

Contracts I -- Fall 2012

1. What is a Contract?

- a. "Agreement", as distinguished from "contract" means the bargain of the parties in fact
 - i. Found in
 1. Their language, or
 2. Inferred from other circumstances
 - a. Course of performance
 - b. Course of dealing, OR
 - c. Usage of trade
- b. Promise that the law will enforce
 - i. Not gift promises
 - ii. Not illegal promises
 - iii. Not Illusory promises
 - iv. Always at least one promise (unilateral); usually two
- c. "CONTRACT"
 - i. Total Legal Obligation that results from parties' agreement
- d. ELEMENTS OF CONTRACT
 - i. Offer
 - ii. Acceptance
 - iii. Consideration
- e. Types of Contracts
 - i. Express
 1. Definite written or oral offer
 2. Adhesion (take it or leave it)
 - ii. Implied-in-Fact
 1. Circumstance evidence existence of contract and meeting of the minds
 2. Must have some some express portion and may be an express contract with implied terms
 - iii. Implied-in-Law (not really a contract; forced on parties)
- f. Social Contract (Coming to Dinner) -- Not enforceable
- g. Marital
 - i. Pre-Marital are enforceable
 - ii. Intra-Marital not enforceable unless with clear contractual intent, usu. of a business nature
- h. Agree to No Legal Enforcement (Agree to not sue)
 - i. Contract not Enforceable

2. Intent to Contract: Offer and Acceptance

- a. Mutual Assent
 - i. **Definite and Clear Offer + Unqualified Acceptance**
 - ii. Lucey v. Zehmer

1. Land deal on back of restaurant ticket
 2. Enforceable even though Zehmer later claimed it was a joke
 3. "The law imputes to a person an intention corresponding to the reasonable meaning of his words and acts"
 4. Objective Intent – Objective Manifestations of one's intent
- iii. Stepp v. Freeman
1. Lottery Ticket Case
 2. Implied-in-Fact Contract
- b. The Offer
- i. Definite and Clear Offer of the Contract
 1. Creating Power of Acceptance in the offeree
 2. Offeree **reasonably believes** that Offeror **Intended** to create power of acceptance **In Good Faith**
 - ii. Preliminary Negotiations
 1. At what point in time (if any) do parties culminate a contract
 2. § 27. Existence of Contract Where Written Memorial is Contemplated
 - a. "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."
 3. See PFT Roberson (tried to enforce against Volvo during negotiations)
 - a. Treating each item as stand-alone is cumbersome and unreasonable
 - iii. Statement of Opinion/Intention
 1. Generally not considered statement of fact
 2. Courts unlikely to impose liability (as long as good faith)
 3. But see Hawkins v. McGee
 - a. Statement was definite, therefore contractual liability (Reasonable person standard)
 - iv. Solicitations
 1. Public offer to Large Groups – Not an offer but a solicitation for offers
 2. See Lefkowitz AND KNOW IT'S NOT GOOD LAW
 3. **RULE: The vast majority rule in this country is that mass solicitations, no matter how limited, do not create a power of acceptance. It is merely a solicitation to treat offers.**
 - a. Courts don't want to bind Offeror to many acceptances
 - i. Therefore "offerees" should understand that there are limitations, so it's not an offer
 - b. Raises too many issues
 - i. What is a mass Communication
 - ii. How many is a limitation
 4. Civil law (non-british empire) do hold that mass solicitation with sufficient clarity represent an offer (implied term is that it's subject to quantity available, quantities are limited)
 5. Bait and Switch
 - a. Solicitation for sale of product not intended for sale
 6. Subject to rational terms

7. OFFEROR IS “MASTER OF THE OFFER”

8. Too Good to Be True:

- a. You cannot accept an offer that’s too good to be true
- b. You cannot bind a party if you know or have reason to know that they are mistaken

v. Written Contract to Follow

1. See Also: Preliminary Negotiations

2. Was a Written Contract required to form a contract?

- a. WHAT WAS INTENTION OF PARTIES AS TO WHEN THEY EXPECTED TO BE BOUND?
- b. Whether contract of a class usually found in writing
- c. Whether it is of type needing a formal writing for full expression
- d. Whether it has few or many details
- e. Whether the amount is large or small
- f. Whether it is common or unusual
- g. Whether all some details are yet unresolved
- h. Whether the negotiations show a writing was expressed or contemplated

