**Is it a sale of goods?**

Uniform Commercial Code:

Two tests to determine if sale was for goods or services

1. Predominant Factor Test (Majority): Whether the predominant factor is the rendition of service (K to paint a house) or a transaction of sale (installation of a water heater)
2. Severing Test (Minority) Sever the K, apply UCC to the goods but not any services

Does the UCC Apply?

Supplement UCC with common law principals – UCC statutes control over common law but courts can weaken statutes through interpretation

**§2-102:** This article applies to transactions in goods

**§2-105:** defines goods - all things, including specially manufactured goods, which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities, and things in action

**§2-201:** Formal Requirements; Statute of Frauds – see below

**§2:** sale agreements, not rental agreements

**§1-103:** Supplementary General Principles of Law Applicable (lists out certain omitted items because the UCC does not have specific provisions to deal with these items)

**Does Statute of Frauds Apply?**

Basics: certain types of Ks are unenforceable unless the K is in writing, if SoF is applicable but not applied, there is no valid contract

* Purpose
  + Evidence
  + Deterrent against hasty action
  + (Sometimes) Ensure deliberation in the making of a K

When does SoF apply?

When there is a sale of goods:

* **Sale of goods** valued at $500 or more
  + Exceptions: oral K sufficient if:
    - Specially manufactured for B, not suitable for sale to others, and S has begun manufacturing goods (reliance type principle)
    - P admits during proceedings that K for sale was made
    - Goods received and accepted/paid for: If UCC §2-201 is not satisfied, entire K is unenforceable
* **Year**: a K that is not to be performed within one year from the making of the K (one-year provision) If the K is incapable of being performed within 1 year, the K must be in writing and signed by the party to be bound

No sale of goods:

* **Marriage:** made in consideration of marriage
* **Year**: a K that is not to be performed within one year from the making of the K (one-year provision) If the K is incapable of being performed within 1 year, the K must be in writing and signed by the party to be bound
* **Land**: transfer of any interest in land must be in writing. Price or value doesn’t matter.
* **Executor**: executor or administrator answering for decedent’s debt
* **Surety:** K to guarantee the debt or duty of another. Goal is to provide a cautionary warning to suretor.
  + Possible exception: when the primary purpose is to obtain an immediate and direct economic benefit or advantage for himself (CiN, pg 202)
* Other exceptions
* Security interests, sale or purchase does not need to be in writin

**Is there a K?**

**Types of Ks**

Types of contracts: consideration is a test of executory bilateral contracts

* **Bilateral contract**: promise for a promise (I promise to mow your lawn if you tutor me)
* **Unilateral contract**: a promise for an act, the act is the consideration (If you mow my lawn I will give you $25, once A mows law, B must pay)

**Express K**: formed by express language or writing

**Implied in Fact K: true K**

the same as an express contract, except *assent is not expressed in words, but is implied from the conduct of the parties*

about unjust enrichment but benefit received is not required

no price because no contract = quantum meruit = market price

Remedies? Expectation, or reliance, or restitution. Same as normal K

**Implied in Law K: “quasi contracts”: not a real K**

Obligations imposed by law on grounds of justice and equity to prevent unjust enrichment (damages for restitution)

Do not rest upon the assent of contracting parties

“Officious intermeddler doctrine” – where a person performs labor for another without the latter’s request or implied consent, however beneficial such labor may be, he cannot recover therefore (exception for emergency aid)

*Nursing Care Services v. Dobos*: where services are voluntarily accepted, law presumes there is an expectation to pay

Remedies? Restitution, unjust enrichment. Look to quantum meruit (§371) – how much the person who performed deserves v. how much other person gained

Unjust Enrichment v Quantum Meruit:

Unjust enrichment based on inequity, damages are benefit conferred

Quantum meruit: based on implied K, damages are reasonable value of services

**Exclusive-right Ks** require best efforts (a higher obligation than good faith, good-better-best)

**Output K**: determines quantity by the output of the seller

**Requirement K**: determines quantity by the requirements of the buyer. Neither of these are necessarily exclusive

**At-Will Employment:** Rule Exceptions

1. Public Policy Exception/Good Faith Requirement: employers may fire for good cause or no cause but NOT for bad cause
2. K not enforceable but promissory estoppel gives remedy for justifiable reliance on job offers/at least in some jurisdictions (*Grouse)*

**Mutual Assent: Offer & Acceptance**

Restatement of Contracts: recommendation for contracts, promotes clarity and simplicity of law

R2K §1: a K is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty

**§17:** K = Mutual Assent + Consideration (Requirement of a Bargain)

**§3.** Agreement defined and bargain defined: an *agreement* is a manifestation of mutual assent on the part of two or more persons. A *bargain* is an agreement to exchange promises or to exchange a promise for a performance or to exchange performance

Rule: Objective standard, if someone outwardly displays their assent, their undisclosed intent does not matter

Mutuality of Obligation

Both parties must be bound or neither is bound

* Exception for unilateral contracts
  + Promisee can no longer do that thing w/o being bound by K
  + A unilateral contract can be an illusory promise

RULE: A valid K may be conditioned upon the happening of an event

*Scott v. Moragues Lumber Co., pg 88 – if S bought a boat, had to charter to M*

* As soon as the event happens, boom, the K is in effect
* Event or lack of event is an express condition (pg 90)
* Only way for S to avoid the K was to not buy the boat (🡪 detriment 🡪 consideration)
* Condition is an element of the K that must be fulfilled before an obligation to perform arises

RULE: K to purchase whatever you want lacks mutuality of obligation. K must specify some quantity

* Obligation to sell, but not to purchase (or vice versa) is not MoO
  + - In Wickham, there was MA, but no MoO
* Buying whatever I want is not a detriment (🡪 not consideration)

RULE: When an agreement is executory and completely terminable at will, no mutuality of obligation

* If no MoO, it doesn’t matter which party wants out. There is no K.
* But, a *10-day termination clause counts* as consideration b/c bound for at least 10 days (detriment)

**Offer & Acceptance**

\* Examine all communications by each party to see if there has been an offer and/or acceptance

**Offer:**

\* Offer creates POWER OF ACCEPTANCE

\* Offeror is MASTER OF THE OFFER: can craft it however he wishes

\* Offers must be CLEAR, DEFINITE, and EXPLICIT

**§ 24: Offer Defined:** offer creates power of acceptance, willingness to enter into bargain, so as to justify the offerees belief that assent concludes the bargain

**§26: Preliminary negotiations**: (*not offers*) manifestation of willingness to enter into a bargain is not an offer if the party to whom the action is addressed has reason to know the person making it does *not intend to conclude the bargain* without further assent

*Lonergan v. Scolnick*: ad in newspaper to sell land, D sells to someone else after some correspondence with P, seller made clear he intended on taking first person to put money in escrow account, court strict on what constitutes offer because offer creates power of acceptance, no offer in this case

Advertisements are generally NOT offers, items for sale in a store are also not offers (exception *Lefkowitz v Great Minneapolis Surplus* – mink scarves $1 for first person to arrive at store, this was an offer, sufficiently specific)

**§49: Effect of Delay in Communication of 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 permissible if the offer had been dispatched at the time that its arrival seems to indicate

Auction Notes (**UCC§2-328**)

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

Rule: If advertisement is clear and leaves nothing up to negotiation + requires some action/performance = binding offer

When an offer *can’t* be revoked:

1. When there has been consideration 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 upon in a foreseeable way (ex. General contractors v. subcontractors problem)
4. Performance has begun (usually require performance to be completed)

**Acceptance:**

**§19: Conduct as Manifestation of Assent**

1. Manifestation of assent can be in any manner reasonable (written, spoken, action)
2. Conduct is not manifestation of assent unless person has no reason to know his actions could be inferred as assent
   1. Lucy v. Zehmer: White drinking, Lucy tells Zehmer he wants to buy his land for $50,000, Zehmer agrees, Zehmer later refuses to sell property to Lucy

Rule: Law imputes to a person an intention corresponding to a reasonable meaning of his words and acts

**§22: Mode of Assent: Offer and Acceptance**

1. Manifestation of assent usually takes form of offer by one party and acceptance by the other
2. Assent can make binding contract even if offer and acceptance cannot be clearly distinguished

**§50 Acceptance of Offer defined; Acceptance by performance; Acceptance by promise**

1. Acceptance of offer is manifestation of assent to terms made by the offeree in the manner invited or required by offer
2. See performance as acceptance for subsections (2) and (3)

**§35: Offeree’s Power of Acceptance**: offer gives offeree *power of acceptance* (acceptance makes K binding)

**§52 Who may accept offer**: offer can be accepted only by person whom it invites to furnish the consideration

**§32 Invitation of Promise or Performance:** when in doubt, offers invite acceptance by promising or by performing

**§30 Form of Acceptance Invited:**

1. Offer may specify the means by which it may be accepted (**§60**)
2. Unless otherwise specified, offers are acceptable by means reasonable in the circumstances

**Mailbox Rule:**

Generally, all correspondences are effective when they are *received*

Acceptance is effective when it is *sent* (**§63**)

For telephone acceptance, treated same as in person acceptance **(§64**)

Medium of acceptance is reasonable if it’s used for similar transaction or is the one used by the offeror **(§65**)

Offeree must properly and reasonably dispatch acceptance for it to be effective **(§66**). If they don’t, see **§67**

**Rolling acceptance:**

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 consumer has reason to expect the contents of the agreement

Have a “duty to read” and when we agree to K, we are bound to its terms, even if we didn’t read them

May be bound to terms by clicking on a download button if the offer makes it clear that clicking on the download button would assent to the terms. Terms must be clear and visible (usually meaning that they must be placed on the screen such that they would be read before the download button is clicked).

