III. Contractual Assent and the objective test

- “legal assent to a K is determined by their apparent intent as shown by their actions and words”
  - what the parties felt is only relevant as far as it shows their objective intent
- subjective state of mind can be relevant—fraud, duress, mental capacity

B. The determination of objective meaning: reasonable person construct

- Define reasonableness w/in the entire context of the transaction

C. Deliberately Undisclosed intent

The mental assent of the parties is not requisite for the formation of a K if the words or other acts have a reasonable meaning to enter into the K

IV. The offer

The manifestation of willingness to enter into a bargain, so made as to justify another person in understanding his assent to that bargain is invited and will conclude it.

B. Is an advertisement an offer or a solicitation?

A publication that is widely dispersed is more likely to be a solicitation, but still may be an offer.

- Ct must ascertain the reasonable meaning the same way as interpretation in context.
- An ad is an offer if it is clear, definite, explicit, and leaves nothing open for negotiation. And a reasonable prospective buyer would understand that an offer was made.

V. Acceptance

Immediate Acceptance = K

If the content is changed, it is either a rejection or could be a counteroffer

- As long as no material change and o’ee’s intent to K is apparent
- O must provide substantive terms, not necessarily procedural
  - O’er has the right to specify terms of A
  - Unless the O makes it clear that a particular form and method of A is absolutely required (exclusive method of A), a response that does not precisely conform to instruction could be effective provided it is reasonable, is consistent with the manner prescribed in the O, and is no less protective of the O’or’s rights.
- If not in time, offer is rejected
- Could make counteroffer
- Usually, the O’er can revoke the offer before A
B. Nature, Mode, and effect of A

- Again, reasonable meaning of the actions is what matters
- Should be knowing, voluntary, and deliberate
- Normally, A to or from a party’s agent is the same as Communication of A to the party itself.
- if an O, by clear and unambiguous terms states that A will occur upon the occurrence of an event, then A occurs on the happening of that event, and communication needs to take please within a reasonable time in a reasonable manner.
- Qualified A is essentially a new O.

C. The effective date of A

Takes effect when it is communicated to the offeror.
Acceptance takes effect when it is deposited in the mail, if the mail is an authorized means of A.
- Offeror can negate the mailbox rule in the offer

D. Inadvertent manifestation of A

- Accept a Unilateral K by performance. Performance has 3 functions in a unilateral K-accepts, provides consideration, and completes performance
- Performance does not accept a unilateral K without knowledge of the promise.
  - Action cannot be induced by the promise w/o knowledge of it
  - Sometimes the offeree’s manifestations of intent are obviously unfair and it is difficult to ignore the offeree’s subjective state of mind.

E. Silence as A

Inaction is almost always a rejection. Offeror cannot change this. Except for notable exceptions:
- 1. Failure to respond results in A only in the following:
  - o’ee takes benefit of services with reasonable opportunity to reject and reason to know there is expectation of compensation
  - o’or has stated or o’ee given reason to understand silence will count as acceptance, and in being silent O’ee intends to Accept
  - o because of previous dealings, it is reasonable that the o’ee should notify the o’or if he chooses not to accept
- 2. o’ee who does any act inconsistent with the o’ors ownership of offered property is bound in accordance with the offered terms unless they are manifestly unreasonable, but if the act is wrongful as against the offeror, it is an A only if ratified by him.

F. Termination of the power of A
• Lapse of the O-specified date, measurable period, or reasonable amount of time
• Rejection
• Counteroffer
• Revocation- unless firm offer or option, can revoke offer before A.
  o Must be communicated (directly or indirectly) to be effective-no MB rule
  o C usually required for a valid option
  o Notice to the agent is notice to the principal
• Death or mental disability

G. A by performance: The difference btw bilateral and unilateral Ks

Bilateral- At the point of K formation, both parties have made promises to be performed at a future date.

Unilateral- the offeree’s performance is complete at the point of K formation, and only the O’or’s promise is outstanding when the K is created.

Performance as an exclusive or permissive method of A
  • If the K is unclear, the O’ee may accept by any method that is consistent with the terms and is reasonable.

If there is a promise saying anybody who performs the condition in the ad accepts the O. Once the conditions are performed, the promisor must perform or is in breach.
  • Can say either accept when performance begins, so cannot revoke O, and fulfillment of the condition compels performance
  • Alternatively, say Start of performance creates an irrevocable O, and completion of performance is A, C, and fulfillment of condition compelling performance

Communication of A by performance
  • Where an O invites A by performance, no notification is necessary to make the A unless the O requests notification.
  • If the O’ee has reason to know that the O’or has no adequate means of learning the performance with reasonable time and certainty, the contractual duty of the offeror is discharged, unless the O’ee gives notice with reasonable diligence, the o’or learns of A w/in reasonable time, or the O dispenses w/ notification of A.

O and A issues are likely to be relevant in 2 situations
  • Where the parties dispute if a K has been formed at all
  • Where there is a K, but the parties disagree on the terms

VI. A under UCC article 2: Basic principles and the battle of the forms

UCC 2-206: O and A in formation of a K
- An O will be construed as inviting A in any reasonable manner under the circumstances unless otherwise indicated by words or circumstances
  - An O to buy goods for prompt or current shipment shall be construed as inviting A either by a promise to ship or by the shipment of conforming or non-conforming goods, but such a shipment of non-conforming goods does not constitute an A if the seller seasonably notifies the buyer that the shipment is offered only as an accommodation to the buyer.
  - A definite and seasonable expression of A counts as A even if it contains terms in addition to or different from the O.

**B. Battle of the forms - UCC 2-207**

**UCC 2-207 Additional Terms in A or confirmation**

- 1. Definite expression of A or a written confirmation operates as an A even though it states terms additional to or different from those offered or agreed upon, unless A is expressly made conditional on assent to the additional or different terms
- 2. The additional terms are to be construed as proposals for addition to the K.
  - Between merchants such terms become part of the K unless:
    - a. the O expressly limits A to the terms of the O
    - b. they materially alter it
    - c. notification of objection to them has already been given or is given w/in a reasonable time after notice of them is received
  - Usual result is that the additional terms in the A do not become part of the K

**What to do with different terms**

- could consider additional and different the same
- could use knockout rule-default rules fill gaps
- could act as though they were never stated-discard

- 3. Conduct which recognizes the existence of a K is sufficient to establish a K for sale although the writings of the parties do not otherwise establish a K. In such cases, the terms of the particular K consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this act.
  - Terms are only those that agree and the others are discarded (knockout).
    Those that stay are the ones in the O, and the non-conflicting terms. Extra terms in the A are left out. Default rules fill in the gap.
Expressly Conditional A

