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Definitions

**Acceptance**

R§50 – “Acceptance of an offer is a manifestation of assent to the terms thereof made by the offeree in a manner invited or required by the offer.”

Goods

**Accord & Satisfaction**

R§281 – “An accord is a K under which an obligee promises to accept a stated performance in satisfaction of the obligor’s existing duty. Performance of the accord discharges the original duty.”

**Certainty**

R§352 – “Damages are not recoverable for a loss beyond an amount that the evidence permits to be established with reasonable certainty.”

**Condition**

R§224 – “A condition is an event, not certain to occur, which must occur, unless its non-occurence is excused, before performance under a contract becomes due.” R§225(1) – Performance of a duty subject to a condition cannot become due unless the condition occurs or its non-occurence is excused.”

**Consideration**

Consideration is a detriment or a benefit that’s been bargained for. (Hamer v. Sidway)

R§71 - “To constitute consideration, a performance or return promise must be bargained for.” To constitute consideration, however (R§75), “a promise which is bargained for is consideration if, but only if, the promised performance would be Ç.” (R§72) – “[A]ny performance which is bargained for is consideration”

**Duress**

R§175(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 K is voidable by the victim.” R§176(1) provides “it’s always improper if...” things (4 of them). R§176(2) provides “it’s improper if the resulting is not on fair terms and...” factors (3 of them)

**Expectation Damages**

R§344(1) – expectation interest is “his interest in having the benefit of his bargain by being put in as good a position as he would have been in had the K been performed.”

**Foreseeability**

R§351 – “Damages are not recoverable for loss that the party in breach did not have reason to foresee as a probable result of the breach when the K was made.” R§351(2) helps define what’s foreseeable: “it follows from the breach: (a) in the ordinary course of events, or (b) as a result of special circumstances, beyond the ordinary course of events, that the party in breach had reason to know.”

**Goods**

UCC§2-105 – “all things (including specially manufactured goods) which are movable at the time of identification to the K for sale other than the money in which the price is to be paid, investment securities (Article 8), and things in action. ‘Goods’ also includes the unborn young of animals and growing crops and other identified things attached to realty as described in the section on goods to be severed from realty (UCC§2-107)”

**Mitigation**

R§350(1) – “[D]amages are not recoverable for loss that the injured party could have avoided without undue risk, burden, or humiliation”

**Mutual Assent**

Mutual Assent is a manifestation of a willingness to be bound.

R§18 – “Manifestation of mutual assent to an exchange requires that each party either make a promise or begin or render performance.

**Offer**

R§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.

**Penalty**

R§355 – “Punitive Damages are not recoverable for a breach of K unless the conduct constituting the breach is also a tort for which punitive damages are recoverable.” & R§356(1) – “A term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty.”

**Reliance Interest**

R§344(2) – reliance interest is “his interest in being reimbursed for loss caused by reliance on the K by being put in as good a position as he would have been in had the K not been made

**Restitution Interest**

R§344(3) – Restitution interest is “his interest in having restored to him any benefit that he has conferred on the other party.”

**Substantial Performance**

R§237 – “...there be no **uncured material failure**by the other party...”

1. Is there a Contract?
   1. Mutual Assent
      1. R§17 – K must have manifestation of MA
      2. Manifestation of Assent is usually offer/acceptance, but we can have MA even if we can’t ID Offer/Acceptance and can’t determine moment of formation
      3. Parties must be capable of assent:
         1. Kids can’t assent
         2. Drunk people can’t assent (when both parties know the party is drunk)
      4. Offer
         1. Offeror is the master of the offer because he can craft it however he wishes
         2. Offer Defined (R§24 p.171): “Manifestation of willingness to enter into a bargain,” so made as to justify another part in believing such.
         3. Preliminary Negotiations are not offers (R§26 p.171)
            1. Manifestation is not an offer if other party knows or has reason to know that potential offeror doesn’t intend to be bound until he’s made a further manifestation
            2. Advertisements are not typically offers – rather, they’re usually an invitation to come make an offer.
            3. Hoffman v. Red Owl Stores, Inc. – No K was made because parties never settled essential terms, but Ct can still allow §90 damages.
         4. Effect of Delay in Communicating Offer - If offeree doesn’t know and has no reason to know of delay in transmission of offer and such delay is the fault of the offeror or the fault of the means of transmission chosen by the offeror, then a K can be created within the period which would have been permissable if the offer had been dispatched at the time that its arrival seems to indicate. (R§49 p.180)
      5. When an offer can’t be revoked:
         1. When there has been Ç for the option K
         2. Firm Offer Rule
            1. Sale of Goods
            2. By a Merchant
            3. Signed in Writing
         3. When Offer has been relied on in a foreseeable way (eg: Gen-K vs. Sub-K problem)
         4. Performance has begun (usually we require performance to be completed) on a unilateral K – see Performance as Acceptance
      6. Auction Notes (UCC§2-328 p.59)
         1. Auction non-binding on Seller (Auctions presumed to have a reserve)
         2. Auction can bind seller if it’s clarified that there is no reserve
      7. Acceptance
         1. Rolling Acceptance:
            1. Language on outside of shrink-wrapped package with language to the effect of “opening this package or using the product inside confirms your acceptance of the following license agreement...” is sufficient to create K with consumer who uses product, provided the consumer has reason to expect the contents of the agreement.
            2. Terms listed on a website that weren’t seen by the user aren’t binding on the user, as he hadn’t assented, having been unaware of them (Specht v. Netscape Communications Corp. p.676)
         2. We have a “duty to read” and when we agree to a K, we are bound to its terms, even if we didn’t read them.
         3. Acceptance is manifestation of assent to terms of offer (R§50 p.180)
         4. Offer gives offeree continuing power to complete MA by accepting. Offer can’t be accepted after power of acceptance has been terminated (R§35)
         5. An Offer may only be accepted by a person whom it invites to furnish the Ç. (R§52 p.181)
         6. When in doubt, offers invite acceptance by promising to perform or by performing. (R§32 p.174)
         7. An offer may specify the means by which it may be accepted. Unless otherwise specified, offers are acceptable by means reasonable in the circumstances (R§30(2) p.174) The offer may specify the time, place, and/or manner of acceptance (R§60 p.183).
         8. Late or otherwise defective acceptance by offeree may be effective as a new offer to the original offeror. R§70 p.187)
         9. The Mailbox Rule
            1. All correspondences are effective as of when they are received,
            2. Except for acceptance, which is effective as of when it is sent. (R§63 p.184)
            3. For telephone/teletype acceptance, it’s as though they’re talking in person (R§64)
            4. Medium of acceptance is reasonable if it’s used for similar transactions or if it’s the one used by offeror (R§65 p.185)
            5. Offeree must properly & reasonably dispatch acceptance for it to be effective (R§66, p. 185). If they don’t, it’s still treated as effective at time of dispatch if it arrives in the same amnt of time it would’ve taken, had they done it right (R§67 p.185)
         10. Performance as Acceptance
             1. Performance is only acceptance when offer invites performance as acceptance (R§53(1) p.181)
             2. Performance isn’t acceptance if offeree manifests intent not to accept. (R§53(2)-(3) p.181)
             3. Acceptance by performance requires that @ least part of what offer requests be performed (R§50 p.180)
             4. Acceptance by a promise requires that offeree complete every act essential to the making of the promise (R§50(3) p.180)
             5. Option K - (R§87, R§45)– when offeror should reasonably expect an offer to induce action by offeree, such action is acceptance and creates a binding K to the extent necessary to avoid injustice (R§87 p.198)

R§87(1) makes an offer binding as an option K if:

it’s in writing and signed by offeror, recites a purported Ç for the making of the offer, and proposes an exchange on fair terms within a reasonable time; or

is made irrevocable by statute

So for an offer to be binding as an option K, we need Ç (for the offer itself)

R§87(2) Can create binding K for “preparing to perform,” where R§45 & R§50 require actual performance. In this way R§87(2) is like R§90, except that to get to R§87(2), you have to actually have an offer, rather than just a promise.

