MAKING OF AGREEMENT (OFFER/ACCEPTANCE & CONSIDERATION)

I. Mutual Assent
   A. Must be:
      1. Offer and
      2. Acceptance
   B. Objective test – ct.’s look to manifestations of assent (language/acts) that could lead a reasonable person to believe agreement (Embry – “get your men out” a pty’s inner intentions aren’t what matters, outward manifestations are)
      1. ct.’s look to circumstances (L. Hand’s opinion in N.Y Trust – sham oil co.)
      2. meeting of minds not necessary (subjective test) Peerless Rule

II. Offer made?
   A. Missing terms
      1. Sale of goods - must be accompanied by a particular quantity (Moulton – ltr advising salt for sale by car load not an offer, no quant.)
         a. UCC – can sill be a K even if missing price
      2. Real Estate – price and description of real estate needed
   B. Ambiguous terms – not a preclusion, look to language of K at a whole
      1. Fairmont Glass – K where buyer inquiry set out quantity, seller responded with price for “immediate delivery”
      2. UCC/Restatement §33 – assent = reasonably certain terms = provide basis for existence of breach and remedy
         a. can look to pty’s bargaining history (sale of goods only – Joseph Martin Deli – same arg. didn’t apply to lease ext. at reason’ble $)
         b. price judged as reasonable price at time of delivery
         c. more open terms, less likely K
      3. must be definiteness to material matters
         a. Raffles – Peerless ship problem: indefinites to which Peerless ship goods being delivery on/delivery date precludes enforceability
         b. §20 – no assent if pty’s attach diff. meanings to same term
      4. advertisement gen’l construed as only invitation, unless specific as to quantity and who can accept

III. Limitations on offer MOVE TO ANOTHER SECTION
   A. Employment at will – employment K construed to be terminable at will (Forrer v. Sears – promise of employer for “permanent” employment is fulfilled as soon as employee begins working and is terminable at will after employment begins)
      1. employee acceptance of offer by beginning to work.
      2. exceptions:
         a. employee provides additional consideration for employment other than just working
         b. employer terminates for reasons that violate public policy (Sheets v. Teddy’s Frosted Foods – quality control inspector can’t be forced to choose b/t employment or following health statute)
   B. Disclaimer – must be conspicuous to be effective (McDonald – disclaimer that addendum was not employment K not valid b/c not conspicuous)
      1. Set off in some way, placed under subheading, no capitalized, etc.
      2. Conspicuousness is matter of law for judge to decide (UCC)
   C. Unilateral v. Bilateral
1. Unilateral – promise in exchange for performance. Can only be accepted by performance of the specific act. (ex. offer of reward)

2. Bilateral – promises b/t to parties to perform. Offer accepted by promise to perform. (ex. offer to sell)

3. How to tell whether offer unilateral or bilateral: (Davis v. Jacoby – guy offered friend to move to Ca. to take care of him in exchange for his estate, friend said yes but didn’t move to Ca. b/f he died)
   a. where doubts, presumption in favor of bilateral
      i. b/c unilateral presumption lead to unfair results (Brooklyn bridge hypo – starts to walk across bridge, then offeror revokes)
   b. whether offeror requests act or promise for act
   c. relationship b/t ptys (offeror trusts offeree’s promise to perform)
   d. whether offeror objects to a promise to perform

IV. Revocation of offer – offer is master of offer and can set terms for acceptance
A. Ct. look to manifestation of offeror’s intent from perspective of offeree
   1. Revocation by offeror selling to somebody else, only if original offeree has notice (aware offeror no longer assents)
   2. death of offeror terminates offer, regardless of offeree’s knowledge (Restatement)

B. Lapse of time
   1. mailbox rule – offer not effective until it is received by offeree acceptance effective the moment offeree puts acceptance ltr in mail (Caldwell v. Cline – time limit P set for acceptance did not start running until D received the offer ltr.)
   2. if time for acceptance not specified, it is set as “reasonable time”
      a. depends on offeror’s words, how offer is made (oral/written), subject mater of offer (land/goods), trade deadlines – quest. of fact
   3. even if time for acceptance specified, offeror may revoke b/f time up by notice to offeree (express or constructive)

C. When offer becomes irrevocable:
   1. offeree accepts (through performance or consideration)
   2. No revocation by selling to someone else unless offeree has notice
   3. Option K – part perform. or tender of a unilateral K creates an irrevocable option K (§45)
      a. beginning preparations to perform not enough, must actually begin performing (Brackenbury v. Hodgkin – mother offered to convey deed if daughter moves in and cares for her until death, mother revoked b/f death, ct. held P’s part perform. was consid.)
         i. remedy for breach of pers. services usually restitution only
      b. offeree pays consideration for offeror’s promise not to revoke w/in a specified time (Mier v. Hadden – P paid consideration and acted on reliance of D’s written offer to keep option to purchase open for specified time, i.e. down payment) (§87)
   4. Gen’l K reliance on subK’s bid
      a. unless bid expressly states it is revocable, bid may not be revoked for a reasonable period of time after gen’l K has relied on it in formulating his bid. (Drennan – majority rule)
i. does not apply where gen’l doesn’t accept after reliance, doesn’t rely, makes counter offer, or uses it to “shop around”
ii. gen’l using sub’s bid does not constitute acceptance
iii. Baird – minority rule, gen’l may not rely on sub’s bid w/out accepting first b/c unfair for sub to be bound to gen’l but gen’l not bound to sub.

ii. offer which the offeror should reasonable expect to induce offeree’s reliance b/f acceptance and does induce offeree’s reliance is binding as an option K (§87)

