1. **Sales Good (SOG) or Sales Service (SOS)???**
   1. If both goods and services, do predominant factor test. 1) price, 2) wording of K, 3)the business of the person who performs. Courts also look at what the negotiations leading to the deal were like.
   2. Say , “this involves the UCC because widgets are moveable at the time identified in the contract, as supplemented by the Common Law.”
      1. **§ 1-103(b): says if there is no UCC law that applies, we apply Common Law.**
      2. UCC reads into every K an obligation to use good faith in the performance of the K. §1-304. **No such requirement for the formation of K.**
2. **K FORMATION**
   1. **CONSIDERATION**?
      1. Bargained for exchange, promisor actually seeking it? § 71
         1. An act, or
         2. A promise

Note: It not does not matter if there is no mutual obligation § 79

* + 1. Something to support the promise?
       1. Forbear a legal right? *Hamer*
          1. Okay if at the time you thought it to be true. *Fiege*
       2. Relied to your detriment? § 90, *Ricketts* (granddaughter stopped working)*,* also *Feinberg*
          1. 2R § 90: **Note this does not require detriment, any reliance is sufficient**

There must be a promise

Promisor must foresee reliance by promisee

Promisee actually relies on the promise

Justice requires the promise be binding

Remedy may be limited as justice requires

* + - 1. Continued employment in at-will relationships valid consideration *Lake Land Employment*
         1. Objections to this view:

Might get fired next day: illusory promise

Employee is getting the same thing by signing non-compete covenant.

* + - * 1. BUT, courts DON’T weigh sufficiency of consideration
    1. NOT VALID:
       1. Past services *Feinberg*
       2. Conditional gift promises *Kirksey*
       3. Person is unconscious, *Cotnam*
          1. No K b/c no bargain for exchange
          2. Person might recover under Restitution OFF the K if a doctor/nurse
       4. Illusory promise § 77, *Strong v. Sheffield*
          1. Promisor reserves an option. If you say “I won’t collect until I want the money” then promisor isn’t giving up anything, he’ll still collect the debt.
          2. **VALID and NOT illusory:**

**SATISFACTION:** *Mattei*

**Commercial satisfaction:** use reasonable person standard (objective test)

**Personal satisfaction:** use good faith standard (subjective test) *Mattei.*

**REQUIREMENTS K:** *Eastern*

there is valid consideration b/c the buyer has to buy what he requires from Eastern. (actual requirement + good faith)

Comment: shut down could be permissible if there were no passengers on planes, but not b/c Eastern wanted to buy from somebody else.

**EXCLUSIVE DEALING:** *Wood v. Lucy*

**Restatement:** implied promise to make **REASONABLE** effort. *Wood v. Lucy*

**UCC § 2-306 (2):** implied promise to make **BEST** effort.

* 1. **OFFER**? (viewed from perspective of reasonable offeree)
     1. Offer: something that bestows the power to create a K if the other party accepts
     2. If other party doesn’t know the other party is joking, then the offer is valid, *Lucy v. Zehmer*
        1. We look at objective and subjective
     3. A statement might just be an invitation to make an offer, *Owen v. Tunison*
     4. Look at:
        1. **Language: has to be specific** 
           1. Must have quantity term, *Fairmount Glass*

If no quantity term, O’or might have problem of unexpected demand, *Leftkowitz*

Solve this by saying “first come, first serve”, or “while supplies last”

* + - * 1. Generally Price quotations are not offers, just an invitation to make offer

EXCEPTION:

An advertisement is a valid offer if, *Leftkowitz:*

CLEAR

DEFINITE

EXPLICIT, and

LEAVES NOTHING OPEN FOR NEGOTIATION

If sent as a result of inquiry, then price quotation might be offer, *Corinthian Pharmaceuticals*