**§2-206: Offer and Acceptance in Formation of Contract**

1. Unless otherwise indicated by the language or circumstances
   1. Offer to make a K will be construed as inviting acceptance in any reasonable manner and by any reasonable medium

Performance as Acceptance/Option Contracts

**§53 Acceptance by Performance; Manifestation of Intention Not to Accept**:

1. Offer can be accepted by performance only if offer invites such an acceptance
2. And (3): performance isn’t acceptance if offeree manifests intent not to accept

**§50**: (see above) – (2) acceptance by performance requires at least part of what offer requests be performed; (3): acceptance by performance requires that offeree complete every act essential to the making of the promise

**§54 Acceptance by Performance; Necessity of Notification to Offeror**

1. Where offer invites offeree to accept by performance, no notification is necessary to make such acceptance effective unless offer requests such notification
2. If offeree who accepts by performance has reason to know the offeror has no adequate means of learning of the performance, contractual duty of offeror is discharged unless
   1. Offeree takes reasonable diligence to notify offeror of acceptance
   2. Offeror learns of performance within reasonable time
   3. Offer indicates notification of acceptance is not required

**§55 Acceptance of Non-Promissory Offers:** acceptance by promise may create a contract in which the offeror’s performance is completed when the offeree’s promise is made (*Klockner v. Green:* step-son cares for his stepmother while she died, she promised to leave him a portion of her estate if he cared for her, he claims he would have done it anyways, court held there was a binding K)

Silence as Acceptance

General Rule: Silence is NOT acceptance

**§69 Acceptance by Silence or Exercise of Dominion**

1. Silence can be considered acceptance only under the following exceptions:
   1. Where offeror takes benefit of the offer and even though they had an opportunity to reject it and had reason to know the offeree would expect compensation (ex: building fence between your property and neighbors)
   2. Where offeror has given reason for offeree to believe silence is acceptance and the offeree by remaining silent intended to accept (tire maker and bicycle shop example)
   3. Where by course of dealing it is reasonable for the offeree to communicate rejection if they do not intend to accept

Note: it is a high standard for courts to find silence as acceptance, general require silence AND some other reason why it would be reasonable for the offeror to rely on that silence as acceptance

General rule is that silence does not ordinarily manifest assent, unless you add something else to it

* Need to fit the silence into 69(a) or 69(c) to get a K.
* If you are the offeree and you want a K, you’d better fit it into 69(b)
* Relationship between the parties or other circumstances may justify the assumption that silence indicates assent to the proposal (*Vogt v. Madden* - sharecrop agreement)

Option Contracts: Agreement to make an *offer irrevocable*

Option K’s: power of acceptance isn’t terminated by rejection, counter-offer, revocation, or death of offeror unless requirements are met for discharge of K duty

**§25 Option Contracts:** an option contract is a promise which meets the requirements for the formation of a contract and limits the promisor’s power to revoke an offer

**§87 Option Contract:** (Ks without consideration)

1. An offer is binding as an option contract if it
   1. Is in writing and signed by offeror, recites a purported consideration for making of offer, and proposes an exchange on fair terms within a reasonable time (need consideration for offer itself, nominal consideration is sufficient); or
   2. Is made irrevocable by statute
2. Can create binding K for *preparing to perform* (§45 and §50 require actual performance), must actually have an offer rather than just a promise
   1. Where offeror makes offer which has not yet been accepted, if offeree has suffered a detriment prior to acceptance, can still be entitled to damages - same elements as §90(1)

**§45 Option Contract Created by Part Performance of Tender:**

1. Where offer invites an offeree to accept by rendering a performance and does not invite a promissory acceptance, an option contract is created when the offeree tenders or *begins* the invited performance
   1. Offeror’s duty is conditioned on completion of offeree’s performance in accordance with terms
   2. Rule is intended to protect the offeree in justifiable reliance on the promise (*Drennan v Star Paving ­*– contractor/sub-contractor bidding case)

**§2-205 Firm Offers (4 basic requirements)**: an offer *by a* *merchant* to buy or sell goods that is *signed* and gives *assurance that it will be kept open* cannot be revoked before reasonable time or time given in offer, regardless of if consideration is given for the option, *period not to exceed 3 months*

Terminating the Power of Acceptance

General Rule: *offeror is master of their offer*, they can revoke at any time before acceptance (subject to limitations – not the case in option Ks)

**§36: Method of Termination of the Power of Acceptance**

1. Offeree’s power of acceptance may be terminated by
   1. Rejection or counter-offer by the offeree **(§38, §39, §59**)
   2. Lapse of time **(§41**)
   3. Revocation by offeror (**§42, §43, §2-205**)
   4. Death or incapacity of the offeror or offeree
   5. Non-occurrence of any condition of acceptance under terms of offer
2. Terminated by non-occurrence of any condition of acceptance under terms of offer

Rejection or Counter-Offer:

**§38: Rejection**

1. Power of acceptance is termination by rejection of offer, rejection is a manifestation by offeree not to accept
   1. *Akers v Sedberry* – 2 employees has 5 year K, ran into problems w boss, *,* met with owner and offered to resign with 90-day notice, she did not accept and never mentioned it again during long meeting, 3 days later sent EEs a note that said she accepted their offer) Offer? Yes. Acceptance? No. She rejected their offer and that rejection terminated the offer to resign.

**§39 Counter-Offers:** (see **§59**)

1. Counter-offer proposes substitute bargain differing from that proposed by original offer
2. Terminates offeree’s power of acceptance, counter offer now gives original offeror power of acceptance

**§59 Purported Acceptance which adds qualifications**: mirror image rule; a reply to an offer which purports to accept it but is conditional on the offeror’s assent to additional or different terms is not an acceptance but a counter-offer (*Ardente v. Horan* – purchase of a home, buyer required certain furniture and amenities included)

Really important to ask if the acceptance is actually conditional, express dissatisfaction with an offer is not a counteroffer

Lapse of Time:

**§41: Lapse of Time**: acceptance must be made within the time period specific in the offer, or if no time is specified, within a reasonable time (subject to **§49** – see ‘Offer’)

Face to face offers – reasonable time is usually before the conversation ends

Same thing under UCC §2-206

Revocation:

**§42 Revocation by Communication from Offeror Received by Offeree:** power of acceptance is terminated once the offeror communicates to the offeree an intention to terminate the offer

courts err on the side of offeror, don’t want to bind offers if they don’t have to and if the offeror wanted to terminate it

*Dickinson v Dodds:* offer revoked when offeree knew offeror was looking to find another buyer, buyer aware of this and tries to accept offer w payment

**§43 Indirect Communication of Revocation:** power of acceptance is terminated when offeror takes actions contrary to the intent to enter into K and offeree becomes aware of those actions from a reliable third party (*Dickinson v Dodds)*

**Interpretation:**

Plain meaning rule: if a K is unambiguous, it should not be supplemented by extrinsic evidence (*Stuart v McChesney*)

sometimes courts want to look at extrinsic evidence when the intention of the parties is unclear

**§ 20: Effect of Misunderstanding**

1. No mutual assent if parties attach materially different meanings to their manifestations
   1. Neither party has reason to know that other party attached a different meaning to the term of K, then no MA and no K
   2. If both parties had reason to know of the others different meaning then no K (double fault)
      1. *Raffles v Wichelhaus*: K to buy goods on “Pierless” ship, §20, both parties attached different meanings, no mutual assent, no meeting of the minds 🡪 No K
2. Manifestations are operative in accordance with the meaning attached to them by one of the parties if
   1. (a) and (b) that party does not know/has no reason to know of any different meaning attached by the other, and the other knows/has reason o know the meaning attached by first party
      1. “Does know” is subjective, while “has reason to know” is objective
      2. If neither party can be assigned the greater blame for the misunderstanding, there is no nonarbitrary basis for deciding which party’s understanding to enforce

**§ 201: Whose Meaning Prevails**

1. Where parties attach the same meaning to a promise or agreement or a term thereof, it is interpreted in accordance with that meaning
2. Where parties have attached different meanings it is interpreted in accordance with the meaning attached by one of them if at the time agreement was made,
   1. (a) and (b) if one party has reason to know that the other has attached a different meaning to a term and the other does not, we use the interpretation of the party who did not have a reason to know, use innocent parties interpretation