- Response to O could count as counteroffer in UCC 2-207 in 3 situations
  - Not timely so O has lapsed
  - Makes it clear the O’ee does not intend to accept the O but proposes a K on different terms. Fundamentally deviates from the transaction-specific terms of the O
  - O’ee makes it clear that the O’or must assent to the changes in the proposed response- expressly conditional A

Whoever is the offeror when there are additional or different terms usually wins-construed by the judge

VII preliminary and incomplete agreements

If the terms are not clear, definite, and specific, it is likely to be a solicitation

If it appears the parties intended a K, the ct should try to resolve the indefiniteness

Reasons for indefiniteness
- Omits a matter vital to the exchange
- Does not fully, clearly, and unambiguously deal with that matter
- Deliberately leaves a matter open for future negotiation

It is correct to supply missing terms of a K only when the terms can reasonably be inferred. O must be definite as to its material terms or require such definite terms in it’s A that the promises and performances to be rendered by each party are reasonably certain.

Terms in a K to agree on the terms of a new K is unenforceable.

C. The effect of an agreement to reduce to writing

- Did the parties intend to be bound immediately upon reaching the oral or informal agreement? Or did the parties not intend to be bound until they had signed the written memorial?

D. The obligation to bargain in good faith

It is possible that they neither reached a K, nor did not reach a K, but they may have bound themselves to negotiate in good faith.

VIII. Statute of frauds

Writing, signed by the party to be charged, sufficient content to evidence a K
- Writing may consist of several writings as long as one of them is signed by the party against whom enforcement is sought, and it points to the same transaction. may be informal letter to another
- Signature can be any symbol made to authenticate a writing.
• Enough content o prove a K and identify the subject matter and reveal the material terms.
• Not absolute-some situations will get out of it
6 situations
• executor or administrator to answer for D of decedent
• suretyship
• C of marriage
• Transfer of an interest in land
• K not to be performed in a year
• K for sale of goods under UCC 2-201

B. The statute of frauds relating to Ks at common law
An oral K that fails to explicitly state the time for performance is a K of indefinite duration and therefore outside of the statute’s proscriptions.
For part performance to dispense the need for a formal writing when the statute of frauds is required, there must be performance unequivocally referable to the K, performance that without the aid of words is unintelligible or at least extraordinary, maybe unreasonable.
• Also, π must show reasonable reliance on the K, restitution is an inadequate remedy, and it would be unjust for the Δ to be able to hide behind the statute of frauds.
• Δ had received a benefit, and there is a basis for recovery outside of K, in restitution.

C. The statute of frauds under UCC article 2
1. $500 or more is not enforceable unless there is some writing sufficient to indicate a K and signed by the party against whom the enforcement is sought or by his authorized agent or broker
• is not enforceable beyond the quantity of goods shown
2. Btw merchants, if a writing in confirmation of the K and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the content of subsection 1 against such party unless written notice of objection to its contents is given w/in 10 days
• Notes- eliminates the need for a signature
3. A K that does not satisfy (1) but is valid in other respects is enforceable...
• a. if the goods are specially manufactured for the buyer and not suitable for sale to others, and seller has made either a substantial beginning manufacture or commitments for procurement
• b. if the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a K for sale was made, but is not enforceable beyond the quantity admitted.
• c. with respect for goods which have been received and accepted
• Probably just the ordering of the raw material is procurement enough, but there should be a loss.

IX. C-
the formation of a K requires a bargain in which there is a manifestation of mutual assent to the exchange and a C
• 1. To constitute C, a performance or a return promise must be bargained for
• 2. "bargained for" if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.
• 3. The performance may consist of
  o a. an act other than a promise
  o b a forbearance
  o c the creation, modification, or destruction of a legal relation
A promise to make a gift traditionally cannot be enforced because it is not supported by C

B. What suffices as C
An oral promise to give a charitable is not an enforceable K when not accompanied by C or reliance. A hope or expectation is not equivalent to either legal detriment or reliance.
A waiver of any legal right at the request of another party is sufficient C. Unbargained for detriments are not relevant to K, but are relevant to estoppel.
Bargain theory-performance or promise must be bargained for in order to constitute C.
• By the terms of the agreement, it is given and accepted as the motive or inducement of the promise.
Promise for reimbursement alone is not C
• Haley says however, promise to repay can be C
Past consideration cannot support a K because it has already occurred and so cannot be bargained for.
A requested performance attached to a gratuitous promise is a condition and not C
It is not the job of courts to review the adequacy of C.
• However, sometimes imprudent promises are procured through foul means-i.e Fraud, duress, unconscionability
Just need some kind of value to suffice as C
• If C is grossly inadequate a court may decline to enforce a promise, but normally mere inadequacy is not the case.
• Inadequacy of C does not avoid a K but, a nominal exchange just to make a K enforceable will not suffice because it can hardly be said to have induced the promise or have been “bargained for

**Preexisting Duties**

A preexisting legal duty cannot serve as C for a K. An actor may have a D, but if that D is changed, there can be new terms to the K. If the actor’s D is unchanged, the other party’s new O is ineffective.

**Settlement Agreements**

Gets more complicated when you factor in preexisting duties. Forbearance to assert or the surrender of a claim or defense which proves to be invalid is not C unless

• The claim or defense is doubtful
• the forbearing or surrendering party believes in good faith that the claim or defense may be fairly determined to be valid

The execution of a written statement surrendering a claim or defense by one who is under no duty to execute it is C if the execution of the written statement is bargained for even though he is not asserting the claim or defense and believes that no valid claim or defense exists.

**C. Mutuality and its limits**

*Mutuality of obligation*—both parties to a K must give something of legal value in order to get something in exchange. Means each party must obligate itself to perform in some way.

Three types of situations

• Party performs but never is obligated to do anything
• Conditional promises
• A party’s performance is left to its own decision
• In all three, there is a party wishing to enforce a K, but was never obligated to do anything

**Conditional promises as C**

Unless the condition comes to pass, the promise does not become enforceable. Where the outcome is uncertain or unknown, the promisor takes some risk by making the promise, which may be sufficient C.

**Discretionary Promises as Consideration**

Courts sometimes stretch to find C where discretionary promises make commercial sense. Cts are not ignoring C, but rather implying an obligation
to exercise one’s discretion reasonably, in good faith, or otherwise in accordance with a similar standard.

- As long as the conditional promise is not in complete control of the promisor, then it is not illusory, and the promisee is bound, but does not have to perform until the promisor does.

UCC 2-306 implies an obligation on both parties to use best efforts in the situations where parties have agreed to deal exclusively with each other.