* + - 1. **Intent to be bound**

Sequence of the correspondence

Circumstances in which statement is made

* + 1. Elements to **rescind** an offer, *Kastorff*
       1. Material mistake of fact
          1. 5.8% in *Lemage;* 7.2 % in *Kastorff;* 301k in *Kempner*
       2. Not neglect of a legal duty
          1. Omitting a total, *Kempner;* Clerical error, *Kastorff*
          2. Note: mistakes of judgment are legal duties
       3. Enforcement unconscionable
          1. O’ee must **know of mistake before acceptance**, *Kastorff*
       4. Other party back in status quo
          1. If you can get another bid w/o advertisement
       5. Prompt notice of rescission
          1. Next day, *Kastorff*
       6. Restore value received (whatever you got from other party)
  1. **ACCEPTANCE**? (viewed from perspective of reasonable offeror)
     1. O’or is the master of his promise, you must accept on his terms,
     2. If the K is formed once you say “I accept”, then it is acceptance.
     3. **Mirror image rule**: acceptance should be the same as the offer, if not it is a counteroffer.
     4. UCC § 2-207 **BATTLE OF THE FORMS**
        1. If K is formed § 2-207 (1), look for Terms in § 2-207 (2).
        2. If K is formed § 2-207 (3) first sentence, look for terms in § 2-207 (3) rest of §.
     5. UCC: Non conforming goods
        1. § 2-206 (1) (b): shipment of **nonconforming goods** is acceptance, unless you notify buyer you are sending them just as an accommodation.
           1. If you send nonconforming goods and don’t notify, then you both accept and breach at same time.
           2. If you notify, then it is not acceptance but just a counteroffer, *Corinthian Pharm.*
           3. UCC § 2-106 (2) goods are conforming when they conform to the terms of the K.
     6. REVOKING POWER TO ACCEPT
        1. General rule: offer is revocable until accepted
           1. Lapse: after a reasonable time period from perspective of offeree
           2. Revocation

“I am not sure I want to go through with it” *Hoover*

Conditional upon receipt of the O’ee.

You don’t have to say “I revoke”

* + - 1. EXCEPTIONS:
         1. Additional consideration?

Option Ks, *Dickinson* (offer revocable b/c there wasn’t additional consideration to keep it open)

* + - * 1. If no consideration,

Firm offers UCC § 2-205

To have firm offer:

Merchant

Buy or sell goods

Signed writing

Reliance – R2 § 45, *Ragasta*

* + - * 1. Was the offer revoked? § 42/43

O’or take definite action inconsistent w/ intent to be bound, AND

O’ee acquires reliable information.

* + 1. REJECTION:
       1. A counteroffer is rejection
       2. Once you reject you cannot accept later
    2. **Mailbox rule**: use when we have correspondence going back and forth, not when oral communication.
       1. Acceptance valid when sent
          1. Exception: if you have an irrevocable offer, then acceptance valid upon receipt
       2. Rejection valid when received
       3. Revocation valid when received.
       4. If you mail rejection first and then mail acceptance, then this is a case of “overtaking acceptance 2R § 40” = WE WAIT AND SEE WHAT GETS THERE FIRST. If rejection gets there first, then it is rejected and when acceptance arrives it is just counteroffer.
  1. **STATUTE OF FRAUDS**
     1. Applied:
        1. Impossible to perform in 1 yr: from date you form K to date you finish performance
        2. Transfer interest of real estate
        3. Surety
        4. SoGs > $500 UCC §2-201(1)
           1. Writing

Signed by party charged against

Sufficient to show K of sale

Okay if you get the terms wrong

Difference from Common Law is that in common law you can’t put terms wrong.

Also okay if no price listed, date of delivery not required.

BUT NOT ENFORCEABLE BEYOND **QUANTITY** SHOWN ON WRITING, so that is needed.

* + - * 1. **Exceptions**

**Specially manufactured goods:** UCC §2-201(3)(a) – if they aren’t suitable for others.

**Judicial admission :** limited to whatever quantity the party admits

**Part performance:** buyer has to pay for amount received.

Policy: if you’ve already sent the goods, no reason to have fraud.

**§ 2-201(2):** allows a seller to enforce a K even though the only person who signed it was the seller. It is enforced against someone who has never signed.

Policy:

solves the asymmetry that K is enforceable against a party, and not enforceable against another party.

This rule facilitates K formation.

Encourages the common, prudent business practice of sending memoranda to confirm oral agreements

Requirements:

BOTH HAVE TO BE MERCHANTS

Reasonable time in terms of sender

Party receiving has to have reason to know about its contents (objective test)

The writing has to be sufficient to satisfy against the party sending, it has to have everything in it that the UCC usually requires.

It has to satisfy the statute of fraud against the sender.

So receiver *could* sue the sender

So it has to be signed

Receipt is the key thing (not mailbox rule of sending)

Party receiving it can send a written objection ten days after it is received.