5. UCC – Firm offer rule
   a. signed offer in writing by a merchant (for sale of goods) not to revoke – 3 mo. ceiling

6. statutes instituting a type of firm offer rule

III. Offer accepted?
   A. Only offeree can accept
   B. silence acts as acceptance/implied acceptance
      1. Where K formed that way in past (Hobbs v. Massosoit Whip – history of business, D kept skins)
      2. applies to insurance when unreasonable delay + retain insurance premiums
      3. receive products w/ no reason to believe they were sent gratuitously
         (Austin v. Burge – received newspapers but didn’t pay)
            i. unsolicited goods statute: unordered free samples, etc. = gift
   C. Unilateral K
      1. Offeree must be aware of offer (reward)
      2. Offeror must have notice of performance (express or constructive)
   D. Sale of goods
      1. Where seller sends wrong stuff – creates acceptance but also breaches
      2. Accommodation exception – sends wrong stuff w/ an explanation doesn’t create a K b/c viewed as counter offer

IV. Rejection – how offeree can reject/terminate offer
   A. Direct Rejection
   B. Indirect Rejection (§36)
      1. lapse of time, death of either pty (all other forms of revocation)
      2. non-occurrence of any condition under the offer
      3. counter offer (Livingston v. Evans - responded to offer to sell land w/ a counter offer. ct. held counter = rejection)
         a. offeror response to counter can renew original offer if it can be objectively inferred from circumstances
         b. counter offer during period of option K doesn’t terminate offer
      4. Conditional acceptance/adding new terms
         a. inquires are ok, just can’t add any new terms
         b. expressly stating implied terms is okay (hypos in class)
         c. Mirror image rule – acceptance must be mirror image of offer
            i. UCC – doesn’t follow mirror image rule
               a. expression of accept. is good regardless of new terms
               b. add. terms = proposals unless both ptys merchants
               c. K est. by conduct that recognizes existence of K
V. Consideration - necessary for a promise to be enforceable

A. Formality – traditionally, they were required to relieve judge of having to test whether a legal transaction was intended

1. Functions:
   a. Evidentiary security (requiring a writing, witnesses, notory, etc.)
   b. Cautionary – ensures pty’s know what they’re getting into
   c. Channeling – simple and external test of enforceability

2. History: Formality moved from seal → assumpsit → consideration

B. To constitute consideration there must be(§71):

1. Bargained for exchange of promises
   a. Sought by promisor in exchange for his promise and is given by promisee in exchange for that promise (Fisher v. Union Trust – dad conveying prop. by gift w/ daughter’s love/affection after promise made is not consideration), i.e. mutual reciprocal inducement

2. That results in a benefit to promisor OR detriment to promise
   a. Detriment to promisee – any present or future legal right given up or limited (Hamer v. Sidway – uncle promised $ for nephew to not smoke, drink gamble)
      i. setting aside money for agreement to purchase in future is a detriment (would be able to use that money for something else)
      ii. forbearance of a legal claim as consideration must (§74):
         a. be in good faith
         b. be based on legal found’n (Duncan v. Black – cottn allot)
      iii. pre-existing duty rule – doing something already legally obligated to do is not a determent/consideration
         a. UCC rejects – no new consid. needed to modify

3. Promise or performance may be given by promisee or a third pty to promisor or a third pty (agents)

4. Neither the promisor’s promise nor the promisee’s return promise/performance need be the actual inducement for the promise (Simmons – knew about contest but not why he was fishing, still recover award)

NOTE: ct.’s do not inquire into the adequacy of consideration, either there is or is not consideration

5. Gift – promise w/out consideration, not enforceable until delivery.

VI. Exception to traditional consideration/bargain

A. Implied K – services performed at recipient’s request but without express promise to pay, past act sufficient to enforce later promise to pay.

B. Moral Obligation as enforceable consideration for later promise

1. Promise renewing a consideration given during incapacity (child)

2. Promise to pay past debt that has been relieved (through stat. of limitations or bankruptcy) is consideration for new promise to pay.
   a. most states require to be in writing

3. Material benefit rule (§86) – Promise to do something made in recognition of a benefit received is enforceable so long as the benefit was bestowed w/ an expectation of compensation or not as a gift. (Webb v. McGowin – employee
injured himself saving employer, employer’s promised to pay and started paying until death, employer’s promise binding on estate

a. elements
   i. material benefit conveyed (viewed as unjust enrichment)
   ii. not meant as a gift (Mills v. Wyman – nursing benefits to sick son construed as gratuitous so later promise to pay not enforceable)
   iii. promise made in recognition of that benefit

b. exception: humanitarian rule – humanitarian act, voluntarily performed by a non-professional does not constitute consideration (Harriginton v. Taylor – cuts hand stopping ax from hitting man)

C. Promisorry Estopell – reliance as substitute for consideration
   1. Historically, split as to whether reliance on a promise acts as consideration.
      a. Kirksey – bro in law asks P to move and live/him, later kicks out, ct. held reliance on gratuitous promise not consideration.
      b. Ricketts – granddaughter quit working on grandfather’s promise to support, ct. held estopell precludes promisor from claiming no consideration, where promise relied to her detriment on promise

   2. Cts begin to recognize part performance on promise of land entitles P to equitable relief regardless doesn’t meet statute of frauds (Seavey v. Drake – gift of land didn’t meet stat. of frauds, P moved on and made improvements, entitled to specific performance of gift of land)
      a. statute of frauds requirements don’t apply in ct. of equity
      b. possession of land/no protests from vendee key to performance

3. Part performance in equity extended to reliance as substitute for consid. in ct. of law. (East Prov. Credit Union – P acted in reliance on D’s promise to pay car ins., estoppel prevents promisor from claiming no consid.)
   a. Restatements (§90) Promise inducing action or forbearance
      i. Promisor reasonably expect promise to induce action/forbearance
      ii. Which does induce action/forbearance
      iii. is binding to prevent injustice
      iv. charitable gift binding w/out detrimental reliance