Output K

- Buyer agrees to purchase whatever the seller produces

Requirement K

- Seller agrees to provide whatever the buyer requires

An illusory promise, one which makes performance entirely optional with the promisor, cannot form the basis of a valid K because it fails to obligate one party to do anything

**X. Promissory estoppel**

Where lack of C threatens to make a promise unenforceable, promissory estoppel can help.

A promisee who has disadvantaged himself by relying on a promise has incurred a detriment, but not bargained for.

*Promissory estoppel-*

- A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by the enforcement of the promise.

**B. PE and non commercial promises**

PE allows collection when the promisee suffers a legal detriment, even though it is not bargained for.

A gratuitous gift prompted by charitable motives is enforceable.

- traditional C is found in the charity’s agreement to appropriate the funds in accordance with the terms of the subscription
- or, reliance on the promise forms the basis of PE

**C. PE in the commercial context**

Traditional K doctrine still remains preeminent in commercial contexts.

Cts are more discerning in the commercial context than in the charitable promises context and look at PE with more scrutiny.
A promise which reasonably induces a promisee to rely on a promise to her detriment results in a binding K.

- The acts on reliance by the promisee to his detriment provided a substitute for C.

Promissory estoppel does not exist where reliance is induced by conduct or words that do not constitute a promise. Promissory estoppel requires an actual, clear, and definite promise, and reliance is reasonable only if it is induced by an actual promise.

**Promissory Estoppel and employment disputes**

Because of at-will employment, employers are not held to vague promises or even fairly clear promises even with substantial reliance because the reliance is not reasonable in the at-will setting.

- Some cts recognize there can be genuine injury if an employer promises stable employment and then does not follow through

A post-hire promise can alter the employment-at-will environment using the doctrine of PE. PE is a consideration substitute

**Enforcement by virtue of action in reliance.**

- 1.) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is enforceable notwithstanding the statute of frauds, if injustice can be avoided only by the enforcement of the promise. The remedy granted for breach may be limited as justice requires.

**Promissory Estoppel in commercial negotiations**

Sometimes, there is not even a promise made except for the promise of a future K, and the other party spends a large amount of money in anticipation of a forthcoming K. If the Δ, by its conduct has *inexorably* led the promissee to believe there was a K coming, PE may provide some relief. There will not be full enforcement, but maybe reimbursement for the expenses incurred.

- Usually must be some kind of bad faith. Not L for expenses incurred in the process of negotiation and preparing for K

**D. Remedies in PE actions**

If a substitute for C, then the π should expect K remedies.

Is it about enforcement or compensation for reasonable reliance?

- Expectiation interest, reliance interest, resituation interest
most cases, where there is a feature of PE, the parties will seek expectation except when difficult to prove, or else go back to reliance damages

XI. Options and firm Os

Traditional Option K—an Offeror promises to limit his power to revoke the O in exchange for C.

- Cts generally take a more lenient approach to C in option K
- Nominal or sham C
- If a K states C has been given, even if it has not
- O is binding in an OK if
  - Writing
  - Signed by the Offeror
  - Recites purported C for making an O
  - Proposes an exchange on fair terms within a reasonable time
- Can also use PE in place of C for an option K

B. PE and Os

Option K created once the offeree begins or tenders the requested performance. Although the offeree has no obligation to complete the performance, the offeror has lost the power to withdraw. PE could take the place of C in creating an option K.

- Part performance or relied to detriment

Could also use conditional A to create something similar to an option K except offerree cannot back out

Or could create a bilateral K, but performance by both parties is conditional upon the occurrence of a specified event

Unilateral K which is accepted by using the Acceptance and being granted the bid-part performance

UCC §2-205

- An O by a merchant to buy or sell goods in a signed writing which by its terms gives assurance that it will be held open is not revocable, for lack of C

XII. Obligation based on UE and Material Benefit

UE is a separate an independent cause of action not based on a promise

- Enriched with some kind of economic benefit
- It would be unjust to allow one party to keep the benefit without compensating the other party for it.
- Remedy granted is restitution- money or the return of the benefit
• Injustice - Not always unjust to keep a benefit without payment  
  o Gratuitous intent  
  o An imposed benefit that cannot be returned  
• Benefit - from the perspective of the beneficiary  
  o Usually the market value  
  ▪ Quantum meruit - MV of services  
  ▪ Quantum valebant - MV of goods  

A K implied in fact is an actual K inferred from the acts of the parties in light of the surrounding circumstances.  
• The promise to pay can only be inferred when there is reasonable expectation of their payment by the party benefited.

A person who pays the expenses of an ill-relative is entitled to reimbursement when they did not intend the expenses to be a gift. Generally cannot recover for services to family because of the reciprocal kindness, but can be changed given an express agreement or circumstances of knowing the relative expected compensation or reimbursement

**B. Moral obligation and the material benefit rule**

Under the moral obligation exception, a prior detriment may be treated as sufficient to support the later promise given on account of it. When moral obligation is used, three circumstances exist

• 1.) some material benefit was conferred on the promisor by the promisee before the promise was made  
• 2.) the benefit unjustly enriched the promisor  
• 3.) The promisor subsequently promised to pay for the benefit

Situations in which past consideration rule does not apply  
• promise to pay for a past debt that is unenforceable  
• discharge in bankruptcy  
• affirmation of a debt who at the time the debt was incurred was a minor but now has reached majority, or other activity that renders the K voidable and now wants to affirm it.

**Promise for Benefit Received**

• 1.) A promise made in recognition of a benefit received by the is binding to the extent necessary to prevent injustice  
• 2.) A promise is not binding under subsection 1  
  o a.) if the promisee conferred the benefit as a gift or for other reasons the promisor has not been unjustly enriched or
b.) to the extent that its value is disproportionate to its benefit (contrary to the law of C)

XIII. Policing Ks for improper bargaining

Different doctrines, but common theme
- Allow the victim to avoid the K, voidable
- If avoided, each party is entitled to restitution
- Other remedies beside restitution
  - Enforcement of the K without a particular term or damages

B. Misrepresentation and fraud

Fraudulent misrepresentation
- Lie as to a fact
- Made at K formation
- There is no true assent if assenting to some other fact

Remedies - rescission and restitution or loss in the value

When a misrepresentation makes a K voidable
- Induced by fraudulent or material misrepresentation by the other party which the recipient is justified in relying

Restatement, Second §162: when misrepresentation is fraudulent or material
- Fraudulent if intended to induce assent and knows or believes it is not in accord with the facts, is not confident that he states the truth, or knows he does not have the basis he states or implies.
- Material if likely to induce a reasonable person to manifest assent, or the maker knows it is likely to do so

§160. When action is equivalent to an assertion (concealment)
- action intended to prevent another from learning a fact

§161: When non-disclosure is equivalent to an assertion
- knows disclosure would prevent a previous assertion from being misrepresentation or fraudulent or material
- knows disclosure would correct mistake of other party as to a basic assumption on which that party is making the K and if nondisclosure amounts to a failure to act in good faith and fair dealing.
- Knows disclosure would correct a mistake as to the contents or effect of a writing evidencing or embodying the agreement
- Other person is entitled to know it bc of a relationship of trust and confidence btw them
There is no fraud by omission by failing to disclose material information that could have been discovered by reasonable due diligence.

