

## CONTRACTS AND SALES

- 1) What is a contract?
  - a) **A contract is a promise for the breach of which the law gives a remedy of the performance of which the law recognizes as a duty.**
  - b) Law
    - i) Common law governs contracts.
    - ii) Sales of goods governed by UCC Art 2.
      - (1) Goods = all things movable.
        - (a) So cars, horses, hamburgers are governed by UCC Art 2.
        - (b) Does not apply to real estate, services, intangibles, construction.
      - (2) Merchant = one who regularly deals in goods of the kind sold, or who holds himself out as having special knowledge or skills as to the goods involved.
        - (a) Exam tip: for Art 2 provisions dealing with general business practices, almost anyone in business can be deemed a merchant. But some Art 2 provisions are narrower and require person to be a merchant with respect to goods of the kind involved in the transaction. (Implied warranty of merchantability)
  - c) Types
    - i) As to formation:
      - (1) **Express** – formed by language, oral or written.
      - (2) **Implied in fact** – formed by manifestations of assent – by conduct.
      - (3) **Quasi contract** – not a real contract, just constructed that way by court to avoid unjust enrichment.
        - (a) So P can bring action in restitution to recover the amount of benefit conferred on def.
    - ii) As to acceptance:
      - (1) **Bilateral** – exchange of mutual promises
        - (a) Each party is a promisor and a promisee.
      - (2) **Unilateral** – acceptance by performance
        - (a) Where offeror requests performance rather than a promise. So promise to pay upon completion of a requested act. Once act is completed, contract is formed.
        - (b) There is only one promisor and one promisee.
      - (3) Modern view – most contracts are bilateral.
        - (a) A true unilateral contract only occurs:
          - (i) When offeror clearly (unambiguously) indicates that the completion of performance is the only manner or acceptance.
          - (ii) Where there is an offer to the public, such as a reward.

- iii) As to validity
  - (1) **Void** – one that is without any legal effect from the beginning.
    - (a) It cannot be enforced by either party.
  - (2) **Voidable** – one that either party may elect to avoid.
    - (a) By raising defense such as infancy or mental illness.
  - (3) **Unenforceable** – one that is otherwise valid but may not be enforceable due to extraneous defense to formation, such as SOL or statute of frauds.
  - (4) Need to keep these distinctions in mind for exam.
- d) Creation
  - i) Court must decide whether there was in fact a contract. Ask:
    - (1) Was there **mutual assent**?
      - (a) Offer (promise, undertaking, or commitment with definite and certain terms communicated to offeree); and
      - (b) Acceptance before termination by revocation, rejection, or operation of law.
    - (2) Was there **consideration** or some substitute?
      - (a) Bargained-for exchange of something of legal value; or
      - (b) Substitute for consideration, such as promissory estoppel, detrimental reliance, or good faith modification under UCC.
    - (3) Are there any **defenses** to creation of the contract?
      - (a) Mistake, or
      - (b) Lack of capacity, or
      - (c) Illegality, or
      - (d) Statute of frauds
  - ii) All 3 elements must exist to have an enforceable contract. Check this carefully on exam.
- 2) **Mutual assent – offer and acceptance**
  - a) One party must accept the other's offer.
  - b) Objection standard: did words or conduct manifest a present intention to enter into a contract?

c) **Offer**

- i) An offer creates a power of acceptance in the offeree and a corresponding liability on the part of the offeror.
- ii) For communication to be an offer, it must create a reasonable expectation in the offeree that the offeror is willing to enter into a contract on the offered terms. To determine this, ask:
  - (1) Was there an expression of a **promise, undertaking, or commitment** to enter into a contract?
  - (2) Were there **certainty and definiteness** in the essential terms?
  - (3) Was there **communication** of it to the offeree?

iii) **Promise, undertaking, or commitment**

- (1) There must be intent to enter a contract.
- (2) Can be shown by language.
  - (a) “I offer” or “I promise” shows intent, but is not necessary.
  - (b) “I quote” or “I am asking \$300 for” are invitations to deal, not offers.
- (3) Look at surrounding circumstances.
  - (a) Was it said in anger or jest? Then no intent.
- (4) Look to prior relationship and practice of parties.
- (5) Method of communication
  - (a) The broader the communicating media (publications) the more likely it will be seen as a solicitation of an offer.
  - (b) Advertisements containing price quotations are usually construed as invitations for offers.
    - (i) Exam tip: look for language that sounds like an offer but is really just an invitation to deal. Advertisements may sound like offers, but usually are invitations to deal. The more definite language, the more likely the statement is an offer (“I’ll pay you \$10 for...”). But don’t forget to look at other factors.
    - (ii) Exam tip: if a series of communications, pay attention to legal significance of each statement.
      - 1. I.e., if A’s first statement to B is only an invitation to deal, then B’s response cannot be an acceptance.
      - 2. Keep checking until you find an offer and an acceptance.

iv) **Definite and certain terms**

- (1) Whether enough of the essential terms have been provided so that a contract including them would be capable of being enforced.
- (2) Offeree:
  - (a) Must identify the offeree, or
  - (b) Class to which she belongs to justify the inference that the offeror intended to create a power of acceptance.

(3) Subject matter:

(a) Must be certain in order for the court to enforce the promise.

(b) Requirements for specific types of contracts.

(i) Real estate transactions

1. Must identify the land and price.

a. Land must be described with some particularity but deed description is not required.

b. Courts will not supply a missing price term.

(ii) Sale of goods

1. Quantity being offered must be certain or capable of being made certain.

a. Requirements contract = buyer promises to buy from seller all goods buyer requires.

b. Output contract = seller promises to sell to buyer all goods that seller produces.

i. In either of these contracts, it is assumed parties act in good faith, so there cannot be a tender or demand for a quantity unreasonably disproportionate to any stated estimate or any normal/comparable prior output or requirement.

(iii) Services

1. Nature of work to be performed is required.

(c) Missing terms

(i) A term left open does not prevent formation of contract if it appears parties intended to make a contract and there is a reasonably certain basis for giving a remedy.

1. In this case, Art 2 and most courts will supply reasonable terms for those that are missing.

(ii) Except for real property, failure to state a price does not prevent formation.

1. If contract for sale of goods, UCC Art 2 provides that the price will be a reasonable price at the time of delivery.

(d) Vague terms

(i) Presumption of reasonable terms cannot be made if parties have included a term that makes the contract too vague to be enforced.

(ii) Uncertainty can be cured by part performance that clarifies vague term.

(e) Terms agreed upon later

(i) If the term to be agreed upon at a future date is material, the offer is too uncertain.

- v) **Communication**
  - (1) Offeree must have knowledge of the offer.
- d) **Termination of offer**
  - i) An offer cannot be accepted after it has been terminated.
  - ii) Termination by offeror
    - (1) **Revocation** – retraction of the offer by offeror.
      - (a) Direct revocation
        - (i) Can be made by directly communicating it to offeree.
        - (ii) Offer made by publication can be directly revoked by publication through comparable means.
      - (b) Indirect revocation if offeree receives:
        - (i) Correct information
        - (ii) From a reliable source
        - (iii) Of acts of the offeror that would indicate to a reasonable person that the offeror no longer wishes to make the offer.
      - (c) Revocation is effective when received by offeree.
        - (i) If by publication, effective when published.
      - (d) **Limitations on power to revoke**
        - (i) Revocations can be revoked at will by offeror except in these circumstances:
          - 1. Options – when offeree gives consideration for promise by offeror not to revoke the offer.
          - 2. Merchant's firm offer under Art 2
            - a. If a merchant
            - b. Offers to sell goods in a signed writing, and
            - c. The writing gives assurances that it will be held open
            - d. Then offer is not revocable for lack of consideration during the time stated, or if no time stated, for a reasonable time.
              - i. But in no event may the period exceed 3 months.
          - 3. Detrimental reliance
            - a. When offeror could reasonably expect offeree would rely on the offer and offeree does so rely to her detriment, the offer will be held irrevocable as an option contract for a reasonable length of time.
              - i. Offeree entitled to relief measured by extent of detrimental reliance.

4. Part-performance – true unilateral contract offers
  - a. Becomes irrevocable once performance begins.
  - b. Offeror must give offeree a reasonable time to complete performance.
    - i. But offeree is not bound to complete performance – she may withdraw prior to completion – remember, there is no acceptance until performance is complete!
  - c. Substantial preparations to perform do not make offer irrevocable but may be detrimental reliance.
5. Part-performance – offer indifferent to manner of acceptance
  - a. Bilateral contract may be formed upon the start of performance by the offeree. So once performance begins, the contract is complete and revocation is impossible.
  - b. But note: notification of the start of performance may be necessary.

iii) Termination by the offeree

(1) **Rejection**

- (a) Express – statement that offeree does not intend to accept the offer.
- (b) Counteroffer – an offer made by offeree with same subject matter, but different terms. (“I’ll take the house at that price, but only if you paint it first.”)
  - (i) Counteroffer is both a rejection and a new offer. It reverses the role of the parties.
  - (ii) Offeree cannot later try to accept the original offer – the counteroffer rejected the original offer and so it no longer exists.
  - (iii) Mere inquiry is not a counteroffer and will not terminate original offer.
    1. Test – would reasonable person believe the original offer had been rejected.

(c) Rejection is effected when received by offeror.

(d) Option contract

- (i) Rejection or counteroffer is not a termination of the offer. So can still accept original offer in the option period unless the offeror has detrimentally relied on offeree’s rejection.

(2) **Lapse of time**

- (a) If offeree fails to accept within the time specified by the offer, or if no deadline specified, within a reasonable period.

- iv) Termination by operation of law
  - (1) Death or insanity of either party (unless offer is a kind the offeror could not termination, like option supported by consideration).
    - (a) This need not be communication to the other party.
  - (2) Destruction of proposed contract's subject matter.
  - (3) Supervening illegality
- e) **Acceptance**
  - i) Manifestation of assent to the terms of an offer.
  - ii) Who may accept?
    - (1) Generally, only the person to whom the offer is addressed. Also, if person is a member of a class to who the offer has been directed.
    - (2) Power of acceptance cannot be assigned.
      - (a) Except if offeree has paid consideration to keep offer open, then right to accept is transferable.
  - iii) Offeree must know of offer in order to accept it.
    - (1) I.e., if A sends B an offer and B sends A an offers, unaware of A's offer (crossed in the mail), no contract is formed, even if the 2 offers contained the same terms.
  - iv) Unilateral contract
    - (1) So offer provides that it can be accepted only by performance.
      - (a) Most courts hold that an offer to form a unilateral contract is not accepted until performance is completed.
        - (i) The beginning of performance may create an option so that the offer is irrevocable.
        - (ii) But offeree is not obligated to complete performance.
        - (iii) Offeree must know of the offer to accept it. If offeree acts without knowledge and learns of the offer later, his acts were not acceptance.
          - 1. I.e., if A finds O's watch and returns it to O without knowledge of O's reward offer, A has no contractual right to the reward.
    - (2) Generally, offeree is not required to give offeror notice that he has begun performance.
      - (a) But he is required to give reasonable notice after performance has been completed.
      - (b) No notice is required if:
        - (i) Offeror waived notice; or
        - (ii) Offeree's performance would normally come to the offeror's attention within a reasonable time.

v) Bilateral contract

(1) May be accepted either by a promise to perform or by the beginning of performance.

