

\*\*\*\*\*RULES GOVERNING CONTRACTS\*\*\*\*\*

- **Common Law** → *Restatement of the Law, Second, Contracts*
  - What the law is / should be
- **Sale of Goods** → *Uniform Commercial Code (UCC) Article 2*
  - **Tangible personal property** that is **movable**
  - Merchant – person engaged in business / profession / seller who deals regularly in the type of goods sold → knowledgeable
- **International Sale of Goods** → *United Nations Convention on Contract for International Sale of Goods (CISG)*
  - Parties → places of business in different States

\*\*\*\*\*UNENFORCEABLE + ENFORCEABLE PROMISES\*\*\*\*\*

- **UNENFORCEABLE**
  - **Pure Moral Obligation** → unbargained-for benefit voluntarily conferred → no existing legal obligation (*doctor vs. good sam.*)
  - **Gratuitous Promise** → no expectation of comp. (*close relation*)
  - **Pre-Existing Duty** → no new consideration (*past consid.*)
  - **Illusory Promise** → promise that promises nothing (*free way out*)
    - EX – implied promise of good faith, best efforts, satisfaction clause
  - **Promise when Promisee Completely Unaware** – no mutual assent
    - EX – part perform, then learn offer, accept by complete perform
  - **Perf. for unenforce** → NO restitution UNLESS substan. forfeiture

ENFORCEABLE

- **Promise Supported by Consideration** → bargained-for exchange
- **Material Benefit** → unbargained-for benefit creates moral obligation + subsequent promise to be bound by moral obligation
- **Reliance** → promise with unbargained-for reliance
- **Debts** → barred by SoL + of bankruptcy + incurred by infants

\*\*\*\*\*K FORMATION\*\*\*\*\*

- **Manifestation of mutual assent** → meeting of the minds
  - intend to make K + intend to be bound + agree to essential terms
- **Essential** → identity of offeree + subject matter + price + time + quantity + nature of work performed
- **Objective Theory of K** → reasonable person would think
  - Intent of parties → words and actions (no state of mind)

K OBLIGATIONS

- **UCC** → K made in any manner to show agreement [2-204]
  - OK → moment K made is undetermined
  - One of more terms left open → not fail for indefiniteness
- **Express K** → stated in words (written or oral)
- **Implied-in-Fact K** → implied from conduct (some uncertainty OK)
- **Quasi-K** → prevent unjust enrichment [disregard assent or intent]
  - Benefit conferred upon party + party acknowledged benefit + unjust for party to retain benefit
  - Remedy → restitution
- **Promissory Estoppel** [§ 90] → unbargained-for reliance
  - Promise that would reasonably induce action or forbearance by promisee (reliance is reasonable + foreseeable by promisor)
  - Material change position in reliance + now worse off (actual)
    - Would not occur if promise not made
  - Enforce promise to avoid injustice
  - Remedy → limited as justice requires → reliance → should not put promisee in better position than perform of promise would have

OFFER

- **OFFER** → unilateral (calls for perform) bilateral (return promise)
  - Shows willingness to bargain + invites assent justifiably + assent concludes bargain [§ 24] (also reasonably certain terms)
- **Ads** → invitations for offers UNLESS includes language of commitment + invitation to take action w/o further comm. OR terms are clear, definite, explicit + leaves nothing open to negotiation
  - Revoke → equal to that of offer (no better means reas.avail.)
- **Unilateral offer** → prize + rewards + friends + relatives
  - Partial performance vs. prep. for performance (not enough) → must be part of actual performance invited → BUT maybe reliance
  - Indicators → conduct referable to offer + definite/substantial character of conduct + actual benefit to offeror rather than offeree + terms of communication + prior course of dealing + trade usage
- **ACCEPTANCE** → mirror image response → accept all terms [§ 50]
  - Manifests assent to terms in manner invited or required by offeror
  - If unstated or doubt → invites both (offeree chooses) [§ 32] [§ 30]
  - Any manner + by any medium reasonable in circumstances [2-206]
- **Return Promise** (words or conduct) → notice to offeror
  - Commencement of work – promise to complete performance
- **Performance** → Last Shot Doctrine → no notice + start performance
  - UNLESS offeror no adequate means of learning of performance
- **Offer to buy goods for prompt / current shipment**
  - Prompt promise to accept / prompt/current shipment of conforming goods (acceptance) / non-conforming goods (breach) UNLESS notice of accommodation (counteroffer – not acceptance) [2-206]
- **Acceptance by Silence or Inaction** → not acceptance UNLESS
  - Takes benefit of services w/ reasonable opp. to reject + reason to know except comp. / stated silence understood as manifestation / prior dealings indicate (to reject → notice not to accept) [§ 69]
- **Mail Box Rule** → if follow invited manner + by medium [§ 63]