**Misrepresentation of Fact, Opinion, and Future Action**

An assertion made in K negotiations that turns out to be false if the Λ did not know of the falsity of the claims at the time does not equate to fraud. Restatement, second (torts) §538 A: a representation is one of opinion if it expresses only a.) the belief of the maker as to the existence of a fact or b) his judgment as to the value, quality, authenticity, or other matters of judgement.

A statement of opinion may also constitute a statement of fact if it is reasonable understood by the recipient to mean there are facts to justify the opinion or there are no facts inconsistent with it were made.

**The distinction btw fraudulent and N misrepresentation**

N is not deliberately false but made carelessly. Element of materiality is usually more important in N misrepresentation.

**The choice of remedy for fraud: PD**

Normally, the remedy is rescission or money damages

- Loss is often measured by the difference btw the actual worth and the value if it was represented correctly.

The accompaniment of an intentional tort allows for PD

**Fraud in the inducement distinguished from fraud in the factum**

Inducement- forms the basis of the K and falsely gives the other party an incentive to enter into the K.

Fraud in the factum-void, not merely voidable

- Related to the document itself-

**C. Duress-improper threat**-core concern is meaningful assent

- The compulsion of a manifestation of assent by force or threat
- The question is usually when a threat is improper, creating duress

When Duress by threat makes a K voidable

- 1.) if manifestation of assent is induced by an improper threat that leaves the victim no reasonable alternative, the K is voidable

When a threat is improper

- 1.) a threat is improper if
  - o what is threatened is a crime or a tort, or the threat itself would be a crime or a tort if it resulted in obtaining property
  - o what is threatened is a criminal prosecution- can be implied
Market or Circumstantial Pressure Distinguished from Duress
Economic duress occurs when the party commits a wrongful or unlawful act or threat that deprives the other of his free will.
- Duress requires circumstances more than ordinary economic pressure faced by every employee who needs a job.
Coercion by a nonparty and the distinction btw void and voidable Ks induced by duress
when a third party, acting independently, employs improper pressure
- Must balance the reliance interest and the free will of the party under duress
- Void only where manifestation of consent is physically compelled, so severe that signer becomes a mere mechanical instrument.
- If duress by a third party, voidable by the victim unless the other party to the transaction in good faith and without reason either gives value or relies materially on the transaction.

D. Duress and Bad faith in relation to K modification
The application of C doctrine and the preexisting duty rule to modifications
- Modifying a K is subject to all the rules as a normal K
- 2 rules are most strongly
  - C-party must do something beyond its preexisting duty
  - Can be avoided if there is duress

The Application of Duress Doctrine to Modifications
Economic duress results when a party threatens to cease delivery of time sensitive goods, and there are no reasonable alternatives. A threat to
breach, in itself, is not economic duress. It must also appear that there were no other options, and an ordinary action for breach of K would not provide an adequate remedy.

**Supervening Difficulties as Basis for Upholding a Modification**

- Fairly bargained Modifications that take into account an unforeseen difficulty that arose after the original K formation
  - “supervening difficulties” exception to the preexisting D rule
- Supervening difficulty (unforeseen difficulty must meet 3 standards
  - After K formation, is apparent that performance of the K is subject to substantial difficulties not anticipated, and not w/in the contemplation of the parties at the time the K was made
  - The benefiting party must conform to the standards of honesty and fair dealing
  - change in performance in the increased obligations must be reasonably fair in view of the changed conditions

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

- 1.) K modification needs no C to be binding
- 2.) A signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded except as between merchants such a requirement on a form supplied by the merchant must be separately signed by the other party.
- 3.) Statute of frauds - must be in writing if the K as modified is within its provisions

Modifications must be made in good faith.

**E. Undue Influence**

unfair persuasion of a party under the domination of the person exercising the persuasion or who by virtue of the relation btw them is justified in assuming the person will not act in a manner inconsistent with his welfare”

- undue influence is the use of excessive pressure to persuade one vulnerable to such pressure.
- In the case of someone not a party to the K- the victim can avoid the K unless the other party, in good faith, and without reason to know of the undue influence, gives value or relies materially on the transaction.- same as duress
- Grounds for voidability
To find undue influence, must examine the totality of the circumstances, including relationship, physical and mental condition, opportunity, disposition, and conduct.

F. Unconscionability

the clauses are so one-sided as to be unconscionable under the circumstances existing at the time of making the K. unfair surprise, oppression.

Procedural
Substantive

Both must be at least somewhat present, unless particularly egregious

Ks of adhesion-most common use of unconscionability

- One party sets the terms on a take it or leave it basis, and the other party has no choice but to adhere to the terms
- In order to be unconscionable, the terms need to be unfair also.

A clause excluding L for consequential damages is not unconscionable per se, but it can be if it excludes L for personal injury

Unconscionability is more difficult to establish in consumer transactions.

- Failure to read does not make it unconscionable, and the terms must be unconscionable at the time of K formation

Relief for unconscionability

- Nonenforcement of the K, removal of the unconscionable term(severance) or rewriting the term to get rid of its unconscionable effect.

If a term is detrimental to the buyer, the seller must make the term conspicuous, or require the seller to bring the clause to the attention orally or by making the buyer specifically initial.

- Rewriting or severing unconscionable K terms is not appropriate where it would significantly change the nature of the K

XIV. Policing Ks on ground other than improper bargaining

A. Illegality

- A party who willingly entered into an illegal K may still have the right of restitution if the K is deemed void because of illegality.
- The court will often not touch it (, and whoever had the money, keeps it (in pari delicto)
- When they are both at fault, the court will often not enforce the K or require restitution.
- Ct may enforce it if not in pari delicto
B. Ks in violation of public policy
If the legal portion of the bilateral K is serverable, and the illegal part does not go to its essence, the legal part may be enforced.
Note-The “rule of reason” regarding no-competes
It is based on the duration, geographic area, scope and extent of activity it restrains.
Overbroadness does not make a provision unenforceable as a whole. A party must show that, “as applied” to the case, the contractual term is unenforceable on grounds of public policy.