Rule: If reasonable man would know that his actions indicated and would be taken as assent, then assent

Look for whoever is less at fault for misunderstanding: look to course of performance, course of dealings, usage of trade, plain meaning of words in this order

*Embry v Hargadine*: employee says he’s going to quit if K not renewed, boss tells him to go back to work, “everything’s fine”, law likes to make determinations based on objective manifestation of intent

**§ 202: Rules in Aid of Interpretation**

1. Words and other conduct are interpreted in light of the circumstances and the purpose of the parties

Rule: Every instrument in writing is to be interpreted, with view to the material circumstances of parties at the time of execution in light of the facts

Restatement Sections on interpretation and usage:

1. **§219**: usage is habitual or customary practice
2. **§220**: usage relevant to interpretation, agreement interpreted in accordance with relevant usage
3. **§221**: usage supplementing an agreement, reasonable usage with respect to agreements of the same type
4. **§222**: usage of trade, a usage having regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to particular agreement
5. **§223**: course of dealing: sequence of previous conduct between parties which can fairly be regarded as establishing common understanding for interpreting conduct

UCC Sections on Interpretation and Usage:

1. **§1-205**: Reasonable time; seasonableness
2. **§2-208**: Course of Performance or Practical Construction: look at parties performance to determine meanings, also look at dealings and usage of trade
3. When terms are in irreconcilable conflict, order of interpreting K is: (**§1-303(e)**)
   1. (e): express language of agreement
   2. (e)(2): course of performance (see subsection a – if parties have utilized one interpretation thus far in performance of this agreement)
   3. (e)(3): course of dealing (see subsection b – if parties have worked together prior to this agreement)
   4. Usage of trade (see subsection c)

**Certainty/Gap Fillers**

Certainty/Gap Fillers:

Rule: In order for valid K to be formed, an offer must be so definite as to its material terms or require such definite terms in the acceptance that the promises and performances to be rendered by each party are reasonably certain, if the content of the agreement is unduly uncertain and indefinite, no K is formed

**§33 Certainty:**

1. Terms of offer must be reasonably certain to form a K
2. Terms are reasonably certain if they provided basis for determining existence of a breach and an appropriate remedy – Ks should be made by the parties, not the courts
3. Fact that some terms are left open or uncertain may show that manifestation of intention is not intended to be understood as an offer or acceptance

**§34 Certainty and Choice of Terms, Effect of Performance or Reliance**: partial performance may remove uncertainty (shows intent to assent)

**§ 204: Supplying an Omitted Essential Term:** gap filler provision: where parties cannot agree on meaning of an essential term, court may supply one that is reasonable in the circumstances

when court uses gap filling power, look to intent of parties in making the K, what was the purpose of the K

*Spaulding v Morse*: husband and wife divorce and make K for husband to pay money to trust for son until he enters college, son enlists in army and father stops paying, court held father did not have to continue to pay while he was in the army (did not follow literal interpretation)

**§2-204 Formation in General**: all essential terms are not necessary for K formation

How court will read in missing terms: (court generally want to find K formed – good for commerce)

**§2-305 Open Price Term**: Missing price to be fixed in good faith by both parties (except sale of real estate requires price)

**§2-308 Absence of Specified Place for Delivery:** unless otherwise agreed, place for delivery of goods is seller’s place of business

**§2-309 Absence of Specific Time Provisions; Notice of Termination**: reasonable time will be supplied

**§2-310 Open Time for Payment or Running of Credit**: due at delivery

**Is there consideration?**

Consideration: a test of executory promises (requirement for the enforcement of executory promises)

Consideration = Detriment/Benefit + Bargain

RULE: Courts have traditionally declined to relieve a party from the terms of a K merely because of a bad bargain

**§71**: Requirement of Exchange; Types of Exchange:

1. a performance or a return promise must be bargained for
2. 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
3. performance may consist of
   1. an act other than a promise, or
   2. a forbearance, or
   3. the creation, modification, or destruction of a legal relation
4. the performance or return promise may be given to the promisor or to some other person. It may be given by the promisee or by some other person

**§79:** Adequacy of consideration; Mutuality of Obligation – consideration is *a detriment that is bargained for* (a gain, advantage, or benefit to the promisor, or loss, disadvantage, or detriment to the promisee)

* abstaining from an action constitutes consideration (is a detriment) (uncle made nephew abstain from drinking/gambling) *Hamer v. Sidway*
* mere inadequacy of consideration will not void a K (Batsakis v. Demotsis – 500,000 drachma for $2,000 US)
* the promise should shrink the realm of choices for the promisor

**K enforceable *without* Consideration**

1. Past performance or benefit:

* Generally, past performance is not consideration b/c it was not bargained for
* However, several exceptions exist
* Can be enforced if a benefit was received and justice so requires (§86)

**§86:** Promise for benefit received: (exception to past performance rule)

1. A promise made in recognition of the benefit previously received by promisor from promisee is binding to the extent necessary *to prevent injustice* (Webb v. McGowin)
2. Promise is not binding under (1) if the promise was a gift or to the extent its value is disproportionate to the benefit

RULE: Where the promisee cares for, improves, and preserves the property of the promisor, though done w/o his request, it is sufficient consideration for the promisor’s subsequent agreement to pay for the service, b/c of the material benefit received (basis of Webb v. McGowin)

2. Promissory Estoppel:

**§90 Promise Reasonably Inducing Action or Forbearance:** A promise which the promisor should *reasonably expect* to induce action or forbearance on the part of the promisee…and which does induce such action or forbearance is binding if *injustice can be avoided only by enforcement* of the promise. The remedy granted for breach may be limited as justice requires

Promissory estoppel requirements:

1. Promise
2. Reasonably induced
3. Action or forbearance
4. Injustice if promise is not enforced

*Feinberg v. Pfeiffer Co* –Plaintiff was promised retirement money. Court held that plaintiffs *reliance* on the continuation of the money enforces the contract.

3. Estoppel en pais: equitable reliance

Estoppel en pais requirements:

1. False representation of material fact
2. Reliance
3. Reasonable
4. Detriment
   1. Promisor estopped from denying truth of statement

Ex: A tells B he should buy a grocery store and says that he has deposited $50,000 in B’s account. B acts on this promise and purchases the store only to find out A has not put the money in his account. This is an enforceable contract, B acted on A’s promise. There was equitable reliance

4. Implied Promises

RULE: Courts have the power to interpret a K to include an implied promise, w/o which the K would not have survived mutuality of obligation (*Wood v. Lucy, Lady Duff-Gordon p. 107)*

* Court said there was implied consideration to use *reasonable efforts* (idea of *exclusivity*) 🡪 UCC 2-306

**No K enforceable**

1. Donative Promise:

RULE: A voluntary gift, without an exchange of value, is not ordinarily enforceable (*Dougherty v. Salt, aunt’s gift of note for $3000 to nephew*)

RULE: The promise of a gift is unenforceable

* + - Executory gift: something that is to be given in the future
    - *Executed gift*: enforceable. Intent + transfer of possession. Valid and legally binding transaction.

2. Nominal Consideration:

RULE: Mere inadequacy of consideration will not negate an agreement…unless mere exchange of money(*Schnell v. Nell, pg 14: $200 for 1-cent*)

* The 1-cent was nothing special, just a penny. Schnell didn’t want it. >Not consideration.

Plays off the bargain theory (recall, exchange must be bargained for)

* + - * Nominal consideration is not a bargain.
      * *Form* of a bargain, but not the *substance*

3. Illusory Promise:

Promisor has not limited themselves, thus no detriment, thus no consideration. If the promisor has a free way out of the agreement, the promise is illusory because of a lack of MoO

**§77: Illusory and Alternative Promises:** a promise or apparent promise is *not consideration* if by its terms the promisor or purported promisor *reserves a choice of alternative performances* unless

1. each of the alternative performances would have been consideration if it had been bargained for; or (b)

RULE: K to purchase whatever you want lacks mutuality of obligation. K must specify some quantity (ASAL v Pavilion)

A K with cancellation clause and penalty upon cancellation is not illusory (cost of cancellation shows detriment – *Wasserman*)

4. Legal Duty:

**§73: Performance of a Legal Duty:** similar performance is consideration if it differs from what was required by the duty in a way which reflects more than a pretense of a bargain

RULE: When a party does what he is already obligated to do, he cannot demand additional compensation for it. (ex. don’t want police officers charging victims to solve cases 🡪 public policy concerns)

* + - * Logic behind the rule is that no new detriment has been created. No MoO and no consideration.
      * How we *define the lines of a K* is extremely important (and difficult). Lines define the scope of the legal duty. If A’s performance is already in the K, then it is not consideration.
      * K law is pre-disposed to enforce modification, b/c the world is messy

