Contracts – Basic Final Outline

1. Offer/Acceptance:
   - Analyze when:
     o Parties disputing whether contract has been formed.
     o Parties agree that contract was formed but disagree on its terms.
   - Objective test – manifestation of parties intent determinative (actual/undisclosed intentions irrelevant).
     o Lucy v. Zehmer
     o Pepsi Co. – rule that advertisements are generally not offers.
   - Substantive/Procedural Terms – Terms of the transaction/instructions for acceptance – acceptance must comply with both types of terms of the offer to qualify as valid acceptance.
     o Roth – signed counteroffer line by accident – no contract formed.
       ▪ Mailbox Rule – Acceptance by mail takes effect when put in the mailbox.
   - Must have known about offer and intended to be accepting for valid acceptance.
     o Glover v. Jewish War Veterans – Π didn’t know about reward when she gave the information Æ not entitled to the amount promised.
   - Silence NOT acceptance unless stipulated by previous dealings, offeree taking benefit with reasonable opportunity to reject/knowledge that compensation expected, offeror gave reason to understand that silence could signify assent.
   - Bilateral (promise for promise) v. Unilateral (promise for performance) contracts.
     o Unilateral Æ performance = acceptance.
       ▪ Carbolic Smoke Ball – consumer accepted offer by buying the product and met the conditions so entitled to amount promised.

2. UCC Differences
   - New terms do not equal counteroffer (applicable when both parties acted on contract but, due to standard forms, both thought K was based on different terms).
     o Generally, additional and different terms drop out (instead of enforcing the terms of the last communication/offer made – as in common law).

3. Irrevocable Offers
   - Only three ways offer becomes irrevocable:
     o Option Contract – Offeror agrees to leave offer open, in exchange for valid consideration, for specified length of time (not revocable until the time is up, offeree can make counteroffers/reject and then change mind until time runs).
       ▪ For consideration, offeree can (pay, perform, or promise to perform). Sometimes mere recital of consideration is accepted.
     o Promissory Estoppel – If performance cannot be accomplished instantaneously Æ options contract is automatically formed at the start of performance (offeree does not have to complete performance, but offeror cannot revoke without giving reasonable time for him to complete performance and thus officially accept).
     o UCC 2-205 – Firm Offer - If, between merchants, there is signed writing that offer will remain open Æ don’t need consideration (unlike common law). If length not stated then use reasonable time, not to exceed 3 months
4. Preliminary/Incomplete Agreements
   - Remember to look at parties’ language and dealings for *manifestation of intentions*.
   - Material terms must be set out and agreed to, otherwise no contract.

5. Statute of Frauds
   - Applies to:
     - Sale of land
     - Goods > $500
     - Performance time > 1yr. starting with time of contract formation.
       - Must be reasonable interpretation from the terms that it will take more than a year for Statute to apply – *Klewin*.
   - Requires:
     - Writing
     - Signature
       - Only of party denying contract
       - If between merchants → no signature required.
     - Clear Content
   - Exceptions:
     - Part Performance – must unequivocally refer to a contract and have reasonable reliance.
     - UCC – goods specially made for buyer

6. Consideration
   - Requirement for contract that promise be induced/bargained for
     - *Patel v. Board of Psychology*
   - Things that do **not qualify as valid consideration**
     - Gratuitous promises (Congregation v. DeLeo)
     - Promises between married couples (Carlisle v. T&R Excavating)
     - Past Consideration (**see #7 for exception**)
     - Pre-Existing Duties
     - Party’s promise to assert or surrender a claim/defense which proves to be invalid.
       - Exception – If claim or defense was actually doubtful because of uncertainty relating to facts or the law, OR if party forebearing believes the claim/defense may be valid (*Fiege bastardry claim*).
   - Inadequacy of consideration is irrelevant – party needs only to manifestly receive something of value.
     - *Hamer v. Sideway*
   - **NEW Consideration is required for Contract Modification.**
     - **Exceptions to new consideration requirement/pre-existing duty rule:**
       - **Supervening Difficulties** – modification on account of events following K formation that create unanticipated difficulty.
       - **UCC** – no consideration required for modifying sale of goods K.

