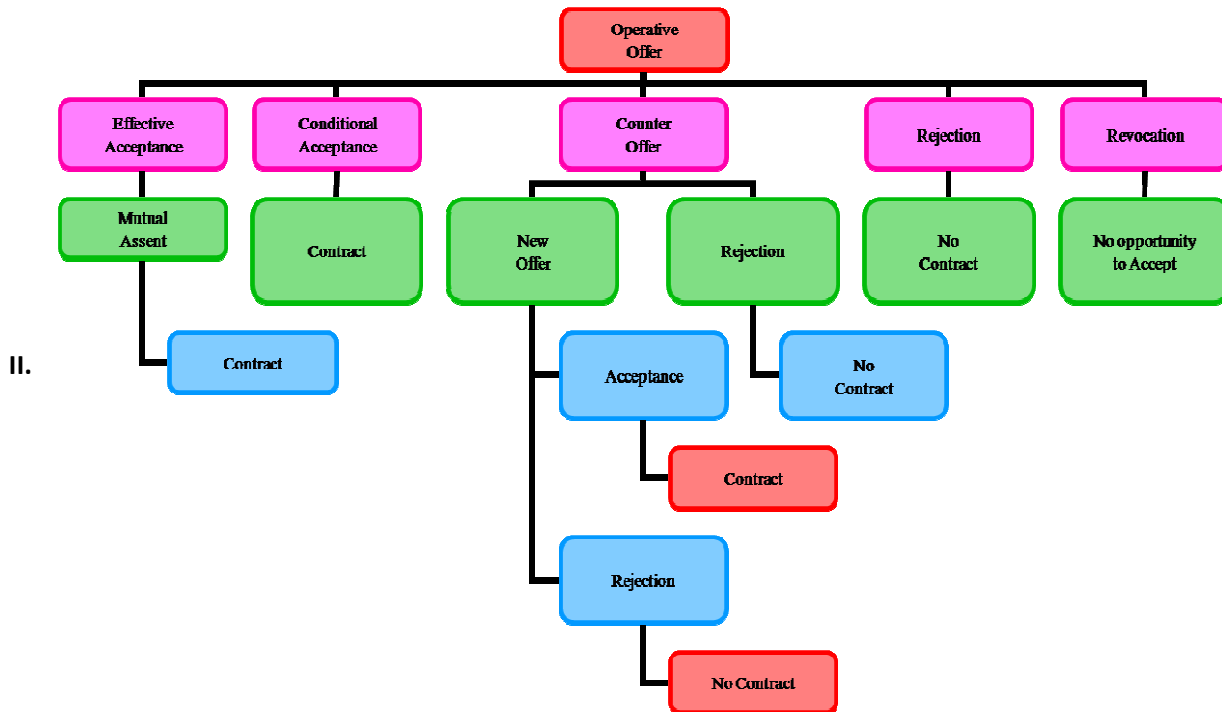


# Outline

Saturday, January 17, 2009  
5:10 PM

## I. Questions to ask:

(1) Intent to enter a K?	Assent to contract
(2) Understand intent?	Assent to same terms
(3) Operative Offer?	Offer
(4) Effective acceptance?	Mirror Image Rule & 2-207
(5) Assent compromised?	Duress, Misrep., Uncon.
(6) What is required in Contract?	Interpretation, Parol Ev., Conditions, Good Faith
(7) Performance per Contract?	Interpretation, Breach, Partial & Substantial Perf.
(8) Was breach of contract excused?	Mistake, Impossibility, Impact., Frustration
(9) If not, what are the damages for breach?	Damages



## III. Mutual Assent

### A. Good faith

- 1) Requirement contracts - an agreement by the buyer to buy his good faith requirements of goods exclusively from the seller.
  - a) Party who seeks to invalidate a requirements contract have the burden of proof as there is mutuality of obligation since it requires good faith.

### B. Intent

- 1) Must have a meeting of the minds for the same thing.
- 2) Does not have to be identical intent - may be valid if a reasonable man would be able to impute the intentions corresponding to his words and actions.
  - a) In Embrey, the answer was unambiguous and error is assigned in requiring that both intentions be shown.
- 3) Intention is of no avail unless it was stated at the time of the contract. Because the two parties did not agree on the same thing (which Peerless the cotton was to come on) there

was no binding contract.

C. **Manifestation**

- 1) Intentions are manifested where a reasonable man can impute meanings of action
- 2) Can only be voided by fraud, misrepresentation, sharp practice, or dealings between unequal parties.

D. Non-enforceable social engagements and contractual agreements:

- 1) Legal if:
  - a) Subject matter and terms have customarily affected legal relations
  - b) No reason to indicate that party had reason to know that party intended to affect his legal relations.
- 2) Not legal if:
  - a) Subject matter and terms are not customarily to affect legal relations
  - b) No express intentions of the parties to affect it so

E. **UCC Requirements and Quantity Variations (p. 368)**

- 1) *Production flexibility* - allows buyer to adjust his intake of materials and supplies to fluctuations in the market.
  - a) Risk shifting device: shifts from one party to the next the risk of their business if there are inducements and incentive
- 2) *Minimization of supply risks* - risk of availability of materials will be restricted
- 3) *Increased operational efficiency* - supply of materials will be constant and ensure greater control of production schedule.
- 4) *Decreased direct operational costs* - savings from increased operational efficiency leads to decreased of operational costs.

F. **Restatement of Contracts Sec. 20: Effect of Misunderstanding**

(1) There is **no manifestation of mutual assent** to an exchange if the parties attach materially **different meanings to their manifestations** and

- (a) neither party **knows or has reason to know** the meaning attached by the other; or
- (b) each party knows or each party has reason to know the meaning attached by the other.

(2) The **manifestations of the parties are operative** in accordance with the meaning attached to them by one of the parties if

- (a) that party **does not know of any different meaning** attached by the other, and the other knows the meaning attached by the first party; or
- (b) that party has **no reason to know of any different** meaning attached by the other, and the **other has reason** to know the meaning attached by the first party.

IV. **The Offer**

A. **Corbin on Contracts:**

An offer is an expression by one party of his assent to certain definite terms provided that the other party involved in the bargaining transaction will likewise express his assent to the identically same terms.

B. **An Offer**, an acceptance of which will become a contract

1. *Clear*
2. *Definite*
3. *Explicit*
4. *Leaves nothing open for negotiation*

C. **Modifications:** can be made at any time before the acceptance of his offer. Afterwards, he does not have any **rights to impose new or arbitrary conditions** in his original offer. (*Lefkowitz v. Great Minneapolis Surplus Store*)

1. **Unilateral offer:** An offer made not to a specific person and to the general public is a unilateral offer (*Craft v. Elder*)

D. **Intent:** The intention of the parties to a contract is to be gathered from the whole instrument, and not from any detached part of it.

1. Mere information or information does not constitute offer. (Courteen Seed Co. "I am asking 23 cents per pound" does not show that it was an offer, rather it was an invitation for negotiations.)
2. A definitive offer after an initial invite for negotiations could **not be withdrawn** after the terms are accepted.
3. Manifestation of intent includes **both actions and words as a reasonable** man would interpret in view of the surrounding circumstances.
  - 1) Words can be interpreted by the **express meaning or by the implied meanings**.

## V. The Acceptance

- A. **Acceptance:** An acceptance is a voluntary act of the offeree whereby he exercises the power conferred upon him by the offer, and creates a legal relations called a contract. Terms are looked at by either words or conduct.
1. Offeror has the **full control over the power of the terms at the beginning** of his offer. He may lose it later, or is unable to change and revoke it at a later period. The power shows whether or not there is a contractual
    - 1) *Definite*
    - 2) *Unequivocal*
    - 3) *Overt*
    - 4) *Identical:* may not add conditions or limitations to original offer or it is a counteroffer.
      - a) Counteroffers require acceptance from offeror before it becomes valid.
      - b) Suggestions, requests, additions or modifications CAN be made so long as it is clear that the acceptance is positive and unequivocal whether such request is granted or not.
- B. **Communication:** acceptance must be communicated in an **overt manner** to the offeror.
1. Offer of a bargain by one person to another, imposes no obligation upon the former, until it is accepted by the latter, according to the terms in which the offer was made. Any qualification of, or departure from, those terms, invalidates the offer, unless the same be agreed to by the person who made it. Until the terms of the agreement have received the assent of both parties, the negotiation is open, and imposes no obligation upon either.
- C. **Silence:** Mere **silence or failure to reject an offer** when it is made does not constitute an acceptance.
- D. **Intent:** A mere mental determination to accept a contract, not indicated by speech, nor put in course of indication by act to the other party, is not an acceptance which will bind the other.
- E. **Partial Performance:** If the offer **requests a return promise** and the offeree without making the promise **actually does or tenders what he was requested** to promise to do, there is a contract if such performance is completed or tendered within the time allowable for accepting by making a promise. Promise becomes valid and binding.
- F. **Restatement (Second) of Contracts § 32: Invitation of Promise or Performance**  
 In case of doubt an **offer is interpreted as inviting the offeree** to accept either by promising to perform what the offer requests or rendering the performance, as the **offeree chooses**.
- G. **Restatement (Second) of Contracts §69: Acceptance by Silence or Exercise of Dominion**  
 (1) Where an offeree fails to reply to an offer, his silence and inaction operates as **an acceptance** in the following cases **only**:  
 (a) Where an offeree **takes the benefit of offered services** with reasonable opportunity to reject them and reason to know that they were offered with the **expectation of compensation**.  
 (b) Where the **offeror has stated or given the offeree reason to understand** that assent may be manifested by **silence or inaction**, and the offeree in remaining silent and inactive intends to accept the offer.  
 (c) Where because of **previous dealings** or otherwise, it is **reasonable** that the offeree **should notify the offeror** if he does not intend to accept.  
 (2) An offeree who does any **act inconsistent** with the offeror's ownership of **offered**

**property** is bound in accordance with the offered terms unless they are manifestly unreasonable. But if the act is wrongful as against the offeror it is an acceptance only if ratified by him.

H. **Restatement (Second) §39 (2): §39. COUNTER-OFFERS**

(1) A counter-offer is an offer made by an offeree to his offeror relating to the same matter as the original offer and **proposing a substituted bargain differing** from that proposed by the original offer.

(2) An **offeree's power of acceptance is terminated by his making of a counter-offer**, unless the offeror has **manifested a contrary intention** or unless the counter-offer manifests a contrary intention of the offeree.

I. **Uniform Commercial Code § 2-206 (1)(a) Offer and Acceptance in Formation of a Contract**

(1) Unless otherwise unambiguously indicated by the language or circumstances

(a) an **offer to make a contract** shall be construed as **inviting acceptance** in any manner and by any medium reasonable to the circumstances.

J. **39 U.S.C. §3009: Mailing of Unordered Merchandise**

Except for (1) free samples and (2) charitable organizations, mailing of unordered merchandise is an **unfair method of competition and trade practices**.

Items mailed in violation may be **treated as a gift by the recipient** who will have the right to retain, use, discard, or dispose of it without any obligations to the sender.

Unordered means mailed without the prior expressed request or consent of the recipient.

VI. **Duration of Offers**

A. **Restatement (Second) of Contracts §36: Methods of Termination of the Power of Acceptance**

(1) An offeree's power of acceptance may **be terminated** by

(a) rejection or counter-offer by the offeree, or

(b) lapse of time, or

(c) revocation by the offeror, or

(d) death or incapacity of the offeror or offeree.

(2) In addition, an offeree's power of acceptance is terminated by the **non- occurrence of any condition of acceptance** under the terms of the offer.

B. **Powers of Acceptance**

1. The offeror holds the power when he is **making the offer, he can set the terms, prices, duration**, etc...but after he makes the offer, the power stays with the offeree.

2. If the offeree **rejects the offer, he loses the power** of acceptance. He cannot change his mind later. If he does, it may be **construed as a offer on his part**.

