Professor Marissa Jackson-Sow
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Grade: A

# Contracts Outline

# Contracts Checklist

**A contract exists where there is, between two or more parties, mutual assent evidenced through offer and acceptance, consideration (bargained-for exchange), and an absence of defenses that would render the contract void or otherwise unenforceable.**

**CONSIDER P'S AND D'S BEST ARGUMENTS!!!!**

1) **Was a contract formed?**
    a) Is it governed by common law, UCC, or CISG?
        i) Domestic sale of goods? – UCC
            (1) Goods = anything that is moveable and sellable (including animals)
        ii) International sale of goods? - CISG
        iii) Everything else - Common law
        iv) Mixed Contract? (*Sally Beauty Co. v. Nexxus Products Co.*)
            (1) Predominant Factor Test (majority)
                (a) What was the purpose of the contract?
            (2) Gravamen Test (minority)
                (a) What is the plaintiff's lawsuit about?

**K = MA (O + A) + C - D**

    b) Do we have all of the necessary elements of contract formation?
        i) Mutual Assent/Manifestation of Assent
        ii) Offer
        iii) Acceptance
            (1) R2dK – Mirror Image Rule & Mailbox Rule
        iv) Consideration
            (1) Bargained-for exchange
                (a) Benefit/detriment
            (2) Reliance-Based → Promissory Estoppel: promise + reliance
            (3) Benefit-Based/Quasi Contract → Unjust Enrichment: confer material benefit
        v) No Defenses
            (1) Look for facts for (i) terms - what is in the agreement and (ii) agreement process – what happened up to the agreement?

**2) Other questions?**

a) Is this a new contract or modification of an existing contract?
   i) R2dK Pre-existing Duty Rule (*Stilk v. Myrick; Alaska Packers*)

b) Are the parties original parties to the contract or is there a third party involved?
   i) Is the third party an intended or incidental beneficiary?
   ii) Is an original party trying to assign/delegate?

**Interpretation**

- Identify terms. Vague/ambiguous (*Frigaliment*)
- Last shot rule (R2dK) or UCC 2-207 (Battle of the Forms)

Good faith and fair dealing (R2dK § 205; UCC 1-201 & 1-304) + Gap-Filling

- UCC Gap Filling Sections
  - §2-309: Absence of Specific Time Provisions; Notice of Termination
  - §2-305: Open Price Term
  - §2-308: Absence of Specified Place for Delivery
  - §2-310: Open Time for Payment or Running of Credit; Authority to Ship Under Reservation
- Parol Evidence Rule: inadmissible for completely integrated agreements; supplemental but not contradictory terms okay for partially integrated agreements

**Breach**

1) Who breached and how? To what degree?
2) Is it a promise or condition?
   a) Failure of a condition can excuse performance or be waived; failure of a promise is a breach
3) Partial breach or material breach: determines remedies. Question of fact.

**Remedies**

Make whole. Don't overcompensate, undercompensate, or punish

1) Expectation: default for K. Benefit of the bargain
2) Reliance: default for PE
3) Restitution: default for UE

- Specific performance: land or art; special/unique; no better remedy. Negative injunctions OK, can't force people to do things (*Lumley v. Wagner*)
- Limited by foreseeability, certainty, duty to mitigate
- Allowable clauses on damages (liquidated / liability-limiting)

# Contract Formation

## Common Law

K = MA (O + A) + C – D

*"A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty."*
*Restatement (Second) of Contracts § 1*

## Promise/Agreement

R2dK § 2. Promise Defined: a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made.

The purpose of a promise is the creation of a duty or a disability in the promisor

*Pappas v. Bever* - The Alumni Pledge Form

## Mutual Assent

Important Cases: *Embry, Lucy v. Zehmer; MCC v. D'Agostino; Nguyen v. Barnes & Noble*

R2dK § 3 **Agreement/Mutual Assent**
An agreement is a manifestation of mutual assent on the part of two or more persons.

**Objective Test**
Refers to the external manifestations of the parties' intent. (*Lucy v. Zehmer*)

**Subjective Test**
Refers to the internal "meeting of the minds" between the parties. (CISG values subjective intent)

- Did the parties will themselves to enter into agreement?

### Embry Mixed-Approach Test

*Embry v. Hargadine, McKittrick Dry Goods Co.*
Mixed-Approach Test to Mutual Assent:
1) how a reasonable person would have understood the external manifestation of the other party's intention (objective); AND

(2) how the promisee ACTUALLY understood the promisor's external manifestation of intention (subjective)

***Lucy v. Zehmer* - The "Joke" Contract**
**R2dK § 201 Whose Meaning Prevails**
(2) Where the parties have attached different meanings to a promise or agreement, it is interpreted in accordance with the meaning attached by one of them if at the time the agreement was made:
(b) that party had no reason to know of any different meaning attached by the other, and the other had reason to know the meaning attached by the first party.

***MCC v. D'Agostino* – Mutual Assent & the CISG**
**Art. 8 CISG**
(1) For the purposes of this Convention, statements made by and other conduct of a party are **to be interpreted according to his [subjective] intent** where the other party knew or could not have been unaware what that intent was.

***Nguyen v. Barnes & Noble* - Digital Contracts & Mutual Assent**
B&N did not provide Nguyen reasonable notice (actual OR constructive) of the terms and Nguyen therefore did not "unambiguously manifest assent" to the terms.

# Offer

Important Cases: *Lefkowitz; Leonard v. PepsiCo; Carlill v. Carbolic Smoke Ball*

**R2K § 24**
An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it. → **An offer is a promise upon which a reasonable person can rely.**

Offers, in general, are revocable prior to acceptance. (exception: option contracts)

**Three parts of an offer:**
1. Manifestation of intention to enter into the agreement
    1. Based on offeror's objective manifestation of intent and not his inner, subjective intent
2. Confers power of acceptance on the offeree
    1. Offeree can say, "I accept," with no further action required to create a contract
    2. **An offer must be something that you can accept without further negotiations**
3. Offer specifies all necessary terms

Under the **Restatement § 33**, the necessary terms of an offer are as follows:

1. The parties to the agreement
2. The subject of the offer
3. The quantity
4. **The price** (Price not required for UCC because UCC § 2–305 provides price gap-filler)

While many offers are valid, there are also certain types of offers that are typically considered INVALID. **The most common types of invalid offers include:**

1) **Jokes:** an offer made in jest is considered an invalid offer, but only if the offeree knows or should have known that the offer is a joke
2) **Preliminary negotiations:** invitations to bid, **price quotations,** and proposals
3) **Advertisements.**

§ 26 Prelim. Neg. / **Invitation to Bargain**
A manifestation of willingness to enter into a bargain is NOT an offer if the person to whom it is addressed knows or has reason to know that the person making it does not intend to conclude a bargain **until HE has made a further manifestation of assent.**

## Advertisements as Offers

Related Cases: *Lefkowitz; Leonard v. PepsiCo; Carlill v. Carbolic Smoke Ball*

In general, advertisements are **not** treated as offers. (R2dK § 26(b) & *Lefkowitz)*

**R2dK § 26 (b) Preliminary Negotiations**
Advertisements of goods…are NOT ordinarily intended or understood as offers to sell. It is of course possible to make an offer by an advertisement directed to the general public (see § 29), but there must ordinarily be some language of commitment or **some invitation to take action without further communication.** (*Lefkowitz; Carlill*)

**R2dK § 29 Unilateral Offer/Acceptance**
(2): An offer MAY create a power of acceptance in a specified person or in one or more of a specified group...of persons...who makes a specified promise or **renders a specified performance**. - UNILATERAL OFFER (*Lefkowitz; Carlill*)

**Lefkowitz Test**
An **advertisement will constitute an offer when** the advertisement is **clear, definite, and explicit** and leaves nothing open for negotiation. *Lefkowitz v. Great Minneapolis Surplus – Fur Coat Advertisement*

Consider under *Lefkowitz*:

- Is it a display or an advertisement?
- Is the price listed or merely suggested?
- Do we know exactly what we need to do to get the specific item?
- What's the environment (store, flea market, etc.)?

**Reasonable Person Standard**

Whether an offer was made depends on the **objective reasonableness** of the alleged offeree's belief that the advertisement or solicitation was intended to be an offer. *Leonard v. Pepsico*
**Ultimately**, whether an ad is an offer or an invitation to make an offer "**depends on the legal intention** of the parties and the surrounding circumstances," as well as the **objective reasonableness of understanding it to be an offer.**

## Bilateral vs. Unilateral Theory of Contracts

**Bilateral contract:** each party makes a promise – offeror makes an offer, and offeree makes a promise in return as acceptance. Both parties are bound by their promises

- If A says to B, "I will give you $100 if you promise to walk across the bridge," and B then promises to walk across the bridge, both A and B are bound by their promises and a bilateral contract is formed.

**Unilateral contract**: one party offers something in return for another party's **performance.** If the promisee completes the performance, the contract is complete and the promisor is obligated to perform his promise. Offers for rewards are an example of a unilateral contract, and so is *Hamer v. Sidway.*

- Only the promisor is under obligation of the contract, whereas the promisee is NOT legally obligated to perform – THIS IS WHY IT IS UNILATERAL
- Acceptance, performance, and consideration are all the same act in unilateral contracts → Performance IS acceptance, and typically the performance requires someone to pay or give up one of their rights, which constitutes consideration

If A says to B, "I will give you $100 if you walk across the bridge," when B has walked across the bridge, there is a unilateral contract, and A is bound to pay B $100.

- A is not bound to pay $100 to B until B has walked all the way across the bridge – no contract arises until the completion of the act called for, but there are different rules regarding the revocability of a unilateral offer (***Peterson* & R2dK § 45**)

## Option Contracts (R2dK § 25 & 45)

**Option contracts** are created when the offeror keeps an offer open for a limited amount of time, in exchange for the offeree's consideration (**R2dK § 25)**

- MUST be supported by consideration in order to be irrevocable

**Option Contract created by Partial Performance or Tender (R2dK § 45)**

Under R2dK § 45, an option contract is created when the offeree tenders or begins the performance invited by a unilateral offer.

- At this point, the unilateral offer is irrevocable for the period of time provided for through the option. After the option expires, the offer can be revoked.
- MUST be supported by consideration [a partial performance (R2dK § 45) to be valid
- The offeror's duty of performance is conditional on completion of acceptance **in accordance with the terms of the offer**
    - An imperfect acceptance from the offeree is a REJECTION of the original offer

## Firm Offer (UCC Option Contract)

**UCC § 2-205 – FIRM OFFERS**

An offer in signed writing by a merchant to buy or sell, which by its terms gives assurance that it will be held open **[option contract]** is not revocable for lack of consideration, during the time stated or if no time is stated for a reasonable time, but in no event may such period of irrevocability exceed three months …

- **Must be in writing**
- **Irrevocable during the option period, but period cannot exceed 3 months** (even if the offer specifies that it will be held open longer!!!)
- **No consideration required**

**UCC 2-104** defines a "merchant" as someone who regularly deals in goods of a particular type or claims to have special knowledge or skills about those goods

# Revocation of Offer

Important Cases: *Peterson v. Pattberg; Dickinson v. Dodds; James Baird Co. v. Gimbel Bros.*

**Terminating Offers**

**R2dK § 36:** An offeree's power of acceptance may be terminated by:

1. The offeree's rejection or a counteroffer;
2. Lapse of time (generally 3 months);
3. **Revocation of the offer by the offeror:** An offeror may revoke his offer in two ways:
    a. **Directly, under R2dK §42** ("when the offeree receives from the offeror a manifestation of an intention not to enter into the proposed contract") – i.e., the offeror directly tells the offeree he is revoking; OR
    b. **Indirectly under R2dK §43** ("when the offeror **takes an action inconsistent with an intention to enter into the proposed contract** and the offeree knows of that action) – i.e., selling to someone else & the offeree hears about it ***(Dickinson v. Dodds)***
4. The offeror or offeree's subsequent death or incapacity

Sentence Summary (+) – An offeree's power of acceptance may be terminated by the sending of a counter-offer, lapse of time (specified or 3 months+), direct or indirect revocation, death or incapacity of either party or non-occurrence of any condition of acceptance.

**An offer is generally freely revocable at any time before it has been accepted by the offeree**, but the **revocation is not effective until it is RECEIVED by the offeree**

- Basically, an offeree's acceptance may still be valid if they give it before receiving the revocation (**R2dK § 68 & CISG Art. 16 (1) Rule)**

**R2dK § 68 What Constitutes Receipt of Revocation or Rejection**
A written revocation or rejection is received **when the writing comes into the possession of the person addressed**, or of some person authorized by him to receive it for him, or when it is deposited in some place which he has authorized as the place for this or similar communications to be deposited for him.

**Three Rules of Revoking an Offer:**

1. **Mailbox:** An offer is irrevocable when the acceptance has been dispatched from the offeree
    a. Supported both by **R2dK § 68 & CISG Art. 16**
2. ***Peterson v. Pattberg* [Traditional Rule of Unilateral Contracts]*:*** a unilateral offer is freely revocable at any time before performance begins
3. **R2K§ 45 Option Contract Created by Partial Performance:** Where an offeror invites an offeree to accept by rendering a performance and does not invite a promissory acceptance, **an option contract is created when the offeree begins the invited performance or tenders the beginning of it,** and the offer becomes **irrevocable**
    - The "partial performance" is the consideration
    - Under §45, the offeree must still complete performance for the contract to be accepted by performance and therefore valid and complete

***Peterson v. Pattberg* - Mortgage Case/The Last-Minute Unilateral Revocation**

**R2dK § 35 Acceptance AFTER Revocation**
(2) A contract cannot be created by acceptance of an offer after the power of acceptance has been terminated in one of the ways listed in § 36.

***Dickinson v. Dodds* – Sold House to Other Guy/ Indirect Revocation**
You cannot accept an offer that you know to be revoked or expired. Also, for an option contract to exist, there must be some consideration to support the option, which there was not in this case.

A person who has given to another a certain time by which to accept an offer is NOT bound by his promise to give that time. *Dickinson v. Dodds*

- Why? There is no consideration for this promise to be enforceable, i.e. it is NOT an option contract.

***James Baird Co. v. Gimbel Bros., Inc.* – The Linoleum Fuck-Up**
**Rule:** (1) An offer **may not be accepted after the promisee receives the revocation (R2dK § 35)**. (2) Promissory estoppel is meant for promises for which there is generally not consideration, **not bargain-based promises that REQUIRE/seek consideration.**
**Legal Takeaway:** The offer required acceptance in the form of a return promise, and not "reliance" via the submission of a bid. The act "bargained for" was acceptance, not submission of a bid. Because Baird had not accepted, Gimbel was free to revoke.

# Acceptance

Important Cases: *Ardente v. Horan; Adams v. Lindsell; Carlill v. Carbolic Smoke Ball; Hobbs v. Massosoit Whip Co.*

**R2dK § 50 Acceptance of Offer Defined**
Acceptance is a manifestation of assent to the terms of an offer, and it **must be made in a way that the offer invites or requires**. Acceptance by performance is a type of acceptance that relies on actions instead of a return promise [**unilateral contract**]

**Three General Requirements of Acceptance:**
1. An expression of commitment
    a. A mere acknowledgment of the receipt of offer or interest is not enough
2. The commitment must not be conditional on any further act by either party
3. The commitment must be on the terms proposed by the offer without any variation – **mirror image rule**
    b. If the offeree proposes a substituted bargain different from the terms of the original offer, it is a **counteroffer / rejection of the original offer**

**R2dK § 59 Purported Acceptance Which Adds Qualifications – Mirror Image Rule (*Ardente v. Horan*)**
A reply to an offer which purports to accept it but is conditional on the offeror's assent to terms additional to or different from those offered **is not an acceptance but is a counter-offer (and therefore a rejection of the original offer per § 39).**

**R2dK § 39 Counter-Offers**
(2) An offeree's power of acceptance is terminated by his making of a counter-offer…unless the counter-offer manifests a contrary intention of the offeree.

# Rules of Acceptance

**Mirror Image Rule R2dK § 59**
*Ardente v. Horan – The Furniture Request/Mirror Image Rule*
R2dK requires an acceptance to be a mirror image of the offer, or **an unconditional assent to the exact same terms as the offer.** Any change to the terms of the offer is considered a counteroffer that rejects and terminates the original offer.

