IS THERE A CONTRACT?

MANIFESTATION OF MUTUAL ASSENT: There must be an objective manifestation of mutual assent to a K. Judged by what a reasonable person would understand the parties’ actions to mean.

- At stake is the general issue of freedom from contract. Individuals can refuse to deal or negotiate without liability.
- There has to look like there is a “meeting of the minds” to an objective, reasonable person.
- **OBJECTIVE TEST** (easier than proving subjective intent—leads to greater stability).
  - Subjective assent is irrelevant, assent is judged by objective manifestations of intent (i.e. what you say, do, sign your name to).
  - If a reasonable person wouldn’t understand that your assent to the contract was just a joke, then you’re bound by your actions. (*Lucy v. Zehmer*)
  - Mutual assent has to be at the time of the contract; doesn’t matter if that changes later on. There must be mutual assent on all the essential terms of the K (parties, subject matter, time for performance, (price)).

Valid Offer?

THE OFFER: Creation of the power of acceptance

- At stake is the general issue of freedom from contract. Individuals can refuse to deal or negotiate without liability.
- RST §24: Offer is a proposal by one party to the other manifesting a willingness to enter into a bargain made in such a way (by words or conduct) that the other party is justified in believing that his assent will create a binding contract.
- **Elements of an offer:**
  - **Manifestation of present contractual intent**
    - Would a reasonable person understand it as an offer? Look to the words used, circumstances, clarity of terms, made to individual? or group? written K contemplated?
  - **Certain & Definite Terms expressly stated or implied**
    - includes parties to K, subject, time, price…
    - If the price is ambiguous, no K. If the price is omitted, then FMV.
  - **Communication of such to the offeree**
  - **Without clear and definite terms, there is no offer.** A request to get an offer is not itself an offer. When you know that a lot of people are being solicited, you know the offer is not being made to you.
Advertisements can be binding when there is clarity as to who is being solicited and performance is definitely promised for something particularly requested in the ad. Look for specific terms and commitments. (Lefkowitz v. Great MN Surplus Store)

Manifestation of intent to make an offer is controlling; not whether the word “offer” is used.

Preliminary negotiations, price quotes and solicitation of bids are NOT offers. Careful, hard to distinguish. These can not be “accepted,” the response is usually the offer.

Valid Acceptance?

- Elements of acceptance:
  - Only the offeree may accept (or an agent of the offeree)
  - Mirror image rule: acceptance must be for exactly what was offered- unequivocal & unqualified

- UCC Differs-§2-207:
  - MODIFYING TERMS:
    - Generally the UCC will find a contract, unless the expression of acceptance is made conditional on the acceptance of the new terms proposed (in other words, the only times that it will be considered a killer of the original offer is if it says something like “unwilling to proceed with the transaction unless terms are accepted).
  
  - ADDITIONAL TERMS:
    - If one party is a non-merchant, then they must expressly agree to the new term.
      - shipment of goods with additional terms should be considered an offer if it includes opportunity to review and return. (computer cases)
    - If both are DIGOTEKs, then the additional term is in unless it’s a (1) material alteration or (2) the offeror does not object within a reasonable period of time.
  
  - CONFLICTING TERMS
    - Term is eliminated and filled in with a UCC gap filler if necessary.

- Bilateral Ks: would a reasonable person see a promise for a promise? offer can be revoked before offeree sends acceptance reply. (promise for a promise)

- Unilateral Ks: beginning performance = acceptance; offer can be revoked prior to beginning of performance. (promise for performance; acceptance when fully performed, but offer held open when performance begins)
• When performance can be acceptance, notice of acceptance need not be given. Just begin performance.

- Where an offer requires written acceptance and execution by specific parties, no other method of acceptance will be enforced. Offeror is the master of the offer and has complete control over the rules. (One signatory didn’t sign K- no K.)

- An offeror can revoke an offer up until the acceptance has been mailed (mailbox rule). An uncommunicated intention to accept is not an enforceable acceptance. (Hendricks v. Behee- told agent that offer was revoked before agent could tell him that they had accepted).

- Order forms are offers, to be accepted by the seller. Computer confirmations are not acceptances.

- **UCC §2-206(b):** Seller may accept by promising to ship or by actually shipping. Partial shipment/part performance is not an acceptance if the seller notifies the buyer that the partial shipment is only an accommodation (consider a counter-offer)

- When an advertisement makes a clear and definite offer with express terms for acceptance by performance, performance is enough to accept. (Carbolic Smoke Ball)
  
  • An advertisement that makes an offer to which performance can be acceptance is bound once performance occurs. It is irrelevant that the advertisement wasn’t the only reason for the performance. (Broker who got companies together).

- However, you cannot purport to accept an offer which you did not know about at the time you performed. (Jewish War veterans advertisement).

- **_rule:**
  
  o **An offer** is valid upon receipt by the offeree.
  
  o **Acceptance** is valid once it is sent to the offeror, unless offeror specifies otherwise. Once an acceptance has been mailed, neither party can revoke without breach. *(for bilateral promises)*
    
    • Once an acceptance has been mailed the parties are bound, the offeree can’t fedex a rejection and hope it’ll stick.

  • **Acceptances under an option contract** is valid upon receipt.
    
    o Counter-offers are valid upon receipt.
    
    o Revocations of offers are valid upon receipt.

- **Acceptance can be silent** only when (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 silence will be manifestation of intent.

  • when parties have **instituted a pattern** of silent acceptance, and the offeree has given the offeror reason to understand silence as acceptance, there is acceptance unless there is an affirmative rejection of the offer.

  • An implied contract can arise out of a **regular course of dealing** between DIGOTEKs.
- When an offeree accepts goods and keeps them.

**Consideration?**

**BARGAIN REQUIREMENT:** An assumption is that the individual bargainers will define their wants in a rational way & seek to satisfy them through voluntary exchange.