- Acceptance is operative → once put out of possession of offeree
- Does not matter whether reaches offeror or not → as long as properly addressed + stamped + precautions to insure safe transmission + no errors by offeror
- **Upon Receipt** → offer + revocation + rejection + counteroffer + option K acceptance + acceptance not invited manner/medium + acceptance improperly dispatched
  - Unauthorized Means / Improperly Transmitted → upon receipt
- **Destruction of Power of Acceptance** → inquiry/request OK
  - Rejection / counteroffer / lapse of time (reasonable) / revocation (direct or indirect comm.) / death/incapacity of offeror/offeree
    - Non-occurrence of condition of acceptance
- **Reasonable Time for Acceptance** → circumstances → shelf life
  - Face-to-face conversation → power ends at end of conversation
  - Offer by mail → accepted if mailed before midnight received
- **Not Rejections** → time to think (extend power of acceptance) + “prefer” (maintain power) + grumbling acceptance (unhappy accept)

BATTLE OF THE FORMS

- **Add'l / diff terms** → still acceptance UNLESS conditional on assent
  - Add'l terms → proposals for additions
- **b/w merchants** → add'l terms part of K UNLESS offer limits (mirror) / materially alter K / notice of objection given w/in reas. time
- **Conduct by parties recognize existence of K** → establish K although writing do not consist of terms in writings which parties agree
  - Terms decided after dispute after exchange (obliterates last shot)
- **Diff. terms (courts split)** → treat like add'l / conflicting terms are taken out (Knockout Rule) → gaps filled by UCC
- **If one merchant** → additional terms part of K → when offeror expressly assents to them

CONSIDERATION

- **Return promise / act / forbearance** (refrain/waiver legal right) / create/modify/destroy legal relation (to/from anyone)
- **Sufficient** → bargain taken place (external manifest) + not required to have actual value → legal value (sufficient not adequate)
  - Promise for a promise + promise creating power of acceptance
- **Insufficient** → false recital of consideration (EX – option K), nominal purported consideration → mere pretense (gift)
- **Settlement of Claims** [§ 74] → refrain from asserting claim/defense (later invalid) → not consideration UNLESS doubtful claim b/c of uncertainty in law/fact / believes claim may be fairly determined valid

IRREVOCABLE OFFER + OPTION K

- **Firm Offers** → merchant's offer + signed writing + gives assurance offer held open for stated time or reasonable time (3 months max) + (if offeree's assurance form, offeror sign sep.) [2-205]
  - Not supported by consideration
- **Option K #1** → promise that limits promisor's power to revoke offer
  - Must be supported by consideration [§ 25]
- **Option K #2** → offer binding as option K [§ 87]
  - In writing and signed by offeror
  - Recites purported consideration for making offer
    - Not supported by real consideration
  - Proposes exchange on fair terms within reasonable time
- **Option K #3** → Unilateral K → partial performance by offeree
  - Manifestation of Contrary Intent → offeror reserves right to refuse to receive performance → not an offer
- **Option K #4** → Bilateral K → Promissory Estoppel Option K
  - Reliance on offer before acceptance by return promise
- **Offeror's Duty of Performance** → bound BUT conditional on completion of performance in accordance with terms of offer
  - Offeree not bound to complete performance
  - If offeror abandons performance → offeror's duty never arises
    - Condition → can be excused by offeror's prevent, waive, repud

REVOCABLE OPTION K

- **Revocable Option K** → no consideration + no reliance
- **Reject Option K** → not rejection of offer UNLESS reliance
- **Sub-K-ors Offers** → gen. K conditionally accept sub-K offer (irrevocable) → when general bid accepted, offer accepted + binding