3. § 27. Existence of Contract Where Written Memorial is Contemplated

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4. Scwhartz v. Greenberg

- a. Each had signed their own copy of the contract, but one party backed out before they exchanged
- b. Court holds that since each held on to their own copy, in the minds of the parties the point of contract would have been the exchange

c. Acceptance

i. Effect of Acceptance

1. Forms a Contract
2. No change in rules
3. Deviations

a. Kortum v. Herbergers (credit card arbitration clause)

- i. Unilateral modifications must be reasonable
- ii. Points to adhesion contract defenses
- iii. Also says that this addendum
 1. Vs an amendment
- iv. Also waiver of basic constitutional right deserves court’s highest scrutiny
 1. Contractual waiver of constitutional right must be “deliberately and understandingly made”

b. ProCD

- i. Fell out of his chair
- ii. Challenges basic rule of acceptance as final
 1. Recognizes modern nature of contracts and classic retail

- contract law are mismatched
- 2. Additional terms can be added after the contract, but
 - a. Must be expected
 - b. Must have opportunity to rescind
 - c. Terms must be those that could be reasonably expected
- iii. 2-207 does not apply because there's only one form (SERIOUSLY???)
Anderson says this is wrong)
- iv. 2-204 applies in that using the software is assent through performance
- v. Rolling Contract/Layer contract; effective only where it is clear that the offer/acceptance of the contract didn't close
 - 1. 2 Prong Test
 - a. Did the parties intend to contract?
 - b. Can the court fashion a remedy?
- 4. "Adhesion Contract" – Take it or leave it
 - a. Defense: Unconscionability
 - b. Not enforceable against weaker party where:
 - i. Not within reasonable expectations
 - ii. W/in reasonable expectations BUT, unduly oppressive, unconscionable, or against public policy (2-302 UCC for unconscionability)
 - iii. Reasonableness is coupled with clear conspicuous notice
- ii. Manifesting Assent
 - 1. Offeror is master of the offer AND TERMS OF ACCEPTANCE
 - a. Beard Implement v. Krusa (Combine purchase)
 - i. Unless unambiguously indicated (by language or circumstance)
 - 1. An offer invites acceptance in any reasonable manner or medium (2-206; see also § 50)
 - b. Hypo
 - i. Offer requires signed P.O. but bulldozer is delivered and payment rendered
 - 1. Actions imply waiver of signature requirement
 - c. Fujimoto v. Rio Grande Pickle Co
 - i. Actions speak louder than words – continued employment implies waiver of need to return contract
 - d. PROBLEM 13
 - i. Using 2-206 – Acceptance by any reasonable manner or medium given the circumstances
 - ii. "in writing" language actually not unambiguous... really means please respond.
 - iii. "immediately" is unambiguous. Cannot allow lapse of time.
- iii. Counter Offer
 - 1. Counteroffer is Rejection of previous offer
 - a. Terminates the power of acceptance
 - i. Exceptions:
 - 1. Option contracts or rejection during the offer period
 - 2. Language makes clear that no rejection intended
 - a. e.g. "I'm thinking about your \$10 price, but wonder if you would consider \$8" (Mere Inquiry Rule)

3. Merely aspirational Language (see phillips)

ii. Phillips v. Moor (Late Acceptance / silence as acceptance)

1. Hay - I'll take your price but hopefully after you see the quality you'll pay more
2. Late Acceptance -- Offer has expired
 - a. Acceptance is just a counteroffer
 - b. BUT,
3. Also covers Risk of Loss (burns in seller's barn)
 - a. at some point, title passes, but risk of loss is separate issue
 - i. UCC says risk of loss is determined by possession or the parties' agreement 2-509(3), plus 2-401 establishes when title passes, and making it irrelevant for sale of goods risk of loss
 - ii. (old days – risk of loss passed with title and title passed at the time of the contract)