- Consideration is a way of ensuring that people voluntarily enter into the K
  - A promise is supported by consideration if: (1) **detriment to the offeree** (gives up something of value or circumscribes his liberty); or (2) there is a **bargained-for exchange.**
  - A gratuitous gift will not be enforced; must be some **detriment to the recipient or benefit to the promisor.** (brother-in-law who kicked his sister to the curb)
  - Business situations where one party has not really promised to do anything or give up anything will not be enforced.
  - Forebearance from doing something can be consideration (i.e. promise not to work for a competitor)
  - The consideration must be **bargained for,** there must be a bargained exchange (guy who tricked his wife into signing away his debt to her).

**SUFFICIENCY OF EXCHANGE**

- Consideration need only be **sufficient** to constitute an obligation that didn’t exist before the bargain; not necessarily adequate. (dead husband leaves house to wife if no remarriage and pay $1/year).
  - However, **nominal consideration,** that is, in name only with no true intention to hand it over or an extreme disparity in value is not acceptable. There must be some real consideration... a peppercorn at least; as **long as it’s bargained for** and is a true benefit to the promisor. . (Whore who got paid and had house bought for her claimed she gave consideration).
  - The fact that nominal consideration is **evidence of no real bargain** but it is not conclusive. If the promisor essentially **made a gift,** as opposed to a promise that's part of a bargain, then the bargain requirement is not met and there is no K.
  - Sufficiency means **either benefit to one party or detriment to another;** usually it's dual consideration. Detriment includes forgoing a legal right to do something. (uncle promised $5K if nephew would stop drinking)
  - **Ideas:** novelty is not necessary to derive value from consideration. Consideration must be **valuable to the other party at the time of the agreement;** it is irrelevant if it turns out to be less valuable. (Prudential computer system idea).
  - Inadequacy of consideration is never a bar to the formation of the contract unless it is a “gross inadequacy” resulting from a bargain that takes advantage of unequal bargaining power. **An extreme disparity in value is evidence that the consideration was not bargained for; Unconscionable Ks lack consideration.** (really expensive fridge sold to poor guy).
A promise to withhold a claim is sufficient consideration if it is valid or believed to be in good faith. (bastard child claim let go of).

However, if the promisor knows the claim to be invalid, it is insufficient consideration.

Words of condition in a charitable donation is consideration because it benefits the promisor. (Allegheny college case). A conditional promise is sufficient consideration as long as the condition does not give the offeror the alternative of canceling the obligation.

Moral obligations are not sufficient consideration (love for brother, guy who saved your friend’s life…). There must be some direct economic benefit to the promisor.

Illusory promises where the K can be terminated by one party at will without notice are not supported by consideration and are unenforceable. They do not commit the promisor at all.

An implied promise to use reasonable or best efforts in an employment situation is sufficient consideration. (Lady Duff case).

Promise to perform a preexisting duty is not sufficient consideration.

**PREEXISTING DUTY RULE:** look out for this in construction cases.

- UCC §2-209(1): Performance or promise to perform a preexisting duty does not constitute consideration; unless otherwise expressly provided. **BUT:**
  - Under the UCC, modifications to a preexisting contract can be made though without further consideration, DIFFERS from CL a little bit.

- RST2d §89: Promise modifying a duty under a K is binding if (a) modification is fair & equitable in view of circumstances not anticipated by the parties when the K was made.
  - A promise to do what one is already legally bound to do is not sufficient consideration. **Additional consideration is needed for modification of a K.** (lessees go bankrupt, modify lease, L sues for back rent).
  - A creditor’s promise not to require payment in full is unenforceable for debt already owed.
  - A promise to give a reward or bonus to do what one has already contracted to do is not enforceable.
  - An agreement to render the exact same services as originally agreed to is not sufficient consideration. There is no enforcement of the modification when one party takes unjustifiable advantage of the other party to get more consideration. (Alaska Packers case)
  - However, when conditions change unexpectedly & modification is made voluntarily (non-modifying party has other available alternatives to choose from), then K modifications can be made for no further consideration. (Garbage guy, more homes in area).

**MUTUALITY OF OBLIGATION**

- UCC §2-204(1): a K 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 K.
- A K can only be enforced when both parties are bound by the contract (i.e. K for “buy as much as I want to buy” is not binding on one party, so it is not binding on both and thus is nonenforceable).
  - However output (you’ll take everything I’ve got) and requirements contracts (everything I need I’ll get from you) are binding on both sides and are thus enforceable. One party has restricted their choice to go elsewhere. However, anything less than everything is unenforceable because it is an illusory promise.
- An implied promise to use good faith is enough to show mutuality of obligation (fashion design guy, requirements/output contracts)
  - UCC §2-306(2): can be implied that seller uses best efforts to supply and buyer uses best efforts to promote the sale.

**MORAL OBLIGATION = PROMISE + ANTECEDENT BENEFIT**

- One who voluntarily performs without expectation of getting paid cannot sue for payment. (deadbeat dad promised to pay son’s caretaker after he died, but then didn’t).
- A bare promise is only moral obligation and is unenforceable; gratuitous benefits are unenforceable as Ks. (promise to pay back a friend for money he has spent on cows).
- A humanitarian act which leads to a oral obligation is not sufficient consideration (woman took an axe for a wife-beater).
  - Minority view: a moral obligation supported by a material detriment to one, and a material benefit to another is sufficient consideration. (one guy saved the other from death; was severely injured).
- A quasi-contract is an obligation imposed by law because of the conduct of the parties or some special relationship between them or because one of them would otherwise be unjustly enriched. It’s an implied-in-law contract that allows the π to recover for a benefit conferred on Δ.
- comes up a lot when K does not satisfy the SOF or some other reason that makes it void and one party has already partially performed or detrimentally relied on it.
- Elements of quasi-contract recovery:
  - conferred benefit to Δ
  - expected to be paid
  - not a volunteer
  - avoid unjust enrichment to Δ
  - ✗ there can be no implied-in-fact K when the parties did not intend to form a K; there can be no implied-in-law contract (quasi-K) when the party acts voluntarily. (Bailey v. West)

**Is there a quasi-K? Can plaintiff claim promissory estoppel?**

*exceptions to the consideration requirement:* modified contracts under the UCC, option contracts (recital only necessary), promissory estoppel.