7. Moral Obligation/Material Benefit
   - **Exception to non-allowance of past consideration.**
     - Allows a *promise* made on account of a promisee’s prior detriment suffered to be valid.
- Detriment is suffered prior to the promise. Action induced the promise. (moral obligation)
- Detriment suffered subsequent to and in reliance on the promise. Promise induces the action. (promissory estoppel).
  - The prior detriment suffered must unjustly enrich the promisor, but unlike with restitution, it is a promissory theory of liability.

- Doctrine exists for Promises Based On:
  o Pre-existing Unenforceable Legal Debt
    - Original promise would be enforceable except for effect of a statute of limitations.
    - Previous debt has been discharged in bankruptcy
    - Previous debt is voidable by the promisor.
  o Prior Material Benefit
    - Promisor must have been unjustly enriched (nothing gratuitous).
      - *Webb v. McGowin* – promisee fell with heavy block to prevent promisor from being hit → action induced promisor’s promise to pay care for life.
    - Value of promise cannot be disproportionate to benefit.
      - *Dementes v. Estate of Tallas* – Promise to pay Dementes for services already performed was determined to be gratuitous, not unjust enrichment → MO didn’t work to enforce the promise.

8. Promissory Estoppel
- Allows recovery when there was no consideration but:
  o Promisee relied to his detriment on a promise
  o Promisor should have reasonably expected that the promise would induce action/forebearance of promisee
  o Only way to avoid injustice is to enforce the promise.
- Note: Not applied often in commercial, or at-will-employment contexts
  o Allowed in *Drennan v. Star Paving* – contractor/sub-contractor context.

- Not based on promise (distinct from contracts).
- Elements:
  o Enrichment/Benefit that was passively received
  o Injustice
    - Make sure it does not involve things that would make it just:
      - Gratuitous, or Imposed (“officious intermeddler”)
      - Retention of benefit that was returnable (could fall under acceptance → contract theory instead of UE).
      - Volunteer (volunteers have no right to restitution).
        o Martin v. Little Brown & Co.

10. Improper Bargaining
- Improper Bargaining Doctrines:
  o Misrepresentation – assertion not in accord with the facts.
- **Fraudulent** – maker intends assertion to induce assent and maker
  - Knows/believes it’s not in accord with facts.
  - Not confident in it’s validity or knows he lacks basis for it.
- **Material** – likely to induce a reasonable person to assent, or maker knows it is likely to induce the recipient to assent. (Relates to Negligent, as opposed to Fraudulent, Misrepresentation).
  - Induce via: Words, Concealment, Nondisclosure.
    - *Sarvis v. Vermont Colleges* – hired based on fraudulent misrepresentation about fact of past imprisonment.
    - *Stambovsky v. Ackley* – ghost, could rescind.
    - *House of Drugs* – Duty of reasonable diligence.
    - *HPG* – Roofs. Only fact statements are actionable.
  - Fraud in Inducement v. Fraud in the Factum (the document)
- **Duress** – Compulsion of assent by force/improper threat.
  - Improper Threats (can be economic duress):
    - Threaten a crime/tort, a criminal prosecution, to sue (in bad faith), breach of good faith/fair dealings duty, not on fair terms and harms recipient/benefits maker, past unfair dealing, use of power for illegitimate ends.
    - Make sure it differs from ordinary pressure.
  - Contract may have been modified in duress if threatened party could not obtain goods elsewhere/ordinary remedy action for breach would not have worked (*Austin* – sub threatened current K).
- **Undue Influence** – One party unfairly persuaded by other party’s abuse of power based on relationship of submissiveness, dependence, or trust (*Odorizzi v. Bloomfield School District* – Gay teacher influenced to resign)
  - If party is unduly influenced by nonparty → victim can avoid K unless the other party materially relies on the transaction in good faith, without reason to know of the undue influence.
    - *Look for money left in will and suing party is someone who would otherwise inherit.*
      - *Nueyev Dance Foundation* – fiduciary relationship
      - *Tinney v. Tinney* – Mental condition of the grantor
- **Unconscionability** – transaction too unfair to enforce (in whole or in part)
  - May relate to Procedural Element (way it was formed) or Substantive Element (terms).
  - “Adhesive” – Party with superior bargaining power dictates terms as “take-it-or-leave-it” to weak party with no choice but to adhere.
  - UCC Rule – limitation of consequential damages for injury to the person in case of consumer goods is prima facie unconscionable (but limitation of damages where loss is commercial is not).
  - *Note: Unconscionability more common in consumer transactions than between sophisticated commercial entities*