iv. Silence as Acceptance

1. Generally, silence is not acceptance,
 - a. **unless** there is a duty to speak
2. Silence and inaction operate as acceptance only where because of previous dealings or otherwise, it is reasonable that the offeree should **notify** the offeror if he does not intend to accept
3. Conduct may overrule a verbal “no”
4. §69 Rest “Acceptance by Silence or Exercise of Dominion”
 - a. Previous dealings
 - b. Offeree silently takes benefit from offer
 - c. Section 2
 - i. Taking someone's property wrongfully is conversion
 - ii. Bound to terms unless manifestly unreasonable
 - iii. You can say “no”, which would kill the offer, but if your conduct is inconsistent (you take the thing) it is presumed that you accept
5. Day v. Caton (neighbor shared wall)
 - a. Implied in Fact: intentional contact created by parties conduct
 - b. Implied in Law: One forced on the parties by the court (regardless of their actual intention) to avoid one party being unjustly enriched
 - i. Action for unjust enrichment (cause of action)—implied in law (quasi-contract).
 - ii. Hypo: finding \$5k and retaining it against another's ownership. No real offer/acceptance; but it's unjust to retain it
 1. D has enrichment
 2. that is unjust for him to retain
 3. and P has a claim to it

v. Knowledge of Offer

1. You must know about an offer to accept it
 - a. Exception: when a governmental entity offers an award; it is intended to benefit the whole populace, so any citizen who fulfills the requirement should be rewarded

vi. Motive

1. Motive is irrelevant
2. All that is relevant is whether you followed within the terms of acceptance, in your acceptance of an offer

vii. Mode of Acceptance

1. Unilateral Contract

- a. We talk in terms of unilateral Ks, BUT, we generally seek bilateral Ks
- b. Performance is required to accept a K rather than a return promise
 - i. Very Rare
 - ii. UCC 2-204; 2-206 tend to prevent bilateral Ks by allowing for other means of accepting
- c. Unilateral Contract -- Performer can walk away whistling at any time
 - i. Unless that wouldn't be fair (in which case it's actually a BILATERAL contract with an implied promise)
- d. Petterson v. Pattberg (Saying "I revoke" on other side of door)
 - i. What constitutes acceptance of Unilateral Contract?
 1. Majority: when payment actually paid (vs just tendered)
 - ii. At what point does offeror lose power to revoke?
 1. **Under §45 Rest 2d -- Beginning Performance Creates Option Contract for reasonable period of time**
 2. Preparing to perform does not constitute performance. Must be separate action for expenses of preparation if the contract is cancelled during prep.
- e. Brooklyn Bridge Hypo
 - i. Need to carry something to someone over the bridge by noon
 - ii. Get halfway there, turn back
 - iii. Does the offeror have a case if he loses money over it
 - iv. When you start walking on the bridge, you create an options contract in which the offeror is bound but you are not
- f. *Marichondo* (Realtor issue -- fact question for jury when performance begins)
- g. Rest 2nd § 62: Beginning performance acts as an implied promise
 - i. (1) Where an offer invites an offeree to choose between acceptance by promise and acceptance by performance, the tender or beginning of the invited performance or a tender of a beginning of it is an acceptance by performance
 - ii. (2) Such an acceptance operates as a promise to render complete performance.

2. Bilateral

- a. Start w/ a promise for a promise
- b. Davis v. Jacoby (old aunt/uncle dying)
 - i. Offer to leave inheritance if they'd care for them
 - ii. Was there need for return promise (bilateral) or performance (unilateral)? Which constituted acceptance?
 1. Offer dies with offeree so it's important whether K before

death

iii. Court: Bilateral

1. Bilateral WAS presumed under restatement §31
 - a. when revised in restatement 2d §32 this presumption was questioned; language now is similar to 2-206
 - b. Also see Rest 2d §62:
 - i. [Beginning performance where either mode of acceptance is invited] operates as a promise
2. Closeness of relationship – knows he can trust promise
3. Specifically request immediate reply
4. Arranging for things if he pre-deceases his wife

3. Bilateral can become unilateral

- a. If one party fulfills its end but the other does not
- b. One party has the obligation

4.

d. Termination of Power of Acceptance

i. Revocation by Offeror

1. Revocable at any time before acceptance, unless it is supported by consideration
 - a. Without consideration, offer is revocable at any time
 - b. Exceptions: option contracts w/ consideration
2. Offeror does not have to revoke the offer directly to offeree, if the **offeree learns indirectly** that the offer is no longer on the table
 - a. Dickinson v. Dodds
 - i. An offeror can revoke any time before acceptance unless it is bound by consideration
 - ii. If one learns that property has been sold, that is revocation of the offer (§42 of restatement 2d)

3. Firm offer rule

- a. Firm offer in writing remains open for *period stated or reasonable* time
- b. UCC 2-205 (applies ONLY to merchants)
 - i. Also makes reasonable time 3 months (even w/out consideration to turn it into an option contract”
- c. CISG / Civil Law
 - i. Applies regardless of “merchant”
 - ii. Does not require “in writing”