C. **Duration of offer**: reasonable period of time to be decided by the jury.

1. *Factors include*: nature of the contract, the relationship or situation of the parties, and their course of dealing, and usages of the particular business are all relevant. A contract terminable at the will of either party can be modified at any time by either party as a condition of its continuance

2. A **unilateral contract** is one in which **no promisor receives a promise** as consideration for his promise.

a. Acceptance of the offer is binding with the **performance of the act** (Brackenbury v. Hodgkin)

b. Only that very act and no other may be given.

c. May be **withdrawn without formal notice**, sufficient with **actual knowledge** of inconsistent act with continuance of the offer.

d. Offer is revocable up until the act is performed. (Petterson v. Pattberg)

3. A **bilateral contract** is one in which there are **mutual promises between two parties** to the contract; each party being both a promisor and a promisee.

a. Bilateral contracts are presumed to be the binding standard in cases of doubt.

b. By accepting, offeree is **accepting to perform what the offer requests**.

- c. When there are no other consideration for a contract, **mutual promises of the parties constitute the consideration** binding the contract
- d. An offer for an exchange is not meant to become a promise until a **consideration has been received**
- e. **Reasonable reliance** serves to hold the offeror in lieu of the consideration ordinarily required to make the offer binding.

D. **Rejection of offers may be:**

- 1. No acceptance **within time fixed**, or, if no time is fixed, within a **reasonable time**.
- 2. **In person** offer is rejected ordinarily as it is expected **at once**.
- 3. Offeror is justified in **inferring from the words or conduct** of the rejection offeree that the offeree intends not to accept the offer or to take it under further advisement.  
In this case D fails because D did not accept the conditions that P gave D while P was still in the room. For oral offers, its is generally accepted that the offer is good while still in the presence of the offering party.
- 4. A manifestation of intention not to accept an offer is a rejection unless the offeree **manifests an intention to take it under further advisement**.

E. **Withdrawal of offers:**

- 1. **Actual knowledge is sufficient** to withdraw if the person who made the offer has done some act inconsistent with the continuance of the offer. (Dickinson v. Dodds)

F. **Mailbox rule:** Where a person uses the post to make an offer, the offer is not made when it is posted but **when it is received**.

- 1. Offeree is not bound by conditions of offer until they receive the offer.
- 2. If it is sent by mail, the time **begins when they receive the notice**.
- 3. Offeree is **allowed the same acceptance** in the same manner used.
- 4. Effective when deposited in the mail properly addressed and with sufficient postage affixed

G. **Option to purchase:** however small, as long as its paid and received, is adequately binding upon the seller for the time specified, and irrevocable for want of adequacy.

- 1. Buyer purchased the privilege of electing to accept the offer prior to the expiration of the contract.

G. **Restatement (Second) §87 (1): Option Contract**

- (1) An offer is binding as an option contract if it
  - (a) is in **writing and signed** by the offeror, recites a **purported consideration** for the making of the offer, and proposes an exchange on fair terms within a reasonable time; or
  - (b) is made **irrevocable by statute**.
- (2) An offer which the offeror should **reasonably expect to induce action or forbearance of a substantial character** on the part of the offeree before acceptance and which does induce such action or forbearance is binding as an option contract to the extent necessary to avoid injustice.

H. **Uniform Commercial Code §2-205: Firm Offers**

An offer by a [merchant](#) to buy or sell [goods](#) in a signed writing which by its terms gives assurance that it **will be held open is not revocable, for lack of consideration, during the time stated** or if no time is stated for a **reasonable time**, but in no event may such period of irrevocability exceed three months; but any such term of assurance on a form supplied by the offeree must be separately signed by the offeror.

VII. **Agreements to Agree**

- A. **Preliminary Agreements:** further negotiations of ultimate agreements; challenge of the law is to determine **when preliminary questions should be enforced** and what the remedy should be.
  - 1. **Understanding:** Both parties **must have a clear understanding** of the terms of agreements
    - a. Certain and specific to ascertain

2. **Intent:** Both parties must have **intent to be bound** by the terms of the agreements
  - a. Objective
  - b. Determined by language used when no ambiguity in its terms exists
3. **Extrinsic evidence:** parole evidence rule applies only after an integrated or partially integrated agreement has been found

B. **Restatement § 27 EXISTENCE OF CONTRACT WHERE WRITTEN MEMORIAL IS CONTEMPLATED**

Manifestations of assent that are in themselves sufficient to conclude a contract will not be prevented from so operating by the fact that the parties also manifest an intention to prepare and adopt a written memorial thereof; but the circumstances may show that the **agreements are preliminary negotiations.**

**COMMENTS & ILLUSTRATIONS:**

1. Parties who plan to make a final written instrument as the expression of their contract necessarily discuss the proposed terms of the contract before they enter into it and often, before the final writing is made, agree upon all the terms which they plan to incorporate therein. This they may do orally or by exchange of several writings. It is possible thus to make a contract the terms of which include an obligation to execute subsequently a final writing which shall contain certain provisions. If parties have definitely agreed that they will do so, and that the final writing shall contain these provisions and no others, they have then concluded the contract.
2. On the other hand, if either party knows or has reason to know that the other party regards the agreement as incomplete and intends that no obligation shall exist until other terms are assented to or until the whole has been reduced to another written form, the preliminary negotiations and agreements do not constitute a contract.
3. Among the circumstances which may be helpful in determining whether a contract has been concluded are the following: the extent to which express agreement has been reached on all the terms to be included, whether the contract is of a type usually put in writing, whether it needs a formal writing for its full expression, whether it has few or many details, whether the amount involved is large or small, whether it is a common or unusual contract, whether a standard form of contract is widely used in similar transactions, and whether either party takes any action in preparation for performance during the negotiations. Such circumstances may be shown by oral testimony or by correspondence or other preliminary or partially complete writings.
4. Even though a binding contract is made before a contemplated written memorial is prepared and adopted, the subsequent written document may make a binding modification of the terms previously agreed to.

C. **U.C.C. - § 2-204. Formation in General, FORM, FORMATION AND READJUSTMENT OF CONTRACT**

(3) Even though one or more terms are left open a [contract for sale](#) does not fail for indefiniteness if the parties have intended to make a [contract](#) and there is a reasonably certain basis for giving an appropriate remedy.

**VIII. Form Contract**

- A. Background: Under the mirror image rule, all the terms and conditions **must be the same or else no contract**. Under 2-207, it allows formation of contracts where some terms may be different in order to encourage trade.
- B. **IMPACT:** No contract has been formed, then, unless the Offeror agrees to the Offeree's express conditions, meaning that the offeror holds power to declare terms and have terms control in most instances.
  1. **Mirror Image Rule:**
    - a. Equivocal, conditional or limited acceptance = counter offer
    - b. A counter offer may be treated as a new offer or a rejection.
    - c. If it is viewed as an offer, it requires acceptance by original Offeror.
  2. 2-207 allows situations where:

- a. Omitted terms
  - b. Additional terms
  - c. Conflicting terms
3. **Presumption:** establishes a presumption that parties intended to contract

	2-207	Test	Common Law
Presumption	Intent to Contract	Identify who made the contract? Identify who made the acceptance?	Intent to Contract? If so, what is the agreement?
2-207(1)	Communication of Parties = Contract?	Did offeror specify no changes could be made? What terms are in the contract?	
2-207(2)	Terms of Contract established via writing?; or	Determining if Acceptance was Expressly Conditional on Offeror's assent to different or additional terms.	1st Examine writing.
2-207(3)	Terms of Contract established via Parties' Conduct?	If acceptance was expressly conditional, it becomes a counter-offer and if Offeror accepts, the Offeree's terms control.	If writing is ambiguous, then look to words & actions.

**A. UCC § 2-204. Formation in General.**

1. A [contract for sale](#) of [goods](#) may be made in any manner sufficient to show [agreement](#), including conduct by both parties which recognizes the existence of such a [contract](#).
2. An [agreement](#) sufficient to constitute a [contract for sale](#) may be found even though the moment of its making is undetermined.

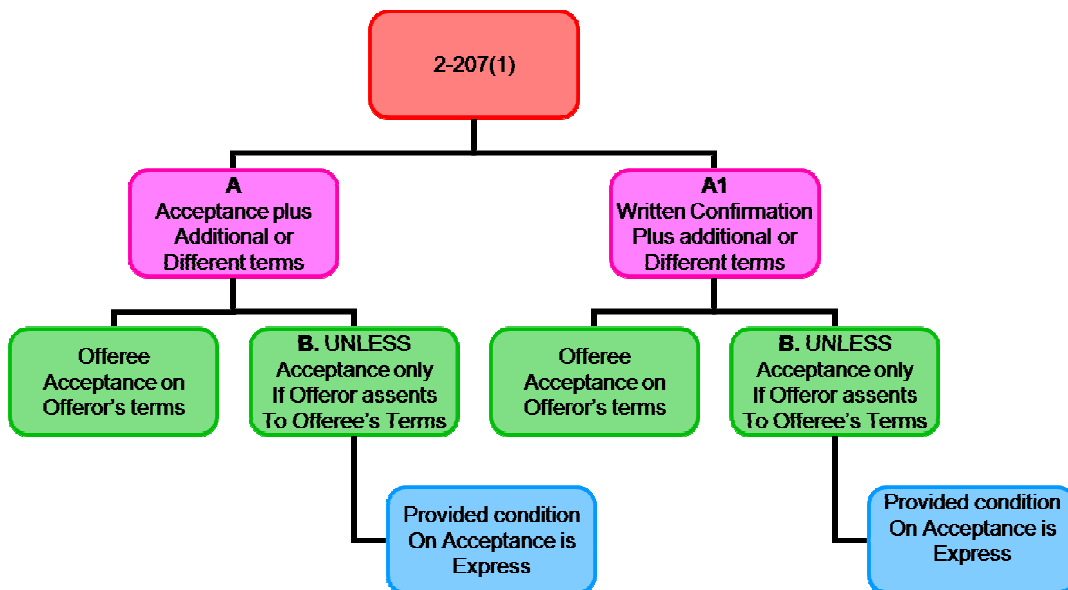
**B. UCC § 2-207. Additional Terms in Acceptance or Confirmation.**

1. A **definite and seasonable** expression of acceptance **or** a written confirmation which is sent within a reasonable time **operates as an acceptance** even though it states terms additional to or **different from those offered** or agreed upon, **unless** acceptance is **expressly made** conditional on assent to the additional or different terms.
2. The additional terms are to be construed as **proposals for addition** to the [contract](#). [Between merchants](#) such terms become part of the contract unless:
  - a. the offer **expressly limits** acceptance to the terms of the offer;
  - b. they **materially alter** it; or
  - c. **notification of objection** to them has already been given or is given within a reasonable time after notice of them is received.
3. **Conduct** by both parties which recognizes the existence of a [contract](#) is sufficient to establish a [contract for sale](#) although the **writings of the parties do not otherwise establish** a contract. In such case the terms of the particular contract **consist of those terms on which the writings of the parties agree**, together with any **supplementary terms** incorporated under any other provisions of this Act.