RULE: Payment of less than the debt does not satisfy the debt unless there is some other consideration (*Foakes v. Beer, pg 114 – installment pymts on principle and forgiveness of interest*)

5. Against Public Policy:

**§178: When a term is unenforceable on grounds of public policy (R2K p. 227)**

**§179: Bases of Public Policies Against Enforcement:** a public policy against the enforcement of promises or other terms may be derived by the court from

1. legislation relevant to such policy, or
2. the need to protect some aspect of public welfare…

* A court can read a provision out of a K if public policy requires it (K itself might be legally enforceable, but this particular part is not )
* Public policy is an overriding concern (especially in human issues) (*In Re the Marriage of Witten, pg 164 – frozen embryos*)
* Contracts for the sale/exchange of organs are unenforceable (note: would not include expenses for storage, transfer or care of the organ) (42 USC §274(e))
* Public policy – government should stay out of personal private reproductive matters, civil code (Perry v. Atkinson)

**Defenses to K formation**

1. Duress:

**§175: When Duress by threat makes a contract voidable**:

1. An improper threat by the other party
2. Leaves the victim no reasonable alternative

**§176: When a Threat is improper**

1. (a) Threat is a crime or tort; (b) Criminal prosecution; (c) Use of civil process; (d) breach of duty of *good faith and fair dealing* (catch all bucket)
2. (a) act would harm recipient and not significantly benefit maker; (b) Prior unfair dealings; (c) Power for illegitimate reasons

Duress when t*hreat of breach (leading to financial loss) + no reasonable alternative + normal remedy for breach damages would be insufficient*

* + Austin Instrument v. Loral (p. 118) (Austin Instruments made an improper threat which left Loral with no free will)
* Duress attacks the mutual assent component. Technically there is consideration, there just isn’t MA
* Whether the duress was a situation caused your own fault, or something you had no impact on, could change the opinion on whether to void the K

2. Unconscionability

**§2-302 Unconscionable Contract or Clause:** If Court finds the K or any clause to be unconscionable, court may..

1. Refuse to enforce the K
2. Enforce K w/o unconscionable clause
3. Limit application of unconscionable clause

**§208: Unconscionable Contract or Term:** if a K or term thereof is unconscionable at the time the K is made, a court may (do the same 3 things)

Reasons:

* Matter of law comment
* Public policy element b/c judges decide matters of law
* Common law also supports unconscionability

Two types of unconscionability: many courts require both types

1. *Procedural* or process unconscionability: procedures under which the mutual assent was gained (unfair surprise, fine print, ignorance)
2. *Substantive* unconscionability actual terms of the contract (unjust, one-sided, fairness issue)
   * “contract terms that are so one-sided as to oppress or unfairly surprise an innocent party” (p. 88)

Absence of meaningful choice on the part of 1 party together with K terms that are unreasonably favorable to the other party, gross inequality of bargaining power, or whether the terms are “so extreme as to appear unconscionable according to the mores and business practices of the time and place” are all considerations of unconscionability (*Williams v. Walker-Thomas Furniture Co., pg 63*)

3. Mistake, Misrepresentation

4 Categories:

1. Mistake (§§151-154)
   1. Unilateral
   2. Mutual
2. Misunderstanding (§20/§201)
3. Misrepresentation (non-disclosure)

Even if K satisfies O/A, MA, and consideration, it can be rescinded bc of a mistake. Mistakes cut across everything

Cannot void a K if you bear the risk

**§151: Mistake Defined:** mistake is a belief that is not in accord with the facts

**§157: Effect of Fault of Party Seeking Relief:** Mistaken party is 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 and fair dealing

**§158: Relief Including Restitution:** courts can award restitution (1) or reliance (2) if K is voided for mistake

Unilateral Mistakes

**§153: When a Unilateral Mistake Voids a Contract:** where a *mistake* of one party at the time a K was made *as to a basic assumption* on which he made the K has a *material effect* on the agreed exchange of performance that is *adverse to him*, K is voidable if he *does not bear the risk of the mistake* under §154 and

1. Effect of mistake is such that enforcement of K would be unconscionable, or
2. The other party had reason to know of mistake or his fault caused mistake

Courts have a growing willingness to allow avoidance where consequences of mistake are so grave that enforcement of the K would be unconscionable

*Donovan v. RLL Corp* (car dealer had ad in newspaper which listed incorrect price of car, court held dealership was not liable to sell car at lower price)

**§154: When a party bears the risk of mistake**: A party bears the risk of mistake when:

1. risk is allocated to him by agreement of parties
2. he is aware that he has only *limited knowledge* with respect to the facts to which the mistake relates but treats limited knowledge as sufficient, or
3. risk is allocated to him by the court on grounds of reasonableness

Comment example: selling of farmland, seller realizes after K that farmland has valuable mineral deposits, court usually allocate risk of mistake to seller

risk of mistake must be allocated to a party where the mistake results from that party’s neglect of a legal duty

*Woods v. Boynton* – woman sells stone for $1, ends up being a valuable diamond, “conscious uncertainty”

Mutual Mistake

**§152: When a mutual mistake makes contract voidable**

1. Where mistake of both parties was made as to a *basic assumption* on which the contract was made has a *material effect* on the agreed exchange of performances, contract is voidable by the adversely affected party *unless he bears the risk of mistake* (see **§154**) – there must be no fault on part of the party who is attempting to avoid K due to mistake, bad bargain isn’t enough
2. In determining whether mistake has material effect, account it taken of any relief by way of reformation, restitution, or otherwise

If both parties are mistaken as to material fact, then K can be rescinded by one of the parties

General Rule: party who has given consent to a K of sale may refuse to execute it, or avoid it after it has been completed if assent was made or K was formed upon mistake of material fact (*Sherwood v. Walker* – replevin of cow)

must determine whether mistake is as to the substance of the whole contract or only to some point

**§155: When mistake of both parties as to written expression justifies reformation**: courts may reform contract in the event that mutual mistake makes writing fail to express the agreement

Misrepresentation/Nondisclosure

**§159 Misrepresentation Defined:** an assertion that is not in accord with the facts

**§160: When action is equivalent to an assertion (concealment):** an action to prevent another from learning a fact is equivalent to denying the fact

**§161: When non-disclosure is equivalent to an assertion:** similar to §160, non-disclosure is equivalent to misrepresentation only if:

1. there has 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

*Hill v. Jones* – non-disclosure of termite infestation, question of buyers knowledge was question of fact, §161 🡪 flexible standard of disclosure

**§163: When a misrepresentation prevents formation of a contract:** misrepresentation can kill the formation of a K when its relevant to the character or essential terms and it induces the other party, who doesn’t know of the misrepresentation to assent

**§164: Elements which make a K voidable by misrepresentation:**

1. Fraudulent statement or misrepresentation
2. Concerns a material fact
   1. Material: one to which a reasonable person would attach importance in determining his choice of action in the transaction
3. Justifiable reliance

**What does the K consist of?**

**Conditions:**

1. Promise /Condition

\*\*Fulfillment of conditions requires strict compliance, *not* substantial performance – they must be fully performed or the counter-party is excused from performance

Result of failure to perform conditions – restitution can be imposed

*Oppenheimer* – tenant in high rise apartment, K said there would be no lease unless and until P delivered written consent from landlord for tenant work, P gave oral consent, did not satisfy condition)

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

**§224: Condition defined:** a condition is an event, not certain to occur, which must occur, unless its non-occurrence is excused, before performance under a contract becomes due (conditions don’t trigger an obligation and therefore can be waived *without* consideration – *Clark v. West*)

* Condition precedent: performance required does not become due until condition is satisfied
* Condition subsequent: performance required is suspended or terminated if condition is satisfied (ex. 12 months insurance claim filing period)
* A condition may be *express* (by language of K, “if”, “provided that”, “subject to” or *implied* (doesn’t always have to say “time is of the essence in K, if that is implied based on nature of K)

**§225: Effects of Non-Occurrence of a Condition**:

1. performance of a condition cannot become due unless condition occurs or non-occurrence is excused
2. unless excused, non-occurrence of a condition discharges duty when condition can no longer occur
3. Non-occurrence of a condition is not a breach by a party unless he is under a duty that the condition occur
   1. A promise can also be a condition when parties promise to perform a condition as part of their bargain
   2. If a party promises to satisfy a condition and then fails to do so the party is in breach and the other party’s performance is excused

**§226: How an event may be made a condition:** an event may be made a condition either by the agreement of the parties or by a term supplied by the court

**§227: Standards of Preference with Regard to Conditions**: when in doubt court will read language as a promise and *not* a condition

Rule: When unsure between a condition and a promise, courts will read language as a promise

Prevention Doctrine: operates as an exception to the general rule that one has no duty to perform under a contract containing a condition precedent until the condition occurs. The nonoccurrence or nonperformance of a condition is excused where the failure of the condition is caused by the party against whom the condition operates to impose a duty (*Johnson v. Coss* – purchase of car dealership, imposed discretionary conditions)

**§245: Effect of a Breach by Non-Performance as Excusing the Non-Occurrence of a Condition**: if party to a K hinders the occurrence of a condition precedent, condition is waived, lack of effort materially performed

Satisfaction: Reasonable person standard

**§228: Satisfaction of the Obligor as a Condition:** if performance is conditioned on the approval of a party or third party, courts don’t let the approver unreasonably deny approval – we look to whether a “reasonable person” would’ve been satisfied

Exception if the substance of the K is aesthetic or of personal taste, in which case may be more likely to defer to the subjective “approver” (*Morin v. Baystone ­*– didn’t like aluminum siding put in)

Excuse- Excuse of condition can arise under *impracticability, frustration of purpose, and mistake*

**§229: Excuse of a Condition to Avoid Forfeiture:** to the extent that the non-occurrence of a condition would cause disproportionate forfeiture, a court may excuse the non-occurrence of that condition unless its occurrence was a material part of the exchange

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.”