4. Sale by Auction

- a. UCC 2-328:
 - i. Bid is merely an offer (people in the crowd are offerors)
 - ii. No acceptance until the hammer hits - if you bid before the hammer hits the seller has the ability to accept your bid (offer)
 - iii. Presumed to be “with reserve” (seller can retract before hammer hits)
 1. Without reserve: first time the first bid is made, the seller of the goods cannot retract the goods
 - 2.

ii. Lapse of Time § 41

1. Acceptance must be within reasonable time
2. (i.e. Offer lasts for a reasonable time)

- a. But See Phillips v. Moor
 - i. if acceptance was not within reasonable time, offeror can retract offer, but offeror must PROMPTLY inform offeree that offer has been retracted (offeror knows or has reason to know that offeree thinks there's a contract)
 - b. Loring v. Boston (Arson reward published in newspaper)
 - i. Generally if revoking an offer you must inform offeree
 - ii. However, offer expires after passing of reasonable period of time
 - iii. Side Note on Rewards
 - 1. Notices of revocations of offers must be made in similar fashion to offers
 - 2. Merely taking down reward signs will do job, but only after reasonable time
 - 3. Offeree must KNOW of the reward to claim it
 - a. Unless offered by government
 - b.
 - c. Option (does not allow termination during reasonable time)
- iii. Termination by Death or Incapacity
- 1. Death or incompetence will terminate an offer
 - a. Even when the offeree did not know the death or incapacitation occurred
- iv. Termination by Rejection
- 1. Very Delicate
 - a. Slightest rejection will kill offer
 - 2. Counteroffers are Presumptively Rejections
 - a. Exceptions:
 - i. Option contracts
 - ii. Counter offer is phrased to make it clear it is not a rejection
- v. Face to Face offer
- 1. Terminates at parting of parties
- vi. **The "Mail Box" Rule** (Adams v. Linsell)
- 1. As soon as the letter goes into the mail it constitutes ACCEPTANCE (if mail is reasonable form of acceptance)
 - a. Exceptions
 - i. rejections,
 - ii. counteroffers,
 - iii. option contract acceptances, etc,
 - iv. EXCEPTIONS effective upon RECEIPT
 - 2. If Acceptance received after offeree has expressly turned down offer, K technically exists, but courts will use estoppel to prevent enforcement (Protects the original offeror)
 - a. Original offeror can then treat acceptance as counter-offer
 - 3. CISG does not follow Mail Box rule
 - a. Acceptance Upon Receipt BUT offer cannot be revoked after it's in the mail, so same effect
- vii. Termination by Counteroffer (**Battle of the forms**)
- 1. Common Law

- a. Mirror image rule: acceptance has to be a mirror image of offer (can't add anything to the offer)
 - i. Counter offer kills the offer
 - ii. Statement of implicit aspect of acceptance is still considered mirror image
- b. Last form always won
- c. Livingstone v. Evans
 - i. Wish and proposal for another amount does not create a counter offer

2. Uniform Commercial Code

- a. Policy
 - i. Rule: the goal of commercial law is to accommodate and facilitate rational business practice—make it easy for business people to do business the way they want it
- b. Battle of the Forms
 - i. Pattern of doing business: the buyer wants goods, sends in an offer on pre-printed form that some lawyer has adopted for him. Both buyer and seller have different “terms and conditions” forms that always say no matter what, we win, you lose, and you're so stupid.
 - ii. If a contract is agreed upon and the parties send written confirmations--this only memorializes. (NO new contract or offers)
 - iii. Generally Speaking: (Purchase Order = Offer; Acknowledgment = acceptance)
- c. Section 2-207 Provides 3 Routes to contract
 - i. **Route A:** Subsection 1 prior the comma
 - 1. No express acceptance of the additional terms is required
 - a. Example: Kloczek v. Gateway
 - i. 2-207 applies even when only one form (contrary to ProCD) (**be sure to discuss both rules on exam)
 - ii. Additional terms are merely a proposal (since not between merchants)
 - iii. IF additional terms are between merchants, then they are part of the K unless objected to in advance or afterwards, or they materially alter (undue surprise or hardship)
 - b. Problem 32 p.123
 - i. K at the oral agreement
 - ii. Later, one party sends forms w/ additional terms
 - iii. Can't be offer/acceptances of a deal already done. It's over.
 - iv. Additional/different terms are a completely different deal
 - c. Knockout Rule
 - i. Majority rule
 - ii. Problem 33 p.123
 - iii. Terms knock each other out, and neither form has that term
 - iv. Based on comment 6 of 2-207