When offeror invites acceptance by performance (not by promise), Option K is made when offeree “tenders or begins the invited performance or tenders a beginning of it.” Offeror’s duty here is conditioned on completion of offeree’s performance in accordance w/terms (R§45, p.178)

* + - * 1. Offeree needn’t notify offeror of acceptance by performance, but offeror’s duty is discharged unless: (R§54 p.181)

Offeree takes reasonable diligence to notify offeror of acceptance

Offeror learns of performance within reasonable time

Offer indicates that notification of acceptance is not required

* + - * 1. For Offeree to accept by promise, they must diligently try to notify offeror of acceptance R§56
      1. Silence as Acceptance (R§69 p.186) – Silence isn’t acceptance unless:
         1. Offeree takes benefit of offered services with reasonable opportunity to reject them & has reason to know that they were offered w/the expectation of compensation
         2. Where offeror has told offeree that silence is acceptance, and offeree, in remaining silent, intends to accept offer
         3. Where, because of previous dealings or otherwise, it is reasonable that offeree should notify offeror he doesn’t intend to accept.
         4. Offeree accepts offer by acting inconsistent with offeror’s ownership of offered property.
         5. Basically, you need “silence plus” – silence and something else that indicates assent (or something else that indicates that silence is assent)
         6. R§69 exceptions don’t apply in Vogt v. Madden – Silence still not acceptance here
         7. Day v. Canton could be argued as §69(1) example of silence as acceptance
         8. Silence can be acceptance when offeror is relying on offeree for goods (Cole-McIntyre-Norfleet Co. v. Holloway)
      2. Ways to terminate Offeree’s power of acceptance:
         1. R§36 – terminated by:

rejection/counter-offer

any manifestation of intent not to accept is a rejection unless offeree manifests an intent to take it under further advisement R§38(2)

lapse of time (R§41)

Offer lapses at time specified. If not specified, at a reasonable time

Reasonable time is a Q of fact

Offer by mail is seasonably accepted if acceptance is mailed at any time before midnight on the day on which the offer is received (subject to R§49)

revocation by offeror

death or incapacity of offeror or offeree

non-occurance of any condition of acceptance under terms of offer

* + - * 1. Option K - power of acceptance isn’t terminated by rejection, counter-offer, revocation, or death of offeror unless requirements are met for discharge of K duty
      1. UCC Offer/Acceptance (UCC§2-206 p.32)
         1. Any offer is construed as inviting acceptance by reasonable mediums
         2. Order for goods invites acceptance by either promise to ship or by performance (shipping goods)
         3. Offeree must notify offeror if they’re accepting via performance (different from R§54)
    1. Counter-offers, lapse, Rejection
       1. Offeree holds the power of acceptance, which can be terminated by rejection, counter-offer, revocation, or by death/incapacity of the offeror (R§37 p.176)
       2. Rejection is a manifestation by offeree not to accept (R§38 p.176)
          1. Counter-Offer (R§39)

is an offer made by an offeree to his offeror relating to the same matter as the original offer and proposing a substituted bargain differing from that proposed by the original offer.

Offeree’s power of acceptance is terminated by his making of a counter-offer, unless the offeror has manifested a contrary intention or unless the counter-offer manifests a contrary intention of the offeree (ie: “I agree to sell you this hay for $5/ton, but if you really like it and you could find it in your heart, it would be swell if you could pay $10/ton”)

Reply to an offer that purports to accept but is conditional of offeror’s assent to additional or different terms is not acceptance – it’s a counter-offer (R§59)

* + - 1. Offer lapses at specified time or, if no time specified, at a reasonable time. Reasonable time is a Q of fact. (R§41 p.177)
      2. Offeree can’t purport to accept while also placing additional terms on offeror. That’s a counter-offer (R§59 p.182)
      3. Revocation
         1. When offeree receives manifestation of intent not to enter K from offeror, the offer has been revoked and power of acceptance has terminated. (R§42 p.178)
         2. Offer is revoked when offeror takes definite action inconsistent w/intent to enter K, and offeree acquires reliable info. of acts (R§43 p.178) (Dickenson v. Dobbs – offer revoked when offeree knew offeror was looking to find another buyer)
         3. Under restatement, unless Offeree has provided some Ç for offeror to keep offer open, it may be revoked at any time (even if offer says it will be kept open).
         4. Under UCC, if offeror is a merchant, then an offer (signed writing) that says it will be left open is unrevokable (UCC§2-205 – Firm Offers – p.32)
    1. MA can fail when there’s a misunderstanding
       1. When the K hasn’t been performed, we look to R§20 p.170
       2. When the K has already been performed, we look to R§201 p.232
       3. Basically, we look at who’s more guilty – try to find someone who attached a meaning and knew or should have known that the other party was attaching a different meaning. If both parties attach different meanings and neither knows or has reason to know that the other party is attaching a different meaning, we fail MA (R§20(1)(a), R§201(3)).
       4. R§20 – “Effect of Misunderstanding”, R§201 = “Whose Meaning Prevails”
    2. Duress
       1. R§175 (p.223) – When Duress by Threat Makes a K Voidable
          1. When MA is induced by improper threat, leaving party with no reasonable alternative, the victim can void the K
          2. If MA is induced by improper threat by 3rd party, victim can void K unless other party to transaction in good faith and w/o reason to know of duress gives value or relies materially on K
       2. R§176 (p.224) – When a Threat is Improper
          1. Threats of:

Criminal/Tortuous Acts

Criminal Prosecution

Bad faith use of civil process

Breach of duty of good faith & fair dealing

* + - * 1. Threat is improper if the resulting exchange is unfair and

The threatened act would harm the recipient and wouldn’t significantly benefit the party making the threat