**UCC 2-306: Output, Requirements and Exclusive Dealings:**

1. Must be *exclusive dealing* in the goods and seller must use *best efforts* to supply the goods and by the buyer to use best efforts to promote their sale (Wood v. Lucy Lady-Duff Gordon)

2. Modification (Change in Promise):

Generally held that a modification of a contract is itself a contract, which is unenforceable unless supported by consideration

Rule: UCC does NOT require consideration to modify a contract for sale of goods

**UCC §2-209 Modification, Rescission and Waiver**:

1. *an agreement modifying a contract [for sale of goods] needs no consideration to be binding* (see sections 2,3,4,5 as necessary)

Modern Trend away from rigid application of preexisting duty rule reflect in §89

**§89: Modification of executory contract:** (doctrine of unforeseen circumstances) a promise modifying a duty under a contract not fully performed on either side is binding

1. if the modification is *fair and equitable* in view of circumstances not anticipated by the parties when the contract was made; or
   1. **Common Law:** *Angel v. Murray* (trash collector): courts can enforce a modification if the parties voluntarily agree and (1) the promise modifying the K was made before the K was fully performed; (2) the underlying circumstances prompting the modification were unanticipated; and (3) modification is fair and equitable
2. to the extent provided by statute; or
3. to the extent that justice requires enforcement in view of material change of position in reliance on the promise

3. Waiver (Change in Condition):

**UCC §2-209 Modification, Rescission and Waiver**: (see above)

(3) Discusses modification/waivers in conjunction with the SoF

(4) If an attempted modification or recessions does not meet the above requirements, it can still operate as a waiver

(5) Waiver can be **retracted** if reasonable notification is given to the other party, unless the retraction would be unjust in view of a *material change* of position in *reliance* on the waiver

**§84: Promise to Perform a Duty In Spite of Non-Occurrence of a Condition**

1. Promise to perform a conditional duty despite non-occurrence of the condition is binding, ***unless***
   1. condition was a *material part of the agreed exchange* and promisor was under no duty for condition to occur; or
   2. Uncertainty of condition was an element of risk assumed by the promisor
2. If waiver is made before occurrence was supposed to happen and condition is within control of promisee, promisor can reinstate the required condition if:
   1. Notification is received while there is still time to cause condition to occur
   2. Reinstatement of condition is not unjust
   3. Promise isn’t made binding by (1)

Notes:

* Conditions can be waived *without* consideration (expressly waived)
* Conditions don’t trigger an obligation to occur (if you win 100 games, you will get $10,000)
* **Waiver** is relinquishment of the right to enforce a condition. Under certain circumstances waivers can be retracted.
* Non-fulfillment of a condition can be excused if a party waives the condition (*Clark v. West – author who wasn’t allowed to drink liquor*)

4. Warranty (UCC)

**§2-313: Express Warranties by Affirmation, Promise, Description, Sample:** express warranties are created by (a) any affirmation of fact or promise by seller to buyer; (b) any description of the goods; (c) any sample or model

“as-is” clauses in Ks, such risk as related to present condition of property or item should lie with buyer, reallocates risk to buyer (most of the time)

**§2-314: Implied Warranty; Merchantability; Usage of Trade**: warranty that the goods shall be merchantable is implied in a K for their sale if the seller is a merchant w respect to goods of that kind, subsection (2) lists qualification for “merchantable”

**§2-315: Implied Warranty: Fitness for Particular Purpose:** implied warranty of fitness for particular purpose when S has reason to know how B is going to use the goods

**§2-316: Exclusion or Modification of Warranties:** goods sold by merchants carry an implied warranty of merchantability

(2) Subject to (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be in writing and conspicuous

term or clause is “conspicuous” when it is so written that a reasonable person against whom it is to operate ought to have noticed it, whether attention can reasonably be expected to be called to the exclusions (*Moscatiello v. Pittsburgh Contractors* – P purchased paving machine, didn’t work properly, D claimed K said no warranties were offered, conditions were written in such fine print that court held it violated 2-316(b))

“as is” clause can exclude all implied warranties unless circumstances indicate otherwise

Courts often look to unconscionability to make K unenforceable – “shocks the conscience”

look at procedure (fine print, writing of K) and substance (machine could not perform function it was meant for)

**5. Form Contracts – Battle of the Forms**

General Rule: “Mirror Image Rule” – any differences between offer and acceptance voids contract formation, no mutual assent (acceptance then becomes counter-offer) – modern interpretation of contracts goes against this (§2-207)

2 Issues: 1) Is there a K? And 2) If there was a K, whose terms prevail?

**UCC §2-207: Additional Terms in Acceptance or Confirmation**, when forms have different terms, negotiated/non-form Ks are inapplicable

1. Writing is an acceptance even w/additional or different terms (violates mirror image rule) and are to be construed as proposals for addition to the K unless acceptance is expressly conditional on assent to the additional terms
2. 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 enter K)
   3. Offeror objects w/in reasonable time
   4. Conduct by both parties recognizes K
3. Conduct by parties which recognize existence of K is sufficient to establish K, terms used are those agreed upon and gap fillers
4. “Knockout Rule” – in the event of conflicting form terms, they know each other out and we look at the law/UCC to fill the gaps
5. §2-207 doesn’t eliminate requirement for offer/acceptance, but makes a lot of things that would’ve been counter-offers into acceptances with proposed additions

Consider whether offeror clearly and unequivocally communicated that its willingness to enter K was conditional on offeree’s assent to additional terms

2-207 only applies to an acceptance which clearly reveals that the offeree is unwilling to proceed with the transaction unless he is assured of the offeror’s assent to the additional or different terms.

Whether this has occurred is dependent upon the commercial context of the transaction. (*Gardner Zemke Co. v. Dunham Bush, Inc –* K to purchase A/C units)

**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.

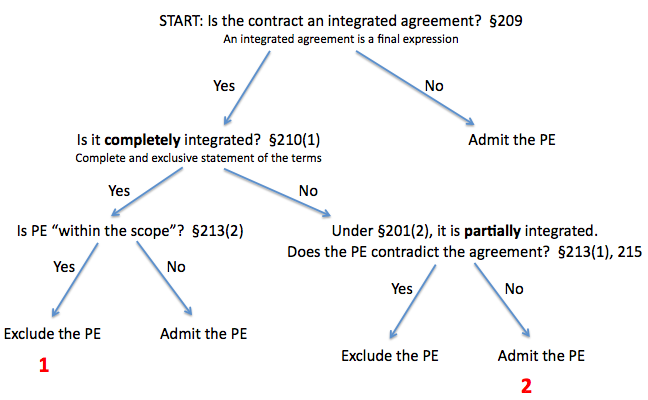
Also watch for language that makes acceptance conditional on the other party’s assent to their terms.