- Does NOT apply to any sale of goods contracts

*Ardente v. Horan*
**Rule**: "An acceptance which is equivocal or upon condition or with a limitation **is a counteroffer** and requires acceptance by the original offeror before a contractual relationship can exist."

**Last Shot Rule**
The party who makes the last offer before acceptance has their terms prevail
- This is the mirror image rule carried out to its logical extent – you are allowed to negotiate back and forth, but **the last set of terms accepted without variation is the "last shot" and stands**
- Does NOT apply to any sale of good contracts

**UCC § 2-207 (Battle of the Forms) does NOT align with the mirror image rule** – it states that the additional terms in an acceptance become part of the contract if:
1. They are expressly accepted by the offeror; OR
2. **So long as both parties are merchants, automatically** as long as:
    1. The offer does not expressly limit acceptance to the terms of the offer;
    2. The additional terms do not materially alter the contract; and
    3. The offeror does not object to the additional terms

**Mailbox Rule - R2dK §63**
*Adams v. Lindsell* - Mailbox Rule
**Rule:** Acceptances are effective upon dispatch, not upon receipt by the offeror.
- An improperly addressed acceptance is effective upon dispatch ONLY IF it is received within the time that a properly addressed acceptance would have been received.
- CISG is NOT in alignment w/ the Mailbox Rule

**R2dK § 63 Time When Acceptance Takes Effect – Mailbox Rule**
"Unless the offer provides otherwise, **an acceptance is operative as soon as put out of the offeree's possession**, without regard to whether it ever reaches the offeror." → An acceptance is effective upon dispatch, and the offeror becomes bound.
- This implies that an offer can be effectively accepted without the offeror's knowledge, and is still an acceptance even if the offeror never receives the acceptance.

**CISG Rule of Acceptance, Art. 18**: Acceptance is effective upon RECEIPT by the offeror, not upon dispatch
- **NOT consistent with the Mailbox Rule / R2dK**
- Must be read in conjunction with CISG Art. 16, which states that "an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance." So, if the revocation reaches the offeree AFTER he has dispatched an acceptance, the revocation is not effective

**Acceptance by Silence - R2dK §69**

*Hobbs v. Massasoit Whip Co.* **- The Silent Acceptance [of Eel-Skins]**
**Silence + retention of goods + previous contractual relationship = acceptance**
When an offeree is silent there is only acceptance in cases where:

a) Offeree takes the benefit of offered services with reasonable opportunity to reject and knows there is an expectation of compensation.
b) Offeror has stated or given offeree reason to understand that assent may be manifested in silence or inaction and the offeree intends to accept the offer.
c) Because of previous dealings, it is reasonable to believe that the offeree should notify of his acceptance or rejection.

# Unilateral Contract Rules

**Form of Acceptance Invited - R2dK §30**

"Unless otherwise indicated by the language or the circumstances, **an offer invites acceptance in any manner and by any medium reasonable** in the circumstances."

- Reinforces idea that offeror is master of the offer

Sentence Summary (MJS+) - The Offeror is the master of the offer and can condition acceptance in any manner (exchange of promises, tender of performance, partial performance etc). However, if the terms of the offer do not delineate the manner of acceptance, it can be tendered in any reasonable manner per R2dK § 30.

**Invitation of Promise OR Performance - R2dK §32 (*Carlill v. Carbolic Smoke Ball)***

In case of doubt, offer invites offeree to accept by

- Promising to perform or
- Rendering performance

**Acceptance by Performance - R2K §54**

*Carlill v. Carbolic Smoke Ball*

Where an offer invites acceptance by performance [unilateral offer], notification of acceptance is not required unless requested by the offer or unless the offeree knows the offeror cannot learn of performance but for notification.

# Enforceability

## Consideration

**R2dK § 71**
**Every contract requires consideration to enforce it and the consideration must be bargained for.**

Sentence Summary (+) - Consideration must be bargained for (sought by both parties) and may consist of a promise, an act, a forbearance, or the creation/modification of a legal relation.

**Forms of consideration:**

i. bargained for performance
ii. bargained for forbearance
iii. bargained for promise to perform
iv. bargained for promise to forbear

**Bargain-Based Contracts**
"Consideration is the bargained-for exchange of promises or performances, and **may consist of a return promise, an act, or a forbearance**."

- Something is bargained for "if it is **sought by the promisor** in exchange for his promise and is given by the promisee in exchange for that promise."

**Two-Part Test for Consideration**: The doctrine of consideration requires that there be some (1) **bargained-for (2) legal benefit** to the **promisor** OR a **(1) bargained-for (2) legal detriment** to the **promisee.**
This consists of two separate inquiries:

1. Was there a bargain on both sides of the exchange? (Did promisor seek it, & did promisee give it as a result?)
    a. The giving up of something of value in exchange for the expectation of receiving something of value – **reciprocal inducement →** Did the promise induce the promisee's behavior, and did the promisee's subsequent behavior induce/activate the promisor's promise?
2. Did the promisor derive a legal benefit from the exchange, or the promisee incur a legal detriment from the exchange? (**Benefit-detriment model of consideration)**

If yes to both, then **there is consideration, and a binding contract.**

***Hamer v. Sidway* – Nephew, Please Stop Gambling – Benefit-detriment model of consideration**

***Kirksey v. Kirksey* - Widow Gifted House – No Consideration, but should have been enforced through Promissory Estoppel**

***Whitten v. Greeley-Shaw* – The Crazy Affair**

***McInerney v. Charter Golf, Inc.* – Lifetime Employment (Policy → We don't like lifetime employment contracts)**

***Barfield v. Commerce Bank, N.A.* - The Racist Bank – Peppercorn Theory**

**The Peppercorn Theory**

Consideration does not need to have a quantifiable financial value in order to be valid. However, to show consideration, there must be a real transaction made in good faith.

## Right to Enter Contract

**42 U.S.C. § 1981 prohibits discrimination** in every phase of a contractual relationship, including initially making the agreement.

- See *Barfield v. Commerce Bank, N.A.*

**42 U.S.C. § 1981**

(a) Statement of equal rights: **All persons** within the jurisdiction of the United States **shall have the same right** in every State and Territory **to make and enforce contracts**…

If you refuse to have a meeting of the minds for provable racist reasons, you will be subject to liability under § 1981. *Barfield v. Commerce Bank, NA*

***Fiege v. Boehm* - Child Support Case – Refraining from Bringing Legal Action**

## Consideration & Contract Modification

When two parties have a valid, consideration-based contract and agree to modify the terms of the original contract, the modified contract is a NEW contract that **must have mutual assent (offer + acceptance) and fresh consideration**. **Fresh consideration is consideration that applies to the modification. R2dK § 73**

Basically, **if you're doing additional duties outside of your contract**, you can argue that you are owed further compensation for those additional duties.

Sentence Summary (+) - Modification of an existing contract requires fresh consideration. (§73 - fresh consideration = if modified performance is different from existing legal duty OR **§89** - Fresh consideration = if modified performance is fair and equitable in view of **unanticipated circumstances** at time contract was made).

**R2dK § 73 Pre-Existing Duty Rule:** A promisee's second promise to do what she has already contracted to do furnishes no extra consideration for the modified contract

*Stilk v. Myrick* – Deserting Pirates + *Alaska Packers Ass'n* – Extortion Fishermen Pre-Existing Duty Rule

**UCC 2-209 & CISG Art. 29** state that no additional consideration is required to modify an existing contract, just **agreement from both parties regarding the modification**

# Other Forms of Enforceable Contracts

## Traditional Bargain-Based Contracts

Enforceable if they meet the traditional bargain-based theory of consideration

### Promises vs Gifts

R2dK § 71: Mere gratuities are unenforceable for lack of consideration. (*Pappas v Bever*)

- Every contract requires consideration to enforce it
- The consideration must be bargained for

## Reliance-Based Contracts: Equitable/Promissory Estoppel (R2dK § 90)

*Ricketts v. Scothorn; Kirksey v. Kirksey, James Baird Co. v. Gimbel Bros., Inc; Drennan v. Star Paving Co.*

Promissory estoppel seeks to protect people from detrimental reliance on a contract (reliance interest).

Reliance is both a substitute for bargain-based consideration AND its own theory of contract

- "We generally judge contracts based on the bargain that was struck, but we also know that we can advance a claim for promissory estoppel as its own cause of action or as a substitute for bargained-for consideration."

Reliance was considered its own cause of action historically – you do not need to pursue it as a substitute for contractual consideration; you can literally just pursue promissory estoppel

- When pursuing under its own theory, **you do NOT have to claim that there was a contract that was breached, you only have to show reliance**

*When is a defendant estopped from raising a "no consideration" defense?*

**1) Equitable Estoppel**

Applicable where there is not a promise but a "**less specific inducement**"

*Ricketts v. Scothorn* – **Grandpa Says "No More Work"**

Implied, deals with representations, **induces reasonable reliance** on the contract

- Reliance damages (ordinarily limit the remedy to the loss suffered in reliance)

**2) Promissory Estoppel**

Applicable where there IS a promise

*Kirksey v. Kirksey, James Baird Co. v. Gimbel Bros., Inc.; Drennan v. Star Paving Co.*

Explicit, requires the existence of a promise, **induces reasonable reliance.**

- Reliance damages (allows an action on the enforceability of the promise to recover the loss suffered in reliance) - sometimes we'll try to do expectation damages

**Promissory Estoppel Elements R2dK § 90**

A (1) promise (thus a contract) which

- (2) the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee (objective test) and
- (3) which does induce such **justifiable** action or forbearance (**JUSTIFIABLE RELIANCE**) (subjective test) is binding if
- (4) injustice can be avoided only by enforcement of the promise (reflects equity).

## Benefit-Based: Unjust Enrichment + Quasi Contract Theory

*Cotnam v. Wisdom, Britton v. Turner, Webb v. McGowin*

Unjust enrichment liability is based on the notion that a party must not unjustly retain a benefit to which it is not entitled – promissory restitution. UNJUST ENRICHMENT IS A SUBSTITUTE FOR CONSIDERATION

- Usually occurs where one party promises to pay for a benefit received, but the promisor backs out & the promise can't be enforced by the bargain-based model (*Mills v. Wyman; Webb v. McGowin*)

**Quantum Meruit:** a legal principle that allows a court to award compensation for services when there is no contract or agreement to specify payment

- Quantum meruit is used **to protect the provider of a service** and ensure that the recipient is not unjustly enriched.

***Britton v. Turner* – Worker Stopped Work – Quantum Meruit**

**Quasi Contract:** A quasi contract creates a contract where none existed to provide a **remedy through reasonable compensation for the services provided.**

***Cotnam v. Wisdom* – Emergency Street Doctor – Quasi Contract**

**Past/Moral Consideration & Unjust Enrichment**

***Mills v. Wyman* - Good Samaritan Case**

**Material benefit rule** **R2dK § 86** → ***Webb v. McGowin*** → One party received a material benefit and promises to pay or should be forced to pay for the benefit

**R2dK § 86:** Promise for Benefit Received - **Exception to Past Consideration – Material benefit rule**
(1) A promise made in recognition of a benefit previously received by the promisor from the promisee is binding to the extent necessary to prevent injustice.

- Allows for enforcement of past consideration when a benefit has been received (**material benefit rule**) to avoid unjust enrichment. (***Webb v. McGowin)***

***Webb v. McGowin* – Guy Fell with Block – Material Benefit Rule**

Sentence Summary (MJS) - Material Benefit Rule - If someone receives a non-gratuitous material benefit from another, then a subsequent promise to compensate that person for rendering the benefit is enforceable.

## Requirement Contracts (UCC 2-306)

*Eastern Air Lines, Inc. v. Gulf Oil Corp*., *Sun Printing & Publishing Assn. v. Remington Paper & Power Co*

A "requirements contract" is a legal agreement where one party (the seller) commits to supplying all the goods or services that another party (the buyer) needs within a specific period, and, in exchange, the buyer agrees to purchase all their required goods or services exclusively from that seller; essentially, the buyer promises to meet all their needs from only one supplier.

Requirement contracts can be binding where the buyer has an operating business. *Eastern Air Lines, Inc. v. Gulf Oil Corp.*

**UCC 2-306 Output, Requirements and Exclusive Dealings**: (1) A term which measures the quantity by the output of the seller or the requirements of the buyer means **such actual output or requirements as may occur in good faith**, except that:

- no quantity unreasonably disproportionate to any stated estimate or, in the absence of a stated estimate,
- to any normal or otherwise comparable prior output or requirements may be tendered or demanded.

(2) A lawful agreement by either the seller or the buyer for exclusive dealing in the kind of goods concerned imposes unless otherwise agreed an obligation by the seller to use best efforts to supply the goods and by the buyer to use best efforts to promote their sale.

Sentence Summary (+) - Good faith quantities are expected in requirements contracts (reasonably proportional to stated estimate or to normal/prior output/requirements), and exclusive dealings for goods impose an obligation for both parties to use their best efforts, per UCC 2-306.

**UCC 2-615 Impracticability Rule:** The doctrine of impracticability is strictly construed to require a showing of great injustice before excusing a party's performance. Therefore, we will not excuse performance on a mere showing of unprofitability.

- **Impracticability for merchants DOES NOT MATTER. Courts generally do NOT care if it's hard for merchants to perform.**

**Remedies for Breach of Requirement Contracts**

Parties typically use clauses to determine the remedy for breach of requirement K:

*More Beneficial to Seller*

1) **Take or Pay Clause** - Requires the buyer to pay for any shortfall, no breach by B if timely payment
2) **Minimum Purchase Requirement** - requires B to purchase a minimum quantity of the product within a year or other specified time period

*More Beneficial to Buyer* (grant a buyer the right to benefit from a lower, third-party price)

3) **Meet-or-Release (MOR) Clause** - must be invoked by B, who must have received TP offer
4) **Most-Favored-Customer (MFC) Clause** - obligates S to extend to B any lower price S charges TP

# UCC - Contract Formation

"A contract is the total legal obligation which results from the parties' agreement."
UCC § 1-201(11)

**In general, courts will always try to find sale of goods contracts enforceable.**

**There is also a general expectation that business people are held to a higher standard of contract formation.**

## Formation in General

**UCC § 2-204**

(1) A contract for sale of goods may be **made in any manner sufficient to show agreement,** including conduct by both parties which recognizes the existence of such a contract.
(2) An agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined.
(3) Even though one or more terms are left open, **a contract for sale does not fail for indefiniteness** if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.

Sentence Summary (+) - Contract can be made in any manner showing agreement by both parties (parties' conduct is sufficient) even if the moment of agreement is undetermined and even if entirety of contract is not agreed upon (some terms can be left open as long as there are terms outlining basis for remedy in case of breach of contract), per UCC 2-204.

# Offer

Under the UCC, the necessary terms of an offer are as follows:

1. The parties to the agreement
2. The subject of the offer
3. The quantity

Unlike the Restatement**, price is not a term that must be specified for an offer to be valid** because the UCC provides gap-filling terms under § 2–305 and 309

# Interpretation

## Battle of the Forms

A battle of the forms arises when two parties to a contract strike a deal with competing boilerplate agreements

**UCC § 2-207. Additional Terms in Acceptance or Confirmation.**

(1) **A definite and seasonable expression of acceptance** or a written confirmation which is sent within a reasonable time **operates as an acceptance** even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

(2) The additional terms in an acceptance become part of the contract if:

1. They are expressly accepted by the offeror; OR
2. **So long as both parties are merchants, automatically** as long as:
    1. The offer does not expressly limit acceptance to the terms of the offer;
    2. The additional terms do not materially alter the contract; and
    3. The offeror does not object to the additional terms

(3) **Knock-Out Rule:** Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act.

**When Both Parties Are Merchants:**

Under the UCC, if the parties are each merchants, there is an assumption that the parties are sophisticated and therefore, any terms or conditions that are added by the offeree become a part of the contract.
This is true, unless one of the following conditions is present:

1. the new terms or conditions fundamentally or materially alter the terms of the offer;
2. the offeror objects to the new terms and conditions within a reasonable amount of time; or
3. the offer specifically limits the offeree's acceptance to the terms and conditions found in the offer.

**When at Least One Party is NOT a Merchant:**
If one or both of the parties in a battle of the forms dispute is not a merchant, then there are different rules that apply, as there is not an assumption of highly sophisticated parties contracting. If there are any terms added in the acceptance, **they are to be considered proposals** and are not a part of the final agreement, **unless agreed to by the offeror**.

