bound party (i.e. no option to cancel once x happens)

Offer and Acceptance

Categorical rules to determine assent when K formed through correspondence.

- Bright line rules as contrasted with reasonableness standard of assent

The Offer

Communication that invites acceptance to form K - becomes a promise when accepted.

- **No legal effect** and may be **freely revoked** until accepted
- Offeror: "Master of the offer," – determines substance, offeree, mode of acceptance

Factors in determining if a communication is an offer:

- Indefiniteness/major items undecided (Moulton)
- Prior dealings/conversations between parties
- Information disseminated to anyone else? (ad vs. offer)
- Induce desired action?

Irrevocable Offers

Express commitment creating an irrevocable offer

- **If in writing**, the offer may be **irrevocable under §2-205 or Rstmt §87**. Otherwise, the offer may be irrevocable if there is **reliance**. Rstmt §139.
- **If offer is oral**, lack of writing overlooked if there is **reliance** (§1-106; Rstmt §139).

UCC §2-205 Firm Offers – Offer by **signed writing** giving assurance that it will be held open is **not revocable during time stated** or for **reasonable time** (not to exceed 3 months). Assurance on offeree's form must be signed by offeror to be effective.

Rstmt § 87, p. 394 and 408. An offer is binding as an option contract if:

- It is in writing, signed by offeror and **recites purported consideration**; it proposes an **exchange on fair terms** w/in a reasonable time. (*Note: some will reject where false recitals of consideration. If consideration is real, then consider under normal rules*)
- It is made **irrevocable by statute**
- Offeror should **reasonably expect to induce action/forbearance** before acceptance and **does so; necessary to avoid injustice**. (*Some stretch to apply to price quotes.*)

Rstmt §139., p. 271. – A promise which promisor should **reasonably expect to induce action/forbearance and does so** is enforceable if **injustice can be avoided only** through enforcement, notwithstanding the SOF.

Special situation: Bidding process for general contractors. When is the bid irrevocable?

- Sub makes substantial mistake, but not so substantial that the general contractor notices it and he reasonably relies upon it in placing a bid.
 - Mistake is found after submission of bid, but before the prime contract is awarded (no reliance). Subcontractor does not have to perform. Baird. **Minority Rule.**
 - Mistake is found after the prime contract is awarded. Subcontractor has to perform the contract. Drennan §2-205 requires performance. **Majority Rule.**
 - *If large discrepancy, may hold that it could not reasonably have been relied upon.*

Offer and Acceptance

Time and Manner of Acceptance

Procedural, not substantive, issues

- Power of acceptance **terminates at end of reasonable time**. Offer expires. (Textron) *UCC §2-606, Rstmt §36, p. 377.*
- **If exclusive mode of acceptance, must be made clear** by offeror (Panhandle Eastern Pipe Line); otherwise, other actions, such as tendering performance, will constitute acceptance (Allied Steel & Conveyors). *UCC §2-606.*
- **Acceptance after expiration** of an offer may itself **become a new offer**.
- Offers for unilateral vs. bilateral contracts:
 - Offer for **unilateral contract** becomes **binding** on offeror when **offeree performs** (Davis v. Jacoby). Until then, promise does not bind offeror, nor can he breach.
 - Offer for **bilateral contract** becomes **binding** when **offeree promises** to perform

UCC §2-606: Offer for prompt sale/delivery is accepted by promise of prompt delivery or by prompt delivery of conforming or nonconforming goods. Nonconforming goods constitute acceptance unless seller notifies buyer within reasonable period of time.

Rstmt §36, p. 377 Offeree's **power of acceptance terminated by:**

- **Rejection/counter-offer** by the offeree
- Lapse of **time**
- **Revocation** by the offeror
- **Death/incapacity** of the offeror/offeree
- **Non-occurrence of any condition** of acceptance under terms of the offer

Option Contracts

Rstmt §45, p. 383 Option contract (i.e. irrevocable offer) created by partial performance.

- In offer for unilateral contract, option contract created when **offeree tenders or begins invited performance**
- Offeror's **duty is conditional upon completion** or tender of performance in accordance with the offer.

Indirect Revocation

Offeror makes an offer to party A, but then sells to B. A still has the power to accept if he doesn't know that the offeror sold it to B. To take away A's power to accept, the offeror needs to notify A immediately of the revocation through sale.

Offer and Acceptance

Terms of Acceptance: Mirror Image Rule & Battle of the Forms

Offer and Acceptance Rules (Mirror Image Rule)

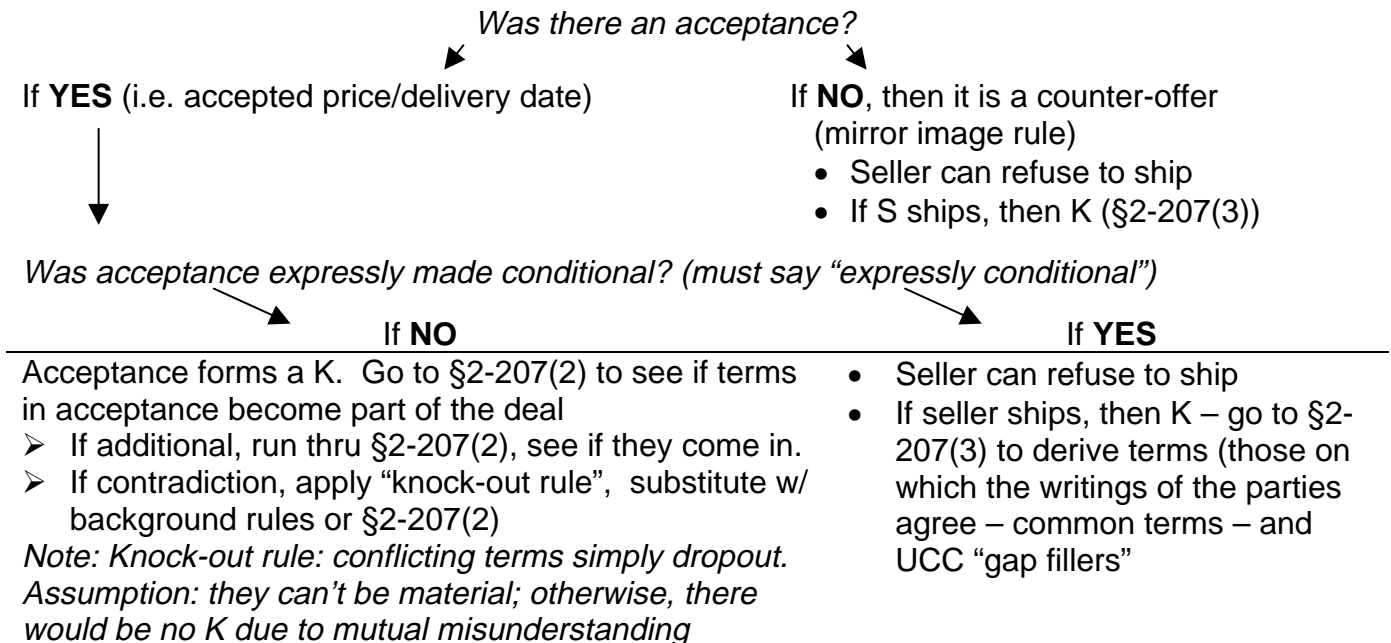
| Seller | Buyer | Buyer | Result |
|--------------------|-------------------------|------------------------|--|
| Offer for K | Reject | Accept | No K, Rejection cancelled offer |
| Offer for K | Ctr-offer | Accept | No, K, ctr-offer cancelled offer |
| Offer for K | Ctr-offer, S revives | Accept | K (<u>Livingstone</u>) |
| Offer for K | Inquiry | Accept | K, inquiry does not cancel original offer |
| Offer for K | | Conditional acceptance | Acceptance effective despite condition if it is clearly independent of the condition |
| Offer for option K | Ctr-offer | Accept | Buyer can retract waiver if seller has not relied upon it. |

Battle of the Forms (UCC §2-207)

(1) A **definite/timely expression of acceptance** or written confirmation operates as an acceptance **even though it states additional or different terms, unless acceptance is expressly made conditional** on assent to the additional or different terms.

(2) Additional terms **are to be construed as proposals** for additions to the K. Between merchants, they **become part of the contract unless**: offer expressly limits acceptance to terms of offer, they materially alter the offer, or notification of objection has already been given or is given w/in reasonable time afterwards.

(3) **Conduct by both** recognizing existence of K **is sufficient to establish K**, although the writings do not otherwise establish it. Terms consist of those on which writings agree.



Relationship of §2-207 and Parol Evidence Rule

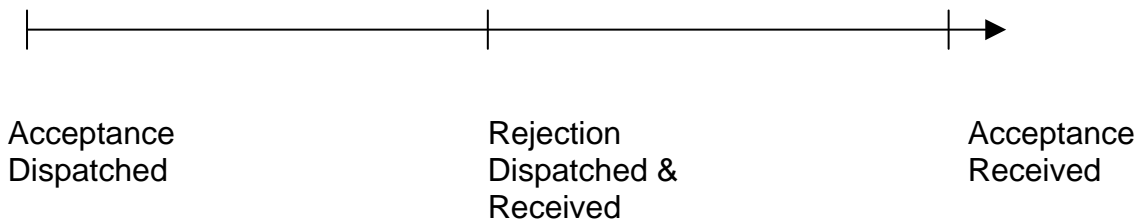
- Terms with respect to which confirmatory memos agree may constitute final expression of an agreement for purposes of the Parol Evidence Rule.