PAROL EVIDENCE RULE

- **Extrinsic evidence inadmissible to vary terms of integrated agreement**
- **PE Rule never bars** → subsequent oral + written agreement (mods) / contemporaneous written agreement / K formation defects (fraud, duress, mistake, illegality, no consideration) / condition precedents / ambiguous and indefinite terms + omitted terms / independent K
- **Integration** → final + complete express. of agreement (total or partial)
  - 4 corners → on its face (merger clause)
  - CA → intent of parties → all relevant evidence (circumstances)
- **Vary / Contradiction** → PE vs. integrated terms of partial
  - Parol evidence → supplement / explain → must be consistent
  - Narrow → must negate or contradict a term of writing (small thing can be negated by a lot of evidence)
  - Broad → absence of reasonable harmony in terms of language and respective obligations of parties
- **Interpretation** → ascertain parties' intended meaning

- 4 corners → words given plain meaning
- CA → within entire context → anything goes
- **End Preference** → written version of terms
- **UCC** → explain / supplement → course of dealing / trade usage / course of performance + evidence of consistent add'l terms [2-202]
  - Consistent terms → naturally would be included → excluded
- **Letter of Intent** → outlines agreement before agreement finalized
  - Binding only if too closely resembles formal K
- **Circumstances** → words and actions + prior course of dealing b/w parties + trade usage or commercial practice

\*\*\*\*\*DEFENSES + LIMITATIONS OF ENFORCEABILITY\*\*\*\*\*

- **INDEFINITE + UNCERTAIN K** → K not enforceable [2-204] [§ 33]
  - Essential term is uncertain or still open to negotiation
    - partial perf. → removes uncertainty + NO “agreement to agree”
    - UCC → fill gaps → reasonable price + within reasonable time
- UNLESS parties intended to make and be bound by K (circumstances) + reasonably certain basis for giving appropriate remedy
  - Determine parties' expectations to craft remedy
  - Reliance → appropriate remedy (though uncertainty not removed)
  - Contingency plan → no reliance
- **Informal Agreement of Terms** → binding → later formal agreement contains no new provisions not contained / inferred from prior inform.

STATUTE OF FRAUDS

- **STATUTE OF FRAUDS** → agreement in writing [2-201]
  - One Year Clause → no possibility that fully performed w/in one year
- **Transfer any interest in land** → EX – parties enter into K, partial perform, performance induced by misrepresentation (silence OK)
- **Sale of goods > \$500 (price)** → writing + signed by party (against whom enforcement is sought) → only needs § term (recovery limited)
- **Confirmation** → b/w merchants → written confirmation + sent w/in reasonable time + without objection made w/in 10 days
- EX – specially mfg. goods + admit in pleadings + partial perf. (received and accepted / paid for and accepted) → oral OK
- **Sufficient Writing** → piece separate writings (refer. same subject matter + one signed)
  - PE → connect separate writings + show assent in unsigned

CAPACITY

- **Infancy** → voidable until 18 then can affirm (adult bound + Quasi-K for necessities) EX – marry, child support, military, insure, st. loan
- **Mental illness or defect** → void + Intoxication → voidable
  - Unable to understand in reasonable manner → nature + effect act

MISUNDERSTANDING

- **MISUNDERSTANDING** → No K if no manifestation of mutual assent
  - Parties attach different meanings to manifestations
  - Neither or each party knows or has reason to know meaning by other
    - One's understanding not less reasonable than other (both at fault)
    - PE → interpret which more reasonable
  - If one party knows → enforceable
    - Both don't know → unenforceable

MISTAKE

- **MISTAKE** → belief not in accord with facts → voidable
  - Fact → exist at time of K - NOT prediction / judgment of future events
- **Adversely Affected Party** → avoid contractual duty
- **Unilateral Mistake** → one party made mistake at time of K
  - Mistake as to basic assumption on which K made
  - Mistake has material effect on agreed exchange of performances
  - Party does not bear risk of mistake (not allocated to it)
  - Enforcement of K would be unconscionable
    - OR
    - Other party had reason to know of mistake or his fault caused mistake
- **Bilateral Mistake** → both parties made mistake at time of K
  - Mistake as to basic assumption on which K made
    - Not conscious of alternatives / other possibilities
  - Mistake has material effect on agreed exchange of performances
    - Upset balance of K →
      - Less desirable to one + more advantageous to other
        - Give or receive something more than supposed
    - Party does not bear risk of mistake (not allocated to it)