# Third Parties

**Intended Beneficiary**
Third-party who is intended to benefit from the contract. A promise made to one for the benefit of another, **he for whose benefit it is made** may bring an action for its breach. **R2dK § 302 (**i.e., a child enrolled in a private school by her parent)

- CAN sue for performance.

If you are the *intended beneficiary* of a contract, you can sue to enforce the contract. *Lawrence v. Fox*

- The court uses **notions of equity** to determine when a third-party can enforce performance. *Seaver v. Ransom*

**Incidental Beneficiary**
Third-party who benefits from the contract unintentionally, (i.e., (law students benefiting from a contract to refurbish the building)

- Can NOT sue for performance.

**R2dK § 302 Intended and Incidental Beneficiaries**

1. Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either:
    1. the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or

2. the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.

If you, a third-party to a contract, promise to make a payment to a promisee's creditor, you may assert any defense against the creditor that you could assert against the promisee. *Rouse v. United States*

**Assignment of Rights and Delegation of Duties**

A transfer of a contract right is called an ***assignment*** of the **right**
A transfer of a contract duty is called a ***delegation*** of the performance of that **duty**

- The **obligor cannot rid itself of a duty merely by making an effective delegation**

**In general**, contracts **MAY** be transferred (assigned or delegated to new parties). (*Macke Co. v. Pizza of Gaithersburg*) **EXCEPTIONS**:

- Contracts for personal services or contracts where *delectus personae* (choice of the person) was important to the bargain may NOT be transferred.
- The court will *probably* not force you to uphold a contract for a sale of goods if you have some SIGNIFICANT conflict/issue with the assignee (*Sally Beauty Co. v. Nexxus Products Co.*).
    - Rule: A contract may not be assigned to a direct competitor or to a wholly-owned subsidiary thereof, without obligee's consent.

**R2dK § 318 & UCC 2-210 Delegation of Performance of Duty**

1. An obligor can properly delegate the performance of his duty to another unless the delegation is **contrary to public policy or the terms of his promise**.
2. Unless otherwise agreed, a promise requires performance by a particular person only to the extent that the obligee **has a substantial interest in having that person perform** or control the acts promised.
3. Unless the obligee agrees otherwise, neither delegation of performance nor a contract to assume the duty made with the obligor by the person delegated discharges any duty or liability of the delegating obligor.

Best Practice? Go back to the drawing board with the new party and create a new contract (novation). **Novation** - complete release of a party from a contract.

***Lawrence v. Fox* – I Gave Your $300 Away – Intended Beneficiary**

***Seaver v. Ransom* – The Shady Judge & the Will – Intended Beneficiary**

***Rouse v. United States* – Bitch Better Have My Money (for the Water Heater) - Delegation of Duties**

***Macke Co. v. Pizza of Gaithersburg, Inc.* – The Vending Machines – Contract Transfer**

***Sally Beauty Co. v. Nexxus Products Co.* – The Direct Competitor (UCC 2-210 + R2dK) – Contract Transfer**
The court will consider notions of equity when applying the Macke rule, even if it's for sale of goods. Judges are gonna do what judges do (this is obviously a sale of goods, but they held it as a service contract to force the outcome they wanted).

**Related**: Mixed Contracts, Gravamen Test, Pre-Dominant Factor Test

### Tests for What Law Applies in "Mixed" Transaction Cases

**"Gravamen" Test**
Looks to whether the part of the transaction upon which P's claim arose involved goods or services. **What is the basis of the lawsuit?** Goods or services?

**"Predominant Factor" Test (Majority Test)]**
Looks to whether the **purpose of the contract** was
(1) for services with goods only incidentally involved (contract with artist for painting) or
(2) for goods with services only incidentally involved (contract to install a sink).

# Interpretation

**Important Cases:** *Frigaliment, Filanto v. Chilewich, Raffles v. Wichelhaus, MCC Ceramica, Thompson v. Libbey, Pacific Gas*

Even though the parties manifest mutual assent to the same words of agreement, there may be no contract because of a **material difference of understanding** as to the terms of the exchange.

## Identifying Terms in Need of Interpretation

### Vague vs. Ambiguous
Related Cases: *Frigaliment, Raffles v. Wichelhaus, Pacific Gas*

**Vague (Broad v. Narrow)**
*Frigaliment Importing Co. v. B.N.C. International Sales Corp.*
- Of uncertain, indefinite, or unclear character or meaning (chicken (young chicken) v. chicken (all chicken))
    - Synonyms: indistinct, indefinite, indeterminate, unclear, ill-defined

**Ambiguous (Two Distinct Meanings)**

*Raffles v. Wichelhaus (Peerless)*

- Open to more than one interpretation; having a double meaning (chicken v. coward)
- Unclear or inexact because a choice between alternatives has not been made
    - synonyms: equivocal, ambivalent, open to debate/argument, arguable, debatable

**Factors to Consider to Resolve Vagueness/Ambiguity**

*Frigaliment Importing Co. v. B.N.C. International Sales Corp.*

1. contract language
2. negotiating history (preliminary negotiations)
3. dictionary meanings
4. industry standards (usage of trade, course of dealings, etc.)
5. language incorporated by reference (i.e., gov't regs)
6. knowledge of parties (i.e. D was new to industry)
7. conduct of parties after making the K
8. maxims of interpretation (e.g., "reasonable construction should be preferred over one that is unreasonable")
9. transactional context (i.e., market prices of the chickens to be supplied)

**Hierarchy of Interpretation:** When they cannot be reasonably construed as consistent with each other, evidence from the parties' **course of performance** of the contract (here, the "pants" contract) takes precedence over evidence from the parties' **course of dealing** (here, the earlier "shirts" contract), which in turn takes precedence over evidence from **usage of trade** ("the general understanding of the industry"). – **MINI BAR QUESTION**

# Interpreting Terms

## Common Law Rules for Interpretation

**R2K § 20 - Effect of Misunderstanding**

Codified *Raffles v. Wichelhaus*

(1) There is NO manifestation of mutual assent to an exchange if the parties attach materially different meanings to their manifestations AND

(a) Neither party knows or has reason to know the meaning attached by the other, OR

(b) Each party knows or has reason to know the meaning attached by the other

(2) The manifestations of the parties are operative in accordance with the meaning attached to them by one of the parties IF

(a) That party does not know of any different meaning attached by the other and the other knows the meaning attached by the first party, OR

(b) That party has no reason to know of any different meaning attached by the other AND the other has reason to know the meaning attached by the first

**R2K § 20 Explained**

If Party 1 and Party 2 attach material different meanings to their manifestations:

**No mutual assent** if:

1) P1 and P2 don't know/don't have reason to know each other's meanings **(ex. *Raffles v. W)***
2) P1 and P2 do know/have reason to know each other's meanings

**Mutual assent** if **unilateral mistake:**

1) P1 doesn't know P2's meaning, but P2 knows P1's meaning
    a) P1's meaning is operative
2) P1 has no reason to know P2's meaning, but P2 has reason to know of P1's meaning
    a) P1's meaning is operative

# Parol Evidence Rule R2dK § 213 & UCC 2-202

*Important Cases*: *Raffles v. Wichelhaus; Thompson v. Libbey; Pacific Gas*

**CISG does NOT follow the PER** (Art. 8)

The Parol Evidence Rule bars extrinsic evidence of prior or contemporaneous oral/written agreements that contradict or create a variation of a WRITTEN agreement that the parties intended to be completely integrated

**General Rule (R2dK § 213):** Parol evidence is **inadmissible to contradict, vary, or supplement** the terms of a **fully integrated** written contract → "Nothing outside the four corners of the document that should amend or modify the terms will be admitted into evidence"

**Fully Integrated Contract**: A fully-integrated contract contains all the terms and provisions intended to be included in the **complete** and **exclusive** agreement between the parties **R2dK § 210(1)** → VERY helpful if there is a **merger clause**

- NO parol evidence, either conflicting OR supplementary, is admissible

**Partially Integrated** - Written agreement is meant to be final, but does not include all necessary terms

- **Supplementary terms CAN be admitted** but conflicting prior or contemporaneous terms are to be excluded.

**UCC 2-202: Parol Evidence Rule**
A binding integrated agreement **MAY NOT be contradicted by evidence** of any prior agreement or of a contemporaneous oral agreement **but may be explained or supplemented by:**

1. Course of dealing or usage of trade (**§ 2-205**) or by course of performance (**§ 2-208**); and
2. Evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement

When they cannot be reasonably construed as consistent with each other, evidence from the parties' **course of performance** of the contract (here, the "pants" contract) takes precedence over evidence from the parties' **course of dealing** (here, the earlier "shirts" contract), which in turn takes precedence over evidence from **usage of trade** ("the general understanding of the industry"). – **MINI BAR QUESTION**

**Exceptions to the PER (Under R2dK & UCC)**

1. **To resolve the meaning of a vague or ambiguous term (***Raffles v. Wichelhaus*)
2. **Partially integrated agreements:** Extrinsic evidence may be admitted for the purpose of **gap-filling / supplementing** the agreement, but never to undermine the agreement
3. **Validity/Legality Defenses:** Evidence showing that the contract is **invalid/illegal** is admissible
    1. Fraud, duress, lack of consideration, mistake (esp. mutual), unconscionability
4. **Names/Subject Matter:** Extrinsic evidence admissible to identify parties or subject matter (e.g., name changes)
5. **Trade usage/Customs:** extrinsic evidence is admissible to establish existence of trade customs (e.g., fuel freighting in ***Eastern v. Gulf***); trade usage is also permitted to **supplement** the express terms of the contract under the UCC
6. **Future Contracts:** Independent contracts made subsequent to the writing

Of course, courts will construe the PER as broadly or as narrowly as they like to avoid what they consider to be injustice in any given case.

| Judge Ruling on Contract | Judge Ruling on Term | Parol Evidence Admissibility |
|---|---|---|
| Totally Integrated | Contrary Additional Term | Parol Evidence is *not* admissible |
| Totally Integrated | Consistent Additional Term | Parol Evidence is *not* admissible |
| Partially Integrated | Contrary Additional Term | Parol Evidence is *not* admissible |
| Partially Integrated | Consistent Additional Term | Parol Evidence *is* admissible |

## Agreement Integration

### R2dK § 209 - Integrated Agreements

(1) An integrated agreement is a writing or writings constituting a **final expression** of one or more terms of an agreement.

(2) Whether there is an integrated agreement is to be **determined by the court as a question preliminary** to application of PER

(3) Where the parties reduce an agreement to a writing which in view of its completeness and specificity reasonably appears to be a complete agreement, **it is taken to be an integrated agreement** unless it is established by other evidence that the writing did not constitute a final expression.

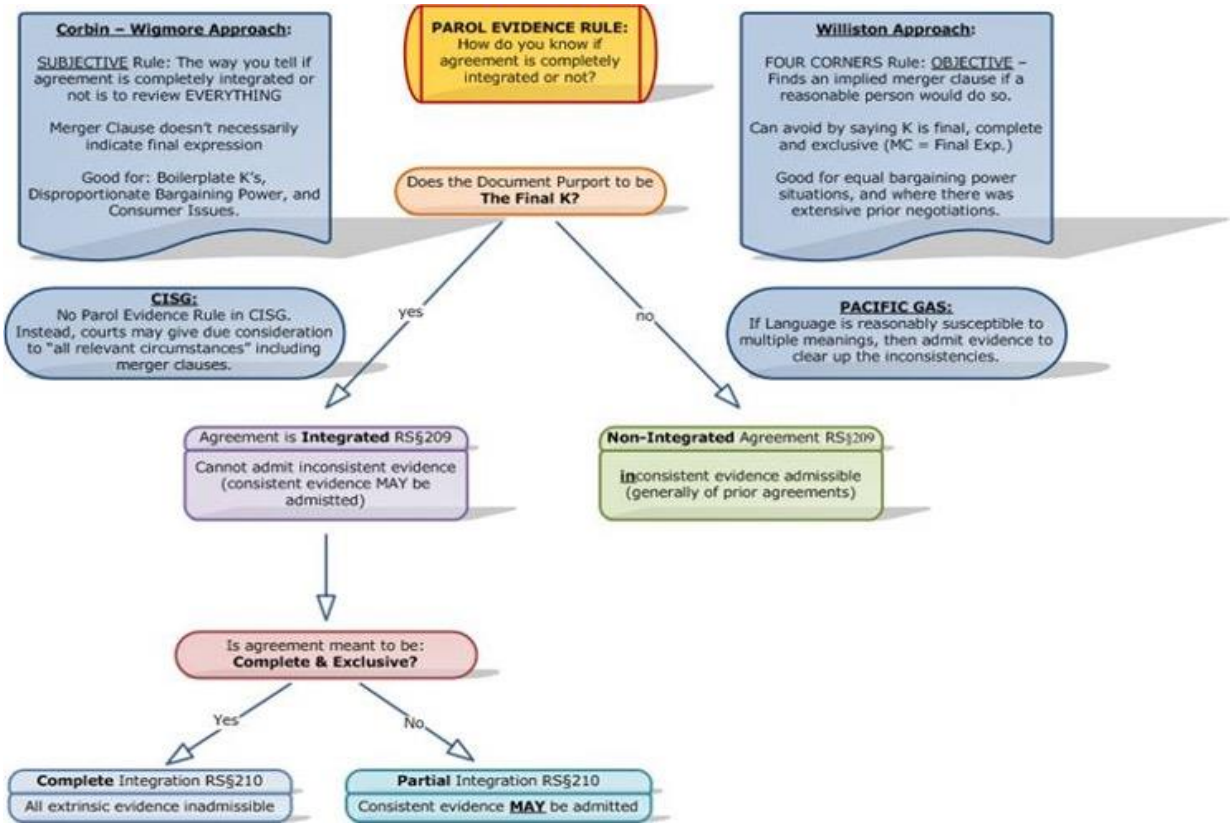
### R2dK § 210(1) - Completely Integrated Agreements

"A completely integrated agreement is an integrated agreement adopted by the parties as a **complete** and **exclusive** statement of the terms of the agreement."

Sentence Summary (1+2) (MJS) - Court decides whether contract is fully integrated before applying PER. If not integrated at all, PER does not apply. If fully integrated, no parol evidence is admissible, with some limited exceptions. If partially integrated, allows for extrinsic/oral evidence that explains or supplements the meaning of existing terms (cannot undermine written agreement) – may supplement w/course of dealing/usage of trade/ evidence of consistent addtl. terms per UCC 2-202.

May we consider extrinsic evidence on the question of whether agreement was completely integrated? Depends:

- Hardline Rule is NO as this would evade the parol evidence rule.
- In practice, maybe to interpret ambiguous terms (*Raffles v. Wichelhaus*)




## R2dK § 213 - Parol Evidence Rule

1. Any past contracts that are **inconsistent** with the **fully integrated contract** are not effective anymore
2. Any past contract that **deals with the same issues/subject matter** of the **fully integrated contract** is not effective anymore

**Related Cases**

***Raffles v. Wichelhaus – Peerless* – PER & Latent/Hidden Ambiguity**

**Rule:** Because there was a **latent, or hidden, ambiguity** in the contract terms, **parol evidence is admissible** to determine the meaning of the term to each party.

***Thompson v. Libbey* – The Log Quality Warranty - Traditional Approach to PER**

**Rule**: Parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument

**EXCEPTION TO PER**

***Pacific Gas and Electric Co. v. G.W. Thomas Drayage & Rigging Co.***

Where meaning is not clear, it may be necessary to consider external evidence in spite of the parol evidence rule.
**Rule:** If a court decides that the language of a contract, in the light of the circumstances, is fairly susceptible to two interpretations, extrinsic evidence relevant to prove either of such meanings is admissible (*Pacific Gas*).

**CISG + PER**
***Filanto, S.p.A v. Chilewich International Corp.* – Italian Shoes – Silence + the CISG + No Parol Evidence Rule**

***MCC v. D'Agostino* – No Parol Evidence Rule in the CISG**

**Art. 8 CISG**
(3) In determining the intent of a party or the understanding a reasonable person would have had, **due consideration is to be given to all relevant circumstances of the case** including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

# Filling Contractual Gaps

**Default rules:** rules that will govern the contract unless parties specifically "contract around" them → These fill the gaps in contracts that the parties themselves do not fill

- Some default rules can be thought of as **"penalty" default rules** to force the parties to do their own negotiating to avoid the court implying a default rule that goes against what both parties ***actually*** want

**Mandatory/immutable rules:** rules that cannot be altered or contracted around by parties

- An example is the rule prohibiting the enforcement of contracts that violate public policy (**R2dK § 178**)

**Implied Terms** → The court can choose to imply terms based on either the actual intention of the parties OR by using basic principles of justice to select the implied contract terms

***Wood v. Lady Duff-Gordon* – 1900s Influencer – Implied Promise**
**Rule:** Courts may imply terms (here, to "give best efforts") that are not explicitly mentioned in the contract.