4. Promissory estopell does not apply to employment at will K (Forrer)
   a. as soon as employee begins working, employer has performed in full
   b. detriment to employee involved in beginning employment is not consideration for anything other than beginning employment.
   c. if employer repudiates b/f employment begins, detrimental reliance is consideration (Hunter v. Hayes – quit work at telephone co. in reliance on promise of employment, repudiating employer resp. for damages from resulting unemployment)

5. Estopell can only be used as a defense – bar pty from asserting that they did not make a promise.

INTERPRETATION OF WRITTEN K
I Purpose of K
A. Evidence of when obligations to each other begin
B. Guides performance/obligations
C. Scope of obligations should disputes arise
D. Interpretation = meaning of language  
C. Construction = legal effect of language as a whole  

II. Parol evidence rule  
A. Rule: Where pty’s intended written agreement to be integrated (final/complete), parol evidence (written/oral) of prior agreement can’t contradict.  
1. Ct. uses objective test to determine whether pty’s intended agreement to be integrated (Mitchell v. Lath – ct. found pty’s intended written agreement to be integrated and oral agreement to remove ice house is one that would be expected to include in written agreement b/c of detail of written agreement and related subject matters)  
2. Merger clause is provision in K which states K is complete/integrated K.  
B. Parol evidence allowed when:  
1. Does not contradict/inconsistent with written agreement (i.e., supplements)  
   a. ct.’s split as to whether contradiction preclusion applies to only express terms or implied terms of the written K as well.  
      i. Hatley v. Stafford – oral time limitation on buy out provision of leased land admissible b/c no express provision re. time limitation in written K  
      ii. §216/Hayden v. Hoadley – reasonable time limitation is implied term of buyout provision and oral time limitation contradicts  
2. It is an agreement that might naturally be made as a separate agreement  
   a. pty’s would not ordinarily expect to include in final agreement  
3. §240 requires separate consideration  
C. Parol evidence always admissible to establish (§214):  
1. whether the agreement was wholly or only partially integrated  
   a. ambiguity/meaning of terms  
2. illegality, mistake, lack of consideration or other invalidating reasons  
3. grounds for granting or denying remedy  
D. Judge decides if parol evidence admissible, jury decides how much weight it has  
E. PER only applies to prior agreements & subsequent agreement in writing?  

III. Interpretation of words  
A. Rules  
1. Deference given to specific language over general language  
   a. 4 corners rule - only where language is ambiguous can look to extrinsic evidence (ct.’s differ on using this rule)  
2. Ambiguity resolved against the drafter of the K  
3. K not interpreted literally if it would produce “absurd” results  
   a. unless language is crystal clear  
4. K interpreted as a whole, in light of linguistic and cultural backgrounds  
   a. Pacific Gas – uncertainty D, subK use of word “indemnify” in agreement. Ct. held to not allow extrinsic evidence contrary to plain language meaning would be unfair b/c not looking at K in light of intention of pty using the word.  
5. Course of dealings (Massosiac Whip)  
B. The meaning of a word is a question of law for the judge (§212)  

IV. Gap fillers
A. Implied duty of good faith – in agencies involving exclusive dealing ct.’s will imply obligation to make good faith efforts (Wood v. Lucy, Lady Duff)
   1. applies to requirement K that seller has implied ob. to provide all required

B. Implied warranties
   1. Sale of goods
     a. Implied warranty of merchantability – product can be used for its intended purpose
   2. Sale of real property
     a. restrict covenants – implied property can be used for purpose it is restricted (Hinson v. Jefferson – rest. cov. for residential purposes, city wouldn’t grant permit for septic tank b/c above swamp)
     b. warranty of fitness – on new house that is free of structural defects
        i. defects must be unknown/undiscoverable by grantee
     c. does not apply to sale or lease of unimproved land
        i. rat. – reliance is not as great as purchaser of new home

REASONS NOT TO ENFORCE
I. Does it need to be in writing?
   A. Statute of Frauds requires written K for:
      1. Transfer in interest in real estate
         a. Includes leases but must be for greater than 1 yr.
      2. Contracts that can’t be performed within 1 year
         a. 1 year runs from making of contract to completion of performance
         i. K that may be completed within 1 year, even though it doesn’t have to → not within the statute
      b. Test: If it is possible, not probable for work to be performed w/in 1 yr.
      3. Contracts for the Sale of Goods > $5,000
         a. applies to aggregate price of all items in K, including value of trade in
         b. If both ptys are merchants, failure to answer a written confirmation of a sale within 10 days of its receipt is tantamount to a sufficient writing
   B. Statute of frauds satisfied by:
      1. Memorandum or other written document
      2. Containing enough terms to show a K has been made
      3. Signed by the pty to be charged
   C. Exceptions where oral K w/in the statute of frauds may be enforced:
      1. Where the pty has begun performance at their detrimental reliance (Seavey)
         a. promissory estoppel – where the pty has relied on oral promise
      2. Judicial admission
   D. If statue of frauds bars a recovery, pty can still bring suit in equity
   E. Statute of Frauds used only as affirmative defense

II. Standardized forms/Signing w/out reading WHAT DOES WHITHER ASSENT MEAN – IF ANY OF THE BELOW RULES APPLY, WHAT DO YOU BRING THE CLAIM UNDER – NO ASSENT???
   A. Benefits of standard forms – allows pty’s to contract quickly w/out bargaining on all details or consulting counsel
   B. At common law pty’s “sign at their own risk”
      1. By itself, signing w/out reading is not a defense
C. Exceptions – inadequately procured = no assent
   1. Misrepresentation
   2. Seller prevents buyer from reading
      a. illegible/hidden from view
   3. Violates public policy
   4. Exculpatory release too broad
   5. K of adhesion (take it or leave it) and
      a. lack of bargaining power/one sided
   6. Creator of form doesn’t adequately bring provision to ptys
      attention/doesn’t explain what it means
      a. not in reasonable expectation of ptys
   7. Examples:
      a. classic ex: baggage check, claim ticket
      b. Sharon v. City of Newton – parent wasn’t aware signing consent for
         child to participate in sports was waiver of liability/indemnity agreement
      c. Henningson v. Bloomfield Motors – P signed sales K that had
         limiting merchantability of car in fine print, got in wreck due to defect
      d. Richards v. Richards – exculpatory K as part of consent to ride
         form required by employer to ride w/husband in truck
      e. Boememer v. Abortion Services – signed an agreement to arbitrate
         that wasn’t explained to her, had no choice if wanted to get abortion