(a) Remember, unless offer specifically provides that it may be accepted only through performance, it will be construed as an offer to enter into a bilateral contract.

(2) Acceptance must be communicated (unless otherwise specified).

(3) Method of acceptance is in any reasonable manner.

(a) **Art 2:**

(i) An offer to buy goods for current/prompt shipment is construed as inviting acceptance either by a promise to ship or by current/prompt shipment of goods.

(ii) If shipment is of nonconforming goods, it is acceptance, creating a bilateral, as well as a breach of the contract, unless the seller seasonably notifies the buyer that shipment of nonconforming goods is offered only as an **accommodation**.

1. Buyer is not required to accept accommodation goods and may reject them. Shipper is then not in breach and may reclaim the goods, because then the tender does not constitute an acceptance of the buyer's original offer.

(4) **Acceptance must be unequivocal**

(a) Common law rule

(i) Any different or additional terms in the acceptance make the response a rejection and counteroffer.

(b) Art 2 – battle of forms

(i) Rejects mirror image rule.

(ii) Proposal of additional or different terms by the offeree in a definite and timely acceptance is not a rejection/counteroffer.

1. It is acceptance unless the acceptance is expressly made conditional on assent to the additional or different terms.

(c) Exam tip – so Art 2 changes the common law rule.

(i) So for purchase/sale of goods, an acceptance with additional terms is still an acceptance and a contract is formed.

(ii) If the offer is for something other than goods, an acceptance proposing additional or different terms is a rejection and counteroffer. No contract is formed.



(5) **Mailbox rule**

(a) Acceptance by mail/similar means creates a contract at the moment of dispatch (mail is properly addressed and stamped) unless:

(i) Offer stipulates that acceptance is not effective until received, or

(ii) An option contract is involved.

1. Acceptance under an option contract is effective upon receipt.

(iii) Offeree sends a rejection and then sends an acceptance, then whichever arrives first is effective.

(iv) Offeree sends an acceptance and then a rejection, then the acceptance is effective (mailbox rule applies) unless the rejection arrives first and the offeror detrimentally relies on it.

(b) Acceptance by unauthorized means may still be effective if it is actually received by offeror while offer is still in existence.

f) Auction contracts – UCC rules

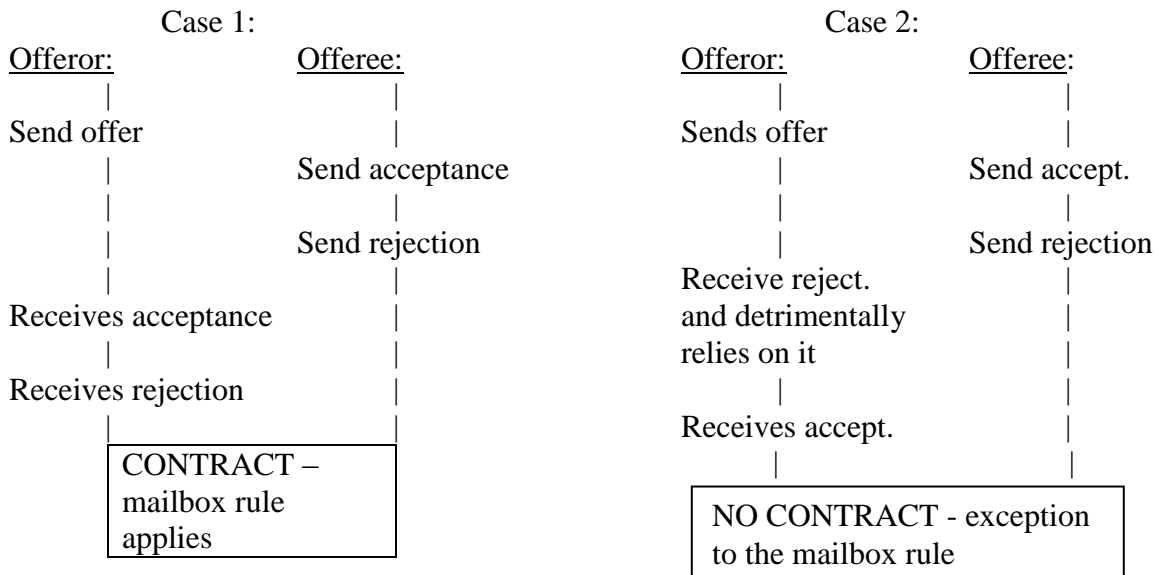
i) Sale complete when hammer falls.

ii) Sale is with reserve unless goods are explicitly put up without reserve.

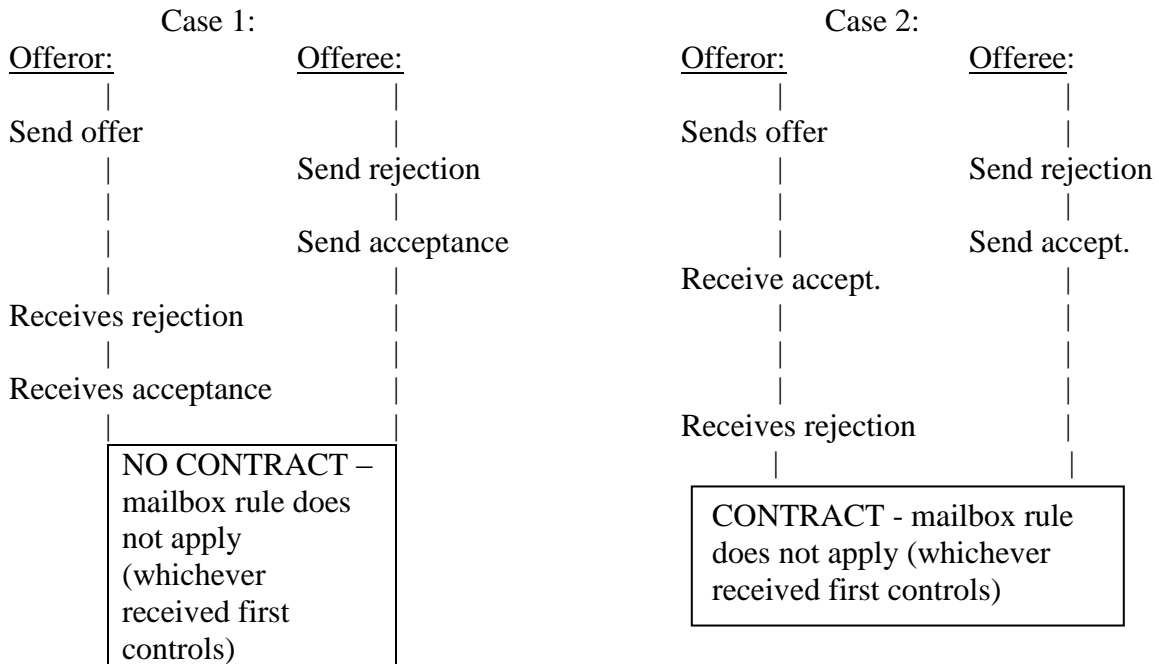
(1) With reserve = auctioneer may withdraw the goods at any time until he announces completion of the sale.

**Effect of rejection or revocation on offer**

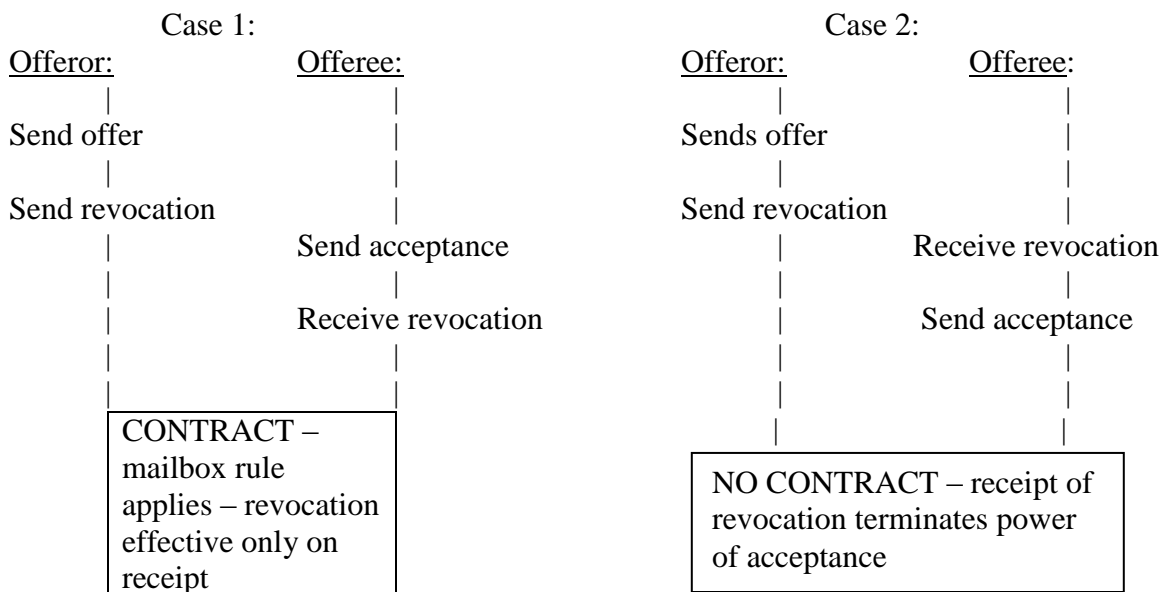
Offeree sends acceptance, then rejection



Offeree sends rejection, then acceptance



Offeror sends offer, then revocation



### 3) **Consideration**

#### a) Elements

##### i) **Bargained for exchange** between the parties, and

(1) Promise induce the detriment and the detriment induce the promise.

##### (2) Gift

(a) There is no bargain involved (no consideration).

(3) Act or forbearance by promisee is enough for consideration if it benefits the promisor.

(a) Benefit need not be economic.

##### (4) Past consideration

(a) Promise given in exchange for something already done does not satisfy the bargain requirement.

(i) Example: "In consideration of your having done X, I promise you \$1k." This promise is not enforceable because promise is in exchange for past acts.

(b) Exceptions:

(i) Where past obligation is unenforceable because of technical defense (SOL), obligation will be enforceable if a new promise is made in writing or is partially performed.

(ii) If a past act benefited the promisor and was performed at the promisor's request or in response to an emergency, a subsequent promise to pay for that act will be enforceable.

ii) **Legal value** - that which is bargained for must be considered of legal value – it must constitute a benefit to the promisor or detriment to the promisee.

##### (1) Adequacy

(a) Court does not consider the adequacy of consideration.

(b) But if it is entirely devoid of value – token consideration – it will be deemed insufficient.

(c) Sham consideration – not actually paid – may also be insufficient.