BEAR RISK

- **Bear Risk** → allocated by agreement / treat limited knowledge as sufficient / reasonable to allocate in circumstances (buyer beware)
- **Fairness/Equity Relief** → mistake material + unconscionable if enforced + fault (no legal duty or negligent) + loss to other (windfall vs. hardship) + prompt notice of error
- **FRAUD + FAILURE TO DISCLOSE** → misrepresent fact → voidable
  - Not opinion → UNLESS fiduc. relation / trick / superior knowledge
  - Fraud → intentionally make + Failure to disclose → fail to make
  - Duty to disclose → correct other's mistake / prevent prior statement misrepresented / entitled to know (relationship) / NOT superior knowledge if equal access (but no mislead or bad faith)
  - Nonfraud. misrep. → voidable if reliance + material
    - Reasonable or that particular person would be induced

DURESS + UNDUE INFLUENCE

- **DURESS + UNDUE INFLUENCE** → deprived of exercise of free will
  - Pressure → leaves party with no reasonable alternative
- **No consent** → forced to say or do something

- **Econ** → not duress UNLESS threat breach existing/continuing K (withhold goods) + no other source + inadequate remedy for breach
- **UNCONSCIONABILITY** → prevent unfair surprise + oppression
  - UCC → one-sided agreement → absent meaningful choice (take it or leave it) + terms unreasonably favor other party (price-value disparity) + lack of bargaining power (lack of knowledge)
- **BUT** not take into account allocations of risk b/c superior bargaining power → must be gross inequality
- **Indicators** → party's belief that no reasonable probability that other party will fully perform + knowledge that other party unable to receive substantial benefit from K + knowledge that other party reasonably unable to protect interests due to ignorance, inability, illiteracy, etc.
  - Consumer transaction (not commercial) + K of adhesion (limit remedy + disclaim warranty) + standardized agreement forms

COMMON REMEDY

- **Common Remedy** → deny specific performance
- **ILLEGALITY + AGAINST PUBLIC POLICY** → unenforceable
  - Bargain, performance, or objective of K violates
- **Exculpatory clause** → OK if only excuse negligent liability
- **Covenant not to compete** → too broad → can reasonably alter + drafted in good faith (limits to geographical + temporal)

\*\*\*\*\*PERFORMANCE + PROBLEMS RELATED\*\*\*\*\*

- **IMPLIED DUTIES OF GOOD FAITH** → K impose obligations both
  - Good Faith + Fair Dealing → honest + observe reasonable standards set by customary standards + parties' expectations
    - K formation, at-will termination, discretion in performance
  - Not intentionally or purposely prevent or hinder → other party from performing his part of K (breach → excused + damages)
  - Cooperation given → when necessary for perform. of other's promise
- **OUTPUT / REQUIREMENT / EXCLUSIVE DEALING** [2-306]
  - **Seller Output K + Buyer Requirement K** → sell all + buy all
    - Stated → good faith (not estimate) controls duty of seller/buyer
      - EX – quantity unreasonably disproportionate to stated estimate
      - Unstated → normal or comparable prior out./req. (reasonable)
        - Must be capable of measurement → otherwise – indefinite term
  - **Exclusive Dealing** → good faith in continued performance
    - Best efforts → to supply goods + to promote sale
      - Specified in K or reasonable efforts in circumstances
    - Ending performance → excused if good faith termination
      - Losses → bankrupt + biz. in genuine danger NOT less profitable + economically not feasible (substantial v. trivial)

MODIFICATION

- **MODIFICATION** → no consideration [§ 89] [2-209] → no uni. retract
  - CL → promise modify K binding → change in circumstances + not fully performed by either + mod. fair + equitable (implied good faith)
    - No duty to negotiate → BUT if do, negotiate in good faith
  - UCC → agreement modify K → mod. obtained in good faith (conduct consistent w/ reasonable comm. standards) NOT coercive conduct

WARRANTIES

- **WARRANTIES** → representation that certain existing facts are true
  - Damages → Breach → if misrep. about goods become part of bargain
    - NO → opinion / commendation of seller
  - Express Warranties → goods conform to → affirmation or promise made + description of goods + sample or model [2-313]
  - Implied Warranty of Quality → title good + transfer rightful + free from any security interest/lien (buyer no knowledge at time) [2-312]
  - Implied Warranty of Merchantability → merchant of goods of that kind → pass w/o object in trade + fair avg quality (if fung. good) + fit for purpose + w/in variation of qual/quantity permitted + adequate contained/packaged/labeled + conform to rep. on label [2-314]
  - Implied Warranty of Fitness for Particular Purpose → if seller knows particular purpose for goods + buyer relies on seller's skill/judgment to select/furnish goods → must fit purpose [2-315]