C. Incapacity

Minority
Makes the K voidable.
May avoid it expressly or by conduct, at any time before majority or within a reasonable time after.-if not, it constitutes ratification
- The only time a contract with a minor will be upheld is when an emancipated minor Ks for necessaries.
If they were not emancipated, a suit could be brought against the parents for unjust enrichment. If they were emancipated, could bring suit against the kids for breach, or unjust enrichment, if it was a necessary.
The minor is only responsible for returning what he still has at the time of disaffirmance
A major may be able to securely K with a minor by getting the minor’s parent to approve the K or sign it on behalf of the minor.
Parents have the authority to bind their children to exculpatory agreements,
- Common law rule is minor can disaffirm upon reaching majority.

Mental Incapacity
In mental capacity, can still make sure Ks are binding through powers of attorney, but the power of attorney must be given before capacity is lost.
1.) a person incurs voidable contractual duties by entering into a transaction if by reason of mental illness or defect
- he cant understand in a reasonable manner the nature and consequences of the transaction or
- cannot act in a reasonable manner in relation to the transaction and the other party has reason to know of his condition.
2.) where the K is made on fair terms and the other party does not know of the mental defect, the power of avoidance terminates to the extent that the
K has been so performed in whole or in part or the circumstances have so
changed that avoidance would be unjust. The court may grant relief as
justice requires.
The state of mind and reasonable expectations play a greater role in mental
incapacity than in minority.
Court are usually wary of giving relief based on intoxication, especially if the
party had control over the decision.
  • Courts usually require a very debilitating degree of intoxication and
    that the party exploited that alcohol or drug-induced incapacity.
A major party who avoids a K on the grounds of mental incapacity may or
may not be required to return any benefits received if she has retained the
benefits. Definitely must return the benefits if she still has them.
  • If other party acted in bad faith, probably do not have to return it

XV. K interpretation and construction
Construction-adding terms by legal implication
Reasonable expectations based on the words and conduct of the parties.
Interpret the meaning in the light of the surrounding context
Always begins with the words used

Interpretation or the search for K meaning
The interpretation of an unambiguous K is a matter of law. If it is
ambiguous, it is a question of fact.

Rules in aid of interpretation
1.) words and other conduct are interpreted in the light of all the
circumstances, and if the principal purpose of the parties is ascertainable it
is given great weight
2.) a writing is interpreted as a whole, and all writings that are part of the
same transaction are interpreted together
3.) unless a different intention is manifested, language is interpreted as its
generally prevailing meaning if one exists-technical terms are given their
technical meaning if used in a transaction w/in their technical field
4.) any course of performance accepted or acquiesced in w/o objection is
given great weight in the interpretation of the agreement
5.) wherever reasonable, the manifestations of intention of the parties to a
promise or agreement are interpreted as consistent with each other and with
any relevant course of performance, course of dealing, or usage of trade.

Standards of preference in interpretation
A.) reasonable, lawful, and effective meaning to the terms is preferred over an interpretation which leaves a part unreasonable, unlawful, or of no effect  
B.) priority- express terms, course of performance, course of dealing, usage of trade, -consistency preferred over inconsistency 
C.) specific and exact terms over general language  
D.) Separately negotiated terms over standardized terms  
Other factors-realities of the market (possible part of usage of trade).  

**Interpretation of standard Ks**

Unambiguous words take precedence over conflicting external circumstances.

When standard Ks are involved, cts may not want to tie themselves to a close and isolated reading of the words of a disputed clause.

If ambiguity found in back pages of a take it or leave it K, most cts have no trouble interpreting ambiguity against the drafter in favor of a reasonable interpretation advanced by the other party.

Ct always construes the K against the party that drafted it  

**XVI. The Parol Evidence rule**

Courts resort to extrinsic evidence when written terms are unclear, ambiguous, or incomplete.

Parol evidence rule limits a party’s ability to offer extrinsic evidence and to have the factfinder consider such evidence.

Contemporaneous writings are considered part of the K  

Where the writing is fully integrated, no parol evidence may be admitted to contradict or augment it.

- Must show not w/in the scope of the agreement in order to allow it  
- To the extent it is partially integrated parol evidence may be admitted to supplement writings by filling gaps but cannt contradict  
- If unclear or ambiguous, parol evidence may be used to clarify, but cannot contradict  

Sometimes it is necessary to look at extrinsic evidence to see if the writing was intended to be an integration.

Proof of a collateral agreement should be allowed if it might naturally be made as a separate agreement by parties in the same situation.

Might need to look at proffered evidence before determining if the writing is susceptible to an alternate meeting  

Evidence after is admissable
UCC 2-202. Final Written Expression; Parol or Extrinsic Evidence
Terms of a writing may not be contradicted by evidence of any prior
agreement or of a contemporaneous oral agreement but may be explained
or supplemented
- By course of dealing or usage of trade or course of performance
- By evidence of consistent additional terms unless the ct finds the
  writing to have been intended to be fully integrated
- evidence of consistent or additional terms allowed unless exclusive

The use of merger and integration clauses
a writing is often fully integrated simply because it includes such a clause
- If there is fraud or the agreement is obviously incomplete despite
  the lause, Parol Evidence is admissable

Escape from the Parol Evidence Rule: Exceptions for Evidence of the
Validity or Voidability of the K
- Extrinsic evidence showing that an alleged K is either void or
  voidable is admissable.
- In cases of clear fraud, a court will allow proof, but the harder cases
  are where the evidence shows misrepresentaion, but the nature and
  scope of the misrepresentation is questionable
- If courts allowed all allegations of misrepresentation, it would
  swallow the parol evidence rule.
  o N misrepresentation may be excluded by M&A clauses

XVII. Misunderstanding, Mistake, and Excuse due to changed
circumstances.
Misunderstanding-restatement section 20, look it up-void
Parties misunderstood eachother, and there is no basis to prefer one party’s
interpretation- results in a void K if terms are materially different
- Neither party knows nor has reason to know of the
  misunderstanding

Mistake
one or both of the parties reach the agreement on the assumption that a
certain state of affairs exists.
3 general themes
  The mistake must relate to a fact in existence at the time of the K.
  Must relate to something that is central to the K
  must be inappropriate to allocate risk of mistake to aggrieved party
Mutual Mistake

Mutual mistake will be grounds for voiding a K if:

- relates to facts in existence at time of the K, is shared by both parties, relates to basic assumption on which K was made, has a material effect on the agreed exchange of performances, and the complaining party did not bear the risk of the mistake.