D. Result – term is treated as if it was not part of K
   1. Exception: Arbitration clause are not invalid unless entire K invalid (Hill)

E. What is adequate attention to term/disclaimer
   1. vendor actually brings it to vendee’s attention to make sure aware
   2. a big sign (at valet stand, baggage claim, etc.)
   3. language is in a comprehensible manner and set out some how (Mundy – D
      bound by new price limitations of ins. policy where limitations set out in bold
      face and easy to read format)
   4. Vendee knew there were condition and had reasonable opportunity to read
      (Hill v. Gateway – comp. ordered over phone, order taker can’t read all
      terms, disclaimer w/ comp. that if keep more than 30 days → assent to
      arbitration clause)
      a. there is opposing view to Hill that add. terms not w/in reas. expect.
   5. If the disclaimer is in the reasonable expectations of the pty’s
      a. Weisz v. Park-Bernet Galleries – disclaimer re. authenticity of
         artwork in catalogue should have been w/in reasonable expect. of pty

III. Duress – wrongful threat the precludes exercise of free will to enter agreement
   A. Physical duress
   B. Economic duress
      1. improper threat (Wolf v. Marlton - even if w/in ptys legal right – selling
         house to undesirable purchaser) AND
      2. left w/ no reasonable alternative (Smithwick v. Whitley – no ec. duress
         where P made improvements on land and seller then demanded more money
         for deed, P had claim in equity rather than paying higher price)
Ex. Austin Inst. v. Loral (P could not recover b/c they had forced D to pay more than K for and D had no alt. to agree b/c under time constraint)

IV. Unconscionability
A. related to duress but no express or implied threat
B. Equity – originated to not allow specific performance that would produce unconscionable results (Woolums v. Horsley – K for old man to convey his prop. w/ expensive mineral right to tycoon who knew its worth and misled man)
C. Recognition in law (William v. Walker – lease/sale of items to low income families, if default on one items, all items repossessed, ct. held uncon. K law)

1. Two part test (UCC/Restatement)
   a. absence of meaningful choice by one pty (procedural uncon.) AND
      i. unequal bargaining power – pty has not other way of getting product, product is a necessity,
      ii. defects in the formation process – buyer doesn’t understand terms, education, etc. (FrostiFresh – K in english, P spanish)
   b. unreasonable terms in favor of other pty (substantive uncon.)
      i. look to commercial setting - is it diff. than what other pty’s in same business do?
         a. just b/c all businesses doing it doesn’t make it okay (Gianni Sport – cancel at any time clause uncon. despite standard practice in industry where clothing manufacturers have unequal bargaining power of small distributors)
         ii. harsh or unfair terms; price too high (FrostiFresh – high pressure sales to buy refrigerator at unfairly high price)

2. Question of law for ct., not question for jury

C. RARELY INVOKED OUTSIDE OF EQUITY (FOR TEST)
   1. Only used in sale of goods
   2. Ct.s don’t want to interfere w/ freedom of ptys to K (parental function)
   3. Almost never used b/t two business, individuals only

D. Courts differ over damages:
   1. Some allow complete cancellation of K (Woolums)
   2. Some allow merchant to retain reasonable profit (Frostifresh)

V Mistake
A. Mutual mistake (Sherwood v. Walker – cow) elements:
   1. Both parties must share an erroneous belief that
      a. where risk assumed by a pty → no mistake (Beachcomber Coins)
   2. was a primary reason both ptys entered K
   3. the mistake made in reference to a material fact
      a. material fact – must go to very heart of K, reason for ptys entering
      i. quality of item or price is not a material fact
   4. Does not apply to a mutual mistake for intended use of land (Hinson – arg. re: mut. mistake for land failed b/c would lead to instability re: land contracts)

B. Where it is unclear, law will leave ptys as it found them

C. Unilateral mistake – not grounds for recession except:
   1. Where benefited pty was aware of mistake
   2. Where enforcement would be unconscionable
D. Mistaken bid – relief granted where benefiting pty reasonably should have known of error b/f acceptance. (ex. bid drastically less than other bids)

VI. Misrepresentation
A. Elements:
1. False misrepresentation or incomplete disclosure made with
   a. can be made through words or conduct
2. full knowledge of fact for purpose of inducing other pty to enter K and
3. which does in fact deceive other pty to their detriment
   Ex. Cushman v. Kirby – wife told buyer that water was good but aware it actually contained sulfer, husband heard her but did not speak)
B. Duty to speak
1. to prevent a previous assertion from being a misrepresentation (Cushman)
2. to correct a mistaken assumption of the other pty for which the K is being made and non disclosure would amount to unfair dealings
   a. unfair bus. dealings is vague and discretionary
3. correct a mistake of the other pty as to the content/effect of writings
4. b/c of a special relationship of trust (fudiciary)b/t ptys
C. No duty to disclose the obvious or that which is readily accessible
   1. a low price can put buyer on notice of quality (cheap artwork)
2. More reluctant to enforce duty to disclose where ptys at arm’s length
   a. want to encourage ptys deliberate search of socially useful info.
D. Court allow harmed pty to recover in damages for what it could have expected to receive had misrepresentation not occurred.