(d) But if there is value in the thing bargained for, consideration will be found even if value never comes into existence.

##### (2) Legal detriment

(a) Majority of courts require party to incur **detriment** to satisfy legal value element.

(i) By doing something not legally obligated to do or refraining from doing something he has a right to do.

(b) Minority of courts say it is sufficient to confer a benefit on the other party.

- (3) Preexisting legal duty
  - (a) Performing or promising to perform an existing legal duty is insufficient consideration
  - (b) Exceptions - there is consideration if:
    - (i) New or different consideration is promised;
      - 1. I.e., payment earlier than required or payment is stock instead of cash.
    - (ii) Promise is to ratify a voidable obligation;
      - 1. I.e., promise to ratify minor's contract after reaching majority, a promise to go through with a contract despite other party's fraud.
    - (iii) The preexisting duty is owed to a 3<sup>rd</sup> person rather than promisor;
    - (iv) There is an honest dispute as to the duty; or
    - (v) There are unforeseen circumstances sufficient to discharge a party.
- (4) A good faith agreement modifying a contract subject to UCC needs no consideration to be binding.
- (5) A promise to refrain from suing on a claim is valid consideration if claim is valid or claimant in good faith believed claim was valid.

**b) Mutuality**

- i) Consideration must exist on both sides of a contract.
  - (1) If only 1 party is bound to perform, the promise is illusory and will not be enforced.
  - (2) Courts often supply implied promises to infer mutuality.
    - (a) I.e., a party must use her best efforts.
- ii) Examples of contracts that satisfy mutuality requirement:
  - (1) Requirements and output contracts
    - (a) Watch language. "All the X I require" or "all the X that you produce" is valid requirement/output contract. But "All the X I want" or "all you ant to sell me" is illusory.
  - (2) Conditional promises, unless the condition is entirely within the promisor's control
  - (3) Contracts where a party has the right to cancel, if that right is restricted
    - (a) I.e., party must give 60 days' notice.
  - (4) Voidable promises
  - (5) Unilateral and option contracts
  - (6) Gratuitous suretyship promises made before or at same time that consideration flows to the principal debtor.

- iii) A promise to choose one of several alternative means of performance is illusory unless every alternative involves legal detriment to promisor.
    - (1) Not illusory if:
      - (a) At least one alternative involves legal detriment and power to choose rests with promisee or 3<sup>rd</sup> party, or
      - (b) A valuable alternative (involving a legal detriment) is actually selected.
  - c) Consideration is not necessary if **estoppel** should apply.
    - i) A promise is enforceable if necessary to prevent injustice if:
      - (1) Promisor should reasonably expect to induce action or forbearance;
      - (2) Of a definite and substantial character; and
        - (a) This element is no longer required by the Restatement.
      - (3) Such action or forbearance is in fact induced.
    - ii) Damages awarded:
      - (1) Under first restatement are expectation damages – what was promised under contract.
      - (2) Under second restatement are reliance damages – what promisee spent in reliance on the promise.
- 4) **No defenses exist**
  - a) Contract may be unenforceable because there is a defense to formation of contract or defense to enforcement.
  - b) Defenses to formation
    - i) Absence of mutual assent
      - (1) **Mutual mistake**
        - (a) If both parties are mistaken about facts relating to the agreement, contract may be voidable by the adversely affected party if:
          - (i) Mistake concerns a basic assumption on which contract is made;
            - 1. I.e., parties think contract is for sale of diamond but it was really a cubic zirconia
          - (ii) Mistake has a material effect on the exchange; and
            - 1. I.e., cubic zirconia is worth only fraction what diamond is worth
          - (iii) Party seeking avoidance did not assume risk of the mistake.
            - 1. So mutual mistake is not a defense if adversely affected party bore risk that assumption was mistaken.
              - a. Such as when 1 party is in a better position to know the risks that the other, or
              - b. When parties knew their assumption was doubtful.
        - (b) Mistake in value is generally not a defense.
      - (2) Unilateral mistake generally does not prevent formation of contract.
        - (a) If nonmistaken party knew or had reason to know of the mistake by the other party, contract is voidable by the nonmistaken party.

(3) **Ambiguity mistakes**

- (a) If contract includes an ambiguous term:
  - (i) Neither party aware of it, no contract unless both parties intended the same meaning.
  - (ii) Both parties aware of it, no contract unless both parties intended the same meaning.
  - (iii) One party aware of it, binding contract based upon what the ignorant party reasonably believed to be the meaning of the ambiguous words.

(4) **Misrepresentation**

- (a) Fraudulent misrepresentation – contract voidable
  - (i) Fraudulent inducement by one of another to enter into contract, contract is voidable by the innocent party if she justifiably relied on the fraudulent misrepresentation.
- (b) Nonfraudulent misrepresentation – contract is voidable if material
  - (i) Contract is voidable by innocent party if she justifiably relied on the misrepresentation and the misrep was material.
    - 1. Material if either info asserted would induce a reasonable person to agree or maker of misrep knew info would cause the person to agree.
- (c) Innocent person may rescind agreement.

ii) **Absence of consideration**

- (1) No contract exists if this is lacking.

iii) **Public policy defenses to contract formation**

(1) **Illegality**

- (a) If consideration or subject matter is illegal, contract is void.
- (b) Exceptions:
  - (i) P is unaware of the illegality while def knows of it;
  - (ii) Parties are not in pari delicto (one party not as culpable as the other); or
  - (iii) Illegality is failure to obtain a license for revenue-raising purpose rather than protect of public.
- (c) If purpose behind contract is illegal, contract is voidable by party who was:
  - (i) Unaware of the purpose; or
  - (ii) Aware but did not facilitate the purpose and purpose does not involve serious moral turpitude.

c) Defenses based on lack of capacity

i) **Legal incapacity**

(1) **Infants** (minors)

- (a) Cannot enter into a contract binding on themselves.
- (b) Contractual promises of an adult made to an infant are binding on the adult.
- (c) Disaffirmance
  - (i) Infant can disaffirm before age of majority. Return anything that she received under the contract that still remains, but no obligation to return any part of consideration that is gone.
- (d) Affirmance
  - (i) Infant can choose to be bound by his contract upon age of majority. Done expressly or by failing to disaffirm within a reasonable time after reaching majority.
- (e) Exception – infant is bound to pay the reasonable value of necessities.

(2) **Mental incapacity**

- (a) Contract is voidable.
- (b) Incapable of understanding the nature and significance may disaffirm when lucid or by his legal rep.
- (c) Exception – mental incompetent is bound to pay the reasonable value of necessities.

(3) **Intoxication**

- (a) Voidable if other party had reason to know of the intoxication.

ii) **Duress and coercion**

- (1) May be rescinded as long as not affirmed.
- (2) Taking advantage of another's economic needs is not a defense.
  - (a) But withholding something someone wants or needs will be economic duress if:
    - (i) Party threatens to commit a wrongful act that would seriously threaten party's property or finances; and
    - (ii) There are no adequate means available to prevent threatened loss.

d) Defenses to enforcement

i) **Statute of frauds (SOF)**

(1) Generally, oral contract is valid.

(2) Exception:

(a) Certain agreements must be by:

(i) A writing:

1. Contract need not be in writing, but there must be a writing signed by the person to be held liable on the contract that reflects the material terms of the contract.
2. Can be reflected in multiple writings.

(ii) Signed by the party to be bound.

1. This is broadly construed. Can be typed or printed. Initials or letterhead may also be enough.
2. Only the person charge – to be sued – must sign.

(b) Agreements covered by SOF:

(i) Promise of executor to personally pay debts of estate.

(ii) Promise to pay debts of another – suretyship promise

1. It must be collateral to another person's promise to pay and not the primary promise to pay.
2. If main purpose of the promisor is to serve a pecuniary interest of his own, contract is not within SOF, even though it is still a promise to pay the debt of another.
  - a. I.e., homeowner promises to pay contractor's debt to building supplier if contractor does not pay, so contractor can obtain supplies to work on homeowner's house.

(iii) Promise in consideration of marriage

1. I.e., if you marry my son, I will give the 2 of you a house.

(iv) Interest in land

1. Includes agreements for:
  - a. Sale of real property
  - b. Leases for more than 1 year
  - c. Easement of more than 1 year
  - d. Fixtures
  - e. Minerals or structures if they are to be severed by the buyer
  - f. Mortgages and most other security liens.
2. Does not include:
  - a. Contracts to build a building
  - b. Contracts to find a buyer for a seller (broker's contract)



3. Effect of performance
  - a. If full performance, seller can enforce buyer's oral promise to pay.
  - b. If partial performance, that unequivocally indicates that the parties have contracted for sale of land, this removes it from SOF. Part performance requires at least 2 of:
    - i. Payment (in whole or part)
    - ii. Possession
    - iii. Valuable improvements
- (v) Performance not within 1 year
  1. If it cannot, by its terms, be performed within a year, must satisfy SOF.
  2. Date runs from date of agreement (not date of performance).
  3. Lifetime contract – not within SOF (can be oral) because may be performed in less than a year if person dies.
- (vi) Goods priced at \$500 or more
  1. A writing is sufficient even if it omits or incorrectly states a term, but the contract is not enforceable beyond the quantity of goods shown in the writing.
  2. Exception – when no writing is needed:
    - a. Specially manufactured goods
      - i. If made for buyer and not suitable for others in the ordinary course of seller's business, the contract is enforceable if seller has made a substantial beginning of their manufacture or commitments for their purchase prior to receipt of repudiation.
    - b. Admissions in pleadings or court
      - i. If admitted that contract for sale was made in this manner, it will be enforceable without a writing.
    - c. Payment or delivery of goods
      - i. If goods are received and accepted or paid for, contract is enforceable. But only to the quantity accepted or paid for.
  3. Between merchants – confirming memo
    - a. If 1 party, within a reasonable time after oral contract, sends the other written confirmation that is sufficient for SOF, it will bind the recipient if:
      - i. He has reason to know of the confirmation's contents; and
      - ii. He does not objects in writing within 10 days of receipt.

(3) Exam tips:

- (a) Check that party that signed the writing is the person to be charged (sued). If not, consider merchant's confirming memo. But this needs to be between merchants – if they aren't, confirming memo rule doesn't apply and signature of one party cannot bind the other.

