I. Article 2 – Sales of Goods

II. Contractual Assent/Intent & Objective Test
   A. Contracts are formed by *mutual consent*. Both parties must *intend* to enter the contract and *agree on its terms*
   B. When determining if the parties intended to create a contract
      a. **Subjective test**: state of mind of actor
         1. Admissible in support of objective contract with respect to relationship and actions
      b. **Objective test**: apparent intent; overt words/actions
         1. Must be objectively *reasonable* within the context
            i. Actor’s attributes (merchant?)
            ii. Background info that actors possessed about one another
            iii. Relationship between the parties
            iv. Commercial context; do these words have specific meaning within the industry? (*Fairmount*)
      2. Undisclosed intentions are immaterial when not manifested to the other party (*Zehmar*)
         i. Contracts made in jest are contracts if the other party is not aware of it
      3. Policy Reasons
         i. Economic efficiency through objective test
            i. Too much effort to determine state of mind
            ii. Find a way to enforce assent to oral contracts for economic viability and security

III. Offer (O)
   A. Offer In General (AKA terms/conditions/promise)
      a. An offer creates the power of acceptance. When an offer is extended to another party, it must be clear, definite and indicate to the other party what they would be bound to upon accepting the offer.
      b. Any change in the initial offer by the accepting party becomes a counteroffer. This alters the power of acceptance to the initial offeror.
      c. The offeror must exhibit intent and ability to deliver on his offer for it to be an offer (*Braithwaite*—coke case)
d. Context of the offer, as indicated in the objective test, is important
   1. Are the terms definite within the scope of the industry to constitute an offer?
   2. Terms: “for immediate acceptance” (Fairmont)

B. Quotes
   a. Generally not offers unless explicitly referring to self as offer
   b. Must have clear quantity/price
   c. Must be addressed to specific person
   d. Not an offer if the offeror can close the deal

C. Invitations to Bid
   a. Not an offer to a binding contract unless language indicates so
   b. Language must indicate commitment on part of inviter to award contract to best bidder; then is bound to contract with that bidder
   c. If a bidder puts in his bid and the contractor uses it with reliance to make his bid, he is normally bound.

D. Advertisements as Offer
   a. If there are definite and explicit terms; nothing left open for negotiation
   b. Is there anything communicated that reasonably indicates it is an offer?
   c. Essentially Unilateral contracts with performance as consideration/acceptance

E. Termination of Offer
   a. Must be accepted within a reasonable time if not stated
   b. Can terminate prior to this “reasonable time” or date if:
      1. Rejection
      2. Counteroffer
      3. Offeror’s Death/Mental Disability [prior to acceptance]
      4. Revocation [like termination of acceptance]
         i. Offeree receives notice of revocation from offeror
            i. Written, authorized rep, mailbox
            ii. Oferee has learned from reliable sources that the offer has been withdrawn
IV. Acceptance
   A. General Rules
      a. Manifestation of Assent; Reasonable person would understand manifestation as Acceptance (Look @ Contractual Assent)
      b. Performed freely, deliberately and with the INTENT to enter a contract on the terms of the offer
      c. Objective test
      d. Only the offeree may accept the offer
      e. OFEREE MUST KNOW OF THE OFFER
         1. Think about the cases with rewards for information
   B. Qualified Acceptance
      a. Common law generally indicates the “mirror image” rule
      b. Offeree cannot impose conditions, or qualify, an offer that changes it
      c. Many courts today indicate that material changes only will create a counteroffer, not an acceptance
      d. Does not apply to standard forms; see below
   C. Mode of Acceptance
      a. Mode of acceptance not indicated, must be given in a reasonable manner (If statute of frauds applies, must be given in writing for it to be enforceable)
         1. Spoken, written, conduct, e-mail, faxed, etc. Depends on conditions as to what is reasonable
      b. If expressly stated:
         1. Must be complied with exactly
      c. Stated, but not appear exclusive
         1. Any reasonable method may suffice as long as it is consistent with the method prescribed
      d. Time frame
         1. When the offer requires it only be signed prior to a specific time, and not communicated prior, then it is okay to fax it w/o oral communication after 5pm
         2. If no time is specified, one must use a reasonable time
         3. When disputes arise to this, look @ how the parties acted; if they act as though acceptance was made, they are bound (Keller)
D. Silence As Acceptance
   a. Common Law: Silence does not constitute acceptance
   b. Restatement (page 106):
      1. Offeror has given offeree reason to understand that silence will constitute acceptance
      2. Acceptance of services: an offeree who silently receives benefit of services will be held to a contract if he a) had opportunity to reject goods and b) knew/should have known that the provider expected to be compensated (unjust enrichment)
      3. Prior course of dealing indicates that silence is acceptance
      4. Exercising Dominion

