**APPLICABLE LAW & UCC**

**APPLICABLE LAW**
- Common law – state
- Statutory law

**UCC**
- Most states have adopted the UCC as law
- Sale of Goods – UCC Article 2
  - §2-105: All things that are moveable personal property
  - Merchant – one who deals in goods of the kind
  - Article 2 either applies to the whole deal or it doesn’t apply to to any of it
  - If the most important part of the deal is the sale of goods, then apply – if it’s just incidental to the real meat of the contract, don’t apply
  - Article 2 does not govern options contracts
  - “Best efforts” clause – parties will use best efforts to sell/buy the products
  - includes contract to sell at a future date

**Express Contract:** “verbal” – solely on oral and written words – you’re able to find the deal solely from words of parties

**Implied Contract:** based at least in part on conduct

**IS THERE A CONTRACT?**

**MANIFESTATION OF MUTUAL ASSENT:** there must be an objective manifestation of mutual assent to a contract; what a reasonable person would understand the parties’ actions to mean.
- Meetings of the Minds
- **OBJECTIVE TEST**
  - Subjective assent is irrelevant
  - Objective manifestations: what you say, do, or sign your name to
  - If a reasonable person wouldn’t understand that your assent is a joke, then you’re bound by your actions
  - Mutual assent at the TIME OF CONTRACT – doesn’t matter what changes down the road
  - Mutual assent on ALL THE ESSENTIAL TERMS of the contract

**VALID OFFER?**

*Was there an offer?*
- Manifestation of Commitment
  - Words/conduct; evidence of commitment
- **Content of the Contract**
  - Missing terms? Incomplete communication?
  - Contract does not have to contain all the material terms, but the more gaps, the harder to enforce
  - Missing price?
    - **COMMON LAW:** In a sale, without a price, not an offer
    - **UCC:** Can be an offer even when missing a term
  - Ambiguous terms? “Fair”; “reasonable”; “appropriate”
• Court will conclude not a manifestation of commitment – indicates parties have not made a deal yet - NO OFFER
  o Requirements Contract
    ▪ Sale of goods in which the quantity is in terms of buyer’s need – VALID contracts
    ▪ Exception to ambiguity
    ▪ “UNREASONABLY DISPROPORTIONATE”
      ▪ Be wary of a dramatic increase in buyer’s demands
      ▪ What is buyer asking for today, and what did he previously ask for? Increase must be in proportion to previous demands.

• Context of the Contract
  o Bargaining history – if there’s a history, adds to the argument that this is a manifestation of commitment
  o Advertisements – not an offer – invitation to make an offer
    ▪ POSSIBLE EXCEPTIONS: when the advertisement is specific about how many of the items are available and who may accept, and performance is definitely promised
  o Preliminary negotiations, price quotes, and solicitation bids are not offers – “acceptance” of these usually is the offer

• 3 Elements to offer:
  o Manifestation of present contractual intent
  o Certain & definite terms, expressly stated or implied
  o Communication to such to the offeree

Was the offer terminated?
• Lapse in time? (easiest way to terminate)
  o Situation where nothing is said about a timeline
  o If no express time limit, courts will impose a reasonable time
  o When was the offer made? How long was the gap after?
    ▪ If more than a month, that should raise flags.
• Death – when a person dies, offer dies with him.

• REVOCATION OF OFFER
  o HOW: Words or conduct of the offeror communicated to the offeree.
    ▪ Change of mind is not enough – offeree must be aware of the revocation.
  o WHEN: Must come before the acceptance.
  o WHEN IT DOESN’T HAPPEN:
    ▪ 1. Option Contract – when there is a promise not to revoke and some consideration for that promise.
    ▪ 2. UCC Rule – “Firm Offer Rule” – sale of goods, with a writing signed by a merchant that not only promises to buy or sell, but has to expressly promise that the offer will not be revoked – (3 month ceiling to keep open.)
3. Where the offer has been **relied** upon.
   - General contractor uses a subcontractor’s offer to make a bid – relied on bid.
   - Courts differ on this (*Drennan Star*, reliance makes irrevocable. James Baird, not irrevocable.)

4. Start of performance pursuant to an offer which requires performance to accept.
   - Once performance starts, too late to revoke.

**REJECTION OF OFFER BY OFFEREES**

- **Counter-Offer**
  - **Kills** the offer in the common law and UCC
- **Conditional Acceptance**
  - Something new has been added and insisted upon, so it’s saying no and killing the offer: “I accept if...”
  - Conduct which includes the condition will be a manifestation of mutual assent, and an illustration of implied contract.
- **Additional Terms**
  - **Common Law rule only** – no express contract – kills deal
  - Something new has been added and it’s more of a suggestion or a proposal: “I accept, and..”
  - **Mirror Image Rule**
    - Acceptance cannot add anything to offer – must be exactly what was offered

**UCC – DIFFERENT TREATMENT - § 2-207 – “Battle of the Forms”**

- Intent is to preserve the agreement, despite material terms included in standard forms exchanged by merchants
- Sale of goods where the communications do not exactly match up, not a deal breaker, unless the acceptance is absolutely conditional on new terms.
- What to do with new term?
  - If either is **not a merchant**, then the new term is a **proposal** and not part of the deal unless the other party agrees to it
  - If **both are merchants**: 1. There is a deal. 2. The new term is part of the deal unless a party objects. 3. Not part of the deal if material change.
  - If terms are conflicting, the they are eliminated and filled with a UCC gap filler if necessary.