CONDITIONS

- **CONDITIONS** → not certain to occur (strictly construed if found)
  - Subsequent → existing duty discharged + Precedent → duty due
  - Performance due → condition occurs or non-occurrence excused
    - Passage of time → NOT condition
  - Non-occurrence → discharge of duty (no breach) + defense
    - UNLESS promisor has duty that condition occur (w/in power)
  - Express → subject to + on condition that + provided that + if
  - Implied → good faith + best efforts + notice
    - Intent of parties + logical sequence of events
  - Illusory Promises or Not → satisfaction condition → actual (subjective) or reasonable (objective) → good faith
  - Forfeiture → lose right to compensation

\*\*\*\*\*GROUNDS FOR EXCUSE OF EXPRESS CONDITIONS\*\*\*\*\*

- **Other party's conduct** → prevents or hinders fulfillment, no reasonable or good faith effort, other wrongful actions to undermine K
- **Waiver** → voluntary relinquishment of known right (unilateral)
  - Express (explicit), Estoppel (reliance), Implied (conduct)
  - Retract waiver → reasonable notice received by other that strict performance will be required of any term waived UNLESS unjust due to reliance
- **Avoid Forfeiture** → if non-occurrence would cause disprop. forfeiture

- Condition immaterial to promisor + promisee relied / conferred benefit onto promisor
- Within control → assumed risk for non-occurrence
- Not within control → event not condition
- Disprop. Forfeiture** → promisor not prejudiced by non-occurrence + Promisee engaged in extensive prep. to perform or part performance
- Changed Circumstances** → compliance w/ condition impracticable
- Condition not Intended** → if implied → not central theme/element K
- Substantial Performance** → smaller the deviation + greater the extent of forfeiture → greater the possibility express cond. excused

### CONSTRUCTIVE CONDITIONS OF EXCHANGE

- Dependent covenants** → one's performance is condition precedent
- Order of Performance** → performance that requires period of time due at earlier time / simultaneous exchange of performances
  - Performance precedes payment - services
- Constructive Conditions** → for fairness b/w parties
  - order of performance + effect of failure to perform
- Preference** → promise over condition (least forfeiting)
- Breach of Condition** → forfeiture of K right + no discharge of duty
- Constructive Condition of Substantial Performance**
  - Breach of condition immaterial or partial → no forfeiture
    - UNLESS willful / intentional / grossly negligent (bad faith)
  - Seek damages → diminution of value (nominal usually)

### IMPRACTICABILITY → more unforeseen, more excusable

- Existing** → existing circumstance at time of K [§ 266]
  - Not impracticability of third-party can do same exact duty
- Supervening** → changed circum. that impair or impact capacity of party to perform to K → increased cost of perform for promisor [§261]
- Event + non-occurrence was basic assumption on which K made**
  - Changes very nature of exchange
  - UNFORESEEN / unexpected** → not contemplate as real likelihood
    - Calamities → act of God + act by third-party
      - War, embargo, strike, crop failure
      - NOT acts by promisee / promisor
    - Change in government regulation or law (illegal or prevented by good faith compliance) [§ 264]
    - Death / incapacity of particular person necessary for perf.
    - Destruction / deterioration / failure to come into existence of specific thing necessary for perf.
    - NOT change in market conditions UNLESS unexpected calamity is cause of market change (not normal business risk)

- Effect of event renders performance impracticable**
  - Severe/burdensome impact** on performance
    - Cannot render w/o great loss, risk, hardship (bankruptcy)
    - Impossible to render
    - NOT inconvenience, lack of profit (increased cost), loss of better opp., financial inability to pay, cannot secure goods
- Party was not at fault in causing occurrence**
  - Cannot take advantage from own wrong
    - Intentional or negligent act
    - Acted in bad faith
    - Occurrence in party's control

- Party not bear risk of event occurring**
  - Risk not assumed or allocated to party by agreement/circumstances
  - Occurrence not contemplated by parties at time of K
    - K → Force Majeure clause (read narrowly)
      - Warranty, insurance, contingency plan (fixed-price K)
      - If different event occur → intended party to bear (?)
      - Normal commercial practices and expectations
    - So dramatic and unexpected that beyond normal range of risk
  - UCC** → protect sellers [2-615]
    - Delay in delivery or non-delivery in part or whole
    - Buyer → only obligation is come forward with money
      - UCC applies → unavailability of credit