Offer and Acceptance

Mailbox Rule

An acceptance of a naked (i.e. revocable) offer is effective upon dispatch (i.e. when placed in mailbox, sent electronically, etc.). All other communications are effective upon receipt.

Typical format:



There is a valid contract in this scenario. **Acceptance occurred and created a binding contract before the rejection occurred.**

- Note: acceptance which is dispatched and lost is still binding. Better for offeror to bear risk of not knowing his obligations – he is the one who is able to bury the rule.
- If an acceptance is sent due to clerical error, there is no acceptance if the other party knows of the error. Can't take advantage of error when you knew before reliance.
- Same logic doesn't apply to rejection sent before an acceptance. Rstmt §40 gives effect to an overtaking acceptance. If it doesn't overtake the rejection, it is a ctr-offer.

Rsmt. §63, p.436. Time When Acceptance Takes Effect.

- Acceptance **operative as soon as it is out of offeree's possession**, w/o regard to whether it ever reaches the offeror.
- An acceptance under an option contract is not operative until received by the offeror.

Acceptance By Silence

Rstmt. §69, p. 441. Acceptance by Silence or Exercise of Dominion

- Silence and inaction may operate as acceptance only where:
 - Offeree **knows \$ expected**, takes benefit **despite reas. opportunity to reject**;
 - Offeror has given offeree reason to understand that **assent may be manifested by silence** or inaction and offeree intends to accept offer.
 - Because of **previous dealings**, it is reasonable that offeree should notify offeror if he does not intend to accept.
- Offeree → any act inconsistent with offeror's ownership of offered property. He is bound in accordance with offered terms unless manifestly unreasonable. If act is wrongful as against the offeror it is an acceptance only if ratified by him.

Note:

- Most state legislatures have enacted "unsolicited goods" statutes, authorizing the recipient to treat unordered merchandise as an unconditional gift.
- Note: jury: would offeror **reasonably interpret** silence as acceptance? Judge: did seller have **duty** to notify seller?

Contract Interpretation

Introduction

Agreement: Bargain of parties as found in their language or by implication from other circumstances §1-201(3)

Four Corners Rule

- Only look at K to determine meaning
- Assumes no private language
- May produce bad results
- Exceptions: latent ambiguity, fraud, mistake

Subjective Intent

- Private language is enforceable if it can be proven
- Look to context in which agreement made

Rules of Interpretation (default rules: the “canons of construction”)

- Every term has a meaning
- Construe against party who drafted the document
- Specific language overrules general language
- To be interpreted by jury if depends on credibility of extrinsic evidence; otherwise, it is a question of law for the judge. Rstmt. §212 p. 499

Contracts with newcomer to a trade

- Newcomer has duty to find out what trade usage means, but will probably not be held to highly specialized terms
- If other party knew there was a misunderstanding, seems to be bad faith

Types of extrinsic evidence:

- Surrounding circumstances (objective, verifiable)
 - Trade/usage custom
 - Course of dealing
 - Course of performance
- Preliminary agreements/negotiations (sometimes objective/verifiable) *Note: judges tend to be cynical about this category*
- Testimony regarding subjective intentions (subjective, not verifiable)

Mutual Misunderstanding

Rstmt §20 p.362

No mutual assent to K exists if the parties attach materially different meanings to it; **and**

- Neither party knows/has reason to know other’s understanding
- Both parties know/have reason to know the other’s understanding

The K is operative in accordance with the meaning attached to it by one of them if:

- That party doesn’t know or has no reason to know of other’s different meaning, yet the other knows of the 1st party’s understanding

In summary, if misunderstanding re: material term, and

Equal fault → No contract;

Fault of one → Take understanding of one not at fault

Contract Interpretation

Parol Evidence Rule

UCC §2-202, Rstmt §213 p. 465 - Limits what evidence is relevant when interpreting Ks

- **Integrated Agreement:** discharges prior agreements **if inconsistent** with terms of the writing (*Note: courts vary on implied v. explicit inconsistencies*)
- **Completely Integrated Agreement:** discharges all prior agmts to extent **w/in scope**
- UCC: terms in IA may not be contradicted by evidence, but may be “explained” or “supplemented” by extrinsic evidence or consistent additional terms unless CIA.

“Integrated” Rstmt §209 p.464

- **Final expression** of one or more terms of an agreement §209(1)
- Whether an agreement is integrated is a **question for the judge** to decide before application of the parol evidence rule (may use other evidence to determine) §209(2)
- Where agmt. is complete/specific/reasonably appears to be complete, it is taken to be integrated unless other evidence establishes that it isn't final expression §209(3)
- Rstmt §216 Consistent additional term admissible if not completely integrated agmt.
- Terms upon which confirmatory memos agree may = integrated agmt UCC §2-202

“Inconsistent”

- Conflict in the law re: whether the inconsistency must be explicit
- Can't introduce evidence that is inconsistent with **either implied or express terms**

“Completely integrated”

- Rstmt §216(2) p. 466. Not completely integrated if **omits consistent additional term** agreed to for separate consideration or such a term as **might naturally be included**.
- Review extrinsic evidence to determine if complete; consider sophistication of parties, informal nature of K. Also note that may be designated by merger provisions.

“Within Scope” – 3 views (overlaps with “completely integrated” analysis)

- *Williston (Hatley):* “**might naturally have been included**”
- UCC §2-202, comment 3: “**would certainly have been included**” – a lesser standard
- *Corbin:* **contemporaneous oral agreement** is evidence that the agreement **is not completed integrated**; therefore, it is not within the scope.

Exceptions to Parol Evidence Rule

Parol evidence is always admissible to establish: 1) **Condition precedent not met**, therefore no agreement; 2) **Fraud/misrepresentation of fact** (*shifts to a tort, parol evidence rule doesn't apply*); or **Mistake** (K doesn't say what it was supposed to say)

Limits that court may apply to use of parol evidence in fraud claims

- **Restrict remedies** (Lipsit – only reliance; Sabo – rescission). Minority position.
- Only allow to **show extrinsic** (independent), **not intrinsic** (directly contradicts K) fraud
- **Strong disclaimer negates reliance – no fraud** (LaFazia, Danann Realty) *Distinguish cases where buyer didn't read because seller prevented - buyer is not partly at fault.*

- **Require clear and convincing evidence** of fraud

Contract Interpretation

Course of Performance

As Evidence of Meaning

Course of performance is post agreement, so not barred by parol evidence rule **BUT** consider hierarchy of §1-205(4) and §2-208. (**Express terms control course of performance, which controls course of dealing, which controls usage of trade.** All are to be made consistent where reasonable.)

- Can use course of performance to establish meaning of a writing: *Rstmt* §214(c).
- Try to interpret as consistent, if can't, writing trumps.

Limitations on usage of course of performance to establish the meaning of a writing:

- **Can't negate express terms** (can cut down, but not negate)
- More weight given to COP if it is in line with **generally accepted trade usage**
- Practice in the trade must be **definite**
- **Clear and convincing evidence** of the course of performance is required
- Give consideration to the fact that people sometimes contract out of usage
- Objective evidence, not subjective evidence

As Waiver

Waiver: Intentional relinquishment of a known right

- Doesn't require reliance to establish a waiver
- Silence may constitute waiver if don't assert rights
- To retract a waiver, notice is usually required as a matter of public policy; however, not all states will require it.
- Can be used negatively, but not affirmatively. Not an independent source of a right.
- **Can't waive a material term**
- *Note: If difficult to determine whether an act sheds light on meaning or if it represents a waiver, go with waiver to retain flexibility of contract.*

COP as Waiver

- Writing may trump only where there is an anti-waiver clause
- Retractable without reliance or with notice
- Waiver can be quite informal, even silent

COP as evidence of meaning

- Writing may trump
- Unretractable unilaterally (once used to establish meaning)

COP as establishing new contract (modification)

- Original writing may trump if "no oral modification" clause
- Unretractable
- Formality
- Writing
- Assent
- Consideration

Contracts With Open Terms

Administering Explicit Performance Standards

§2-306 Output Contracts

- “Good faith” requirement **EXCEPT**
- Amount to be comparable with prior or stated amount. *Note: courts generally hold that you can decrease in good faith, but can not increase in good faith*

Canceling in Good Faith

- “More than trivial losses” Feld
- On verge of bankruptcy, not just a financial loss Feld
- “legitimate business reason” American Bakeries
- “Not to avoid unfavorable price” American Bakeries
- Doesn’t require “financially disastrous steps” or “spend(ing) self into bankruptcy” Bloor v. Falstraff Brewing Corp
- Must not be indifferent to plaintiff’s interests Bloor v. Falstraff Brewing Corp

Conditions of Satisfaction

Objective or standard test? (Judge decides)

- If matter of “fancy, taste, sensibility or judgment” → subjective
- If matter of “operative fitness, utility or marketability” → objective

If subjective standard, courts hold that party’s only duty is to be honest about its decision. (i.e. if can cancel if not satisfied with x, good faith requires only that the party truly cancel because of dissatisfaction with x, not because of y.)

Contracts With Open Terms

Contracts to “Terminate at Will”

Arguments used by employees or others in an attempt to not have their employment (or contract) terminated. (*Note: usually doesn't work*)

- **Received an oral promise** of job security (employee makes a contract claim or a negligent misrepresentation/fraud claim)
- Received an **employment manual** which added terms to employment agreement
- Breached duty of **good faith and fair dealing**
- **Wrongful termination** as a matter of public policy.