**Option Contract?**

- Separate Contract to keep negotiation open – offeree may counter-offer and negotiate without voiding original offer, and may accept original offer at his option as defined by agreement
• Binding if:
  o In writing and signed by offeror
  o Recited purported consideration for making of offer
  o Proposes an exchange on fair terms within a reasonable time

**VALID ACCEPTANCE?**

**Who is accepting?**

• Must be the person to whom the offer was made
  o Offers are not assignable; offeree or an agent may accept.

• Offeree must know of the offer at the time of acceptance
  o You cannot purport to accept an offer which you did not know about at the time you performed.

**Mirror Image**

• Acceptance must be for exactly what was offered

**How are they accepting?**

• The offer may control how accepted – stipulated in terms.

• **Acceptance by Performance – Unilateral Contract**
  o Promise for Performance
  o The start of performance is generally viewed as a promise to perform and generally constitutes **acceptance** of the deal, and mutual manifestation of assent.
  o Acceptance when fully performed, but offer held open when performance begins – revocation must be before start of performance.
  o EXCEPTION: where the offer requires **notification** to perform.

• **Notice of Acceptance – Bilateral Contract**
  o Promise for a Promise
  o If it is going to be acceptance by **promise**, that acceptance has to be communicated to the offeror.
  o Where an offer requires written acceptance and execution by specific parties, not other method will be enforced
  o The only case in which you do not have to notify of performance is where the offeror is reasonably aware of the performance.
  o Order forms are offers, to be accepted by the seller.

• **Mail-Box Rule**
  o Offer is valid upon receipt by offeree.
  o Acceptance is valid once it is sent to offeror, unless offeror specifies otherwise. Once mailed, neither party can revoke without breach.
    • Revocation must happen before acceptance is mailed; if so, valid upon **receipt**.
  o Acceptance under option contract is valid upon **receipt**.
  o Un-communicated acceptance is not acceptance.

• **Acceptance by Conduct or Silence**
  o Only valid when (a) a benefited party accepts services with an opportunity to reject, and reason to know compensation was expected, (b) offeror has
stated or given the offeree reason to understand that silence is manifestation of intent, (c) previous dealings between the two, with a pattern of silent acceptance; acceptance unless there is affirmative rejection of offer
  - Implied contract can arise out of regular course of dealing between merchants.
  - Valid when an offeree accepts goods and keeps them.
  - Valid when offeree acts inconsistently with offeror’s ownership, and must accept the offered terms (unless manifestly unreasonable) – only acceptance is ratified by offeror

• **Sale of Goods**
  - Buyer offers to buy, and seller sends the wrong stuff.
    - Consequences:
      - 1. Creates a deal, and sending the wrong stuff is acceptance, but the receiver can now sue for breach.
      - 2. Breaches the contract it creates.
  - **UCC § 2-206 (b):** Seller may accept by promising to ship or by actually shipping. Partial shipment/part performance is not acceptance if the seller notifies the buyer that the partial shipment is only an accommodation (consider a counter-offer.)
  - When an ad makes a clear/definite offer with express terms for acceptance by performance, performance is enough to accept.
    - Irrelevant that the ad wasn’t the only reason for performance
  - Requirements/Outputs contracts
    - Contracts where seller agrees to sell or buyer agrees to buy as much as seller can produce or buyer can buy
  - Shrinkwrap/Clickwrap Acceptance
    - Terms included with shipment of the product – by its own terms effective upon use
    - Electronic contracting and signature valid under recent legislation

**DESTRUCTION OF POWER OF ACCEPTANCE**

• Restatement
  - May be terminated by (a) a rejection or counter-offer by the offeree (b) a lapse in time (c) revocation by offeror (d) death/incapacity of either party
  - Terminated by non-occurrence of any condition of acceptance under terms of offer

**CONSIDERATION**

*Bargain Requirement:* assumption that the individual bargainers will define their wants in a rational way and seek to satisfy them through voluntary exchange

• **Modes of consideration** – bargained-for exchange
  - 1. Detriment to the promisee (gives up something of value, or circumscribes his liberty) – forbearance from doing something will be consideration OR
2. Benefit to the promisor
3. Bargained-for exchange
   * When there is a legal benefit to the promisor, there will always be a legal detriment to the promisee, although it will not always seem that the reverse is true – focus should be on detriment to promisee.
   The fact that what is bargained for does not itself induce the making of the promise does not preclude it from being consideration.