**Parol Evidence Rule**

\*Only applies to written agreements

Corbin Test: Take into account parties’ intent from specific circumstances

Williston Test (Minority Rule): Look only to plain meaning text of writing to determine if term would have been included



**§212 Interpretation of Integrated Agreement:** question of fact if it depends on the credibility of extrinsic evidence or on a choice among reasonable inferences to be drawn from extrinsic evidence

courts can supply omitted essential term that is reasonable in the circumstances (**§204**)

K must be reasonably certain to be enforceable, courts can dictate intent of parties without knowing what they assented to (**§33**)

**§213 Effect of Integrated Agreement on Prior Agreements (Parol Evidence Rule):** Generally, writing is final expression of bargain, discharges prior agreements to the extent that it is inconsistent with them

Evidence from prior writing/oral agreements are inadmissible to contradict terms of writing

Usually deals with prior agreements, not evidence relating to formation of the K in dispute

**§214 Evidence of Prior Contemporaneous Agreements and Negotiations**: evidence an always be admitted 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 consideration, other invalidations of K
5. Ground for granting or denying remedy

**§215 Contradiction of Integrated Terms**:Where there is a binding agreement (either completely or partially integrated) – evidence can never be admitted to contradict an integrated agreement

1. Is there an integrated agreement? (**§209**)
   1. An integrated agreement is a writing constituting a final expression of agreement
   2. More complete the writing the more likely it is integrated
   3. If not integrated (or partially integrated) then allow parol evidence
2. Completely or Partially Integrated? (**§210**)
   1. Completely Integrated (**§210, §215**) – If completely integrated move to section 3
      1. §210(1) a completely integrated agreement is one adopted by the parties as a complete and exclusive statement of the terms of the agreement
      2. §210(3) whether agreement is fully or partially integrated is to be determined by the court
      3. §215:no evidence that contradicts or supplements writing if within scope of K
   2. Partially Integrated (**§216)** – If partially integrated move to section 4
      1. §216(2): any agreement that omits consistent additional terms agreed to for separate consideration or that might naturally be omitted from writing is partially integrated
      2. §215: No evidence that contradicts terms
      3. §216(1): Evidence of consistent additional terms are admissible to supplement a partially integrated agreement
      4. **§2-202 Final Written Expression:** Parole or Extrinsic Evidence: 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 consistent or additional term (unless Ct determines completely integrated agreement)
3. Is parol evidence “*within* *scope* of completely integrated agreement? (**§213(2)**)?
   1. Yes – exclude parol evidence
   2. No – admit parol evidence
4. Does the parol evidence *contradict* the agreement? (**§213(1), §215**)
   1. Yes – exclude parol evidence
   2. No – admit parol evidence

3 conditions must exist for oral condition to alter written K (*Mitchell v Lath)*

1. Agreement must be collateral (separate)
2. Can’t contradict provisions of written K
3. Parties would not normally expect it to be embodied in writing (if they had really meant it, they would have written it into K)

*Mitchill v. Lath, –* Ds wanted to sell land, orally agreed to remove icehouse from their land, k subsequent to promise, gave deed to P, D never removed icehouse, in this case, did not meet the third requirement, P could not introduce PE

*Masterson v. Sine –* conveyed ranch with an option to purchase in the deed, trustee in bankruptcy proceedings wanted land back, D wanted to introduce evidence that the option was only to keep the property in the family

Exceptions of Special Circumstances in PE:

* Merger Clauses: statement that says “this is the K and nothing else matters”. If there is a merger clause, this declaration conclusively establishes that integration is total, unless
  + Document obviously incomplete
  + Merger clause was included as result of fraud or mistake
  + If there is no merger clause, look to the writing – does it appear to be complete and exclusive?
* Admissible if evidence shows an “invalidating cause” of the written agreement (ie. lack of consideration, duress, mistake, ect) even if there is a merger clause or agreement is otherwise thought to be completely integrated

**Has there been a breach?**

1. Unexpected Circumstances (**§§261-271**)

Rule: Parties can be excused from contract if unforeseen circumstances occur which make performance of contract impossible

*Taylor v. Caldwell* – contract for rental of music hall, hall burned down prior to P’s performance dates, D did not have to pay P for expenses incurred

Rule: a thing is impossible in legal contemplation when it is not practicable; and a thing is impracticable when it can only be done at an excessive and reasonable cost

*Mineral Park v Howard* – D had contract with P to take concrete from their property, said they would take all the concrete they needed from P, D took all above water concrete from P but not the rest, court said it would be *impracticable* and unreasonable to force D to spend excess money to get additional concrete from P

Three Part Test of Impracticability (*Transatlantic Financing v U.S.)*

1. Something unexpected occurs
2. Risk of unexpected occurrence not allocated by agreement or custom
3. Occurrence of condition makes rendering of performance impracticable

**§261: Discharge by Supervening Impracticability (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

**§2-615: Excuse by Failure of Presupposed Conditions**

1. Seller isn’t in breach for non-performance if it is impracticable (increased costs don’t usually constitute impracticability alone, sometimes exceptions where increased price gets seller off the hook)
2. When contingency only affects part of seller’s capacity, he can allocate resources as he so desires (b)
3. Seller must notify buyer of delay or non-delivery and, if allocating under (b) must notify of estimated quota buyer gets
4. When seller gets buyer’s notice he can void K or modify by notice to seller, failure to do so within 30 days makes K lapse (§2-616)

2. Frustration of Purpose

**§265: Frustration of Purpose**

1. Performance is still technically possible, but the reason the parties executed the contract is now removed
   1. *Krell v Henry* – D rented room from P to watch King’s coronation, coronation was cancelled, purpose of K is frustrated, not binding
2. Under §272 can get restitution and maybe reliance

3. Doctrine of Substantial Performance

Rule: There is an implied condition of substantial performance in every contract, if you have not substantially performed then you fail the condition and the other party is not required to perform

**§241: Factors to Consider whether a Breach is Material:**

1. extent to which the injured party is deprived of benefit which he reasonably expected
2. extent to which injured party can be adequately compensated
3. extent to which party who failed to perform will suffer forfeiture
4. likelihood that party failing to perform will cure his failure
5. extent to which the behavior of the party failing to perform comports with good faith and fair dealing

**§237: Effect on Other Party’s Duties of a Failure to Render Performance:** (if one party breaches, the other is off the hook)it is a condition of each party’s remaining duties to render performances to be exchanged under an exchange of promises that there be no uncured material failure by the other party to render any such performance due at an earlier time

4. Obligation to Perform in Good Faith

**§1-201:** good faith means honesty in fact and the observance of reasonable commercial standards of fair dealing

**§2-304: Obligation of Good Faith:** every contract under the UCC imposes obligation of good faith in its performance and enforcement

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

5. Perfect Tender Rule

**Buyer’s Rights – “Perfect Tender Rule” (No substantial performance doctrine in UCC)**

* + - 1. Buyer 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

**Remedies for Breach of Contract**

**Basics of damages**

“Purpose of the law is to put the plaintiff in *as good a position* as he would have been had the breacher kept his promise”, give non-breaching party the *benefit of their bargain*

Don’t typically have punitive damages in K law, unless there is some sort of a tort (since the goal of tort law is partially to punish the D, also to compensate the P)

**§344 Purpose of Remedies:** Judicial remedies serve to protect one or more of the following interests of a promisee:

* his **“expectation interest”** which is his position in having the *benefit of his bargain* by being put in as good a position as he would have been in had the contract been performed
* his **“reliance interest”** which is his interest in being reimbursed for loss caused by his reliance on the contract by being put in as good a position as he would have been had the contract not been made, or
* his **“restitution interest”** which is his interest in having restored to him any benefit that he has conferred on the other party
  + Promissory restitution: Person has received some benefit. Later promises to pay the other party X. X is a good indication of what the person thought it was worth.
  + Laurin v. DeCarolis Construction Co – property value was not diminished by the taking of the trees, gravel, and loam, however, benefit was conferred on breaching party *(unjust enrichment)*

**Types of Damages:**

1. Expectation Damages: §347

*“put non-breaching party in as good a position as he would have been in had the contract been performed”*

Default measure for damages: give non-breaching party the *benefit of his bargain* by being put in as good a position as he would have been in had the contract been performed

**§347 Measure of damages in General:** subject to certain limitations, the injured party has a right to damages based on his expectation interest as measured by

* the loss in value to him of the other parties performance caused by its failure or deficiency, plus
* any other loss, including incidental or consequential loss, caused by the breach, less
* any cost or other cost that he has avoided by not having to perform

\* Damages = (value of the thing you received) – (value of the thing you were promised) - 🡪 exception is economic waste theory – diminution

2. Reliance Damages: §349

*“put non-breaching party in as good a position had the K never been formed”*

Expectation damages fail 🡪 look to reliance damages (Rel. §344(b))

**§349: Damages Based on Reliance Interest:** 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 spent $100 preparing to perform, you breach. I can sue for $100. You should I would have lost $10 had we performed K, I can only get $90) 🡪 measured by outlay of expenses

\* Damages = (expenses incurred by the non-breaching party in reliance on the K) – (any value added by the costs)

* Out-of-pocket costs: costs incurred by promisee in reliance prior to breach, minus the value produced by those costs that can be realized after breach (ie. buy suits for convention)
* Opportunity costs: things the promisee would have enjoyed if he had taken opportunities that the given promise made him forgo (house cleaner example)
* Look at Reliance damages when Expectation damages can’t be accurately calculated (Security Stove & MFG v. American Rys. Express Co. – fails to send shipments to convention)

3. Restitution Damages: §370, §371, §374 (UCC §2-718)

*Restores to non-breaching party any benefit that has been conferred on the other party* (unjust enrichment) 🡪 what has the breaching party gained/retained

ONLY applied in cases of substantial/material breaches

**§370: Requirement that Benefit be Conferred:** party is entitled to restitution only to the extent that he has conferred a benefit on the other party

**§371: Measure of Restitution Interest:** measure restitution interest by:

1. what it would have cost the other party to obtain services elsewhere
2. increased property value

**§374: Restitution in Favor of Party in Breach:** even breaching party can get restitution for benefit conferred (Osteen v Johnson – breached contract for sale of residential home, could still recover part of deposit)

For sale of goods: look at **§2-718(2) & (3):** gives buyers restitution damages when they’re in breach

*Quantum Meruit:* “reasonable value of performance” 🡪 when P would have lost money in the event that K had been performed (ie: no expectation damages because P would have lost money), he can still get quantum meruit undiminished by any loss that would have been incurred by complete performance, measured by the cost to procure services at similar time/place

* *U.S. v. Algernon Blair* – part performance of construction project, P opted for restitution since expectation damages would have resulted in nothing)

4. Consequential Damages: (UCC §2-710, §2-715)

For restatement, look at diminution in value (§347)

For UCC: see

**§2-715**: Buyer’s Incidental and Consequential Damages

**§2-710:** Seller’s Incidental Damages

**Damages Under UCC:**

First question to ask: where did goods end up? With buyer or seller?