- C. When applying [U.C.C. § 2-207\(1\)](#) and the meaning of "expressly made conditional on assent to the additional or different terms," the conditional nature of the acceptance **should be so clearly expressed** in a manner sufficient to notify the offeror that the offeree is **unwilling to proceed** with the transaction unless the **additional or different terms are included** in the contract

1. **Definition of express** - if offeree's terms are not express, then offeror's terms control:
  - a. Conspicuous & Utterly clear
  - b. Reasonably calculated to inform the recipient that no deal has concluded and non will unless assents to terms.
  - c. Must notify of objection to terms

2. **Definition of conditional (split):**
  - a. The term materially alters contractual obligations solely to disadvantage of Offeror;  
OR
  - b. Acceptance is expressed in a manner sufficient to notify Offeror that Offeree is unwilling to proceed unless additional or different terms are adopted; OR
  - c. Mere predication of acceptance on clarification, addition or modification...
  - d. Qualified Acceptance by Offeree:  
There is a contract on the original terms of the offer, but if the Offeror is willing to entertain a change in terms, the Offeree is willing to accept that too.
3. **Definition of merchant (§2-104):**
  - (1) "Merchant" means a person that **deals in goods of the kind** or otherwise holds itself out by occupation as having **knowledge or skill peculiar to the practices or goods** involved in the transaction or to which the knowledge or skill may be attributed by the person's employment of an agent or broker or other intermediary that holds itself out by occupation as having the knowledge or skill.
  - (3) "Between Merchants" means in any transaction with respect to which **both parties are chargeable with the knowledge or skill** of merchants.
4. Definition of additional terms:
  - a. **Minority View:**
    - a) If not merchants:
      - i) Considered proposals for addition to K where Offeror can accept or reject.
    - b) If 2 Merchants: Offeror's silence may = acceptance unless:
      - i) Term materially alters K [then go back to subsection 1]
        - Gives notice of objection
        - Expressly requires offer's terms
        - If so, the contract is on the Offeror's terms and Offeror's silence isn't Acceptance of added terms.
  - b. **Majority View (knock out rule):**
    - a) Different terms cancel each other out. (Knock Out Rule)
    - b) Canceled terms are replaced by any applicable GAP FILLERS supplied by UCC.
5. **Definition of conduct:** Offeree contingently accepts terms but both parties continue to perform, then terms in both contracts plus gap fillers govern,



**D. Convention on Contracts for the International Sale of Goods  
Article 19**

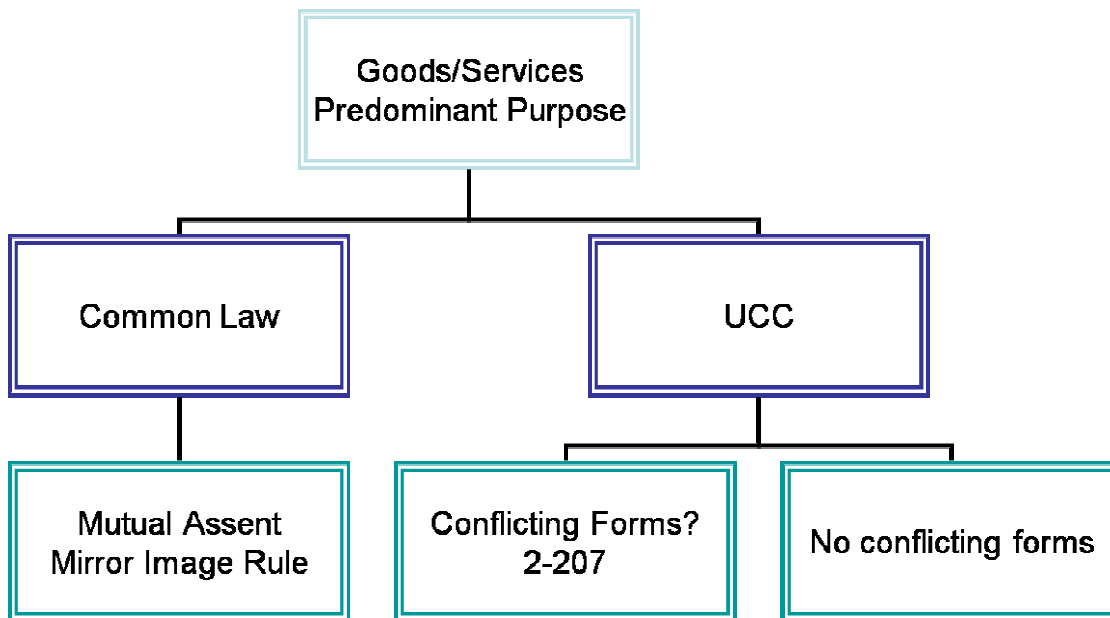


(1) A reply to an offer which purports to be an acceptance but **contains additions, limitations or other modifications is a rejection of the offer** and constitutes a **counter-offer**.

(2) However, a reply to an offer which purports to be an acceptance but contains additional or different terms which **do not materially alter the terms** of the offer constitutes an acceptance, unless the offeror, **without undue delay, objects orally to the discrepancy** or dispatches a notice to that effect. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.

(3) **MATERIAL:** Additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially.

#### E. Mutual Assent, Comparing Common Law & UCC



#### IX. Policing Doctrine

A. Defenses to obligations to perform under an agreement with consideration

1. **Policing Doctrines** – grossly unfair terms or overreaching at bargaining or promising stage (negotiation) addressing:

- 1) The Existence and Quality of Assent
- 2) The Substantive Terms of Exchange

- a. The relationship between Policing Doctrines and the Freedom to Contract
- b. The freedom to contract is compromised by undermining assent.

B. **Changed Circumstances**

1. **Duress**

a. Induced by wrongful threats

- 1) **Economic duress:** threats to withhold something another party badly needs or wants IS NOT duress. However, economic duress is;
  - i) Threatens to commit a wrongful act that would place other in a position to seriously threaten his property or finances
  - ii) No adequate means to avoid and prevent the threatened loss other than entering the contract
- 2) **Moral Duress:** There is always an element of illegality in the demand complained of, some denial of a right, some unfounded claim, some extortion.

b. **Test of Duress:** Has the party been constrained to do what he otherwise would not have done using the standard of a person with "ordinary firmness". Cannot have an

immediate and adequate remedy in the courts to test or resist it.

i) Mere threat to withhold a legal right or future expectancy is NOT duress.

- 1) **Undue Influence:** Where one party persuades another party by relation between them of domination where the second party does not act inconsistently from first.

c. **Restatement §176. WHEN A THREAT IS IMPROPER**

(1) A threat is improper if

- (a) what is threatened is a **crime or a tort**, or the threat itself would be a crime or a tort if it resulted in obtaining property,
- (b) what is threatened is a **criminal prosecution**,
- (c) what is threatened is the use of civil process and the threat is made in **bad faith, or**
- (d) the threat is a **breach of the duty of good faith and fair dealing** under a contract with the recipient.

(2) A threat is improper if the resulting exchange is not on **fair terms**, and

- (a) the threatened act would **harm the recipient** and would not **significantly benefit the party** making the threat, or
- (c) what is threatened is otherwise a **use of power for illegitimate ends**.

2. **Misrepresentation, Concealment, Duty to Disclose:**

a. **Negligent Misrepresentation**

- 1) False representation as to a **past or existing fact**.
- 2) The person stating the belief must have **no reasonable grounds** for believing it to be true.
- 3) The representation must have been made with the **intent to induce the other party to rely** upon it.
- 4) The other party must have **believed** the misrepresentation and **reasonably relied on it**.
- 5) As a result of the reliance on the misrepresentation, the other party **suffered damages**.

b. **Material misrepresentation:**

- 1) Assertion will induce a reasonable person to agree or make the particular person agree

c. **Restatement §552C: The Misrepresentation** of a material fact to "A" by "B" with the **intent to induce an act or inaction** by "A" based on the **misrepresented fact** in a sale, rental or exchange transaction occasions liability for "B" (the inducing party) for **pecuniary loss suffered by "A"** even though the representation is not made **fraudulently or negligently**.

d. **Restatement (Second) of Torts**

(1) One who, in a sale, rental or exchange transaction with another, makes a **misrepresentation of a material fact for the purpose of inducing** the other to act or to refrain from acting in reliance upon it, is **subject to liability to the other for pecuniary loss** caused to him by his justifiable reliance upon the misrepresentation, even though it is **not made fraudulently or negligently**.

(2) Damages recoverable under the rule stated in this section are limited to the **difference between the value of what the other has parted with** and the value of what he has **received in the transaction**. (includes **consequential damages due to detrimental reliance**...victims of misrepresentations can also recover the **benefit of the bargain**.)

• Differences between **fraudulent and negligent concealment:**

- In fraudulent misrepresentation, one becomes liable for breaching the **general duty of good faith or honesty**.
- However, in a claim of negligent misrepresentation, one may become liable

even though acting honestly and in good faith if **one fails to exercise the level of care required under the circumstances.**

e. **Fraudulent concealment:**

- 1) that the defendant **concealed or suppressed a material fact**;
- 2) that the defendant had **knowledge** of this material fact;
- 3) that this material fact was not within the **reasonably diligent attention, observation, and judgment** of the plaintiff;
- 4) that the defendant **suppressed or concealed** this fact with the intention that the plaintiff be misled as to the true condition of the property;
- 5) that the plaintiff was **reasonably so misled**; and
- 6) that the plaintiff suffered damage as a result.
  - i) **Silence may be fraudulent** and that relief may be granted to one contractual party where the other suppresses facts which he, under the circumstances, is bound in conscience and duty to disclose to the other party, and in respect to which he cannot, innocently, be silent.

f. **Duty to Disclose**

- 1) Required if the parties are in a **fiduciary relationship** with one another concerning the subject matter of the contract
- 2) Or, when there is no fiduciary relationship with one another but a party has a **material fact due to virtue of a special position** that cannot be determined by exercise of **normal diligence**.

3. **Unconscionability**

- a. **Restatement §208 or UCC §2-302**: court may refuse to enforce a contract or parts of the contract or limit the contract if found to be **unconscionable**. **It must exist** at the time the contract was made.
  - 1) **Procedural - unfair surprises**: where a party **includes a term, knowing** that it is not included in fair expectation and other **party will not notice**.
    - i) **Adhesion**: parties in **unequal bargaining positions forced to adhere** to the terms of the printed form with a **take it or leave it attitude**.
    - ii) **Lack of knowledge**: modern rule holds that contracting party is only bound by those that are **not unreasonably surprising**
  - 2) **Substantial**:
    - i) **Exculpatory** - releasing a party from **liability to injury** caused by his actions when intentional wrongs are included, though negligence is not as clear.
      - a. **Negligence**: negligent is enforceable unless it is unconscionable, such as affecting **public interest or harming a protected class**.
      - b. The **adequacy or fairness of the consideration** that adduces a promise or a transfer is **not alone grounds o refuse to enforce** a promise.
      - c. Must be an inequality so **strong, gross, and manifest**
      - d. A contract is unconscionable if it is such as **no man in his senses and not under a delusion** would make on the one hand, and as no **honest or fair man** would accept on the other.
      - e. It is generally held that the unconscionability test involves the question of whether the provision amounts to a taking of an **unfair advantage by one party over the other**.
  - 3) Where there is an
    - i) (1) absence of **meaningful choice** for one party, coupled with
    - ii) (2) contract terms **unreasonably favorable** to the other party, and characterized by
    - iii) (3) **gross inequality of bargaining power**.

4) **Bifurcated test:**

- i) Examination of the consideration “(a) The substance;” and
- ii) Examination of the bargain process “(b) The process.”

b. **UCC § 2-302. Unconscionable contract or Clause.**

(1) If the court as a matter of law finds the [contract](#) or any clause of the contract to have been unconscionable **at the time it was made** the court may refuse to enforce the contract, or it **may enforce the remainder of the contract without the unconscionable clause**, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) When it is claimed or appears to the court that the [contract](#) or any clause thereof may be unconscionable the parties shall be **afforded a reasonable opportunity to present evidence** as to its commercial setting, purpose and effect to aid the court in making the determination.

4. **UCC § 2-313. Express Warranties by Affirmation, Promise, Description, Sample.**

(1) Express warranties by the [seller](#) are created as follows:

- (a) Any affirmation of fact or promise made by the [seller](#) to the [buyer](#) which relates to the [goods](#) and becomes **part of the basis of the bargain creates an express warranty** that the goods shall conform to the affirmation or promise.
- (b) Any description of the [goods](#) which is made part of the basis of the bargain creates an express warranty that the **goods shall conform to the description**.
- (c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the [goods](#) shall conform to the sample or model.

(2) It is **not necessary** to the creation of an express warranty that the [seller](#) use formal words such as "warranty" or "guarantee" or that he have a **specific intention to make a warranty**, but an affirmation merely of the value of the [goods](#) or a statement purporting to be merely the seller's **opinion or commendation of the goods** does not create a warranty.

5. **UCC § 2-314. Implied Warranty: Merchantability; Usage of Trade.**

(1) Unless excluded or modified (Section [2-316](#)), a warranty that the [goods](#) shall be merchantable is implied in a [contract](#) for their [sale](#) if the [seller](#) is a [merchant](#) with **respect to goods of that kind**. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.

(2) [Goods](#) to be merchantable must be at least such as

- (a) **pass without objection in the trade** under the [contract](#) description; and
- (b) in the case of fungible [goods](#), are of **fair average quality** within the description; and
- (c) are **fit for the ordinary purposes** for which such [goods](#) are used; and
- (d) run, within the variations permitted by the [agreement](#), of even **kind, quality and quantity within each unit** and among all units involved; and
- (e) are adequately **contained, packaged, and labeled** as the [agreement](#) may require; and
- (f) conform to the **promise or affirmations of fact made** on the container or label if any.