VII Indefiniteness (maybe put somewhere else)
A. Illusory promise (§77) – promisor retains an unlimited right to decide later the nature or extent of performance unless:
   1. each of the alt. performances would be consideration or one of the alt. performance would be consideration and substantial possibility that events would eliminate alt. that would not be consideration
   Ex. I’ll sell you by skis for $50 or you can have them for free if I win lotto
2. Rationale – no mutuality of obligation, it must exist at inception, both ptys must be committed to each other (Paul v. Rosen – sale of store conditioned upon buyer obtaining lease and seller inventory of stock, not enforceable b/c sale conditioned upon obtaining lease which not required to do).
   ex. where pty reserves the right to cancel K at any time or b/f delivery
3. Exception where looks like illusory promise but is not:
   a. Requirement/Output K – commit to buying all that require or selling all that produce even if don’t wind up requiring or producing anything.
   b. Conditional promises – give up future right if an event comes to fruition (Obering v. Swain Roach - promise to buy land if P aquire title to specific tract in auction, enforceable after title obtained) NEED TO REVIEW FURTHER – IS K UNENFORCEABLE UNTIL ACT COMES INTO FRUITION OR ENFORCEABLE EVEN IF REPUDIATION B/F ACT?
   c. Key – limiting future actions = detriment/consideration!

REASONS TO EXCUSE PERFORMANCE
I. Later agreement changes obligations
   A. Accord and satisfaction
      1. Accord = agreeing to do something different than originally agreed upon
      2. Satisfaction = performing the new agreed upon act
         a. must be a promise to do something different than already obligated to do under K(pre-existing duty rule)
         b. partial payment or modification on a disputed (unliquidated) claim in exchange for promise to excuse claim is accord and satisfaction
            (Morton Remodeling – debtor sent check of partial payment w/ note that it was full payment, although creditor refused to accept it as full payment by cashing the check satisfied accord and satisfaction)
      2. Executory accord – exchange of new promises on past debt but no perform
         a. common law – past debt not excused until perf. on new promise
         b. many states have statutes making executory accord effective
   II. Changed circumstances
      A. Impossibility of performance – (Taylor v. Caldwell – K to rent venue, later destroyed by fire, lessor not liable for lessee’s reliance losses)
         1. Implied condition that:
            a. performance of K depends on the continued existence of
            b. a person place or thing which
            c. is later destroyed not by fault of pty seeking relief
            d. excuses performance by both ptsys.
               i. death of pty not always excuse where estate could pay (sale of car hyo)
         2. Similar to mutual mistake, which happens at time K formed
            a. diff is impossibility of perf. happens post K formation
         3. To be effective, destruction must occur b/f breach
            a. American rule – can recover reliance expenditures, Eng. rule – can’t
      B. Impartibility of performance – evolved out of impossibility doctrine (Krell v. Henry – K to rent room to watch King’s coronation, cerem. later cancelled)
         1. Implied condition excusing pty’s of performance arises where:
            a. K formed on assumption of the continuing existence of a particular state of things and
            b. the occurrence of an unforeseen circumstance, not within contemplation of the ptsys at the time K entered (Kel Kim – not being able to get ins. is not an unforeseen event)
            c. renders the pty’s performance impracticable which
            d. thereby frustrates the purpose of both ptsys for entering the K
               KEY – frustrates the purpose of both ptsys
         2. Pty seeking relief must not be at fault in causing the occurrence or have born risk of event occurring
         3. Event making performance more expensive does not excuse
            a. judgment call by ct.’s as to what is impracticable
   III. Unmet express condition
      A. condition = an operative fact subsequent to formation of K on which duty to perform depends. If condit. doesn’t happen → no duty to perform (depending on K)
      1. condit. doesn’t create a duty unless a pty promised it would occur
B. condition v. promise – promise is an obligation no matter what, condition is only an obligation if an operative event occurs

1. look to language of K to det. whether pty’s intended condit. or promise
2. When language is unclear, presumption in favor of promise §261, HAS THE LAW CHANGED SINCE THIS RESTATEMENT/CASE? (Howard v. Fed. Crop. – insured plowed over field b/f insurer could inspect, clause prohibiting act did not contain conditional language but preceding clause did)
   a. interpret language against drafter of K
   b. ct.s disfavor forfeiture

C. Person who has control over condit. can excuse it by preventing it from occuring

1. waiver v. estoppel – both limit conditions
   a. waiver permanently eliminates condition unless opposing prty consent to reinstate it
   b. estoppel excuses condit until estoppel lifted (Gilbert v. Globe insurer’s actions led D to rely that claim would be paid. Once D given notice that claim wouldn’t be paid, estoppel ends and condit. to make claim w/in time allotted back in effect)
   i. reliance on by promisse on promise is key to estoppel, once promisor give notice invalidating pomise – estoppel lifted
   ii. once estoppel is lifted, time limit begins running where left off

D. Conditions of time

1. Where condit. of time is clear, not performing on time excuses other pty’s performance
   a. exceptions:
      i. where enforcing a condition of time would cause forfeiture court must find non-performance on time prejudiced pty trying to enforce (Aetna v. Murphy – insured did not meet condit. of time to make claim, ct. held couldn’t recover b/c didn’t prove insurer didn’t suffer prejudice)
         a. ct.’s want to avoid forfeiture (of premiums/installments)
         b. ct.s divided over who has burden of proving prejudice
      ii. nature of the product does not show that a slightly late delivery would cause harm to purchaser (Beck & Pauli – seller could recover K price for delivery of sketches delayed by a few days when did not harm buyer)

2. Where not clear, time is ordinarily found not to be of the essence
   a. construed as “a reasonable time”
   b. UCC – sale of goods time is found to be of the essence (Oshinsky – purchaser not bound to accept goods delivered after specified date)