- **Sufficiency of Exchange**
  - Consideration need not be adequate, only **sufficient** to constitute an obligation that didn’t exist before the bargain.
  - **Nominal Consideration** – consideration in name only, with extreme disparity in value, not acceptable – must be real consideration, at least a peppercorn – as long as it’s bargained for
    - Evidence of no real bargain, but not conclusive – is promisor made a gift instead of a bargain, then there is no contract
    - A gift promise, even though written, signed, and containing language that the promisor intends to assume a legal obligation is not enforceable
  - **Novelty not required** – must be valuable to other party at time of agreement, regardless of its real value
  - Inadequacy of consideration – not a bar to formation unless it’s **gross inadequacy**, resulting in one party having advantage of unequal bargaining power
  - Promise to without a claim is sufficient if in good faith
    - INVALID if promisor knows claim to be invalid
  - Words of **condition in a charitable donation** is consideration – benefit to promisee, as long as does not give the promisor the alternative of canceling the obligation
  - INVALID: moral obligations and illusory promises (where the contract can be terminated by one party at will without notice)

- **Pre-Existing Duty Rule**
  - Doing something that you are already legally obligated to do is not consideration for a promise to pay you $ to do it
  - Additional consideration needed for modification of contract
    - **UCC** Differs – modifications to pre-existing contracts can be made without further consideration
  - **NOT CONSIDERATION:**
    - **Part Payment** on a debt – creditor’s promise to release the rest of the client – part payment of a debt that is due and undisputed is not consideration for a release
    - Promise to give reward/bonus to do what one already contracted to do
- Agreement to render same services as already agreed, or bargain for something already done
  - EXCEPTION
    - When conditions change unexpectedly & modification is made voluntarily (non-modifying party has other alternatives to choose from)

- **Mutuality of Obligation**
  - **UCC § 2-204(1):** Contract for the sale of goods may be in any manner sufficient to show agreement, including both parties conduct which recognizes the existence of such a contract
  - **UCC § 2-306(2):** can be implied that seller uses best efforts to supply and buyer uses best efforts to promote the sale
  - Implied promise of good faith is enough
  - Only enforceable when both parties are bound

- **Moral Obligation = Promise + Antecedent Benefit**
  - If voluntarily performs without expecting to get paid, cannot sue for payment
  - Bare promise is unenforceable – gratuitous benefits unenforceable
  - Humanitarian act which leads to moral obligation not sufficient

- **Illusory Promises**
  - Appears to be a promise, but it is an illusion and no promise exists – cannot serve as consideration
  - Free way out of the contract – avoidance of performance
  - “You will pay me $20 and I will mow your lawn if I feel like it.”

- **Implied promises of Best Efforts and Good Faith Dealing**
  - Subjective standard of conduct
  - Neither party will act in bad faith

**CON. ALTERNATIVES: QUASI-CONTRACT? PROMISSORY ESTOPPEL?**

- **Quasi-Contract:** EQUITABLE REMEDY - obligation imposed by law because of conduct of the parties or some special relationship between them or because one of them would otherwise be UNJUSTLY ENRICHED – implied-in-law contract that allows the plaintiff to recover for benefit conferred on defendant
  - **Elements**
    - Conferred benefit to defendant
    - Expected to be paid
    - Not a volunteer
    - Avoid unjust enrichment to defendant
  - **NOT A Q-C:** when the parties did not intend to form a contract

- **Promissory Estoppel:** Promise + Unbargained for Reliance
  - Not based upon existence of bargain – neither agreement nor consideration necessary – promisor does something promissory in nature, then the other person acts in detrimental reliance on that promise
• Obligation of the promisor arises because of a foreseeable change of position by the promisee in reliance on the promise.
• Can be substituted for bargained-for consideration if:
  o Reliance is foreseeable
  o Reliance occurs
  o Reliance was reasonable
  o Promisee suffered detriment
  o Enforcement necessary to prevent injustice
• Reliance on illusory promise enough to form PE claim
• Damages – usually will only get the amount the reliance cost him: reliance and restitution damages – put him where he was before
• Questions: What is the promise? Who’s the promisee/promisor? What did the promisee do after promise was made? Was the action/reaction induced/cause by the promise? Should the promisor have anticipated this action? Foreseeable? Does the action in reliance on the promise make it unjust NOT to enforce?

Equitable Estoppel
• One takes a position and backs off of it – this is estopping that party from backing off the position they took

WHAT ARE THE TERMS OF THE CONTRACT?
DO THE FACTS INVOLVE WARRANTIES?
To disclaim a warranty: 1.) Must be in conspicuous writing 2.) there has to be full examination (no implied warranty as to defects reasonably discoverable upon examination)
• Express
  o UCC §2-313: ways in which seller creates express warranty:
    ▪ 1.) affirmation of fact or promise which becomes basis of the bargain
    ▪ 2.) description of the goods made part of basis of bargain
    ▪ 3.) sample or model of goods which becomes part of basis of bargain
  o Representations/affirmations of fact create express warranties that those are true; seller’s affirmation of value is not a warranty
• Implied
  o Implied warranty of merchantability: applies to DIGOTEKS – goods must be sufficient for ordinary purposes for which they are used
  o Implied warranty of fitness for particular purpose: when seller has reason to know specific purpose good is to be used for and knows that buyer would be relying on opinion, and buyer relies on seller’s judgment
  o Warranty will be implied even when waived if otherwise would be contrary to public policy.
• Limited
  o Where limited warranty fails its essential purpose, limitation will not be enforced.