(3) Unless excluded or modified (Section [2-316](#)) other implied warranties may arise from course of dealing or usage of trade.

6. **UCC § 2-316. Exclusion or Modification of Warranties.**

(1) Words or conduct relevant to the creation of an express warranty and words or conduct **tending to negate or limit warranty shall be construed wherever reasonable** as consistent with each other; but subject to the provisions of this Article on **parol or extrinsic evidence** (Section [2-202](#)) negation or limitation is inoperative to the extent that such construction is

unreasonable.

(2) Subject to subsection (3), to **exclude or modify the implied warranty of merchantability** or any part of it the language **must mention merchantability** and in case of a writing must be **conspicuous**, and to exclude or modify any **implied warranty of fitness** the exclusion must be by a **writing and conspicuous**. Language to **exclude all implied warranties** of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."

(3) Notwithstanding subsection (2)

- (a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is", "with all faults" or other language which in common understanding **calls the buyer's attention to the exclusion of warranties** and makes plain that there is no implied warranty; and
- (b) when the **buyer** before entering into the **contract** has **examined the goods** or the sample or model as fully as he desired or has **refused to examine the goods** there is no implied warranty with regard to defects which an examination ought in the circumstances to have **revealed to him**; and
- (c) an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.

#### X. Contract Modifications:

##### 1. UCC § 2-719. Contractual Modification or Limitation of Remedy.

(1) Subject to the provisions of subsections (2) and (3) of this section and of the preceding section on liquidation and limitation of damages,

- (a) the **agreement may provide for remedies in addition to or in substitution** for those provided in this Article and may **limit or alter the measure of damages** recoverable under this Article, as by limiting the **buyer's** remedies to return of the **goods** and repayment of the price or to repair and replacement of non-conforming goods or parts; and
- (b) resort to a remedy as provided is optional unless the **remedy is expressly agreed to be exclusive**, in which case it is the sole remedy.

(2) Where **circumstances cause an exclusive or limited remedy to fail** of its essential purpose, remedy may be had as provided in this Act.

(3) Consequential damages may be limited or excluded unless the limitation or exclusion is **unconscionable**. Limitation of consequential damages for injury to the person in the case of consumer **goods** is prima facie unconscionable but **limitation of damages where the loss is commercial is not**.

##### 2. Restatement § 89. MODIFICATION OF EXECUTORY CONTRACT

A promise **modifying a duty under a contract not fully performed** on either side is binding

- (a) if the modification is **fair and equitable** in view of circumstances not anticipated by the parties when the contract was made; or
- (b) to the extent **provided by statute**; or
- (c) to the extent that justice requires enforcement in **view of material change of position in reliance** on the promise.

##### 3. Accord and Satisfaction: ADD

**Unmistakable communication** to the creditor that tender of the lesser sum is upon the condition that acceptance will constitute satisfaction of the underlying obligation. Consideration for the new contract **establishing a discharge of the prior obligation** is the **settlement of a bona fide dispute** between the parties. (the requirement of bona fide dispute presupposes that parties knew that an **issue of greater liability has been settled** by the accord.)

#### XI. Interpretation

A. **Intent:**

1. **Writing:** objective from intention gathered from entire body of writings
2. **Actions:** objective from intention imputed from reasonable meaning of words & actions
  - a. Exceptions: Peerless rule
    - 1) Where two parties both had **equally reasonable meanings** for the ship, resulting in subjectively different, but **objectively reasonable interpretations**, leading to no contract.

B. **Parol Evidence:**

1. Assumption: The Rule assumes the **duties or restrictions not appearing** in final written contract **even if accepted earlier, weren't intended to survive.**
2. Goal: Parol evidence rules seek to find some middle ground between **total adherence to the written language of agreement** and **total reliance on extrinsic evidence** of prior or contemporaneous agreements or negotiations that may affect the writing.
  - a. **Oral Contracts:**
    - 1) **The conservative rule:** The oral agreement must:
      - a) Be **collateral** in form
        - i. Collateral in form may [but does not always] mean that the two agreements **must be supported by separate consideration**, however.
        - ii. R2d§ 216 requires that there must either be "separate consideration" or the term must be one that under the circumstances might naturally be omitted from the writing
        - iii. Admitted if collateral **might reasonably be omitted** from the written agreement
      - b) **Not contradict express or implied provisions** of the written agreement  
Cannot assert or express the opposite or the contrary of express or implied provisions of the contract.
      - c) Be one that the parties would **not be expected to have reduced to writing** – (not be so **clearly connected** with the written agreement that it **should be reasonably expected** to be included).
        - i. Should not be so closely related to the primary transaction that it should naturally be included.

Test	
Is the agreement Integrated? Does it have full and complete intent?	Intended to be final &/or complete expression?
<b>Partially Integrated</b> writing is final but incomplete expression of intent some terms are unwritten.	Final, not Complete: supplemental but non contradictory evidence is allowed.
<b>Fully Integrated</b> Writing is final and complete expression of terms it contains.	Final & Complete: no evidence allowed

b. **Parol Evidence:**

- 1) cannot be admitted to **contradict a fully integrated** agreement.
- 2) cannot be admitted to **contradict the integrated portion** of a partially integrated agreement.
- 3) can be used to **prove elements** of the agreement **not reduced to writing...**
- 4) should be **excluded** only when the fact finder is **likely to be misled...**
  - a) If **terms of the contract are express**, must show (also considered exceptions to the rule):
    - i. Fraud (No mutual assent)
    - ii. Duress (No mutual assent)

- iii. Mistake (No mutual assent)
- iv. Ambiguous terms (Clarify intent)
- v. Promissory Estoppel (Clarify intent)
- vi. Misleading or deceiving 3rd party (No intent to be obligated)
- vii. Condition Precedent [to formation of contract] (No intent to be obligated)

c. **UCC § 2-202. Final Written Expression: Parole or Extrinsic Evidence.**

Terms with respect to which the **confirmatory memoranda of the parties agree** or which are otherwise set forth in a writing intended by the parties as a **final expression of their agreement** with respect to such terms as are included therein **may not be contradicted by evidence** of any prior agreement or of a contemporaneous oral agreement but **may be explained or supplemented:**

(a) by course of **dealing or usage of trade** (Section 1-205) or by course of performance (Section 2-208); and

(b) by evidence of **consistent additional terms** unless the court finds the writing to have been intended also as a **complete and exclusive statement** of the terms of the agreement.

d. **UCC §2-202: Exclude oral evidence if:**

- 1. parties intended writing to be **final and exclusive expression** of agreement of terms;
- 2. writing is **final written expression of terms that oral evidence** would contradict;  
or
- 3. oral evidence of terms is not credible.

XII. **Interpretation**

A. **Intent:** Effectuate the intent of the parties **at the time of contract formation;**

- 1. **Clear language:** Where the language of a contract is clear on its face, the court ascertains intent from language which is interpreted consistent with its ordinary meaning.
  - a. A contract will be construed as whole...all parts harmonized so far as reasonably possible.
- 2. **Ambiguities:** Where an ambiguity of language may support two disparate outcomes – courts favor the **reasonable, fair and customary** one over the **unreasonable, inequitable and unlikely**. Where ambiguity is alleged, it may be one of two types:
  - a. **Patent:** ambiguity apparent upon the face of the instrument due to **inconsistency, obscurity or inherent** uncertainty of language used; or
  - b. **Latent:** clear and intelligible contract language suggesting a single meaning but **extrinsic fact or extraneous evidence suggests more** than one possible meaning.
    - 1. Examine **extrinsic evidence** to determine if evidence supports assertion that language is capable of more than one interpretation.
    - 2. If latent ambiguity discovered, examine **extrinsic evidence to determine meaning** (appropriate interpretation) of contract language.

B. **U.C.C. Interpretation**

1. **§ 1-203. Obligation of good faith.**

Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement.

2. **§ 2-208. Course of Performance or Practical Construction.**

(1) Where the contract for sale involves **repeated occasions for performance by either party with knowledge of the nature** of the performance and opportunity for objection to it by the other, any course of performance **accepted or acquiesced in without objection** shall be relevant to determine the meaning of the agreement.

(2) The **express terms of the agreement** and any such course of performance, as well as any course of **dealing and usage of trade**, shall be construed whenever reasonable as consistent with each other; but when such construction is unreasonable, **express terms shall control course of performance** and course of performance shall control both course of dealing and usage of trade (Section 1-205).

(3) Subject to the provisions of the next section on modification and waiver, such course of performance shall be relevant to show a waiver or modification of any term inconsistent with such course of performance.

3. **§ 1-205. Course of Dealing and Usage of Trade.**

(1) A **course of dealing** is a **sequence of previous conduct between the parties** to a particular transaction which is fairly to be regarded as establishing a **common basis of understanding** for interpreting their expressions and other conduct.

(2) A **usage of trade** is any practice or method of dealing having such **regularity of observance in a place, vocation or trade as to justify an expectation** that it will be observed with respect to the transaction in question. The existence and scope of such a usage are to be **proved as facts**. If it is established that such a usage is embodied in a written trade code or similar writing the interpretation of the writing is for the court.

(3) A course of dealing between parties and any usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware give particular meaning to and **supplement or qualify terms of an agreement**.

(4) The express terms of an agreement and an applicable course of dealing or usage of trade shall be construed wherever **reasonable as consistent with each other**; but when such construction is unreasonable **express terms control both course of dealing and usage of trade and course of dealing controls usage of trade. (more specific than broad)**

(5) An **applicable usage of trade in the place where any part of performance** is to occur shall be used in interpreting the agreement as to that **part of the performance**.

(6) Evidence of a relevant usage of trade offered by one party is not admissible unless and until **he has given the other party such notice** as the court finds sufficient to **prevent unfair surprise to the latter**.

Parole Evidence	Interpretation
Goal	Effectuate Ps' intent
Process	Objective Evidence
NY Williston	Integrated Writing
Cal Corbin	All credible evidence
C. Focus & Burden	'Best Evidence'
NY Williston	Parties' writing
Cal Corbin	Parties' relationship
Intersections	PER/Interpretation
Level 1: Scope	What is included?
Level 2: Meaning	What does it mean?

**XIII. Gap Fillers**



- A. Used when contracts **fail to include critical matters or when conflicting clauses cancel** each other out.
1. Intent to contract established
  2. **Issue of performance**
  3. Term(s) omitted?
  4. **Ascertain intent**
  5. Rely on discernable intent, fairness and/or gap fillers to determine meaning
    - a. Where parties haven't **clearly specified the duration** of an ongoing contract, the court will imply duration for a reasonable time based upon the surrounding circumstances and the parties' intent at time of contract.
    - b. Where **intent** may not be clearly ascertainable, the courts may **substitute fairness**.
- B. **UCC § 2-204. Formation in General.**  
 (3) Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have **intended to make a contract** and there is a reasonably certain basis for giving an appropriate remedy.
- C. **§ 2-305. Open Price Term.**  
 (1) The parties if they so intend can **conclude a contract for sale** even though the price is not settled. In such a case the price is a reasonable price at the time for delivery if
  - \* (a) nothing is said as to price; or
  - \* (b) the price is **left to be agreed by the parties** and they fail to agree; or
  - \* (c) the price is to be **fixed in terms of some agreed market or other standard** as set or recorded by a third person or agency and it is not so set or recorded.

(2) A price to be fixed by the seller or by the buyer means a **price for him to fix in good faith**.

(3) When a price left to be fixed otherwise than by agreement of the parties **fails to be fixed** through **fault of one party** the other may at his option treat the contract as **cancelled or himself fix a reasonable price**.

(4) Where, however, the parties **intend not to be bound unless the price be fixed** or agreed and it is not fixed or agreed there **is no contract**. In such a case the buyer must return any goods already received or if unable so to do must pay their reasonable value at the time of delivery and the seller must return any portion of the price paid on account.
- D. **§ 2-309. Absence of Specific Time Provisions; Notice of Termination.**  
 (1) The time for **shipment or delivery** or any other action under a contract if not provided in this Article or agreed upon **shall be a reasonable time**.
- (2) Where the contract provides for **successive performances** but is **indefinite in duration** it is valid for a **reasonable time** but unless otherwise agreed **may be terminated at any time** by either party.
- (3) **Termination of a contract** by one party except on the **happening of an agreed event** requires that **reasonable notification be received** by the other party and an agreement dispensing with notification is invalid if its operation would be unconscionable.
- E. **§ 2-312. Warranty of Title and Against Infringement; Buyer's Obligation Against Infringement.**  
 (1) Subject to subsection (2) there is in a contract for sale a warranty by the seller that
  - \* (a) the title conveyed shall be good, and its transfer rightful; and
  - \* (b) the goods shall be delivered **free from any security interest or other lien or encumbrance** of which the buyer at the time of contracting has no knowledge.