**PROMISSORY ESTOPPEL: Promise + Unbargained for Reliance**
- RST §90: Promise is enforceable without consideration if promisee foreseeably and actually relied on the promise to his detriment.

- Can substitute for bargained-for consideration if:
  
  - reliance is foreseeable
  - reliance occurs
  - reliance was reasonable
  - promisee suffered a detriment
  - enforcement necessary to prevent injustice.

☑ Often applied to gifts, charitable subscriptions, subcontractor bids made temporarily irrevocable, negotiations made in bad faith, reliance on illusory promises; promises to pay pensions

- Reliance on an illusory promise is not sufficient to form a K, but it is enough to form a promissory estoppel claim. (guy who was supposed to be hired, quit his job and then the employer failed to hire him).

- When someone relies on a clear & definite promise to his own detriment and promisor's induced reliance on the promise, it would be unjust not to assert promissory estoppel. (Cowles Media Co.- gave up their anonymous source).

- Usually π will only get the amount that the reliance cost him, reliance and restitution damages, not expectation. Puts π back where he was before the bargain.

**WHAT ARE THE TERMS OF THE K?**

**Do the terms of the acceptance vary from the offer?**

**TERMINATION OF THE OFFER: Destruction of the Power of Acceptance**

- RST §35: Termination is (1) rejection or counteroffer by the offeree; (2) lapse of reasonably long time; (3) revocation by the offeror; (4) death or incapacity of the offeror or offeree.

**COUNTEROFFER: Killer of the Original Offer**

Death of an offer = actions of parties; rejection by the offeree; counteroffer by the offeree (common law; not necessarily under UCC).

Additional conditions supplied by the offeree which are implied in the original offer or if the offeree has a legal right to the condition, it is not considered a counteroffer.

- A proposal to accept an offer on modified terms kills the offer. Now, the original offeror has to accept for their to be a K.

- The offeree can not then accept the terms of the original offer once he has killed it.

- You want to expressly state that you are not “accepting or rejecting your proposal” if you want to give an independent proposal.
In a K for the sale of goods, when the objective manifestations of the K express intent to be bound there is a K even if the writings don’t agree on all the terms. The court will look at what was agreed on and fill in the rest.

- **UCC Battle of the Forms: UCC- 207**
  - See page 2.
- **UCC Gap Fillers: UCC- 207**
  - The UCC will fill in gaps in price, place, time, and warranty. It will not fill in a gap in subject matter or quantity. Failure to agree on these latter two terms will result in the K being deemed unenforceable.
  - **Price**: reasonable price at the time of delivery.
  - **Place of delivery**: seller’s place of business
  - **Payment**: Due on delivery

**REVOCATION OF THE OFFER**

Revocation of the offer can be made by a 3rd party or by circumstances which would lead a reasonable person to believe there was a revocation.

If offeror behaves in a way inconsistent with an intention to enter into the K & the offeree learns indirectly that the offeror has taken such action, there is a revocation.

**However**, mere negotiations with a third party even though an offer has been made is **not** sufficient to constitute a revocation.

**IRREVOCABLE OFFERS**

- General rule: an offer is revocable even if the offeror expressly promises not to revoke or gives a definite time period for acceptance.

- Exceptions:
  - **Firm offers** under the UCC, a **signed, written** offer to buy or sell goods which states explicit assurance as to the time period for acceptance (3 months max without consideration), is not revocable (UCC §2-205). **UCC requires no consideration nor recital of**. When it’s the offeree’s form, the form must be signed by the offeror.
  - **Common Law**: If the offeree gives consideration for offer to stay open = option contract. Offer is then not revocable for the period of time bargained for. (Modern trend is that recital of consideration is enough).
  - **Promissory Estoppel**: An offer which the offeror reasonably should expect to induce action or forbearance and which does so induce is irrevocable where necessary to prevent injustice.
    - Where substantial performance has already begun the offer must remain open as long as the offeree continues to diligently perform. Preparations to perform are not sufficient.

- An option is itself a contract, there is no more open offer. Any new proposed terms, rejection, further negotiation is all independent. and does not repudiate the contract being bargained for.
- **RST §87**: An offer is binding as an option if it is (a) in writing, (b) requires consideration, and (c) proposes an exchange on fair terms within a reasonable period of time.

- An offer of a unilateral contract can be revoked at any time prior to performance no matter how short the time is between the offer and acceptance.  
  - If \( \pi \) accepts \( \vartriangle \)'s offer that contains a mistake, the burden falls on \( \vartriangle \) via promissory estoppel—the offer can not be revoked because of a mistake once accepted. **The terms of the contract are those that reach the offeree**—a fuck up in the transmission is the offeror’s problem. (Western Union case).

### INDEFINITE, INCOMPLETE AND DEFERRED TERMS

#### DEFECTIVE FORMULATION AND EXPRESSION OF AGREEMENT

- There is no meeting of the minds and thus no valid contract when each party interprets the same term materially differently without knowledge of the other’s interpretation. *(Peerless)*

- No contract if parties have misunderstanding as to what they’re agreeing to, no contract if (1) parties each have a subjective belief about a term, (2) term is a material one, (3) neither party knows or has reason to know of the misunderstanding. **Mutual mistake**.
  - However, when the offeree doesn’t understand the terms because he fails to read them he assumes the risk; if terms are misrepresented the contract terms then favor the offeree.

- If one party’s understanding is less reasonable than the other’s, the contract will be construed to the benefit of the reasonable party, or it may be construed against the offeror who has an obligation to make the offer clear. *(surge protector case)*

### INDEFINITE AGREEMENTS

- For a contract to be valid, agreement to terms must be certain and explicit. If a contract is present, the court can imply terms from the circumstances.

- An advertisement can not be construed as an offer where definite terms are not included in the ad *(Lefkowitz case again – 1st ad re: coats worth over $100—not specific enough)*.

### INCOMPLETE AND DEFERRED AGREEMENTS

- If the parties have simply negotiated but have failed to agree with sufficient certainty on essential terms, there is not yet a contract.
  - However, if an agreement has been reached to negotiate in good faith, that agreement can be enforceable as evidence of intent to be bound.