DOES THE CONTRACT INVOLVE MORE THAN TWO PARTIES?
When people who did not make the contract have rights under it.

**Assignment:** transfers rights to another party – two people make a deal, and one transfers benefits to someone else

- Motives of assignee are irrelevant
- Contract will not be enforced if assigned in face of express language to the contrary, unless the assignee has already fully performance or the right to sue for damages has been assigned (can always be assigned)
- When there is **payment of consideration for assignment,** cannot be revoked.
- **Gratuitous assignment**
  - Can be revoked by 1.) death of assignor 2.) revocation by assignor 3.) subsequent assignment by assignor
- Once payer receives notice of assignment of debt, payer will be liable for payments subsequently paid to debtor (creditor beneficiary situation)
- You cannot make an assignment that substantially changes the duties of the obligor.

**Delegation:** transfers duties to another party – get someone else to do work

- **UCC §2-210:** A party may perform his duty through a delegate unless otherwise specified or unless the party has a substantial interest in having the original promisor perform/control the acts required by contract. No delegation relieves original party for breach.
  - Delegation may not be made to a competitor without express agreement
  - Contracts which call for performance of **special skills** are normally not delegable – **construction contracts** usually are.
- If party never agreed to substitution, may sue the breaching party.

**Third Party Beneficiary**

- Contract between two people, both of whom intended that a third party would benefit (ex, life insurance contract)
- Member of a class for whose benefit contract was made – can enforce the contract while it remains unrescinded.
  - **BUT** – where one party promises for consideration to pay a 3rd party, law automatically establishes a privity b/w party and the 3rd party regardless of 3rd party’s knowledge or acceptance of the benefit – promisor cannot rescind the contract w/o 3rd party’s consent – original party’s power to modify/discharge terminates when 3rd party’s rights vest (changes position in reliance, brings suit, manifests assent to contract)
- Intended 3rd party beneficiary can sue for breach of promise to perform professional services that would have made him beneficiary
- Creditor beneficiary – can sue the promisee on original debt
- **Incidental beneficiary** cannot sue.

**CAN THE CONTRACT BE ENFORCED?**

**STATUTE OF FRAUDS (“SOF”) APPLICABLE?**
No general rule that there must be a writing to be enforceable, BUT there are certain contracts “Within the Statute of Frauds” – non compliance makes the contract voidable, but not void

- 1.) Sale of goods with purchase price $500+
  - UCC Article applies regardless of $

- 2.) Personal services contracts
  - only those that are not capable of being performed within a year
  - deals in which there is no way it could be performed within a year – time specific, not task specific
    - If any possibility of performance within a year, then not within SOF – has to expressly state that time is over a year

- 3.) Real Estate
  - transfers of interest in real estate, regardless of $ amount
  - term or duration of more than a year

- 4.) Signature
  - Electronic contracting and signature is valid under recent legislation

- “MYLEGS” – marriage, year, land, estate, guarantee, surety
- Multiple writings – if each refer to the same agreement, can be admitted
- Writing does not have to be a contract – just something that is signed and refers to the deal

**Satisfaction**

- By a Writing
  - 1. What does the question tell you about contents?
    - Anything BUT sale of goods: in order for the writing to satisfy the SOF, all materials must be in writing
      - Who the contracting parties are
      - What they’ve each agreed to do
    - Sale of goods for $500+, writing just has to say the quantity terms – doesn’t have to have parties or price
  - 2. Who signed the writing?
    - When NOT sale of goods, the rule is that to satisfy the SOF, it has to be signed by the DEFENDANT – the person AGAINST WHOM the agreement is being enforced

- **UCC §2-201** Exceptions to the SOF Rule:
  - When buyer receives and accepts goods
  - Partial payment has been made (contract enforced as to what has been partially paid for
  - Specially manufactured goods which the seller has begun making
  - Dealings between merchants (dealers in goods of the kind) without written objection
  - Admission to the formation of a contract

**Exceptions**
• When one party has fully performed on the oral agreement
• When GOODS are specially manufactured for a buyer and cannot be resold, SOF not required
• When admission by the parties of a contract
• When payment has already been made and accepted

ANY REASON VOID OR VOIDABLE? (Defenses to Formation)

Capacity
• a proposed contract with one party that is legally incapacitated is void or voidable
  – legally capacitated is bound, incapacitated is not
• If capacity condition changes, then no longer voidable
• Incapacitated are always liable for the reasonable value of necessaries (food, shelter, etc.) or people would never sell to them – Quasi-contract

Infancy (Minors) (usually less than 18):
  o Voidable at the option of the minor; minor can enforce a contract against an adult
  o Minor can rescind contract any time before adulthood; does not have to return the other party to status quo