- (b) Acronym for when a writing signed by party to be charged is not required for sale of goods, even if for more than \$500. These things take it out of the SOF – SWAP
    - (i) Specifically made goods
    - (ii) Written confirmation by a merchant
    - (iii) Admission in court
    - (iv) Performance
  - (c) Acronym for agreements covered by SOF – MY LEGS
    - (i) Marriage
    - (ii) Year – performance not within one year
    - (iii) Land
    - (iv) Executor
    - (v) Goods (for \$500 or more)
    - (vi) Surety
- (4) Noncompliance with SOF renders contract unenforceable at the option of the party to be charged.
  - (a) I.e., party being charged may raise lack of sufficient writing as an affirmative defense.
- (5) Remedies
  - (a) Party can sue for reasonable value for services or part performance rendered, or
  - (b) Restitution of any other benefit conferred.
- ii) **Unconscionability**
  - (1) Allows court to refuse to enforce a provision or an entire contract to avoid unfair terms, usually due to some unfairness in the bargaining process.
    - (a) Unfair price alone is not a ground for unconscionability
    - (b) Determined at time contract as formed.
  - (2) Common instances of procedural unconscionability
    - (a) Inconspicuous risk-shifting provisions
      - (i) Found in fine print.
      - (ii) Courts have invalidated these because they are inconspicuous and incomprehensible to the average person, even if brought to actual attention.
    - (b) Adhesion contracts – “take it or leave it”
      - (i) Courts will deem clause unconscionable and unenforceable if signer is unable to procure necessary goods from any seller without agreeing to a similar provision.
    - (c) Exculpatory clause
      - (i) Release for intentional wrongful acts is usually unconscionable.
      - (ii) Release for negligent acts may be unconscionable if they are inconspicuous, but mostly upheld if for activities that are hazardous.

- (d) Limiting remedies
  - (i) Clause that limits liability for damages to property are not unconscionable unless inconspicuous.
  - (ii) If contract limits to a certain remedy and that remedy fails of its essential purpose, it may be held unconscionable.
    - 1. I.e., limit remedy to repair and item cannot be repaired.
- (3) Effect if court finds unconscionability:
  - (a) Refuse to enforce the contract;
  - (b) Enforce the remainder of the contract without that clause; or
  - (c) Limit the application of any clause to avoid unconscionable result.
- (4) On MBE, this is seldom a good defense.

## 5) Terms of the contract

- a) Rules of contract construction
  - i) **Contracts will be construed as a whole**
    - (1) Specific clauses will be subordinated to the contract's general intent
  - ii) Courts will **construe words according to their ordinary meaning**
    - (1) Unless it is clearly shown they were meant in their technical sense
  - iii) If provisions appear inconsistent, **written or typed provisions will prevail over printed provisions**
  - iv) Courts generally look to **custom and usage** of particular business
  - v) Courts generally **try to reach a determination that a contract is valid and enforceable**
  - vi) **Ambiguities in contract are construed against the party preparing the contract** absent contrary intent
- b) **Parole evidence rule**
  - i) When agreement is in a writing with the intent that it be the full and final expression of their bargain (writing is an integration), any other expressions made prior to or contemporaneous with the writing are inadmissible to vary the terms of the writing.
  - ii) Writing as integration
    - (1) Ask:
      - (a) Is the writing intended as a final expression?
        - (i) The more complete it appears on its face, the more likely it was intended as an integration.
      - (b) Is the writing a complete or partial integration?
        - (i) If agreement contains a merger clause saying it is complete on its face, this strengthens the presumption that all negotiations were merged into the written document.
    - (2) Determined by judge, not jury.

- (3) Tests for deciding:
  - (a) Corbin test – majority view
    - (i) Takes into account specific circumstances of the transaction involved and asks whether parties like these would normally include in their writing the extrinsic matter they seek to introduce.
    - (ii) If would normally have been included in the writing, it will then be excluded under the parol evidence rule.
- iii) Evid that does not vary, contradict, or add to an integration falls outside parol evid rule and will be admitted.
  - (1) Things that can be shown by extrinsic evid without violating parol evid rule:
    - (a) Formation defects
      - (i) Fraud, duress, mistake, illegality
    - (b) Conditions precedent
    - (c) Interpretation
      - (i) Uncertainty, ambiguity or a dispute to the meaning of terms, parol evid is admissible to aid in reaching a correct interpretation of the agreement.
      - (ii) If meaning is plain, parol evid is inadmissible.
    - (d) Showing of true consideration paid
    - (e) Reformation
    - (f) Subsequent modifications of a written contract
- iv) Art 2
  - (1) Follows the above rules, but allows evid of consistent, additional terms unless:
    - (a) There is a merger clause, or
    - (b) Courts find from circumstances that writing was intended as a complete and exclusive statement of the terms.
  - (2) Terms may be explained or supplemented by the following, whether or not writing appears to be ambiguous:
    - (a) Parties' course of dealing.
      - (i) Sequence of conduct concerning prior transactions that may establish a common basis of understanding.
    - (b) Usage of trade
      - (i) Practice of method of dealing regularly observed in particular business setting to justify an expectation.
    - (c) Parties' course of performance
      - (i) If contract involves repeated occasions for performance and course of performance was accepted previously.

c) **Art 2 provisions for interpreting contracts**

i) **Battle of the forms**

- (1) Under Art 2, contract can be formed even though terms of acceptance do not match the offer. So what terms are in the contract?
- (2) Contracts involving nonmerchants
  - (a) Terms of the offer govern
    - (i) Additional/different terms are considered proposals that do not become part of contract unless the offeror expressly agrees.
- (3) Contracts between merchants
  - (a) Additional terms in acceptance will be included in contract unless:
    - (i) They materially alter the original terms of the offer;
    - (ii) The offer expressly limits acceptance to the terms of the offer; or
    - (iii) The offeror has already objected to the particular terms or objects within a reasonable time after notice of them is received.
  - (b) Different terms in acceptance:
    - (i) Some courts treat them as additional terms.
    - (ii) Some courts follow the knockout rule:
      1. Conflicting terms in the offer and acceptance are knocked out of the contract. Any gaps left are filled by the UCC.

Acceptance with additional terms

If the response to an offer is an

acceptance or confirmation, does it-----No-----Offer accepted  
propose additional terms?

|  
|Yes

Is the contract for a sale of goods?-----No-----Offer rejected and  
counteroffer made

|  
|Yes

Are the parties merchants?-----No-----

|  
|Yes

Did the offer limit acceptance to its terms?-----Yes-----Contract formed but the  
additional terms are not  
|  
|No included

Do the terms materially alter the contract?-----Yes-----|

|  
|No

Did the offeror object to the new terms in-----Yes-----|  
a reasonable time?

|  
|No

Contract formed including the additional terms

ii) **Supplemental (gap-filler) terms**

(1) Art 2 provides terms that may be missing from contract.

(2) **Price**

(a) Is a reasonable price at time of delivery if:

(i) Nothing is said as to price;

(ii) Price is left open to be agreed upon by the parties and they fail to agree; or

(iii) Price is to be fixed in terms of some standard that is set by a 3<sup>rd</sup> person and it is not set.

(3) **Place of delivery**

(a) If not specified, place is seller's place of business (or home).

(4) **Time for shipment/delivery**

(a) Due in a reasonable time.

(5) **Time for payment**

(a) Due at the time and place at which the buyer is to receive the goods.

(6) If contract provides that **an assortment of goods** is to be delivered but does not specify who is to choose

(a) Assortment is to be at buyer's option.

iii) **Delivery terms and risk of loss**

(1) All contracts for sale of goods require delivery of the goods.

(2) Noncarrier case (parties do not intend goods to be moved by common carrier, like when you buy groceries):

(a) If seller is a merchant, risk of loss passes to buyer only when she takes physical possession of the goods.

(b) If seller is not a merchant, risk of loss passes to buyer upon tender of delivery.

(3) Carrier case

(a) Shipment contracts

(i) If contract requires seller to ship goods by carrier, but does not require delivery at a particular destination, risk of loss passes to buyer when goods are delivered to the carrier.

(b) Destination contracts

(i) If contract requires seller to deliver goods at a particular destination, risk of loss passes to buyer when goods are tendered to the buyer at the destination.

(4) Delivery terms

(a) Shipment contracts

(i) Price in contract includes price of goods, cost of shipping to buyer, etc.

1. CIF = cost, insurance, freight.

2. C&F = cost and freight.

(b) FAS = free alongside

(i) Type of destination contract. For shipping by boats

(c) FOB – free on board

- (i) Followed by location and that is where risk of loss passes to buyer.
- (ii) Seller bears risk and expense of getting goods to that named location.

<b>Noncarrier v. Carrier Contracts</b>		
	<b>Noncarrier contract</b>	<b>Carrier contract</b>
<b>Place of delivery</b>	Seller's place of business	Shipment contract: seller must deliver to the shipper.
		Destination contract: seller must tender delivery of goods to the buyer at the destination
<b>Time for payment</b>	Upon tender of delivery	When buyer receives goods
<b>When does risk of loss pass from seller to buyer?</b>	If seller is merchant: when buyer takes possession.	Shipment contract: when goods are delivered to the shipper.
	If seller is not a merchant: when seller tenders delivery	Destination contract: when seller tenders delivery of goods to the buyer at the destination

(5) Effect of breach on risk of loss

(a) Defective goods

- (i) If goods are so defective that buyer can reject them, risk of loss does not pass until defects are cured or buyer accepts goods in spite of defects.

1. Buyer generally has right to reject for any defect.

- (ii) If buyer rightfully revokes acceptance, risk of loss is treated as having rested on the seller from the beginning.

(6) Risk on sale or return contracts

- (a) Where buyer takes goods for resale and can return them if unable to sell.
- (b) Ordinary rules apply but if goods are returned to seller, risk remains on buyer while goods are in transit.

(7) Risk in sale on approval contracts

- (a) Where buyer takes goods but may return them even if they conform to contract.
- (b) Risk does not pass to buyer until she accepts.

iv) Bilateral contract formed by performance

- (1) Contract can be formed by parties' performance where mirror image rule is not satisfied and under Art 2 battle of forms. Contract includes all terms that parties agree on and missing terms filled in by Art 2.

(2) Common law contracts:

- (a) The contract will include the terms of the last communication sent to the party who performed.

v) **Warranties**

(1) Warranty of title

- (a) Any seller of goods warrants that title transferred is good and there are no liens or encumbrances on title of which buyer is aware.
- (b) Automatic – need not be in contract.
- (c) Can be disclaimed by specific language or circumstances that give buyer notice that seller does not claim title.

(2) Warrant against infringement

- (a) Merchant seller regularly dealing in these goods warrants that goods are free of patent, trademark, copyright claims.
- (b) Buyer who furnishes specifications for goods to seller must hold seller harmless against such claims.

(3) Implied warranty of merchantability

- (a) Implied in every contract for sale by a merchant who deals in these goods.
  - (i) Serving food/drink for consumption on the premises has this warranty too.
- (b) To be merchantable, goods must be fit for the ordinary purposes for which such goods are used.
- (c) Does not matter that seller did not know of defect or could not have discovered it.
- (d) Can be disclaimed only by mentioning merchantability. Must be conspicuous.

(4) Implied warranty of fitness for a particular purpose

- (a) Warranty is implied in contract for sale of goods whenever:
  - (i) Any seller has reason to know the particular purpose goods are going to be used for; and
  - (ii) Buyer is relying on seller's skill/judgment to select goods; and
  - (iii) Buyer in fact relies on seller's skill/judgment.
- (b) Can be disclaimed only by a conspicuous writing.
  - (i) It is enough to say "there are no warranties which extend beyond the description on the face hereof."

(5) Express warranty – part of the basis of the bargain.