Confirmation memo can’t be an offer

* + - 1. *Monarco* (unable to perform in a yr): reasons why R2 § 90 over SoFs:
         1. Substantial reliance isn’t enough, you need:

Unconscionable injury

Unjust enrichment

* 1. **DEFENSES to K FORMATION**
     1. **Minor**, *Keifer*
        1. K is not void, just voidable against person.
        2. Minor can rescind, but has to return the things he got
        3. Cannot rescind food/necessities K
     2. **Duress**, *Alaska Packers*
        1. Employees doing the exact same thing they had been charged to do, no additional consideration for employer. (pre-existing duty)
        2. Employer could not have found other fishermen in Alaska in the middle of the ocean.
     3. **Misrepresentation** must be of a material fact
        1. General rule is that you don’t have to tell ppl everything when you negotiate (otherwise, if you had to disclose everything, ppl wouldn’t be encouraged to invest in knowledge).
        2. BUT, if you mention something, then you have to disclose fully,
           1. *Swinton* termites got to rescind b/c it was **latent** defect buyer would not have known,
           2. *Kannavos* apartment got to rescind even though it was **patent** defect and buyer should have known b/c seller mentioned apartment and did not disclose fully

1. **K INTERPRETATION**
   1. **PAROL EVIDENCE RULE: negotiations prior or @ time of K**

The parol evidence rule is about whether *x* is one of the terms of the K, about whether it deals w/ the K, **not about what *x* means.** Only applies when you ADD, not when you EXPLAIN

|  |  |  |  |
| --- | --- | --- | --- |
| **Degree of Integration** | **Effect** | **How do you determine?** | **What evidence use/ look to?** |
| Unintegrated | * PER doesn’t apply * Can add or contradict |  | 1. *Gianni:* K writing 2. Writing + circumstances |
| Partially integrated  (*Masterson* case) | * **Can’t** contradict * Can add consistent terms | 1.***Gianni****:* prior negotiationnaturally be in writing  2. ***Masterson****:* naturally be in separate agreement.  3. **2 R § 216 (2) (b)** : naturally omitted from the writing  4. **UCC § 2-202** comment 3 “if they would have certainly been included” | 1.*Gianni:* K writing  2. writing + circumstances |
| Completely integrated  (*Gianni* case) | * Can’t contradict * Can’t add |  |  |

a. *Gianni* Test: old school view of PER. If the term would naturally be in the writing, then the K is integrated. Result is that you almost never get PER in.

b. *Masterson* Test: opposite of *Gianni*, says test is if the writing could be naturally put in simply another paper

c. *Restatement* Test: loser than both *Gianni* and *Masterson*

d. *UCC* Test, found in Comment 3:

i. If the term would have certainly been included, then it is completely integrated.

i. If it would not have certainly been included, then it is partially integrated.

Note: Gianni is the toughest test.

**Policy reason to have the rule:** if ppl make the time to make an agreement final, we don’t want ppl to come later on to say the K wasn’t valid.

**If it is a sales of goods, use UCC. If the question is in California, use *Masterson.* But regardless, use the modern trend of Restatement and mention it during final. The modern trend is also that you can look beyond the writing to see if something is integrated (writing + circumstances).**

**Merger clause:** says everything is in the K.

* 1. **Exceptions to PER:**
     1. To show fraud, duress, K invalid, etc. EVEN IF MERGER CLAUSE IS PRESENT
     2. Special, narrow exception:
        1. *Bollinger*: both parties made a mistake about the writing in the K, they thought it meant something else (waste in their property, they thought it would be sandwiched). What both parties wanted was a **reformation**. Both parties acted according to what they believed.

1. **Plain Meaning Rule:** applies when a party wants to introduce extrinsic evidence to prove what the writing means. They are not trying to add a term to the K (that would be PER)
   1. Courts look at two things, *Pacific Gas:*
      1. **Is the K ambiguous?**
         1. Options:
            1. If ambiguous, courts will look at extrinsic evidence
            2. If not ambiguous, NO extrinsic evidence
         2. Determining ambiguity:
            1. NY Rule: face of K “four corners rule” (example: *Frigaliment* chicken)

Extrinsic evidence only admissible if ct concludes that K is Ambiguous

Argument in favour:

CA rule lets ppl w/ self interest motives to say what they want to get out of K, so are we getting the actual true intent?

CA rule might chip away the foundations of law b/c then even rules and statues could be construed to be ambiguous & law would not be able to control criminal intent & law would lose its efficacy

CA rule invites ppl to do things in bad faith.

NY rule a lot of times will miss out on what ppl actually wanted, but trade off is that you have STABILITY and PREDICTABILITY.