(2) A warranty under subsection (1) will be **excluded or modified only by specific language** or by circumstances which give the buyer reason to know that the person **selling does not claim title in himself** or that he is purporting to sell only such right or title as he or a third person may have.

(3) Unless otherwise agreed a seller who is a **merchant regularly dealing in goods** of the kind **warrants** that the goods shall be delivered **free of the rightful claim** of any third person by way of infringement or the like but a buyer who furnishes specifications to the seller **must hold the seller harmless against any such claim** which arises out of **compliance with the specifications**.

Parol Evidence	Interpretation	Gap Fillers
Intent to contract established	Intent to contract established	Intent to contract established
Issue of performance	Issue of performance	Issue of Performance
Terms to be included?	Term ambiguous?	Term(s) omitted?
Ascertain intent	Ascertain intent	Ascertain intent
Term excluded if: Contradicts or is additional to terms in writing; Contradicts or additional per extrinsic evidence	Rely on discernable intent and extrinsic evidence to determine intended meaning	Rely on discernable intent, fairness and/or gap fillers to determine meaning

#### XIV. **Good Faith**

- A. **Restatement §205** - good faith is faithfulness to an **agreed common purpose and consistency** with the **justified expectations of the other party**.
1. Bad faith conducts **violates standards of decency, fairness, or reasonableness** from its definition of bad faith, including evasion from the spirit of the bargain, lack of diligence, willful rendering of imperfect performance, abuse of power to specify terms, and interference with or failure to cooperate with other party's performance.
- B. **UCC §1-203**: "Every contract or duty within this act imposes a duty of good faith in its performance or enforcement."
- C. **UCC § 2-306. Output, Requirements and Exclusive Dealings.**
- (1) A term which measures the **quantity by the output of the seller** or the requirements of the buyer means such actual output or requirements as may occur in good faith, except that **no quantity unreasonably disproportionate to any stated estimate** or in the absence of a stated estimate to any normal or otherwise comparable prior output or requirements may be tendered or demanded.
  - (2) A lawful agreement by either the seller or the buyer for **exclusive dealing in the kind of goods** concerned imposes unless otherwise agreed an obligation by the seller to use **best efforts to supply** the goods and by the buyer to use **best efforts to promote** their sale.
- D. §1-201 "Good faith" means **honesty in fact in the conduct or transaction concerned**.
1. For merchant, also includes honesty in fact **AND the observance of reasonable commercial standard** of fair dealing in the trade.

#### XV. **Express Conditions**

- A. Order of performance
  1. Conditions of the performance

- a. Process:
  - 1) **Intent & Circumstances:** Ascertain party's intent from contract language & surrounding circumstances; or if
  - 2) **General Trade Customs:** Less substantial evidence, look to general trade custom; or if
  - 3) **Gap Filler:** No evidence of probable intention, fill gap by devising general rule of law.
    - a) A term supplied by a gap filler is called:
      - An **Implied-in-law condition precedent**, or
      - A **Constructive condition precedent**
- 2. Where the court fills the gap and determines which party performs 1st, the other party's duty is impliedly-in-law conditional **on the 1st party's performance**
- B. **Express conditions** are when a party does **not have a duty to perform** unless that express condition **is fulfilled**.
  - 1. Explicit contractual provision to describe a condition that **must or must not occur**, if it does so, it **releases parties from a duty to perform**.
  - 2. **Excuse of performance** - does not excuse the other party to perform under the contract
    - a. If party's promise to perform is **subject to a condition**, there is no breach until **condition is fulfilled**.
  - 3. Presumptions: in doubt, construe as promises to the parties expectations.
- C. **Conditions precedent:** must occur before the party has a duty to render performance
- D. **Condition subsequent:** where occurrence or non-occurrence extinguishes or terminates a duty to perform

CONDITION	PROMISE
An operative fact <b>occurring after acceptance</b> but before discharge of obligations upon which the rights and duties of the parties depend.	A declaration <b>made as part of contract (during)</b> formation that one party will or will not do something, fulfillment of which occurs after acceptance.
Made by agreement of both parties <b>to qualify</b> start of contract obligations	Made by one party <b>to create an obligation</b> or detriment in the Promisor
Postpones a duty or other relationship.	Discharges a duty when fulfilled
Non Occurrence <b>prevents discharge</b> of obligations	Non-Fulfillment <b>constitutes breach</b> with right to damages.
Provided, If, When	Promise, Agree

- E. **Quality of performance - Conditions of Satisfaction**
  - 1. Performance to satisfaction as a CP:
    - a. Actual personal satisfaction or **reasonable person** - modern trend is **promisor's satisfaction** to the subject matter of the contract
      - 1) Mechanical fitness, utility, marketability - reasonable person
      - 2) Personal taste or judgment - personally satisfied in good faith
      - 3) To a third person - actual personal satisfaction in honest and good faith
  - 2. Conditions relating to the time of payment
    - a. Only enforceable **if condition has occurred**, provisions of unconditional promise to pay, with payment postponed until occurrence of time of payment.
- F. **Excused performance** - in general, no obligations to fulfilled contract duty **unless all conditions** are fulfilled. Exceptions are granted if prevented or hindered by party favored by condition. Cannot use own wrongful conduct to escape liability.
  - 1. **Wrongfulness** - must be wrongful but **DOES NOT require bad faith or malice**, but essential

that other party would not have reasonably anticipated that type of prevention or hindrance that occurred.

2. **Waivers - words or conduct may waive** right to insist fulfillment of condition upon which his duty of performance depends.
3. **Impossibility or Impracticability** excuses the fulfillment of a condition if it is **not material** to the agreed exchange and forfeiture.
4. **Forfeiture:** no fulfillment would cause a disproportionate forfeiture, fulfillment of the condition may be excused unless the fulfillment of the condition was a material part of the agreed exchange.

G. **Implied Conditions:** where express conditions refer to an explicit contractual

H. Restatements

1. **§ 224 CONDITION DEFINED**

A condition is an event, not certain to occur, which must occur, unless its non-occurrence is excused, before performance under a contract becomes due.

2. **§ 225 EFFECTS OF THE NON-OCCURRENCE OF A CONDITION**

(1) Performance of a duty subject to a condition cannot become due unless the condition occurs or its non-occurrence is excused.

(2) Unless it has been excused, the non-occurrence of a condition discharges the duty when the condition can no longer occur.

(3) Non-occurrence of a condition is not a breach by a party unless he is under a duty that the condition occur.

a. The first, stated in Subsection (1), is that of preventing performance of the duty from becoming due. This follows from the definition of "condition" in § 224. Performance of the duty may still become due, however, if the condition occurs later within the time for its occurrence.

b. The non-occurrence of the condition within that time has the additional effect, stated in Subsection (2), of discharging the duty. The time within which the condition can occur in order for the performance of the duty to become due may be fixed by a term of the agreement or, in the absence of such a term, by one supplied by the court (§ 204).

3. **§ 229 EXCUSE OF A CONDITION**

"Excuse non-occurrence of express condition where non-excuse works disproportionate forfeiture unless occurrence is material."

4. **§ 230 EVENT THAT TERMINATES A DUTY**

(1) Except as stated in Subsection (2), if under the terms of the contract the occurrence of an event is to terminate an obligor's duty of immediate performance or one to pay damages for breach, that duty is discharged if the event occurs.

(2) The obligor's duty is not discharged if occurrence of the event

(a) is the result of a breach by the obligor of his duty of good faith and fair dealing, or

(b) could not have been prevented because of impracticability and continuance of the duty does not subject the obligor to a materially increased burden.

(3) The obligor's duty is not discharged if, before the event occurs, the obligor promises to perform the duty even if the event occurs and does not revoke his promise before the obligee materially changes his position in reliance on it.

I. **UCC § 1-204. Time; Reasonable Time; "Seasonably".**

(1) Whenever this Act requires any action to be taken within a reasonable time, any time which is not manifestly unreasonable may be fixed by agreement.

(2) What is a reasonable time for taking any action depends on the nature, purpose and circumstances of such action.

(3) An action is taken "seasonably" when it is taken at or within the time agreed or if no time is agreed at or within a reasonable time.

## XVI. Implied Conditions

- A. Express conditions normally refer to explicit contractual provisions, whereas implied conditions are duties that **should be performed under a contract** even if it **does not explicitly state so**. There **must be an implied or constructive condition that must occur before** the performance of one or both parties come due.
1. **Implied Conditions of Performance**
    - a. Where the other party has rendered its performance or made a tender of its performance.
  2. **Implied Conditions of Cooperation and Notice**
    - a. Conditions other than performance or tender, such as obligation of one party to perform is conditioned on the other party's cooperation in that performance.
  3. **Implied Conditions of Notice**
    - a. Other party needs to give **notice that performance is due** where the other party could **not be reasonably expected** to know when his duty to perform was triggered.
- B. **Order of Performance**
1. The performance that **takes time must occur first** (meaning the one that takes longer). It is the implied condition to the duty to render the performance that will not take time (meaning unless the one that takes time is done first)
  2. Earlier Performance is **conditioned to later performance** - the first performance is an **implied condition to the other party's duty** to perform.
  3. **Simultaneous performances** - tender of performance by each party is an **implied condition to the other party's duty** to perform - concurrent duty.
    - a. Same rule applies even if there is no time set if the promises are capable of being performed simultaneously.
    - b. Same rule applies even if only one of the promises have set time but both can occur simultaneously
- C. **Anticipatory Repudiation**: a performance that would normally be an **implied condition** to the other party's performance or tender **will be excused if the other party repudiates** the contract **prior to the time** when the performance was to occur.
1. **Rationale**: to avoid forcing innocent party to **remain futilely in readiness** to perform
  2. **Victim of the repudiation**: does not have to make a tender, he still may have to show that **but for repudiation he had the ability to perform**.
  3. **As a breach**: nonrepudiating party is **excused from his duty to perform** and may be able to sue the repudiating party for breach even if the time for performance has not yet arrived.
- D. **Anticipatory Breach**: **material breach of contract** and able to bring immediate action for value of the promised performance.
1. Not needed to be done by words, **voluntary acts are sufficient**.
  2. Insistence on **terms not in the contract** are held to be **breach**
  3. **Requirement of Unequivocal Repudiation** - only an **express or implied unconditional refusal to perform** constitutes repudiation.
    - a. Exception: where **only remaining duty belongs to repudiating party** does not give rise to cause for breach until there is an **actual breach at the time for performance**.
- E. **Retraction** - repudiating party **may retract at any time prior to date set** for performance unless innocent party has accepted the repudiation or **changed his or her position in detrimental reliance**
1. Damages: **Repudiation party must mitigate damages**
  2. Innocent party must also mitigate damages
  3. U.C.C. 2-609-611

a. **§ 2-609. Right to Adequate Assurance of Performance.**

(1) A contract for sale imposes an obligation on each party that the other's **expectation of receiving due performance will not be impaired**. When reasonable grounds for insecurity arise with respect to the performance of either party the other may **in writing demand adequate assurance of due performance** and until he receives such assurance may if **commercially reasonable suspend any performance** for which he has not already received the agreed return.

(2) Between merchants the **reasonableness of grounds for insecurity and the adequacy** of any assurance offered shall be determined according to **commercial standards**.

(3) **Acceptance of any improper delivery or payment** does not prejudice the aggrieved party's **right to demand adequate assurance of future performance**.