- (a) If made at the time that buyer could have relied on it.
- (b) Does not need to show actual reliance, though seller may negate warranty by showing no reliance.
- (c) Statement of opinion or value of goods is not an express warranty.
- (d) Once made, these are difficult to disclaim.



- (6) General disclaimer methods
- (a) General language, such as “as is,” “with all faults.”
  - (b) By inspection or refusal to inspect
    - (i) If buyer, before entering contract, has examined goods or sample fully as she desires or has refused to examine, there is no warranty as to defects that a reasonable examination would have revealed.
  - (c) By course of dealing, course of performance, or usage of trade.
- (7) Timing of disclaimers
- (a) Must be agreed to during bargaining process.
  - (b) Included inside the packaging of goods is not effective against the buyer.
    - (i) Thought disclaimers on software that appears on screen is ok.
- (8) Warranty disclaimers that limit damages for personal injury caused by breach of warranty on consumer goods are prima facie unconscionable.

<b>Warranties</b>			
<b>Type</b>	<b>How arise</b>	<b>By whom</b>	<b>Disclaimer</b>
<b>Implied:</b>			
<b>Warranty of title</b> (title is good, transfer rightful, no liens or encumbrances)	By sale of goods	Any seller	By specific language or circumstances showing seller does not claim title
<b>Warranty of merchantability</b> (fit for ordinary purposes)	By sale of goods of the kind regularly sold by the merchant	Merchant only	By disclaimer mentioning “merchantability” (if written, it must be conspicuous).  May also be disclaimed by “as is” language, inspection or refusal to inspect, or course of dealing/performance, or usage of trade.
<b>Warranty of fitness for particular purpose</b> (fit for buyer’s particular purpose)	By sale of goods where seller has reason to know of particular purpose and of buyer’s reliance on seller to choose suitable goods	Any seller	By conspicuous written disclaimer.  May also be disclaimed by “as is” language, inspection or refusal to inspect, or course of dealing/performance, or usage of trade.
<b>Express</b>	By affirmation of fact, promise, description, model, or sample	Any seller	Extremely difficult to disclaim

6) **Performance and excuse of nonperformance**

a) Common law

- i) Party's basic duty is to substantially perform all that is called for in the contract.

b) Art 2

- i) Generally requires perfect tender.

ii) Noncarrier cases

(1) Seller's obligation of tender and delivery

- (a) Seller must put and hold conforming goods at buyer's disposition for a time sufficient for buyer to take possession.

- (i) Seller must give buyer reasonable notice and tender must be at a reasonable hour.

(2) Buyer's obligation to pay

- (a) Unless provided otherwise, sale is for cash and price is due concurrently with tender of delivery.

iii) Carrier cases

(1) Shipment contracts

- (a) Seller need not see that goods reach buyer, but only:

- (i) Put goods in hands of reasonable carrier and make contract for transportation to buyer;

- (ii) Obtain and tender promptly any documents required by contract or usage of trade to allow buyer to take possession; and

- (iii) Promptly notify buyer of shipment.

- (b) Buyer's obligation to pay

- (i) Price is due when goods put in hands of carrier.

(2) Destination contracts

- (a) Seller must, at destination, put and hold conforming goods at the buyer's disposition.

- (b) Buyer's obligation to pay

- (i) Price is due when goods reach named destination.

- iv) Buyer has right to inspect before paying unless contract calls for COD or indicates otherwise.

c) Bound under contract vs. bound under duty to perform

- i) Person is bound if there has been an offer, acceptance, and exchange of consideration.

- (1) However, contract may provide that bound party does not come under a duty to perform unless/until some condition occurs.

- ii) Def:
- (1) Promise – commitment to do/refrain from doing something.
    - (a) Unconditional promise is absolute.
      - (i) Failure to perform an unconditional promise is a breach of contract.
    - (b) Conditional promise may become absolute by occurrence of the condition.
  - (2) Condition
    - (a) Event, other than the passage of time, the occurrence/non-occurrence of which will create, limit, or extinguish other party's absolute duty to perform.
  - (3) So failure of a promise gives rise to a breach. Failure of a condition relieves a party of the obligation to perform.
  - (4) Contract v. promise is the intent of the parties.
    - (a) In doubtful situations, courts lean to promise.
- iii) Classification of conditions
- (1) According to time of occurrence
    - (a) **Condition precedent**
      - (i) One that must occur before an absolute duty of immediate performance arises.
    - (b) **Condition concurrent**
      - (i) Capable of occurring together and parties are bound to perform at same time
        1. I.e., tender of deed for cash.
    - (c) **Condition subsequent**
      - (i) One that cuts off an already existing absolute duty of performance.

<b>Conditions – Time of Occurrence</b>			
<b>Type</b>	<b>Definition</b>	<b>Effect of occurrence of condition</b>	<b>Example</b>
<b>Condition precedent</b>	Condition must occur before performance is due	Performance is due	Agreement to pay \$10k “if house is sold by 4/1.” No payment unless house is sold by 4/1.
<b>Condition concurrent</b>	Conditions to occur at the same time	If one condition occurred, performance on the other is due	Agreement to pay \$100k for Blackacre. Money and deed exchanged in the same transaction.
<b>Condition subsequent</b>	Condition cuts off already existing duty	Duty to perform is excused	Agreement to buy Blackacre for \$100k unless zoning changes. If zoning is changed, no duty to pay \$100k or transfer deed.

(2) **Express conditions**

- (a) Expressed in the contract

(3) **Implied conditions**

- (a) Inferred from evid of parties' intentions.

(4) **Constructive conditions**

- (a) Are read into the contract by the court without regard to parties' intention.

- (i) Done in interest of fairness.

(b) Time test

(i) Constructive conditions concurrent

1. If both performances can be rendered at same time, they are constructively concurrent – so each is a condition precedent to the other.
2. So absent excuse, each party must first tender its own performance in order to put the other under a duty of immediate performance.

(ii) Constructive conditions precedent

1. If performance takes time to complete while other is instant, completion of longer one is constructive condition precedent to execution of shorter one.

iv) Excuse of conditions

(1) Duty of immediate performance with respect to conditional promise does not become absolute until conditions:

- (a) Have been performed, or  
(b) Have been legally excused.

(2) Excuse of condition by hindrance or failure to cooperate

- (a) If party who has duty to perform prevents condition from occurring, condition will be excused if prevention is wrongful.

(3) Excuse of condition by actual breach

- (a) Actual breach of contract when performance is due will excuse the duty of counter-performance.  
(i) Common law – counter-performance excused only if breach is material. Minor breach will suspend duty, but not excuse it.

(4) Excuse of condition by anticipatory repudiation

- (a) Occurs if promisor, prior to time set for performance, indicates he will not perform when time comes.  
(b) Requirements:  
(i) Applies only if there is a bilateral contract with executory (unperformed) duties on both sides.  
(ii) Unequivocally indicate that he cannot or will not perform when time comes.

- (c) Effect of anticipatory repudiation
  - (i) Treat it as total repudiation and sue immediately
  - (ii) Suspend performance and wait to sue until performance date
  - (iii) Treat it as offer to rescind and treat contract as discharged
  - (iv) Ignore repudiation and urge promisor to perform
    - 1. Party can still sue for breach later if still repudiates.
- (d) Retraction of repudiation
  - (i) Can withdraw repudiation at any time unless other party has materially changed position in reliance on repudiation.
- (5) Excuse of condition by prospective inability or unwillingness to perform
  - (a) Occurs when party has reasonable grounds to believe other will be unable or unwilling to perform when performance is due.
  - (b) This is not unequivocal – it is just a doubt that party will perform.
  - (c) Effect – allows innocent party to suspend performance until she receives adequate assurances that performance will be forthcoming.
    - (i) If assurances are not received, innocent party may be excused from performing.
- (6) Excuse of condition by substantial performance
  - (a) Generally, condition of complete performance may be excused if party has rendered substantial performance. Other party's counter-performance becomes absolute.
  - (b) This is only applied if constructive condition is found. Not applied to express conditions.
  - (c) Not applied where breach is willful.
  - (d) Generally inapplicable to contracts for sale of goods.
- (7) Excuse of condition by divisibility of contract
  - (a) If contract is divisible and one part is performed, he is entitled to agreed-on equivalent for that unit even though others are not completed.
  - (b) Divisibility:
    - (i) All 3 must be met concurrently to be divisible:
      - 1. Performance of each party is divided into 2 or more parts;
      - 2. Number of parts due from each party is the same; and
      - 3. Performance of each part by one party is agreed on as the equivalent of the corresponding part from the other party.
        - a. I.e., each performance is quid pro quo of the other.
  - (c) Art 2
    - (i) Contract is not divisible unless it allows deliveries in several lots – installment contract.

- (8) Excuse of condition by waiver or estoppel
- (a) One with benefit of condition can indicate by words or actions that she will not insist on condition being met.
    - (i) Consideration is not required for waiver of condition.
    - (ii) If no consideration is given for waiver, condition must be ancillary or collateral to main subject and purpose of contract.
    - (iii) Waiver of condition does not waive right to damages.
  - (b) Waiver will be binding (estoppel) if person detrimentally relies on the waiver.
    - (i) Waiver can be retracted any time prior to reliance.
  - (c) If condition is broken, can choose to terminate liability or continue under the contract.
    - (i) If continue, condition is deemed waived.
  - (d) Installment contract
    - (i) If waiver is not supported by consideration, beneficiary of waived condition can insist on strict compliance with terms for future installments by giving notice that he is revoking the waiver (as long as no detrimental reliance).

(9) Excuse of condition of impossibility, impracticability, or frustration

- d) Discharging the absolute duty to perform
- i) By full and complete performance.
  - ii) By good faith tender of performance in accordance with contract terms.
  - iii) By occurrence of condition subsequent.
  - iv) If subject matter has become illegal, performance will be discharged.
    - (1) Due to a subsequently enacted law or govt act.
    - (2) If illegality existed at time agreement was made, no contract was formed.
  - v) By impossibility
    - (1) Duties will be discharged if it is impossible to perform them.
      - (a) Must be objective – duties could not be performed by anyone.
      - (b) Must arise after contract was entered into.
        - (i) If problem existed at time contract as formed, it is a question of whether the contract is voidable because of mistake.
    - (2) Each party is excused from duties yet to be fulfilled.
      - (a) Either party may sue for rescission and get restitution.
    - (3) Temporary impossibility suspends contractual duties, does not discharge them.
    - (4) Specific situations:
      - (a) Death or physical incapacity of person necessary to effectuate contract serves to discharge it. Must be unique to that person.
        - (i) If services could be delegated, contract is not discharged.
      - (b) Supervening illegality

- (c) Subsequent destruction of subject matter or means of performance
  - (i) Except a contractor's duty to construct a building is not discharged by destruction of the work in progress. Not impossible – can still rebuild.
  - (ii) However, when a contract to repair's subject matter is destroyed, repairer's performance is discharged by impossibility because there is nothing left to repair.
  - (iii) This will not apply if risk of loss has already passed to the buyer.

vi) By impracticability

(1) Test:

- (a) Extreme and unreasonable difficulty and/or expense; and
- (b) Its nonoccurrence was a basic assumption of the parties.