E. Date of Acceptance/Mailbox Rule
   a. Mailbox Rule: Acceptance is effective upon proper dispatched, regardless of whether it ever reaches the offeror
      1. Applies only to acceptances by promise, not performance
      2. Does not apply if acceptance follows a counteroffer or rejection (initially mails one, but then says no, I change my mind)
         i. Also if it is a firm offer/option
   b. If offer provides when there is acceptance, this does not apply
   c. As soon as manifested = binding
   d. So if it does not apply, then effective on receipt

F. Promise or Performance
   a. Bilateral
      1. Promise for a promise of future performance
      2. Generally words, but could also have terms of how to accept, such as jumping up and down
   b. Unilateral
      1. Act of acceptance is performance/the promise of the offeree
         i. So at the inception of the contract, the offeror has the only promise to perform
   c. Neither Is Indicated Solely
1. Performance
d. Part Performance (Cannot be done Instantly)
   1. If acceptance only takes place on completion of performance, there is no protection
   2. §45
      i. **Performance as exclusive mode of acceptance**
         i. Commencement creates an option in favor of offeree
         ii. Offeror loses the right to revoke once begun
         iii. Must complete within required time
         iv. Offeree can walk away, but if he substantially performs he can seek restitution
      ii. Can still be revoked if offeree makes preliminary preparations
  3. Bilateral contract that invites either promise or performance → once you begin to perform, it is a promise and you must complete performance
  4. Exception: offer explicitly states right of revocation reserved to offeror
  5. UCC: Beginning of performance would be a reasonable form of acceptance, it is effective only if offeree seasonably notifies the offeror of acceptance
e. Preparations Prior to Acceptance (Performance)
   1. Preliminary preparations? Was the offer intended or expected to induce performance? Justifiably relied on to detriment? Avoid injustice? : Apply Promissory Estoppel
   2. Also applies to subcontractors and bids; bids open for at least the time necessary for general contractor to obtain job and accept the sub’s bid.
f. Notice When an Offer is Accepted by Performance
   1. Unless requirement of notice, usually it’s pretty obvious
   2. Obligation of notice if it is not rendered directly or there is no reliable means of learning/prompt means

G. Termination of Acceptance
a. Revocation is not effective if acceptance has been dispatched
b. Look @ termination of Offer

V. O/A under the UCC
  A. Common Law applies unless the UCC specifies otherwise
  B. UCC 2-206: In General
      a. Unless otherwise indicated by language/circumstances
         1. An offer to make a contract invites acceptance by any manner reasonable (same as common)
         2. An order/offer to buy goods for prompt or current shipment invites acceptance either by
            i. Promise to ship
            ii. Prompt/current shipment of goods (conforming or non-conforming—regardless of warrantability)
            i. This does not function if seller notifies the buyer that shipment is offered only as an accommodation to buyer (?)
         3. If beginning of performance is reasonable, an offeror who is not notified within reasonable time may deny acceptance (common law as well)
      b. ProCD v. Zeidenberg
         1. Licenses within boxes are enforceable unless terms are objectionable on groups on contracts in general
         2. What constitutes the offer? The placing on the shelf?
            i. If so, then part of the offer, and the acceptance when purchased, is agreeing that there are additional terms/license
         3. Conduct that shows agreement that there is a contract is sufficient under UCC
         4. A buyer can accept by performance, and in this case he pressed the Yes button
  C. Battle of the Forms: UCC 2-207 (written communication, applies ONLY IF response is an acceptance)
     a. Common law, this would be considered a counteroffer and upon acceptance/shipment of goods the second party to send out a form would have made the contract. But under the UCC it generally is not.
1. Additional terms in an acceptance/confirmation of acceptance, such as with a purchase form
   i. It is a contract unless acceptance is made conditional upon those extra terms.