Oral Promises of Job Security/Contract Claims

Presumption: permanent employment = “employee at will”

- In these cases, assent to K (or Statute of Frauds) is generally the primary problem. The presumption is not that the employer assented to lifetime employment (Forrer)
- Due to presumption in society, no implied-in-fact contract's will be inferred for an employment for term of years. Any such K must be expressly provided for.
- Note that the presumption flips if the employee contributes his own capital to the business (until such time as his investment is recovered)
- If the at-will relationship is terminated before employment ever begins, the employee will most likely win reliance damages. Promise to employ not fulfilled. (Hunter, Goodman – as employed to a franchise situation)

Note: misrepresentation of fact is only basis for an equitable estoppel claim. A negligent misrepresentation claim in tort won't lie as it is pure economic loss.

Employee Handbook

Rule: Representations/promises in a handbook **are binding unless conspicuously disclaimed**. (*Note: consideration is satisfied by employee continuing to work*)

- **Disclaimer must be conspicuous** to be effective (employee initials, font, formatting, placement in document)
- Other possible employer defenses include: **indefiniteness** (is there a K? is it legally binding?) or **uncertain damages**

Rsmt §21, p. 338. Intent to be bound not necessary to form a K, but **showing intent NOT to be bound may prevent** the forming of a K.

- Covers cases where consideration and reliance exist, but we don't think an agreement should be legally enforceable. (Cohen: consider requirement 3 for promissory estoppel. Is it an injustice not to enforce?)

Contracts With Open Terms

Contracts to “Terminate at Will” (cont’d)

Good Faith and Fair Dealing

Rstmt. §205 p. 699 Duty of good faith and fair dealing in performance and enforcement.

UCC: (§1-203) Obligation of good faith (not reasonableness or fairness) which is not disclaimable (§1-102(3)); requires merchants to act reasonably and in conformity with trade norms (§2-103 (1)(b))

There is not a general requirement of reasonableness or fairness. Good faith is violated only where there is an **abuse of power or discretion**.

- Determine purpose of clause granting power/discretion. Is **power used in a manner consistent with its purpose?** (judge determines purpose; jury →state of mind.)
- Small number of cases constituting an exception to this general rule:
 - Obligation implied based on trade usage or custom (trade norm is concrete, clear and there is clear and convincing evidence. i.e. Nanakuli)
 - Situation not anticipated by the contract. Good faith is used to regulate behavior (i.e. no malice, insufficient regard for other’s interests). Consider Nowli v. Taco Bell (Texas) – strict standard, no general duty of fair dealing and Carmichael (Vermont) – loose standard, bad faith exhibited)
- *UCC* §2-209(3) Can reasonably terminate at will (if there are no definite terms); must give **reasonable notice**. *Presumption: terminate at will in distributorship agreements, just as in employment contracts.*
 - Note: §2-309(3) addresses unconscionability of inadequate notice, which is a good faith question (Gianni Sport) whereas §2-302 addresses unconscionability when contract created.

Wrongful Termination

Termination held to be wrongful in certain situations where it violates public policy. (Tort claim, enhanced damages).

- **Against public interest**
- Can’t terminate for filing a worker’s compensation claim
- **Violates a civil rights interest.**

“Public interest” (need to limit, so all firings do not result in a wrongful discharge claim)

- Employee **takes action in the public interest**; it is a crime for him not to do so.
- Employee is **under a legal obligation** to do something, it would be a crime for him to do what the employer wants him to do.
 - Texas standard: “refusing to engage in a criminal act”
 - NJ (Pierce v. Ortho) can’t require an employee to do something he has ethical problems with
 - California (1985-1991) termination without good cause was enough to violate

Contract Modifications

Policing Contract Modifications

Arguments a party will put forth in an attempt to nullify a contract modification:

- **No consideration** offered for the modification (“pre-existing duty” rule – no consideration where a party performs duties already required of him). Responses:
 - **Valid settlement** offer
 - **Reliance** (as an alternative basis for enforcing the promise) – See Fried v. Fisher. Also waiver/estoppel – See Mahban v. MGM Grand.
 - **Changed circumstances** as substitute for consideration
 - **§2-209 UCC**: modifications may be made to Ks for sale of goods if in good faith. Consideration is not required.
- Modification **void because exacted through duress**

Note that the legal requirement of consideration is only important in the enforcement of executory promises. Once a promise is executed, it is a completed gift.

Settlement claims

- Claim upon which settlement is based must be in **good faith, must have some foundation** (can’t be “utterly baseless”, must have “reasonable, tenable ground”)
- Settlement will not be enforced if claim is inherently illegal or against public policy.
- Release overcomes consideration problem: formality, giving release = adequate consideration. Also, we want to facilitate non-coercive settlements.

Rstmt §74, p.224 Settlement of Claims

- Surrender of a claim/defense which is invalid does not constitute consideration unless:
 - (a) the **claim/defense is doubtful** due to factual, legal uncertainty, or (b) the party fairly believes that his claim/defense **may be fairly determined to be valid**.
- **Execution of a written instrument** surrendering a claim/defense by one who has no duty to do so is consideration if the instrument is bargained for.

Changed Circumstances: Rstmt §89

- Modification of K not fully performed is binding if: it is **fair and equitable** in view of **circumstances not anticipated** when the K was made; or to the extent provided by **statute**; or to the extent that **justice requires** if change in position in reliance

Rstmt provisions for duress:

- **Improper (or wrongful?) threat, precluding exercise of free will**
 - Threat is itself wrong (**extortion** – an act merely to enrich self)
 - Threat to **commit a wrong**
 - Wrong to **threaten criminal process**
 - Wrong to **threaten civil process in bad faith**
 - Threat that is a **breach of duty of good faith & fair dealing** (threat to breach or exercise contractual right is not improper if good business reason; threat to withhold money is not duress unless extreme situation, but threat to withhold goods may be duress)
- Victim left with **no reasonable alternative**

Contract Modifications

Policing Contract Modifications

“No Oral Modification” Clauses

“No oral modification” clauses do not tend to be worth much. Oral modifications can still be taken into consideration on one of two theories:

- The modification was done under an oral agreement separate from the written K.
- The “no oral modification” clause was a condition that was waived and the other party acted in reliance on such waiver. §2-209

Despite the ease in overcoming “No oral modification” clauses, note that they are still of evidentiary relevance on the issue of assent and whether a reasonable person would have thought the contract was modified.

See chart above. Note that a contract modification requires all the elements of a K.

Accord and Satisfaction

A check is offered as settlement of a dispute. If the other party accepts the check, it is taken as full accord and satisfaction of the claim. If the other party does not know that there is a dispute or that the check is offered as accord and satisfaction, then cashing of the check will not get the other party out of its obligations.

Executory Accord – Had no legal effect at common law until performance completed

- States vary on whether to treat the executory accord as a **new contract** or as an offer for a unilateral contract. It is **usually treated as an offer for a unilateral contract** – i.e. offeror only bound to leave offer open unless offeree performs. Once performance is completed, the matter is considered settled.
- If debtor never performs and the offer expires, offeror will again have a claim on the original contract or debt
- In states where the executory accord is essentially treated as a new contract, it may be binding, particularly when it is in writing and signed by both parties.

Excuse from Contract

Mutual Mistake

Mistake by both parties as to an existing fact that materially alters the cost or return on a contract. (*Differs from mutual misunderstanding where there is no meeting of the minds. Differs from mutual mistake leading to reformation – meeting of the minds, but K was supposed to say something different. Here, meeting of the minds, but on mistaken fact.*)

- Did mistake go to the substance of the agreement? Did the mistaken belief go to a basic assumption of the parties?
- May be able to rescind the contract based on mutual mistake.

The question in these cases is: **who bears the risk of error?**

- Look to the **express terms** of the contract. Do they allocate risk? *Note: “As Is” allocates risk to buyer.* (If no, then:)
- Is there a **background legal rule** allocating risk (includes trade usage)? (If no, then:)
- Was the **risk foreseeable**? (If yes, enforce K – assume parties mean to allocate risk by general terms of the K. If no, then:)
- Cases that are left are just **hard cases**.

Warranties made by used as an **alternative mechanism for allocating the risk**.

- Where land subject to covenants is conveyed and it is later found that the land can not be used for the purpose to which its use is limited by the covenants, the grantor breaches an implied warranty arising out of the covenants. Hinson. *Warranty doesn't cover all sales of land – purchasers of residential homes are more likely to be protected than commercial developers.*
- In sale of defective goods (“lemons”), **allocate risk to seller** through the **implied warranty of merchantability** unless there is an “As Is” clause or unless the defect is visible and should have been seen.
- Where goods are more valuable than anticipated (“windfalls”), the seller usually bears the risk, but we first ask whether the windfall resulted from a **clerical error or error in judgment**.

Unilateral Mistake

Who bears the risk where there is a mistake only on one side?

- Was the mistake the result of a **clerical error or an error in judgment**? Elsinore School District
- Did other party know (or should they have known)? If so, they may not take advantage of the other party making an innocent mistake. Drennan.
- Has performance begun? (Or has there been a change in position?) If there is substantial performance or reliance, the contract should be enforced.