- Remedy if improper bargaining doctrine found to apply → contract becomes voidable (aggrieved party has option to keep or rescind/avoid contract).
11. Policing on Other Grounds (not Improper Bargaining)
- **Illegality**
  - General Rule: Contracts that are illegal/against public policy won’t be enforced by courts.
    - Exception – parties not in “pari delicto” (not equally culpable).
- **Violation of Public Policy**
  - Non-competition clauses – enforceable to extent that it is reasonable.
    Applied in: Sale of Business K, Partnership Agreements, Employment K.
- **Incapacity** – Applies to 2 parties:
  - **Minor** – can avoid simply by showing minority, and has until reasonable time after reaching majority to disaffirm the contract. (Note: MO Rule!)
    - Note: Minority not responsible for monetary restitution (minority trumps unjust enrichment).
    - Exception – Minors may legally contract if:
      - *Emancipated Minor* – parent’s duty of support terminated (marriage, armed services, etc – leaving home not enough).
      - Contracts for *Necessaries* – Essential goods and services
        - Liability based on Quasi-Contract
        - Note: Parent may be liable when un-emancipated minor contracts for necessaries.
  - **Mentally Incompetent Person** – Avoidable if impairment existed at time of contract formation, affecting party’s ability to act rationally, and other party had *reason to know* of the condition.

12. Interpretation/Construction, Parol Evidence, Merger Clauses
- Remember to look at course of performance, course of dealing, or usage of trade.
- Unambiguous terms – interpreted by court as *matter of law* (no parole evidence).
- Ambiguous terms – question of fact for fact-finder (may allow parole evidence).
- **Parol Evidence Rule** (exclusionary rule) – Limits party’s ability to offer extrinsic evidence and to have the fact finder consider that evidence in *interpreting* the contract when a written memorial of the agreement exists.
  - Limits evidence based on alleged:
    - *Oral* agreements made before or contemporaneously with the execution of the writing.
    - *Written* agreements made before the writing.
  - Purpose for which parol evidence offered → way the rule operates:
    - To *contradict* terms of the writing → evidence rarely permitted.
    - To *add* term that writing is silent on → may get to the fact-finder.
      - “Fully Integrated” writing (final and complete) → evidence w/in scope of agreement is not admissible (rule applies)
      - “Partially Integrated” writing (final but not complete) → evidence is admissible (rule does not apply) so long as evidence does not contradict writing.
    - To *explain* written language → may consider to clarify ambiguity.
- **Merger Clause** (Integration Clause) – disclaimer stating finality of the contract.

13. Misunderstanding, Mistake, Excuse Due to Changed Circumstances
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   **Always look at who bore the risk because if party bore risk → can’t recover.**

   - **Misunderstanding Doctrine**: If parties’ interpretations of terms sufficiently differ, cannot be solved, and neither bears greater responsibility for misunderstanding → no contract (manifestation of mutual assent was “illusory.”)
     - **Peerless ship** – “no meeting of the minds” → No K.
     - **Spokane Computers, Inc.** – surge protector price mix-up – material term expressed ambiguously and both interpretations were reasonable → No K

   - **Mistake Doctrine**: Parties share common understanding of terms but one or both is mistaken about a fact underlying the contract → mistaken party may be relieved from contract if he proves his expectations radically differed based on mistake.
     - **Unilateral mistake requires strong showing of inequity** (unmistaken party should have had reason to know or should be otherwise unconscionable).
       - **Estate v. Rice** – fine art sold for little $ - II assumed risk (conscious ignorance).
     - **Drennan v. Star Paving** – Mistake alleged by Star, but Drennan had no reason to know → court did not apply it.

   - **Changed Circumstances/Conditions**: Happening subsequent to contract formation radically alters the nature or effect of agreed performance (look for materiality and risk allocation to see if relief is available).
     - **Impracticability Doctrine** (aka “Impossibility”) – promised performance is impossible or highly impractical due to changed conditions.
       - **Farmer** not relieved of sales agreement due to crops freeze damage (was subjectively impractical, not objectively as required).
       - **Doane College** relieved because “impossible” to know year in advance whether more qualified person would apply for position.
     - **Frustration of Purpose Doctrine** – Party’s reason for entering contract disappears in light of changed circumstances. (Not applied to UCC).
       - Assumption must be **fundamental to the contract and must be shared** (not private purpose of one party).
         - Case where event cancelled because of terrorism inhibiting international participants (doctrine was not applied because the international objective was not a common understanding of purpose known to both parties).
14. Conditions and Promises

- **Condition** – something which the obligation to render performance is contingent upon (can be future event/nonoccurrence, or past event which the parties are uncertain about but can ascertain).