- **If there is an objective intent to be bound, the courts will fill in the gaps.**

- **UCC §2-304**: even though one or more terms are left open, a contract for sale does not fail if the parties intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy. UCC will fill in terms for price, delivery, time, etc. UCC implies good faith.

- Courts can fill in a term as long as there is an objective method to determine the term; can look to custom of the industry. *(MGM K did not specify start date of filming—courts inferred it)*.
- However, a mere agreement to agree in which a material term is left out is too indefinite, and is not enforceable when there is no objective method to determine the term. People are not bound to accept fair market value.

- Courts can impose a reasonable price when the parties have a longstanding course of business with each other and when they have an intention to be bound. Terms can be implied from their regular course of business. *(Oglebay Norton Co.)*

- TINALEA (this is not a legally enforceable agreement) clauses preclude a finding that the parties intended to be bound; no K. Letters of intent merely set the stage for future negotiations.

- Parties who rely on incomplete or indefinite agreements can recover for detrimental reliance on the K. When an agreement to agree induces detrimental reliance by one party which is reasonably foreseeable to the other, PE applies and reliance damages can be awarded. *(Hoffman v. Red Owl stores)*

**DUTY OF GOOD FAITH: RESERVED DISCRETION**

Instead of specifically defining risks or desired performance standards, parties may adopt a general standard of good faith, leaving it up to one or both parties to exercise discretion. i.e. output and requirements Ks and Ks which adequacy depends on the satisfaction of one party.

- Under the UCC 2-209, a modification is limited only by the general obligation of good faith: 1) was conduct consistent with reasonable commercial standards of fair dealing? and 2) were the parties seeking to modify the contract by an honest desire to compensate for commercial exigencies?

- Employment agreements are usually terminated at will but have an implied covenant of good faith, and express language of company policies can be considered. There is an implied covenant of good faith in every contract, can’t terminate at whim. *(UCC 4-103)* *(Bank terminates credit line for no good reason)*

- Output and requirements contracts requires good faith that the seller will put out as much as possible *(breadcrumb case)* and that the buyer will require as much as possible. That’s the consideration.

- If acceptance is made conditional on the buyer’s satisfaction, buyer is liable for damages if he claims dissatisfaction in bad faith and rejects the seller’s tender. *(Potato chip case)*

- **Accord and satisfaction agreements:** UCC §2-207: a party who with explicit reservation of rights performs or promises performance in a manner demanded by the other party does not thereby prejudice the rights demanded. Under the UCC, a creditor can accept partial payment without implied waiver of debt.
  
  - CL- can’t only collect part of debt.

**Is one party trying to introduce evidence to either supplement or contradict a written contract?**

- 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.

- Generally, where an agreement has been reduced to writing which the parties intend as the final and complete expression of their agreement, evidence of an earlier oral agreement is not admissible to alter the terms of the K. *(the law favors written contracts)*
- How can the judge tell if the K is final and complete (total integration):
  - face of the agreement
  - any relevant evidence
  - merger clause “this is a final and complete agreement”

- Exceptions to the general rule:
  - Evidence of an oral collateral agreement will be received if it does not contradict terms of the written K and must be of the nature to ordinarily be left out of the written K. **It has to be a totally separate deal.** *(Ice house case- Mitchell v. Lath)*
    - **Collateral agreements** are subsequent oral agreements supported by the same consideration or prior agreements supported by new consideration.
  - RST §240-1(b): Proof of a collateral agreement is permitted if it is “such that an agreement as might naturally be made as a separate agreement by parties situated as were the parties to the written K.”
  - UCC §202: Terms which certainly would have been included in the written agreement must be kept from the trier of fact. *(Follows the common law rule).*
  - The proponent of parole evidence may claim that the written agreement was “partially integrated,” i.e. that the parties intended the agreement to be definite only on the subjects therein. Therefore parole evidence should be heard on subjects not included.
  - when the K is silent as to a subject or term, there are two views: 1) that it was left out on purpose, so parole evidence would contradict, or 2) it’s not there, so parole evidence can’t contradict it.
  - The more inconsistent the parole evidence is with the K, the more likely it would have been included in the written agreement.
  - A written agreement may be conditioned on an oral condition precedent, so unless the condition contradicts the written agreement, evidence of a condition precedent is admissible. *(Williams v. Johnson- written K for home improvements conditioned on prior condition of getting funding).*
  - Parole evidence concerning the validity of the K (mistake, duress, illegality) will always be admissible.

Is there an issue with the interpretation of the K?

- If an agreement is ambiguous on its face or becomes so in performance, parole evidence will be admitted to clarify the party’s intent, unless the ambiguity is so fundamental that there is no way to figure out intent of the parties.
  - Modern trend is to allow more parole evidence. Problem: if courts are too liberal with this they will open up the possibility of varying the true intent of the parties at the time of the K.
- Ambiguous term will generally be construed against the drafter.
- If the parole evidence claims an inconsistency which is not a reasonable interpretation of the language used in the K, it can not be admitted. (*A. Kemp Fisheries*—sold boat that didn’t freeze fish, oral agreement to have working freezer was not included in K).

- If the court is unable to determine the intent of the parties by examination of K’s terms, may look to standard industry practice and custom. Courts can look to course of dealing, course of performance, and usage of trade. (*Stewing/Fryer chicken case*)

- Terms written in to the written contract trump pre-printed terms.

- An exclusionary clause hidden in an adhesion K must be made plain and clear and will be judged in light of the reasonable expectations of the signer.

**Do the facts involve any warranties?**

**To disclaim a warranty:** 1) must be in conspicuous writing; 2) there has been a full examination (there is no implied warranty as to defects reasonably discoverable upon examination).

- **Express**
  - UCC §2-313: ways in which a seller creates an express warranty: (1) an affirmation of fact or promise which becomes basis of the bargain; (2) description of the goods which is made part of the basis of the bargain; (3) sample or model of the goods which becomes part of the basis of the bargain.

- Representations or affirmations of fact create express warranties that those representations are true. Seller’s opinion or affirmation of value is not a warranty.