Excuse from Contract

Fraudulent Nondisclosure

There is a duty to disclose information to the other party where:

- **Duty to tell** buyer about any **hidden defects** known to him. Cushman v. Kirby.
 - Implied warranty of merchantability – §2-314 (Cmt. 3). Requires disclosure by merchants/imposes good faith obligation to disclose for one time sale of goods.
- **Affirmative duty to disclose** material facts where:
 - Disclosure necessary to prevent a previous assertion from being a misrepresentation or from being fraudulent or material.
 - Disclosure would correct a mistake of the other party as to a basic assumption on which the K is being made, if nondisclosure is a failure to act in good faith.
 - Disclosure would correct a mistake of the other as to the contents, effect of writing
 - Other party is entitled to know because of a relationship of trust b/w the parties.
- **Fraud may not be cloaked** behind an “As Is” clause.

No duty to disclose where:

- Buyer should reasonably know the true nature of the product. Eytan v. Bach.
- Defect that buyer should discover by ordinary inspection and inquiry. Matthews.

What if defects are unknown?

- Strict liability exists where the implied warranty of merchantability covers the sale
- Other defects are not covered. (*Note that negligence with regard to unknown defects will only allow a claim in Torts where there is an accompanying physical injury*)

Impossibility, Impracticability, and Frustration of Purpose

Note differences:

- Mutual mistake – mistake on existing fact
- Impossibility/impracticability – mistake on later event, increasing the cost of performance. American Trading
- Frustration of purpose – mistake on later event, decreasing value of K. (Krell, Lloyd)

Again, we ask the same question: who bears the risk of error?

- Does the **agreement allocate** the risk?
- Is there a **per se rule** in the law?
- Is the risk **foreseeable**? (if yes, inference that risk assumed)
- Was the **loss extreme**? (If no, won't relieve party from loss)

Excuse from Contract

Impossibility, Impracticability, and Frustration of Purpose (cont'd)

Excuse from Contract Due to Impossibility and Impracticability – Background rules:

- K is subject to an **implied condition** that **a certain thing be in existence** as the foundation of what is to be done. Performance becomes **impossible** because of the **perishing of the thing** w/o the fault of either party. Taylor.
 - Personal service contract is subject to an implied condition that party be alive to perform. Death terminates the contract.
 - In sale of agricultural products, destruction of a crop will only excuse perf. if such crop was specified as the object of sale. Bunge Corp. (party is wholesaler/crop was not specified), Snipes Mountain Co. (party is grower/crop was specified).
 - Risk of destruction of the premises falls on a LL due to the Implied Warranty of Habitability
- Performance becomes **objectively impossible** due to an **unanticipated event** that **could not have been foreseen** or guarded against.
 - BUT if party specifically guarantees performance by express contract, the unanticipated event will not excuse him from the contract. He should provide against contingencies. Tompkins.
 - Performance must be impossible or commercially impracticable (UCC §2-615). Burdensome is not sufficient to excuse performance. Kel Kim Corp.
 - In general, if there is an alternate means of performance, and a particular means is not specified, performance is not excused. American Trading & Prod. Corp.
- General price variances are one of the risks undertaken when a party enters into a contract. Does not relieve a party of its obligation.

Excuse from Contract Due to Frustration of Purpose – Both parties are excused from further performance of a contract due to frustration of purpose where:

- An event is **neither anticipated nor caused** by either party
- The risk of the event was **not allocated by K**
- The event **destroys** the object or **purpose of the K** and the value of performance

Note that courts may sometimes allow restitution of money paid and any “benefit” conferred through partial performance of a frustrated contract.

Remedies

- Note that once a court has decided to void a K, there aren't many remedies available to the other party. At most, the party may get restitution for costs incurred.
- In hard cases, we may feel more sorry for a party where there is a “real loss” – i.e. not just lost profit.

Enforcing Promises

Current American View: Means of enforcing promises:

- "Bargain theory" → Was there **consideration**?
- **Reliance** (also charitable subscriptions)
- **Writing/formality** (also by statute) – *Gergen said he would discuss in spring? ?*
- *Some cases in moral obligation enforced*
- *Note: Completed gift will be enforced; formality of transfer shows seriousness. Consider Fischer v. Union Trust*

Enforcing Promises Based on Consideration

Consideration is that which is sought by the promisor in exchange for a promise which is given by the promisee in return for the promise. (See *Restatement of Contracts, §71 & §81, p. 209, for requirements of consideration*)

- Core concept is the "bargain." (*Holmes: "reciprocal conventional inducement"*)
 - Things that can't be considered under the bargain theory:
 - Nominal consideration (or meritorious consideration)
 - Past consideration
 - Legal benefit or detriment
 - Apparent bargains do not work (courts have lenient view, though)

Notes on consideration:

- Can not make a legally binding promise for a gift.
- A seal is largely ineffective, although it used to be binding
- Wills aren't any different as they can be changed at any time
- In every promise, donor has satisfaction of knowing promisee has benefited. General goodwill is not valid consideration.
- Bargain/consideration is opposed to a gratuitous gift with a condition: Condition is not motive for the gift, but is a necessary prerequisite for receiving promise.
- If promisor's desire for consideration is incidental to other objectives, this is immaterial. There may be more than one motive in negotiating an exchange.
- Note: in some cases, several years residence may satisfy an open-ended promise (Alternative basis for Kirksey)

Enforcing Promises Based on Reliance

Promises based on reliance are enforced through estoppel. D is estopped from denying consideration. Party has changed position in reliance on the promise and should be able to count on it.

Promissory Estoppel Root for concept that promise is enforceable based on reliance. (*Restatement, §90, p. 282*)

- Promise that promisor reasonably would expect to induce an action or forbearance
- Induces action or forbearance (change in position, not necessarily either for the better or for worse)

- Injustice not to enforce (detrimental reliance) *(Note: this provision gives courts an easy out for cases not easily categorized)*

Enforcing Promises

Enforcing Promises for Charitable Subscriptions (Reliance Theory)

Restatement, §90(2), p. 282 Charitable subscriptions are enforceable without proof that the promise induced action or forbearance.

Enforcing Promises Based on Moral Obligation

Cases that are morally easy, but legally difficult

- Results may be morally offensive
- Cases can't be made consistent (whether court followed law or moral inclination varies)
Did court follow the rule or apply a standard?

Rule v. Standard: Neither is absolutely right, each has costs and benefits

- *Rule*: Determinate/fixe; objective (Pros/cons: Consistency, predictability, rigid, non-adaptable, obtuse to purpose, invite line-walking)
- *Standard*: Subjective; indeterminate/fluid (Pros/cons: Adaptable, expressed in terms of purpose, inconsistency, unpredictability)

Four Responses to Cases in Moral Obligation

- **Apply Rule.** "Tough luck." (Mills, Harrington)
- **Twist Rules** "to achieve just ends" (Webb)
- **Ignore Rules** (concurring, Webb)
- **Substitute Standard for Rule** (Restatement, §86, p. 243)
(*Promise in recognition of past benefit is binding to extent necessary to prevent injustice.*)

Basic form: P performs service for D. D gratefully promises to pay. Later, D or his successor in interest backs out on promise.

- Doesn't quite fit into other areas where promises can be enforced (Law of K and restitution, consideration, reliance)
- If could overlook lack of "bargain" could probably enforce pretty easily
- Doesn't fall in torts, either, as the loss is purely economic

Broken Promises - Dividing Line Between Torts and Contracts

Reasons for sometimes raising as a negligence action:

- Useful if lack consideration
- Different damage measures (fewer limitations on consequential damages)
- Contract suit barred in some situations
 - No promise
 - Nothing in writing

Economic loss rule - Tort claim will not lie if only loss is economic. Need a claim of loss or injury to person or property.

Statute of Frauds

Considering contracts covered by Statute of Frauds

- Is contract covered under statute of frauds?
 - Note: UCC §2-201 Statute of Frauds applies to **sale of goods over \$500**
- Is there **sufficient writing**?
 - For **sale of land**? Then must be in writing.
 - K **cannot** be performed within one year *from time of making the agreement*? Then must be in writing
- Exceptions/grounds for granting relief notwithstanding noncompliance
 - Restitution
 - Partial Performance
 - Reliance

Restitution

- Party in breach may not recover in restitution in these cases
- Get back benefit conferred on D.

Partial Performance

Partial performance exception to statute of frauds only applies to land contracts.

- Entry into possession of land
- Improvements on land
- Partial payment

Reliance

Restatement §139 is a broad based reliance exception to Statute of Frauds cases, although not all states follow it. (i.e. Texas) If P performs services in good faith and reliance upon contract, damages may be awarded.

Implied Contracts

Implied in Law → Restitution (Quasi-Contract)

- Created by Law of Restitution, rather than contract law
- Requirements:
 - **Unjust enrichment** to one party
 - **Injustice not to award restitution**
 - Remedy: Enrichment conferred on D (restitution); offset by benefits to other party

Implied in Fact → True Contract

- Remedy: Expectation damages
- Would a **reasonable person** have believed that **there was a contract**? Contract established through actions rather than words
 - Social custom or practice
 - A person requests another to perform such services or knows that the person is performing such services and does not object

To recover restitution for Implied in Law Contract, must prove:

- **Didn't act gratuitously** (degree of necessity? profession? Assumed among family)
- **Didn't act officiously** (officious intermeddler)
- *Was there an opportunity for bargain? Opportunity to get consent? Done out of charity? Necessary or essential?*

Restitution is allowed where:

- **Unbargained for** benefits
- **Unjust enrichment** (misappropriated benefit)
- **Defective contract** (statute of frauds)
- **Mistakenly conferred** benefits
- **Rescue** (i.e. Cotnam v. Wisdom - physician treating D in street after car accident)
- *Note: If doubts about value to D, usually resolve doubts in his favor. Restitution conferred when something of value given to D and there is no chance to bargain.*

Note: Differences between Cotnam v. Wisdom and Martin

- *Opportunity for bargain in Martin*
- *Didn't want to ignore autonomy/wishes of a party (Cotnam - D was not conscious, but likely that he would have consented to medical care if he had been alert).*

Remedies

To award a remedy, must first determine (1) that a **promise or agreement exists**; and (2) that it is a **type that the law enforces** (reliance, formality, statute of frauds, etc.). Then discuss what type of remedy should be awarded.