Effectiveness of the threat has been increased by prior dealings

What is threatened is a use of power for illegitimate ends

* + 1. Unconscionability:
       1. 2 parts:
          1. Procedural Unconsc. – How K was made; ie: how parties were induced to assent (spanish K to english speaker, tiny print presented to elderly person, disparity in bargaining power) (Maxwell v. Fidelity Financial Services)
          2. Substantive Unconsc. – actual terms of ; overly harsh, unbalanced obligations (Williams v. Walker-Thomas)
       2. R§208 (p.237) – Unconscionable K or Term
       3. If a Ct finds a K or term Unconscionable, it may refuse to enforce K or term
       4. UCC VERSION - Ct won’t enforce unconsc. K (UCC§2-302 (p.38))
    2. Public Policy – rarely void Ks on public policy grounds (R§178 p.227)
       1. In Re Marriage of Witten
       2. Promises restraining marriage, affecting custody (R§189-191)
       3. Can’t force someone to be a parent via K
       4. Won’t award SP if it’s contrary to public policy (R§365)
  1. Consideration (Ç)
     1. Ç is a performance or return promise that is bargained for - R§71 (p.188)
        1. Ç 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 – R§71(2) p.188
        2. detriment OR benefit; not detriment AND benefit (Hamer v. Sidway)
     2. R§72 (p.188) – Exchange of Promise for Performance: Any performance bargained for is Ç except:
        1. R§73 (p. 189) – Performance of Legal Duty
        2. R§74 (p.190) – Settlement of Claims
     3. R§79 (p.192) – Adequacy of Consideration: Mutuality of Obligation: No additional requirement for:
        1. Benefit to promisor/detriment to promisee
        2. Equivalence of value (Hancock Bank & Trust v. Shell Oil, Batsakis v. Demotsis)
        3. Mutuality of obligation
     4. Agreements that are unenforceable for lack of Ç:
        1. Illusory Promise Rule (Wickham & Burton Coal v. Farmers’ Lumber)
           1. Both parties must be bound to something
           2. Illusory and Alternative Promises - R§77 (p.192)

If one party has the option of alternate performance (ie: “I’ll buy all of the jalapenos I want from you”), it is not Ç

Unless alternate performance would also satisfy as Ç (option to cancel would not satisfy as Ç)

* + - * 1. UCC **&** Exclusive Dealings as Ç:

UCC§2-306 (p.42) – Output, Requirements and Exclusive Dealings – these are not illusory

Promising to only deal w/somebody is Ç

Even if K doesn’t require you to buy/sell any amount of product

* + - 1. Donative promises (Dougherty v. Salt) (including where there’s a fake “nominal Ç) (Schnell v. Nell)
      2. Performance of Legal Duty - R§73 (p. 189)
    1. Things still enforceable w/o Ç (Restatement §82-§96):
       1. Promise to pay debt R§82 (p.193)
          1. Promise to pay all or part of an antecedent debt is binding if the debt is still enforceable or would be enforceable but for SoL. Such an obligation can happen via:

voluntary acknowledgment to obligee, admitting existence of debt

voluntary xfer of $, negotiable instrument, or other thing made as interest on or part payment of debt

statement to obligee that SoL will not be pleaded as a defense.

* + - * 1. Promise to pay debt discharged in bankruptcy R§83 (p.194)
        2. @CL, promise to pay debt incurred while a minor was also enforceable (just like R§82/R§83 promises)
      1. Promise to perform despite nonoccurrence of a condition (R§84 p.194) (see below, in “Conditions” section)
      2. Promise for past benefit received (R§86 p.196) (Mills v. Wyman)
         1. Here, to be enforceable, we want the beneficiary of the promise to have suffered some harship while conferring the past benefit. ie: You pushed me out of the way of a bus and in doing so you broke your leg. My promise to pay your medical bills is enforceable. If you push me out of the way you suffer no injury and I promise to pay you $1M/year for life, we’re less likely to enforce that.
         2. Promise to pay for benefit already received is binding (to the extend necessary to prevent injustice) unless:

Promisee conferred the previous benefit as a gift or if, for other reasons, promisor hasn’t been unjustly enriched, or

To the extent subsequent promise is in proportionate value to already-rendered performance

* + - * 1. Only obligated to pay for your own benefit received (not the benefits to a 3rd party)
  1. Certainty
     1. K which says “we’ll figure stuff out and come to an agreement later” = unenforceable. Cts won’t enforce K where terms aren’t “reasonably certain” (R§33 p.174)
        1. Terms are reasonably certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy.
        2. The fact that one or more terms are left open may show that a manifestation of intent is not intended to be understood as an offer or as acceptance.
     2. Part Performance under K may remove uncertainty and establish K is enforceable. (as performance helps us validate MA) (R§34 p.175)
     3. Even w/uncertainty, reliance on agreement may make contractual remedy appropriate (R§34(3) p.175)
     4. “A contract may be enforced even though some K terms may be missing or left to be agreed upon, but if the essential terms are so uncertain that there is no basis for deciding whether agreement has been kept or broken, there is no K (Academy Chicago Publishers v. Cheever p.539)
     5. If there’s a reasonable basis for Ct to supply a term, they can do so (Moolenaar v. Co-Build Companies, Inc. – Tenant could renew lease at a “reasonable” rate even though no rate was specified in K)
     6. **UCC** has no problem w/uncertainty (UCC§2-204(3) p.31):
        1. Lacking price, assumes reasonable price @ time of delivery (UCC§2-305 p.40)
           1. When B or S is empowered by K to set price, they must do so in good faith
           2. When a price doesn’t get fixed b/c 1 party screws up, the other can treat K as cancelled or himself fix a reasonable price
           3. When parties agree not to be bound unless there’s a fixed price, there’s no K absent a fixed price. B has to return goods or pay a reasonable price for them.
        2. Lacking place, it assumes seller’s place of business (UCC§2-308 p.43)
        3. Lacking time, it assumes reasonable time (UCC§2-309 p.44)
        4. Lacking time of payment, assumes at time of delivery (UCC§2-310 p.44) When things sold on credit, credit starts running when shipped, unless invoice is post-dated (in which case it starts running then)
  2. Statute of Frauds
     1. Things that fall within SoF:
        1. Promises with Executors & Administrators (R§110(a))
           1. Only applies to promises by an executor to pay an existing debt of the estate
           2. Unimportant. Few cases.
        2. Suretyship (R§110(b))
           1. “main purpose rule” – when A wants to take on B’s debts as a friend or to help B out, then it’s within SoF
           2. When A wants to take on B’s debts for A’s own interests (maybe A is a creditor to B and wants to stave off other creditors, maybe A’s property is subject to a lien on B’s property), it is outside the SoF.
        3. Marriage as Ç (R§110(c))
        4. K for the sale of an interest in land (R§110(d)
        5. Agreements not to be performed within 1 year from the making thereof (R§110(e))
           1. If it is possible the K could be performed within 1 year (eg: “. . . until I die . . .”), it is outside SoF
           2. SoF only applies to Ks that cannot possibly be performed w/in 1 year.
        6. UCC **-** Sale of Goods >=$500 (UCC§2-201)
           1. Not enforceable beyond quantity specified in writing (therefore, there must be a quantity)
           2. Exceptions in UCC§2-201(3)
     2. Even Ks that fall within SoF can be enforceable, lacking signature, if the Ct exercises an exception due to part performance
     3. Rescision of K that falls within SoF doesn’t have to satisfy SoF, unless K has already been fully performed
     4. For Modifications, SoF must be satisfied if the K, as modified, would fall within SoF.
  3. Implied Contracts
     1. Implied in Fact
        1. Just like regular contracts, except MA is implicit rather than explicit
        2. Actions make contracts
        3. Reasonable person would understand that there is a duty based on the circumstances – that actions implied MA
        4. Your actions show that you would agree
     2. Implied in Law
        1. Recognize Quasi-Contract to avoid Unjust Enrichment
        2. K Implied when one party knowingly and voluntarily accepts benefit from other party.
        3. Parties don’t have K but someone would be unjustly enriched at the expense of the other if there was no K.
        4. Facts don’t indicate MA
           1. Law will find an implied K, by law, not by circumstances of the case.
           2. Otherwise, there would be unjust enrichment
     3. Unjust Enrichment vs. Quantum Meruit (bottom p.515)
        1. Unjust Enrichment = “based upon the inequity of allowing the ∆ to retain a benefit without paying for it” – damages calculated by benefit conferred.
        2. Quantum Meruit – “based upon an implied K to pay reasonable compensation for services rendered.” – damages calculated by reasonable value of π’s services.