Today, **R2dK § 77** states: The agreement for **exclusive dealing** imposes an obligation on A **to use best efforts** to promote sale of the goods and on B to use best efforts to supply them.

**Specificity/Certainty Required of Contract Terms**
**R2dK § 33: Certainty**

1. Even though a manifestation of intention is intended to be understood as an offer, it cannot be accepted so as to form a contract unless the terms of the contract are reasonably certain.
   **a. Parties, Subject of offer, Quantity, and Price**
2. The terms of a contract are reasonably certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy.
3. The fact that one or more terms of a proposed bargain are left open or uncertain **may show that a manifestation of intention is not intended to be understood as an offer** or as an acceptance.

Sentence Summary (MJS +) (Hold deals together when merchants make deals) – Reasonably certain terms are required to constitute a contract and are present in a contract when they provide a basis for determining the existence of a breach and for providing an appropriate remedy. (When ambiguous terms are present, it may show that the manifestation of intention is not intended to be understood as an offer or an acceptance)

**R2dK § 204 Supplying an Omitted Essential Term – GAP-FILLING**
When the parties to a bargain sufficiently defined to be a contract have not agreed with respect to a term which is essential to a determination of their rights and duties**, a term which is reasonable in the circumstances is supplied by the court.**

**UCC § 2-204. Formation in General.**
(3) **Even though one or more terms are left open, a contract for sale does not fail for indefiniteness if the parties have intended to make a contract** and there is a reasonably certain basis for giving an appropriate remedy.

***Sun Printing v. Remington Paper Co.* – No Time Terms, No Good**

**UCC § 2-309** addresses the above issue today: "The time for shipment or delivery or any other action under a contract if not provided in this Article or agreed upon shall be a reasonable time."

## Duty of Good Faith & Fair Dealing (R2dK & UCC)

**R2dK § 205 Duty of Good Faith and Fair Dealing**
Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.

**Good Faith Obligation**
Related: *Eastern Air Lines, Inc. v. Gulf Oil Corp.*
**§1-201:** "Good faith," except as otherwise provided in Article 5, means honesty in fact and the observance of reasonable commercial standards of fair dealing.

**§1-304:** Every contract or duty within the Uniform Commercial Code imposes an obligation of good faith in its performance and enforcement.

**UCC § 2-306. Output, Requirements and Exclusive Dealings.**
(2) A lawful agreement by either the seller or the buyer for **exclusive dealing** imposes an obligation on both parties to use their **best efforts.**

**UCC Gap Filling Sections**
§2-309: Absence of Specific Time Provisions; Notice of Termination
§2-305: Open Price Term
§2-308: Absence of Specified Place for Delivery
§2-310: Open Time for Payment or Running of Credit; Authority to Ship Under Reservation

# Performance/Breach

# Performance

## Conditions

Related: *Luttinger v. Rosen, Howard v. Federal Crop Ins. Corp., Kingston v. Preston*

**The condition itself is not the contract, it is what must be fulfilled for the contract to take place. If no condition takes place, no contract.**

**R2K § 224 - Condition**
A condition is "an event, not certain to occur, which must occur, unless occurrence is excused, before performance under a contract becomes due."
**Reworded**: Some uncertain event that will trigger a duty that does not exist right now.
**Pro Tip:** Paraphrase the language to see if it is a promise or a condition – if there is an "uncertain event" which must occur for a duty to be triggered, it is a condition and NOT a current promissory obligation

**Creation of Condition**
**Express Condition:** Parties intended that it should be a condition and said so in words.

**Implied Condition** *(Taylor v. Caldwell):* Parties intended it to be a condition, the intention being reasonably inferable from conduct.

**Constructive Condition (Condition Implied by Law):** The court believes that the parties would have intended it to operate as a condition if they had thought about it, OR that justice requires that it should so operate.

**Operation of Condition**

**Conditions Precedent**

*Luttinger v. Rosen; Kingston v. Preston*

An operative fact that must exist **prior to the existence** of some legal relationship. An event which the parties stipulate must take place before there is a right to performance – **triggers contractual obligations**

The condition must be satisfied in order for the other party's obligation to be activated. If it is not, the other party's **performance is excused & there are no damages** because the contract doesn't exist

**Conditions Subsequent**

An operative fact that **causes the termination** of some previous legal relationship. "I will rent to you until and unless there is a dog on the property."

The contract is active **but can be rescinded at the moment that the condition is met.**

**Conditions Concurrent**

Where performances of two parties are required to be concurrent in time and neither party can be charged with a breach until after a tender of a performance by the other, both promises are dependent and the conditions are concurrent.

## Conditions vs. Promises

**Promise**

*Howard v. Federal Crop Ins. Corp.*

**Purpose**: The creation of some duty or disability in the promisor

**Fulfillment**: Discharges a duty

**Non-Satisfaction:** The non-performance of a promise is a **breach**, which can result in liability for damages AND the other party will still have a duty to perform if breach is not material

**R2dK § 261 - Interpretation of Doubtful Words as Promise or Condition**

**1. Where it is doubtful** whether words create a promise or an express condition, **they are interpreted as creating a promise** (*See Howard v. Federal Crop Ins. Corp.)*

2. In resolving doubts as to whether an event is made a condition of an obligor's duty, and as to the nature of such an event, an interpretation is preferred that will reduce the obligee's risk of forfeiture.

Sentence Summary (+) - Ambiguous/vague terms will be construed as a promise instead of a condition to avoid forfeiture. (*Howard v FCIC)*

**Condition**

*Luttinger v. Rosen; Kingston v. Preston*

**Purpose**: The postponement of an instant duty (or specified legal relation)
**Occurrence**: Creates a duty
**Non-Satisfaction:** May result in NO duty to perform, and NO damages in liability

## Excusing Conditions

If a condition is excused/waived, performance becomes due even though the condition has not occurred either at all or within the required time.

**Excuse by Waiver**

*Clark v. West*

If, after a contract is made, the obligor promised to perform despite the nonoccurrence of the condition or despite a delay in its occurrence, the condition may be excused.

## Waiver vs Estoppel vs Modification

**Waiver**

*Clark v. West*

The intentional (voluntary) relinquishment of a party's known right (may be implied in fact by parties' conduct)

- Does not require reliance
- Can be unilateral
- May be revoked under R2dK § 224 or UCC §2-209(5) if:
    - there's still a reasonable time left to make the waived condition happen,
    - there hasn't been material reliance on the waiver,
    - the waiver is not otherwise binding (i.e. supported by *consideration*)

**Equitable estoppel or estoppel in pais**

Where A's conduct (or language) induces reasonable reliance, A is precluded from later taking an inconsistent position

- Requires reliance
- Requires something of both parties (action by one party, reasonable reliance by other)

**Modification**

Essentially, a new contract

- Requires consideration
- Requires an agreement
- May NOT be unilaterally retracted

# Breach

A failure to perform is a breach IF:

- Promisor is under absolute duty to perform (aka no defenses)
- Its duty to perform has not been discharged

Non-breaching party must show that, but for the breaching party's failure to perform, they are willing and able to perform.

A MATERIAL BREACH excuses the non-breaching party from performance (***Shah v. Cover-It, Inc.)***, and the party may immediately sue for breach.

## Responses to Breach

No Breach - I complied.
No Breach - I was excused.
No Breach - I was justified.
No Breach - My duty was terminated.
I breached, but you have no damages or your damages are less than you claim.

## Substantial Performance vs Material Breach

Restatement does NOT have UCC's Perfect Tender Rule

### Minor Breach (Substantial Performance)

A common law doctrine that allows a party to recover damages if they have "substantially performed" their duties under a contract, even if they didn't comply with all terms, as long as the deviation from the agreed-upon terms is "immaterial"

***Jacob & Youngs, Inc. v. Kent*** **- The Pipes**

**Rule: Are you operating in good faith (willful v. innocent breach) & did your performance substantially satisfy the PURPOSES of the contract (substantial perform. v. material breach)?**

How can you tell whether a party has performed or breached its Contract?

1) First ask, was performance substantial?
   - Look at what was bargained for, try the *Embry* test! (What would a reasonable person consider to be the purpose of the contract?)
   - Did your performance substantially satisfy the PURPOSES of the contract?

2) Next, if performance was substantial ask, was the breach willful?
   - Yes = cost of completion remedy should be awarded, regardless of hardship, because "the willful transgressor must accept the penalty of his transgression."
   - No = cost of completion remedy should still be awarded unless it is "grossly and unfairly out of proportion to the good to be attained," as in *Jacob & Youngs*

## Anticipatory Repudiation - *Hochster v. De La Tour – The 1800s Footman*

An **anticipatory repudiation/breach** is when a party refuses to perform its duty BEFORE the time for performance has arrived. An anticipatory breach **discharges any remaining duties of the injured party,** and the nonbreaching party may treat breach as material and can **sue immediately** for damages

- Courts find continuing is a failure of duty to mitigate
- UCC permits completing manufacture of goods

R2dK § 251/UCC §2-610: **(Anticipatory Repudiation)** (Despite perfect tender rule, keep deals together) -

Once a breaching party/ potentially breaching party shows that they are not going to be able to meet contract, the non-breaching party can (a) seek remedy for breach, (b) or suspend their own performance and seek remedy or (c) await performance by repudiating party for a commercially reasonable time.

## Material Breach - *Shah v. Cover-It, Inc.*

When promisee does not receive substantial performance or benefit of the bargain.

- Promisee **may treat contract as at end** (a material breach excuses the other party's remaining performance, *Shah v. Cover-It, Inc.*) and has immediate right to all remedies for breach of the entire contract

A **material breach** is a breach that goes to the very substance or root of the contract, rather than to a subordinate or incidental matter

**R2dK § 241 Material Breach**

In determining whether a failure to render or to offer performance is material, the following circumstances are significant:

1. **the extent to which the injured party will be deprived of the benefit** which he reasonably expected;
2. the extent to which the **injured party can be adequately compensated** for the part of that benefit of which he will be deprived;
3. the extent to which **the party failing to perform will suffer forfeiture**;
4. the likelihood that the party failing to perform or to offer to perform **will cure his failure**, taking account of all the circumstances including any reasonable assurances;
5. the extent to which the behavior of the party failing to perform **comports with standards of good faith** and fair dealing.

**R2K § 237 - Effect on Other Party's Duties of a Failure to Render Performance**
**Except as stated in § 240, a party is not required to render performance in a bilateral contract if the other party has a previous "uncured material failure to render its performance [i.e., breach]" –** A MATERIAL BREACH EXCUSES PERFORMANCE (***Shah v. Cover-It, Inc.)***

***Walker & Co. v. Harrison* – The Tomatoed Billboard – R2dK § 241 (Material Breach)**
A party may only suspend performance or terminate the contract if the breach is **MATERIAL**, and the injured party risks that a court may later find the breach to be immaterial, meaning the repudiator himself may become guilty of a material breach for suspending performance

When a breach occurs but is not material, we say that the breaching party has rendered "substantial performance." **The other party can then sue over the breach but CANNOT withhold its own remaining performance.**

**R2K § 240 - Part Performances as Agreed Equivalents**
If the performances to be exchanged under an exchange of promises can be apportioned into corresponding pairs of part performances so that the parts of each pair are properly regarded as agreed equivalents, a party's performance of his part of such a pair has the same effect on the other's duties to render performance of the agreed equivalent as it would have if only that pair of performances had been promised.
**Material Breach of a Divisible Contract**: **Recovery is available for substantial performance of a divisible part even though there has been a breach of the entire contract**

**Adequate Assurance of Performance**
To avoid the risk of refusing performance in response to a perceived breach and being wrong about the breach, a party that has **reasonable grounds for insecurity** has the **right to demand adequate assurance that performance will be forthcoming and suspend performance until they receive the assurance. UCC § 2-609 & R2dK § 251**

If a potentially-breaching party fails to respond to a demand for adequate assurance ***within 30 days,*** they will be said to have **repudiated the contract**

***AMF, Inc. v. McDonald's Corp.* – The Shitty Prototype**

Sentence Summary (MJS) - A party that has a reasonable justification for insecurity with respect to the other party's capacity to effectively perform may demand satisfactory confirmation of execution by the other party and, if sufficient affirmation is not given, may treat the contact as at an end. (To prevent contractual obligations from stopping flow of commerce due to unfair actions of one party).

# Performance/Breach under UCC

## UCC § 2-601 - Perfect Tender Rule

There is NO substantial performance under the UCC.

In a contract for the sale of goods, if the goods fail to conform exactly to the description in the contract the buyer may accept the goods, or reject the goods, or reject the nonconforming part of the tender and accept the conforming part.

HOWEVER, the UCC has modified the perfect tender rule. *Ramirez v. Autosport*

The harshness of the perfect tender rule is mitigated by **balancing the interests** of the buyer and seller through provisions for revocation of acceptance and cure (§2-508).

*How do the provisions for revocation of acceptance and cure modify the perfect tender rule?*

If buyer rejects the goods **WITHIN the time set for performance**:

- The buyer may reject goods for **any** nonconformity. [§2-601]
- However, the buyer's rejection does not discharge the K, as **seller has a right to cure** within the time set for performance in the K. [§2-508]

If buyer rejects the goods BUT **AFTER the time set for performance**:

- The seller has a further reasonable **time to cure** if he reasonably believed that the goods would be acceptable. [§2-508(2)].

*What happens if seller doesn't cure? Buyer may cancel the contract per § 2-711 & 2-106.*

If buyer revokes the acceptance of the goods AFTER A PRIOR ACCEPTANCE:

- The buyer may revoke acceptance ONLY IF the nonconformity **substantially impairs** the value of the goods to him. [§2-608].

- Protects the seller from revocation for trivial defects, and prevents the buyer from taking advantage of the seller by allowing goods to depreciate and then returning them because of asserted minor defects.

**Cancellation vs. Termination - UCC § 2-106**

**"Termination"** occurs when a party puts an end to the contract. All obligations that are still executory (not yet performed; i.e., future obligations) on both sides are discharged, but any right based on prior breach or performance survives. *Ramirez v. Autosport*

**"Cancellation"** occurs when a party puts an end to the contract and it is the same as termination except the canceling party also retains any remedy for breach of the whole contract or any unperformed balance.

Cancellation preserves the right to sue for total breach, while termination discharges executory duties and only preserves rights for past breach.

# Damages

**NO PUNITIVE DAMAGES in Contracts – only equitable compensatory damages**

Important Cases: *Hawkins v. McGee*
The measure adopted by the court awards the difference between what was received and what was promised (i.e., the value of the unperformed promise) – **EXPECTATION INTEREST**. Any additional amount (e.g., the cost of the operation) would overcompensate Hawkins. If the operation had been successful, Hawkins would have had to pay the cost of the operation.
What "interest" would award the cost of the operation?
The "restitution" and "reliance" interests.

**Courts only want to confer the benefit of the bargain**. However, different courts will do different things.

# Remedies

The purpose of contract remedies is **to make the injured party "whole" by putting them in the same position they would have been in if the contract had been fulfilled properly**.
HOWEVER, it is a fundamental tenet of contract law that damages are not meant to punish parties for breaching (see *Alpattah Services, Inc. v. Exxon Corp).*

## Types of Remedies

**Property Rule (Specific Performance)**
Specific performance is an **EQUITABLE REMEDY** that forces the promisor to give the promisee the very thing he bargained for.

- This is referred to as specific relief because the injured party gets exactly what he contracted for.
- Compels the promisor to performance, which is not always possible.
- Usually for contracts for land or works of art
    - Because land & art are unique or limited edition.
    - We NEVER DO SPECIFIC PERFORMANCE FOR SERVICES, only goods.

**According to UCC 2-716, "Specific performance may be decreed where goods are unique or in other proper circumstances."**

**Liability Rule (Substitutionary Relief)** – *Hawkins v. McGee*
Awards monetary damages for the value of the promised performance.

- This is referred to as substitutionary relief and, rather than giving the promisee what was promised, it awards (or attempts to award) the next best thing: the value of the promise.
- It asks, in other words, how much the promise is worth, and awards this instead of compelling the promisor to perform.