* + - * 1. CA Rule: extrinsic evidence can create ambiguity

Argument in favour:

it’s a lot of $ in these Ks, trying to prove a term that might be ambiguous is not too taxing.

NY rule presupposes the fixed meaning of language & doesn’t let you figure out what the parties actually intended

It is also a way of being heard

* + 1. **Determine Meaning**
       1. Ambiguous🡪 jury
       2. Unambiguous🡪judge
  1. UCC Rule (Common Law does not allow):
     1. You can always look at the following w/o violating PER:
        1. Course of performance: what two parties to this K did during this K *Hurst* (horse meat case)
        2. Course of dealing: what 2 parties have done in past Ks, *Hurst* (horse meat case)
        3. Usage of trade: if not a member of the trade, you can still be held liable for knowing usage of trade, *Nanakuli* (paving) (**we look @ time K was made, not performed)**
           1. Could:

Supplement

arguing about the price. It supplements b/c we are not interpreting what price means, we are just adding a term to the K.

Give meaning

Qualify

“ no publication sooner than October”, you still can’t publish in October, so it does not give meaning, just qualifies.

* + 1. *Nanakuli*: Trade usage and past course of dealings between contracting parties may establish terms not specifically enumerated in the contract, so long as no conflict is created with the written terms.
    2. *Frigaliment*: trade usage must be so common that actual knowledge can be inferred.
  1. General rule: **Ks are construed as against the drafter**
  2. **LATENT AND PATENT AMBIGUITY:**
     1. *Oswald* & *Raffles*: **latent ambiguity**. *Oswald* = no way to pick interpretation, so no K. In both just by reading K no one would have known there was ambiguity.
        1. *Frigaliment*: **latent ambiguity** b/c both parties wanted chicken, just as in *Raffles* both wanted “Peerless”
     2. *Colfax*(printing press) **patent ambiguity**, so employer should have realized. Difference here is that by reading K you would have noticed ambiguity.
        1. With patent ambiguity you gamble w/ the interpretation, and might lose @ court
  3. **WARRANTIES**
     1. **IMPLIED**
        1. Implied Warranty **of Merchantability** UCC § 2-314
           1. fit” means reasonable expectations of ordinary user (usually we don’t care about the subjective expectations of the particular user) *Koken*
           2. “ordinary” means appropriate and customary use
           3. Requirements:

seller is a merchant

fit for ordinary purposes (not valid if buyer uses for other purposes)

* + - * 1. **To exclude or modify UCC § 2-316 (2)** any part of the writing:

**Must mention merchantability, and**

**Must be conspicuous**

* + - 1. Implied Warranty of **Fitness** UCC § 2-315
         1. Requirements:

Seller has reason to know particular use

Buyer relies on seller’s skill or judgment

* + - * 1. Disclaimer: **UCC § 2-316 (2)**

Exclusion be by writing

Conspicuous, 2-201 (10), use *South Carolina v. Combustion*

Language

Example “there are no warranties which extend beyond the description on the face thereof”

* + - 1. **ALL IMPLIED WARRANTIES EXCLUDED BY:**
         1. “AS IS,” “WITH ALL FAULTS”, ETC (doesn’t have to be conspicuous)
         2. BUYER EXAMINED GOODS BEFORE
         3. CAN ALSO BE EXCLUDED/MODIFIED BY

COURSE OF DEALING

COURSE OF PERFORMANCE

USAGE OF TRADE

* + 1. **EXPRESS**
       1. UCC § 2-313
          1. Affirmation of fact or promise / related to goods / basis of bargain

Opinions don’t count, so “these shoes best in market” will not count, but “will last several years” is an express warranty

*Bayliner* test: if describing specific features, characteristics, or things that can be quantified, like years, that is NOT opinion.

* + - * 1. Description of goods / part of the bargain
        2. Sample or model / part of the basis of the bargain.
      1. UCC § 2-316(1) **general rule according to Hawkins is that YOU CAN’T DISCLAIM EXPRESS WARRANTIES!!!!!! But, what you can do is keep express warranties out of court by using PER (as in Hypo). If K says “this is completely integrated”, the court won’t admit the express warranty b/c it is prior negotiation & you should have put it in the writing.** 
         1. **“there aren’t any other …” = this doesn’t negate express warranties. BUT IF YOU HAVE A MERGER CLAUSE, then you would not admit express warranty.**
    1. *Henningsen*: this is an exception. THE GENERAL RULE IS YOU ARE BOUND BY WHAT YOU SIGN, EVEN IF YOU DON’T READ IT. Here the exception is b/c of public interest b/c the majority of the car companies have the same K. **This case was a huge exception, like the *Moncarco* case.!!!!!!!!!!! Extreme situations.**