1. What does the K Consist of?
   1. Implied obligation of good faith:
      1. R§205 – Every K imposes upon each party a duty of good faith and fair dealing in its performance and enforcement
      2. UCC§1-304 – Every K or duty within the UCC imposes an obligation of good faith in its performance and enforcement
      3. You can’t purposely interfere with the other party’s performance of the K (Patterson v. Meyerhofer)
      4. When one party has discretion to act for a particular purpose, exercising that discretion for another purpose is bad faith (ie: saying you don’t approve of an artist’s work just to get out from paying him is bad faith) (Best v. United States Nat, Bank)
      5. Merely making the K more difficult to perform isn’t bad faith (ie: if buying your materials puts a squeeze on one of your suppliers and they have a hard time performing), but wholly preventing the other party’s performance may excuse their nonperformance (Iron Trade Products Co. v. Wilkoff Co.)
   2. Conditions:
      1. Condition Precedent – the performance required does not become due until the condition is satisfied (Scott v. Moragues Lumber)
      2. Condition subsequent – the performance required is suspended or terminated if the condition is satisfied
      3. R§224 (p.245) – Condition Defined – Event, not certain to occur, which must occur, unless its non-occurence is excused, before performance under K becomes due
      4. Substantial performance N/A to conditions – they must be fully performed or the counter-party is excused from performance (Oppenheimer, p.935)
      5. A condition may also be a promise. (R§225(3)). Therefore, if I promise to satisfy a condition and I fail to do so, not only are you excused from performance, but I am in breach.
      6. To create a condition, language must be express - When in doubt, we want to read K language as a promise and not a condition (R§227 p.246)
      7. Usually if performance is conditioned on the approval of a party or third party, we don’t let the approver unreasonably deny approval – we look to whether a reasonable person would’ve been satisfied (R§228 p.248) There’s an exception if the substance of the K is aesthetic or of personal taste, in which case we may be more likely to defer to the subjective “approver” (Morin v. Baystone p.955)
      8. Cts can excuse nonoccurance of a condition: (p.938)
         1. Waiver under R§84(1)
            1. Promise to perform despite nonoccurance of Condition is binding unless:

Condition was material part of K and promisor was under no duty for condition to occur; or

Uncertainty of condition was a risk assumed by the promisor

* + - * 1. Waiver does not require Ç (Clark v. West)
        2. if waiver promise was made before occurance was supposed to happen and condition is w/in control of promisee, promisor can again make performance subject to condition by giving notice if: R§84(2)

Notification is received while there’s still time to cause condition to occur; and

Reinstatement of the condition isn’t unjust; and

Promise isn’t made binding by R§84(1)

* + - 1. If enforcing condition would cause disproportionate forfeiture (R§229 p.248) Forfeiture is described in the comment as “the denial of compensation that results when the obligee loses his right to the agreed exchange after he has relied substantially.”
  1. Modifications:
     1. While K is still executory, (not fully performed on either side), it may be modified:
        + 1. R§89 (p.199) – Modification of Executory K – executory promise modifying a duty under K is binding:

If modification must be fair & equitable in view of circumstances not anticipated by the parties when K was made; or

to the extent provided by statute; or

to the extent that justice requires enforcement in view of material change of position in reliance on the promise

See Angel v. Murray (p.138) – here there was a new, bargained-for Ç, so there’s no pre-existing duty problem

* + 1. Modification under UCC (UCC§2-209 (p.35) – Modification, Rescission and Waiver)
       1. K modifications don’t need Ç, but modifications must be made in good faith.
       2. Huge departure from @CL – need good faith instead of Ç to modify K.
       3. UCC§2-209(2) also provides that if K says modifications must be in writing, then they must.
       4. If original K fell under SoF, so do modifications
       5. Waivers:
          1. Waivers needn’t be written, even if other modifications would be so required (UCC§209(4))
          2. Party that’s waived can retract waiver while K is executory via notice to other party unless other party has relied on waiver (UCC§2-209(5))
    2. Wagenseller & Exceptions to the Employment @ Will doctrine (p.516)
       1. Public Policy – can’t fire for “bad cause; that which violates public policy (that is, violating statutory, constitutional, or common law)
       2. Implied In Fact (“Personnel Policy Manual” exception) – A policy manual outlining disciplinary steps before firing may form K implied in fact. Whether it does is a Q of fact, even if manual says “this isn’t inclusive, only a guide”
       3. Implied in Law (“Good Faith & Fair Dealing”) – Employers can’t fire employees to avoid paying them benefits they’ve earned (such as sales commissions)
    3. Accord & Satisfaction
       1. Restatement (R§281, p.266)
          1. Accord = K under which obligee promises to accept a stated performance in satisfaction of the obligor’s existing duty Performance under accord discharges original duty
          2. Until performace of accord, original duty suspended. If obligor substantially breaches accord, obligee may enforce either original duty or accord
          3. Breach of accord by obligee doesn’t discharge original duty, but obligor may sue for SP of accord in addition to claim for damages for partial breach
          4. Satisfaction – Accord has been performed
          5. @CL, Executory accords are unenforceable, but a major exception is Substituted Ks (R§279)

Substituted K is accepted by obligee in satisfaction of obligor’s existing duty

Substituted K discharges original duty and breach of substituted K doesn’t give a right to enforce original K.

* + - * 1. Cts are likely to find accord is a substituted K (enforceable while executory) if the original duty was:

Disputed

Unliquidated

Not matured

Involved performance other than the payment of money

* + - * 1. Conversely Ct is likely to find Accord is not Substituted K (not enforceable while executory if:

Undisputed

Liquidated

Matured

Involved payment of money

* + - 1. UCC Accord and Satisfaction (UCC§3-311 p.110) (eg: McMahon Food Corp. v. Burger Dairy)
         1. Instrument = Check (UCC§3-104 negotiable instrument defined p.106)
         2. Applies if ∆ proves that:

In good faith, he tendered instrument to π as full satisfaction of claim,

Amount of claim was unliquidated OR subject to bona fide dispute, and

π obtained payment of the instrument (cashed the check)

* + - * 1. Claim is discharged if ∆ can show some writing (on instrument or accompanying writing) with a conspicuous statement that the instrument was tendered as full satisfaction of the claim
        2. or if ∆ can prove that:

in a reasonable time before collection instrument was initiated

claiming (π)

knew that instrument was tendered as full satisfaction

* + - * 1. Claim is not discharged if:

π told ∆ that communications about disputed debts are to be sent to a designated person and the instrument wasn’t received by that person, or

π proves that they tendered repayment (to ∆) of the instrument within 90 days of receiving it