(4) After receipt of a justified demand **failure to provide within a reasonable time** not exceeding thirty days such **assurance of due performance** as is adequate under the circumstances of the particular case is a **repudiation of the contract**.

b. **§ 2-610. Anticipatory Repudiation.**

When either party repudiates the contract with respect to a performance not yet due the loss of which **will substantially impair the value of the contract to the other**, the aggrieved party may

(a) for a **commercially reasonable time await performance** by the repudiating party; or

(b) **resort to any remedy for breach** (Section 2-703 or Section 2-711), even though he has notified the repudiating party that he would await the latter's performance and has urged retraction; and

(c) in either case **suspend his own performance** or proceed in accordance with the provisions of this Article on the **seller's right to identify goods to the contract notwithstanding breach** or to **salvage unfinished goods** (Section 2-704).

c. **§ 2-611. Retraction of Anticipatory Repudiation.**

(1) Until the **repudiating party's next performance is due** he can retract his repudiation unless the aggrieved party has since the **repudiation cancelled or materially changed his position** or otherwise indicated that he considers the repudiation final.

(2) Retraction may be **by any method which clearly indicates** to the aggrieved party that the **repudiating party intends to perform**, but must include any **assurance justifiably demanded** under the provisions of this Article (Section 2-609).

(3) **Retraction reinstates the repudiating party's rights** under the contract with due excuse and allowance to the aggrieved party for any delay occasioned by the repudiation.

F. **Prospective inability to perform** - one party apparently cannot perform than it excuses the performable party from holding himself ready to perform.

1. Under UCC - insolvency of party gives other the **right to demand assurances** of performance or adequate assurances of performance.

G. **Substantial Performance** - Implied condition of prior or simultaneous performance will be

satisfied by substantial performance.

1. Expectations Damages, offsetted by the amount of damages he incurred as a result of the plaintiff's breach.
2. Substantial performance - whether the performance **meets the essential purpose** of the contract
  - a. **Rest. Of Contracts, §275: Factors establishing materiality**
    - 1) Extent to which injured party **receives the anticipated substantial** benefit
    - 2) Extent to which injured party **may be compensated in damages** for lack of complete performance
    - 3) Extent of partial performance and/or preparations to perform
    - 4) **Greater or less hardship** on non-performing party in terminating contract
    - 5) **Willful, negligent or innocent** behavior of non-performing party
    - 6) Greater or less uncertainty that non performing party will perform remainder of contract.

b. **§ 241 CIRCUMSTANCES SIGNIFICANT IN DETERMINING WHETHER A FAILURE IS MATERIAL**

In determining whether a **failure to render or to offer performance is material**, the following circumstances are significant:

- (a) the extent to which the injured party **will be deprived of the benefit** which he reasonably expected;
- (b) the extent to which the injured party can be **adequately compensated** for the part of that benefit of which **he will be deprived**;
- (c) the extent to which the party failing to perform or to offer to perform will **suffer forfeiture**;
- (d) the likelihood that the party failing to perform or to offer to perform will **cure his failure**, taking account of all the circumstances including any reasonable assurances;
- (e) the extent to which the behavior of the party **failing to perform or to offer to perform** comports with **standards of good faith and fair dealing**.

H. **U.C.C. Implied Conditions Fixing Order of Performance**

1. **UCC § 2-507. Effect of Seller's Tender; Delivery on Condition.**

(1) **Tender of delivery is a condition to the buyer's duty to accept the goods** and, unless otherwise agreed, to his duty to pay for them. Tender entitles the seller to acceptance of the goods and to payment according to the contract.

(2) Where payment is due and demanded on the delivery to the buyer of goods or documents of title, his right as against the seller to **retain or dispose of them is conditional upon his making the payment due**.

2. **U.C.C. Sect. 2-511 Tender of Payment by Buyer; Payment by Check**

(1) Unless otherwise agreed, tender of payment is a condition to the **seller's duty to tender and complete any delivery**.

(2) Tender of payment is **sufficient when made by any means or in any manner current in the ordinary course of business** unless the seller demands payment in legal tender and gives any extension of time reasonably necessary to procure it.

(3) Subject to the provisions of this Act on the effect of an instrument on an obligation (Section 3-802), **payment by check is conditional** and is defeated as between the parties by dishonor of the check on due presentment.

3. **U.C.C. Sect. 2-307 Delivery in Single Lot or Several Lots**

Unless otherwise agreed all goods called for by a contract for sale must be tendered in **a single delivery and payment is due only on such tender** but where the circumstances give either party the right to make or demand delivery in lots the price if it can be **apportioned may be demanded for each lot**.

I. **Implied Conditions Fixing the Quality of Performance**

1. UCC § 2-717. Deduction of Damages From the Price.

The **buyer on notifying the seller of his intention to do so may deduct** all or any part of the damages resulting from any breach of the contract from any part of the price still due under the same contract.

G. **U.C.C. Comparisons and Conditions**

1. **§ 2-601. Buyer's Rights on Improper Delivery.**

Subject to the provisions of this Article on breach in installment contracts (Section 2-612) and unless otherwise agreed under the sections on contractual limitations of remedy (Sections 2-718 and 2-719), if the **goods or the tender of delivery fail in any respect** to conform to the contract, the buyer may

- (a) reject the whole; or
- (b) accept the whole; or
- (c) accept any commercial unit or units and reject the rest.

2. **§ 2-602. Manner and Effect of Rightful Rejection.**

(1) Rejection of goods **must be within a reasonable time** after their delivery or tender. It is ineffective unless the buyer seasonably notifies the seller.

3. **§ 2-608. Revocation of Acceptance in Whole or in Part.**

(1) The buyer may revoke his acceptance of a lot or commercial unit whose **non-conformity substantially impairs its value to him** if he has accepted it

- (a) on the reasonable assumption that its **non-conformity would be cured** and it has not been seasonably cured; or
- (b) without discovery of such non-conformity if his acceptance was **reasonably induced either by the difficulty of discovery** before acceptance or by the seller's assurances.

(2) Revocation of acceptance **must occur within a reasonable time** after the buyer **discovers or should have discovered the ground** for it and before any substantial change in condition of the goods which is not caused by their own defects. It is not effective until the buyer notifies the seller of it.

(3) A buyer who so revokes has the same rights and duties with regard to the goods involved as if he had rejected them.

4. **§ 2-612. "Installment contract"; Breach.**

(1) An "installment contract" is one which **requires or authorizes the delivery of goods in separate lots** to be separately accepted, even though the contract contains a clause "each delivery is a separate contract" or its equivalent.

(2) The buyer **may reject any installment which is non-conforming** if the non-conformity substantially **impairs the value of that installment and cannot be cured** or if the non-conformity is a defect in the required documents; but if the non-conformity



does not fall within subsection (3) and the seller gives adequate assurance of its cure the buyer must accept that installment.

(3) Whenever non-conformity or default with respect to one or more installments **substantially impairs the value of the whole contract there is a breach of the whole.** But the aggrieved party reinstates the contract if he **accepts a non-conforming installment without seasonably notifying of cancellation** or if he brings an action with respect only to past installments or demands performance as to future installments.

5. **§ 1-205. Course of Dealing and Usage of Trade.**

(1) A **course of dealing is a sequence of previous conduct** between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.

(2) A **usage of trade is any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question.** The existence and scope of such a usage are to be proved as facts. If it is established that such a usage is embodied in a written trade code or similar writing the interpretation of the writing is for the court.

(3) A course of dealing between parties and any usage of trade in the vocation or trade in which they are **engaged or of which they are or should be aware** give particular meaning to and supplement or qualify terms of an agreement.

(4) The express terms of an agreement and an applicable course of dealing or usage of trade shall be construed **whenever reasonable as consistent** with each other; but when such construction is unreasonable express terms control both course of dealing and usage of trade and course of dealing controls usage of trade.

(5) An applicable usage of trade in the place where any part of performance is to occur shall be used in interpreting the agreement as to that part of the performance.

(6) Evidence of a relevant usage of trade offered by one party is not admissible unless and until he has given the other party such notice as the court finds sufficient to prevent unfair surprise to the latter.

**XVII. Mistake: Defects in the bargaining process**

- 1) Last Semester: §20: Lack of mutual assent → as to formation of contract, therefore, no contract. Enforceable at the terms of the innocent party. It is to the option of the innocent party (where the person knew of the mistake and took advantage of the mistaken party, then the innocent party's terms will be used). This falls under the objective theory of the formation of the contract. Issue: if offeror should have known or known of the mistake.
- 2) This semester: **Mistake of fact that was made at the time the contract was formed. There is mutual assent and there is already a contract established.** Courts rarely void contract because of mistake because the mistaken beliefs at issue in mistake cases may not be the D's fault. Falls under R2 §19(3), 151, 153, 154 (where the contract is voidable)
- 3) **Unilateral Mistake**
- (a) **Restatement §153: Unilateral Mistake:** When a mistake of one part makes a contract voidable
  - (1) Where a mistake of one party at the time a contract was made as to a **basic assumption** on which he made the contract has a **material effect** on the agreed exchange of performances that is adverse to him, the contract is **voidable** by him if he **does not bear the risk** of the mistake, **and**
    - (i) The effect of the mistake is such that enforcement of the contract would be

**unconscionable, or**

- (ii) The other **party had reason to know of the mistake or his fault caused the mistake.**
- (b) Boise Junior College v. Mattefs Construction
  - (1) One who errs in preparing a bid for a public works contract is entitled to the equitable relief of rescission if he can establish the following conditions:
    - (i) **Basic Assumption**
    - (ii) The mistake is **material**;
    - (iii) Enforcement of a contract pursuant to the terms of the erroneous bid would be **unconscionable**;
    - (iv) The mistake did not result from the violation of a positive legal duty or from culpable negligence; (negligence is shown by bidder's lack of good faith).
    - (v) The party to whom the bid is submitted will **not be prejudiced** except by the loss of his bargain; and
    - (vi) **Prompt notice of the error** is given (relief from mistake bids is consistently allowed where the acceptor has actual notice of the error prior to its attempted acceptance and the other elements necessary for equitable relief are present).
- (c) *Mistake in Bids and Federal government contracting*: if the contracting officer has reason to believe that a mistake may have been made, the contracting officer shall request from the bidder a verification of the bid, calling attention to the suspected mistake. If there is desire to rescind after award of bid, then P must show by clear and convincing evidence that a mutual mistake has been made or a unilateral mistake (and other party should have known), then agencies can rescind or reform the contract.
- (d) If there is a palpable (noticeable) error, then this may be sufficient to warrant relief.

**Mutual Mistake**

- (e) **Restatement §152: Mutual Mistake**: When mistake of both parties makes a contract voidable
  - (1) Where a mistake of both parties at the time a contract was made as to a **basic assumption** on which the contract was made has a **material effect** on the agreed exchange of performance, the contract is **voidable** by the adversely affected party **unless he bears the risk** of the mistake.
- (f) Beachcomber Coins v. Boskett
  - (1) Both parties acted under the mistake of fact, and it was a material effect, and neither parties bore the risk. However, if the person bears the risk, (like a garage sale and no one knows what anything is worth) and if both parties are contracting if they do not know of the thing being sold, then there can be no rescission.
  - (2) Mutual mistake is voidable by either party if enforcement more onerous than had the facts been the way the parties believed them to be.
  - (3) Negligence does not preclude rescission.
- (g) Sherwood v. Walker
  - (1) Common law: Walker contracted to sell Sherwood a cow that both parties believed was barren. Before delivery of the cow, Walker discovered the cow was pregnant and thus more valuable. The **contract could be rescinded** because the parties made a mutual material mistake as to the substance of the contract's subject matter (not necessarily the value – if just value the court may not have held for P). P wants Replevin – to recover the thing itself (the cow). (Pre-restatement case)
  - (2) A mutual mistake occurs when both parties are under substantially the same erroneous belief as to the facts.
  - (3) Both seller and buyer believed the cow could not breed. When seller discovered cow was in fact pregnant, he attempted to avoid the contract. The court held that **seller was entitled to avoid** if the cow was sold, or contracted to be sold, upon the understanding of both parties that she was barren, and useless for the purpose of breeding, and that in fact she was barren, but capable of breeding.
- (h) Lenawee v. Messerly
  - (1) Bloom installs septic tank without permit, Bloom sells to Messerly (contract of sale in default), Messerly sells to Barnes (through quit claim), then Messerly to Pickles with

contract of sale with “as is”. The board of health gives an injunction to the property, since it is unfit for habitation. Court says that it shouldn’t matter if mistake is regarding value or subject matter, rather it is just a material effect, and this should be the reason to give rescission (dicta). Court holds that risk should be allocated to purchasers because of “as is” clause. **R2 §154(a)** says that the court should look first to whether the parties have agreed to the allocation of the risk between themselves.