1. **LIMITING / POLICING THE BARGAIN**
   1. **It could happen during:**
      1. **Negotiation**
         1. **Duress** (*Alaska Packers)*
         2. **Unconscionability** (in UCC found in § 2-302
            1. Principal purpose is prevention of oppression and unfair surprise.
            2. **Two views:**

**Procedural:** manner in which K was formed. **Substantial:** terms of the K. EITHER ONE OF THESE IS ENOUGH FOR COURT.

**Only Procedural** is good Unconscionability.

Court looked at both in *Walker Thomas Furniture*

Unreasonably favourable: you look at the commercial context , whether there is meaningful choice.

**Π** could not buy from anyone else, pro-rata unfair

* + - * 1. *Jones* To determine unconscionability, courts look to/for:

Obvious mathematical disparity. BUT court provides caveat saying mathematical alone could *at times* be enough.

The financial resources of the buyer.

Seller’s knowledge of buyer’s financial situation.

Inequality of choice., lack of meaningful choice (top 504)

* + - * 1. **Standard Form Ks**

good b/c they save time & trouble,

certainty in a way b/c courts will have dealt w/ those issues over and over again, so there is a body of precedence.!!!!

**Ks of ADHESION**

Not all Standard Form Ks are K of Adhesion

**Ks of adhesion when there are parties of unequal power. Other party can’t shop around**

One party sets all the terms *Graham* musical promoter did not have a choice.

Unenforceable when:

NOT REASONABLE EXPECTATIONS

**UNCONSCIONABLE,**

*Graham Scissors* is unenforceable K b/c it is unconscionable that Scissor has all the bargaining power and the arbitration is in charge of a biased party

The fine print on a K that absolved a car dealer from all liability was deemed unenforceable because of the gross inequality of bargaining power and that since cars involve the public to such a high degree, this is against public policy.  (Henningsen **v** Bloomfield)

* + 1. **Substance**
       1. **Unfairness** (*Benedict*, lake property, promise not to cut down trees or make improvements)
          1. The court found that a K that only provided a small amount of benefit ($145) to a large amount of detriment, (the inability to redevelop one’s property), was unfair and UNENFORCEABLE
    2. **Performance**
       1. **Obligation of Good Faith**
          1. *Eastern Airlines:* How does court determine if this violates UCC good faith?

course of performance and

usage of trade b/c it was an established industry practice*.*

UCC 2-306 K cannot be unreasonable disproportionate to: 1) stated estimate, and 2) prior demand.

1. **PERFORMANCE / BREACH**
   1. A party might get out of obligation to perform based on an event not happening, or conduct of the party
   2. **CONDITIONS**
      1. Restatement 224: “event, not certain to occur, which must occur, unless its non-occurrence is excused, before performance under a K becomes due”.
      2. allow the party who didn’t breach to defer or refuse to perform
      3. duty to perform does not mature until condition is met
         1. if condition doesn’t occur, you don’t have to perform
         2. You can’t get reliance damages in a K when a condition isn’t met that obligates the other parties performance.
      4. Categories:
         1. EXPRESS CONDITIONS: created by words or by language in the K. They don’t have to be written, unless SoFs issue. We’ve seen *Gibson* and *Mattei* a satisfaction clause :my payment is conditioned upon my satisfaction w/ your work. In that case we have an express condition
            1. Purpose: allows parties to shift risk
            2. *Peacock*: if courts cannot figure out whether something is a condition or duty, it is a duty.

b/c courts try to mitigate harsh results of conditions

* + - 1. IMPLIED CONDITIONS: not w/ words. Courts read into sales of services that payment isn’t due until services are done. This is a constructive condition, it is not in the K but courts read it in
         1. It is an implied condition that service (work, etc) occur b4 payment
    1. Other categories
       1. precendent: event has to occur before performance is due.
       2. concurrent: something like I’ll let you borrow my car as long as you keep it in good shape. My performance terminates the second my condition isn’t met.
       3. subsequent: this would be something like I’ll let you borrow my can until the ‘Stros win the world series. At the point when they win the World Series, my condition would stop.
    2. Mutual conditions:
       1. If separate and independent: if one party breaches, other party cannot breach second K.
    3. **Standard of performance:**
       1. Constructive conditions: substantial performance ok, *Jacob & Young* pipes
          1. Substantial performance changes obligations from dependent to independent