b. How do we deal with these extra terms?
   1. ADDITIONAL: Proposals for addition to contract, if not agreed on, you revert back to initial contract, and these terms fall away
      i. If Between Merchants (deals in goods of kind, or has/represents knowledge or skill concerning goods)
         i. Part of contract Unless
            ▪ The offer expressly limits acceptance
            ▪ They materially alter offer
            ▪ Notification of objection has been given within reasonable time do
      ii. So in most situations these terms fall away because it is only applicable to small things

2. Different terms?
   i. Some courts use the subsection on this too
   ii. Some claim they are disregarded b/c they are not spoken about
   iii. Some say they cancel one another out and are replaced by contract law if there is one → COMMENT ADOPTS THIS RULE

D. Options & Firm Offers UCC 2-205
   a. Option: Promise to keep an offer open for a stated period of time
      1. Offeree has the ability to reject and then rescind within period
      2. Given consideration when new contract: can be as small or as big
         i. Sham: courts try to enforce this by instituting estoppel or saying that it was to be completed at later date
ii. If it is an option within a contract, it is fine (lease with option to buy)

b. Firm Offer: Sale of goods
   1. One party must be a merchant
   2. Signed writing with assurance that it will be held open
      i. If assurance is on a form given by offeree, offeror must sign it
   3. No consideration
   4. Cannot exceed 3 months
   5. If need to exceed 3 months, consideration must be given

VI. Is it an Enforceable Contract?
   A. Preliminary & Indefinite Offers/"Contracts"
      a. Offer must include
         1. Parties
            i. Subject Matter
            ii. Time for Performance
            iii. Price
         2. Vague offer missing essential terms will not be a contract \(\rightarrow\) if you can’t even determine breach
         3. Can be saved if parties or courts supply missing terms; courts hesitant to do such for policy reasons
            i. Courts should not be forced to indicate fair pricing or impose times upon parties as their full knowledge is limited and the question of fairness is raises
      b. See Construction/Interpretation

B. Intent to Memorialize in Writing
   a. Reach mutual assent on terms, and decide to formulate a written agreement that they will later sign
   b. Intent to be bound (prior to signing): Contract
   c. Intent not to be bound (until signing): No contract
   d. No Intent: typically courts say contract
   e. Letter of intent contemplating more formal agreement: depends on the intent in the document; need clues

C. Deferred Agreements
a. Generally speaking, common law indicates that a mere agreement to agree, in which a material term is left for future negotiations, is unenforceable. (Landlord/Tenant)
   1. Need some sort of definite way of indicating how you will come to an agreement.

D. Illusory Promise
   a. Agreement to do something that is so indefinite that it is impossible to tell what is to be done or the performance is optional
      1. Think the steakhouse problem; so indefinite that she really didn’t agree to anything
      2. Also, one side has such inadequate power to say how the contract will be interpreted
         i. ‘if I feel like it’ ‘I have every right to interpret these rules and change them at any time’

E. Law of Conditions
   a. If the contract is based on a consideration, “I will see you Y if you can obtain an appropriate lease” you are then bound to accept an appropriate lease. But if you can’t find one, then the contract falls out.

VII. Statute of Frauds
A. Interests in land, contracts that CANNOT be performed within one year, sales of goods over $500
B. Must be in writing with signature of person you so desire to enforce against
   a. Identify subject matter, states essential terms, can indicate a contract
   b. UCC requires quantity of good
C. Writing may be a conglomeration of other things that point to a contract
D. Contracts of indefinite duration do NOT fall under the SoF \(\rightarrow\) an oral contract that does not specify time for performance
   a. If it COULD be completed within a year, it does not apply
E. Part performance will take you out of the SoF; will provide enough proof of contract \(\rightarrow\) must be related to the agreement
   a. Reasonable reliance is necessary
F. UCC 2-201 – *Between merchants*
   a. A writing *in confirmation* of a contract is enforceable if
      1. It is received in a reasonable time
      2. Party receiving should know of contents
      3. Party does not object to contents in writing within 10 days
         i. Goes back to silence as acceptance
   b. Can suspend the writing for sales of goods if...
      1. Goods are only suitable for buyer
      2. Payment is made and accepted (partial performance)