- **Implied**
  - Two implied warranties:
    - **Implied warranty of merchantability:** applies to DIGOTEKs- it’ll work for the ordinary purposes for which such goods are used.
    - **Implied warranty of fitness for a particular purpose:** when seller has reason to know specific purpose good is to be used for and knows that the buyer would be relying on his opinion, and buyer relies on seller’s judgment.

- A warranty will be implied even when waived when it would otherwise be contrary to public policy. (*Henningson v. Bloomfield Motors*—car was a piece of crap, signed waiver of warranty of merchantability).

- Where a limited warranty fails its essential purpose the limitation will not be enforced.

**Does the K involve more than two parties?**

- **assignment:** transfers rights to another party.
  - the motives of the assignee are irrelevant.
  - while the default rule is assignability of K is allowed, a K will not be enforced if assigned in the face of express language to the contrary; unless the assignee has already fully performed or the right to sue for damages has been assigned (can always be assigned).
- When there is payment of consideration for an assignment, it can not be revoked.

- If it is a gratuitous assignment it can be revoked by (1) death of the assignor; (2) revocation by the assignor; (3) subsequent assignment by the assignor.

- Once the payor receives actual notice of assignment of debt, payor will be liable for payments subsequently paid to the debtor (creditor beneficiary situation).  
  (Continued to pay poor Mrs. Porter)

- delegation: transfers duties to another party.

  - 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 or control the acts required by K.  
    No delegation relieves the original party for breach."
    
    - Under UCC 2-210 an delegation may not be made to a competitor without express agreement.
    - Contracts which call for the performance of special skills are normally not delegable. Construction contracts are usually delegable.

- 3pbs

  - Person whom the promisee in a K intends to benefit
  
  - A third party who is a member of a class for whose benefit a K was made can enforce the K while it remains unrescinded.  
    (tenants can sue for L’s violation of government standard; accident victim can sue insurer).
    
    - However, where one party promises for consideration to pay a 3rd person, the law automatically establishes a privity between that party and the 3rd person regardless of the 3rd person’s knowledge or acceptance of the benefit. In that case, the promisor can not rescind the K without the 3rd person’s consent. In other words, original parties’ power to modify or discharge terminates when the 3ob rights vest (1) changes position in reliance; (2) brings suit. (3) manifests assent to the K.  
      (Tweedale v. Tweedale)

  - An intended third party beneficiary can sue for breach of promise to perform professional services that would have made him the beneficiary.
    
    - An incidental beneficiary can not sue.

   CAN THE K BE ENFORCED?

Does the Statute of Frauds apply?

Anything within MY LEGS has to be in writing (acceptable: printed receipt of sale, integration of writings which refer to each other)

- A memorandum satisfies the SOF rule if: (1) reasonably IDs the subject matter; indicates that a K has been made; (3) states with reasonable certainty the essential terms; (4) signed by party to be charged.

Non compliance with the SOF makes the K voidable, not void.
- RST §208: May consist of several writings (a) if they refer to each other; (b) they are physically annexed; (c) they appear to refer to each other.

Marriage, contracts that can’t conceivably be completed within one *Year*, *Land*, Executory authorization, *Goods* over $500, Surety

**MORE THAN ONE YEAR**

- If it is at all possible for the K to be completed within a year, even if it is unlikely, no written K is necessary.

- It is the possibility of performance, not the possibility of discharge that rules.

- If K has a choice of performances, K is not within the SOF if *any* can be performed within a year.

- The K has to expressly state that the term of the contract is to span over one year’s time.

**GOODS OVER $500**

- UCC §2-201:
  
  o **Exceptions to the SOF rule:** (a) When buyer receives & accepts goods; (b) partial payment has been made (contract is enforced as to what has been partially paid for; (c) specially manufactured goods which the seller has began making; (d) dealings between DIGOTEKs (dealers in goods of the kind) without written objection; (e) admission to the formation of a K.

- Under the UCC rule, writing just has to show there was a K for sale formed and is signed by the party against whom enforcement is being sought. *Terms need not be definite.*

- UCC definition: all things moveable at the time of sale (things that are not affixed to realty) other than money, securities and things in action.

- Ks which *combine goods and services* do not fall into the SOF rule unless the value of the goods is clearly over $500. Services not included.

**EXCEPTIONS TO THE SOF RULE:**

- When one party has fully performed on the oral agreement, SOF is not an issue. Performance is enough evidence of a K.

- When GOODS are specially manufactured for a buyer and they can not be resold, SOF is not required.

- When there is an admission by the parties that a K had been made.

- When payment has already been made and accepted.

**Is there any reason the K would be void or voidable?**

- **Capacity?**

  - A proposed K with one party that is legally incapacitated is void or voidable; legally capacitated is bound by the K, incapacitated is not.
- Ratifies (no longer voidable) when capacity condition changes.
- Incapacitated are always liable for **reasonable value** of necessaries (food, shelter, etc.) or else people would never sell to them.

**INFANCY (usually less than 18):**
- K is voidable at the option of the minor; minor can enforce a contract against an adult.
- Minor can rescind a K any time before he turns adult age, does not have to return the other party to the status quo.

**MENTAL INCOMPETENCE:**
- Defined as unable to understand the nature and consequences of a K; other person must have reason to know of the condition.
- K is voidable by the mental person.
- Where K is made on fair terms and other party has no knowledge of the mental condition, power of avoidance **terminates to the extent the K has been performed** and avoidance would be unjust.
- Presumption of competency must be overcome with by clear and convincing evidence (i.e. prior/subsequent condition, physical condition; providency of transaction; relation of trust between parties). **Lucid intervals** are enforced.