Mental Incompetence
  o Unable to understand the nature and consequences of a contract; other person must have reason to know of the condition
  o Contract voidable by the mentally ill person
  o Where contract made on fair terms and other party had not knowledge of mental condition, power of avoidance terminates to the extent the contract has been performed and avoidance would be unjust
  o Presumption of competency must be overcome by clear and convincing evidence (prior/subsequent condition, physical condition, providency of transaction, relations of trust between parties)
    o Lucid intervals are enforced

Intoxication
  o Could not understand the agreement

Duress
• Wrongful act or threat by one party which compels or induces other through fear to enter into the contract against will – voidable due to duress
• Physical duress, economic duress, threats; modifications in contracts, improper threats, changing the deal
  o Other part left with no reasonable alternative – deprived of free will
• Threat to discontinue future business is NOT sufficient to show economic duress

Undue Influence
  o Unfair persuasion – under domination of other party – problem with how the deal was done
  o Victim (defendant) weaker so that you can actually say was under the domination of plaintiff

Illegality/Contrary to Public Policy
Legislation says a term of agreement is unenforceable – neither party may enforce unless they did not know of illegality and detrimentally relied upon contract.

Court will not knowingly aid an illegal contract; will leave parties where found them – court will not aid parties trying to circumvent federal law.

Evidence as to illegality is admissible, even when doesn’t look illegal.

If drafted in good faith, court may reasonably alter contract to make legal and enforceable.

Non-Compete Clauses
- Cannot be overly broad
- Only be enforced when are necessary to safeguard employer’s trade secrets or customer list.

Fraud or Misrepresentation
- **Misrepresentation**: material misrepresentation of fact that was relied upon – assertion not in accordance with the facts.
- **Fraud**: *intentional* material misrepresentation of fact that was relied upon to detriment of disadvantaged party.

Elements of Proof:
- 1. Doesn’t have to be an intentional misrepresentation
- 2. Must be material fact
- 3. Justifiable reliance on the misrepresentation
  - no undue influence without showing reliance

**No duty to inform** when access to info is equally available to both parties – failure to disclose generally does not serve as misrepresentation.

**Duty to disclose material facts if**: 1.) necessary to prevent a previous assertion from being fraudulent or a misrepresentation 2.) would correct a mistake as to a basic assumption of the contract, and failure to disclose would be failure to act in good faith/fair dealing 3.) correct mistake of a writing 4.) entitled to know because of relationship of trust (fiduciary duty).

Mistake
- Parties do not fully understand surrounding facts (barren cow case)
- **Mutual mistake**: both make mistake about material fact – deal UNENFORCEABLE
  - Mistake must be basic and material – nature of what it is
  - Question or misunderstanding about what something is worth is never a ground for non-enforcement.
- **Unilateral mistake**: one party is mistaken; mistaken party must also show that enforcement of the contract would be otherwise unconscionable, or that the other party had reason to know of the mistake or other party’s fault caused the mistake.
- If one party assumes the risk of mistake: enforceable.

Unconscionability
- Source
• Procedural Unconscionability: one party induced the other to enter into the contract without meaningful choice
  o Disparity of bargaining power (absence)
    • When taken advantage of with commercially unreasonable terms with absence of meaningful choice to disadvantaged party
    • Against public policy
  o Whether the terms were hidden or clearly expressed
  o Bargaining process in all its flaws
• Substantive Unconscionability: the clause or contract itself is unfair (excessive price, remedy waiver, waiver of warranty)
  o What the bargain says
  o Oppressive terms
  o Always decided by a judge
• Enforced for consumers – concern that consumers and sellers have unequal bargaining power that sellers can take advantage of
• Adhesion Contracts
  o Usually preprinted document containing non-bargained for clauses disguised in fine print – favorable to drafter and offered on take-it-or-leave-it basis
  o Party using contract has responsibility to make terms very clear – burden on D to show P had knowledge, understanding and meeting of the minds when P has less bargaining power
• Waiver of Remedy: must be clear and explicit in contract to be enforceable
• Contract will be enforced when other party didn’t read the contract and so didn’t know of the clause
  o In commercial transactions, unconscionability will not be found when party had opportunity to understand terms but chose not to
• Gross inadequacy of Consideration
  o As seen in excessive price situation – unconscionable term which courts can refuse to enforce, and set value based on FMV

ARE THE OBLIGATIONS UNDER THE CONTRACT SUBJECT TO CONDITIONS?
Promisor bound to perform only after contingency occurs or only until a contingency occurs when there is a conditional duty to performance.
Express
• Intent of contracting parties and language used in contract
• Court will uphold express conditions – if one party fails to fulfill condition precedent, other party has no duty to perform
• Court may find a condition excused where extreme forfeiture would occur and damage to other party’s expectations from non-occurrence is minor
  o Court can find a substantially performed condition to be a minor breach – may award diminution in value
- **Express satisfaction condition**: satisfaction must be generally judged objectively and with good faith – if acceptance is condition on buyer’s satisfaction, buyer liable for damages if claims dissatisfaction in bad faith and rejects the seller’s tender