Goals of damages:

- Make promisee whole
- Not to punish breach
- Gravitate towards more certain measures of damages

Remedial Cost v. Loss in Value

Two measures of expectation damages: remedial cost or loss in value

- If Remedial Cost (“**RC**”) is **less than or equal to loss in value**, then giving P the RC makes him whole without giving him a windfall.
- If there is no dollar figure for loss in value, we award **RC as the most certain measure** of damages.
- If **RC is greater than loss in value**, it becomes more complex. May sometimes need to take subjective value of fixing into account. Ex: Restatement definition of ugly monument. Consider Peevyhouse and Groves

Duty to Mitigate

P may take reasonable measures to minimize his loss, but he **must take reasonable measures to minimize D's loss**. A measure is reasonable if it maintains P in the position he would have been in on performance. Damages that have been incurred will be awarded if P has acted reasonably.

Mitigation of Damages includes:

- Stopping performance
- Affirmative action (cover)

Anticipatory Breach

If party repudiates before performance due, other party may bring suit before performance date for breach.

- Repudiation must be **clear** (mere doubt not enough)
- Repudiation **can be retracted if not relied upon**
- Injured party must mitigate

UCC §2-610: If party anticipatorily breaches, other may:

- Await performance
- Sue for breach
- Suspend own performance
- Breaching party may retract if the other party has not yet relied on breach

Remedies

Foreseeable Damages

P may recover consequential damages on breach only if they were foreseeable to D as a consequence of the breach at the time of contracting (Restatement, §351, p. 74).

- **Foreseeability of the harm/damages**, not of the breach
- **Objective standard** unless reason to give credit to subjective knowledge
- *UCC §2-715* Seller had **reason to know** at time of contracting and damages could **not have been obviated by cover**.
- *Note: Textual argument that foreseeability is not an issue in UCC. "General and particular requirements" of P. Could argue that market shift is not a requirement of P; it is public information. §2-715 should only apply to private information of P.*

What is standard of foreseeability?

- Ordinary course of events
- Party in breach had reason to know would happen
- Measures
 - Heron II (p.72) 1 in 4 is OK, but 1 in 52 is too small a chance.
 - Hector v. Martinez Doesn't have to be most foreseeable of all possible harms, but not so remote as to make it unforeseeable (easier standard).
 - Restatement: Foreseeable as a probable result of breach

Foreseeability test is over-inclusive. May end up holding promisor responsible for risks that he shouldn't have to bear. There are **three alternatives to get out**:

- **Tacit Agreement Test:** (Lamkins) Not enough that D had notice - did promisor assent to bear this risk? Some risks too large to assume that a reasonable person would have assumed liability had it been expressly laid out in contract. (*Note: UCC rejects - only Arkansas holds to this test*)
- **Avoid disproportionate compensation in informal contracts** (Restatement §351(3)) If long, formal contract, we expect that promisor considered all consequences and would have addressed if he didn't want to assume risk. If the contract is informal, we assume that the issue was not addressed and D did not assume liability
- **"Not prevented by cover or otherwise"** (UCC §2-715) Duty to mitigate - buyer must take reasonable, precautionary measures.

What if unforeseeable event reduces damages?

- Hadley rule does not come into play
- Don't want to give P a windfall
- Hadley rule is limitation on damages, not meant to increase damages

Remedies

Damages for Emotional Distress

In general, damages for emotional distress are not awarded in contracts cases, although there are exceptions. Asserting a right under contract can not be infliction of emotional distress (have to exceed rights or breach contract)

- Sometimes stated as part of Hadley rule (*emotional distress may not be foreseeable*)
- Mental anguish can be recovered if there is an independent tort (*as a tort claim*)
- Sometimes mental anguish allowed (*i.e. Hawkins v. McGee, undertaker mistakes, telegrams with wrong message or to wrong person*)
 - Does contract have "**elements of personality**"?
 - Is there a **market standard** by which damages can be adequately measured?
 - Is the **primary purpose** economic or to secure personal interests? (i.e. job - purpose is the wage)

Uncertain Damages

Degree of certainty required in proof of damages ("preponderance of the evidence" or "more likely than not") (*Note §1-106: "remedies shall be liberally administered."*)

Reliance -- P's Provable Loss = Damages
(*Burden is on D to prove*)

Pre v. Post Formation Reliance

Chicago Coliseum v. Dempsey Only post-contract reliance

Security Stove Pre-contract reliance where D had duty to accept contract

Anglia TV Pre-contract reliance in all cases. (*Gergen: this is right. Pre-contract costs expended in expectation that profits will allow them to recoup costs. Entitled to recover "wasted expenditure"*)

Restitution as an Alternative Measure for Breach of Contract

- There must be a **substantial breach** (i.e. material, total) and unjust enrichment
- Promisee must **return any benefit** he got from promisor
 - Market value/cost of getting same service elsewhere
 - Profit made by party, net enrichment
 - *To file a suit in restitution, P also has to give back any amount conferred on him (if any). P gets the difference between the two.*
- Must **elect to rescind contract** (sometimes req'd)
 - If continue to perform after repudiation, can't sue in restitution, as P is choosing to abide by the contract
- Contract **must not be completed** (i.e. Oliver v. Campbell)
 - Where there is full performance, must go with the contract price as it is more certain (easy to calculate expectation damages). Restitution only allowed where there is partial performance (hard to calculate expectation damages).

Remedies

Remedies for Breaching Party: Restitution vs. Right to Be Paid on Contract

Restitution: Avoid unjust enrichment to non-breaching party. In determining the value of labor, **give the non-breaching party the benefit**. Give him the contract price or the lower alternative cost, but not the higher alternative cost.

Rule for Restitution:

Value of Labor -- Damages to D from Breach = Restitution

Rule for Contract: (Includes cost to complete)

Contract Price -- Damages to D from Breach = Damages

Substantial Performance

If substantial performance → Contract law

If insubstantial performance → Restitution

- *Test for substantial performance: does performance meet **essential purpose** of the contract? Problem trying to avoid is benefit to one side/forfeiture by the other.*
- *Note: Differences between restitution cases and contract damages collapses where contract price is used as evidence of benefit conferred.*

Differing Rules re: Substantial Performance

- Majority Rule: Suit on contract if substantial performance; otherwise, restitution (Plante)
- Massachusetts Rule: Only if complete performance do you get a suit on the contract. Substantial performance → Restitution. If not substantial performance, no suit.
- NY Rule: Substantial performance → Suit on the contract. Otherwise, no damages. No right to recover in restitution on a material breach.

Willful Breach

Defining the willful breach:

- **Intentional** (Vincenzi v. Cerro, p. 120)
- **Unjustified** (Vines v. Orchard)
- Doesn't necessarily mean no value was conferred on D; may still allow restitution, but it is a factor.

General concern is with the value of work done for D. If work deviates from contract slightly, use contract price. If gross deviation, use market valuation. If really gross and done intentionally, no recovery (due to skepticism regarding value to D combined with culpability of contractor). We want to make sure D has received value.

Deposit Cases

Rule: Purchaser must **show that damages didn't exceed deposit**, justifying restitution.

Benefit Conferred -- Damages = Restitution
(Deposit) (Don't know, hard to define)

Remedies

Rescission

Rescission is allowed where:

- **Repudiation** (definite, unequivocal)
- **Total failure to perform** (no substantial or material performance); breach goes to essence of contract
- *(Note §2-612(3): breach of one installment is complete breach only if it substantially impairs the value of the whole contract)*
- *Payment from past performance may not be withheld if contract is divisible, but innocent party may withhold \$ due as an offset to damages claimed. (UCC §2-717: withhold payments. §2-612(2): does away with perfect tender rule in installment Ks.)*

If insecurity about future performance, assurances may be demanded and performance stopped if adequate assurances are not given (Rstmt §251, p. 836, and UCC §2-609).

- Grounds for insecurity must be reasonable
- Party seeking assurance must do so in writing
- May make commercially reasonable suspension of performance until assurance received, but can not treat insecurity as a breach until no assurances given.
- Questioned party has 30 days to respond or contract is considered repudiated.
- Depending on circumstances, "adequate" may be more than mere assurance; may include posting a bond, etc.