- **Sequencing:**
  - *Condition Precedent* – must be satisfied before performance will become due. (When K is silent on sequence, courts construe longer performance as condition precedent to instantaneous one – build house before payment).
  - *Concurrent Conditions* – set of conditions dependent on each other that must be performed simultaneously. (When contract is silent on sequence courts construe as concurrent if simultaneous performance is possible).
  - *Condition Subsequent* – discharges duty already in existence (duty to pay is excused if permit is not issued).

- **Types:**
  - *Express Condition* – stated clearly and expressly articulates intention that performance is subject to the contingency (“subject to,” “provided that”).
    - Strict compliance required. No occasion for interpretation.
      • *Oppenheimer* – express condition that landlord’s consent had to be delivered in writing (calling was insufficient)
      • *Jacobs & Young v. Kent* – pipe specifications were not an express condition.
  - *Implied Condition* (implied in fact) – not expressly stated, but can be inferred as matter of evidence from the language in context.
  - *Construed Condition* (implied in law) – court concludes it is reasonable and fare given nature of relationship and the usual expectation in transaction to find that condition exists.
    - Koch v. Construction – no condition expressed or implied, contractor had to pay sub (look at wording – “until/when” different than “if/shall unless”)
  - *Pure Conditions* – no promissory content except make some degree of effort to bring it about (fulfillment/non-fulfillment beyond parties’ control)
  - *Promissory Conditions* – promissory content involved – one party has some ability to influence outcome of the event.
  - *Conditions of Satisfaction* – party’s desire for contract is dependent on satisfaction of self or third party.
    - Relating to taste/artistic judgment → good faith standard
    - Relating to technical/commercial nature → objective reasonableness

- **Four justifications for excusing condition:**
  - *Waiver* – knowing and voluntary abandonment of the condition expressly or impliedly.
    - Unlike modification, only one-sided relinquishment of right (no consideration) so can only be raised if waved right is non-material part of contract (otherwise can only be abandoned via modification which requires consideration (unless UCC) for relinquishing it).
      • *Mercedes Benz Credit Corp* – waved right to repossess based on late payments (require notice to reinstate).
o **Estoppel** – beneficiary of condition indicates by words/conduct that he will perform despite nonfulfillment of condition, knows it’s likely to be relied on, and is relied on to detriment by other party.

 o **Obstructive/Uncooperative Conduct** – Promisor prevents fulfillment of condition in breach of duty not to hinder/impede its occurrence.
   ▪ Sullivan v. Bullock – homeowner denied contractor access to home to complete work, obstructing performance, condition for payment.

 o **Unfair Forfeiture** – Court’s determination that enforcement of condition would result in undue/unfair hardship to party waiting for performance.

15. **Material Breach and Substantial Performance**

 - **Material Breach** (“total breach”) – allows other party to be discharged from performance and sue for full expectation damages.
  o Breaching party must be given opportunity/reasonable time to **cure** if possible (not possible if it would require breach of another material term) thus rendering total breach a partial breach - remedy for substantial perf.
  o No recovery for party that materially breaches.
    ▪ Exception: If party **partially performed before material breach** he has claim for restitution of benefit conferred, offset by the other party’s damages.

 - **Substantial Performance** - partial breach (not material), short of contract requirement but not substantial enough for other party to avoid the contract (performance is still due).
  o **Cannot** have substantial performance if **express agreement/conditions** are breached.
    ▪ **Usual measure of damage** – cost of rectifying defective performance.
    ▪ **Exception** – when cost of rectifying would be grossly out of proportion to the harm → award resulting diminution in value.
    ▪ If breaching party substantially performs → he can enforce contract/is entitled to full contract price less any allowance to other party for rectifying the defect/compensating for the loss in value.
      * Jacobs & Young v. Kent (contractor had to be paid in full less diminution which was nominal).