* 1. Interpretation
     1. Plain meaning rule = @CL, if a K is unambiguous, it should not be supplemented by extrensic (Steuart v. McChesney p.608)
        1. Contrasted in Pacific Gas & Electric Co. v. G.W. Thomas Drayage & Rigging Co – There, Ct says we want to look at any extrinsic evidence which can help us arrive at the intention of the parties (Corbin likes this)
     2. What parties meant is a Q of fact if it depends on the credibility of extrinsic evidence or on a choice among reasonable inferences to be drawn from extrinsic evidence. Otherwise, a question of interpretation is a Q of law (R§212)
     3. Ct. can supply an omitted essential term that is reasonable in the circumstances (R§204 p.235)
     4. Keep in mind R§33 p.174 – K must be reasonably certain to be enforceable. Ct can’t dictate intent of parties without any clue as to what they were assenting to.
     5. Restatement sections on interpretation and usage:
        1. R§219 (p.243) – Usage is habitual or customary practice
        2. R§220 (p.243) – Usage Relevant to Interpretation
        3. R§221 (p.244) – Usage Supplementing an Agreement
        4. R§222 (p.244) – Usage of Trade
        5. R§223 (p.245) – Course of Dealing
     6. UCC
        1. Reasonable Time – UCC§1-205, p.12
        2. Course of Performance or Practical Construction – UCC§2-208, p.35
           1. Look @ Parties’ performance to determine meanings
           2. Also look @ dealings and usage of trade.
     7. When terms are in irreconcilable conflict, our order of preference is (UCC§1-303(e)):
        1. Express Terms of Agreement
        2. Course of Performance (if parties have utilized one interpretation thus far in the performance of this agreement)
        3. Course of Dealing (if parties have worked together prior to this agreement)
        4. Trade Usage
  2. Parol Evidence Rule
     1. Parol Evidence is any evidence (written or oral) of a prior or contemporaneous agreement that will vary/alter the terms of a written agreement,
     2. Rundown: A & B have written K. A claims prior or contemporaneous verbal agreements re: K. Is evidence of this agreement admissable?
     3. This rule only applies to prior & contemporaneous agreements – not subsequent agreements
     4. UCC version (UCC§2-202 p.30) – can’t contradict writing, but can explain or supplement (a) by course of performance, course of dealing, or usage of trade), and (b) to add a consistent additional term (unless Ct determines completely integrated agreement)
     5. Evidence can always be admitted (R§214 p.241) to establish:
        1. Whether writing is integrated
        2. Whether writing is completely or partially integrated
        3. The meaning of the writing
        4. Illegality, fraud, duress, mistake, lack of Ç, other invalidations of K
        5. Ground for granting or denying a remedy
     6. Similarly, evidence can never be admitted to contradict an integrated agreement. (R§215 p.241)
     7. Oral condition to the legal effectiveness of K (vs. oral promise to perform) is excluded from parol evidence rule. (ie: since oral cond. wasn’t satisfied, K isn’t an enforceable integrated agreement, so rule isn’t implicated.
     8. First look to determine if there’s an integrated agreement (R§209)
        1. When parties reduce their agreement to writing and it looks like a complete agreement, it’s integrated.
        2. If it’s not integrated, then evidence is admitted
     9. Is it completely or partially integrated? (R§210 p.238)
        1. To be determined by Ct (R§210(3))
        2. Agreement isn’t completely integrated if it omits a consistent additional term which is agreed for separate Ç or if such a term might naturally be omitted (R§216(2) p.242)
        3. If it’s partially integrated, additional consistent terms admitted under R§216(1) p.242.
     10. If we’re looking at a completely integrated agreement, is the proposed evidence within the scope of the completely integrated agreement? (R§213(2))
         1. If evidence is outside the scope of the completely integrated agreement, it’s admitted
     11. So basically, you can admit additional terms for partially integrated agreements and stuff “outside the scope” and things that would naturally have been excluded from the agreement if it’s completely integrated, while 214 and 215 provide you with some absolutes (and 214 trumps 215)