### FRUSTRATION OF PURPOSE → performance possible but pointless

- Circumstances that frustrate purpose of party in entering K → decreased benefits from promisor's performance for promisee [§ 265]
- Purpose that was frustrated was party's principal purpose in making K**
  - Without this purpose → likely no K
  - Party's motivation must be obvious to other party + relevant to K
    - Make a profit (if absolute primary purpose)
- Event + non-occurrence was basic assumption on which K made**
  - UNFORESEEN / unexpected → not contemplate as real likelihood
- Effect of event frustrates K's primary purpose** for party
  - Promisor's performance is virtually worthless to promisee
  - Severe impact on value / usefulness of benefit reasonably expected**
    - Not enough → less profitable / sustain a loss
    - Enough → not within risks assumed under K
- Party was not at fault in causing occurrence**
- Party not bear risk of event occurring**

### BREACH + REMEDIES

### MATERIAL BREACH [§ 241]

- Breach** → failure to perform / repudiation / action of bad faith
- If determine failure not material → not have effect of non-occurrence of condition (forfeiture)
- Materiality of Failure of Performance** → extent of...
  - Loss of expected benefit to injured party (function vs. aesthetic)
  - Adequacy of compensation for loss (damages) → difficulty in proving certainty of amount / specific performance
  - Forfeiture suffered if treated as material (windfall vs. salvage prep or perf) + (occurs late vs. occurs early) + (restitution available + progress payments) + (salvage by resale → sellers)
  - Possibility of curing failure (full performance) + (adequate assurance given after failure) + (default under other K + financial weakness)
  - Absence of good faith and fair dealing (willful conduct vs. adherence to standards) + (conflicts of interests)
- Other Test** → Purpose to be served + desire to be gratified + excuse for deviation + cruelty of enforced adherence (quality)
- If material breach** → suspend perf. + terminate K + seek damages
- If partial breach** → substantial performance → seek damages (only)
  - Injured party's duty to perform not discharged
- Perfect Tender Rule** → no substantial performance allowed
  - If goods fail in any respect to conform to K → reject whole, accept whole, accept some and reject rest → no obligation to reject goods
- Divisible K** → test to basis of bargain that K be performed in entirety
  - Each sequence treated as complete perform of inde. Transaction
  - Request pay after completed part vs. until full performance

### ANTICIPATORY REPUDIATION → prior to time for performance

- Statement** → clear, unambiguous refusal to perform
- Conduct** → voluntary act to make substantial performance impossible
  - If party not show unwillingness to perform → wait until time
- CL** → seek damages immediately + wait until time + waive AR → K still in force + AR retracted
- UCC** → suspend performance + await performance for commercially reasonable time / seek remedy [2-610]
  - b/w K price + market price reasonable commercial time after AR
- Unilateral K** → if already full performed → must wait until time
- Hochster v. De La Tour Arguments**
  - Pl's arguments → harm occurs now (even though future performance, breach now) + mitigation (if must wait until time for perf, possibility to mitigate lost) + further at risk (if must wait, jeopardizes other chances)
  - DLT's arguments → unforeseen events (other party might be unable to perform) + cure (if wait, possibly change mind and cure) + force tender (if breach now, difficult to calculate damages)

### ADEQUATE ASSURANCE → [2-609] waiting + max 30 days

- Reasonable grounds for insecurity** → demand adequate assurance
  - Anything that impairs expectation of due performance (delegating duty to third-party)
- Until receive adequate assurance, suspend performance if reasonable
- Failure to provide within reasonable time → treat as repudiation
- If b/w merchants → follow commercial standards

### MONEY DAMAGES → substitution → dispute is fungible

- Expectancy** → gives injured party benefit of bargain
  - Δ in value b/w expected + actual
- Reliance** → puts injured party in status quo
  - Reimbursed for loss (expenditures made in reliance)
- Restitutory** → puts breaching party in status quo
  - Breaching party gives up what was given to it
  - Lossing K + breaching party (if not intentional)
- Incidental** → arise naturally from breach – pain and suffering
  - Loss that results from breach in ordinary course of events
- Consequential** → special circumstances – lost profits
  - Within contemplation of parties at time of K
    - FORESEEABLE → reason to know → risk premium + prior dealings + commercial practice + past occurrences
  - Communicated by P to D (or agent of D)
- Punitive** → detriment effect – calculated commercial fraud
  - Reasonable relation → single digit ratio to actual (9:1 max)
- Mental Anguish** → where bodily harm will cause emotional distress after breach or where emotional distress is likely result of breach
- Nominal** → no actual loss to non-breaching party (\$1) / non-breaching party cannot show reasonable certainty of damages