Discharge by Express Condition

Conditions v. Promises

Breaking a promise = Breach of Contract → Possible restitution/damage claim

Breaking a condition = No Contract → No claim; parties relieved of all obligations

In determining how to construe a clause, ask:

- Is it a **condition or a promise**?
- Who is the condition **meant to protect**?
- **From what**?
- *Note: Some exceptions when a contract may be enforced without the fulfillment of a condition. If, for example, there is a condition in a contract requiring buyer to obtain a secured loan, but buyer instead shows up with cash, seller can not invoke the condition to get out of the sale. The condition is meant to protect seller from buyer's inability to pay. Buyer can clearly pay if he has cash to hand over.*

Escaping Conditions

- **Impossibility** or impracticability (combined with lack of real harm) Howard
- **Breach prevents** fulfillment (promisee makes it impossible for promisor to perform)
- **Waiver** (by promisor) - estoppel is invoked. Royal Globe
- Excuse to **avoid disproportionate forfeiture**. Aetna
 - Contract of adhesion (no bargaining over terms allowed)
 - Forfeiture

➤ In excess of likely loss to obligor

Remedies

Liquidated Damages and Penalties

Basic rule: Liquidated damages clause enforceable where:

- It is **reasonable** in light of **actual or anticipated damages** and
- Difficulty of proof of loss (**uncertain damages**)
- *Rstmt §356(1), p. 134 and UCC §2-718*

BUT. . . Courts may refuse to enforce liquidated damages clause where:

- A term fixing "**unreasonably large liquidated damages** is unenforceable on grounds of public policy as a penalty." (*Note some hold this provision just gives consequences of violating the first sentence: see above.*)
- On substantive grounds (not meant to cover this situation) - "**Failure of purpose**"
 - *Note: Massman Bridge not finished, but neither was access road. Damages meant to protect city from not being able to use road. Clause not enforceable.*
 - *Tennessee case: Contractor can't collect liquidated damages from subcontractor when state forgave damages against him*
 - *Pacheco Clause not meant to cover those customers using pre-payment option, just those paying deposit only.*
- Liq. damages clause is **not exclusive** (must state that it is). In this case, party may choose whether to enforce clause or receive actual damages (UCC §2-719(1)(b))
- *It is a matter of judicial temperment (makes cases hard to reconcile sometimes)*
 - *City of Rye: Hostile court v. Yockey: Permissive court*

Note: Liquidated damages clause can not be used to gamble over uncertain ex ante, but easily measured ex post. Does not satisfy "difficulty of proof of loss." Limitations on liability is a better way to handle this.

Remedies

Limitations on Liability

Limitations of Remedy (Repair and replace remedy; §2-719)

- Acknowledges quality commitment, but **restricts remedy** upon breach
- Can't revoke acceptance; have to allow cure, no other remedy
- Escape provisions
 - **Failure of essential purpose** (only on repair/replace remedies; §2-719(2))
 - **Unconscionable** or against public policy (§2-302 and §2-719(3); Personal injury is prima facie unconscionable; economic loss is not - Comment 3; UCC)

Disclaimer of Warranty §2-316

- **Eliminates quality commitment** (limits the rights of the purchaser)
- Disclaiming express warranties (§2-316(1))
 - Must be **explicit**
 - Express warranties to be construed as consistent with disclaimers where possible. Otherwise, disclaimer is void
- Disclaiming implied warranties
 - Disclaimer of Warranty of Merchantability **must mention "merchantability"** specifically and (if in writing) **must be conspicuous**
 - Disclaimer of Warranty of Fitness for a Particular Purpose **must be in writing and must be conspicuous**
 - In general, we don't enforce disclaimers when:
 - **Inconspicuous** (Does he know or should he know? Judge decides. §2-316(2))
 - **Later term**; not part of the bargain
 - **Unconscionable** (§2-302)
 - Also consider: is this customary knowledge? §2-316(3)
- Implicit Disclaimers §2-316(3)
 - All implied warranties disclaimed by such phrases as "as-is", "with all faults"
 - If buyer inspects or refuses to inspect where such inspection would have revealed defects, implied warranties as to those defects is disclaimed. Seller must demand inspection, not just hold item available for inspection. §2-316(3)(b)

Limitation of Liability

- Arises in negligence claims; negligent conduct for which D is liable
- Some held void as against public policy; court is more hostile to these clauses
- Clause may be enforced where mere negligence, but usually not gross negligence.
- *Confused body of law. Ruling will depend on nature of contract and sophistication of parties to the contract*

Elements of unconscionability

- **Procedural** (Freely assented to? Hidden clause? Contract of adhesion?)
- **Substantive** (Reasonable allocation of risks? Unreasonable? Fully informed person would have assented?)

Note: 3rd party who is injured and not a party to the contract will probably be covered by an indemnity clause. Hold party harmless against 3rd party claims.

Enforcement in Equity

Awarding Specific Performance

Affirmative v. Negative Injunctions:

- For example, must sell goods to P v. can't sell to anyone besides P if do sell.
- Issue negative where difficult to be specific in order or where aff. would enslave D

Basis for ordering specific performance:

- **Inadequate legal remedy**
 - “Where **goods are unique** or in other proper circumstances” UCC §2-716(1)
 - *Rstmt §360 p. 157*, difficulty proving damages, getting substitute, collecting money
- **Land K** (inadequacy of damages presumed; other factors may prevent, but rarely)
- **Other discretionary factors** such as proportionality or impossibility are considered
 - *Disproportionality*: consider Van Wagner, Manchester. Specific performance was not awarded due to disproportionate harm to D. Would be inefficient to enforce K.
 - *Impossibility*: Specific perf. won't be ordered where it is impossible to comply.

Awarding Specific Performance of Personal Service Contracts

Personal Service: (Could someone else perform w/o breaching K?) Spec. perf. of personal service/employment Ks is limited (*Note: still need to consider issues above*)

- **No affirmative enforcement** allowed (13th amendment problems: slavery)
- Negative enforcement during term of K may be allowed if:
 - **Express or implied promise of exclusivity.**
 - Services are **unique**
 - Keep competitors from having unique competitive edge
 - Irreparable harm (distinct loss) if employee is permitted to labor for competitor.
 - Note: **Won't enslave D** per 13th amendment (consider Fitzpatrick: negative enforcement = affirmative enforcement since he must have help)

Post-term covenants not to compete may be enforced. Relevant factors:

- Implied covenants will not be enforced. Covenant must be **expressly stated**.
- Provisions which are **too broad or unreasonable** are not enforceable (pub. policy)
- Enforce where:
 - **Protect** trade secrets, customer lists, good will of employer's business
 - **Special harm** to employer (unique nature of services)
 - **Not unreasonable in time, space or scope.** Not harsh or oppressive. Sometimes re-written by court to reduce scope (Fullerton). Minority rule: “blue pencil rule” → mark out words in provision and enforce what is left.
 - Employer makes investment in employee (trains him)

Arbitration

- Modern trend: enforce awards w/o evaluating whether they are legally permissible. Many have statutes making agmts to arbitrate “valid, enforceable and irrevocable”

Unconscionable Equity

- Contracts that “shock the conscience” will not be enforced.

Uniform Commercial Code

Definition of Transactions Falling Under UCC

§2-102 Applies to transactions in goods (not security transactions)

§2-105 Definition of "Goods"

- 1) Moveable goods (not securities, investments, money)
- 2) Existing and identified (definition of "future goods")
- 3) Mixed goods and services
 - If goods predominate, UCC
 - If services predominate, contract law
- 4) Shares in an identified bulk of fungible goods
- 5) Lots
- 6) Commercial units

Buyer's Remedies Under the UCC

§1-106 Expectation damages

§2-711 Buyer's Remedies in general

- 1) Seller fails to make delivery or repudiates or buyer rightfully rejects or justifiably revokes acceptance. Buyer may cancel and cover
- 2) Seller fails to deliver or repudiates; buyer may recover identified goods or obtain specific performance
- 3) Buyer has rightfully rejected or revoked goods for which he has paid or incurred expenses. He has a security interest in the goods and may resell them in like manner as an aggrieved seller

§2-712 Cover by Buyer

- 1) Buyer may cover in good faith with any reasonable purchase of or contract to purchase goods as substitution
- 2) Buyer may recover as damages: Cost of cover - Contract price + Incidental or consequential damages - expenses saved.
- 3) Failure to cover does not bar buyer from any other remedy

§2-713 Buyer's damages for non-delivery or repudiation

- 1) Measure of damages for non-delivery or repudiation is market price at time when buyer learned of breach - Contract price + Incidental or consequential damages - expenses saved.
- 2) Market price determined at place for tender or (if rejection after arrival or revocation of acceptance) at place of arrival

§2-714 Buyer's damages for breach in regard to accepted goods

- 1) Buyer has accepted non-conforming goods. He may recover as damages for any non-conformity of tender the loss from the breach.
- 2) Measure of damages for breach of warranty = difference at time/place of acceptance between the value of the goods accepted and the value they would have had as warranted, except in special circumstances.
- 3) Incidental/consequential damages → next section.

Uniform Commercial Code

Buyer's Remedies Under the UCC (cont'd)

§2-715 Buyer's incidental and consequential damages

- 1) Incidental damages → costs incurred in inspection, receipt, transportation, care and custody of goods rightfully rejected and commercially reasonable charges, expenses or commissions in connection with covering
- 2) Consequential damages → loss resulting from requirements and needs which seller had reason to know of at time of contracting and could not have been obviated by cover (*Note: contradicts §2-712(3) - makes cover required to recover full damages*)

§2-716 Buyer's right to specific performance or replevin

- 1) Specific performance where goods are unique
- 2) May include conditions (pymt of price, dmges) as deemed just by court
- 3) Buyer's right of replevin for goods identified to the contract if reasonably unable to cover or such effort will be unavailing or if goods shipped and security interest in them made or tendered

§2-717 Deduction of Damages From the Price

Buyer may notify seller of his intention to deduct from the contract price all or part of any damages resulting from any breach of the contract

Buyer's Remedies: Summary

- Buyer can cover by buying from another vendor; he may then recover difference b/w K price and cover price (plus incidental damages, less expenses saved) §2-712
 - Cover must be reasonable, without unreasonable delay and in good faith
- If buyer doesn't or can't cover, he can recover difference b/w market price of goods at time of breach and K price (plus incidental damages, less expenses saved) §2-713
- If buyer has accepted goods that are non-conforming, he can recover difference between value of goods promised and value of non-conforming goods §2-714
- If goods are unique, buyer has right to specific performance §2-716
 - Consider: is cash an adequate remedy?
 - Typically used for conveyance of land and rare items

Does the Buyer "Have" to Cover?