(2) Art 2

- (a) Follows above rules. If performance is impossible or commercially impracticable, seller will be discharged to extent of the impossibility or impracticability.
- (b) Generally, seller assumes risk and must perform. But if parties would not have placed the risk of the extraordinary occurrence on the seller, he will be discharged.
- (c) Events sufficient for discharge:
  - (i) Shortage of raw materials
  - (ii) Inability to convert them into product due to war, strike, embargo, shut down of major supplier
  - (iii) Catastrophic local crop failure (not just shortage)
- (d) Increase in costs not sufficient to discharge
  - (i) Increase of more than 50% held insufficient
- (e) Seller's inability to perform is only partial:
  - (i) He must allocate deliveries among customers.

vii) By frustration

- (1) If purpose of contract has become valueless by virtue of some supervening event not the fault of the party seeking discharge.
- (2) Elements:
  - (a) Some supervening act/event leading to the frustration;
  - (b) Parties did not reasonably foresee the act or event occurring;
  - (c) Purpose of the contract is almost completely destroyed by act/event; and
  - (d) Purpose of the contract was known by both parties at time of contract.

- viii) By rescission
- (1) Mutual rescission
- (a) Express agreement between the parties to rescind.
    - (i) This itself is a binding contract supported by consideration – giving up right to counter-performance by the other.
  - (b) If 3<sup>rd</sup> party beneficiary case and rights of 3<sup>rd</sup> party have already vested, then contract cannot be discharged by mutual rescission.
  - (c) Unilateral contracts
    - (i) To rescind where offeree has already performed, the rescission promise must be supported by:
      - 1. An offer of new consideration by nonperforming party; or
      - 2. Elements of promissory estoppel (detrimental reliance); or
      - 3. Manifestation of an intent by original offeree to make a gift of the obligation owed her.
    - (d) Can be oral, even if contract expressly states that it can be rescinded only by a written document, unless:
      - (i) Subject matter of contract falls within SOF, or
      - (ii) Contract is for sale of goods.
        - 1. Art 2 requires written rescission if original contract requires written rescission.
- (2) Unilateral rescission
- (a) To be granted, party desiring rescission must have adequate legal grounds.
    - (i) Mistake, misrepresentation, duress, and failure of consideration.
- ix) Partial discharge by modification of contract
- (1) If contract is subsequently modified, it will discharge the terms of the original contract that are the subject of the modification but it will not discharge the entire contract.
  - (2) Must have:
    - (a) Mutual assent
      - (i) But under doctrine of reformation, either party may bring equity action to have terms modified if the writing, through mistake or misrepresentation, does not incorporate the terms orally agreed to.
    - (b) Consideration
      - (i) Courts usually find this because each party has limited his right to enforce the original contract.
      - (ii) Except:
        - 1. No consideration is needed for modification of sale of goods under Art 2.



x) By novation

- (1) Occurs when new contract substitutes a new party to receive benefits/assume duties that originally belonged to original party under old contract. Novation will discharge the old contract.
- (2) Elements:
  - (a) Previous valid contract;
  - (b) Agreement among all parties, including new parties to contract;
  - (c) Immediate extinguishment of contractual duties between original parties; and
  - (d) Valid and enforceable new contract.

xi) By cancellation

- (1) Destruction of written contract will not discharge it.
- (2) But if parties manifest intent to have these acts serve as discharge, it will have this effect if consideration is present.

xii) By release

- (1) Release and/or contract not to sue will discharge contractual duties.
- (2) Must be in writing and supported by new consideration or promissory estoppel elements.

xiii) By substituted contract

- (1) When parties to contract enter a second one that immediately revokes the first one (expressly or impliedly).
- (2) Depends on intent of parties.
  - (a) If immediate discharge of first contract is intended, there is a substitute contract.
  - (b) If parties intend that first contract to be discharged only after performance of the second contract, there is an executory accord rather than a substituted contract.

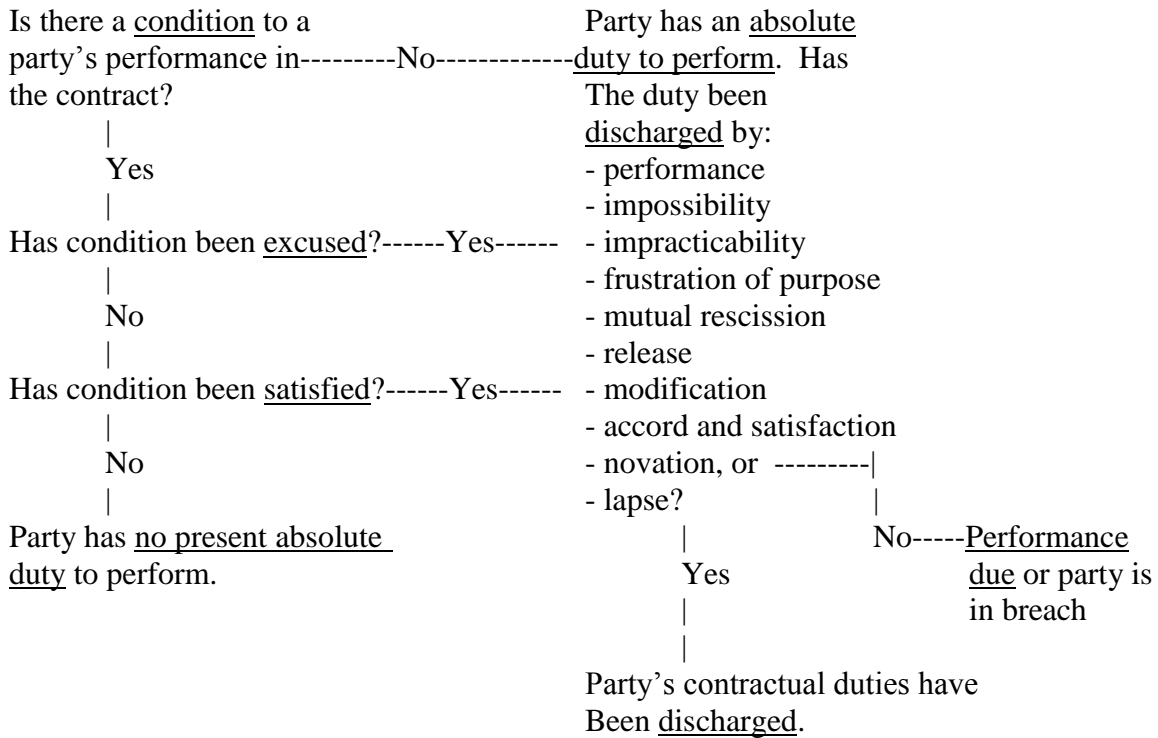
xiv) By accord and satisfaction

(1) Accord

- (a) Agreement in which one party to existing contract agrees to accept, in lieu of original performance, some different performance.
- (b) Must be supported by consideration.
  - (i) When it is of a lesser value than original consideration, it will be sufficient if the new consideration is of a different type or if claim is to be paid to a 3<sup>rd</sup> party.
  - (ii) Partial payment of original debt
    1. Majority view – will suffice for an accord and satisfaction if there is a bona fide dispute as to the claim or there is some alteration (even slight) in debtor's consideration.

- (c) Effect
  - (i) Accord suspends the right to enforce the contract in accordance with the terms of the accord contract.
- (2) Satisfaction
  - (a) Performance of the accord agreement.
  - (b) Its effect is to discharge:
    - (i) Original contract, and
    - (ii) Accord contract.
- (3) Breach of accord before satisfaction
  - (a) Breach by debtor
    - (i) Creditor may sue either:
      - 1. On the original undischarged contract, or
      - 2. For breach of the accord agreement.
  - (b) Breach by creditor (i.e., sues on original contract)
    - (i) Debtor may:
      - 1. Raise the accord agreement as an equitable defense and ask that contract action be dismissed; or
      - 2. Wait until he is damaged – creditor is successful in the contract action on the original contract – and then sue for damages.
- (4) If monetary claim is uncertain or subject to bona fide dispute, an accord and satisfaction may be accomplished by a good faith tender and acceptance of a check, when check conspicuously states that it is tendered in full satisfaction of the debt.
- xv) By account stated
  - (1) Account stated – contract between parties where they agree to an amount as a final balance due.
- xvi) By lapse
- xvii) Running of SOL
  - (1) If SOL has run, actions for breach of contract may be barred.
    - (a) Only judicial remedies are barred.
    - (b) Does not discharge duties. Just makes the contract unenforceable. (where lapse discharges the contract)

## Performance of contract



## 7) Breach

### a) Occurs when:

- i) Promisor is under an absolute duty to perform, and
- ii) This absolute duty has not been discharged, and
- iii) There is a failure to perform in accordance with contractual terms.

### b) Type of breach – common law

#### i) Minor breach

- (1) If obligee gains the substantial benefit of the bargain, despite defective performance.
- (2) Does not relieve duty of performance under the contract but gives a right to damages for the minor breach.
- (3) Coupled with anticipatory repudiation
  - (a) Nonbreaching party may treat it as a material breach (sue immediately for total damages and discharged from performance).

- ii) Material breach
  - (1) If obligee does not get substantial benefit of the bargain.
  - (2) Nonbreaching party:
    - (a) May treat the contract as at an end – discharging any counter-performance, and
    - (b) Have an immediate right to all remedies for breach of the entire contract.
  - (3) Failure to perform by time in contract is generally not a material breach if performance is rendered in a reasonable time.
    - (a) Unless timely performance is essential to contract, then it may be material.
- iii) So remember: minor breach allows aggrieved party to recover damages, but she still must perform. Material breach, aggrieved party need not perform.
- iv) Determining materiality
  - (1) Courts look at:
    - (a) Amount of benefit received by nonbreaching party;
    - (b) Adequacy of compensation for damages to the injured party;
    - (c) Extent of part performance by breaching party;
    - (d) Hardship to the breaching party;
    - (e) Negligent or willful behavior by breaching party; and
    - (f) Likelihood that breaching party will perform the remainder of contract.
  - (2) Nonbreaching party must show he was willing and able to perform.
- c) **Perfect tender rule** – Art 2 sale of goods
  - i) Does not follow rule of substantial performance.
  - ii) If goods or their delivery fail to conform to the contract in any way, buyer may reject all, accept all, or accept any unit and reject the rest.
  - iii) Right to reject is cut off by acceptance
    - (1) A buyer accepts (under Art 2) when:
      - (a) After reasonable opportunity to inspect the goods, she indicates to seller that they conform or that she will keep them even though they fail to conform;
      - (b) She fails to reject within a reasonable time after tender or delivery; or
      - (c) She does any act inconsistent with the seller's ownership.
  - iv) If buyer rejects goods and they are in her possession, she must hold them with reasonable care and obey any instruction as to them.
    - (1) If seller gives no instruction within a reasonable time, buyer may reship the goods to seller, store them for seller's account, or resell them for seller's account.