1. Has there been a breach?
   1. Unexpected Circumstances R§261-R§271 p.262
      1. R§261 factors:
         1. Party’s performance is made impracticable
         2. Without his fault
         3. Occurrence or non-occurrence of the event was a basic assumption on which K was made (implied condition)
         4. His duty is discharged, unless language or circumstances indicate otherwise
      2. An event which occurs after the formation of the K and which renders performance impracticable can discharge performance. 3 steps (Transatlantic p.775):
         1. Contingency – something unexpected happens
         2. The risk of the contingency hasn’t been allocated to either party by agreement or by custom
         3. Occurrence of the contingency has rendered performance commercially impracticable
      3. Making performance slightly more expensive isn’t impracticable – must require an excessive and unreasonable cost (Mineral Park Land Co. bottom p.770)
   2. Frustration of Purpose R§265 p.262
      1. Performance is still technically possible, but the reason the parties executed the contract is now removed.
      2. eg. I rent a room from you to watch the king’s coronation. The coronation gets cancelled – the purpose of the K is frustrated (Krell v. Henry p.802)
   3. Under R§261-271, either party can get restitution (R§272 p. 264) (and maybe reliance if justice requires)
   4. UCC Unexpected Circumstances (Failure of Presupposed Conditions) UCC§2-615 p.86
      1. S isn’t in breach for non-performance if it’s impracticable (2-615(a))
         1. Here, increased costs don’t usually make for impracticability (note p.794)
         2. Exception where increased price did get S off the hook – ALCOA (same note)
      2. When contingency only affects part of S’s capacity, he can allocate resources as he so desires (2-615(b))
      3. S must notify B of delay or non-delivery and, if allocating under (b) must notify of estimated quota B gets
      4. When S gets B’s notice, he can void K or modify by notice to S. Failure to do so within 30 days makes K lapse (UCC2-616 p.88)
   5. UCC has some risk-allocating gap filler provisions:
      1. Risk of loss in the absence of breach - UCC§2-509 p.68
      2. Effect of breach on risk of loss – UCC§2-510 p.69 (basically says risk of loss is on B if they breach; S if they breach)
      3. When goods suffer casualty after K at no fault of either party, K is void if casualty is total, and in the event it’s partial, S can either void K or take goods w/allowance from S for damage (places risk on S) UCC§2-613 p.84
      4. Substituted Performance UCC§2-614 p.85
         1. If the K’ed means of delivery becomes unavailable and there’s a substitute, it must be used and must be accepted (2-614(1))
         2. If Gov. reg. makes payment impossible, B has to make alternate reasonable payment (2-614(2))
   6. Good Faith and Fair Dealing
      1. R§205 p.236
      2. Good Faith = honesty in fact and observance of reasonable commercial standards of fair dealing - UCC§1-201(20) p.7, 2-103(1)(b) for merchants
      3. You can’t maliciously interfere with the counter-party’s performance of K . This excuses the counter-party’s performance (Patterson v. Meyerhoffer p.886)
         1. But if you’re in the business of buying widgets and in the course of buying widgets (in good faith) you restrict the supply and the counter-party has a hard time fulfilling K, they still have to perform (Iron Trade Products Co. v. Wilkoff p.888)
      4. “Good Faith” can mean acting within reasonable expectations of parties (Best v. U.S. National Bank, bottom p.898)
   7. Substantial Performance
      1. For a party to be excused from performance, the counter-party must have committed a material breach. If the counter-party has substantially performed the K, the original party must also perform (Copper house piping case p.???)
      2. There are several factors to consider whether a breach is material R§241 p.253
   8. Perfect Tender Rule
      1. B in a single-delivery K (vs. installment K) can reject goods that aren’t perfectly as promised/ordered (UCC§2-601 p.72)
      2. 2-601 only applies to rejection. When B has accepted goods, discovers defect, and revokes acceptance UCC§2-608 applies and the nonconformity must substantially impair the value to B
      3. 2-601 also doesn’t apply to installment Ks. There, UCC§2-612 p.83 the same “substantial impairment” requirement applies, and B can only reject that shipment (unless the defect substantially impairs the value of the whole K – UCC§2-612(3))
      4. Cure – S can replace defective goods with conforming ones if K hasn’t expired. Also, if K has expired, but:
         1. B rejects
         2. S had reasonable grounds to believe goods would be accepted
         3. He seasonably notifies B of intent to cure
      5. Perfect tender rule (2-601) is also tempered by good faith (UCC§1-203, UCC§2-103) – B can’t seize on a minor defect to justify rejection actually based on something else.
2. What are the damages?
   1. Purpose of Remedies (R§344 p.284) – serve to protect 1 of 3 interests:
      1. Expectation Interest – “benefit of his bargain . . . being put in as good a position as he would have been in had the K been performed”
      2. Reliance Interest – “reimbursed for loss caused by reliance on the K . . as good a position as . . . had the K not been made”
      3. Restitution Interest – “[H]aving restored to him any benefit that he has conferred on the other party.”
   2. Remedies Available (R§345)
      1. money due under K as damages,
      2. SP of K or enjoinment
      3. Restoration of specific thing to prevent unjust enrichment
      4. Awarding money to prevent unjust enrichment
      5. Declaring rights of parties, and
      6. Enforcing arbitration award
   3. R§ Expectation Damages:
      1. Expectation under R§347 ie: “cost of completion” (Louise Caroline Nursing Home, Inc. v. Dix Construction Co.)
         1. injured party gets damages measured by: loss of value plus consequential/incidental loss minus costs or losses avoided by not having to perform
      2. If cost of completion is disproportionate to diminution in value (ie: it would cost $10k to repair your property, but the loss in value from your property being messed up is $500), we use “diminution of value” (R§348(2)(b)) – this is an exception to the typical “cost of completion” expectation damages. (Peevyhouse v. Garland Coal & Mining Co.); Exceptions where we still award cost of completion:
         1. Substantial Defect (City School District of the City of Elmira v. McLane Construction Co.)
         2. Look to subjective interest of the non-breaching party
      3. Look to diminution in value when cost of repair/completion would result in windfall to π.
   4. R§ Reliance Damages (R§349)
      1. Non-breaching party can recover damages in preparation to perform or in performance, less what breaching party can show non-breaching party would have suffered had K been performed (ie: I spend $100 preparing to perform. You breach. I sue for $100. You show I would’ve lost $10 had we performed K. I only get $90 from you)
      2. Look @ Reliance damages when Expectation damages can’t be accurately calculated (Security Stove & MFG v. American Rys. Express Co.)
      3. When π seeks reliance damages, burden is on ∆ to prove that expectation damages are too uncertain to calculate (CCC Films (London) v. Impact Quadrant Films Ltd.)
   5. R§ Restitution Damages (R§370-371)
      1. Restitution = restores to nonbreaching party any benefit that he has conferred on other party (R§344(c))
      2. Party is entitled to restitution only to the extent that he has conferred a benefit on the other party (R§370)
      3. We measure restitution damages by: (R§371)
         1. What it would have cost the other party to obtain the services elsewhere, or
         2. Increased Property Value
      4. Quantum Meruit - When π would have lost money in the event that K had been performed (ie: no expectation damages because π would’ve lost money), he can still get quantum meruit – the reasonable value of the performance, undiminished by any loss that would’ve been incurred by complete performance, measured by the cost to procure services at similar time/place
      5. π may forego expectation damages under K and instead opt for restitution damages (United States v. Algernon Blair, Inc.)
      6. Can get restitution damages even when there’s been a material breach (Osteen v. Johnson)
      7. Even the breaching party can get restitution for a benefit conferred (R§374)
      8. UCC§2-718(2) & (3) give Buyers restitution damages when they’re in breach
   6. UCC §1-306: Claim arising from a breach may be discharged w/o Ç via agreement of aggrieved party in authenticated record.
   7. **UCC Damages:**
      1. Breach by the Seller: (when buyer doesn’t have goods – S failed to deliver, B rejects or revokes acceptance)
         1. Buyer’s remedies in general (UCC§2-711 p.95) – buyer may cancel and whether or not he has done so may in addition to recovering so much of the price as has been paid
            1. B can recover the goods (UCC§2-502) or get SP or replevy of goods (UCC§2-716)
            2. Cover (UCC§2-712 p.96)

Buyer can buy substitute goods (must be in good faith & must without unreasonable delay)

Buyer may recover from Seller the diff b/t substitute goods and K price + incidental & consequential damages, minus costs saved by S’s breach (B’s damages = Consequential/Incidental Damages + Cover price – K price – costs saved by S’s breach)

Buyer who covers can only get cover (not UCC§2-713 damages), but whether replacement goods constitute cover or not may be a Q of fact. If replacement goods <> cover, then Buyer can get §2-713.

* + - * 1. Non-Cover (UCC§2-713 p.97)

Buyer can recover from Seller the diff b/t market price (at the time Buyer learned of breach) and K price (B’s Damages = Consequentials/Incidentals + Market Price – K Price – costs saved by S’s breach)

Market Price = UCC§2-723 (price at place and time of tender or, in the case of revocation of acceptance, the place of arrival)

Buyer cannot recover UCC§2-713 damages if they “cover.”

* + - * 1. When Buyer accepts goods but they’re not as agreed (UCC§2-714 p.98)

Buyer may recover from Seller diff b/t goods as delivered and goods as warranted.

Buyer may also recover incidental & consequential damages

Damages for Breach of Warranty = Consequential/Incidentals + Value of Goods as Warranted – Value of Goods Received – costs saved by S’s breach

* + - * 1. Buyer’s Incidental & Consequential Damages (UCC§2-715 p.98)

Incidental includes expenses incurred in: inspection, receipt, transport, care and custody, reasonable charges, expenses, etc. (everything about these damages is qualified with “reasonably”)

Consequential Damages Include any loss foreseeable to Seller which couldn’t have been prevented by mitigation/cover; or injury proximately resulted from breach of warranty

* + - * 1. Notes on Market Price (UCC§2-723)

MP is what’s prevailing at time when injured party learned of repudiation(2-723(1))

When (1) isn’t readily available, look @ reasonable substitute (temporally and regionally)

UCC§2-724 tells us what’s admissible to show market price

* + 1. Breach by the Buyer
       1. Seller’s Remedies in general (R§2-703 p.90): Aggrieved Seller may:
          1. Withhold delivery of goods
          2. stop delivery y bailee (UCC§2-705)
          3. resell and recover (UCC§2-706):
          4. Recover for non-acceptance (UCC§2-708) or for price (UCC§2-709)
          5. cancel
       2. UCC§2-704(1) (p.90) – Seller’s Right to Identify Goods to the Contract Not-withstanding Breach or to Salvage Unfinished Goods
       3. Resale including K for Resale (UCC§2-706 p.92)
          1. Seller can resell (in good faith & commercially reasonable)goods and get diff b/t sale price and K price from Buyer.
          2. Seller can also get incidental damages, but less expenses saved in consequence of Buyer’s breach.
          3. Sale may be public or private, but must be commercially reasonable.

For private sale, Seller has to give Buyer reasonable notification of his intent to resell

For public sale, only identified goods can be sold, & it has to be made at a usual place for public sale. The seller may buy.