• **Duress?**
- Any wrongful act or threat by one party which compels or induces the other party through fear to enter into a K against his will makes the K voidable due to duress.
- The fact that one party is in desperate economic need of that which the other has to sell is in itself not duress, however, it may be when the one party puts the other in that desperate economic situation.
- **Threatening to breach a K where the threat does not leave the other party with any other reasonable options and where expectation damages would not have been enough,** there is duress because the threatened party was deprived of its free will. *(Alaska Packers; Loral- navy contracts)*
- A threat to discontinue future business is not sufficient to show economic duress. *(Machinery Hauling v. Steel)*

• **Illegality/Contrary to Public Policy?**
- A promise or term of an agreement is unenforceable on grounds of pub pol if legislation says its unenforceable. Neither party may enforce it, unless they did not know of illegality and detrimentally relied on it.
- A court will not knowingly aid the furtherance of an illegal K but will leave the parties where it finds them. A court will not knowingly aid the parties to a K who are trying to circumvent federal law by contracting around paying taxes.
- Even if the K looks legal on its face, evidence as to its illegality will be admissible. *(Homami v. Iranzadi)*
- The court should choose to reasonably alter the K where possible to make it enforceable (non-compete clause can not be overly broad); but only if it believes it was drafted in good faith. Noncompeting clauses will only be enforced when they are necessary to safeguard employer’s trade secrets or customer list, not too broad or long.
- Unmarried cohabitants are not precluded from asserting property and contract claims against the other. Pub Pol does not preclude an unmarried cohabitant so long as claim exists independently of the sexual relationship and is supported by valid consideration. (*Watts v. Watts*)

- **Fraud or Misrepresentation?**

  - **Fraud:** intentional misrepresentation of fact that is relied upon to the detriment of the disadvantaged party.
  
  - **Elements of proof:** (1) Doesn’t have to be an intentional misrepresentation; (2) must be a material fact; (3) justifiable reliance on the misrepresentation.
  
  - **π can only claim misrepresentation when he had relied on the misrepresentation.** There is no undue influence without showing that they had confidence reposed in the other party.
  
  - **There is no duty to inform when access to the information is equally available to both parties.** (Tobacco buyer was silent as to price increase)
  
  - **A statement of opinion by a party with superior knowledge may be regarded as a statement of fact, although if the parties are on equal terms, misrepresentation of opinion is not a defense.** (*Arthur Miller dance classes*)
  
  - Usually only affirmative statements of fact can serve as a misrepresentation, a failure to disclose generally does not serve as one. However, a **seller has a duty to disclose material facts if (a) necessary to prevent a previous assertion from being fraudulent or a misrepresentation; (b) would correct a mistake as to a basic assumption of the K, and failure to disclose would be a failure to act in good faith and fair dealing, (c) correct mistake of a writing or (d) entitled to know because of relationship of trust (fiduciary duty)** (sellers of a house fail to disclose termite problem= bad sellers!)

**Mistake?**

- **Mutual Mistake:** A K can be rescinded when both parties make a mistake about a **basic assumption on which the K was formed;** when that mistake has a **material effect on the agreed exchange;** and **no one assumed the risk of mistake.**

  - When there is a **Unilateral Mistake** (i.e. only one party is mistaken), the 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.**
  
  - Mistake occurs when one or both parties state clearly what they mean in the K but they make a mistake re: one of the essential terms.
  
  - When a mistake is not made intentionally or grossly negligently and the mistake was material to the K and the mistake-maker gives notice to the other party of the mistake and enforcement would be unconscionable, the contract can be rescinded due to the mistake.
  
  - Mistake has to effect the subject matter of the K, not the value of the K.
  
  - Even when all of those elements are satisfied, a court must enforce the agreement if there if one party assumes the risk of mistake (i.e. signing an “as-is” clause). (*Septic tank discovered after signed “as-is” clause—too bad buyer*).
  
  - **An innocent receiver is not liable for relying on a fucked up telegram offer if he believes it to be correct in good faith.** If receiver accepts those terms, there is an agreement and the offeror has to perform. The offeror then has to seek redress from the telegram company; sender assumes the risk. (*Western Union case*)
Unconscionability?

- If the court finds a K to be so unfair to one party to be unconscionable the court may decline to enforce the K in part or in whole.
  - Procedural unconscionability- one party induced the other party to enter the K without meaningful choice.
  - Substantive unconscionability- the clause or K itself is unfair (excessive price, remedy waiver, waiver of warranty)
  - Usually only enforced for consumers—concern is that consumers and sellers have unequal bargaining power that sellers can take advantage of.

- **adhesion Ks:** usually a preprinted document containing non-bargained for clauses disguised in fine print, exceptionally favorable to the drafter and offered to the other party on a take-it-or-leave-it basis.

- A waiver of remedy must be made clear and explicit in the contract. When a K is expressed in clear and explicit terms, the small type not easily seen not in the body of the instrument and not referred to in it is not necessarily to be considered part of the K.

- A K will be enforced if the party didn’t know of the clause because they didn’t read the K before signing. However, where there is a disparity in bargaining power which is taken advantage of with commercially unreasonable terms with absence of meaningful choice to the disadvantaged party, the K can be held unenforceable because of unconscionability. *(Williams v. Walker Thomas Furniture)*

- Gross inadequacy of consideration as seen in an excessive price situation is an unconscionable term which the courts can refuse to enforce. Courts set reasonable value based on FMV. Price alone is not a great UCS argument, complex clauses which seek to take advantage of those with less bargaining power is better. *(Jones v. Star Credit Corp.)*

- A party which uses an adhesion contract has a responsibility to make clear unusual or UCS terms within. Burden on $\Delta$ to show $\pi$ had knowledge, understanding & meeting of the minds where $\pi$ has significantly less bargaining power. *(Weaver v. American Oil)*

  - When a party shows that the K was in fact UCS due to prodigious amount of bargaining power on behalf of one party which is used to that party’s advantage and is unknown to the other party causing him great risk and hardship, the K provision or the entire K should not be enforceable on grounds of public policy.

- On the other hand, where the parties have equal barg power as they tend to in commercial transactions, a K provision if signed will not be found UCS if the disappointed party had an opportunity to understand the clauses therein but neglects to do so. *(Zapatha v. Dairy Mart)*

Is a party discharged from the 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.**

Parties may be discharged from the K if performance is 1) impossible; 2) because of changed circumstances the fundamental purpose has been frustrated; or 3) performance is not impossible but would be so financially burdensome that it is impracticable.