- §2-712(3) Failure to cover does not bar other remedies
- §2-713 Governing damages if no cover. Gives contract - market "when buyer learned of the breach"
 - Breach = "Time of repudiation" (Oloffson v. Cooper)
 - Breach = "Time of performance" (Cargill v. Stafford)
- "Breach" §2-712 → "Repudiation" BUT "Breach" §2-711 → "Performance"
"Breach" §2-713 → ???

Practical Result:

Buyer does not "have" to cover, but we will measure damages as if he did if spot price later goes up. Conflict between measure of damages and §2-712(3). Ultimately, if buyer can cover, then he should.

Uniform Commercial Code

Acceptance/Imperfect Tender/Right to Reject

§2-503 Manner of Seller's Tender of Delivery

- 1) Seller holds available, notifies buyer to take delivery. Manner, time and place in agreement (a) reasonable hour; available for period necessary to enable buyer to take possession, (b) buyer furnishes place for receipt
- 2) Case within §2-504: seller must comply with provisions
- 3) If tender required at particular destination, comply with (1), (4), (5)
- 4) Bailee in possession; goods to be delivered without being moved: (a) tender title/procure acknowledgment of buyer's right to goods, (c) title/written direction to bailee sufficient unless buyer objects. Risk of loss or failure of bailee to honor remains on seller until buyer presents document or direction. Bailee's refusal to honor defeats tender.
- 5) Where seller delivering documents (a) tender documents in correct form, (b) tender through banking channels is sufficient. Dishonor of draft accompanying documents = non-acceptance or rejection.

§2-504 Shipment by Seller

If seller required to deliver, he must (a) contract for transportation of goods (b) give buyer necessary documents to gain possession (c) notify buyer. Failure under (a) or (c) is only grounds to reject if delay or loss is material

§2-507 Effect of Seller's Tender; Delivery on Condition

- 1) Tender of delivery is a condition to buyer's duty to accept and pay for goods. Entitles seller to the same
- 2) Where payment is due and demanded on delivery, buyer's right to retain goods is conditional upon his making payment.

§2-508 Seller's Right to Cure

- 1) Imperfect Tender must be cured before performance is due
- 2) Non-conforming tender delivered; seller reasonably believed would be accepted, seller has reasonable time to substitute conforming tender.
(Time of the essence clause, can't substitute non-conforming tender)

§2-513 Buyer's Right to Inspection of Goods

- 1) Buyer has right to inspect before payment/acceptance. If seller sending goods to buyer, inspection may be after arrival
- 2) Expenses of expense borne by buyer; may be recovered if goods are non-conforming and rejected
- 3) Buyer not entitled to inspect where (a) delivery C.O.D. or (b) payment against documents of title, except where payment due after inspection
- 4) Place/method of inspection fixed by parties is exclusive unless otherwise agreed. If compliance impossible, inspection under this section unless indispensable condition of contract

§2-515 Preserving Evidence of Goods in Dispute

(a) either party has right to inspect, test, sample goods, (b) parties may agree to 3rd party inspection and that findings shall be binding

§2-601 Buyer's Right to Reject Imperfect Tender

If goods "fail in any respect to conform," buyer may reject the whole, accept the whole, or accept any commercial unit(s) and reject the rest

Uniform Commercial Code

Acceptance/Imperfect Tender/Right to Reject (cont'd)

§2-602 Manner and Effect of Rightful Rejection

- 1) Rejection within reasonable time. Must notify seller
- 2) After rejection, exercise of ownership by buyer wrongful against seller, (b) buyer must hold with reasonable care for seller to remove (c) buyer has not further obligation
- 3) Seller's rights - §2-703

§2-603 Merchant Buyer's Duties as To Rightfully Rejected Goods

- 1) Buyer duty to follow any reasonable instruction from seller with respect to goods or to sell for seller's account if perishable
- 2) If sell under (1), entitled to reasonable expenses and commission
- 3) Buyer held only to good faith

§2-604 Buyer's Options as to Salvage of Rightfully Rejected Goods

If seller gives no instruction, buyer may store rejected goods on seller's account, reshipe them, or resell them for seller's account

§2-605 Waiver of Buyer's Objections by Failure to Particularize

- 1) Buyer's failure to state particular defect precludes him from rejecting (a) if seller could have cured or (b) between merchants when seller makes a written request for such
- 2) Payment against documents without reservation precludes recovery of payment for defects apparent on face of document

§2-606 Effect of Acceptance, Notice of Breach

- 1) Buyer pays contract rate for accepted goods
- 2) Acceptance precludes rejection; if made with knowledge of conformity can not be revoked unless made on assumption that would be cured.
- 3) Where tender accepted (a) buyer must notify seller of breach within reasonable time (b) if claim for infringement and buyer sued, must notify seller within reasonable time
- 4) Burden on buyer to establish breach
- 5) Where buyer sued for breach/warranty and seller answerable (a) may give seller written notice of litigation; seller bound by judgment if doesn't defend after such notice, (b) claim for infringement: original seller may demand that control of litigation be turned over or else buyer may be barred from remedy
- 6) (3), (4), (5) apply to any obligation of buyer to hold seller harmless against infringement or the like

§2-607 What Constitutes Acceptance of Goods

- 1) Acceptance occurs when buyer (a) signifies that goods are conforming after opportunity to inspect or indicates that he will retain them despite non-conformity, (b) fails to effectively reject, but not until he has had opportunity to inspect, or (c) does any act inconsistent with seller's ownership (if wrongful against seller, only if ratified by him)
- 2) Acceptance of any part of a commercial unit is acceptance of the whole

Uniform Commercial Code

Acceptance/Imperfect Tender/Right to Reject (cont'd)

§2-608 Buyer's Right to Revoke Acceptance

- 1) Buyer may revoke acceptance whose non-conformity substantially impairs its value to him if he accepted it (a) on the reasonable assumption that non-conformity would be cured and it has not been, or (b) without discover of non-conformity if his acceptance was induced by difficulty of discovery or by seller's assurances
- 2) Revocation within a reasonable period of time after discovered or should have discovered defect and before substantial change in goods (not caused by defects). Not effective until seller notified.
- 3) Buyer who revokes has same rights and duties as if goods rejected

§2-609 Right to Adequate Assurance of Performance

- 1) If reasonable grounds for insecurity arise, party may demand assurance in writing; may suspend performance if commercially reasonable until assurance received
- 2) B/w merchants, grounds to be determined by commercial standards
- 3) Acceptance of improper delivery/payment does not prejudice right to assurance for future performance
- 4) Failure to give assurance w/in 30 days is a repudiation

§2-610 Anticipatory Repudiation

If contract repudiated before performance due, party may (a) await performance, (b) resort to remedy for breach (ñ2-703 or ñ2-711), (c) suspend his own performance

§2-611 Retraction of Anticipatory Repudiation

- 1) Can retract repudiation unless other party acted in reliance upon it
- 2) Any method notifies other of intention to perform (note: §2-609)
- 3) Reinstates party's rights under contract; allowance to other for delay

§2-612 Installment Contract; Breach

- 1) Requires delivery in separate lots, separately accepted
- 2) Buyer may reject any installment which is non-conforming if impairs value of installment and cannot be cured. If doesn't fall under (3) and seller gives assurance of cure, must be accepted
- 3) If non-conformity substantially impairs value of whole contract, it constitutes a breach of the whole. Contract reinstated if accept non-conforming installment w/o cancellation or if bring an action re: only past installments or demand performance for future installments.

Buyer's Right to Accept and Reject Goods: Summary

Acceptance (after inspection §2-606) occurs when: §2-607

- Buyer signifies goods are conforming
- Retain despite non-conformity
- Fails to reject
- Takes action inconsistent with seller's ownership

Uniform Commercial Code

Acceptance/Imperfect Tender/Right to Reject (cont'd)

Buyer's Right to Accept and Reject Goods: Summary (cont'd)

Limitations on Buyer's Right to Reject §2-601

- Seller's right to cure §2-508
- Good faith and fair dealing (*can't reject opportunistically*)
- Doctrine of waiver (§2-605 - unless defect is not curable).
- Interpretative Argument (what was seller's promise exactly?)
- Limited application to installment contracts §2-612
- Delay in delivery grounds for rejection only if material §2-504
- *Procedure for Rejecting Goods §2-602 (Notify seller; hold goods for removal)*

Buyer's Reasonable Opportunity to Inspect §2-606

- If accept without noticing flaw, still have rights to remedies (i.e. breach of warranty, RC, loss of value), but rejecting is not one of them (unless falls under §2-608).
- Revoking acceptance under §2-608. Must meet all three criteria:
 - Substantially impairs value
 - Hidden defect
 - Within reasonable period of time (before substantive change in quality of good)

Can Seller Cure in the Face of Revocation?