VIII. Consideration

A. In general
   a. Exchange a promise for either a promise or performance
      1. Performance will act as consideration AND acceptance,
         and thus there is no such thing as a breach
   b. Benefit or detriment
      1. Get someone to act in a way they normally would not
      2. Giving up a legal right is a detriment

B. You cannot enforce a gift/oral promise without reliance or consideration
   a. DeLeo: the gift needed to be given in exchange for a dedication, not ‘oh you’re giving us a gift, here’s a dedication’
   b. Judges will look @ intent with respect to gifts
   c. Courts will not except sham consideration for gifts, only for option contracts/modifications

C. Pre-existing Duty Rule & Settlements
   a. If you are legally or contractually obligated to do something, there is no consideration stemming from the promise to do the same
   b. If the performance is similar but differs enough to demonstrate more than a pretense of bargain, it is consid.

D. Mutuality
   a. Employer handbook/promise; when the employee acts with reliance on that and begins to work, then it is enough to enforce
   b. Discretionary promises require duty to act in good faith
c. Implied promises, such as to deal exclusively but in good faith, are enforceable
   1. Implied promises will NOT be read over express language

E. Past Consideration
   a. Past performance OR consideration cannot be consideration unless moral obligation/material benefit

F. Modifications
   a. Modifications to contracts are treated as new contracts and need consideration that is DIFFERENT from that of the previous one. Unless substantial change.
   b. No consideration is needed for UCC

IX. Promissory Estoppel
   A. Gifts
      a. Generally, gifts aren’t enforceable. But, if something is done with RELIANCE on the gift, it may be enforceable. Performance must be started

B. Defined
   a. Make a promise that is reasonably expect to
      1. Induce action/forbearance
   b. Does induce action/forbearance
   c. Is binding if injustice can only be avoided by enforcement

C. Most courts will not use PE in employment at will situations in pre-employment situations
   a. Post-hire, reliance on additional promise not to terminate is enforceable

D. Commercial negotiations, the party that promises a contract is forthcoming and induces an action, may NOT break off the negotiations
   a. No applied to pre-contractual promises when the risk is assumed voluntarily and without inducement

E. WILL ALWAYS APPLY TO UNILATERAL CONTRACTS WHEN PERFORMANCE OR PREPARATIONS ARE MADE IN RELIANCE ON THE PROMISE

X. Options & Firm Offers
   A. Construction Contracts
a. General contractors must generally notify subcontractors of acceptance after receiving the overall contract. Subcontractors are not bound until the general contractor accepts their bid.

b. If bid is used to make a bid for the overall contract, it amounts to part performance and will be enforced by estoppel if overall contract accepted.

c. Exchange of promises before contract is award, it constitutes a bilateral contract conditional upon awarding of overall contract.

B. Option Contract
   a. Consideration is necessary to make a separate contract to make the initial contract remain open for a period time
      1. Courts are lenient about consideration in this element
      2. Can revoke and accept as many times as you desire during this if it is your option
   b. If one party claims it was a sham at court, estoppel may only be implemented when the other party has incurred some loss
   c. If no consideration was given for option, and action was done in relation to it, estoppel fits

C. Firm Offers: UCC §2-205, dispensing with the need for consideration
   a. Signed Writing w/one party as a merchant
   b. Assurance that it will be held open
      1. If on a form supplied by offeree, offeror must sign it
   c. Not revocable for the time stated, or a reasonable time and not to exceed 3 months

XI. Unjust Enrichment & Material Benefit
   A. Based on benefit, not promise, therefore Restitution is sought
      a. One party obtains economic benefit
      b. Unjust for beneficiary to keep the benefit
   B. Available when contract is unenforceable or there was a breach
   C. If benefit conferred gratuitously, by family or by an officious intermeddler → no recovery
      a. Someone who confers a benefit w/o permission that cannot be returned (usually services)
b. If you pay someone’s debt b/c of moral obligation, you are entitled to reimbursement if not gratuitous

D. Assess recovery based on market value
   a. Must demonstrate that a tangible benefit was conveyed
   b. Illegality to proffer that benefit will sometimes negate compensation