**Implied/Constructive Conditions (usually bilateral contracts)**
- **Implied-in-fact**: parties would have agreed to had they thought about it
- **Implied-in-law**: implied by the courts in interest of fairness
- **Substantial Performance**: where complete performance is a constructive condition to the other’s counter performance, condition may be excused if party has rendered substantial performance, and other party still has duty to perform (& deduct damages for breach.) Each party’s substantial performance is generally a constructive condition to the other’s.
  - Must be good faith intention to comply, and defects must be unintentional that do not harm essence of contract
  - One who has substantially performed is entitled to payment for performance minus detriment to other party
- **UCC §2-601**: “Perfect Tender Rule” – no delay or deviation from specifications in contract are permitted; **substantial performance not allowed** (unless contract involves installments, then divisible)
- **Conditional and dependent promises** – failure to perform precedent condition relieves other of duty to perform
- **Performance that takes time** is precedent condition to other’s performance
- **Covenants DEPENDENT** unless otherwise specified
- **Divisible Contracts**: one in which parties have divided up performance into units/installments in such a way that each part’s performance is roughly equal to compensation for corresponding performance of other party
  - Divisible if expressly made so, or if reasonable interpretation indicates a failure to perform one part would constitute failure of basic consideration bargained for

**Conditions satisfied/excused?**
- Grounds for **excuse**: 1.) agreement by both parties 2.) conduct by one benefited by the condition which waives the condition 3.) changed circumstance that makes compliance impracticable 4.) discharge by court

**IS THE AGREEMENT INCOMPLETE/DEFERRED?**
- Agreement to agree – unenforceable
- If contract can be rendered certain and complete by reference to something certain, court will fill in the gaps – **UCC** objective method
  - **Parties must have intended to make contract**
  - **Must be a reasonably certain basis for giving an appropriate remedy**
- Agreement to negotiate in good faith is DIFFERENT from agreement to agree
- **Price Term** – given **INTENT** to contract, court will fill in price with a reasonable price unless the parties did not intend to be bound unless there was a fixed price (**UCC**)?
PERFORMANCE MODIFICATION

Elements
- Mutual assent
- Consideration
  - UCC Article 2: no need for consideration, but need for good faith
  - Promissory estoppel – enforcement despite absence of consideration
    - When justice requires enforcement in view of material change of position in reliance on promise
- Statute – did it have to be in writing?
- Original contract – require modifications to be in writing?
- Good Faith Modification
  - Was the modification a result of improper threat, violation of obligation of good faith and fair dealing?

IS A PARTY DISCHARGED FROM DUTY TO PERFORM?
If a party is discharged for any of the following reasons, he is not liable for breach, as long as no one allocated the risk.

Impossibility/Impracticability
- 1.) Destruction of the subject matter (which is essential to purpose)
- 2.) failure of the agreed-upon means of performance
- 3.) Death/incapacity of a party

Existing Impracticability
- Subject still exists, but in fact it does at an excessive and unreasonable cost to one party which neither had bargained for nor reasonably expected – cost must be an extreme differed for duties to be discharged

Supervening Impracticability (something happens after formation which makes performance impracticable)
- Implied condition that subject matter exists – when ceases to exists through no fault of parties involved, duties are discharged
  - Music hall burning down
- If one party could have reasonably foreseen and controlled the risk, court will assign to that party (even if 3rd party’s fault)
- To claim impracticability, must show:
  - 1.) event made performance impracticable
  - 2.) nonoccurrence of event was basic assumption of contract formation
  - 3.) occurrence of even was through no fault of parties involved
  - 4.) no party assumed the risk
- UCC §2-615a (following common law): seller’s non-delivery will be excused if performance has been made impracticable by the occurrence of an event which nonoccurrence was basic assumption of contract
- Assuming Risk: party will alone shoulder burden of impracticability
- Unanticipated Hardship
  - Increase in price – NOT IMPOSSIBILITY
Unforeseen circumstance – may constitute commercial impossibility
Performance more expensive – NOT impossibility

**Frustration of Purpose (changed circumstances)**
Fundamental purpose of contract destroyed by supervening events; most courts will discharge performance – issue not inability to perform, but that it makes no sense because party will not get the bargained-for valuable consideration.

- **Elements:**
  - Supervening act or event
  - Unforeseeable act or event at time of contract formation
  - Avowed purpose recognized by both parties at time of contract

- Something happens after the deal that does not affect the ability to perform, but the REASON for performance

**DUTY OF GOOD FAITH**
- Implied duty of good faith and fair dealing in all contracts
- Implied duty of good faith not to intervene with other party’s ability to perform the contract

**SELLER’S WARRANTIES**
- **Warranty of Title and Against Infringement**
  - Rightful transfer
  - Good title
- **Express Warranty**
  - Description, affirmation, or sample that become basis of bargain
- **Implied Warranty of Merchantability**
  - Good faith and fair dealing in trade – goods will pass without objection in the trade and fit for purpose of use
- **Implied Warranty of Fitness for a Particular Purpose**

**CONTRACT INTERPRETATION**
Courts first look at the subjective intent of the parties, then it looks at the objective intentions of the parties from their communications with one another. The court looks at custom.