### DAMAGES CALCULATION reasonable certainty → no speculation

- Loss in Value + Gen./Conseq. Damages – Costs Avoided
- Contract Price/Market Price Standard** → Δ b/w K price + market price at time of breach (time for performance)
- Alternate Calculation** → Δ b/w loss of value + what is still owed

### BREACH + REPUDIATION BY PAYOR

- Sale of goods**
  - Resell → Δ b/w K price + resale price
  - Unable to resell or buyer accepted → K price
  - Seek damages → Δ b/w K price + market price at time for perf.

- Sale of land** → Δ b/w K price + fair market value (foreclosure)
- Full performance** → K price + interest
- Substantial performance** → Δ b/w K price + diminution in value
- Partial performance** → Δ b/w K price + cost of completion
- No performance** → profits

### BREACH + REPUDIATION BY PERFORMER

- Sale + Delivery of Goods**
  - Cancel and cover → Δ b/w cover price + K price
  - Seek damages → Δ b/w mkt px when buyer learn breach + K px
    - No consequential damages
- Sale of land** → Δ b/w K price + fair market value
- Construction K** → Diminution in Value Rule
  - Trivial + innocent breach → Δ in value b/w promised + provided
  - Substantial breach → mkt. price of complete/correct performance
    - Substantial = finished building partially unusable + unsafe
    - UNLESS actual performance → unreasonable econ. waste
      - Δ in value b/w promised + provided
- Services** → reasonable cost of performance of work
  - UNLESS economic benefit by full performance is grossly disproportionate to cost of performance
    - Δ in value b/w promised and provided
    - As long as unintentional breach, substantial perf., good faith

### MITIGATION OF DAMAGES

- Duty to mitigate** → use reasonable efforts to avoid loss
  - Recover the expenses of mitigation
  - If no efforts → no recovery of expenses
- Construction K** → not continuing work
- Lost Volume Seller** → if resell, gains do not reduce damages
- Limited Supply Seller** → if resell, gains reduce damages
- Buyer** → cover (but substitute goods)
- Employment K** → reasonable care to find equivalent position
- General contractor** → if new K, gains do not reduce damages
- Gains made after breach** → no reduction in damages
  - UNLESS gains caused by breach (made possible)

### SPECIFIC PERFORMANCE → duty to act

- Money damages are inadequate + hard to calculate damages + money not proper substitute + necessary to protect party's interest**
  - Subject matter / situation is unique or rare – land
- Allow if no need for court supervise + parties work with each other
- Practical problem** → presume that performance can be performed
- Personal services → involuntary servitude

### INJUNCTION → duty of forbearance

- Personal services → enjoined from working for competitor

### LIMITATION AGREEMENTS

- Liquidated Damages** → usually exclusive remedy
  - Amount is reasonable forecast → in light of anticipated or actual loss caused by breach → provides just compensation
  - Harm is difficult to calculate
- Reasonableness of Liquidated Damages**
  - Unreasonably large sum → unenforceable → public policy
  - Reasonable if → fixed or determined in early stages of K relation + competitors would set higher + more generous than should be
- Agreed Remedies** → agreement that include remedies in addition to / in substitution for those provided by law + limit or alter measure or kind of damages (return of goods + repayment of price / repair and replacement of non-conforming goods)
- Limitations of Agreed Remedies**
  - Use relief provided by law if → circumstances cause exclusive / limited remedy to fail its essential purpose (impractical to carry out essence of agreed-upon remedy)
  - Consequential damages may be limited or excluded UNLESS unconscionable (buyer is consumer)

### THIRD-PARTY INTEREST

### RELATIONSHIPS

- Obligor → duty to delegate + obligee → right to assignee
- Promisor + Promisee → K → right to intended beneficiary