XII. Moral Obligation (exceptions to past consideration)
   A. Statute of limitations has run and you agree to pay the debt, then a new promise is formed
   B. If you are bankrupt and agree to pay a creditor, it is enforceable (protected by large series of exceptions)
   C. Affirmation by minor after she is an adult
   D. Sufficient consideration to support a promise to pay AFTER the promisor has received a material benefit (exception)
   E. §86
      a. A promise made in recognition of benefit is binding to the extent necessary to prevent injustice

XIII. Improper Bargaining
   A. Misrepresentation/Fraud
      a. Concerns a fact central to the contract
      b. *Fraudulent Misrepresentation*: deliberately and knowingly inducing contract by a lie (by words, concealment or nondisclosure)
      c. Remedies
         1. Rescind contract & seek restitution for performance already made
         2. Keep the contract and sue for loss in value
      d. *By words*: assertion is knowingly or believed to be a lie OR there is no confidence that the assertion is true OR does not have a basis for the assertion \(\rightarrow \text{need the plaintiff to rely on this material fact}\)
      e. *Concealment*: Act to intentionally or likely prevent acquisition of a fact
      f. *Nondisclosure*: knows that the fact is necessary to prevent a previous statement from being fraudulent OR the fact would
correct a mistaken assumption OR the other party should know of the fact b/c of a relation of trust and confidence
g. If the false statement/nondisclosure was a mistake OR not known at the time, it must be material to be actionable and may not be actionable at all.
h. **Reasonable diligence**
   1. If you know enough to uncover misrepresentation or omission, then no fraud has been committed
   2. A normal inspection is required, but if the fact does not come up, the other party is still liable if he **knows** of the issue AND it impairs the value of the contract.
i. **OPINIONS ARE NOT ACTIONABLE UNLESS IT IMPLIES THERE ARE FACTS TO JUSTIFY THE OPINION**

**B. Duress**

a. Improper threat to induce assent; no reasonable alternative

b. Threat
   1. Commit a crime or tort
   2. Criminal prosecution / use of civil process
   3. Breach of duty & good faith under contract

c. Resulting exchange is not on fair terms AND
   1. Threatened act would harm recipient and not benefit party making threat
   2. Effectiveness of threat is increased by prior unfair dealing
   3. Threatened is otherwise a use of power for illegitimate ends

d. May threaten termination

e. Void: only when assent is manifested by physical compulsion, else wise it is VOIDABLE

f. Third parties: voidable when a third party makes an improper threat unless the other party does not know of the duress and gives value/relies materially on transaction

**C. Bad Faith & Modification & Economic Duress**

a. Consideration is needed for modification to be valid
   1. May be avoided if it is induced by duress
   2. No consideration when unforeseen difficulty arises
i. Show there is some substantial difficulty not anticipated
ii. Benefiting party must act in good faith
iii. Fair change in performance

b. No consideration for UCC
   1. Statute of frauds will apply to writings if writings are necessary (merchants—it must be a separate writing if required)

c. Economic Duress is shown by:
   1. Immediate possession of goods is threatened OR
   2. One party threatens to breach by withholding goods unless some further demand is met
      i. Must also show that the goods cannot be obtained elsewhere AND ordinary breach remedies are not available

D. Undue Influence
   a. Relationship of trust (fiduciary) or dependence/domination
      1. Person is justified in assuming that the person will not act in a manner inconsistent with his welfare
      2. Unfair persuasion
   b. Suspicion will arise when the dominant party benefits and there is a detriment to the dependent party \( \rightarrow \) benefit must somehow be unwarranted
   c. Totality of circumstances test
      1. Relationship
      2. Physical and mental condition of dependant party
      3. Opportunity and disposition of the dominant person
   d. Misrepresentation is not essential
   e. **NO RELATIONSHIP** when one takes advantage of another’s weakness/distress
   f. **Be suspicious when:**
      1. Unusual/inappropriate timing & places
      2. Demands that things consummate at that moment
      3. Emphasis on consequence of delay
      4. Multiple persuaders on one party
5. No advisers to servient party and attempt to avoid consultation