- **Impossibility/Impracticability?**
3 types of impossibility: (1) destruction of the subject matter (must be essential to the purpose of the K), (2) failure of the agreed-upon means of performance, (3) death or incapacity of a party.

- **Existing Impracticability**
  
  o When a subject is said to exist, but in fact it does at an excessive and unreasonable cost to one party which it had not bargained for nor reasonably expected, the duties will be discharged. In legal contemplation, impracticability is impossibility, cost must be extreme difference. *(Gravel underwater)*

- **Supervening Impracticability** (something happens after the formation of the K to make K performance impracticable).
  
  o In every K there is an implied condition that the subject exists when the subject matter ceases to exist through no fault of the parties involved, the duties are discharged. *(Music hall burning down)*
  
  o When the court believes that one party could have reasonably foreseen and controlled the risk, the court will assign the risk to that party. Impracticability due to a third party is not an excuse if one party had control over the risk that 3rd party would bear on the K. *(molasses distributor)*

  o **When a party is claiming impracticability, it must show that 1) event made performance impracticable; 2) nonoccurrence of that event was a basic assumption of the K formation; 3) the occurrence of the event was through no fault of the parties involved; and 4) no party assumed the risk.**

    - UCC §2-615a (follows CL): seller’s non-delivery will be excused if performance has been made impracticable by the occurrence of an event which nonoccurrence was a basic assumption of the K.

- When one party assumes the risk, he alone will shoulder the burden of impracticability; Who is the least cost avoider? Who could have reasonably anticipated the risk?
  
  o “Take-or-pay” contracts inherently assign the risk to the buyer. *(Kaiser-Francis Oil)*

- **Frustration of Purpose?**

  Where the fundamental purpose of the K is destroyed by supervening events most courts will discharge the performance. Unlike impossibility, the issue is not an inability to perform, but that it makes no sense to because she will not get the bargained for valuable consideration.

  - There are two basic considerations here; the party claiming frustration of purpose will be more successful if she can prove that the occurrence of the event was unforeseeable and that it totally destroyed the fundamental purpose of the K.

- **Elements of frustration of purpose:**
  
  - Supervening act or event
  
  - Which was unforeseeable at the time of the K formation

  - Avowed purpose was recognized by both parties at the time they contracted. *(Krell v. Henry- King coronation hotel room: WA State Hops Producers, Inc.)*
Are the obligations under the K subject to conditions?

- Promisor is bound to perform only after contingency occurs (condition precedent or concurrent) or only until a contingency occurs (condition subsequent) when there is a conditional duty to performance in the K.

- When there is a concurrent or precedent condition, there can be no breach of duty until one party doesn’t perform.

**Express**

- Look at the intent of the contracting parties and the language used in the K.

- Courts will uphold express conditions. If one party fails to fulfill the condition precedent, the other party has no duty to perform under the K. *(Dove v. Rose Acre Farms- mean bonus program at work)*

- When a condition is expressly included in the K and makes logical sense, the court will uphold the condition.

- A court may find a condition excused where extreme forfeiture would occur and damage to the other party’s expectations from non-occurrence is relatively minor. When the breach of a condition is neither willful nor particularly harmful (i.e. the conditioned party has performed the condition substantially), the court can treat it as a minor breach rather than a breach of the entire K which would release the other side from their duty. Instead the court may award diminution in value. *(Reading pipes asked for and not used).*

- **When there is an express satisfaction condition-** the satisfaction must be generally judged objectively and with good faith. If acceptance is made conditional on the buyer’s satisfaction, **buyer is liable for damages if he claims dissatisfaction in bad faith and rejects the seller’s tender**. *(Potato chip case)*

**Implied/Constructive Conditions: usually in bilateral contracts**

Implied-in-fact conditions: conditions which parties would have agreed to had they thought about it.

Implied-in-law conditions: some conditions may be implied by the courts in the interest of fairness.

- Examples: 1) earlier performance condition precedent to later performance; 2) simultaneous performance is concurrent condition; 3) performance that takes a while is a condition precedent to the other.

- **Substantial performance:** Where complete performance is a constructive condition to the other’s counter performance, the condition may be excused if the party has rendered substantial performance thus the other party still has a duty to perform (& deduct damages for breach). **Each party’s substantial performance is generally a constructive condition to the other’s performance.**

  - In order to constitute substantial performance there must be a **good faith intention to comply** and the defects or remainder must be unintentional defects that do not harm the essence of the contract.

  - When one has rendered substantial performance he is entitled to payment for that performance minus the detriment to the disadvantaged party. *(Britton v. Turner- worked for 9 months of a 1 year contract)*

- **UCC Differs! UCC §2-601: ‘Perfect Tender Rule”** — “no delay or deviation from specifications in K are permitted. Substantial performance is not allowed.” Unless the K involves installments, then its divisible.
- When promises are conditional and dependent, the failure to perform the precedent condition relieves the other of his duty to perform.

- When one party’s performance takes time, the performance that takes time is usually a condition precedent to performance of the other party’s duties.

- Covenants are dependent unless otherwise specified. Neither party can maintain an action against the other without proving performance on his part, or ready-and-willingness to perform his part.

- **DIVISIBLE CONTRACTS.** A contract is divisible if it is expressly made so, or if a reasonable interpretation indicates that a failure to perform one part would not constitute a failure of the basic consideration bargained for. (Contract that looked like one contract was actually two, performance of one)

  - A divisible contract is one in which the parties have divided up their performance into units or installments in such a way that each part’s performance is roughly equal to the compensation for a corresponding part performance by the other party. (multiple contracts that look like one)

- **Have the conditions been satisfied or excused?**

- **Grounds for excuse of a condition:**

  - agreement by both parties

  - conduct by one benefited by the condition which waives the condition
    - When the non-breaching party of a condition continues to perform his side of the K, he waives the breach of the condition by the other party. (*In re Carter*)
    - If the words and conduct of one party reasonably impress on the other that a condition will not be enforced it is considered excused. (*Clark v. West Publishing*)

  - changed circumstances that makes compliance impracticable

  - discharge by the court

**HAS THERE BEEN A BREACH?**

Has the contract been discharged?