Factors for substantial performance:

Purpose to be used for / desire to be gratified

Excuse for deviation (why you didn’t perform)

Cruelty to the breaching party

This is the skyscraper example,

The painter in the personal satisfaction example

* + - 1. Express conditions: must be strict performance, have to be fully performed
  1. **Common LAW: substantial performance ok**
  2. **UCC:** 
     1. **Perfect Tender Rule**
        1. **§ 2-601** close/substantial is not good enough. Buyer has three choices
           1. **Reject**: buyer doesn’t have to pay

for a buyer to reject he must § 2-602 (1)

with reasonable time

seasonably notify seller of rejection

CANNOT HAVE ACCEPTED GOODS

* + - * 1. **Accept the whole**

If you accept non-conforming goods, it doesn’t mean you waive any damages, just means you can’t reject

Buyer can still sue for decrease in value

* + - * 1. **Accept some, reject the rest**
    1. **Mitigating the harsh Perfect Tender Rule**
       1. **§ 2-508** gives seller time to mitigate/cure if
          1. Seasonably notify buyer of intention to cure, and

if too much time has passed, you cannot cure

Exception § 2-508 (2): if seller knew buyer in the past usually accepted

* + - * 1. you can actually cure

Note: seller does NOT have obligation to cure

* + - 1. **§ 2-608** makes it hard to **revoke** acceptance
         1. Requirements:

Previously accepted

Substantially impairs **value to buyer**

AND

Assumed it would be cured, or

Didn’t know b/c tough to figure out or b/c seller assured you

* + - 1. **§ 2-612** rejects perfect tender for installment Ks/ not as harsh
         1. Buyer may **reject** any non-conforming instalment if

Nonconformity substantially impairs value of THAT instalment

* + - * 1. **NOTE**:

If nonconformity doesn’t substantially impair, Seller will have to pay damages and Buyer will have to perform.

If nonconformity substantially impairs, Seller will have to pay damages, and Buyer will NOT have to perform.

* + - * 1. **UCC § 2-612 (2)** buyer can only reject entire K if the installment(s) if it impairs value of whole K, NOT THE VALUE OF AN INDIVIDUAL INSTALLMENT.
  1. **Divisiblility:**
     1. **Divisible Ks:** roughly equivalent, example: *Gill*, cargo. you have to pay for the parts performed
     2. **Indivisible Ks:** if it is not priced per unit
  2. **Breach:** 
     1. **Material breach:** LEGAL question, not something parties decide
        1. party can either:
           1. treat it as a partial breach (keep performing under K, and sue for damages), OR
           2. suspend performance: and you wait to see if the breaching party cures:

if it cures, you treat it as partial breach

ii. if it doesn’t cure, then you treat it as a total breach and you repudiate K.

* + - 1. common law usually says that time limit of your performance IS NOT A CONDITION. So, you could deliver something two days late and you haven’t materially breached.
         1. If K says time is of the essence, it makes it a condition, and it IS MATERIAL
      2. In UCC if you think the other party will materially breach, you can ask for assurance § 2-609
         1. Must be reasonable insecurity
         2. Party must do something in 30 days (or less time if market is volatile), if he doesn’t, then it is grounds for REPUDIATION
    1. **Non-material breach:** treat it as partial breach
  1. **DEFENSES** example- yes, I breached it, but I am still not liable BECAUSE the contract was
     1. **Impracticability:** a promisor seeks relief on the ground that a **supervening turn of events** has impeded its performance (also known as “impossibility”, or impracticability)
        1. *Taylor* leased music hall for a series of events, but burnt down. Performance was conditioned upon the existence of a music hall. When it burned down, the party was excused from having to perform.
        2. Elements to figure out is something’s impracticable *Transatlantic:*
           1. Something unexpected must have occurred
           2. No allocation of risk

Figuring out allocation of risk courts look at:

Express terms

Implied Terms (if implied, does it say who will pay?)

Surrounding Circumstances

Just b/c something is foreseeable, doesn’t automatically allocate risk

* + - * 1. Occurrence of the contingency must have rendered performance commercially impracticable.