Buyer at resale takes good free of any right by original Buyer, even if Seller screws up some provision in this section.

* + - * 1. Seller is not accountable to Buyer for any profit from resale
      1. Seller’s damages for non-acceptance or repudiation (UCC§2-708 p.94)
         1. Seller’s damages for Buyer’s non-acceptance is diff b/t market price @ time and place & unpaid K price (& incidentals), less expenses saved in consequence of Buyer’s Breach + incidentals
         2. If that doesn’t make Seller whole, then look @ what seller would’ve made had Buyer performed.
      2. When Buyer fails to pay what he owes Seller - Action for the price (UCC§2-709 p.94)
         1. S can recover price of goods delivered, & of goods Identified to K if seller is unable to resell
         2. When S sues for the price, he must hold for the buyer any goods which have been IDed to the K and are still in S’s control, except that if resale becomes possible, he can resell them to satisfy judgment.
         3. When B wrongfully rejects or revokes acceptance of goods, S who isn’t entitled to action for price under this section shall nevertheless get non-acceptance damages under §2-708
      3. Seller’s Incidental Damages (UCC§2-710 p.95): expenses incurred in stopping delivery, transport, care and custody after breach, etc.
      4. Even if B is in breach, he is entitled to (2-718(2)):
         1. amount he’s paid to S in excess of liquidated damages in K (if there is one), or
         2. (absent liquidated damages clause) 20% of total value of performance or $500 (whichever is smaller)
         3. Keep restitution in mind here – nobody’s going to get more than they deserve. B’s remedy under 2-718(2) is offeset by other amounts he owes S. (2-718(3))
         4. If S has notice of B’s breach before reselling goods received in part performance, his resale is subject to 2-706 (2-718(4))
    1. Proof of Market Price (UCC§2-723 p.104)
       1. In cases of repudiation, look @ market price at time of repudiation
       2. Look to reasonable times/places to figure out price
       3. For commodities traded on markets, we admit trade journals, etc. as evidence of market price (UCC§2-724 p.105)
  1. Limitations on damages
     1. Diminution vs. Cost of Completion
        1. R§348(2)(b) = Cost to complete/repair (Continental Gravel – broken frontloader case
        2. R§348(2)(a) - When the cost to complete (or repair) is grossly disproportionate to the diminution in value, we may limit recovery to diminution in value (Peevyhouse rule)
        3. When looking at repair vs. diminution (even if they’re way off), remember that (1) UCC says you get the diff b/t goods as warrantied and as delivered, and (2) if the breach is central to the K, then we may give repair even if super high(in peevyhouse, it was a mining K and repairing the land wasn’t really “central”)
     2. Mitigation - Damages may be limited when a party has failed to Avoid them(R§350 p.287) (Rockingham County v. Luten Bridge Co.)
        1. You can’t recover damages that could’ve been avoided,
        2. unless you reasonably tried to avoid them and failed
        3. In Employment K, duty to mitigate doesn’t require π to accept different or inferior employment (Shirley MacLaine Parker v. 20th Century-Fox Film Corp.) – you must do what is reasonable & ∆ must show that other employment was comparable (also don’t have to take employment far from home)
        4. If you have expenses from prudent attempts to minimize, they are recoverable even though they aggrevated rather than mitigated damages (Mr. Eddie, Inc. v. Ginsperg p.275)
        5. Examples:
        6. If your exp
        7. Dismantling custom pool tables instead of trying to resell is not commercially reasonable (Madsen v. Murrey & Sons Co. p.269)
        8. π not required to mitigate by making unreasonable personal outlays of money – only slight expense and reasonable effort required to mitigate (Bank One, Texas N.A. v. Taylor p.270)
        9. Where π and ∆ have equal opportunity to mitigate by same act, it’s equally reasonable to expect ∆ to reduce damagesl ∆ can’t contend π failed to mitigate (S.J. Groves & Sons Co. v. Warner Co. p.270)
     3. Foreseeability – Damages must be foreseeable (R§351 p.288)
        1. Loss may be foreseeable as a probable result of a breach because it follows from the breach
           1. in the ordinary course of events, or
           2. as a result of special circumstances, beyond the ordinary course of events, that the party in breach had reason to know
        2. Ct may limit lost profits damages; restricting to only reliance if it needs to in order to avoid disproportionate compensation.
        3. Hadley v. Baxendale – π can recover damages that were reasonably foreseeable to ∆ at the time K was made
        4. test is reasonable foreseeability, not actual knowledge - Hector Martinez & Co. v. Southern Pacific Transport
     4. UCC includes “had reason to know” and “could not reasonably be prevented” re: consequential damages in its relevant damages sections (See UCC§2-715)
     5. Certainty – Damages limited to what we can “be established with reasonable certainty.” (R§352 p.289)
        1. Doesn’t require us to know with absolute certainty, only capable of measurement based on known reliable factors w/o speculation (Ashland Management Inc. v. Janien)
     6. Emotional Disturbance (R§353 p.354): Forecloses recovery for emotional disturbance unless:
        1. “Breach also caused bodily harm”, or
        2. “K or Breach is of such a kind that serious emotional disturbance was a particularly likely result” (eg: Lane v. Kindercare, p.305)
     7. Punitive Damages aren’t recoverable for breach of K unless breach is also a Tort for which punitive damages are recoverable. (R§355, p.290)
     8. Liquidated Damages Clauses:
        1. Restatement (R§356 p.290): Liquidated damages term must be reasonable-
           1. in the light of the anticipated or actual loss caused by breach
           2. Unreasonable liquidated damages is a penalty
           3. Penalties aren’t enforceable b/c we want to encourage efficient breaches.
        2. Term in a bond providing for the amount of money as a penalty for non-occurance of a condition of the bond is unenforceable - R§356(2)
        3. NJ Rule (p.312) (a) is much more important than (b):
           1. Is clause a reasonable forecast?
           2. Did parties come up with this b/c damages would be difficult to estimate?
        4. UCC (UCC§2-718 p.101)
           1. Also requires reasonableness. Penalties also void under UCC (2-718(1))
           2. Hasn’t been widely adopted – most places still use pre-2003 version of UCC§2-718.
           3. Lee Oldsmobile v. Kaiden – LD of a deposit isn’t necessarily enforceable – still look @ whether damages could be accurately estimated @ time of K
        5. Party claiming LD clause is unreasonable has burden to prove. (LD Clauses presumed reasonable)
     9. K limitation of Remedy – UCC§2-719
        1. If remedy is limited soas to fail in its purpose, Cts can use whatever remedy they want (2-719(2))
        2. Consequential damages can be limited by K unless the limitation is unconscionable. Limitations of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable (2-719(3))
  2. Specific Performance
     1. Basically, we don’t do SP if there’s any way to avoid it.
     2. Exception: Real Estate. We usually default to SP for R.E. because the land is special/unique.
     3. We especially try to avoid SP for employment Ks and don’t enforce non-compete clauses that leave the employee without a way to make a living (R§367)
     4. If Damages can protect the expectation interest of the injured party, no SP (R§359 p.291). We may give SP if (R§360 p.291):
        1. Difficult to prove damages w/certainty
        2. Difficult for π to procure substitute performance w/damages awarded
        3. π will have a hard time collecting damages from ∆.
     5. Ct won’t give SP will place a great enforcement burden on the Ct (R§366) – weigh ease of enforcement of SP v. ease of calculation of monetary damages (Walgreen Vo. v. Sara Creek Property Co.)
     6. UCC SP:
        1. Seller’s Action for the price (UCC§2-709 p.94) is basically Seller’s SP
        2. Buyer’s SP is appropriate where the goods are unique (or in other proper circumstances (UCC§2-716 p.99) – Ct can include terms like price.
           1. 2-716(3) gives B right of replevin for goods if he can’t cover
           2. Personal/family/households, B’s right of replevin vests upon acquisition of a special property, even if S hadn’t repudiated or failed to deliver
        3. Even if goods aren’t unique, if B will be unable to cover, he may still get SP (Laclede Gas Co. v. Amoco Oil Co.)
        4. Note – UCC doesn’t include R§ language re: Ct’s difficulty in enforcing SP
  3. Restitution Damages for Breach of K
     1. Party entitled only to the extent that he has conferred a benefit on on the other party (R§370 p.294)
     2. Restitution Damages may be calculated as either (R§371 p.294):
        1. reasonable value of what party received in terms of what it would have cost him to obtain it from a person in the claimant’s position, or
        2. The Extent to which the other party’s property has been increased in value or other interests advanced
     3. Note that restitution damages may be awarded to the party in breach (R§374 p.296)
  4. Promissory Estoppel (R§90 p.200) - elements
     1. Promise
     2. Reasonable Reliance
     3. Detriment
     4. Injustice can only be avoided by enforcement
  5. Estoppel in Pais – (1) misstatement offact, (2) Justifiable reliance (3)detriment from reliance. Like PE, but fact instead of promise.