- v) Buyer's right to revoke acceptance
  - (1) Once goods are accepted, buyer can no longer reject and is now obligated to pay for them (less any damages resulting from seller's breach).
  - (2) Exception:
    - (a) Buyer may revoke acceptance if goods have a defect that substantially impairs the value, and:
      - (i) She accepted the goods on the reasonable belief that the defect would be cured and it has not been; or
      - (ii) She accepted the goods because of the difficulty of discovering the defects or because of the seller's assurance that the goods conformed to the contract.
  - (3) Revocation must occur:
    - (a) Within a reasonable time after defects discovered/should have been discovered; and
    - (b) Before any substantial change in goods occurs that is not caused by defect.

vi) **Exceptions to perfect tender rule**

- (1) Installment contracts
  - (a) Right to reject is more limited.
  - (b) Installment can be rejected only if:
    - (i) The nonconformity substantially impairs the value of that installment; and
    - (ii) Cannot be cured.
  - (c) The whole contract is breached only if the nonconformity substantially impairs the value of the entire contract.
- (2) Seller's right to cure
  - (a) Single delivery contracts
    - (i) Seller can cure by notice and new tender within time for performance.
    - (ii) Right to cure beyond original contract time
      - 1. Ordinarily, seller has no right to cure beyond original contract time.
      - 2. But if buyer rejects tender of nonconforming goods that the seller reasonably believed would be acceptable, the seller, with reasonable notification to buyer, has further reasonable time beyond contract time to make a conforming tender.
        - a. Reasonable belief it seller can show that:
          - i. Trade practices or prior dealings with buyer, or
          - ii. Seller could not have known of defect despite proper business conduct (i.e., packaged goods purchased from supplier).
  - (b) Installment contracts
    - (i) Art 2 – defective shipment of installment cannot be rejected if the defect can be cured.

- d) Anticipatory repudiation
  - i) Can be treated as an immediate breach of contract.
- e) Breach of warranty
  - i) Seller warranties condition of goods even after acceptance.
  - ii) Failure of warranties is a breach.

## 8) Remedies

- a) Nonmonetary
  - i) **Specific performance**
    - (1) If the legal remedy is inadequate, this can be sought by nonbreaching party.
    - (2) Always available for land sale contracts, rare goods, or unique at the time performance is due.
    - (3) Not available for contracts to provide services, even if services are rare or unique.
      - (a) But court may enjoin breaching employee from working for a competitor for duration of contract if services contracted for are rare or unique.
  - (4) Covenants not to compete
    - (a) Courts will grant specific performance to enforce these contracts if:
      - (i) Services to be performed are unique (rendering money damages inadequate); and
      - (ii) Covenant is reasonable. To be reasonable:
        - 1. Must be reasonably necessary to protect a legitimate interest of person benefited by the covenant (employer);
        - 2. Must be reasonable as to its geographic scope and duration; and
          - a. Cannot be broader than the benefited person's customer base and not longer than 1 or 2 years.
        - 3. Must not harm the public.
- (5) Equitable defenses available
  - (a) Laches
    - (i) Claim that P has delayed bringing the action and the delay has prejudiced def.
  - (b) Unclean hands
    - (i) Claim that party seeking specific performance is guilty of wrongdoing in the transaction being sued upon.
  - (c) Sale to a bona fide purchaser
    - (i) Claim that the subject matter has been sold to a person who purchased for value and in good faith.

ii) **Nonmonetary remedies under Art 2**

(1) Buyer

(a) Cancellation

- (i) Buyer can cancel the contract if rightfully rejects goods because they do not conform to the contract.

(b) Right to replevy

(i) On buyer's prepayment

1. If buyer made part payment and seller has not delivered the goods, buyer may replevy the goods if:
  - a. Seller has become insolvent within 10 days after receiving buyer's first payment, or
  - b. Goods were purchased for personal, family, or household purposes.
2. Buyer must tender any unpaid portion of purchase price to seller.

(ii) On buyer's inability to cover

1. Buyer may replevy undelivered, identified goods from seller if the buyer, after reasonable effort, is unable to secure adequate substitute goods.

(c) Specific performance

- (i) Where goods are unique or in other proper circumstances.
- (ii) Court may order it even where the goods have not yet been identified to the contract by the seller.

(2) Seller

(a) Right to withhold goods

(i) Can be done if:

1. Buyer fails to make payment due on or before delivery
2. When goods sold on credit, and before delivery, seller discovers buyer is insolvent.
  - a. But here, goods must be delivered if buyer tenders cash for payment.

(b) Right to recover goods

(i) On buyer's insolvency

1. If buyer received goods on credit while insolvent, seller can reclaim goods upon demand made within 10 days after buyer's receipt of goods.
  - a. 10 day limit does not apply if misrepresentation of solvency has been made in writing to seller within 3 months before delivery.

- (ii) Shipped or stored goods from bailee
    - 1. On buyer's insolvency
      - a. Seller may stop delivery of goods in possession of carrier if buyer is insolvent.
    - 2. On buyer's breach
      - a. Seller may stop delivery if buyer breaches or seller has right to withhold performance pending receipt of assurances.
- (3) Right to demand assurances
  - (a) If party reasonably fears that other will not perform, he can demand assurances that performance will be forthcoming in proper time.
    - (i) He can suspend performance until adequate assurances are made.
  - (b) If assurances not received in reasonable time, he can treat contract as repudiated.
  - (c) Different from anticipatory repudiation, which requires more than just fear of nonperformance – there must be a clear indication that other will be unable to perform.
    - (i) I.e., “I am not going to perform” = anticipatory repudiation. “I’m not sure if I can perform” = reason to demand assurances.
- b) Monetary remedy – damages
  - i) Types
    - (1) **Compensatory damages**
      - (a) To put the nonbreaching party where she would have been had the promise been performed.
      - (b) **Expectation damages** - standard measure
        - (i) Sufficient damages to buy substitute performance.
        - (ii) Also known as benefit of the bargain damages.
      - (c) **Reliance damages**
        - (i) If expectation damages are too speculative, can recover this.
        - (ii) To put P in position she would have been in had the contract never been formed.
          - 1. Awards P cost of her performance.
      - (d) **Consequential damages**
        - (i) Losses resulting from breach that any reasonable person would have foreseen would occur from breach at time of entry into contract.
        - (ii) P must show:
          - 1. Both parties were aware of special circumstances at time of contract formation, which would involve substantial risk and damage if contract were breached.



(iii) In sale of goods, only buyer can recover consequential damages.

**(e) Incidental damages**

- (i) Includes expenses reasonably incurred by the buyer in inspection, receipt, transportation, care, and custody of goods rightfully rejected.
- (ii) Other expenses reasonably incident to the seller's breach.
- (iii) Expenses by seller in storing, shipping, returning, and reselling goods as a result of buyer's breach.

**(2) Punitive damages**

- (a) Not recoverable in contract cases.

**(3) Nominal damages**

- (a) May be awarded when a breach is shown but no actual loss is proven.

**(4) Liquidated damages**

- (a) Parties can stipulate damages in event of breach.
- (b) Must be reasonable in view of actual or anticipated harm caused by breach.
- (c) Requirements for enforcement:
  - (i) Damages for breach must have been difficult to estimate or ascertain at the time contract was formed; and
  - (ii) Amount agreed on must have been a reasonable forecast of compensatory damages if breach.
    - 1. Test – comparison between amount of damages prospectively probably at time of contract formation and the liquidated damages amount.
- (d) If liquidated damages amount is unreasonable, court will not enforce it.
- (e) If requirements are met, P will get this amount, even if no actual money damages are suffered.

ii) Standard measure

(1) Contracts for sale of goods

(a) Buyer's damages

(i) If seller does not deliver/buyer rejects goods/revokes acceptance

1. **Difference between contract price and either:**

- a. Market price - **benefit of the bargain damages**; or
  - i. Market price determined at time buyer learns of breach.
- b. Cost of replacement goods – **cover**
  - i. To use this, buyer must make a reasonable contract for substitute goods in good faith and without unreasonable delay.

2. **Plus incidental and consequential damages, less expenses saved due to seller's breach.**

(ii) If seller delivers nonconforming goods that buyer accepts

1. Warranty damages

- a. Damages = difference between value of goods delivered and value if goods were according to contract plus incidental and consequential damages.

2. To recover damages for defect to accepted goods, buyer must within a reasonable time after discovers/should have discovered defect notify seller of defect.

(iii) If seller anticipatorily breaches contract

- 1. Damages = difference between market price at time buyer learned of breach and contract price.

(b) Seller's damages

(i) If buyer repudiates/refuses to accept conforming goods

1. Seller can:

- a. Recover the difference between **market price and contract price**;
  - i. Market price measured as of time and place of delivery.
- b. **Resell** the goods and recover the difference between **contract price and resale price**; or
- c. Recover under **lost profits** – difference between **contract price and cost to seller**.
  - i. If seller is dealer, his costs would be cost to obtain the goods.
  - ii. If seller is a manufacturer, his costs would be costs of making the goods.

- iii. Should only be used when other measures will not put seller in as good a position as he would have been in if buyer did not breach. So typically used for sellers with unlimited inventory because a lost sale will result in loss of 2 sales (i.e., sale of TV, by resell, then seller loses out on 2 sales, so lost profit is a better measure to compensate seller).
- iv. To determine if this is the measure to be used, look at seller's supply – if unlimited, then he is a lost volume seller and lost profits measure can be used. If limited, lost profits measure cannot be used and use other methods instead.

(ii) Action against buyer for full contract price if:

1. Buyer accepted goods and did not pay.
2. Buyer has not accepted goods and seller is unable to resell them at any reasonable price.
3. When goods are damaged/lost and risk of loss was on buyer.

Art 2 damage measures for total breach (buyer does not accept/seller does not deliver)			
Buyer's measures			
<b>Benefit of bargain</b> Market price – Contract price	+ Incidental damages (costs of shipping, storing, etc. due to breach)	+ Foreseeable consequential damages	- Expenses saved
Or			
<b>Cover</b> Cost of reasonable replacement goods – Contract price			
Seller's measures			
<b>Benefit of bargain</b> Contract price – Market price	+ Incidental damages (costs of shipping, storing, etc. due to breach)	- Expenses saved	
Or			
<b>Resale</b> Contract price – Resale price			
Or			
<b>Lost profit</b> Contract price – Cost of goods (only used if seller has lost sales volume from breach)			
Or			
<b>Action for price</b> Contract price (only used if goods cannot be sold to others at reasonable price)			

- (2) Contracts for sale of land
  - (a) Damages = difference between contract price and fair market value of land.
- (3) Employment contracts
  - (a) Breach by employer
    - (i) Employee's damages are full contract price – regardless of when the breach occurs.
      - 1. Damages may be reduced if employee fails to mitigate.
  - (b) Breach by employee
    - (i) Employer's damages are what it costs to replace the employee.
- (4) Construction contracts
  - (a) Breach by owner
    - (i) Builder will be entitled to profits that would have resulted from contract + any costs expended.
  - (b) Breach by builder
    - (i) Owner is entitled to cost of completion plus reasonable compensation for the delay.
- (5) Installment payment contracts
  - (a) If a payment is not made, there is only partial breach.
  - (b) Aggrieved party limited to recovering the missing payment.
    - (i) But contract may include an acceleration clause making the entire amount due on any late payment.