1) **Mistake made by intermediary during transmission**

(a) **Ayer v. Western Union**

- (1) Telegram omits a number, which differs the quantity term. The party who selects the telegraph should bear the loss caused by the errors (in this case, the seller). P is entitled to recover the difference between the two dollars and the market price from Western Union, since it is the fault of Western Union based on strict liability (court ignores disclaimer clause because the consumer does not read the disclaimer and was not clear and obvious).
- (2) In an offer, where there is a mistake in the telegram, the offeree has the power to accept (since the offeree is innocent), however if there is a huge difference, then the offeree should not take advantage of the offeror, since the offeree knew or should have known he did not have the power to accept. (In this case, the court said not that big of a difference, so there was a contract).

1) **Remedies:**

- (a) **Rescission:** it is an equitable remedy **invalidating** the contract. For mutual mistake in the formulation rather than the expression of the agreement, then the proper remedy is rescission. (Same thing to say a party wants to **avoid the contract** as rescission.)
- (b) **Reformation:** reformation is designed to restore the efficacy of the writing which does not reflect the earlier agreement to the parties, frequently oral, which they apparently intended to be reflected in the writing (limited to the (scrivener’s {draftman’s} error). P must show by clear and convincing evidence that the parties had actually reached agreement over the term at issue, that both parties intended the term to be included in subsequent writing, and because of the mutual mistake in expression, the term was not included. D will deny the term was to be included, so P has an uphill burden.

XVIII. **Impossibility and Frustration:**

Contract will normally be excused if the performance has been made impossible or impracticable

- A. Impossibility of Performance
- B. Impracticability of Performance
- C. Frustration of purpose

XIX. **Changed Circumstances:**

- 1) Older concept: **supervening impracticability** (this is where you make the contract, and then an unexpected event happens which makes the contract impracticable).
- 2) **Frustration of purposes:** only in restatement; parties contract and either because of an existing or supervening event that they did not know about, the purpose of one party going into the contract is reduced to zero, should that party be able to get out.
  - (1) Overarching Question: Ask: who should bear the risk? Then was there really impracticability?
- 3) Remedies: courts don’t necessarily have to make it all or nothing (uphold contract or not relieve performance obligation).
- 4) **Define impracticability:** the party seeking relief must prove that there was an extraordinary circumstance (both parties assumed it would not happen) that made performance so vitally different from what was reasonably to be expected as to alter the essential nature of that performance (impracticable). When a court excuses a party on the ground of impossibility, it is supplying a term to deal with an omitted case, to fill a gap à courts have rationalized this by saying that it is an implied condition.
- 5) Historical sequence that it moved from defense of impossibility à to the defense of

impracticability to à the restatement allowance of frustration of purpose.

1) **Impracticability**

(a) Six Part Test in book:

- (1) What was the **nature of the risk event** and what was its **impact on the contractual relationship**?
- (2) Was the party **seeking relief at fault** in that it cause the event or failed to take reasonable steps either to avoid it or to minimize the impact?
- (3) If the party seeking relief was not at fault, did the agreement **allocate the risk of the event to one or the other** or both parties?
- (4) If there was no agreement, express or implied, allocating the risk, how is the court to fill the gap in risk allocation?

**Restatement §261 {party that wishes to be excused, has burden of proving that performance is impracticable,** without default of the party seeking to be excused, and the party seeking to be excused has the initial burden of proof that the non-occurrence of an event was a basic assumption of the contract – exceptions: 3 instances where the burden shifts – death of incapacity of person necessary to perform the contract, the thing that the contract is about is no longer in existence, and the law has not changed to make performance illegal}.

- (5) What is the nature and scope of relief when the conditions of §261 or UCC 2-615(a) are satisfied? If relief limited to discharge of the contract with appropriate restitution or must the parties continue performance under terms adjusted by the court to reflect the risk? Is there a remedial middle ground?
- (6) Would the modification be enforceable?

(b) **R2 § 266(1) Existing Impracticability** (Facts similar to this can also be argued under R2 152 by mutual mistake, which makes contract voidable). (Different than UCC because allows for impracticability about an event during the time of the contract, but was not known to the parties at the time of contracting). (Allows something less than impracticability, since it has also the concept of frustration of purpose – where one party is substantially frustrated, then they may not have to perform). (This is different than §261 since the duty never arises). (Impracticability is not an excuse: both parties must assume the condition did not exist.)

- (1) (1) Where, at the time a contract is made, a party's performance under it is **impracticable without his fault** because of a fact of which he has **no reason to know and** the non-existence of which is a **basic assumption** on which the contract is made, **no duty to render that performance arises**, unless the language or circumstances indicate the contrary.

(c) **Mutual mistake**: Existing impracticability or frustration may also claim excuse on grounds of mistake. A party that relies on the ground of impracticability or frustration must show that it was **impracticable for the party to perform or that the party's purpose was substantially frustrated**. By contrast, a party that relies on the ground of mistake need show only that the mistake had a material effect on the agreed exchange of performances. In order to succeed on the ground of mistake, however, a party must show that there was a mistake as to an existing fact, not merely an erroneous prediction as to the future. Furthermore, it is more likely that a party will be regarded as having borne the risk in the case of mistake than in the case of impracticability or frustration

(d) **Mineral Park Land v. Howard** (CA, 1916)

- (1) Just because the price goes up it does not excuse you from the contract. However, the courts have looked at extreme unprofitability in connection with factors highly abnormal and unexpected. It is unreasonable that the promisor assumed this particular risk of this particular thing happening. The price of taking out the gravel would cost over 10 times as much as what was contracted for. There was extreme unprofitability.
- (2) Could the contractor would have known of extreme conditions? No, then the contractor did not bear the risk and excused the performance. The degree of impracticability is weighed against the bearing of risk (what the parties knew at the time of contracting).

- (3) The court says that performance is not only more expensive, but in legal contemplation when it is not practicable, and a thing is impracticability when it can only be done at an excessive and unreasonable cost. However, in legal contemplation, the gravel did not exist and it was impracticability that it could not be removed. The court gets to the idea of impossibility through the fiction that the gravel did not exist.
- (4) Existing impracticability.
- (5) This case can also be looked at through mutual mistake under R2 §152.
- (e) US v. Wegematic
  - (1) The Court of Appeals held that alleged engineering difficulties encountered by defendant electronics manufacturer did not relieve it, on ground of practical impossibility, from liability to government, for breach of contract for delay in delivery and ultimate nondelivery of computer.
  - (2) The US had a choice when accepting bids, dependent on the attractiveness of manufacturer's representation. Manufacturer should be bound by contract, since the manufacturer should not be free to express what are only aspirations and gamble on the mere possibilities of fulfillment of risk of liability. The manufacturer was in a much better position to know what would have been possible. If they did not want to bear the risk, the appropriate exculpatory clause is well known and should have been used.
- 1) Supervening Impracticability
  - (a) **R2: § 261-264:** they all deal with the presumption of who should bear the risk. 261 makes the moving party to have the burden, whereas the other sections show the exceptions.
  - (b) **R2: § 261 Discharge by Supervening Impracticability:** (Classic statement of a discharge of one's duty because of a supervening impracticability). (Supervening: An event that occurs after the contract has formed) (Assumes contract performed, but then discharged if impracticable).
    - (1) Where, after a contract is made, a party's performance is made **impracticable** without his fault by the occurrence of an **event the non-occurrence** of which was a **basic assumption** on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary. {Note: Test (1): the non-occurrence of the event must have been a basic assumption on the contract was made, and (2) the event must have made performance impracticable.}
- (c) **UCC § 2-615. Excuse by Failure of Presupposed Conditions. (Much like R2 §261, supervening impracticability)** {This is a more sophisticated approach than §261– since it is not all or nothing}
  - (1) Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:
    - (i) (a) **Delay in delivery or non-delivery in whole or in part** by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been **made impracticable by the occurrence** of a contingency the **non-occurrence** of which was a **basic assumption** on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid. {It is more likely that there would not be performance for part of the contract in the real life, so the parties must perform what they can}.
    - (ii) (b) Where the causes mentioned in paragraph (a) affect **only a part** of the seller's capacity to perform, he **must allocate production and deliveries** among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable.
    - (iii) (c) The seller must **notify** the buyer seasonably that there will be delay or non-delivery and, when allocation is required under paragraph (b), of the estimated quota thus made available for the buyer. {He may not be necessarily totally excused like in §261, since there is an allocation and notification requirement}.
- (d) A promise has constructive conditions that are dependent on one another. Can we come to the conclusion that one of the parties should bear the risk of the unexpected events?

- (e) Taylor v. Caldwell (1863)
- (1) A music hall burned down and it was not any party's fault, so P could not have a concert there. The court holds that the continued existence of a music hall at the time the concerts were to be given, was essential to their performance. (This is the beginning of the idea of supervening impracticability). (This is a pious fiction that the parties would have implied that the condition would relieve them of their obligations).
  - (2) In contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or things shall excuse the performance.
- (f) **Chemtron v. McLouth:** A party may not by its own conduct, create the event causing the impracticability of performance, in fact it must make all reasonable efforts to avoid impossibility and once the event occurs, it must employ any practicable means of fulfilling the contract, even if it had originally expected to meet its obligation in a particular way.
- (g) Canadian Industrial Alcohol v. Dunbar Molasses:
- (1) Court holds in favor of the buyer, since the seller was at fault since they did not contract with the refinery. A party that is fault for impracticability, then you should not have it as a defense, due to risk bearing since they had the ability to avoid the impracticability – this is considered a subjective impracticability – person made themselves unable to perform rather than outside parties causing the condition. Cardozo says that it is not commercially reasonable to excuse performance.
  - (2) Notes: P.820: if the clause were in the contract would there be an excuse? Clause would not help him, since he was at fault.
- (h) Dills v. Town of Enfield
- (1) Whether the doctrine of commercial impracticability excuses a developer from submitting construction plans when he discovers that necessary financing has become available.
  - (2) Financing was a risk that was borne by the P, and therefore not getting financing did not excuse his performance, since he had to unconditionally submit the plans first, which he didn't. The judge would have granted relief if the below standards were met, however, in this case, the standards were not met since P bore the risk and the financing was not a basic assumption. This is language of performance.
  - (3) A party claiming that a supervening event or contingency has prevented, and thus excused, a promised performance must demonstrate that (basic elements of 261):
    - (i) The event made the performance impracticable;
    - (ii) The nonoccurrence of the event was a basic assumption on which the contract was made;
    - (iii) The impracticability resulted without the fault of the party seeking to be excused, and
    - (iv) The party has not assumed a greater obligation than the law imposes.
- (i) **Basic assumption.** Note #3 P. 825: You have to show that the nonoccurrence of the event was a basic assumption. Does this mean that the event had to be **unforeseeable**? Event upon which the obligor relies to excuse his performance cannot be an event that the parties foresaw at the time of the contract. The parties would bear the risk of all foreseeable events. Most modern courts concede that foreseeability of some risk and its impact on performance does not necessarily prove its allocation to the promisor. If the occurrence of the foreseen event is improbable, it is less likely that the parties intended to allocate its risk to one or the other. It is better to say unexpected not necessarily than unforeseeable. P has the burden of showing that they did not bear the risk and there was a presumption that the event that occurred was unexpected.
- (1) **Posner:** Superior Risk Bearing: compare the parties, and ask which party is better able to bear (or insure) the risk? The loss should be placed on the party who is the superior risk bearer at a lower cost – spreading the risk throughout society. This test conflicts with the test of expectancy. Elements to consider: knowledge of the magnitude of the loss, knowledge of the probability that it will occur, and other costs of self or market insurance.
- (j) US v. Winstar:
- (1) The federal government bails out. Did the parties state who would bear the risk? No, they did not. Congress changed the law, and the subsequent change of law was devastating to

the loan groups. The US sues the government for the loss they suffered because of the change of law. The US government raises the defense that it was impossible for them to anticipate the change of law made by Congress. The court says that the government accepted the risk that the laws might change and because they accepted the risk, they in affect promised to pay Winstar damages if the law did change.