1. Mistake (Defined R§151 p.214), Misrepresentation, & Unexpected Circumstances
   1. This is one of the areas where we may reference UCC§1-103(b) in a Sale of Goods case to use the Restatement as persusasive
   2. Party not barred from avoidance or reformation for failing to know or discover facts before making K unless his fault amounts to breach of good faith & fair dealing (R§157)
   3. Cts can award restitution (R§158(1)) or reliance (R§158(2)) if K is voided for mistake.
   4. Unliateral Mistakes – R§153 p.215
      1. Elements of Unilateral Mistake:
         1. Mistake (as to basic assumption)
         2. material effect
         3. No allocation of risk to affected party
         4. No fault
         5. At time of K
         6. Effect of mistake is Unconscionable OR the other party had reason to know of the mistake
      2. K is voidable by prejudiced party if he doesn’t bare risk of mistake under R§154 and
         1. Enforcement of K would be unconscionable, or
         2. Other party had reason to know of the mistake or his fault caused the mistake
   5. Mutual Mistakes
      1. Elements of Mutual Mistake:
         1. Mutual Mistake – goes to a basic assumption on which K was made
         2. Having a Material Effect – affected party must show > mere loss of advantage
         3. No allocation of risk to affected party
         4. No fault (on part of party who is attempting to void K due to mistake)
      2. Reform - Ct may reform K in the event that mutual mistake makes writing fail to express the agreement. (R§155 p.216) & reformed K not precluded by SoF (R§156)
      3. Void – Ct may void K in the event mutual mistake re: basic assumption w/material effect on agreed exchange (R§152(1) p.214) – Cts may also grant reformation, restitution, or other relief (R§152(2)) (Sherwood v. Walker)
      4. Mistake must be fundamental – ie: a K can be voided if you and I are mutually mistaken in believing that a given painting is a Picasso. It cannot be voided if we’re mutually mistaken in believing that a Picasso is worth $100.
   6. When a party bears the risk of mistake (R§154 p.216)
      1. The risk is allocated to him by agreement of the parties, or
      2. He’s aware, at the time K is made, that he has limited knowledge w/respect to facts & treats his knowledge as sufficient, or
      3. Ct decides it’s reasonable in the circumstances to stick him w/the risk
   7. For mistakes in the sales of goods, look @ Warranties (below)
   8. Nondisclosure/Misrepresentation
      1. This is one of the areas where we may reference UCC§1-103(b) in a Sale of Goods case to use the Restatement as persusasive
      2. Misrepresentation is an assertion that is not in accord with the facts (R§159)
      3. Elements to make K voidable by misrepresentation:
         1. Misrepresentation (assertion not in accord w/facts)
         2. Misrepresentation is either fraudulent or material
         3. Justified Reliance
      4. An action to prevent another from learning a fact is equivalent to denying the fact (R§160 p.219)
      5. Similarly, (R§161) non-disclosure is equivalent to misrepresentation only if:
         1. There’s been a previous assertion and the party knows disclosure is necessary to prevent misrepresentation via the prior assertion
         2. If not disclosing fails to correct the other party’s mistake as to a basic assumption, and nondisclosure amounts to bad faith and unfair dealing.
         3. Where the party knows the disclosure would correct the other party’s mistake as to the agreement.
         4. If the other party is entitled to know the fact b/c of relation of trust
      6. Misrepresentation can kill the formation of a K when it’s relevant to the character or essential terms and it induces the other party, who doesn’t know of the misrepresentation, to assent. No K b/c no MA (R§163 p.221)
      7. K can be voided in the above situation and also if a third party misrepresents to one party and the other party, who’s acted in good faith & without reason to know of the misrepresentation, hasn’t relied on it. R§164 p.222)
2. The Battle of Forms
   1. General Rule = “Mirror Image Rule” = acceptance must mirror offer, else it’s a counter-offer – not acceptance
   2. UCC§2-207 p.33
      1. Negotiated (non-form) Ks are outside UCC§2-207
      2. Writing is an acceptance even w/additional or different terms – they’re to be construed as proposals for addition to the K. B/t merchants they become part of the K unless:
         1. Offer expressly limits acceptance to the terms of the offer (and this has to be very express and very obvious) – Gardner Zemke
         2. They materially alter the terms (material usually means they would likely affect a party’s decision to enterK)
         3. Offeror objects w/in reasonable time
         4. Conduct by both parties recognizes K
      3. Behavior (like shipping/accepting goods) evidences a K, even if writings b/t parties don’t otherwise establish K. – for stuff parties don’t agree on, look to other sections of UCC.
      4. “Knockout Rule” – in the event of conflicting form terms, they knock each other out, and we look at the law/UCC to fill in the gaps.
      5. Remember that 2-207 doesn’t eliminate our requirement for offer/acceptance, but it makes a lot of things that would’ve been counter-offers into, instead, acceptances with proposed additions.

**From a prior test answer, here’s what he says to do:**

“According to Section 2-207(2), additional terms (such as those [here]) become part of the contract unless (1) the offer limits acceptance to its terms ([not here?]); (2) they materially alter it; or (3) notification of objection to the terms is given.”

In a Battle of Forms problem, it’s probably going to be #2 we’re fighting over.

Also watch for language that makes acceptance conditional on the other party’s assent to their terms.

1. Warranty – (look here fore mistake re: Sale of Goods)
   1. R§2-312 p.46 – warranty to good title, and freedom from lien
   2. R§2-313 p.46 – Express Warranties are created by:
      1. Any affirmation of fact or promise by S to B
      2. Any description of the goods
      3. Any sample or model
   3. Goods sold by merchants carry an implied warranty of merchantability (unless excluded by UCC§2-316) (UCC§2-314 p.48)
   4. There’s also an implied warranty of fitness for particular purpose when S has reason to know how B is going to use the goods (UCC§2-315 p.50)