**§1-305: Remedies to be Liberally Administered**: the remedies provided by the UCC should be administered…give the non-breaching party the benefit of their bargain

Notes:

Remedies are not the same as damages. Damages in K law means money amount that is being attributed to the remedy prescribed by the ct. Other remedies may not involve money damages.

Whatever rule the court is using, test it against the 3 types of damages. If it doesn’t work, need to revise it

Court is granted “reasonable leeway” in measuring market price (*Egerer v. CSR West, LLC, pg 243 – k to fill land development w/pit run, only a more $ substitute*)

**Variable costs** may be included in the computation of lost profits, but fixed costs are generally not b/c they aren’t really tied to the K (*Delchi Carrier v. Rotorex, pg 248*)

Crappy goods delivered to buyer. Buyer rejects. They can have §§2-711, 712, 713, 715. If Buyer decides to keep them, then he gets §§2-714, 715.

**Seller’s Breach (Remedies for Buyer)**

Buyer doesn’t have goods – S failed to deliver; B rejects or revokes acceptance

*Two Categories:*

1. Specific relief, buyer is awarded actual goods
2. Damages, two subcategories
   * 1. Buyer’s remedies when seller fails to deliver or buyer properly rejects the goods or revokes his acceptance (§2-711 to 715, 723, 724)
     2. Buyer’s remedies when buyer has accepted the goods, and cannot or does not want to rightfully revoke his acceptance, but the goods are defective (§2-714)

**§2-711: Buyer’s Remedies in General; Buyer’s Security Interest in Rejected Goods**

* + - 1. …buyer may cancel and whether or not he has done so may, in addition to recovering so much of the price as he has paid
         1. ‘cover’ and have damages under the next section as to all the goods affected whether or not they have been identified to the contract **(§2-712**);
         2. recover damages for non-delivery as provided in this **(§2-713**)

**§2-712: “Cover”; Buyer’s Procurement of Substitute Goods**

1. Buyer can buy substitute goods (*must be in good faith and without reasonable delay*)
2. The buyer may recover the *difference between* the cost of cover and the contract price + any incidental or consequential damages **(§2-715**), but less expenses saved in consequence of the seller’s breach.

\*Damages = Cost of Cover – K price + incidental/consequential damages – expenses saved

1. Failure of the buyer to affect cover within this section does not bar him from any other remedy.

**§2-713: Buyer’s Damages for Non-delivery or Repudiation** (No Cover/”Hypothetical Cover”)

1. Buyer can recover from seller the difference between the market price at the time when the buyer learned of the breach and the K price together with any incidental and consequential damages provided in (**§2-715**), but less expenses saved in consequence of the seller’s breach.

\*Damages = Market Price (at time breach is determined) – K price + incidental/consequential damages – expenses saved

* Buyer cannot recover these damages if they cover

1. Market price is to be determined as of the place for tender or, in cases of rejection after arrival or revocation of acceptance, as of the place of arrival.

**§2-714: Buyer’s Damages for Breach in Regard to Accepted Goods** (buyer accepts goods but they are not as agreed or warranted)

1. Buyer may recover for any *non-conformity of tender* the loss resulting in ordinary course of events…in any *manner which is reasonable*.
   1. Delchi v. Rotorex – goods sent were not as warranted (sample prod)
2. Buyer may recover from seller difference between goods as delivered and goods as warranted, unless special circumstances show proximate damages of a different amount

\*Damages = Value of goods as warranted – value of goods as accepted

1. May also recover *incidental and consequential damages* under (**§2-715)**

**§2-715: Buyer’s Incidental and Consequential Damages**

1. *Incidental damages* resulting from S breach include expenses *reasonably incurred* in inspection, receipt, transportation, care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and other reasonable expense incident to the delay or other breach (key = *REASONABLY INCURRED* – usually not fixed costs)
2. *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 🡪 **MITIGATION/FORESEEABILITY**
   1. Can’t recover if the expense could have been prevented by covering
   2. “reason to know” of losses (actual language in section)

**§2-723: Proof of Market Price: Time and Place:**

1. market price is price that is prevailing at the time when injured party learned of breach (**§2-708 or §2-713**)
2. When market price is not reasonable available (1) look to reasonable substitutes

**§2-724: Admissibility of Market Quotations:** what is admissible to show market price

**§2-716: Buyer’s Right to Specific Performance or Replevin – specific performance**

1. Specific performance may be ordered where the *goods are unique* or other proper circumstances
   * Note: uniqueness is measured by the entire circumstances, not just the good itself (i.e. Are the terms of the contract unique? What is the good? Is there any substitute?)
2. SP may include payment of the price, damages, or other relief as the court may deem just
3. Buyer has right of replevin (recover possession of items) for goods if he cant cover – personal/family/households, right of replevin vests upon acquisition of special property, even if S hadn’t repudiated

**Buyer’s Breach (Remedies for Seller)**

**§2-702: Seller’s Remedies on Discovery of Buyer’s Insolvency**

**§2-703: Seller’s Remedies in General**

1. Aggrieved seller may:
   1. withhold delivery of such goods;
   2. stop delivery by any bailee (**§2-705**);
   3. resell and recover damages (**§2-206**);
   4. recover damages for non-acceptance **(§2-208**) or for price **(§2-709**);
   5. cancel

**§2-704: Seller’s Right to Identify Goods to the Contract Not-withstanding Breach or to Salvage Unfinished Goods**

1. An aggrieved seller under the preceding section may
   1. identify conforming goods not already identified if they are in his possession or control at time of breach;
   2. treat as the subject of resale goods intended for K even if unfinished
2. Where the goods are unfinished an aggrieved seller may…either *complete the manufacture* **or** *cease manufacture and resell for scrap* or salvage value or proceed in any other *reasonable manner* 🡪 **MITIGATION**

**§2-706: Seller’s Resale Including Contract for Resale**

1. Seller can resell (in good faith and commercially reasonable manner) and recover the difference between the resale price and the contract price together with any incidental damages allowed under **(§2-710**), less expenses saved in consequence of the buyer’s breach.

\*Damages = K Price – Resale Price + incidental/consequential damages – expenses saved

1. Sale may be public or private, but must be commercially reasonable
2. Where resale is private seller must give buyer reasonable notification of intent to sell (see pp. 92-93 for resale provisions)
   1. Seller is not accountable to Buyer for any profit from resale

**§2-708: Seller’s Damages for Non-acceptance or Repudiation**

1. Seller’s damages for buyer’s non-acceptance is the difference between the market price at the time and place for tender and the unpaid contract price together with any incidental damages provided in **(§2-710**), less expenses saved in consequence of the buyer’s breach.

\*Damages = K price – Market price (at time and place for tender) +/- unpaid K price + incidental/consequential damages

1. If damages in (1) are *inadequate* to make the seller whole, then damages should be the *profit which the seller would have made from full performance to the buyer*, together with any incidental damages **(§2-710**), due allowance for costs reasonably incurred and due credit for payments or proceeds of resale.
   1. *Lost volume seller* (sells several identical items), but for buyers breach, seller would have made 2 sales instead of 1, if market damages inadequate, damages = profit that would have been realized
   2. Proceeds of the resale are not to be credited to the buyer if the seller is not a lost volume seller (*Lazenby Garages*)

*Neri v. Retail Marine:* P contracted to buy boat and reneged, wanted deposit returned, D later sold boat to another buyer for same price. S would have made 2 sales if P had not breach (lost volume seller)

* + calculated damages as profits that would have been realized if P had not breached – expenses incurred from BoC (ie. storage costs, maintenance of boat before resale)

**§2-709: Action for the Price 🡪 essentially buyers specific performance**

1. When the buyer fails to pay what he owes to seller 🡪 seller can recover price of goods delivered and 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**

**§2-710: Seller’s Incidental Damages:** include any *commercially reasonable charges*, expenses or commissions incurred in stopping delivery, transport, care and custody after breach

Notes:

Whether or not the buyer actually suffered the economic damages, or if instead he was able to pass them along to a subsequent party, is irrelevant in the damage calculation