- Have the conditions been satisfied or excused?

Has one party materially breached or just partially breached the K?

- 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 shouldn’t have to perform. (battery lead seller didn’t make one payment).

Right to suspend or cancel performance upon prospective inability or breach?
- If there is a **prospective breach**, either a **refusal to perform in the future** (anticipatory repudiation) or **prospective inability to perform**, π can wait until the date set for performance or he can sue immediately. If he waits, he risks the chance that the K will be reinstated. *(Hochester v. DelaTour rule)*

- When inability to perform is certain the party can suspend performance and cancel the K. When unclear, can only suspend and then wait and see.

- A retraction of repudiation can occur until the aggrieved party has sued for breach or changed position materially in reliance on repudiation.

- A repudiatee may not be able to recover if it is shown that he would have been unable to perform his share of the bargain.

- An anticipatory repudiation of a unilateral contract to pay $$ at a certain time does not give rise to a claim for breach until that time comes.

A repudiatee owes a duty to mitigate damages arising from repudiation with a good faith effort and if he fails to do so he will not be entitled to full damages (majority view).

  - If the injured party treats the K as still in force after a repudiation, he waives the repudiation and then can only sue when there is an actual breach *(horse fucking case)*

- **UCC §2-609**: either party has a right to demand “adequate assurances of performance” from the other if reasonable grounds exist for believing the other party’s performance may not be tendered. Unless such assurance can be provided, the asking party can suspend their performance for which he has not already received the agreed return. *(McDonald’s case)*

### WHAT REMEDIES ARE AVAILABLE?

After a repudiation or breach occurs, the repudiatee may not simply ignore it and continue the K, the repudiatee must **mitigate damages** or risk not recovering the total damages (must make a good faith effort).

#### Was there a liquidated damages clause?

- Parties may include provisions in the K limiting or fixing the amount of damages recoverable in the event of breach.

- **Liquidated damages v. Penalty.** A K may include a provision stipulating a fixed, definite sum to be paid in the event of breach. Its enforceability depends upon whether the court finds it to be a valid liquidated damages clause or an attempted penalty.

  1. **Penalty**- if it was intended as a pecuniary threat to prevent breach, or as a kind of security to ensure the other party’s performance.

  2. **Valid liquidated damages clause**- good faith effort by the parties to estimate the actual damages which would probably ensue in the case of a breach it may be enforced

a. Two requirements:

i. **At the time the K was entered into actual damages in the event of breach would be impracticable or almost impossible to ascertain.**

ii. **Amount agreed upon must be a reasonable forecast at the time the K was entered into of fair compensation for harm that would result from a breach.**

   a. Under common law has to be reasonable at the time of the K formation. Doesn’t matter if actual damages result or not.
3. **UCC (2-718)** says that the liquidated damages provisions do not have to be foreseeable at the time the K was formed, but may be enforceable if after breach they prove reasonable relative to actual damages.
   
a. **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. (UCC §2-719) *(Fruit refrigerator case)*

4. **When one side to the contract puts up a lot up front or when it fully performs its obligations,** it is reasonable for the liquidated damages clause to require a large percentage of the K price, and it is not necessarily to be considered a penalty clause. *(United Airlines v. Austin Travel)*

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**Is this a sale of goods?**

- **Apply UCC damages for sales contracts**

  2-713: measure of damages for repudiation by seller is the difference between the market price at the time of breach – contract price. EXCEPT when goods are made uniquely for buyer.

**Are equitable remedies available?**

- **Specific performance and injunction.** Targeted to the person, forces the person to perform, doesn’t allow the person to breach or pay damages.
  
  o **Requirements for Specific Performance:**
    
    - K definite and certain
    
    - **Inadequacy of monetary damages**
      
      1. because injury can not be estimated with substantial certainty, or
      2. money can not substitute for contracted performance.
    
    - Enforcement does not cause great hardship
    
    - Enforcement must be feasible.
    
    - Mutuality of remedy no longer required.
  
  o **Specific performance under the UCC §2-716:** specific performance may be decreed where the goods “are unique or in other proper circumstances. The buyer has a right of replevin for goods identified to the contract if after reasonable effort he is unable to effect cover for such goods or the circumstances reasonably indicate that such effort will be unavailing” *Usually in the case of goods money damages will be adequate. The non-breaching party must prove that he was totally unable to cover the breach.*
    
    - specific performance will be enforced for the sale of goods when the goods are unavailable in the market and π’s business depends on the goods, especially in the case of output and requirements contracts when the item is not in ready supply.. *(Tomato case).*

- specific performance encourages efficient use of resources because parties will bargain with each other, whoever values more will win.

- generally available in land contracts; generally not available in employment contracts.

**Are expectations damages available?** court will try to put π in the position he would have been in had the K been performed. *(including profits sometimes). Consequential damages (anticipated profits) will only be awarded if (1) loss was foreseeable at the time K was made, or (2) special circumstances were communicated to the seller at the time of K formation.
Are reliance damages available?

Court will attempt to put the nonbreaching party in as good a position as before the K was made. This includes out-of-pocket costs, etc. Used when too difficult to figure out expectation damages or in promissory estoppel claims.

Are restitution damages available?

\( \triangle \) has to pay \( \pi \) back for the value of any performance that he has benefited from by \( \pi \)'s performance when restitution is greater than K price.

Are punitive damages available?

- punitive damages will only be awarded when there is additional tortious conduct (fraud, misrepresentation, willful deceit) accompanying the breach or if the breach causes bodily harm. (contractor lied about his work, car seller lied to buyer that car was new).

- When there are good public policy reasons for awarding punitive damages they are appropriate as long as they are proportionate to the actual damage. They should be more than an amount the \( \triangle \) could just factor into their general costs, but not so much as to drive someone out of the industry.

  - evidence of \( \triangle \)'s wealth can be factored in when assessing punitive damages.

- damages for emotional distress may be available if performance of the K is of such a nature that breach would foreseeable cause such emotional damage. (guy’s dead bro never arrived)