## Forms of Substitutionary Relief (Liability Rule)
Aims to satisfy the Interests of the Promisee - **R2K §344 & Article 2 of the UCC**

**Substitutionary Relief Rule Statement:** "Substitutionary relief awards monetary damages for the value of the promised performance, and it seeks to satisfy one of three interests of the promisee: his expectation interest, reliance interest, or restitution interest. Expectation interest is by far the most common basis for contract damages, and reliance and restitution damages are only considered when the expectation damages are for some reason inapplicable or insufficient (as in *Sullivan v. O'Connor* and *Bush v. Canfield*). The expectation interest seeks to give the party the benefit of his bargain by putting him in as good a position as he would have been if the contract had been performed, per R2dk § 347 0R **UCC Article 2**. The reliance interest seeks to reimburse the injured party for loss caused by reliance on the contract by putting the party in as good a position as he would have been had the contract not been made, per R2dK § 349 0R **UCC Article 2**. Finally, the restitution interest seeks to restore to the injured party any benefit that he has conferred on the other party without payment, per R2dK § 373 0R **UCC Article 2**."

**You can ONLY award one type of liability remedy: either expectation OR reliance OR restitution damages.**

**On exams, you will try to find the MOST fair remedy out of these three, and then say "This is what I would do, but a court may do something else if they like Efficient Breach Theory or have differing economic views."**

**Expectation Interest R2dK § 347** (to put in the position of if the full performance was made)
Promisee's interest in having the benefit of his bargain by being put in as good a position as he would have been if the contract had been performed.

- Attempts to give the injured party the **benefit of the bargain**
- Recognizes lost profit - Not based on the injured party's "hopes" but on the actual value that the contract would have had if it had been performed
- Based on the market at the time for performance, NOT at the making of the contract

## Calculating Expectation Damages - R2K § 347 (*Hawkins v. McGee)*

The injured party has a right to damages based on his **expectation interest** as measured by:

(a) the loss in the value to him of the other party's performance caused by its failure or deficiency, plus
(b) any other loss, including incidental or consequential loss, caused by the breach less
(c) any cost or other loss that he has avoided by not having to perform.

**Incidental damages § 347**: direct costs incurred by the non-breaching party to mitigate the effects of the breach, such as costs to obtain substitionary performance

**Consequential damages § 351**: more indirect and arise from the unique/special circumstances of the breach, often including lost profits. **Must be foreseeable** (*Haxley v. Baxendale*)

- Essentially, consequential damages are the "consequences" of the breach *beyond the immediate loss*, while incidental damages are the costs associated with dealing with the breach itself

All losses are recoverable, but **we do not overcompensate or punish.**

**GENERAL MEASURE OF EXPECTATION DAMAGES** = LOSS IN VALUE (of performance) + OTHER LOSS (incidental or consequential) – COST AVOIDED – LOSS AVOIDED

**Reliance Interest R2dK § 349** (to put into the position from before the contract was made)
*(Promissory and Equitable Estoppel)*
Promisee's interest in being reimbursed for loss caused by reliance on the contract by being put in as good a position as he would have been had the contract not been made.

- Expenses incurred by preparing to perform
- Does not recognize foregoing other opportunities to make this contract, because that damage would be very difficult if not impossible to calculate

***Sullivan v. O'Connor* – Celebrity's Botched Nose Job**

**Reliance Formula:** What non-breaching party gave in reliance on the breaching party's promise **minus** what non-breaching party received in reliance on the breaching party's promise

**Restitution Interest R2dK § 373** (to compensate for benefits conferred on the other party without payment)
Promisee's interest in having restored to him any benefit that he has conferred on the other party.

- Prevents unjust enrichment
- When an injured party has conferred some benefit like payment or services.
- Includes neither lost profit nor expenditure in reliance that did not confer benefit to the other party

***Bush v. Canfield* – The Advance Pay + Non-Delivery of Flour** - *(Unjust Enrichment)*

# Unjust Enrichment

To find unjust enrichment there must be one who

- without intent to act gratuitously,
- confers a measurable benefit upon another, and
- is entitled to restitution.

He will be entitled to restitution, if he

- affords the other an opportunity to decline the benefit , OR
- has a reasonable excuse for failing to do so.

## Material Benefit Rule - R2dK § 86

If someone receives a non-gratuitous material benefit from another, then a subsequent promise to compensate that person for rendering the benefit is enforceable.

**Restitution Formula:** Non-breaching party receives the reasonable value of the benefit she conferred on defendant **minus** what non-breaching party already recovered (if anything) for conferring that benefit

# UCC Damages Rules

*Neri v. Retail Marine Corp.*, *Tongish v. Thomas (Decatur)*

## Seller's Remedies under the UCC

*Neri v. Retail Marine Corp*.

**UCC 2-703**

§703(1): Defines repudiation as breach, and
§703(2): Describes the seller's **EXPECTATION** remedies in case of a breach, §703(2). These include the right to:

(1) Resell and recover damages under Section 2–706;
  (a) **2-706 Formula**: Resale price – [K price + incidentals] – expenses saved in consequence of buyer's breach
  **(b) Hence, when seller resells, damages are to be calculated under §706, using the smaller "resale - contract price" differential. When buyer repudiates & seller does NOT resell, 2-708 is applicable (which is generally larger damages)**
(2) Recover damages for . . . repudiation under Section 2–708(1) when seller does NOT resell;
(3) Recover lost profits under Section 2–708(2) (**Lost Volume Seller**)

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

(1) **Usual Seller's Remedies for Buyer Repudiation: [2-708(1)] = Mkt price @ time of tender - [unpaid K price + incidentals] – expenses saved by buyer's breach**

(2) **LOST VOLUME SELLER PROVISION:** If the measure of damages provided in subsection (1) is **inadequate to put the seller in as good a position as performance would have done** then the measure of damages is **the profit** (including reasonable overhead) which the seller would have made from full performance by the buyer, **together with any incidental damages**

- **Lost volume seller:** a seller with a virtually unlimited inventory – there is not a "finite" supply, you could go get another boat and sell it to someone else, but you LOST A SALE because of the buyer's breach

**Lost Volume Seller's Remedies [2-708(2)] =** Profit should have received from buyer + incidental damages

**UCC §2-718 – Buyer's Restitution (after His Breach)**

The buyer, despite his breach, may have restitution of the amount by which his payment exceeds: reasonable liquidated damages stipulated on the contract, or absent such stipulation, 20% of the value of the buyer's total performance or $500, whichever is smaller.

- *Neri v. Retail Marine Corp.* → "Neri is entitled to recover his deposit of $4,250 less an offset to Retail amounting to $3,253 ($2,579 in lost profits and $674 in reasonable incidental damages for storage and upkeep costs, finance charges, and insurance)

*Neri v. Retail Marine Corp.*
The Neris, despite their breach, were entitled to restitution. Likewise, Retail Marine was entitled to damages in the form of lost profits and any incidental expenses stemming from the breach as a lost volume seller. Retail Marine would have been unjustly enriched had it kept the entire $4250 deposit, as it never actually delivered the boat and did not incur that much in total damages.

2-708(2) Retail is thus entitled to **expectation interest** of $2,579 (profit) + $674 (expenses) = $3,253
2-718 Neri is thus entitled to **restitution interest** of $4,250 (deposit) - $3,253 (for D) = $997

## Buyer's Remedies under the UCC

*Tongish v. Thomas – The Shady Farmer who Tried Efficient Breach*
Plaintiff breached his contract to sell seeds to Decator Co-Op in order to sell them for double the price to a different seller. Initially, the court awarded Decatur its expectation damages, but the higher court ordered that the damages should be calculated under UCC 2-713, which operates as an implied liquidated-damages clause to deter sellers from breaching a contract if the market price goes up, essentially making Tongish give up the gain he made from breaching the Decatur K, which was $5,100.

**UCC § 2-711 Buyer's Remedies in General**
When the seller fails to make delivery or repudiates OR the buyer rightfully rejects or justifiably revokes acceptance, the buyer may recover damages for:

(a) "cover price" (if someone does not deliver the goods you needed and you have to buy replacement goods) as provided in § 2-712
(b) recover damages for non-delivery as provided in § 2-713 **when buyer does NOT cover**

**UCC § 2-712. "Cover"; Buyer's Procurement of Substitute Goods. – TYPICAL BUYER'S REMEDIES**
The buyer may recover from the seller as cover damages:

[Cover Price (CP) – K price] + [Incidental Damages (ID) + Consequential Damages (CD)] – Expenses Saved because of seller's breach → Failure to Cover does not bar buyer from other remedies

**UCC § 2-713. Buyer's Damages for Non-delivery or Repudiation.**
The buyer may recover from the seller when seller does not deliver or repudiates the K AND **buyer does not cover the goods:**

[Mkt price @ time of tender – K price] + [Incidental Damages (ID) + Consequential Damages (CD)] – Expenses Saved because of seller's breach

§ 2-713 can operate as an implied liquidated-damages clause **to deter sellers from breaching a contract if the market price goes up**. **As the more specific section, § 2-713 prevails over § 1-106 if a buyer chooses to use it.**

## Efficient Breach

*Peevyhouse v. Garland Coal Mining Co. – The Shady Coal Mine; Tongish v. Thomas – The Shady Farmer* (Court did NOT allow efficient breach in this case)

The Perfect Contract = Transfers resources to efficient use with minimum transaction costs + The Coasian theorem (free market/open bargaining) + no contracting disruptions (duress, undue influence, etc.)

- When a contract doesn't do these things, it should be void by public policy or BREACHED according to efficient breach theory

**Efficient Breach Rule Statement:** "Efficient breach theory essentially not only allows but encourages parties to breach agreements that are economically inefficient. The theory promotes efficiency by incentivizing sellers to make wealth-enhancing second transfers, thus moving goods to higher-valued uses, which ultimately benefits the economy. And, under the efficient breach theory, the non-breaching party is compensated for his expectation interests (but not for the breaching party's gain as in *Tongish*), and can then use the money to buy goods in open market, allowing the flow of commerce to continue.

*Peevyhouse v. Garland Coal Mining Co. – The Shady Coal Mine*
**R2dK § 348 Rule**: Damages awarded for breach of an agreement to perform remedial work on property should **normally be measured by the reasonable cost of performance of the work**, but if the contract provision breached is (1) **merely incidental** to the main purpose in view and if the economic benefit that would result to the owner from full performance is (2) **grossly disproportionate to the cost of performance**, damages should instead **be limited to the diminution in value** resulting to the premises because of the nonperformance.
**Conclusion**: Similar to *Tongish*, where it was economically inefficient for the farmer to sell the seeds at a lower price but the court held Tongish to the contract. For Garland, it was economically inefficient for the coal mining company to fix the land, so the court didn't make them do that. For *Peevyhouse*, the court awarded what it thought the expectation damages were, which was $300.

**Efficient Breach Theory** (*Tongish v. Thomas; Peevyhouse v. Garland*)
Question: Should "A" Breach?
Answer: Theory answers "yes." Why?
Reasons:

- Breaching party "A" is better off than it was before.
- Random third party "C" is better off than it was before.
- Society is better off (because "A" and "C" are better off) than it was before.

- Non-breaching party "B" is no worse off than before.
- This breach is thus Pareto Superior in that at least 1 party is better off, and no party is worse off
- Thus, according to the theory, the breach should not only be allowed, but encouraged!

**Advantages:**

- It promotes efficiency by incentivizing sellers (here, "A") to make wealth-enhancing second transfers, thus moving goods to higher-valued uses
    - If sellers were forced to disgorge these benefit, then some wealth-enhancing transfers would not be made, and society would be worse off.
- Markets continue to function because promisees (here, "B") are compensated, and can use money to buy goods in open market
- Keeps transaction costs low (because damages are easy to calculate so buyer ("B") and seller ("A") can reconcile differences between themselves)
    - NOTE: Incidental expenses (expenses directly from the breach) are covered under the theory.

**Disadvantages:**

- Performance belonged to B under the K!!!
- Damages are often not fully compensatory:
    - Buyer's time is not compensated
    - Buyer will not recover damages if "too speculative" or "unforeseeable"
    - Certain downstream transactions not covered (what if B had a subsequent K with D, who had a K with E, etc.)
    - Emotional costs (anger, frustration, etc.) not covered
    - Idiosyncratic value not covered – market does not tell you what value a particular person places on a good, only the value the market (or the average buyer through S&D) places on the good
        - E.g., $5 baseball card (but if last in set, worth $500 to buyer)

## Reliance Damages: An Alternative Measure of Damages R2dK § 349

Reliance damages are awarded when the damages for the injured party's **full expectation interest is for some reason inappropriate or insufficient**

**However, an injured party must NOT be put in a better position than if the contract had been performed -** fundamental tenet of contract damages

*Sullivan v. O'Connor*

**Reliance Interests**

When weighing the benefits of the different damage interests when it came to such agreements, the court noted that recovery limited to restitution "seems plainly too meager" while awards based on expectancy are conducive to harshly excessive damages. So, in this case, Sullivan's botched operation was compensable under reliance interests.

- *See also Hawkins v. McGee*

*Drennan v. Star Paving Co.* – The Fucked-Up Paving Bid -- **Promissory Estoppel**

When reasonable reliance on the offer by the offeree results in a foreseeable negative change in the offeree's position, a promise not to revoke the offer is implied on behalf of the offeror. This reasonable reliance serves as a substitute for the consideration ordinarily required to form a bilateral contract.

- ***But see Baird v. Gimble Bros.*** (No promissory estoppel for similar situation)

## Restitution Damages R2dK § 373

Restitution damages account for a benefit that the injured party conferred on the breaching party without payment

- The purpose is to **prevent unjust enrichment** of the breaching party

*Bush v. Canfield* - **Unjust Enrichment**

Although damages are traditionally measured by expectation interest, here, where D has completely failed to perform, P should be entitled to a full refund of its deposit.

Failure to refund the money would have resulted in unjust enrichment of the Defendant, who plainly refused to perform.

*United States v. Algernon Blair* - **Quantum Meruit and Damages**

The measure of recovery for quantum meruit is the reasonable value of the performance, Restatement of Contracts § 347 (not R2K).

- *See also Britton v. Turner*

## Limitations on Damages R2dK § 350-352

An injured party's expectation damages may be limited in 3 ways:

1. **Avoidability (§ 350):** The injured party cannot recover damages for loss that could have been avoided if that party had taken appropriate steps to do so
    1. *Rockingham County v. Luten Bridge Co.; Parker v. Twentieth Century-Fox Film Corp.*
2. **Foreseeability (§ 351):** Or for loss that the breaching party did not have reason to foresee as a probable result of his breach at the time the contract was made
    1. *Hadley v. Baxendale*
3. **Certainty (§ 352):** Or for loss beyond the amount proven with reasonable certainty
    1. *Freund v. Washington Square Press; Drews Company, Inc. v. Ledwith-Wolfe Associates, Inc.*

## Unforeseeability as a Limitation on Damages – Consequential Damages

*Hadley v. Baxendale* – The Broken Mill Crank

Per R2dK § 351, damages are only recoverable if they are reasonably foreseeable to the breaching party at the time of the making of the contract. Damages stemming from special circumstances may ONLY be recovered if those circumstances were communicated to and known by the breaching party at the time of contract formation, per *Hadley v. Baxendale*.

**R2K § 351 - Unforeseeability and Related Limitations on Damages**

(1) Damages are not recoverable for loss that the party in breach [not both parties] **did not have reason to foresee [objective test] as a probable result of the breach *when the contract was made.***

(2) Loss may be foreseeable as a probable result of a breach because it follows from the breach

(a) in the **ordinary** course of events, or [**DIRECT/INCIDENTAL DAMAGES**]

(b) as a result of **special** circumstances, beyond the ordinary course of events, **that the party in breach had reason to know. [CONSEQUENTIAL DAMAGES]**

## Certainty R2dK § 352

The injured party cannot recover damages for loss that cannot be proven with reasonable certainty

The **doctrine of certainty** requires damages for breach to be shown "by clear and satisfactory evidence, to have been actually sustained" and to be shown with "reasonable certainty, and not left to speculation or conjecture"

*Freund v. Washington Square Press* -- The 6 Cent Award

**Equity vs Over- or Undercompensation**

The law attempts to secure to the injured party the benefit of his bargain, subject to the limitation that the amount of damages claimed be measurable with **a reasonable degree of certainty and, of course, adequately proven**. But **it is equally fundamental that the injured party should not recover more from the breach than he would have gained had the contract been fully performed.**

Measure of damages in this case according to the cost of publication to the plaintiff would confer greater advantage than performance of the contract would have entailed to plaintiff and would place him in a far better position than he would have occupied had the defendant fully performed.