**§2-718: Liquidation or Limitation of Damages; Deposits**

1. damages for breach by either party may be liquidated in the agreement in an *amount which is reasonable in the light of the anticipated or actual harm caused by the breach*, the difficulties of proof of loss, and the inconvenience or non-feasibility of otherwise obtaining an adequate remedy.
   1. A term fixing unreasonably large liquidated damages is *void as penalty*
2. Even when buyer is in breach, he is entitled to resolution of any amount by which the sum of his payments exceeds
   1. Amount he’s paid to S in excess of liquidated damages in K (if there is one), or
   2. Absent a liquidated damages clause: *20% of the value of total performance or $500 (whichever is smaller)*
3. Discusses restitution, nobody is going to get more than they deserve
4. If seller has notice of buyers breach before reselling goods received in part performance

**§2-723: Proof of Market Price: Time and Place**: see above

6. Damages for Construction Ks

**§348: Alternatives to Loss in Value of Performance**

1. if breach delays use of property…may recover damages based on rental value or interest on value of property
2. If a breach results in defective or unfinished construction and the loss cannot be proved w certainty, he may recover damages based on
   1. The *diminution* in the market price of the property caused by the breach, or
   2. The reasonable *cost of completing performance* or of remedying the defects if that cost is not clearly disproportionate to the probable loss in value to him

Rule: If the provision breached was *merely incidental to the main purpose* of the K and cost of performance would be grossly disproportionate, then **diminution in value** is the appropriate measure of damages (*Peevyhouse)*

Goal is to avoid **economic waste**, or to give non-breaching party a **windfall**

* *Aiello Construction v. National Tractor*: Damages = Contract price – Cost of completion +/- amount paid by non-breaching party prior to breach

Examples

* Fact finder may determine that if CoP is awarded instead of DIV (even if CoP is more) the owner will actually complete performance. If he is not interested in obtaining damage $, cost of repair may be appropriate.
* Where the appearance of the beams was central to the aesthetics of the architectural scheme, when the beams were defective the Ct held that CoP was the proper remedy even though it was more than DIV – defect was not incidental (*City School Dist. Of Elmira v. McLane Const. Co, pg 232*)

Rule: Where one party does not suffer a measurable loss from a breach and the D breach is deliberate and willful, damages limited solely to diminution in value may sometimes be inadequate

* Laurin v. DeCarolis Construction Co.- P bought land from B, before moving in D removed trees, gravel, landscape) *avoid unjust enrichment*

7. Specific Performance: §357, §359, §360, §366, §367 (UCC §2-709, §2-716)

UCC SP see **§2-709** and **§2-716** (UCC does not discuss difficulty in enforcement of SP)

The default is that damages are money damages. Specific performance is the exception to this rule – court orders breaching party to perform K instead

**§357: Availability of Specific Performance and Injunction**

1. SP will be granted in the discretion of the court
2. An injunction against breach of a K duty will be granted if
   1. the duty is one of forbearance, or
   2. specific performance would be denied only for reasons that are inapplicable to an injunction

**§359: Effect of Adequacy of Damages**

1. Specific performance will not be ordered if money damages would be adequate to protect the expectation interest of the injured party; (2); (3)

**§360: Factors Affecting Adequacy of Damages**

1. In determining whether the remedy in damages would be adequate, the following circumstances are significant:
   1. Difficult to prove damages with certainty
   2. Difficult for P to procure substitute performance w/ damages awarded
   3. P will have hard time collecting damages from D

**§366:** **Effect of Difficulty in enforcement or supervision:** courts wont give SP if it places a great burden on the court

**§367: Contracts for Personal Service or Supervision**: try to avoid SP for employment Ks and don’t enforce non-competing clause that leave the employee without a way to make a living

Rule: An equitable decree will not be adjudged unless the ordinary common law remedy of damages for a breach of K is an inadequate and incomplete remedy for injuries arising from the failure to carry out its terms

*London Bucket Co v. Stewart, pg 326 – K to furnish and install a heating system, D did a bad job and never finished, P sued for specific performance*)

Notes:

courts weigh the *ease of enforcement* of specific performance with the *ease of calculation* of monetary damages (Walgreens v Sara Creek)

Specific performance is traditionally the remedy for breach in the sale of real property (more often available for buyers)

Damages may be inadequate if difficult to calculate

Arguments against SP

Public policy

Difficulties of supervision

Personal relationships

8. Limitations on Damages: §350, §351, §352, §356

**Mitigation**

For UCC see **§2-704(2)** and **§2-715(2)**

UCC has clause that says all damages must be reasonable, using the word reasonable implies duty to mitigate 🡪 seller can usually not recover full contract price unless the goods could not reasonably be resold. Any costs from attempt to mitigate can be added to damages

Duty to mitigate damages (limit damages) 🡪 violates expectation interest, purpose is to avoid economic waste, encourage efficiency

**§350: Availability as a Limitation on Damages**

1. Can’t recover damages that could have avoided *without undue risk, burden, or humiliation*
   1. Rockingham County v. Luten Bridge: granted damages in an amount sufficient to compensate plaintiff for labor and materials costs incurred prior to repudiation of K (P did not get benefit of their bargain)
   2. Ex. Luten’s expenses $1,900, Profits: $10,000, Damages: $11,900 🡪 if they had stopped work)
2. The injured party is not precluded from recovery if he has made a reasonable but unsuccessful efforts to avoid loss

**Mitigation: K for Employment**

Rule: employee is under duty to use *reasonable* care to find employment of *substantially similar type and rank*

In Employment K, duty to mitigate doesn’t require P to accept different or inferior employment (Shirley MacLaine Parker v. 20th Century-Fox Film Corp.)

Must do what is reasonable & D must show that other employment was comparable (also don’t have to take employment far from home

If the employee obtains other employment, even if different or inferior, his earnings are used in calculation of mitigation of damages

If the employee can prove real and specific losses that resulted from the injury to their reputation by the breach of contract (i.e. damage to reputation that hurts future opportunities, inability to practice the profession if such practice was reasonably foreseeable through the contemplation of the contract), such damages may be recoverable.

\* Damages = amount of salary agreed upon for period of service – amount which employer proves employee has earned or with reasonable effort might have earned from other employment

**Foreseeability**

For UCC, see **§2-713**, **§2-715(2)**

Rule: damages have to be in the *reasonable contemplation* of the parties at the time of K, or the special circumstance must have been communicated to the party at the time of K (undermines expectation damages 🡪 public policy concerns, policy for fairness, want ppl to plan for risk, avoid *disproportionate compensation*

Rule promotes the sharing of information (*Hadley v. Baxendale*:broken crank shaft S/D mill for a few days, mill sued for lost profits and court denied recovery)

**§351: Unforeseeability and Related Limitations on Damages**

1. Damages must be foreseeable to recover
2. 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*
3. Damages are not recoverable for loss that the party in breach did not have reason to foresee as a probably result of the breach when the contract was made (Hadley rule)

**Restatement §356: Liquidated Damages and Penalties:**

1. Damages for breach by either party may be liquidated in the agreement but only at an amount that is reasonable in the light of the anticipated or actual loss caused by the breach and the difficulties in proof of loss

Test is *reasonable foreseeability*, not actual knowledge. It doesn’t have to be the most foreseeable consequence, just a foreseeable consequence to the *reasonable person*

**Certainty**

**§352: Uncertainty as a Limitation on Damages:** cant recover damages that cannot be proved within reasonable certainty

Damages must be:

Demonstrated with certainty that such damages resulted from breach

Alleged lost must be capable of proof with reasonable certainty

Must be a showing that the particular damages were “foreseeable” (ex. *Kenford Co. v Erie County, pg 292 – domed stadium in Buffalo*)

Does not require absolute certainty, only capable of measurement based upon known reliable factors *without undue speculation*

For new business: a stricter standard is imposed bc there is not a reasonable basis of experience on which to estimate lost profits with the requisite degree of reasonable certainty (*Kenford Co. v. Erie County, pg 292*)

Courts considered damages certain where racehorse had proved her ability prior to the breach and then was consistent in the year after the breach (*Rombola*)

**Liquidated Damages Clauses:**

**§356: Liquidated Damages and Penalties** –

1. liquidated damages terms must be *reasonable* in light of anticipated or actual harm cause by the breach and the difficulties of proof of loss
2. penalty clauses are unenforceable on ground of *public policy*
   1. fixed sum a party agrees to pay in event of breach (used as punishment)

*Enforceable damages clauses*: reasonable forecast of injury resulting from breach, otherwise it is considered an unenforceable penalty clause and non-breaching party will be limited to conventional damage measures (*Wasserman v Middletown)*

Notes:

Liquidated damages clauses must be in amount reasonable compared to actual or anticipated loss, and actual damages must have been difficult to foresee at time of K

Policy: point of Ks is not to penalize breaching party, don’t want to give one party a windfall