E. Unconscionability
   a. So unfair that it would offend court to enforce it (judge)
   b. UCC/Restatement: court may refuse to enforce it, or enforce remainder, or limit application of clause
   c. If a form contains an unusual/unreasonably expected term that imposes material burden → not enforced
   d. Procedural v. Substantive:
      1. P: the way the contract was formed
         i. Age, intelligence, bargaining power, comprehensibility, oppressiveness, choice
      2. S: terms of the contract
         i. Reasonableness, purpose and effect, allocation of risks
         ii. AT TIME OF CONTRACTING
   3. Both elements must be somewhat present for a contract to be unconscionable (undue influence AND bad terms)
      e. Contracts of adhesion: signifies some sort of oppressiveness in its formation and may satisfy the procedural element
      f. If it is a sale of goods, and the exclusions include personal injury, there is a presumption of unconscionability (sketchy)

F. Illegality
   a. Violate statutory law or against public policy
   b. If the parties are not equally culpable, the court may at times enforce the contract
      1. Must be excusably ignorant of facts or legislation and reasonably
      2. Cannot enrich the defendant or hurt the public
   c. Courts will not aid either party when it is against PP and will leave them where they are, or fix it.
   d. Non-competition clauses only upheld for a reasonable amount of time and the consequences of enforcement

G. Incapacity
a. Mental: degree and seriousness, but also whether the vulnerability was used for exploitation
   1. Unable to understand nature and consequences
   2. Unable to act rationally
      i. Need more than momentary lucidity
   3. **If the other party did not know about it AND has begin performance AND voiding would be unjust** → will not void

b. Minor
   1. Voidable, but not void UNLESS for necessaries
   2. Minor may disaffirm expressly/implicitly before reaching majority or within reasonable time after
   3. Cannot change your mind about disaffirming
   4. Even if a minor performed or actively affirmed, he may still disaffirm as adult
   5. Minor may ratify a contract expressly after reaching age
   6. **May recover ALL consideration furnished, but must restore the consideration he received (or that which he has of that property at time of disaffirming)**
   7. May still be able to recover damages in tort if there was misrepresentation or destruction of property

c. Parents & minors
   1. Parents may bind their children to exculpatory agreements

XIV. Contract Interpretation & Construction
   A. Unambiguous terms will be interpreted by the judge, ambiguous terms by the fact-finder.
      a. Ambiguous when it is susceptible to different interpretations
   B. Interpretation
      a. Words & conduct are interpreted through circumstances and the purpose of the contract
      b. Writings are interpreted as a whole, and together
      c. Unless alternative interpretation is shown
         1. Language is interpreted with prevailing meaning
         2. Technical terms are given the meaning within the field
d. Reasonable, lawful and effective meanings prevail
e. Express terms are more important than performance, dealing and trade usage (performance → dealing → trade)
   1. This will be UCC & Haley will give it to us (2-208)
   2. Negotiated terms are also more important
C. Implied Warranty of Merchantability
   a. May conspicuously modify or exclude it
D. Requirements Contracts
   a. May buy less as long as the buyer isn’t buying elsewhere
   b. If buyer has a legitimate reason for eliminating requirements, it may
XV. Parol Evidence
   A. Writing that purports to be a final agreement
      a. Completely integrated: adopted by parties as complete and exclusive statement of terms
         1. Bars introduction of evidence to show additional terms or augmentation
      b. Partially integrated: Not necessarily everything agreed to
         1. May introduce evidence of other terms so long as they do not contradict what is written
      c. Evidence may be used to clarify unclear or ambiguous terms
   B. Determine if it’s a final and complete agreement
      a. Four corners: objective, appearance
      b. Use of extrinsic evidence → use parol evidence to determine parol evidence admission!
      c. Collateral agreements are not subject to the rule
   C. UCC indicates that regardless, course of dealing, trade usage may be submitted to clarify
      a. Really only excludes evidence if it clearly would have been part of the agreement if agreed upon
   D. Merger clauses will bar parol evidence UNLESS there is fraud or the agreement is obviously incomplete
XVI. Reasons Not to Enforce
   A. Misunderstanding
      a. Interpretation issues are severe and cannot be solved
b. Parties attach completely different material meanings to the terms and neither has a reason to know the meaning of the other  
  1. If neither party bears greater responsibility, a court will say mutual assent was missing  
c. Generally, context will not provide an ample interpretation so the contract will become voidable  
d. More often than not, one party’s understanding is less reasonable and thus they will not prevail  
e. Parol evidence of context and other writings is admissible to determine who is more reasonable and if it can be solved  