Mistake of fact may or may not treated the same as mistake of fact

- the risk is allocated to him by agreement of the parties (as is)
- he is aware that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient, or
- the risk is allocated to him on the ground that is reasonable to do so.

Unilateral Mistake

- Mistake relates more to one party than the other
- Either the effect of the mistake is that enforcement of the K would be unconscionable or the other party had reason to know of the mistake or his fault caused by the mistake

Relief for Mistake

- Rescission if it is purely executory, or the parties can be restored to the status quo.
- maybe the parties’ reliance interests can be protected or even adjusting the terms of the K.
- parties can agree to amend K with a mistake by mutual agreement
- Rescission- only remedy available for mistake when reformation would not put the parties in the position they intended to be in
- A party seeking rescission is not entitled to retain favorable portions
- If the party assumed the risk of the mistake, no rescission.
- If rescission is impractical, treat each party as equitable as possible.

Excuse due to changed circumstances

Issues-same as mistake; Materiality and risk allocation

Impracticability

Discharge by supervening impracticability

- after K is made, Performance is made impracticable w/o his fault by occurrence of an event the non-occurrence of which was a basic assumption on which the K was made, his D to perform is discharged, unless language or circumstances indicate contrary

UCC 2-615: Excuse by failure of presupposed conditions-similar wording
The first element is that performance must be objectively impracticable.

- A seller will not be excused if the contingency was the seller’s fault, the seller had reason to know of the impracticability, or the seller assumed the risk.
- If a K fails to specify the source of the goods, impracticability does not result when there are other means to get the goods the K specifies.

Frustration of purpose
If after a K is made, a party’s principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the K was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary. Does not result just because a K becomes uneconomical

- The key is that both parties know of the primary purpose.

XVIII. Conditions and Promises
Construed/costructive-drawing an inference as a matter of law to find a condition (implied in law)
Parties can waive conditions if the condition is for their own benefit.

Nonfulfillment of a condition excuses the performance contingent on the condition

Promissory condition-combined promise and condition
- Failure of a condition, and a breach of K
- L for damages and the other party is discharged

*Breach does not give exit unless it is also a condition./material or total breach
St. Louis Paving case. If getting the permit was a condition, it was not a breach, but if it said, the doctor shall get the permit, then it was a promise, and the failure to do so would be a breach. It would also be a condition. When they went ahead, they waived the condition of a permit.

Express, Implied, and Construed Conditions
Constructive condition of exchange-the ct construes one party’s performance to be a condition of the promise of the other. If not express, may construe a condition so does not require exact compliance.

Express conditions must be literally performed, whereas constructive conditions are subject to substantial performance. Courts interpret doubtful language to be a promise or a constructive condition, rather than an express condition

Substantial compliance with an implied condition satisfies the condition and compels performance where replacement would be grossly out of proportion to the good attained, but the nonbreaching party is entitled to damages for the decreased value. –Jacobs and Young v Kent

Uses of Conditions
- Allow a party to escape a K
  - Party may wish to structure it so he gets out if detrimental
allow one of the parties to exercise judgment by making the party’s performance contingent on a certain state of affairs
  o make sure the promise is not illusory—usually an implied D to act in good faith in an attempt to satisfy a condition
  o condition of satisfaction—express, implied, or construed
    ▪ good faith standard for matters of taste
    ▪ reasonableness for technical or commercial nature
- Allow for alternate performances
- Sequencing performances by making one performance the condition of the other.
  o construed as concurrent if can be performed simultaneously
  o UCC-2-511—unless otherwise agreed, tender of payment is a condition to the seller’s duty to tender and complete delivery.
  o If one is instantaneous, and another takes a while, the longer performance is construed as a condition precedent
  o BC the conditions are also a promise, failure to complete performance excuses the other party and gives rise to breach

**Excuse of Conditions**
Usually, when there is an express condition it is strictly enforced, but there are circumstances when it is not appropriate to do so
4 situations
- Waiver,
- Estoppel
- Obstructive or uncooperative conduct
- Unfair forfeiture—used sparingly by the cts that recognize it

**Waiver**—knowing and voluntary abandonment of a right
- Express or implied by conduct
- Because there is no C, it can only be raised if the waived right is a nonmaterial or ancillary part of the K.
  o Only the person benefiting from the condition can claim no C.
- Condition may be waived by failing to facilitate a condition.

**Estoppel**
- The party indicates he will perform the contingent promise despite nonfulfillment of the condition.
• Must have known or had reason to know his words or conduct were likely to be relied on by other party, and they must have been relied on by that party to her detriment.
  o Could use promissory estoppel if a promise was made
• Unlike estoppel, waiver does not require reliance and detriment.
• could also say K was modified. If there is no C, can use estoppel as a substitute.

Obstructive or Uncooperative Conduct
If there is a breach of the D not to hinder the occurrence of a condition, the response is to excuse the condition, making the promise unconditional.
• Every K has an implied condition to cooperate, and is immediately L if he breaches it and it is of substantial and unreasonable character

Unfair Forfeiture
• Ct determines enforcement of the condition would result in undue and unfair hardship to the party to whom the performance is due.
• Enforcement of the condition will allow promisor to benefit from a technicality that will deprive the promisee of valuable rights and give the promisor a windfall.

XIX. Material Breach, Substantial performance, and anticipatory repudiation.
Breach of a promissory condition entitles other party to decline performance and to claim breach. Material or total breach-breath is so serious that it allows the other party to decline her performance, terminate the K, and sue for full expectation damages.
Where the breach is not material it is called a partial breach, and the performance of the breaching party is called substantial performance.
A breach that would be total if not cured may be averted by fixing the problem before it becomes serious. The owner must permit the opportunity to cure, as long as the breach was cured in proper time.
  • If the delay in curing is material, then the cure is ineffective. If it is not material, then it will give rise to substantial performance.
  • If there is no express provision that time is of the essence, whether delay is material depends on the surrounding circumstances.

Consequences of substantial performance
Substantial performance is still a breach, and the remedy is usually the cost of rectifying the defective performance, but this is not appropriate where the
breach is not material nor willful, and the cost of remedying the defect would be grossly out of proportion to the harm.

- Economic waste
- In those cases, the better award is the amount the defective work reduced the market value of the product of the performance.