Objective test, look at reasonable party

* + 1. **Frustration of Purpose** focuses on the value or purpose of performance
       1. Case of party renting rooms to overlook coronation procession
       2. Two requirements:
          1. Total frustration
          2. Frustration was substantial/key to K
    2. **Mutual mistake (**UCC does not have rule, so fall back on common law): party’s performance impeaded/expectations thwarted by circumstances **existing** but unknown to them
       1. Jojoba water availability) diff from *Raffles* b/c there WAS a K formed here, *Raffles* both parties mistaken AT THE TIME OF FORMATION.
       2. Both parties must be mistaken, if only one then look at *Kastorff*
       3. If mutual mistake, cannot get reliance damages, only restitution.
       4. Note: if the mistake benefits the buyer, then it is FINE. But if it is a DETRIMENT to the buyer it is not fine. Maybe b/c it was not a basic assumption of the buyer. Neither seller nor buyer thought about minerals.
          1. *Wood*, lady sells stone, doesn’t know it was worth $700. Both seller and buyer thought it was just a stone. Court says she cannot get diamond back on grounds of mutual mistake.
       5. Pregnant cow case: mutual mistake

1. **REMEDIES**

1. Measure

* 1. **RESTITUTION**:
     1. First ask: is there consideration? Is there reliance? If K fails, then sue under restitution. You can always get restitution b/c it is about getting your own money back.
     2. Requirements:
        1. It is an enrichment
        2. It has to be unjust
           1. It is not unjust if it is gratuitous

Gratuitous service does not get restitution, EXCEPTION: **contract implied IN LAW**

Doctors/nurses**,** *Cotnam*

Service is very burdensome, ie: going out of your way 100 miles to take person to hospital.

POLICY REASON: we want doctors to help, even those unconscious.

* + - * 1. It is not unjust if you are not expecting payment from that person, *Callano* (shrub case)
        2. It is not unjust if there was an express K b/c it truncates implied K

Exception: You *can* recover if the party who benefitted knew about the K: situation in which daughter contracts, she is on bankruptcy, and parent’s house is improved.

* 1. **SPECIFIC PERFORMANCE**
     1. Not granted on personal service Ks
        1. Might achieve something using NEGATIVE injunction (Italian opera singer may not sing for anyone else)
     2. When to grant?
        1. damages are inadequate = money doesn’t compensate
           1. example: will lose good faith, or there is specific taste
        2. money too uncertain to determine
        3. there is no substitute
           1. *Campbell v. Wentz* (carrots): K unconscionable, but would have gotten SP b/c NO MARKET SUBSTITUTE. (no UCC in here b/c @ the time, not enacted)
           2. *Morris:* you can’t go train another horse
     3. UCC
        1. § 2-716 (note 4)
           1. Goods are unique
           2. Other proper circumstances
        2. Requirements /Output Ks more likely to get specific performance
           1. *Laclede*, **Long term K** usually has no market substitute, and nearly impossible to calculate damages
  2. **EXPECTATION**
     1. Formulas:
        1. LV – CA + OL (I/C) – LA = damages
        2. **Reliance + Profits + O/L (I/C) – LA = Damages**
     2. For other formulas specific to buyer/seller see supplement
     3. An injured buyer can do 3 things:
        1. **COVER UCC §** 2-712 (Cost of Cover – K price + I/C )
           1. Requirements:

Act in Good Faith (honestly in fact & commercial reasonable)

No unreasonable delay

Reasonable purchase price

Has to be substitute good (you can’t buy diff type of goods)

* + - * 1. Notes:

UCC says you do not have to prove market price. All you have to do is show your invoice. The burden is on the seller to show that the price you paid was unreasonable **(***Laredo*).

If you buy better quality hide, that is not cover b/c it is different

If you wait 6 years that is not cover

* + - 1. **Market value** UCC § 2-713

Market p – K p + Incidental + Consequential – Cost Avoided

* + - 1. **Specific Performance** UCC § 2-716
    1. Sellers:
       1. Important note, **HAWKINS “**if seller actually sells at a loss, the SELLER SHOULD GET JUST THE LOST PROFITS UNDER **2-708(2**). HE SHOULDN’T GET THE EXTRA AMOUNT UNDER 2-706.
       2. Repudiation/Non acceptance § 2-708 (1) **Market p – M p + Incidental – CA**
       3. Lost volume / lost profit UCC § 2-708 (2)

**Profits + Overhead + Incidental Damages – Sale Payments/Proceeds**

* + - * 1. *Diasonics* test: Have to have ability to produce the multiple goods and it would’ve been profitable to make the additional sale(s)