- (2) The court looks to §261, then the US has the burden to show that the nonoccurrence of the change of law was a basic assumption as to when the contract was made. The parties assume all the foreseeable risks. The court says the change of regulations was a foreseeable risk, and the US does not get out of their promise. This is an unusual case, and it should have been applied to 264 (however, because the US is a party, 264 might not be appropriate, since it would be unjust).
  - (3) **Change of law to make performance impossible:** Notes: P. 831: the parties assume that the law would not change. Look to R2 §264. The party does not have the burden of showing that there was a basic assumption. A change of law is a presumed excuse, and the party does not have to prove it – this is rebuttable presumption – which can be shown by the other party (circumstances that show that it would have been expectable that the law would change). UCC 2-615 also bypasses the basic assumption test to the change of law – the UCC also has the assumption that the law will not change, and the party bringing the case does not have to prove this.
  - (4) **R2 § 264. Prevention By Governmental Regulation Or Order**
    - (i) If the performance of a duty is made impracticable by having to comply with a domestic or foreign governmental regulation or order, that regulation or order is an event the non-occurrence of which was a basic assumption on which the contract was made.
    - (ii) {The usual case is that buyer wants to pay a certain amount for sheep, then the US bars the importation of the animals, and seller claims impossibility. In this situation, seller has to prove the other elements of 261, but does not have to show that nonoccurrence of change of law was a basic assumption to the contract, since this is automatically presumed.}
- (k) **§ 263 Destruction, Deterioration or Failure to Come Into Existence of Thing Necessary for Performance**
- (1) If the existence of a specific thing is necessary for the performance of a duty, its failure to come into existence, destruction, or such deterioration as makes performance impracticable is an event the non-occurrence of which was a basic assumption on which the contract was made. {Basic Assumption: whether the particular person is necessary for the performance of a duty}.
- (l) **§ 262 Death or Incapacity of Person Necessary for Performance**
- (1) If the existence of a particular person is necessary for the performance of a duty, his death or such incapacity as makes performance impracticable is an event the non-occurrence of which was a basic assumption on which the contract was made.
- (m) **Bolin Farms v. American Cotton Shippers**
- (1) The price of cotton drops dramatically. The court says that every contract is a gamble. The seller takes the risk that the prices will not rise. The buyer takes the gamble that prices will not later drop. The purpose of the contract is that the parties allocate the risks. Parties are not excused because there has been a dramatic market price change – since this is exactly the type of risk contracted for.
  - (2) Notes: however, where the increased costs of performance, however, the risk event, whether it be an Act of God, extreme inflation, or an oil embargo, can, unlike market fluctuations, be viewed as a contingency the non-occurrence of which was a basic assumption on which the contract was made.
- (n) Notes: ALCOA: look at book P. 834
- (o) **Dills v. Town of Enfield (1989)**

- (1) Impracticability doctrine represents an exception in recognition that certain conditions cannot be met because of unforeseen occurrences. Test from §261: a party claiming that a supervening event or contingency has prevented, and thus excused, a promised performance must demonstrate that:
    - (i) The event made the performance impracticable,
    - (ii) The nonoccurrence of the event was a basic assumption on which the contract was made; {The occurrence of a condition may be excused in the event of impracticability if the occurrence of the condition is not a material part of the agreed exchange and forfeiture would otherwise result}. In looking at basic assumption courts look at all the circumstances, including the terms of the contract. The fact the event was unforeseeable is significant as suggesting that its non-occurrence was a basic assumption.
    - (iii) The impracticability resulted without the fault of the party seeing to be excused, and
    - (iv) The party has not assumed a greater obligation than the law imposes.
  - (2) Only in the most exceptional circumstances have courts concluded that a duty is discharged because additional financial burdens make performance less practical than initially contemplated.
  - (3) Legal change that prevents or makes performance illegal usually satisfies the impracticability requirement. it is more difficult to establish impracticability, however, where the subsequent legal change makes performance more expensive or frustrates the purpose of one party.
- (p) Kaiser-Francis Oil v. PGC
- (1) Take or pay contract – the buyer was required to take or pay for certain minimum quantities of gas from wells in which the seller had a percentage interest. Seller bears the risk of production and the buyer bears the risk of market demand. The purpose of the take-or-pay clause is to apportion the risks of natural gas production and sales between the buyer and seller. Take-or-pay provisions are not unconscionable at the time the contract is made.
  - (2) **Force majeure** clause interpreted to excuse the buyer from the consequences of the risk he expressly assumed would nullify a central term of the contract. Force majeure clause is not meant to buffer a party against the normal risks of the contract. Decline in demand doesn't constitute a force majeure in this contract. Force majeure clauses are not intended to excuse the buyer from changes in the market, no matter how dramatic.
  - (3) The parties can allocate unknown risks through the very language of the contract. Clauses like a force majeure clauses “act of god” clauses – where certain circumstances will relieve the parties of performing the contact.
  - (4) Notes: P. 841: **Reopener clauses** in long-term supply contracts: there must be a gross inequity under the existing contract resulting from unusual economic conditions not contemplated by the parties at the time of the contracting must exist, next, the parties agree to **negotiate** in good faith to correct or to adjust the inequity by agreement and to cooperate with each other in the process, then, if the negotiations fail to produce an agreed adjustment, the dispute is submitted to **arbitration**. → Reopener clauses when included, preserve both the relative equities of the parties over time and the contract.
  - (5) Look at 6.2.1 à 6.23 for **hardship** provision in supplement.
- 1) **Frustration of Purpose**
    - (a) In these cases, performance is possible, and may not be impracticable – nevertheless there may be defense for frustration of purpose. Overgeneralization – defense of impossibility/impracticability is used by sellers to get out of contract – whereas buyers usually use frustration of purpose.
    - (b) **R2 §266(2): Existing Frustration**
      - (1) (2)Where, at the time a contract is made, a party's principal purpose is substantially frustrated without his fault by a fact of which he has no reason to know and the non-existence of which is a basic assumption on which the contract is made, no duty of that party to render performance arises, unless the language or circumstances indicate the



contrary.

(c) **R2 § 265: Discharge by supervening frustration**

- (1) Where, after a contract is made, a party's **principal purpose is substantially frustrated** without his fault by the occurrence of an event the **non-occurrence of which was a basic assumption** on which the contract was made, his **remaining duties** to render performance are **discharged**, unless the language or the circumstances indicate the contrary.
- (2) Comment A: *Rationale*. This Section deals with the problem that arises when a change in circumstances makes one party's performance **virtually worthless** to the other, frustrating his purpose in making the contract. It is distinct from the problem of impracticability dealt with in the four preceding sections because there is no impediment to performance by either party. Although there has been no true failure of performance in the sense required for the application of the rule stated in § 237, the impact on the party adversely affected will be similar. The rule stated in this Section sets out the requirements for the discharge of that party's duty. First, the **purpose that is frustrated must have been a principal purpose** of that party in making the contract. It is not enough that he had in mind some specific object without which he would not have made the contract. The object must be so **completely the basis of the contract** that, as both parties understand, **without it the transaction would make little sense**. Second, the **frustration must be substantial**. It is not enough that the transaction has become less profitable for the affected party or even that he will sustain a loss. The frustration must be **so severe that it is not fairly to be regarded as within the risks that he assumed under the contract**. Third, the **non-occurrence of the frustrating event must have been a basic assumption** on which the contract was made. This involves essentially the same sorts of determinations that are involved under the general rule on impracticability. See Comments *b* and *c* to § 261. The foreseeability of the event is here, as it is there, a factor in that determination, but the **mere fact that the event was foreseeable does not compel the conclusion that its non-occurrence was not such a basic assumption**.

(d) Paradine v. Jane (1647)

- (1) T says that they shouldn't pay rent because they cannot use the land, too bad about the army. The court says that it is too bad, you promised to pay the rent, regardless of the circumstances. This is a historic case and the invading army caused a materially different circumstance, and neither parties would have reason to expect that that this would occur. However this would be different under R2 §261. This rule stayed around until 1981.

(e) Krell v. Henry

- (1) Earliest case recognizing frustration of purpose as a defense to breach of contract action. There was a lease to rent out a window to see the coronation parade. However, Edward became sick, so the parade was cancelled and the purpose of renting the window was frustrated. The lessee refused to pay the agreed rent and the court held that his duty was discharged and that he was therefore not liable for a breach.
- (2) The LL's purpose is not frustrated since the LL wants the money, but the T's purpose is frustrated because of the cancellation of the parade. This is why frustration is tricky. The room is now virtually worthless to T, and the contract no longer makes sense to T.
- (3) The cancellation of the parade was not a situation of impracticability, rather it deprived one party entirely of the benefit he expected from the other's performance. Generally, impracticability operates to the advantage of parties that are bound to furnish goods, land, services, or some similar performance, while the doctrine of frustration of purposes operates to the advantage of parties that are to pay money in return for those performances.
- (4) Notes: a party must show that hits principle purpose in contracting has been substantially frustrated. First, the affected party's principle purpose in broad terms. The mere fact that some exceptional event has prevented a party from taking advantage of the transaction in the particular way expected may not suffice to satisfy the requirement of substantial frustration if the party can turn the bargain to its advantage in some other ways. Second, courts have insisted that the frustration be nearly total. The mere fact that what was expected to be profitable transaction has turned out to be a losing one is not enough.

- (5) Questions to ask:
  - (i) What, having regard to all the circumstances, was the foundation of the contract?
  - (ii) Was the performance of the contract prevented?
  - (iii) Was the event which prevented the performance of the contract of such a character that it cannot be reasonably be said to have been in the contemplation of the parties at the date of the contract?
  - (iv) If all these questions are answered in the affirmative, both parties are discharged from further performance of the contract.
  - (v) Was the event that causes impossibility was or might have been anticipated and guarded against?
- (f) Notes: prohibition of alcohol caused there to be a subsequent illegality to operate bars, therefore, if the premises were only used as a bar/saloon, then this discharged the contract. If the premises was not restricted to use as a bar and other commercial uses were possible, excuse was likely denied. This was provided that the risk of subsequent, retrospective law was not foreseeable as likely to occur.
- (g) Washington State Hope Producers v. Goschie Farms
  - (1) The doctrine of frustration is a question of law not fact.
  - (2) One of the few cases the at grants relief under frustration of purpose.
  - (3) It was clear that both parties assumed that there would be still be value to the hop base. The value of the hop base would have dropped, and by 1986 it would be virtually worthless. It may have been foreseeable that the government changed their mind, but it was not really expected. (Case looks to §265, comment a)
- 1) Forms of relief after impracticability (P.858 – good review!)
  - (a) The courts are unanimous that in the absence of an agreement a promisee has not duty to negotiate with the promisor in good faith over any proposed adjustment.
  - (b) If the court determines that the promisor is not entitled to relief, the legal situation is reasonably clear. If the promisor has failed to complete performance, it has breached the contract and is liable for damages to the promisee. If the promisor has completed performance despite the difficulty it must bear the burden of any costs incurred in excess of the contract price.
  - (c) **If court determines that the promisor is entitled to “some relief from impracticability”, here are the alternatives:**
    - (1) If there is full performance in spite of the difficulty, at an additional cost but without default, some courts have denied recovery for any costs incurred after the promisor knew or had reason to know that the performance was impracticable.
    - (2) If the promisor encounters a claimed impracticability, and refuses to continue performance, if the court determines that performance was excused, then the promisor is discharged from the unexecuted portion of the discharge and neither parties can recover damages for breach of contract.
    - (3) If there has been some part performance prior to discharge, then look to see if party can recover at contract rate for a divisible part of the performance. If the part performance is not divisible, either party can recover in restitution for any benefit conferred on the other. But expenditures incurred in reliance on the contract, whether in preparation or part performance, are not recoverable unless they have met the divisibility or benefit tests.
  - (d) **R2 §272: In any case where relief from impracticability or frustration of purpose is justified,** wither party may have a claim for relief including restitution under the rules stated in §240, dealing with divisible contracts, and § 377 dealing with restitution in cases of impracticability. There will be a granting of relief as justice requires, including protection of the parties’ reliance interests. à thus if a contract is discharged because of impracticability, the court in the interest of justice, may supply a term to protect the reliance interest regardless of whether the contract was properly divisible or whether the other party has benefited from the part-performance.