*Drews Company, Inc. v. Ledwith-Wolfe Associates, Inc.* – **New Business Rule of Certainty**

Lost profits cannot be speculative. Lost profit can be recoverable but must be foreseeable & proven w/ reasonable certainty.

- Typically only applies to new businesses, because old businesses can usually determine what lost profits would be.

## Avoidability/Mitigation R2dK § 350

The injured party cannot recover damages for loss that could have been avoided if that party had taken appropriate steps to do so

The injured party is under a **"duty" to mitigate damages**

- **HOWEVER,** the party is not required to take steps that involve **undue burden, risk, or humiliation**

*Rockingham County v. Luten Bridge Co.*
When the nonbreaching party receives **notice of breach**, **you can't keep performing** and piling on damages. Court says we will only reward you for your work up until you become aware of the breach.

*Parker v. Twentieth Century-Fox Film Corp.* -- **The Musical v. Western Movie**
To mitigate damages, the other offer must be comparable. Actress needs to be offered another blockbuster role in exchange for her blockbuster role. The employee need not seek other available employment of a different or inferior kind to mitigate damages.

# Equitable Remedies

Equitable relief addresses the deficiencies of common law remedies (substitutionary remedies – expectation, reliance, restitution)

### Specific Performance for Land

*Wollums v. Horsley* – The Extremely Shady Land Sale
Generally, where a contract involves the sale of land, **specific performance is the remedy.** However, this sale was so unconscionable that the court refused to enforce it.

### Specific Performance for Services

The most direct form of equitable relief for contracts is specific performance. However, a court will not order a performance that is:

1. Impossible
2. Unreasonably burdensome
3. Unlawful

Specific performance may be ordered after there has been a breach of contract by either nonperformance or repudiation – an **injunction** may be ordered to **direct a party to refrain from doing a specified act**

*Lumley v. Wagner* -- **The Disloyal Opera Singer**

Opera singer under the care of her father. She got a better offer and tried to breach. The court blocked efficient breach in this case - they could have let her pay damages, but instead prevented her from singing elsewhere via a negative injunction.

**Contorts: Tortious Interference with Contract**

*Lumley v. Gye*

Court not only "punished" Wagner, but came after Gye (owner of rival theatre) since he was going to help her breach her contract with Lumley - tortious interference.

## Contractual Remedies

**Contractual remedies** are remedies agreed upon by the parties in their contract

If a contractual remedy provision is **so high as to constitute a penalty** for breach in the court's eyes, it will NOT be enforced

**Liquidating Damages**

**Liquidated damages clause**: a contract provision that outlines a predetermined amount of compensation to be paid to one party by another if the contract is breached.

- Fairly compensates a party for losses that are difficult to quantify, such as when a deadline is missed or a trade secret is leaked

When negotiating a liquidated damages clause, the parties should make **a reasonable estimate of the damages that would be incurred if the contract is breached.**

Liquidated damages clauses are enforceable **as long as the amount specified is not disproportionate to the loss**

*Kemble v. Farren* -- The Repudiating Comedian

Just because you write in a contract that the damages are not punitive doesn't actually make them not punitive. Court upholds here that there's no penalty for breach.

**R2dK § 356. (Liquidated Damages And Penalties) / UCC § 2-718**

Damages for breach by either party may be liquidated in the agreement but only at an amount that is reasonable in the light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss. **A term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty.**

**Limitation of Liability Clauses**

A limitation of liability (LOL) clause is a legal provision in a contract that limits the amount of damages one party can claim from another in the event of a breach or other legal issue

*Wedner v. Fidelity Security Systems, Inc.* – The Shitty Security Guys

Unlike liquidated damages clauses, limitation of liability clauses do not require a ""reasonable relationship between the damages stipulated and the foreseeable harm." The only requirement is that they must not be unconscionable. LOL clauses limiting liability for personal injury are ALWAYS unconscionable – commercial loss limitations are not necessarily unconscionable, as in this case. **UCC § 2-719.**

- **BUT SEE dissent:** The majority misinterprets the UCC. Even though UCC § 2-719 permits the limitation of damages, that provision is made expressly subject to UCC § 2-718. Both are subject to the requirement of reasonableness considering the anticipated or actual harm caused by breach. A comment to § 2-718 states that the stipulation of unreasonably small damages may warrant avoidance on the grounds of unconscionability. Moreover, it is a general principle of contract law that an adequate minimum remedy must be afforded for breach

*Allapattah Services, Inc. v. Exxon Corp.* – NO Punitive Damages in Contract Law

We want good-faith dealing. When dealing is too bad-faith, the court will make the contract void/voidable but bad faith dealing will NOT open the door to punitive damages.

**R2dK § 355 Punitive Damages**

Punitive damages are not recoverable for a breach of contract unless the conduct constituting the breach is also a tort for which punitive damages are recoverable.

# Defenses

R2dk § 19(3) – **Conduct as manifestation of assent** - Conduct of a party may manifest assent even though he does NOT in fact assent. In such cases resulting contract may be voidable because of fraud, duress, mistake, or other invalidating cause.

## Void or Voidable?

A contract is void when it is:

- Illegal due to statute or public policy → I.e., a contract based on a serious crime or tort ("I'll pay you $10k to kill my ex-husband") or a contract so against public policy that we want it to be illegal (*Baby M* & *Flood v. Fidelity*)
- Court is saying the contract never existed

A contract is voidable when:

- You can bring a defense against it (mistake, misrepresentation, fraud, duress, undue influence)
    - Voidable under **R2K § 19(3)**
- Parties are TAMPERING WITH THE NORMAL PROCESS OF CONTRACT
- "If you complain, court will void it out for you"

A contract is voidable when you can present a defense against it. If a contract is only voidable, it will be held together until you bring a defense against it to complain.

## Illegality/Public Policy – VOID Contracts

Related: *In Re Baby M*, *Flood v. Fidelity*,

Contracts must be made in good faith and not violate public policy. **R2dK § 178 When a Term Is Unenforceable on Grounds of Public Policy**

**Related Cases**

Flood v. Fidelity

Public Policy Issue: A beneficiary of a life insurance policy is not entitled to the proceeds of the insurance if the beneficiary kills the insured.

- Contractual Issue: Life insurance policy is formed on the basis of a natural death - killing yourself or someone else is a misrepresentation/fraudulent behavior to collect on the life insurance policy

In Re Baby "M"

Public Policy Issue: You can't sell babies.

The court's decision in Baby "M" demonstrates that our freedom to contract is limited in two ways.

- First, contracts that conflict with law will not be enforced.
    - This is based on the notion that if an agreement conflicts with law then it is illegal, and illegal agreements cannot be enforced by the courts.
- Second, contracts that conflict with public policy will not be enforced.
    - Contracts that promote social injustice or allow for some harm to society are not enforced by the courts.

# Contractual Capacity

Related Cases: *Kiefer v. Fred Howe Motors, Inc.*

**Incapacity:** the inability to meaningfully participate in the bargaining process – **a party's inability to manifest assent due to lack of legal capacity. R2dK § 12.**

**General Minor Rule:** Anyone below the age of majority (18) is a minor, and a contract entered into by a minor is **voidable by the minor.** And, generally, **a minor is not accountable for the other party's loss as a result of the contract. R2dK § 14. Infants**

However, age of majority is a legal fiction (arbitrary).

Kiefer v. Fred Howe Motors, Inc.

**Facts**: Kiefer bought a car from D, attesting that he was 21 years old even though he was only 20 and, legally, a minor. He then returned the vehicle and demanded return of money. No response so he sued for the $412 purchase price. Defendant appeals, citing Kiefer's misrepresentation.

**Held**: The contract is voidable by P because he is under the age of majority. Plaintiff's infancy cuts against competency to defraud or try to defraud. Further there was no justifiable reliance as Defendant failed to verify Plaintiff's age.

**Dissent**: Old enough to have a kid/be married, so should be old enough to contract.

# Mistake

Related Cases: *Raffles v. Wichelhaus, Sherwood v. Walker*, *Wood v. Boynton, Smith v. Zimbalist*

Voidable under **R2K § 19(3) & R2K § 152**

**R2K § 151 - Mistake Defined**

A mistake is a belief that is not in accord with the facts.

**R2dK §152 When Mistake of Both Parties Makes a Contract Voidable**

The K is voidable by the adversely affected party if three conditions are met:

1. The mistake must relate to a "basic assumption on which the contract was made."
2. The party seeking avoidance must show that the mistake has a material effect on the agreed exchange of performances.
3. The mistake must not be one as to which the party seeking relief bears the risk.

**R2dk § 154 - When A Party Bears the Risk of Mistake** - Sentence Summary (+) - Party bears risk of mistake if it is allocated to him by agreement of the parties, if he is aware of it to some extent at contract formation but treats his limited knowledge as sufficient [*Wood v. Boynton]*, or it is allocated by the court in reasonable circumstances.

To allege a mistake defense, two elements: there must be a **mutual** mistake of **material** fact. (*Sherwood v. Walker, Wood v. Boynton*)

- Unilateral mistakes are still enforceable, so you're screwed if you make one (R2K § 20).

When there is a mutual mistake of a material fact, there was no contract. See R2K § 20 - Effect of Misunderstanding.

Remedy? **Rescission**. **Because if there was a mutual mistake, then there was no actual mutual assent.**

Mistakes Checklist
Was there a mistake? (R2K § 151). Would that mistake render the contract voidable? (R2K § 152)

1) Is the mistake unilateral or mutual?
   a) Unilateral Mistake
      i) When only one party is mistaken.
      ii) Unilateral mistakes are still enforceable so mistaken party is screwed (R2K § 20)
   b) Mutual Mistake
      i) When both parties are mistaken.
      ii) Generally, makes a contract voidable (R2K § 20)

3) If mutual mistake, is the mistake of a material fact?
   a) A "mistake of material fact" exists where an error made by both parties regards a significant factual element that is essential to the contract, meaning that the mistake is so important that it could fundamentally change the nature of the agreement and potentially make it voidable

**Related Cases**
*Sherwood v. Walker* - Barren Cow

*Wood v. Boynton* - Diamond Case
P chose to sell the diamond without further investigation as to its intrinsic value, so she cannot repudiate the sale because it turned out to be a bad bargain. She assumed the risk. (Should've done your due diligence)

*Smith v. Zimbalist* - Violin Case
There was a mutual mistake when two parties, both collectors of rare violins, were mistaken as to the identity of two violins. What they believed to be the identity of the violins was written in their contract. Smith was trying to recover the money for the mistaken value of the violin, as opposed to the actual value of the violin (court says no). Contract was not voided in the case - it only affected the remedies.
- Honest mutual mistake here, so no caveat emptor

**Note also, different courts will do different things:**

The court's opinion **would most likely be influenced by any economic policy that the court was trying to uphold at the time of the decision.** For example, a court may be more inclined to interpret the nature

of the mistake to either benefit the seller, to hold together the sale, or to teach a lesson by imposing caveat emptor, which happens despite contract doctrine not being punitive in nature.

In addition, the court may apply the mistake doctrine to instead assess proper remedies rather than voiding the contract in its entirety. For example, in *Smith v. Zimbalist*, where both parties were mistaken to the value and brand of the violins being sold, and had a written contract detailing what they, mistakenly, believed the violins to be worth, the courts did not allow Smith to recover the whole $8,000 mistaken amount, but also did not return Zimbalist's deposit on the violin and therefore did not void the contract in its entirety. The court instead found the contract to be unenforceable, and left the parties how it found them.

# Misrepresentation

A misrepresentation is "an assertion that is not in accord with the facts" → basically, a lie **R2dK §159**

**All fraud is misrepresentation, but not all misrepresentation is fraud** → Meaning, a party can make an innocent misrepresentation in good faith that still provides a defense to the other party

**Misrepresentation: (4 Prong Test)**
[i) a misleading OR intentionally false (fraudulent) statement;
(ii) of a material fact;
(iii) that induces the injured party to enter into the contract;
(iv) as a result of the party's reasonable reliance

A misrepresentation does NOT have to be fraudulent, but it can be:

- Non-fraudulent mispresentation: Something not true but said in good faith is just regular misrepresentation → There is no mutual assent (similar to mutual mistake)
- Fraudulent misrepresentation: where you have the intent to lie – market misconduct
    - Fraudulent misrepresentation we especially hate – it is both a torts AND a contracts problem

**Remedies**:

- If fraudulent (whether material or not) the misrepresentation may allow the party who relied upon it to (a) bring an action in tort or (b) sue to rescind the contract (and obtain restitution).
- If material (but not fraudulent), the party who relied may only sue in contract, but not in tort. [Obviously, if immaterial and not fraudulent, then no action.]

**Related Cases**

*Vokes v. Arthur Murray* - Dancing Case
Vokes was taking classes at Arthur Murray, where the instructor kept complimenting her dancing and falsely represented to her that she was rapidly progressing when she was not in order to induce her to purchase more classes. Although misrepresentation is normally only for cases of fact, in this case, the opinion of an expert was considered fact.

- Court is kind of implying a fiduciary duty here between instructor/student

Generally a misrepresentation, to be actionable, **MUST BE ONE OF FACT** rather than opinion.

- However, there are exceptions: *(Vokes v. Arthur Murray)*
    - There is a fiduciary duty between parties
        - Shareholders, Realtors
        - Landlord/Tenant *(Obde v. Schlemeyer)*
        - Teacher student *(Vokes v. Arthur Murray)*
        - NO duty between buyer/seller
- The representee does not have equal opportunity to become apprised of the truth or falsity of the fact represented

## Caveat Emptor & Non-Disclosure / Concealment

Related: *Wood v. Boynton*, *Obde v. Schlemeyer, Swinton v. Whitinsville Savings Bank; Stambovsky v. Ackley*

**Let the buyer beware** – **Generally non-disclosure DOES NOT equal misrepresentation.** It is not the duty of the seller to point out defects of goods he offers for sale, but the duty of the buyer to satisfy himself about the quality and condition of the goods.

***However, when IS non-disclosure as bad as a lie*** **(i.e., misrepresentation)*?*** 4 prongs in R2K § 161

**R2dK § 161 - When Non-Disclosure Is Equivalent to an Assertion (Lie/Misrepresentation)**
A person's non-disclosure of a fact known to him is equivalent to an assertion that the fact does not exist in the following cases only:

- where he knows that disclosure of the fact is necessary to prevent some previous assertion from being a misrepresentation or from being fraudulent or material.
- where he knows that disclosure of the fact would correct a mistake of the other party as to a basic assumption on which that party is making the contract and if non-disclosure of the fact amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing.
- where he knows that disclosure of the fact would correct a mistake of the other party as to the contents or effect of a writing, evidencing or embodying an agreement in whole or in part.

- where the other person is entitled to know the fact because of a relation of trust and confidence between them.

Sentence Summary (+) - Non-disclosure is equivalent to a misrepresentation when it is necessary to prevent a previous assertion from becoming a misrepresentation/fraudulent or if it amounts to failure to act in good faith/meet standards of fair dealing, or due to relation between parties (i.e., not arms-length) or **disclosure would correct mistake of other party to a basic assumption of contract.**

**Concealment =** misrepresentation if affirmative action is taken to prevent the discovery of a fact

- **Concealment of latent (non-obvious) defect (***Obde v. Schlemeyer*)

**Buyer**

- Duty to do due diligence (beware!)

**Sellers**

- You can't lie or conceal
- You may or may not have to disclose (usually don't)
    - You do have to disclose hazardous conditions
        - (*Obde* considers termites hazardous, *Swinton* does not)
- You can use an implied warranty/as is clauses to not be liable for defect

**Related Cases**

*Swinton v. Whitinsville Savings Bank - Termite Case*

While the defendant cannot purposefully conceal the defect, they are not required to disclose the latent defect either.

- In this case, the bank never concealed the termites, but never mentioned it and the buyer didn't ask. The bank had no fiduciary duty to the defendant to tell the buyer about termites.

*Obde v. Schlemeyer* - Termite Case -- **Fraudulent Concealment**

In this case, the defendants concealed the fact that there were termites. The court really hates concealment, as it impedes the buyer's ability to do their due diligence.