**The recovery of the breaching party: restitution or recovery under K**

- A material breacher has no right to enforce the K he has violated.
- If he has partially performed, he has a claim for unjust enrichment if it was unintentionally breached.
- If substantially performed
  - Full K price minus cost to rectify defect or compensating for loss in value of the performance.
- If a breach is material, the breacher may be able to argue the K can be subdivided into self-contained units

**Breach and substantial performance under the UCC article 2**

**Perfect Tender, Cure, and Installment Ks**

Perfect Tender under article 2- Substantial performance is not applicable

- Seller’s obligation is to tender delivery at time and place provided

**UCC 2-601- Buyer’s rights on improper delivery**

- Reject the whole
- Accept the whole
- Accept any commercial unit or units and reject the rest

**UCC 2-313, the seller warrants that the goods will conform to the sample.**

**The Seller’s right to cure a noncomforming tender**

UCC 2-508: Cure by seller of improper tender or delivery; replacement

1.) Where noncomforming and the time for performance has not yet expired, the seller may seasonably notify the buyer of his intention to cure and may then within the K time make a conforming delivery.

2.) where the buyer rejects a non-comforming tender which the seller had reasonable grounds to believe would be acceptable the seller may if he seasonably notifies the buyer have a further reasonable time to cure

**Installment Ks**

UCC deviates from the perfect tender rule

UCC 2-612 “Installment K”; Breach

1.) Installment K is one which requires or authorizes the delivery of goods in separate lots to be separately accepted
2.) The buyer may reject any installment which is noncomforming if the noncomformity substantially impairs the value of that installment and cannot be cured; but if the non-conformity does not fall within (3) and the seller gives adequate assurance of its cure the buyer must accept that installment.  
3.) whenever noncomformity or default with respect to one or more installments substantially impairs the value of the whole K, there is a breach of the whole. But the aggrieved party reinstates the K if he accepts a non-conforming installment without seasonably notifying of cancellation or if he brings an action with respect only to past installments or demands performance as to future installments. 
anticipatory repudiation- may be allowed to exit if they are going to breach.

XX. K Remedies
Goal is to make the aggrieved party in the position he would have been had the K been performed.

**Distinction btw expectation, reliance, and restitution interests**
- (a) expectation interest-having the benefit of his bargain by putting him in as good a position as if the K had been performed
- (b) reliance interest-reimbursement for loss caused by reliance on the K by being put in as good a position as if the K had never been made 
- (c) restitution interest-restore to him any benefit conferred to the other party 
least amount to most in general; restitution, reliance, expectation. 
The correct award of damages is to give the π the benefit of what he bargained for at the least cost to the Δ. 

**The Expectation Interest (Kp-costs/losses saved, or costs incurred + profit.)** part needs to be put in same position 
direct damages and Indirect losses-consequential and incidental losses
Expectation interest:
- The loss in the value of the other party’s performance plus 
- Any other loss, including incidental or consequential loss caused by the breach, minus 
- Any cost or other loss he has avoided

π must establish damages with reasonable certainty, show they were reasonably foreseeable, and shwo they reasonably couldnt be avoided 
Measurement of the expectation interest by reference to market value.
• Often measured by the market value or a cost of replacement
• A subsequent price paid is evidence of the FMV but is not sufficient

Measurement of expectation interest by reference to substitute transaction.
If the replacement is less advantageous than K performance would have been, the nonbreaching party may request that damages be measured with reference to that particular substitute transaction, rather than market value.

Measurement of the expectation interest when Performance is deficient
§347, the loss in value of the other party’s performance.
Deficient performance may constitute a material and total breach or substantial performance and only a partial breach.
• Material and total—excuse from performance plus damages
• Substantial performance—still must perform, but get damages
If the other party does something completely different, there may be a total breach, but there may not be any direct losses.
• Cost of repair could be substantial, but dimunition could be zero.
• Unfair forfeiture or Economic waste vs those that it would not
  o Extent of waste
  o Willfulness of the breach
  o Desires and motivations of the nonbreaching party
• where the K provision breached was merely incidental to the main purpose, and where the economic benefit resulting from full performance is grossly disproportionante to the cost, the damages are limited to diminution in value bc of nonperformance.
• Economic waste is the argument for diminution in value
• both cost of completion and diminution where appropriate.

Limitations on recovery of expectation damages
Reasonable certainty, foreseeability, mitigation
• If there is wrongdoing, the ct is more likely to reach—culpability
• Damages may be approximated if a reasonable basis of computation is afforded, as long as the fact of damage is clear
• In order to recover consequential damages, must show the fact of the loss and the amount of the loss with reasonable certainty.
• Must be foreseeable at the time the K is made
  o Any special need must be communicated
General needs that are or should be known do not need to be communicated
- bare notice of the circumstances is not enough.

The mitigation principle
π has a burden to reduce the negative consequences of a breach.

Damages not available if could have been avoided by appropriate action.
- Do not have to accept different or inferior work
  - If she does, it is used to offset
  - Few substitutes for more skilled and specialized
  - Δ must show there were equivalent subs available
  - not precluded from recovery if reasonable, though unsuccessful efforts are made

Expectation Damages Under the UCC

Buyers remedies under the UCC

UCC 2-711 Buyer’s remedied in general
- cancel and may recover the price paid and
  - Cover
  - Recover damages for nondelivery as provided by this article
  - may obtain specific performance or replevy the goods.
  - May hold noncomforming goods as a security interest

2-712-cover-buyer’s procurement of substitute goods
- buyer may cover by making good faith any reasonable purchase of or K to purchase goods in substitution for those due from the seller
- buyer may recover difference btw the cost of cover and the K price plus incidental or consequential, less expenses saved
- failure to effect cover does not bar other remedies
- Buyer is free to choose btw cover and market measure of damages
- If buyer has covered, market measure does not apply, 2-713

2-713-buyer’s damages for non-delivery or repudiation
- market price at the time the buyer learned of the breach and the K price plus incidental and consequential less costs saved
- market price is determined as of the place for tender or arrival

A company cannot “cover” from itself-the measure is just MV in that case.

2-714. Buyers Dams for breach in regard to accepted goods
- recover loss resulting in the ordinary course of events from the seller’s breach as determined in any reasonable manner
• measure for Ds in breach of warranty is difference at time and place of A btw value of the goods as accepted and the value they would have had if had been as warranted
• incidental and consequential are also recoverable

**Seller’s remedies under UCC**

- Seller’s action for the price
  - If accepted but refuses to pay, entitled to full K price
- substitute sale or MV
  - If inadequate, look to the profit the seller would have made

2-703. Seller’s remedies
- withhold delivery
- stop delivery
- proceed under the next section respecting goods still unidentified
- resell and recover
- recover for non-A or perhaps the price
- cancel

2-706. Resale including K for resale
- resale made in good faith in commercially reasonable manner seller may recover the difference plus incidental, less expenses saved
- Can be private or public sale
- If the buyer covers, he is stuck with the substitute price, but it is unclear if the seller can still choose if he can use the MV or what he sold even if he already sold for a higher price (authority is split).