E. Conditions of satisfaction

1. Where a condition of satisfaction is expressly stated in a K, if the obligated pty does not perform to satisfaction, the other pty is excused from performance unless:
   a. satisfaction is judged by a 3rd pty to the K (architect) and it is withheld in bad faith (Second Nat’l Bank v. Pan-American – after approving P’s plans architect required changes midway through construction which P refused to make, thus architect withheld certificate
and ct. held D excused from paying entire K price unless jury finds certificate withheld in bad faith

  i. bad faith judged by whether it honestly believed performance was unsatisfactory, not simply right or wrong in judgment
      a. withholding certificate of satisfaction must be based on reasons stated in K, can’t withhold for reasons based on whim of paying pty (owner)
  ii. 3rd ptys failure of duty will also excuse condition

b. satisfaction is judged by the other pty in the K and satisfaction is withheld unreasonably

  i. reasonableness of withholding the K is judged by:
      a. subjective standard (from the non-satisfied pty’s view) where the nature of K is aesthetic (based on fancy, taste, sensibility or judgment) (Fursmidt v. Hotel Abbey – ct. held D’s dissatisfaction held to subjective standard where K for dry-cleaning services for D’s hotel guests)
      b. objective standard (reasonable person view) where the nature of the K is functional (based on operative fitness, utility, or marketability) (Haymore v. Levinson – ct. used objective standard where D was homeowner judging satisfaction of builder)
      c. K can be related to both personal services and functional services – ct. use most fair approach

IV. Unmet constructive condition

A. Constructive condition – where a promise is an obligation to perform but also an implied condition which must be satisfied b/f other pty has to perform

B. Historically, there were not constructive conditions, each promise was mutually exclusive and pty could sue other pty for non performance w/out ever performing themselves (Nichols v. Raynbred – ct. held P could recover for money promised for cow w/out ever delivering the cow)

a. Began to recognize three types of promises in K
   i. promises had no temporal relationship (mutual and independent)
   ii. one promise had to be performed b/f the other (dependant condition)
   iii. promises must be performed simultaneously (mutual conditions)

C. How to decide if promise is a constructive condition:

1. Intention of the pty’s (Kingston v. Preston – K contained clause which required P to provide security and D to convey business. ct. held promise to provide security was a condition of D’s performance b/c if not the promise would be meaningless)
   a. factors in considering pty’s intent:
      i. fairness, public policy (avoid forfeitures), efficiency, practicality of remedies

2. §234 – Where promised performances can be rendered simultaneously, they are to be due simultaneously
   a. unless language or circumstances prove otherwise (Price v. Van Lint – D promised to give loan in exchange for deed ct. held promises
independent b/c pty’s knew that deed had to go to Netherlands and D may have to perform b/f P)
i. ex. – diff. periods are fixed w/in which each pty is to perform
b. situations where presumption that promises can be rendered simultaneously §234:
i. where same time is fixed for performance
ii. what a time is fixed for perf. of one pty but not time fixed for perf. of other (Ziehn v. Smith – K required vendee to perform on certain date and vendor to hand over deed but no date given for vendor perf. ct. held perf. to by both ptys to be rendered simultaneously)
iii. where not time fixed for perf. of both ptys
iv. where same period fixed w/in which each pty is to perform

V. Sale of goods
A. UCC – perferct tender rule – if goods or tender fail in any respect, buyer can reject goods
1. Exceptions:
a. cure – seller sends wrong stuff early, if seller can still get right stuff to purchaser by deadline, then purchaser is not excused
b. installment K – pty’s in their agreement have agreed to delivery in installments, then a problem w/ one installment, so long as not a substantial problem does not excuse performance

BREACH
I. Def. – Under an enforceable K, non-fulfillment of promise or a promissory condition that was not excused.
II. Non-fulfillment of a condition excuses pty from performance and entitles it to recovery when:
A. Non-performing pty made an independent promise to fulfill an express condition (Merritt Hill Vineyards – where sale of land conditioned upon vendor obtaining title ins. and mortgage confirmation and vendor did not satisfy conditions by closing, ct. held vendee not entitled to recovery of damages b/c no promise to fulfill conditions)
B. There are constructive conditions (always assumed to be promissory in nature unless clear evidence to the otherwise) and non-breaching pty shows that it:
1. Render/Tender Rule - demanded performance and rendered/tendered performance itself or
   a. this rule views a constructive condition as both a promise & condition
   b. must render/tender even where requires expenditures
2. did not demand performance be can show breaching pty was absolutely unable to perform at time performance due
   a. must be aware performance was impossible (Ziehn v. Smith– vendee could not recover for vendor’s non-perf. where it did not demand perf. or show that it knew an encumbrance in deed made perf. impossible)
3. may be able to recover in restitution for non-performance w/out having to render/tender.

IV. Material breach – if one pty commits a material breach the other pty is justified in canceling the K and seeking damages

A. How to determine if breach material (must be a wrong or default)
   1. Party seeking recession must be in good faith and wait a reasonable period of time (Turner Concrete – ct. held sub K could not cancel K for material breach where gen’l K had been attempting to make payments and sub K had not waited reasonable about of time)
   2. Goes to the essence of K
   3. Breach is so substantial and unfair it defeats essential purpose of both ptys
      a. cause – was the breach intentional or due to unexpected circumstances
      b. extent – how long did breach last
      c. needs and expectations of both ptys
      d. likelihood of breach continuing
   4. If a pty breaches materially, they are no longer entitled to compensation under the K, but may recover in restitution

B. If D’s breach is not total, but D substantially performs its obligations under the K, D can recover on the K for K price less damages (depending on situation whether damages is cost of completion or diminution in value).
   1. Test for whether performance is substantial
      a. whether performance meets essential purpose of K (see above)
         (Plante v. Jacobs – where homeowner refused to pay b/c of defects in construction, ct held substantial performance need not conform to every detail but must be much closer to complete performance than no performance at all and builder had substantially performed)
   2. Different from UCC’s perfect tender rule, which requires complete performance to receive compensation