- Additionally, **there was a fiduciary duty here** (Landlord/Tenant)

Swinton and Obde are very similar cases! Here are the distinctions:

- Concealment *(Obde)* vs Failure to Disclose *(Swinton)*
    - Failure to disclose is okay per ***Caveat emptor*** **("Let the buyer beware"): Not the duty of the seller to point out defects** of goods he offers for sale, duty of buyer to satisfy himself about the quality and condition of the goods
- Fiduciary Relationship

- Landlord/Tenant Relationship in *Obde v. Schlemeyer* versus arms-length transaction in *Swinton v. Whitinsville Savings Bank*

*Stambovsky v. Ackley* **-** Haunted House -- **Fraudulent Concealment**
Ackley created a "problematic condition" (advertised house as a haunted house) and did not disclose it to Stambovsky, who tried to back out of the contract when he found out (somewhat similar to Flood v. Fidelity… can't create a problem and then recover).

- Concealment of the haunted condition of the house was fraudulent concealment
- If you create any problematic condition (kill someone in house, infest w/ termite) you can't conceal

*Wood v. Boynton* - Diamond Case
The court imposes caveat emptor onto Wood and holds that she should have done her due diligence rather than selling the stone without knowing what its value was.

# Fraud

Voidable under **R2K § 19(3)**

**Misrepresentation + Conscious Deception + Injury = Fraud**

There must be **reasonable reliance** to have a claim for fraud.

- Meaning not just an "opinion" or mere puffery which cannot be justifiably relied on
- Usually due to some fiduciary duty or relationship of trust between the parties

**Fraud**
Fraud involves CONSCIOUS misrepresentation, or concealment, or non-disclosure of a material fact which induces the innocent party to enter into a contract. Plaintiff must show:

1. Misrepresentation
2. Knowledge of falsity
3. Intent to induce reliance
4. Justifiable reliance by the plaintiff
5. Resulting damage

So, to properly state a claim for fraud, plaintiff must allege a misrepresentation or material omission by defendant, on which it relied, that induced plaintiff to perform an act.

**Related Cases**
*Obde v. Schlemeyer* – Good Termite Case **-- Fraudulent Concealment**
In this case, the defendants concealed the fact that there were termites. The court really hates concealment, as it impedes the buyer's ability to do their due diligence.
Additionally, there was a fiduciary duty here (Landlord/Tenant)

Swinton and Obde are very similar cases! Here are the distinctions:

- Concealment *(Obde)* vs Failure to Disclose *(Swinton)*
    - Failure to disclose is okay per ***Caveat emptor*** **("Let the buyer beware"): Not the duty of the seller to point out defects** of goods he offers for sale, duty of buyer to satisfy himself about the quality and condition of the goods
- Fiduciary Relationship
    - Landlord/Tenant Relationship in *Obde v. Schlemeyer* versus arms-length transaction in *Swinton v. Whitinsville Savings Bank*

*Flood v. Fidelity* - Husband Poisoned for Life Insurance
Wife killed husband and tried to collect on his life insurance policy.
Life insurance policy is formed on the basis of a natural death - killing yourself or someone else is a misrepresentation/fraudulent behavior to collect on the life insurance policy so the contract is void for fraud. Additionally, the signatures to the contract were fraudulent.

*Leonard v. Pepsico*
Did Pepsico commit fraud by making statements they never intended to fulfill? No, because the plaintiff did not claim that they were induced to enter the contract on the basis of the misrepresentation. Also, the court knows that the humor was tongue-in-cheek.

# Unconscionability

*Williams v. Walker-Thomas Furniture*

Two-Pronged Test:
*Williams v. Walker-Thomas Furniture*
1) **Procedural unconscionability**: absence of meaningful choice on the part of one party.
Consider whether there was:

1. A gross inequality of bargaining power
2. Low education of one of the parties
3. A reasonable opportunity to understand the terms or were important terms hidden via fine print
4. Deceptive sales practices

**2) Substantive unconscionability:** unreasonably favorable to one party
"The terms of the contract are so extreme as to appear unconscionable according to the mores and business practices of time and place."

**BOTH prongs generally must be satisfied to find unconscionability,** but they do not need to be present to the same degree. The more substantively oppressive the contract term, the less evidence of procedural unconscionability is required…and vice versa.

HOWEVER, **"The doctrine of unconscionability is fluid - in *Wollums v. Horsely*, only substantive unconscionability was present, but the court found unconscionability anyway."**

**Rule**: "Where the element of unconscionability is present at the time a contract is made, the contract should not be enforced." *Williams v. Walker-Thomas Furniture*

**Contract of adhesion:** a standardized contract that is imposed and drafted by the party of superior bargaining power and relegates to the other party "only the opportunity to adhere to the contract or reject it" (**procedural unconscionability**)

**R2dK § 208 & UCC 2-302 Restitution for Unconscionability**
**Unconscionable:** "extreme unfairness" - terms that are so **unjust or one-sided** that they're unreasonable
(1) If the court as a matter of law finds the contractor any clause of the contract to have been unconscionable at the time it was made the court:

1. may refuse to enforce the contract, or
2. it may enforce the remainder of the contract without the unconscionable clause, or
3. it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) When it is claimed or appears to the court that the contractor any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

Sentence Summary (+) - Courts can refuse to enforce unconscionable contracts or unconscionable terms. They may also limit the application of unconscionable terms to avoid unconscionable results.

## Duress (R2dK § 174-176)

Duress is a **psychological state that robs you of your free will**, which **kills mutual assent** and renders a contract **voidable**

### 4-Point Test for Duress (R2dK § 176)

1. A threat to use
2. Improper, illegitimate, or wrongful pressure of
   Sentence Summary (+) - Threat is improper if illegal act; a breach of duty of good faith/fair dealing under contract; wrongful act (resulting exchange is not on fair terms - harms recipient/does not significantly benefit party making threat / there is history of prior unfair dealings).
3. A sufficiently grave nature that
4. **Induces** a part to act or manifest their assent against their free will

a. Duress is about **STATE OF MIND**

There must be **no reasonable alternative**. R2K § 175(a).

The duress must be what triggers the assent *(Rubenstein v. Rubenstein)*

Sentence Summary (+) - Defense of duress can be utilized when victim providing assent has no reasonable alternative, and other parties may not be said to have applied duress if assent was not induced through their actions.

## Duress of the Person

*Rubenstein v. Rubenstein*
This case illustrated that duress MUST be what triggers the assent in order for the contract to be voidable under duress.

## Economic Duress

*Wolf v. Marlton Co.*
Free will is deprived because someone is wrongfully depriving you of your economic interests.

## Duress of Goods

*Hackley v. Headley*
Free will is deprived because someone is wrongfully depriving you of your goods.

**R2k § 174 - When Duress by Physical Compulsion Prevents Formation of a Contract**
If conduct that appears to be a manifestation of assent by a party who does not intend to engage in that conduct is physically compelled by duress, the conduct is not effective as a manifestation of assent.

**R2k § 175 - When Duress by Threat Makes a Contract Voidable**
(1) If a party's manifestation of assent is induced by an improper threat by the other party that leaves the victim **no reasonable alternative**, the contract is voidable by the victim.
(2) If a party's manifestation of assent is induced by one who is not a party to the transaction, the contract is voidable by the victim unless the other party to the transaction in good faith and without reason to know of the duress either gives value or relies materially on the transaction.

**R2K § 176 - When a Threat Is Improper**
(1) A threat is improper if

- what is threatened is a crime or a tort, or the threat itself would be a crime or a tort if it resulted in obtaining property,
- what is threatened is a criminal prosecution,
- what is threatened is the use of civil process and the threat is made in bad faith, **or**
- the threat is a breach of the duty of good faith and fair dealing under a contract with the recipient

(2) A threat is improper if the resulting exchange is not on fair terms, **and**

- the threatened act would harm the recipient and would not significantly benefit the party making the threat,
- the effectiveness of the threat in inducing the manifestation of assent is significantly increased by **prior unfair dealing by the party making the threat**, or
- what is threatened is otherwise a use of power for illegitimate ends.

**Related Cases**

*Rubenstein v. Rubenstein* - The Wife's Arsenic Gang Threat **– Duress of Person**

*Hackley v. Headley* **-** The "Dire" Financial Situation **– Duress of Goods**

The court says **no duress of goods here** - Duress has to be caused by the other party to the contract, not your own financial situation. It is only duress if the contracting party putting you in a bad position is the BUT FOR cause of your bad position, not any aggravating factors.

*Wolf v. Marlton Corp.* - Black Neighbors **– Economic Duress**

Where a party for malicious reasons threatens to resell a home to an undesirable purchaser, for the sole purpose of injuring a builder's business, this threat is "wrongful" and constitutes duress.

- The court finds duress here because selling the house to a Black family could hurt the builder's business.

## Undue Influence (Overpersuasion)

The equitable concept of **undue influence** is aimed at the **protection of those affected with a weakness** (short of incapacity to contract) against **improper persuasion** (short of misrepresentation or duress) **by a person in a special position to exercise such persuasion**

**Improper persuasion** is WEAKER than duress, but it is compensated for by requiring the victim to be in a weak position which the other party takes improper advantage of

**Undue Influence Requirements** R2K § 177

1. A special relationship between the parties
    1. Also applies where the weaker party is for some reason **under the domination of the stronger OR**

b. There is a **relationship of trust or confidence** in which the weaker party is justified in assuming the stronger will not abuse the relationship
    i. Parent/child; clergy/churchgoer; doctor/patient; husband/wife

2. Improper persuasion of the weaker by the stronger
    - "An application of excessive strength by a dominant subject against a servient object." ***Odorizzi v. Bloomfield School District***

**7-Point Test for Undue Influence/Overpersuasion**

*Odorizzi v. Bloomfield School District*

Look at the number of factors present, **doesn't have to be all** of them, but **want at least 3-4**

1. Transaction discussed at unusual or inappropriate time
2. Consummation discussed at unusual place (ex. coming to your house)
3. Insistent demand that the transaction be finished at once
4. Extreme emphasis on untoward consequences of delay
5. Use of multiple persuaders by the dominant side against a single servient party
6. Absence of third-party advisers to the servient party
7. Statements that there is no time to consult financial advisers or attorneys

**R2K § 177 - When Undue Influence Makes a Contract Voidable**

1) Undue influence is unfair persuasion of a party who is under the domination of the person exercising the persuasion or who by virtue of the relation between them is justified in assuming that that person will not act in a manner inconsistent with his welfare.
2) If a party's manifestation of assent is induced by undue influence by the other party, the **contract is voidable** by the victim.
3) If a party's manifestation of assent is induced by one who is not a party to the transaction, the contract is voidable by the victim unless the other party to the transaction in good faith and without reason to know of the undue influence either gives value or relies materially on the transaction.

# Statute of Frauds

Related Cases: *McInerney v. Charter Golf, Inc., Lucy v. Zehmer, Rosenfeld v. Basquiat*

**What it Does / Purpose:** Some contracts are so important that we want written proof of them → The contract itself does not have to be in writing – just something that exists showing that the two parties had an agreement

The Statute of Frauds exists to prevent fraud and misunderstandings by requiring certain types of contracts to be in writing and signed by the parties involved, essentially providing concrete

evidence of the agreement and reducing the risk of one party falsely claiming the terms of a verbal contract were different than what was actually agreed upon

***McInerney v. Charter Golf, Inc.* – Lifetime Employment + Statute of Frauds**

**R2K § 130 Contract Not to Be Performed Within a Year**
(1) Where any promise in a contract cannot be fully performed within a year from the time the contract is made, all promises in the contract are within the Statute of Frauds until one party to the contract completes his performance.
(2) When one party to a contract has completed his performance, the one-year provision of the Statute does not prevent enforcement of the promises of other parties.

**Contracts of uncertain duration are NOT within the Statute of Frauds; the provision covers only those contracts whose performance cannot possibly be completed within a year. R2dK § 130, comment a**

**MYLEGS**
Marriage. Year. Land [Real Estate]. Executor [Wills/Trusts]. Goods over $500. Suretyship.

**General Rule:** An agreement that falls within the Statute of Frauds is not enforceable unless there is some writing that satisfies the statute, or unless the agreement fits into an exception to the SoF.

The writing only needs to give the fact-finder **a basis for believing that the contract to which the party is testifying really exists**, but does not need to include all terms. (*Rosenfeld v. Basquiat*)

**Related Cases**
*McInerney v. Charter Golf, Inc.* - **Lifetime Employment + Statute of Frauds**
Rule: A contract that is not ABLE to be performed within one year from the making thereof (the one-year provision) MUST BE IN WRITING. Under the statute of frauds, a contract for lifetime employment is unenforceable unless it is in writing. Also, a reasonable reliance is insufficient to bar the application of the statute of frauds. (like giving up another job opportuntiy)

*Rosenfeld v. Basquiat* - **The Crayon Contract – UCC 2-201 & Statute of Frauds**
Rosenfeld sued the estate of Basquiat to obtain paintings that she had purchased.
**Rule**: The statute of frauds does not require that a writing evidencing a contract for the sale of goods under the UCC contain all of the contract's material terms. Under the UCC, the writing only has to indicate that a contract for sale has been made and that both parties signed the writing. Also, the only term that must appear in the writing is the **quantity** of goods being sold.

**UCC § 2-201. Formal Requirements; Statute of Frauds.**
(1) Except as otherwise provided in this section a contract for the sale of goods for **the price of $500 or more is not enforceable by way of action or defense unless there is some writing** sufficient to indicate that a contract for sale has been made between the parties and **signed by the party against whom enforcement is sought** or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.

# Excusing Performance

**Rule:** Some post-contract occurrences (or non-occurrences) excuse performance.

## Nonoccurrence of a Condition Precedent

**Condition Precedent**
*Luttinger v. Rosen; Kingston v. Preston*
An operative fact that must exist **prior to the existence** of some legal relationship. An event which the parties stipulate **MUST take place** before there is a right to performance

A condition **modifies** a promise → Conditional language: "if, provided, so long as, on condition that"

Home sale contract example - "e.g., closing is conditioned on buyer's obtaining mortgage at not more than 8.5%." *Luttinger v. Rosen* → If this condition is NOT satisfied, the parties' obligations to the contract are EXCUSED

**Conditions are DISFAVORED**, so if it is unclear whether the language is a condition, it will be construed as a promise in order to avoid forfeiture of the contract. **R2dK § 261**

## Impossibility

Related Cases: *Stees v. Leonard, Taylor v. Caldwell*

The value of the performance has to be essentially destroyed for impossibility/impracticability to apply.

Strict/Formalist Rule - A person must perform the duties, which are in themselves possible to perform and he has contracted to perform, unless he is prevented from performing by an act of God, the law, or the other party. *(Stees v. Leonard)*

Context Rule: "If the existence of a particular thing is necessary for a party's performance, the party is excused from performance if the destruction or deterioration of that thing prevents

performance." Where performance is not possible, it's not possible and must be excused. No contract. *(Taylor v. Caldwell)*

*Stees v. Leonard* - Quicksand Case
Builder twice started building the building on quicksand and then it would collapse. The builders refused to rebuild the third time. The court held that even though the soil was quicksand, they could still build the building, so they were not excused from performance.

- This is similar to the dissent in Jacob & Young v. Kent, where they wanted to change the pipes out to perform exactly as they were contracted to

*Taylor v. Caldwell* - Music Hall Burned Down
There was a contract for Taylor to rent a music hall for four concerts from Caldwell. A week before the concert, the music hall burned to the ground. Taylor sues for breach of contract. The court reasons that the existence of the music hall was **an implied condition** that was essential for fulfillment, so performance was impossible for both parties and no contract.

**R2dK § 263 Destruction, Deterioration or Failure to Come Into Existence of Thing Necessary for Performance**
If the existence of a specific thing is necessary for the performance of a duty, its failure to come into existence, destruction, or such deterioration as **makes performance impracticable** is an event the non-occurrence of which was a basic assumption on which the contract was made.

## Act of God/Force Majeure

A force majeure clause can excuse performance, but a court will not allow for you to be unjustly enriched for services that you did not render *(Facto v. Pantagis)*.

**COVID-19 & terrorist attacks may count under a force majeure clause under modern concepts; if a judge views these as coming under a force majeure clause, they may excuse performance even if these events are not mentioned explicitly in the contract.**

*Facto v. Pantagis* - Wedding from Hell
About 45-minutes into the wedding, there was a power outage that prevented the band, photographer, and videographer from performing their duties and the guests were extremely uncomfortable. There was a force majeure clause written into the contract that excused Pantagis's performance if there was an act of God or unforeseen circumstance and precluded Facto from recovering for breach of contract.