2-708. Damages for non-A or repudiation
- difference btw market price at time and place for tender and unpaid K price plus incidental minus expenses
- If inadequate, the profit including reasonable OH, which the seller would have made from full performance by the buyer, together with any incidental damages
- “lost volume seller”—if the buyer breaches, but seller has more goods than customers
  - market price or sub performance may equal K price
  - Deprived of sales volume and the profit from the sale
  - entitled to lost profit for the period it could have performed multiple Ks.
  - has excess resource or production capacity.
Mitigation of Damages under the UCC

- UCC does not fully compensate for unreasonable actions/inactions

UCC 2-715. Buyer’s incidental and consequential Ds

- Loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise;
  - And Injury to person or property proximately resulting from any breach of warranty

UCC 2-710. Seller’s incidental damages

- Expenses in connection with return or resale of the goods

Reliance Damages as an alternative to Expectation Damages

Costs incurred in reasonable reliance on the K

Normal damages for promissory estoppel or where there is a bargained-for exchange but unenforceable for some reason such as the statute of frauds. Where there is an enforceable K, reliance damages come into play where the only question is the measure of damages.

- Where expectation is unavailable or inappropriate, nonbreaching party may seek reimbursement for costs suffered in reasonable reliance on the K
- Still need reasonable certainty and reasonably foreseeable, and reasonably avoid damages.
- Usually, more certain, but may allege lost opportunities
- Sometimes divided into essential reliance (costs incurred in preparing to perform under the K), and incidental reliance, (costs incurred in preparing to take advantage of the benefits to accrue under the K).
- Mitigation is encompassed under requiring reasonable reliance
- If \( \Delta \) can prove with reasonable certainty the \( \pi \) would have lost money had the K gone forward, a ct may reduce reliance damages

The goal of restitution damages is to put the aggrieved party in the position he would have been in had the K never been entered into.

- Reimbursement for all costs incurred as a foreseeable result of the K
- Only recoverable for after the K was entered into
- Can collect for incurred costs, including time spent, as long as can be reasonably calculated and certain.

Restitution as An alternative to expectation or reliance damages
Focuses on the benefit received by the breaching party. Must be reduced by the counterbenefit received.

Restitution is available even if the π would have lost money on the K if it had fully performed, and the terms of the K do not control restitutionary claims.

Measurement of restitution
- Sometimes, return what was actually received.
- Usually, the net benefit received
- Market value (K price is evidence)

Court will take fairness and proportionality into consideration.

Only those benefits that flow from the performance of the nonbreaching party need to be restored.

Where particularly egregious or wrongful or if there is a special relationship, courts may require profits from the breach be disgorged.

**Limits on recovery of restitution**
- Party seeking restitution is asking for the K set aside and unwound
- Only appropriate for a total and material breach
- If the aggrieved party has performed all obligations under K, and the only performance left is the payment of a definite amount of money, the ct will not grant restitution

**Restitution to the party in breach**
- Generally a party who has not substantially performed is not entitled to anything, but a party who has substantially performed is entitled to the K price, less any difference in value of performance or the cost of fixing the problem.
- Cts may allow restitution when the nonbreaching party is enriched by partial performance if they are relatively innocent and the nonbreaching party is clearly enriched.
- The true measure of quasi-K recovery should be the unpaid K price less the cost of completion or other additional harm to the Δ except that it should never exceed the benefit actually received by him.

The innocent party should never end up paying more than K price

**Agreed Remedies**

Because of the unpredictability of damages, parties may specify the nature and extent of remedies for breach in the K.
- Penalties for breach of K are unenforceable as against public policy
- Liquidated damages clauses may be enforceable.
Parties may seek the limit the remedies available, such as caps
Also specific categories of damages or not specific categories
May specify procedures to be used to resolve disputes
  o Cts tend to balk if the limitation leaves the aggrieved party w/o a reasonable way to remedy a breach

Restatement, second 356: liquidated damages and penalties;
Damages for breach by either party may be liquidated in the agreement but only at an amount that is reasonable in the light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss. A term fixing unreasonably large liquidated damages is unenforceable as a penalty
  • Earnest money agreements not significantly out of line, that are widely practiced are generally allowed.
  • minority says if no actual loss, liquidated damages clauses is unenforceable
  • Majority rule is not to take into actual damages except to determine if it ws reasonable at the time of contracting

If it is reasonable in light of either the actual or anticipated amount, it should pass the test.
If a K price specifies a single sum for all damages, it is unreasonable because all breaches are not of the same gravity, and when the fixed sum greatly exceeds the actual damages likely to be inflicted by a minor breach, its character becomes unmistakeable.
The party is still entitled to common law damages
Limitation of consequential damages is enforceable as long as not unconscionable.
  • Limitation of damages for injury to the person in the case of consumer goods is prima-facie unconscionable, but limitation where the loss is commercial is not.
  • Common carriers cannot limit L for its own N

**Specific performance and injunctions**
Specific performance is generally the exception-
  • Available only if damages would be inadequate to compensate the π

First, must determine that damages are inadequate
Then determine whether appropriate to grant specific performance
Inadequacy of damages
  • Sometimes, inadequate if there is no substitute, unique K
Specific performance usually available for real estate

Cts will still deny specific performance if the harm is economic that can be accurately measured and compensated

difference btw physical difference and economic interchangeability

Probably not for normal goods, because replacements are readily available

If unique, it cannot obtain, at a reasonable cost, enough info about substitutes to permit it to calculate an award of money damages w/o imposing an unacceptably high risk of under compensation

- Sometimes inaccuracy of damages or obstacles to recovery
- Nature of the negative consequences that would flow from failure to peformnce
  - Damages of lost profits are credible, but not reasonably certain in amount

The discretionary nature of the remedy
- he who seeks equity must do equity, clean hands
- Courts try not to unfairly advantage πs, unfairly burden a Δ or third parties, or get involved in affairs it feels it should not
- Generally a K to perform personal services will no be specifically enforced-involuntary servitude
- to compel continuance of a personal relationship when one of the parties is resistant is repugnant as a form of involuntary servitude..

Injunctive relief as an alternative to specific performance
- Mandatory-must do something-specific performance
- Prohibitory-cannot do something
  - useful substitute when mandatory injunctions are not appropriate for policy reasons or if K specifically calls for forbearnce.
- An injunction should be granted when the intervention of a ct of equity is essential to protect a party’s property rights against injuries that would otherwise be irremediable.
- Requirements are irreparable injury and inadequacy of legal remedies.
• To determine if a no compete is enforceable, need to look at reasonable in time and geographic area; and Employer’s legitimate business interest v the employee’s loss of livelihood