Note it’s WOULD have not COULD have

Also, **HAWKINS** said “**you have to prove that market conditions you could profitably produce enough *MRI machines* to sale. The focus is not that you actually resold it.**

* + - 1. ResaleUCC § 706

**Resale p – K p + Incidental – Cost Avoided**

* + - * 1. Private sale

Requirements:

2-706 (3) Reasonable notification

Good Faith

Honesty in fact

Commercially reasonable

Sale is in a commercially reasonable manner

* + - * 1. Public sale

Requirements

Good faith UCC § 2-706 (1)

Commercially reasonable UCC § 2-706 (1)

UCC § 2-706 (4)Reasonable notice of time and place

2. LIMITATIONS

1. **Foreseeability**
   * 1. *Hadley*: loss has to be probable, not just possible. (mills loss profit not probable, so no recovery)
     2. Requirements: **KNOW** (probable) or **REASON TO KNOW** (communication) **= reasonable consequence**
2. **Mitigation/Avoidability**
   * 1. Note: you can’t sue someone b/c he didn’t mitigate, other party just can’t recover.
     2. UCC § 2-715 (2) Buyer’s **consequential damages:**
        1. Seller had reason to know AND could **not** have reasonably been prevented
     3. You can’t pile up damages, *Luten Bridge*.
        1. Economic reason: makes no sense to have a bridge nobody wants. This is an efficient breach. If you keep piling up damages you are not better off, but the other party is worse
     4. Substitute has to be similar or comparable. No duty to mitigate if different kind of employment *Parker v. 20th Cent. Fox*
        1. Recovery for wrongfully discharged employee:

**Salary – Earning from other job (or amnt he could have reasonably earned)**

1. Proven with **reasonable certainty**
   * 1. think about the necessity of establishing an evidentiary foundation for damages.
     2. Common law, prove things with reasonable amount of certainty
        1. Do not have to prove things with mathematical certainty
     3. Tipped in favour of injured party
     4. **Fera case:** MAJORITY VIEW
        1. There is no general rule against awarding lost profits to a new business
           1. Can get lost profits if you can prove them with certainty, if you don’t have 2 year history to show how many profits on avg you make or costs for labor and supplies and overhead, it will be hard to prove to court that you had lost profit b/c of breach of K

Not impossible, if you can show specific sales that you lost b/c of br/K

* + - 1. Minority view: you can’t get lost profits if new business

**3.** LIQUIDATED DAMAGES

1. Damages designated by parties @ formation of K
2. Policy reasons for enforcing: allows damages without having to go through judicial process (better for courts and individual parties), allows to recover for uncertain damages that may not be awarded in court (small damages they can’t prove with certainty), efficient, reinforces right to contract, lets parties foresee losses, judges aren’t businessmen…saves them from having to determine the damages, if don’t enforce the clause then the other party gets a windfall of money (if ask for liquidated damages clause then other party will ask for more money so get to keep that)
3. policy reasons for not enforcing: undermines the judicial process by letting private parties determine damages (don’t want parties to mandate that contract will be specifically enforced and force judges to monitor this, and don’t want to let them stipulate that there doesn’t need to be consideration, both of these are unfair), which should be determined by public laws, also if the damages are way more than they should be then they are unfair and are basically a punishment, which contract law does not allow for breaching, put huge pressure on party to perform
4. **Common Law**
   * 1. *Wasserman* applies
        1. Gross receipts potentially unreasonable b/c too speculative (overhead not included)
        2. Party wanting to get out of liquidated damages has burden of proof
5. Liquidated damages clauses are presumptively reasonable
6. **How do we figure out if enforceable?**
   * 1. **Page 686: Factors:**
        + 1. **Legal Rule:**

Test? Elements?

Consistent with principle of Reasonableness (TEST) (objective)

reasonable forecast (objective)

hard to forecast damages

Question of time

some courts consider whether parties intended the clause to be one for liquidated damages (intent)

**Almost no effect**

* + 1. **Look AT REASONABLENESS**
       1. TWO VIEWS
          1. **Two look view:** at time of formation, and at time of breach
          2. **One look view:** majority opinion, only look at time of K formation
       2. **On exam,** 
          1. **if UCC only have to chose one or the two, but**
          2. **if it is Common Law, then have to explore all the possibilities if you don’t know the jurisdiction.**
    2. **If unreasonably high/excessive**, then punitive and not enforceable
    3. **If unreasonably low** Hawkins thinks court will use Unconscionability
  1. **General rule:** liquidated damages cannot change avoidability