### iii) **Certainty rule**

- (1) P must prove that the losses suffered were certain in nature and not speculative.
  - (a) Lost profits are recoverable if they can be made more certain by showing similar businesses in the area or others owned by same party.

### iv) **Duty to mitigate**

- (1) Nonbreaching party has a duty to mitigate damages.
  - (a) Cannot incur further expenses, make reasonable efforts to cut down the losses by procuring a substitute at a fair price.
- (2) Party can recover expenses of mitigation.
- (3) Specific cases
  - (a) Employment contracts
    - (i) Employer breach – employee is under duty to use reasonable care to find position of same kind, rank, and grade in the same locale. Burden is on employer to show such jobs were available.

- (b) Contracts for sale of goods
    - (i) Buyer breach – seller cannot bring action against buyer for full price unless goods cannot be resold or were damaged when risk of loss was on buyer.
  - (c) Manufacturing contracts
    - (i) Buyer breach – manufacturer is under duty to mitigate by not continuing work after the breach.
      - 1. But if completion will decrease damages, then mfg can continue.
  - (d) Construction contracts
    - (i) Owner's breach – builder does not have to mitigate by finding other work, but does have duty to mitigate by not continuing work after breach.
- c) **Restitution**
- i) Based on preventing unjust enrichment.
  - ii) It is the value of the benefit conferred. Usually to def.
    - (1) May also be measured by the detriment suffered by P if benefits are difficult to measure or benefit measure would achieve an unfair result.
  - iii) Specific cases
    - (1) When contract is breached
      - (a) Nonbreaching party may choose to rescind the contract and sue for restitution to prevent unjust enrichment.
        - (i) Remember that if P has fully performed, he is limited to damages under the contract. It is possible for these damages to be less than the amount he would have received under restitution (since that is not limited to the contract price).
    - (2) When contract is unenforceable
      - (a) Quasi-contract
        - (i) I.e., star is hired to sign autographs and is paid, but dies before he performs, the other party has a restitutionary action to recover the payment.
    - (3) When no contract is involved
      - (a) Quasi-contract – when restitution will be available, if:
        - (i) P has conferred a benefit on def;
        - (ii) P conferred the benefit with the reasonable expectation of being compensated for its value;
        - (iii) Def knew or had reason to know of P's expectation; and
        - (iv) Def would be unjustly enriched if he were allowed to retain the benefit without compensating P.

9) **3<sup>rd</sup> parties to contract**

a) **3<sup>rd</sup> party beneficiaries**

- i) A (promisee) contracts with B (promisor) that B will render some performance to C (3<sup>rd</sup> party beneficiary).

ii) Types

- (1) Incidental beneficiary – do not have contractual rights
- (2) Intended beneficiary – have contractual rights
  - (a) Consider whether beneficiary:
    - (i) Is identified in contract,
    - (ii) Receives performance directly from promisor, or
    - (iii) Has some relationship with the promisee to indicate intent to benefit.
- (3) Creditor beneficiary – person to whom debt is owed by the promisor
- (4) Donee beneficiary – person whom the promisee intends to benefit gratuitously

iii) Vesting of rights to 3<sup>rd</sup> party

- (1) Occurs when he:
  - (a) Manifests assent to a promise in the manner requested by the parties;
  - (b) Brings a suit to enforce the promise; or
  - (c) Materially changes position in justifiable reliance on the promise.
- (2) Prior to vesting, promisee and promisor are free to modify or rescind beneficiary's rights under the contract.
  - (a) Once vested, no changes without his consent.

iv) Rights of parties

- (1) 3<sup>rd</sup> party beneficiary vs. promisor
  - (a) Beneficiary can sue promisor.
  - (b) Promisor can assert any defense he would have had against promisee.
  - (c) If promisor made absolute promise to pay,
    - (i) Promisor cannot assert promisee's defenses against 3<sup>rd</sup> party.
  - (d) If promisor made only a promise to pay what the promisee owes the 3<sup>rd</sup> party,
    - (i) Promisor can assert promisee's defenses.
- (2) 3<sup>rd</sup> party beneficiary vs. promisee
  - (a) Creditor beneficiary can sue promisee on existing obligation.
  - (b) Donee beneficiary has no right to sue promisee unless grounds for detrimental reliance remedy exists.

## Determining intended 3<sup>rd</sup> party beneficiary status and contractual rights

At time contract was made, did promisor

promise the promisee to render some performance to a 3<sup>rd</sup> party? -----No-----Not a 3<sup>rd</sup> party beneficiary Situation

|  
Yes

|  
Is 3<sup>rd</sup> party:

- 1) specifically identified in contract,
- 2) to receive performance directly-----No----- 3<sup>rd</sup> party cannot enforce the contract from promisor, or
- 3) in some relationship with promisee to indicate an intent to benefit?

|  
Yes

|  
Have 3<sup>rd</sup> party's rights vested by the 3<sup>rd</sup> party's:

- 1) assenting to the contract,
- 2) bringing suit to enforce the contract, or-----No-----Promisor and promisee are free to change the contract's terms, including changing the beneficiary
- 3) materially changing position in justifiable reliance on the promise?

|  
Yes

|  
3<sup>rd</sup> party can enforce the contract against promisor, subject to promisor's defenses against promisee (unless promisor made absolute promise to perform)

### b) Assignment of rights and delegation of duties

#### i) Assignment

- (1) X (obligor) contracts with Y (assignor). Y assigns his right to X's performance to Z (assignee).

- (2) Generally, all rights can be assigned.

#### (a) Exceptions:

- (i) Assignment that would substantially change the obligor's duty or risk
  1. I.e., personal service contracts where service is unique or requirements/output contracts where assignee will substantially vary the quantity.
- (ii) Assignment of future rights to arise from future contracts (not in already existing contracts)

- (iii) Assignment prohibited by law
  - 1. I.e., wage assignments
- (b) Clause prohibiting assignment of the contract is construed as barring delegation of assignor's duties.
  - (i) Clause prohibiting assignment of contractual rights does not bar assignment but gives obligor right to sue for damages.
  - (ii) Clause that says attempts to assign will be void bars assignment by parties.
- (3) Effective assignment requires the assignor to manifest an intent to immediately and completely transfer her rights.
  - (a) Right being assigned must be adequately described.
  - (b) Not required:
    - (i) Writing
    - (ii) Use of word "assign"
    - (iii) Consideration
- (4) Effect of assignment
  - (a) Establishes privity of contract between obligor and assignee
  - (b) Extinguishes privity between obligor and assignor.
- (5) If assignment is for consideration, it is irrevocable.
  - (a) Gratuitous assignment is revocable, except if:
    - (i) Obligor has already performed,
    - (ii) A token is delivered,
      - 1. I.e., stock certificate
    - (iii) Assignment is put in writing, or
      - 1. I.e., intangible claim, like contract right
    - (iv) Assignee can show detrimental reliance on the assignment
  - (b) Revocable gratuitous assignment may be terminated by:
    - (i) Death or bankruptcy of assignor,
    - (ii) Notice of revocation by assignor to assignee or obligor,
    - (iii) Assignor takes performance directly from obligor, or
    - (iv) Subsequent assignment of same right to another.
- (6) Rights of parties
  - (a) Assignee vs. obligor
    - (i) Assignee can sue obligor
    - (ii) Obligor can raise a defense inherent in the contract.
    - (iii) Obligor cannot raise any defense the assignor might have had against the assignee.



- (b) Assignee vs. assignor
  - (i) Assignee can sue assignor for wrongfully revoking assignment.
  - (ii) Assignee can sue assignor if obligor successfully uses a defense to enforce the obligation.
  - (iii) Assignor not liable to assignee if obligor is incapable of performing.
- (7) Successive assignments of the same right
  - (a) If 1<sup>st</sup> assignment is revocable, subsequent assignment revokes it.
  - (b) If it is irrevocable, 1<sup>st</sup> assignment will prevail.
    - (i) Exceptions (if 2<sup>nd</sup> assignee paid value and took without notice), the subsequent assignee:
      - 1. Gets first judgment against obligor;
      - 2. Gets first payment of claim from obligor;
      - 3. Gets delivery of a token;
      - 4. Is a party to a novation releasing the assignor; or
      - 5. Can proceed against 1<sup>st</sup> assignee on an estoppel theory
- ii) **Delegation**
  - (1) Y (obligor/delegator) promises to perform for X (obligee). Y delegates her duty to Z (delegate).
  - (2) Generally, all duties can be delegated.
    - (a) Exceptions:
      - (i) Duties involve personal judgment and skill
      - (ii) Delegation would change the obligee's expectancy
      - (iii) A special trust was reposed in the delegator by the other party to the contract
      - (iv) There is a contractual restriction on delegation
  - (3) Effective delegation requires delegator to manifest a present intent to make a delegation.
    - (a) Nothing else special.
    - (b) Need not be in writing.
  - (4) Rights of parties
    - (a) Obligee must accept performance from delegate.
    - (b) Delegator remains liable on contract – so obligee can sue delegator for nonperformance by delegatee.
    - (c) Obligee can sue delegate for nonperformance, but can require delegate to perform only if there has been an assumption.
      - (i) Promise + consideration that forms a contract between delegator and delegate in which the obligee is a 3<sup>rd</sup> party beneficiary.

- c) Power of person other than owner to transfer good title to purchaser
  - i) Entrusting
    - (1) Entrusting goods to a merchant who deals in goods of that kind gives him power – but not right – to transfer all rights of the entruster to a buyer in the ordinary course of business.
      - (a) I.e., A leaves her watch with Jeweler for repairs. Jeweler sells watch to, who does not know that J does not have a right to sell. Z gets good title against A. A's only remedy is to sue J for damages.
      - (b) Note – requirements are specific.
        - (i) Deals in goods of that kind
          - 1. I.e., tv repair shop that only repairs tvs does not qualify.
        - (ii) Sale in the ordinary course of business
          - 1. I.e., seizure by creditor to satisfy a lien does not qualify.
        - (iii) Only transfers rights, not ownership.
  - ii) Voidable title
    - (1) If sale induced by fraud, seller can rescind and recover goods from fraudulent buyer – voidable title.
    - (2) Exception:
      - (a) Cannot recover goods from a good faith purchase for value who bought from fraudulent buyer.
        - (i) Rights of defrauded seller are cut off by a buyer and by a person who takes a security interest in the goods.
  - iii) Thief cannot pass title to subsequent buyer.
    - (1) Exception:
      - (a) If buyer has made valuable improvements to the goods, or
      - (b) True owner is estopped from asserting title.
        - (i) I.e., true owner expressly/impliedly represented that thief had title.