### ASSIGNMENT OF RIGHTS → unilateral

- Manifestation of Assignor's Intent to Transfer Right**
  - Assignor's right to performance extinguished (in whole or part)
- K w/ consid. (irrevocable) vs. gift (revocable)** → subject to rules of K
  - Irrevocable → no right to revoke + to assign (but power)
- Derivative** → assignee acquires right which may be subject to defenses that obligor had against assignor
- Limitations** → if materially changes obligor's duty / materially increases burden or risk on obligor / if materially impairs obligor's chance of obtaining return performance / if materially reduce its value to obligor [§ 317] [2-210]
- Notice** → obligor not affected by assignment until has notice
  - If assignee does not give notice to obligor → obligor can still perform for assignor → assignee has no claim against obligor
- Anti-assignment clause** → power and/or right
  - Favor free transfer of rights → covenant → damages

- "void" → no power + no right
- Prohibit assign of "contractual rights" → power + no right
- Prohibit assign of "the contract" → bars delegation only

### DELEGATION OF DUTIES → unilateral

- Delegation of Performance of Duty**
  - Obligor can delegate contractual duties to delegate
  - Obligor's duty + liability not discharged → secondarily liable
- Limitations** → if obligee has substantial interest in having particular obligor perform, if disavowed by public policy [§ 318] [2-210]

### INTENDED BENEFICIARIES → third-party beneficiary

- Promisor + Promisee** → provide some benefit to third-party
  - Third-party acquires right from K → intended beneficiary
    - Could be class of intended beneficiaries
- Evidence from K** → intent of parties to benefit (words and actions)
  - "Intended beneficiary can bring action against promisor"
- Intended vs. Incidental** → where performance is going to run
  - Incidental → no intent by promisor/promisee to benefit
    - Liquidated damages clause → no intent to create beneficiary
- Nature of Rights**
  - By conduct of promisee / by subsequent agreement b/w promisor + promisee → modification or discharge of duty to intended beneficiary UNLESS rights vested
- Time** → Vested Rights → enforce K only after rights vest
  - Assent (manner invited or requested by parties or notice) + reliance on promise + brings suit to enforce K
- Creditor** → discharge obligation + Donee → confer gift

### CISG

- Silence + Inactivity** → not an acceptance [18]
- Time When Acceptance Effective** → upon receipt of offeror [18]
  - If oral offer → must be accepted immediately
  - Acceptance by performance → no notice required
- Irrevocable offer** → may be withdrawn if withdrawal reaches offeror before or at same time as offer [15]
- Offer may be revoked** → before acceptance dispatched [16]
  - Cannot revoke if → stated irrevocable or reliance [16]
- Additions, Limitations, Mods** → rejection + counteroffer [19]
  - Add / diff terms → acceptance if do not materially alter offer terms
    - Relating to price, payment, quality / quantity of goods, place and time of delivery, extent of liability to other, settlement
- Modification** → only requires agreement of parties [29]
- No writing requirement** → for any K [11]
- Anticipatory Repudiation** → if party wants → reasonable notice in order to permit party to provide adequate assurance [72]
  - If it is clear that party will commit fundamental breach → permitted to declare K avoided (no show of unwillingness)
- If mismatch of forms/communication** → K based on terms of agreement + other terms not part of K
- Interpretation** → statements + conduct of party [8]
  - Interpreted according to his intent where other party knew or could not have been unaware what that intent was
    - If other party did not know → interpreted according to understanding that reasonable person of same kind as other party would have in same circumstances
  - Considerations → all relevant circumstances (negotiations, prior practice, usage, conduct of parties)

### ISSUE SPOTTING

- Rest vs. UCC (MERCHANTS) vs. CISG
- Writing → Statute of Frauds → goods > \$500 + > 1 year + land
- Promise → Enforceable vs. Unenforceable
- Terms → What? + Indefinite + Ambiguous + Omitted
- Intent of Parties vs. Circumstances vs. Actual K
- Circumstances → Prior Course + Usage + Industry + Words + Actions
- Lack of Consideration → Option Ks, Gifts, Assign, Mod
- Relationships b/w Parties
  - Unique v. Fungible
  - Parties → Benefit / Detriment → No K, K, Before K, After K
  - Avoid / Discharge Duties → Implied Duties / Defenses / Excuses
- Unfairness → Duress / Unconscionable / Mistake / Etc.
- Communication → Initial Mode + Requested Mode
- Mirror Image Responses (manner and medium invited)
- Reasonable Time → Circumstances → Self Life
- Promise vs. Condition (Constructive / Implied / Precedent)
- Breach → Material Breach vs. Substantial Performance
- Relief → Equitable vs. Legal → Reasonable Certainty + Foreseeability
- Back Up Plan → Unjust Enrichment / Reliance (Worse Off)