**Parole Evidence Rule**: evidence of a prior agreement may never be admitted to contradict an integrated writing, and may not even supplement when writing intended to be complete. Parole evidence used when one party is attempting to influence the legal effect of a written document by offering evidence outside the document itself to supplement the meaning.

- If claims an inconsistency, will not be admitted
- **Integrated Agreement**: written and final – intended as parties’ last word
  - Parol evidence cannot contradict, but may be used to explain ambiguous terms
- **Partial Integration**: written and final as to what it covers, but may not be the full deal
  - Terms may be added
- **Merger Clause**: contract provision that says this is the complete deal
- Types:
1. Course of Performance (most persuasive): about what the parties have previously done under this deal – extrinsic evidence about what the deal means
2. Course of Dealing (less persuasive): what parties have previously done under earlier, similar deals
3. Custom in Usage (least persuasive): what different people have done under different but similar deals
   - Parol evidence concerning the validity of the contract (mistake, duress, illegality) will always be admissible
   - UCC § 202: Terms may not be contradicted by any evidence of prior or contemporaneous agreement, but course of performance, course of dealing, and custom in usage may be used to supplement or explain.

Gap Fillers
- Common law recognizes as a gap filler that there is an implied duty of good faith and obligation to use reasonable efforts to achieve
- UCC – Sale of goods, rich sources of terms to fill the gap (Art. 2)
  - Implied obligation of good faith
  - Implied warranty of merchantability
    - Obligation on the seller that the goods must be fit for ordinary purposes

Adhesion Contracts
- Drafted by one party and reduced to form presented on a take-it-or-leave-it basis
- Not per se objectionable
- No realistic opportunity to negotiate
- Courts will interpret them so as to enforce only those principles that are reasonable and that a contracting party would anticipate

HAS THERE BEEN A BREACH?
Has someone not done what they agreed to do? If yes, who?

HAS THE CONTRACT BEEN DISCHARGED?
- Have the conditions been satisfied or excused?

HAS ONE PARTY MATERIALLY OR PARTIALLY BREACHED?
Failure to pay amounts to a material breach if 1.) nonpayment makes it difficult for the seller to perform; or 2.) failure creates such a large risk that the seller should have to perform

ANTICIPATORY REPUDIATION
- If Prospective breach, either a refusal to perform in the future (anticipatory repudiation), or prospective inability to perform, P can wait until date set for performance or can sue immediately – if waits, risks chance contract will be reinstated
- Inability to perform: when present, the party can suspend performance and cancel contract; when unclear, can only suspend and wait
- Retraction of repudiation: can occur until aggrieved party has sued for breach or changed position materially in reliance on repudiation
• Repudiatee may not be able to recover if shown that would have been unable to perform his part of bargain; owes a duty to MITIGATE DAMAGES arising from repudiation with good faith effort; if fails to do so, will not be entitled to full damages
  o if injured party treats contract as still in force after repudiation, waives the repudiation and can only sue when actually breached
• UCC §2-609: either party has a right to demand “adequate assurances of performance” from the other if reasonable grounds exist for believe the other party’s performance may not be tendered; unless such assurance can be provided, the asking party can suspend performance for which has not already received the agreed return (McD’s case)

EFFICIENT BREACH
• Efficient Breach: when performance is INEFFICIENT
• Inefficient breach: “where the value derived when the breaching party re-employs resources committed to the contract is equaled or exceeded by the loss to the promisee
• Efficient breach is positive, if there are expectation damages available for the non-breaching party – when the breaching party is able to pay the expectation damages to non-breaching party and still end up better than would have if the contract had been performed
• Rewards risk-taking in market transactions

AVAILABLE REMEDIES?

MITIGATING DAMAGES
• One cannot recover for damages that could have been avoided with the party’s reasonable effort (and without unreasonable risk of hardship)
• One has a duty to reasonably protect interests and prevent further damages from occurring

LIQUIDATED DAMAGES CLAUSE?
• Contract provision that attempts to fix, or set the way of fixing, damages
• Valid as a general rule – good faith effort by parties to estimate actual damages that would probably ensue in case of breach
• Requirements:
  o 1.) At time of contract, actual damages in event of breach would be impracticable or almost impossible to ascertain
  o 2.) Amount agreed upon must be a reasonable forecast at time of contract of fair compensation for harm from breach
  ▪ Common Law: must be reasonable at time of formation; doesn’t matter if actual damages result or not
• UCC §2-718: liquidated damages provisions do not have to bbe foreseeable at time contract was formed, but may be enforceable after breach if they prove reasonable related to actual damages
Agreed Damages: where the agreed limited remedy fails its essential purpose the UCC remedies may be applied even if the limited remedy agreed to would exclude them (§2-719)

**EXCEPTION:**
- Parties cannot by agreement set out amount of damages that will really be a PENALTY (pecuniary threat to prevent breach)
- Not valid if clause is disguise for indirect penalty

Not a penalty clause when one side puts up a lot up front, and liquidated damages reflect large amount of contract price