B. Mutual Mistake  
a. Misapprehension of fact when contract is entered; mistaken factual basis for contract and thus would not have made contract if not for the mistake  
b. Fact must be in existence at the time of the contract, NOT future events  
c. Fact must be material to the exchange: upset the basis of the contract  
d. Mistake is shared by both parties and the complaining party did not bear the risk of the mistake  
  1. Risk is born when a party is allocated the risk by agreement, when at the time of contract limited knowledge of the mistake is known, the court allocates risk to him  

C. Unilateral mistake  
a. Same as mutual except:  
  1. One party only  
  2. The mistake is material and adversely affects mistaken party  
  3. Mistaken party did not bear risk  
  4. Enforcement would be unconscionable OR the other party caused/knew of mistake and did not fix it (misrepresentation issue)  
b. If the plaintiff had reason to believe that a bid was a mistake, he may not justifiably rely on it
c. Courts may supply new term or modify the agreement

D. Impracticability
   a. Party’s performance is impracticable without his fault
      1. Event, which the contract assumed would not occur, occurs
      2. Duty to render performance is discharged unless contract says elsewise
   b. UCC: failure to provide goods on time or at all is not a breach if impracticability arises
   c. When statutory law intervenes, damages for a breach are not recoverable
   d. Normally found in death/incapacity, destruction, prohibition
      1. Loss in profit/value does not matter

E. Frustration of Purpose
   a. Performance will be excused when the underlying purpose of the transaction has fallen away
      1. Cannot be the fault of the party
      2. Usually the occurrence of an event the contract relied on non-occurrence of

XVII. Conditions
A. Express, implied, construed
B. Promissory: not fulfilled, it is a breach and a failure of a condition and thus the non-breaching party does not have to perform
   a. Generally, this is when a party has control over the condition, such as to find adequate financing
C. Substantial performance is enough to satisfy implied or construed conditions; meaning that unless payment is EXPRESSLY CONDITIONED on X happening or X being used, substantial performance will suffice and the condition is fulfilled. Reliance damages may be sought though.
D. Implied obligation to make a good faith effort to fulfill conditions
   a. If you try to obstruct this, you suck and it is a full promise
E. Conditions of satisfaction
   a. Unlimited discretion → illusory
   b. Measurable against an objective standard will provide consideration
c. Taste/art, it must be in good faith

F. Waiver: knowingly and voluntarily abandon right of express or implied condition
   a. If it is a waiver of material condition, then modification w/consideration is necessary
   b. May revoke a waiver

G. Estoppel: beneficiary of condition indicates he will perform despite non-fulfillment of condition
   a. Other party must then rely on this

XVIII. Material Breach & Substantial Performance

A. Material & total breach: so serious that it allows the other party to decline, terminate and sue for full expectation damages

B. Material & Partial Breach: suspend performance, cure, claim compensation for loss suffered

C. Substantial performance: claim compensation for any loss suffered
   a. Value of performance, cost of rectifying
   b. If the non-breaching party doesn’t want damages and suspends all payment, breaching party may receive restitution based on market value

D. Cure: breach may be material, but not total, because it can be cured
   a. Must permit opportunity to cure
   b. If cure is ineffective or there is no cure, it becomes total
   c. If cure is successful, then it becomes substantial performance
   d. Must be done within a reasonable time
   e. If too costly and economically wasteful, damages are based upon difference of value of property and value if performance had been completed

E. UCC: if the goods fail in any respect, buyer may
   a. Reject whole, Accept whole, or Accept part
   b. Cure
      1. If time for performance has not expired, seller may notify buyer of intention to cure and may do so within delivery time
      2. Buyer rejects that which reasonably would be acceptable, the seller gets more time to substitute
c. Installment contracts
   1. Buyer may reject installment

XIX. Remedies
   A. Expectation Damages
      a. In General
      b. UCC
   B. Limitations on Recovery
      a. Certainty
      b. Foreseeability
      c. Mitigation
   C. Reliance Damages
   D. Restitution
   E. Agreed Remedies
   F. Non-economic & Non-compensatory Damages
   G. Specific Performance & Injunctions