- Appellate court split the loss to uphold equity - Pantagis was entitled to profit for services that he did render, but Facto shouldn't be liable to pay for services they didn't receive. They are trying to uphold the principle that both parties should receive the benefit of the bargain. Pantagis is excused from performance due to the clause, but he should not be unjustly enriched either.

# Impracticability

You could perform, but it's in nobody's best interest for you to perform and/or your performance may be in direct opposition to public policy, so performance will be excused.

**"Occurrence of assumed but unstated nonoccurrence that makes performance Impracticable."**

Contracts contrary to public policy are void *(Hanford v. Conn. Fair Ass'n – The Polio Epidemic & Baby Show)*

**Related Cases**

*Hanford v. Connecticut Fair Ass'n* - Baby Show

Hanford had a contract to produce a baby show at a park, but then an epidemic of infantile paralysis started to spread in Connecticut. The Fair Ass'n contacted and canceled, claiming that holding the baby show would be highly dangerous because of the health risks. The court held that although performance was technically possible, they'd prefer that it not happen since it runs directly in contrast to public policy, so they're going to excuse performance and there will be no damages for breach by Fair Ass'n.

*In Re Republican Party of Texas*

The Republican Party of Texas contracted to host their convention with the Houston First Corporation. Houston canceled the agreement on the basis of the COVID-19 pandemic per the order of the mayor. Although performance is possible, the convention would've been held at the height of the pandemic and would've run contrary to public health/policy.

*In Re Baby M*

Although performance was possible, the court feels that selling babies is against public policy and would prefer that it does not happen. Therefore, they excuse performance – an example of impracticability.

# Frustration of Purpose *(Taylor v. Caldwell, Krell v. Henry)*

A doctrine of contract law that is applicable when an unforeseen event causes one party to be **entirely deprived of the benefit he expected from the other party's performance**

**"Occurrence of assumed but unstated nonoccurrence that eliminates mutually understood purpose of contract"**

**R2dK § 265 Discharge by Supervening Frustration**

Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary.

*Krell v. Henry* - Coronation Trip
Krell was renting a room from Henry to watch the coronation procession, which was postponed due to King Edward VII falling ill. The purpose of the contract was not written. The court holds that the procession happening was an implied condition to the contract and it'd be equitable to void contract

The principle that **an implied condition that ceases to exist voids the contract** stems from the case of *Taylor v Caldwell*. The principle was extended to situations in which **an underlying condition that was essential to the purpose of the contract, rather than simply being a necessary condition, ceases to exist.**

- The judge held that such a condition need not be explicitly mentioned in the contract itself but rather may be inferred from the extrinsic circumstances surrounding the contract

## Material Breach Excuse

The injured party is EXCUSED from its performance if the other party **materially breaches** the contract (*Shah v. Cover-It, Inc.* -- ONLY applies to common law – UCC has perfect tender rule [2-601])

- While every breach matters, ONLY a material breach will excuse performance. *See [Walker & Co. v. Harrison]*

**Material breach**
E.g., P quits after painting 10% (quantity)
E.g., P paints house purple instead of white (quality)

- Whether breach is material is question of fact

Consequences of material breach:

- Injured party excused from performance
- May sue for damages

Consequences of non-material breach: E.g., *Jacob & Youngs v. Kent* (Reading pipe and Cohoe pipe)

# Public Policy Discussions

## Freedom to Contract

The freedom to contract is something that the court finds important.

The court will enforce doctrine to uphold the freedom of contract and uphold contracts that people intended to enter:

- Codified in 42 U.S.C. § 1981
- Unconscionability
- Mutual Mistake *(R2K § 20 - Effect of Misunderstanding)*
- Substantial Performance
- UCC Gap Filling
- Remedies (we don't punish for breach - only make people whole)

There's some debate as to how we should view freedom to contract (Williams v. Walker-Thomas Furniture).

- Formalist/Conservative view: People have freedom to contract and responsible for the contracts they enter into without any context
- Paternalist/Progressive view: We should apply context to these situations.

In *Stees v. Leonard,* one perspective would be what the court applied (not impossible, you must perform), but another would recognize the intense burden that you're placing on these builders to keep rebuilding on land that won't hold the building or pay damages.

In *Williams v. Walker-Thomas*, there's a business who was purposefully exploiting a community that didn't have enough money and including a clause in her contract that if she missed any of her monthly payments, they would come to repossess everything.

- Should we extend that same grace to poor people who are engaging in consumer purchases?

To not apply context, there must be an assumed equality in bargaining power. Usually, there isn't though.

However, if there is freedom to contract, there is a <u>responsibility to know</u> what you're getting yourself into

- Caveat Emptor
    - However, we have exceptions to offset the "harshness" of this rule
        - Undue Influence/Duress

        - Misrepresentation of fact/Concealment/Fraud
    - To provide exceptions to caveat emptor, the court may infer a fiduciary duty between parties that may not necessarily have such a relationship (for example, where there was a misrepresentation of opinion in Vokes v. Arthur Murray, Inc.)
        - Fid. Duty is why *Obde v. Schlemeyer* was decided differently than *Swinton v. Whitinsville Savings Bank*

# Right to Contract

**42 U.S.C. § 1981 prohibits discrimination** in every phase of a contractual relationship, including initially making the agreement.

- See *Barfield v. Commerce Bank, N.A.*

**42 U.S.C. § 1981**
(a) Statement of equal rights
**All persons** within the jurisdiction of the United States **shall have the same right** in every State and Territory **to make and enforce contracts**, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

If you refuse to have a meeting of the minds for provable racist reasons, you will be subject to liability under § 1981. *Barfield v. Commerce Bank, NA*

# Contact Interpretation

## UCC Gap-Filling Approach

**Pros:**
The negotiation of every term in advance can be costly and parties may not wish to enter into negotiations over terms that they feel are not worth the trouble ex ante, yet they do intend to contract

- It saves the parties the expense of negotiating over every term, because they know that, if they do not, the code will supply a term. If they do not like the code's terms, they are free to negotiate the point ex ante.

A recognition that *every* contract is, *to some extent*, **incomplete**—or "indefinite" on some issue

- Attempts to remedy the situation (see, e.g., UCC §2-204 - UCC Formation In General) by providing "off-the-rack, gap-filling" terms provided that a contract was *intended*
- It recognizes the parties' *intent* and finds a K where it is clear that the parties, in fact, intended to form a K.

**Cons:**

- It increases the chance that parties will have agreements imposed upon them.
- Letting the parties escape the costs of negotiations by shifting the costs to the courts.
    - Courts are paid for by taxpayers, so this is really allowing the parties to save money by shifting their ex-ante negotiating costs on the taxpayers in ex-post litigation

Although it would be preferable for the parties to decide as much as possible ex ante (because *their* terms are more likely to reflect *their* needs and expectations), a rule such as §2-204 - UCC Formation In General (and the open term provisions of the UCC), coupled with a tax-funded court system, reduces the incentives the parties have to negotiate.

**Restatement**

Substantial Performance - when remedy would be unduly burdensome, they choose different ways to compensate for the breach (*Jacob & Young v. Kent*)

Anticipatory Repudiation - you have the ability to repudiate a contract when there is a breach but if the court finds it to be a minor breach, now you are the breacher
*(Walker & Co. v. Harrison)*

## Pros/Con of Written Contracts

Sometimes a written contract won't save you
When you have equity-focused court we can get good outcomes on non-written cases (like *Neri*)

- Also think of *Facto v. Pantagis* where force majeure clause did not allow Pantagis to come away unjustly enriched from the contract

# Remedies

Contract damages are based in law and liability. It is a substitute relief. We don't punish people for breach. **The freedom of contract means the freedom to breach.**

- We make people whole, but don't overcompensate or undercompensate. There are no criminal remedies or punitive damages.
- We also don't distinguish willful breach from unintentional breach. Breach is just breach. Mental state does not matter.

**UCC Remedy Discussions -- 2-706 (Resale Damages) v. 2-708 (Repudiation Damages)**

**Using 706 encourages efficient breaches, while using 708 discourages them**

1) **Overcompensation:** expectation damages are meant to put the injured party in the position they would have been in had the K been performed.
    a) When seller resells and collects the resale-contract differential, the seller is perfectly compensated (2-706)
    b) When seller resells and collects the MARKET-contract differential, the seller is "overcompensated." (2-708)
    c) This suggests using §706, at least when seller *actually* resells.
2) **Equity:** Using 706 allows the breaching buyer to reap the gains of the falling market price; that seems wrong—the buyer should be given an incentive to keep its promise
    a) 708 does 'overcompensate' the seller, but at least this prevents the buyer from walking away from the deal, since it has to disgorge all the profits it made.
    b) Since *someone* is going to get a windfall, why not give it to the innocent seller rather than the perfidious buyer?
3) **Efficiency:** Suppose seller had NOT actually resold as above.
    a) Now, it would be eligible for §708 damages, which are larger than 706; at least, there would be no obvious reason why seller couldn't use §708
    b) Thus, if we insist that when the seller resells, it only gets §706 lost profits, we provide it with an incentive NOT to resell. Does it make sense for the seller to have such an incentive?
    c) Alternatively, seller has a duty to mitigate damages by reselling, so 708 would only be used in very special circumstances, where the seller had no ability to resell.

# Defenses

All defenses—whether we are talking about fraud or duress or undue influence or mutual mistake—are ultimately based on public policy considerations.

When deciding if a party has breached a contract, the court must first determine that the contract is enforceable—**if the contract violates public policy, the court will find it unenforceable** and will award no remedy for its breach.

A bargain to suppress prosecution may be unenforceable on grounds of public policy.

## Doctrine of Mistake

When courts try to limit the doctrine of mistake (*Wood v. Boynton - diamond case*), they are trying to encourage **caveat emptor.**

Caveat emptor is a tougher standard to meet than mutual mistake.

### Caveat Emptor

Related: *Wood v. Boynton*, *Obde v. Schlemeyer, Swinton v. Whitinsville Savings Bank*

Let the buyer beware

Not the duty of the seller to point out defects of goods he offers for sale, duty of buyer to satisfy himself about the quality and condition of the goods.

Exceptions:

- Misrepresentation
- Concealment of latent/hidden defect
- Sale by description and/or sample
- Implied warranties of merchantability and fitness for a particular purpose

Buyers:

- Caveat Emptor (buyer beware)

Sellers:

- No lying
- No concealing (*Swinton v. Whitinsville Savings Bank*)
- Otherwise, usually only need to disclose hazardous conditions
- Seller can include implied warranties and as-is clauses (disclaimers)

When courts want to enforce public policy, they will infer a fiduciary duty between seller/buyer even though there isn't one normally (*Vokes v. Arthur Murray*)

- Termite cases
    - Courts really don't want you to conceal things

### Caveat Emptor Policy Considerations

Court is assuming that there is an equality of bargaining power and freedom of contract.

**Equality of bargaining power** - Each party, whether a merchant or not, has a duty to do enough research to know what they are contracting for.

With a freedom of contract, there is a responsibility to know what you're getting yourself into.

Because of these principles, courts hate duress and undue influence.

- Duress and undue influence will make a contract voidable, because they cut against freedom of contract and equality of bargaining power

Similarly, courts hate <u>concealment</u> and <u>wrongful failure to disclose</u>.

- Keeps you from being able to do your due diligence so it cuts against freedom of contract and equality of bargaining power.

When courts want to apply a duty to disclose, they will infer a fiduciary duty. *(Obde v. Schlemeyer)*

## Important Cases

**<u>In Re Baby "M"</u>**

The court's decision in Baby "M" demonstrates that our freedom to contract is limited in two ways.

- First, **contracts that conflict with law will not be enforced.**
  - This is based on the notion that if an agreement conflicts with law then it is illegal, and illegal agreements cannot be enforced by the courts.
- Second, **contracts that conflict with public policy will not be enforced.**
  - Contracts that promote social injustice or allow for some harm to society are not enforced by the courts.

Therefore, a person's freedom to contract is limited within the scope of legality and justice.

- See also the doctrine of impracticability, *In Re Rep. Party of Texas, Hanford v. Conn.*

**<u>Sun Printing & Publishing Assn. v. Remington Paper & Power Co</u>**

In this case, each judge argues from "freedom of contract" principles

Cardozo is unwilling to impose terms of an agreement on an unwilling seller.

- Freedom ***<u>from</u>*** contract.

Crane is unwilling to let the seller get out of an obligation freely assumed to the detriment of the other party who was entitled to rely on the contract.

- Freedom ***<u>to</u>*** contract.

The dissent's (Crane's) ability to articulate numerous *<u>different</u>* ways of filling in the gap supports the majority's conclusion that this **K was too indefinite to be enforced**.

- Each of dissent's suggestions would yield a *<u>different result</u>*, none of which would be *<u>compelled</u>*, and none of which could be *<u>excluded as inconsistent with the terms of the writing</u>*.
- Thus, if enforced by the court, the court would be *<u>inventing</u>* a term—revising "while professing to construe."

## Cases Where Public Policy Played a Role

**Flood v. Fidelity & Guaranty Life Ins. Co. -- Fraud**

As a matter of public policy, a beneficiary named in a life insurance policy is not entitled to the proceeds of the insurance if the beneficiary feloniously kills the insured.

**Hanford v. Connecticut – Public Health**

The association asserted that the public-health risks of holding the baby show meant that performing the contract would be contrary to public policy.

**Contracts contrary to public policy are void!**

- See also, *In Re Republican Party of Texas and In Re Baby M*

# CISG Rules

## CISG - Contract Formation

CISG governs sale of goods between parties who do business in countries that have ratified the CISG. **NOT all international countries have ratified CISG**.

## Mutual Assent

*Important Cases: MCC v. Ceramica, Frigaliment, Raffles v. Wichelhaus, Filanto v. Chilewich*

**Article 8**

To determine mutual assent:

1) FIRST, look to see if there is a subjective meeting of the minds.
    - If yes, we have sufficient mutual assent.
2) IF FIRST NOT MET, look at objective intent and the reasonable person requirement (*Embry* test)
    - If yes, we have sufficient mutual assent.
    - If no, no mutual assent to form a contract.

Sentence Summary (+) – CISG Art. 8 requires consideration of subjective intent (sub. intent of party determinative when other party knows or could not have been unaware of that intent), and that intent may be determined through reasonable person standard based on parties' statements, conduct, or prior negotiations/ subsequent conduct between parties.

NOTE: Apply Frigaliment-like interpretation techniques when evaluating (look at all relevant circumstances including negotiations, practices that the parties have established, usages, and conduct of the parties).

Unlike *Embry*, the CISG **requires an inquiry into a party's subjective intent.**

## CISG Acceptance

Modified Mailbox Rule

- An acceptance of an offer becomes effective the moment the indication of assent **reaches the offeror.** Article 18(2)
- A revocation is effective if it reaches the offeree before he has dispatched an acceptance. Article 16(1). In contrast, if the offeree has dispatched his acceptance before receiving the revocation, **his acceptance is valid.**

**CISG Contract Modification - Art. 29**

"A contract may be modified or terminated by the mere agreement of the parties…"

# CISG - Interpretation

Relevant Cases: *MCC v. Ceramica Nuova D'Agostino, Filanto, S.p.A v. Chilewich*

**CISG Article 8**

*MCC v. Ceramica Nuova D'Agostino*

(1) For the purposes of this Convention statements made by and other conduct of a party are **to be interpreted according to his intent where the other party knew** or could not have been unaware what that intent was.

(2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the **understanding that a reasonable person** of the same kind as the other party would have had in the same circumstances.

(3) In determining the intent of a party or the understanding a reasonable person would have had, **due consideration is to be given to all relevant circumstances** of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

**CISG Article 19 -- COUNTEROFFER**

A response to an offer that changes the offer's terms rejects the offer and makes a counteroffer.

**CISG Article 18 – CONDUCT AS ACCEPTANCE**

An offeree may accept an offer through conduct showing consent to the offer. Silence or inactivity is insufficient, yet the parties' past and subsequent communications might be considered while deciding if the offeree accepted the offer through conduct.

**Filanto, S.p.A v. Chilewich**

**Rule** - An offeree who delays dismissing an offer's term until after the offeror has started execution **will be held to that term.**

## CISG - Parol Evidence Rule

No rule. Courts may give due consideration to all relevant circumstances (Article 8).