C. Summary: Victim of the breach recovers expectancy position under K, and material breaching pty recovers in restitution for benefits bestowed what does victim of breach recover if it has not substantially performed when breach occurs? if expec. on k, how is substantial performance diff than any other perfom?
   a. some ct.s do not allow breaching pty to recover on K (even if substantially performed) or restitution where the breach is willful

D. Other options available
   1. Suspend non-breaching pty’s obligation to perform until other pty performs
      a. Problem – non-breaching pty standing ready to perform can’t transfer their interest
   E. Material breach in equity – if pty brings suit in equity, they must have rendered or tendered substantial performance to demand specific performance for breach
      i. same test in equity as in law
      ii. look to intention of ptys to determine whether performance was substantial (Reigart v. Fisher – where a misrepresentation was made as to acreage of property being sold, ct. held seller entitled to specific performance b/c did not enter K based on acreage compare to Keating v. Price – ct. held missing
acreage was a material breach where vendor knew acreage was important to vendee)

III. Anticipatory repudiation as a material breach
   A. Def. – pty’s makes clear by its statements or actions that it does not intend to perform (breach) when performance falls due (Paul v. Rosen)
   B. Anticipatory Repudiation is a material breach where:
      1. Bilateral K and
      2. Non-breaching pty would have been ready to perform had repudiation not occurred and
      3. Repudiator expresses intent to render a substantially deficient performance or
      4. Refuses performance unless promisor agrees to do more than K requires
   CAN THIS ALSO BE VIEWED AS ECONOMIC DURESS???
   C. Damages – non-breaching pty may either bring suit at time of repudiation or wait until performance comes due
   D. Anticipatory repudiation does not apply to unilateral K b/c P has already performed, therefore can’t bring suit b/f promise due (Greguhn v. Mut. of Omaha – ct. held where ins. co. expressed intent not to make future installment payments on policy, P was not entitled to recover for advance payments under ant. repudiation b/c unilateral K, dissent – lump sum based on life exp. is fair and eliminates need for future law suits)
      1. Rationale: purpose of anticipatory repudiation is for non-breaching pty to mitigate (recover for lost profits and exp. rather than entire K) a unilateral K can’t be mitigated b/c pty has already fully performed
      2. Other options for recovery for repudiation of unilateral K for installment payments other than having to bring suit each time installments not paid (ex. ins. policy, etc.)
         a. recover in restitution of premiums paid
         b. seek a declaratory judgment reinstating policy whose validity is being denied by insurer
         c. seek a judgment granting payments in installments
         d. relief in equity not available b/c primary claim is at law for money

REMEDIES FOR BREACH
I. Expectancy: law aims to give disappointed promisee, so far as money will do, what it was promised – looks forward
   A. No punitive damages – K means if breach pay what would cost to put party in same position as if K completed, nothing more
      1. Efficient breach – awarding expectancy position forces breaching pty to internalize external cost of breach
   B. Valuation – in determining value of breach ct.’s look to replacement costs:
      1. Cost of completion – upper limit for measure of damages
         a. Principle of substitution - where non-breaching pty must make a substitute transaction, loss suffered as result is a measure (Acme Mills – breach on sale of wheat)
2. Diminution in value – may be less than replacement costs if replacement exceeds pty’s expectancy position Peeveyhouse (awarded dim./value rather than C/C after coal strip mined and land not restored) Groves dissent

3. In deciding b/t C/C or D-in-V ct.’s look to
   a. likelihood of completion (Advanced Inc. – awarded C/C for home improvements for home repair left undone b/c of breach)
   b. Chose not to favor the faithless contractor Groves, Laurin – awarded C/C where seller took gravel off land before buyer took possession
   c. Go w/ C/C unless undue economic waste (Plante v. Jacobs)

4. Gains made by the non-breaching party on other transactions after breach are never deducted from damages awarded unless such gains could not have been made w/o breach Kearsage Computer

5. Collateral Source Rule – do not reduce damages by amount of gov’t benefits or insurance (not a universal rule)

II. Limitations on expectancy damages
   A. Causation - be a causal relationship b/t breaching pty and damages to P
   B. Foreseeability – damages must be reasonably foreseeable
      1. Direct damages - only liable for damages which could be seen at time K formed to arise naturally from breach or special circumstances communicated in K (Hadley v. Baxendale – delayed delivery of mill part, not recoverable for lost profits, Victoria – where delay del’vry of laundry boiler P only recover for loss of business profits not for loss of dying jobs)
         a. need only be foreseeable to reasonable person
      2. Tacit Assent – loss can’t be disproportionate and must be something P would have agreed to had it been aware at formation (Lamkins – delayed del’vry light on tractor P couldn’t recover for loss of ability to plant crop)
      3. Can only recover mental distress damages for breach when one of the purposes of the contract is emotional tranquility, ex. funeral (Valentine - can’t recover emot. distress damages from losing job)
   C. Avoidability – Doctrine of avoidable consequences
      1. A pty can’t recover for that which it could have reasonably avoided
         a. mitigation – can’t recover for damages aggravated by non-breaching pty’s bad faith or unreasonable action
            i. Avoid waste (Rockingham County v. Luten bridge)
            ii. Encourage productivity (Parker – only recover if not work of like kind/quality, Blittner – not required to accept like work for less pay)
      2. Used only as an affirmative defense
   D. Certainty – damages must be calculatable to a reasonable degree of certainty
      1. Degree of proof held to highest standard (Dempsey – not able to recover for lost profits calculated based on indeterminate circumstances)
      2. Emotional distress inherently not provable to reason. degree of certainty
   E. Unfair forfeiture?