- Policies make us want to allow; avoid loss to seller and opportunistic rejection. Want to give promisee what was promised with minimal loss to promisor.
- BUT, textual argument that §2-508 doesn't apply; appears to apply only to rejections, not revocations. (*BUT if cured, substantial difference in value no longer exists §2-608(1). Is a curable defect substantial?*) §2-612 sets no standard for revocations.

Breach of Warranty

§2-312 Warranty of Title

- 1) Warranty in a contract for sale by seller that (a) good title conveyed and transfer rightful, (b) goods delivered free from security interest, lien, encumbrance of which buyer has no knowledge
- 2) Warranty under (1) excluded or modified only by specific language/circumstances giving buyer reason to know that seller does not himself have title or is only selling rights as a 3rd person might have
- 3) Merchant regularly dealing in goods warrants that goods will be delivered free of rightful claim by 3rd party. Buyer furnishing specs must hold seller harmless against claim arising out of such compliance

§2-313 Express Warranty

- 1) Express warranty created when (a) affirmation of fact or promise is the basis of the bargain, (b) description of goods is the basis of the bargain, or (c) sample or model is the basis of the bargain
- 2) Formal words, specific intentions not necessary in creation of express warranty, but affirmation of value or seller's opinion is not a warranty.

Uniform Commercial Code

Breach of Warranty (cont'd)

§2-314 Implied Warranty of Merchantability

- 1) Implied in contract for sale if seller is a merchant with respect to goods of that kind. Serving for value of food or drink is a sale.
- 2) Goods must (a) pass w/o objection under contract description, (b) of fair average quality w/in description, if fungible goods, (c) are fit for ordinary purposes (d) run of even kind, quality and quantity within and among all units, (e) are adequately packaged as agreement requires, and (f) conform to promise/affirmation on label
- 3) Unless excluded or modified under §2-316, other implied warranties may arise from course of dealing or usage of trade

§2-315 Implied Warranty of Fitness for Particular Purpose

If seller knows particular purpose for goods & buyer is relying on his judgment to select goods → implied warranty that it be fit for that purpose

§2-317 Cumulation and Conflict of Warranties Express or Implied

Warranties construed as consistent with each other, but if can't, intention of parties shall determine which is dominant (a) exact specs displace inconsistent sample, model, gen. language (b) sample from existing bulk displaces inconsistent gen. language (c) express warranties displace inconsistent implied warranties except fitness for a particular purpose.

Warranty: an affirmation of fact or promise relating to a contract that becomes part of the basis of a bargain.

Express Warranty

When we don't think people warrant certain "uncertain" promises, unreasonable to hold it as an express warranty (i.e. "prevents hair loss"). Relevant factors:

- Affirmation of fact or promise that becomes basis for bargain; reliance by promisee
 - Thought uncertainty removed; thought promisor standing behind promise
 - May include description of goods, sample or model
- Would a reasonable person have thought that a warranty was made?
- *Note: Statement of value or opinion is not a warranty*

Warranty of Merchantability

Only if seller is merchant (as defined by §2-104), unless goods guaranteed (§2-314).

- Pass without objection in the trade
- Fungible goods must be of fair average quality
- Be fit for ordinary purposes
- Be of even kind, quality and quantity
- Be adequately contained, packaged and labeled
- Conform to any promises on the label

Uniform Commercial Code

Breach of Warranty (cont'd)

Warranty of Fitness for Particular Purpose

- Seller has reason to know purpose
- Buyer relying on Seller's judgment and expertise
- *Problem: some goods we have understanding that sold on condition of satisfaction - i.e. tailored clothes. Maybe this is an exception?*

Seller's Remedies

§2-703 Seller's Remedies in General

Where buyer wrongfully rejects, revokes, repudiates or fails to pay, seller may (a) withhold delivery, (b) stop delivery, (c) proceed under §2-704 to identify goods, (d) resell and recover damages §2-706, (e) recover damages for non-acceptance §2-708 or for the price §2-709, (f) cancel

§2-704 Seller's Right to Identify Goods to the Contract Notwithstanding Breach

§2-705 Seller's Stoppage of Delivery

- 1) Seller may stop delivery if discovers buyer to be insolvent §2-702, or if buyer repudiates or fails to make payment
- 2) Seller may stop until (a) receipt of goods by buyer, (b) notification to buyer that goods held for him, (c) same by carrier, (d) conveyance of title
- 3) (a) To stop delivery, seller must notify bailee, enable him to prevent delivery (b) bailee must hold, but seller liable for costs, (c) bailee doesn't have to stop if title not surrendered to him, (d) carrier who has issued non-negotiable bill of lading only stops if notified by person other than consignor.

§2-706 Seller's Resale Including Contract for Resale

- 1) Seller may resell. If in good faith and commercially reasonable manner, may recover K price - resale + incidental damages - expenses saved.
- 2) Resale must be commercially reasonable. Resale must be reasonably identified as referring to broken contract.
- 3) If private sale, seller must give buyer notification of his intention
- 4) Where resale is public (a) only identified goods can be sold except where recognized market for public sale of goods (b) must be at usual place for public sale and must give buyer notice if non-perishable goods (c) if goods not in view, notification must state location and provide for inspection by prospective bidders (d) seller may buy
- 5) Purchaser in good faith takes goods free of rights of original buyer
- 6) Seller is not accountable to buyer for any profit made on resale. Seller (or revoking buyer) must account for any amount over security interest.

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Seller's Remedies (cont'd)

§2-708 Seller's Damages for Non-acceptance or Repudiation

- 1) Measure of damages for non-acceptance or repudiation by buyer is unpaid contract price - market price (time/place of tender) + incidental damages - expenses saved.
- 2) If measure of damages in (1) inadequate to put seller in as good a position as performance would have done, then measure of damages is profit which seller would have made + incidental damages + costs reasonably incurred - payments or proceeds of resale.

§2-709 Action for the Price

- 1) Buyer fails to pay price when due; seller may recover (with incidental damages) the price (a) of goods accepted or conforming lost or damaged within commercially reasonable time after risk of their loss has passed to buyer, and (b) of goods identified to contract if seller is unable after reasonable effort to resell them at reasonable price
- 2) Seller sues for price; he must hold goods for buyer, except that he may resell prior to collection of judgment. Net proceeds credited to buyer.
- 3) If buyer wrongfully rejected, revoked acceptance, failed to make payment or has repudiated and seller is not otherwise entitled to price under this section, he shall nevertheless be awarded damages for non-acceptance under preceding section

§2-710 Seller's Incidental Damages

Include commercially reasonable charges, expenses or commissions incurred in stopping delivery, transportation, care and custody of goods after breach.

Seller's Remedies: Summary

- Seller can resell goods and recover difference between K price and resale price (plus incidental damages, less expenses saved) §2-706
 - Commercially reasonable resale
 - Good faith
 - Seller must give buyer notice of resale. Otherwise, remedy becomes §2-708(1), market price remedy (see below)
- Seller can keep the goods and recover difference between K price and market price at time of breach (plus incidental, less expenses) §2-708(1)
 - Exception: lost volume seller. Seller gets lost profit §2-708(2)
- If seller can not resell, he can recover full K price §2-709
 - Must hold goods for buyer

Note: Damages must always be foreseeable & reasonable; seller must try to mitigate

Uniform Commercial Code

Liquidated Damages and Penalties

§2-718 Liquidation or Limitation of Damages; Deposits

- 1) Damages may be liquidated at an amount which is reasonable in light of anticipated or actual harm, difficulties of proof of loss. Unreasonably large liquidated damages are void as a penalty
- 2) Where seller justifiably withholds delivery, buyer entitled to restitution of amount by which his payments exceed (a) amount seller entitled to by (1), or (b) in the absence of such terms, 20% of value of total performance or \$500, whichever is smaller
- 3) Buyer's right to restitution subject to offset to extent that seller establishes (a) right to recover (b) amt/value of benefits recv'd by buyer
- 4) Where seller has received payment in goods, they shall be treated as payments for (2), but if seller has notice of breach before reselling goods, resale is subject to §2-706

Limitations of Remedies

§2-302 Unconscionable Contract or Clause

- 1) Court may refuse to enforce contract which is unconscionable at time it was made, or may so limit as to avoid unconscionable result.
- 2) Parties have reasonable opportunity to present evidence to aid court in making determination on unconscionability

§2-316 Disclaiming Warranty

- 1) Words or conduct creating/negating express warranty shall be construed wherever reasonable as consistent with each other. Negation inoperative to extent that construction is unreasonable
- 2) To exclude or modify implied warranty of merchantability, language must mention merchantability/be conspicuous. To exclude or modify implied warranty of fitness, exclusion must be in writing/conspicuous
- 3) Notwithstanding (2), (a) all implied warranties are excluded by expressions such as "as is", "with all faults", etc., calling attention to exclusion of warranties, (b) if buyer fully examines goods (or refuses to examine) there is no implied warranty with respect to defects which would have been revealed, and (c) implied warranty can be excluded or modified by course of dealing or performance or usage of trade.
- 4) Remedies for breach of warranty can be limited in accordance with provisions on liquidated damages. (§2-718, §2-719)

§2-719 Contractual Modification or Limitation of Remedy

- 1) Subject to (2), (3) and §2-718, (a) agreement may provide for remedies, may limit or alter damages recoverable (i.e. repair and replace), (b) remedy optional unless expressly agreed to be exclusive
- 2) Exclusive/limited remedy fails essential purpose, resort to other remedy
- 3) Consequential damages may be limited or excluded unless unconscionable. Limitation for injury to person (consumer goods) is prima facie unconscionable).