 - **UCC Difference** – no materiality/substantial performance, instead…
  o **Perfect Tender Rule** – If goods or tender of delivery fail in ANY respect to conform to contract buyer has choice to accept, reject whole, reject part.
    ▪ **Qualification**: Right to reject subject to “good faith” obligation.
    ▪ If seller shows **sample** → warrants that goods will conform to it.
    ▪ **Seller** may notify buyer of intention to **cure** non-conformity if **time for performance has not expired** (or may have reasonable amount of extra time if seller had reasonable grounds to believe goods would be acceptable).
      * Note special rules for **installment contracts**.

16. **Remedies**

 - **EXPECTATION DAMAGES** – gives Π the “benefit of bargain” to put him in as good a position as he would have been in had the contract been performed.
- Damages should put party in place of had there been performance (but not better).
- Two Components:
  o **Direct Damages** – loss of value of contract
    ▪ If ▲ partially performed → measured by difference in value between what Π hoped to get under contract and actually received.
  o Indirect Losses
    ▪ **Consequential Losses** – don’t relate to contract, arise as consequence of the breach (ex: lost profit).
    ▪ **Incidental Losses** – costs of coping with breach (ex: costs of arranging substitute performance).
- Measure by: (loss in value) + (consequential/incidental loss) – (costs avoided)
- If cost of completion vastly disproportionate to value (economic waste/unfair forfeiture) → measure by *diminution in value*.
  o Pevyhouse v. Mining Co.
- Limitations on Recovery of Expectation Damages:
  o **Reasonable Certainty Principle**
    ▪ Damages cannot be entirely speculative/uncertain
    ▪ Can used past performance/dealings as basis, so with no unproven business more difficult to determine loss because lack of evidence. (case with wedding photographs – no expectation damages).
  o **Foreseeability Principle**
    ▪ Damages recover must be *foreseeable at time of contract* – either
      ▪ Arise naturally from breach, or
      ▪ Within reasonable contemplation of the parties.
        o Often limits *consequential damages*
        o *Hadley v. Baxendale* (broken shaft for mill case)
  o **Mitigation Principle**
    ▪ Burden placed on non-breaching party to reduce the negative consequences of breach. No reasonable effort made → damages not awarded for consequences that could have been avoided.
- **RELIANCE DAMAGES** – Costs incurred in reasonable reliance on the contract (puts back in position as if contract had not been made).
- SAME LIMITATIONS as above.
- If ▲ can show that Π would have had to spend so much money to perform that *contract would have been unprofitable* → reliance damages may be lessened because they would exceed expectation damages, and they *cannot put Π in better position than performance of contract* would have.
- Measure: (Incurred Costs) – (loss party in breach can prove injured party would have suffered had contract been performed).
- **RESTITUTION** – Disgorgement of benefits received.
  o Return property if possible or Measure net benefit received
    ▪ *Market Value* – what breaching party would have to pay in order to receive the benefit in open market.
    ▪ *Actual extent of breaching party's enrichment*.
- Limits on Restitution Recovery:
o Contract remedy → shouldn’t put in better position than full performance would have (contract price = cap).

o Independent claim → Only available when total material breach (instead of substantial performance) BUT enforced when benefit conferred exceeds party’s expectation/reliance (in losing contract).
  ▪ Note: Breaching party may recover restitution but never more than contract price.

- AGREED REMEDIES

- Liquidated Damages - specify damage for breach in the contract.
  o Not enforceable if it is a penalty.
  o Must be reasonable in light of the anticipated or actual loss caused, and the difficulties of proof of loss.
    ▪ Majority looks at estimated loss (not actual) so even if there ends up being no damage, clause is enforceable.

- SPECIFIC PERFORMANCE – order to perform.
  o ONLY if damages would be inadequate:
    ▪ Difficulty of obtaining substitute for performance
    ▪ Obstacles to accurate measure of damage
      • If performance promised is unique (land is always).

17. UCC Remedies

- Buyer’s Damages = (market price at time when buyer learned of breach) - (contract price + incidental/consequential damages) – (costs saved).

- Seller’s Remedy =
  o (resale price) – (contract price + incidental damages) – (costs saved)
  o OR (market price at time for tender) – (unpaid contract price + incidental damages) – (costs saved).