**SALE OF GOODS?**
- **UCC §2-713:** Measure of damages for repudiation by seller is difference between the market price at time of breach and contract price, EXCEPT when goods are made uniquely for buyer

**EQUITABLE REMEDIES AVAILABLE?**

*Specific Performance*
- Court ordering someone to do what they agreed to do
- Employed only when legal remedies viewed inadequate
  - Alternative: legal remedy of money damages

**Requirements:**
- Contract definite and certain
- Inadequacy of monetary damages
  - Injury cannot be estimated with substantial certainty, or money cannot substitute for contracted performance
- Enforcement does not cause great hardship
- Enforcement is feasible
- Mutuality of remedy no longer required

**Real Estate**
- Reasonable remedy, as real estate pieces are unique

**Sale of Goods**
- Usually NOT a reasonable remedy
- If goods are UNIQUE, then SP will be possible remedy
  - Art, antiques, custom-made goods
- **UCC §2-716:** SP may be decreed where goods are unique or in other proper circumstances – money damages usually adequate; non-breaching party must prove he was totally unable to cover the breach
  - Enforced when goods unavailable on market and buyer’s business depends on goods

**Service Contracts**
- NEVER

*Injunctive Relief*
- Negative Specific Performance
- Keeping person from working for your competitor, even if you can’t get them to work for you
**EXPECTATION DAMAGES?**
- General Standard for damages – make the world as it would have been if contract had been properly performed – awarding money damages to compensate the non-breaching party for the loss of benefits that party would have received if the contract had been performed
- Look to the open market to determine damages
- Limitations:
  - 1.) *Avoidable Damages*
    - Not recoverable
    - Fact Patterns: 1.) agreement followed by a breach followed by continued performance by non-breaching party. (Was the breach clear and unambiguous? Did continuing performance actually decrease damages?) 2.) Employment Contract – plaintiff could have gotten a comparable job and didn’t do so.
  - 2.) *Consequential Damages* (anticipated profits)
    - Recoverable ONLY IF FORESEEABLE by both parties and in contemplation of both at time of contract
    - P saying because you breached, something else BAD happened
    - “Special damages” that do not arise in every situation
  - 3.) *Economic Waste*
    - Example, contracts involving work done on land, and when work is done, worker agrees to restore the land – plaintiff wants cost of doing what the contract said would be done, even though it will cost more to restore the land than the land is worth
- You can get both expectation damages and consequential damages together

**RELIANCE DAMAGES?**
- *Court putting non-breaching party in as good a position as before the contract was made*
- Includes out-of-pocket costs, etc.
- Used when too difficult to figure out expectation damages or in promissory estoppel claims

**RESTITUTION DAMAGES?**
- *Defendant had to pay Plaintiff back for the value of any performance that he has benefited from by P’s performance when restitution is greater than contract price*

**PUNITIVE DAMAGES?**
- NEVER for breach of contract, not under common law or *UCC*
- Only awarded when there is additional tortuous conduct (fraud, misrepresentation, willful deceit)
- Public Policy Reasons
  - Appropriate to award as long as proportionate to actual damage
  - Evidence of D’s wealth is a factor
- Emotional Distress
Available if performance of contract is of such nature that breach would foreseeably cause emotional damage

**CONSEQUENTIAL DAMAGES**
- Damages that occur as a consequence of special facts and circumstances relating to the specific transaction
- May not be within contemplation of breaching party
- May be recovered only if it is established that they were foreseeable to the breaching party at time of contract

**BUYERS’ VS. SELLERS’ REMEDIES (UCC)**
- *Seller’s right to cure*: When an seller has made a nonconforming tender that was rejected by the buyer, the UCC provides the seller with the opportunity to correct the non-conformity. 1.) if the contract time has not elapsed, seller may do this if notifies buyer of intention to do so, or 2.) within a reasonable time after the contract period if the seller believes the tender would be accepted
- *Sellers’ remedies for breach*: 1.) if the buyer breaches before the goods have been accepted, seller may resell to a third party, an may recover the different between the contract price and the subsequent sale, plus incidental expenses, less those that could be avoided. 2.) If the buyer has accepted the goods or they were destroyed after the seller no once had the risk, the seller may maintain action for the price or the contract price
  - Resale of goods, damages for buyer’s non-accepting or repudiation, damages for lost profits, contract price
- *Buyer’s remedies for breach*: if the seller breaches, the buyer may make a reasonable purchase of substitute goods in good faith without reasonable delay, and recover the difference between the cost of the goods and the contract price, and incidental and consequential damages less any expenses saved
  - Recovery of price paid, “cover,” damages for non-delivery or repudiations, specific performance, damages resulting from acceptance of non-conforming goods, resale and offset, deduction of damages from payment due

**ATTORNEY FEES**
- American Rule: everyone pays their own

**VOIDABLE CONTRACT REMEDIES**
- Reformation
- Restitution

**INSOLVENCY**
- Buyer may obtain goods themselves if under certain circumstances where the buyer has made part payment and the seller becomes insolvent (unable to pay debt)