III. Application
   A. Construction K
      1. Breach by builder
         a. C/C – Groves, Laurin
i. often base don likelihood of completion (Advanced Inc. – repairs for a home)
b. D-in-V – if C/C caused ec. waste (Groves dissent, Peeveyhouse)
c. Builder can still recover for substantial performance (at law) or if not substantial performance, for benefits bestowed (in restitution)

2. Breach by owner
   a. After completion: Must pay full K price
   b. Before completion
      i. anticipatory repudiation: lost profit + expenses incurred, including overhead (Leingang – weed board)
      ii. during performance: K price – expenses saved (Keasage – K for data possessing services breached half way through)

B. Sale of goods
   1. Breach by seller: FMV – K + incidental costs Acme Mills
      a. Installment K: FMV measured at time of each installment (Mo Furnace – breach of forward looking installment K, P could not recover based on new forward installment K, but FMV at each time of each delivery – K)
      b. UCC – buyer may seek reasonable cover: cover – K.
   2. Breach by buyer: K – FMV + incidental costs (case???)
      a. Seller is dealer w/ inexhaustible supply: lost profits + expense (Neri v. Retail Marine & UCC)

C. Employment K
   1. Breach by employer: K salary – earnings from comparable work (Parker)
      a. courts differ on collateral source rule (deducting gov’t benefits)
   2. Breach by employee: FMV – K is this right? any cases?

IV. When expectancy is not available
   A. Reliance – costs incurred by non-breaching pty in anticipation of K
      1. Pre formation expenditures
         a. one view – can’t rely on K b/f it exists (Dempsey)
         b. another view – breaching pty is liable for pre K expenses if breach cause waste and breaching pty aware exp. made in anticipation of K (Anglia – T.V. co. made exp. in anticipation of K, actor signed K then repudiated, ct. allowed recovery b/c expenditures would be wasted and D must have been aware exp. made)
         c. if common law duty to accept K, then can recover for pre-formation reliance expenditures (Security Stove – breached delivery to show)
      2. Reliance stops once K is breached (Dempsey, Rockingham Cnty)
      3. Breaching pty has opportunity to show cost of expenditures > than value of benefit P would have received (they would have lost money on K) and damages may be reduced by that amount (Armstrong Rubber – seller never delivered rubber machines, buyer wants cost of preparing foundation)
      4. Expectancy is upper limit
   B. Equitable relief (specific performance) – distinct system from law
      1. Only available where remedy at law is inadequate – Unique goods
         a. Sale of Land – remedy at law is presumed to be inadequate
b. Sale of Goods – presumption does not exist, but may be proven if can est. unique good or no market (baseball hypothetical)

2. How get in the door
   a. can’t est. damages to reasonable degree of certainty
      i. no replacement, no market (can’t sell to anybody else), no market price, damages more far reaching than just lost profits
      a. Curtis Bros. – failed to deliver whole crop of tomatoes per K, market uncertain to get replacement
      b. City Stores – leasing space in mall
      c. Manchester Dairy – selling milk outside of ass’n cause damages more far reaching than lost profit
   b. withheld when monetary damages are adequate to compensate or specific performance is impossible (Palaukos – dealership sold out cars)

2. Discretionary
   a. compare benefit to P from relief against harm to D for specific performance, make sure not disproportionate (Van Wagner – billboard)
   b. K for personal services – ct.s rarely grant equity (Fitzpatrick – nursing K to care for D for rest of his life in exchange for estate)
      i. rat: strains relationships, diff. to supervise, services not unique
   c. Construction K – specific performance rarely available
      i. difficult to supervise (N. Delaware)
      ii. don’t want to encourage ptys to come to court to settle every minor dispute
      ii. not available unless special circumstances or in public interest

3. How enforced
   a. specific performance or
   b. more typically injunction/contempt: court order pty not to do an act if they do will be held in contempt (Dallas Cowboys, Manchester D)
   c. can alter anti-compete clause if overly broad or restrictive (Fullerton – lumber worker, too longer, Data Mng’t – can’t provide services to all of AK, too broad)

4. Clean-up principle – court in equity may also retain case and make whatever rulings are necessary (including money damages) for complete and final disposition of case

V. Restitution – only available through ct. of equity
   A. Basis entirely independent of K law (theory of liability/civil obligation)
      1. Goal: prevent unjust enrichment, compensate for benefits bestowed
      2. Available even if no remedy at law (to breaching pty)
   B. Damages
      1. Non-breaching pty, choice b/t remedy at law or restitution (Race Adjudicata
         a. Damages: FMV of benefit conferred - $ already paid on K (Algernon Blair – sub quit after gen’t refused to make installment payments)
         b. Debate as to whether limited by K price
         i. Algernon Blair – not limited
         ii. Noyes – don’t want to put pty in better than expectancy position
      c. If full performance, only K price available (Oliver – lawyer had provided virtually all K services, limited to K price not FMV)
2. Breaching pty – material breach
   a. Can’t recover on K price b/c breaching pty has no remedy at law
   b. Damages: FMV of benefit conveyed/retained or K – damages (cost of completion), whichever is less
      i. measure of damages can’t exceed K (Briton – farm hand quit)

ARBITRATION

A. Gen’l
   1. Courts uphold arbitrator’s judgment w/out judging merits of case (Grayson - ct. upheld arbitrator’s judgment for specific performance to build mall even though builder couldn’t get funding)
   2. Arbitration clause is binding unless entire K unenforceable (Broemmer v. Abortion Services)
   3. Merchants often push arbitration clauses b/c avoids risk of large verdict

A. Advantages
   1. Relieves court of congestion
   2. Fewer rules than judicial procedure
   3. Arbitrator more familiar w/ industry than a judge
   4. Free to discharge traditional rules of law to substitute own sense of fairness
   5. Faster and less expensive than litigation

B. Disadvantages
   1. No precedent to rely on
   2. Don’t report decisions/write opinions
   3. US constitution gives right to jury trial
   4. Courts have est. a high standard to determine whether a pty has assent to K, arbitration usually does not require such a high standard
   5. No judicial review, decision is final
   6. Systematic Bias – arbitrators compete w/ each other to get employer/merchant’s business

C. MAIN POINT: ARBITRATION CLAUSES THREATEN CONSUMER/EMPLOYEE RIGHTS