- ii. **Route B:** Subsection 1 after the comma
 - 1. Acceptance of additional terms is expressly required by the form and they are accepted (rare, accept that consumers rarely have their own form)
 - 2. NOT acceptance unless terms are expressly agreed to
- iii. **Route C:** Subsection 3 by conduct with terms falling back on SHARED terms from written forms and filling gaps with other UCC provisions (conduct has created the contract)
 - 1. Acceptance of additional terms is required; they are not accepted, however, parties go forward with performance anyway
 - a. UCC gap fillers tend to favor buyer (warranty, etc.)
 - b. Example: Malden Mills v. Bayer
 - i. Malden Mills' writings have Arbitration clause
 - ii. Bayer's writings have no Arbitration clause
 - iii. Bayer wants to enforce arbitration
 - iv. Court says no; not mutual and not part of UCC

d. Additional Terms under 2-207

- i. (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:
 - 1. (a) the offer expressly limits acceptance to the terms of the offer
 - 2. (b) they materially alter it; [UNDUE SURPRISE OR HARDSHIP TEST – Posner: Result rather than criterion] or
 - a. Ex: Warranty disclaimers might be material, remedy limitations might not be material
 - b. How common is it in the industry?
 - 3. (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

viii. Indefiniteness

- 1. Must be enough terms in the agreement to support the contract
 - a. UCC can provide filler terms, including price
 - i. e.g. 2-305, 2-307, 2-308, 2-309, 2-310
- 2. Indef. if there are not enough terms for the court to enforce the K
- 3. Maxim: Agreement to agree is a legal nullity
- 4. Walker v. Keith (lease renewable with rent rate TBD)
 - a. All material items had to be agreed to
 - b. NO LONGER GOOD LAW
- 5. Rego v. Decker (Gas station with option to purchase)
 - a. UCC 2-204 (3): Contract does not fail for indef. if the court finds:
 - i. the parties have intended to contract and;
 - ii. they have agreed to enough terms for the court to give a reasonable remedy for breach
 - 1. (even though no terms on how long to pay off or what down payment was required)

3. CONSIDERATION

- a. The Basic Concept
 - i. Rest 2nd §71
 1. a performance or a return promise must be bargained for
 2. it is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for the promise
 3. Performance may consist of
 - a. an act other than a promise, or
 - b. a forbearance, or
 - c. the creation, modification, or destruction of a legal relation.
 - ii. As long as you bargained for it, it doesn't matter whether it was not beneficial or not detrimental to the promisee, its consideration.
 - iii. Hamer v. Sidway (\$5000 not to smoke/drink/gamble)
 1. Giving up a legal right is a detriment
 2. WE DON'T KNOW for sure whether bargained for detriment or gift with condition
 - a. This court did not care about "bargained for"
 3. Gift with condition=not enforceable
 - a. *might be enforceable under promissory estoppel, though
 4. Consideration=enforceable
 5. Justice required enforcement in this case
 - a. Ruled it to be a contract and thus enforceable
 - iv. Sufficiency
 1. Offered consideration must be something that has value in the eyes of the law
 2. Refers to quantity of the amounts exchanged
 - v. Adequacy of Consideration
 1. K requires consideration to be enforceable
 - a. promise to make a gift is complete nullity
 2. Batsakis v. Demotsis
 - a. Exchange of 2000 dollars for equivalent of 25 US dollars
 - b. Court found that there was consideration; it was bargained for because it was given in exchange for something else
 - c. Law does not look into the adequacy of consideration but assesses whether a deal was intended, or a rashly made promise
 3. Schnell v. Nell
 - a. One penny today for 200 dollars tomorrow
 - b. No good consideration
 - i. No simultaneous exchange of funds: was nominal consideration
 1. **nominal** consideration is not intended to be a barg. for exch.
 - ii. Token gesture to get around making a gift
 - iii. Was not bargained for
 - c. Cant make an enforceable agreement to make an agreement
- b. Forbearance as Consideration
 - i. §87 Rest 2nd: 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 by 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.

- ii. If you recite the consideration paid, and the deal proposed by the option is otherwise fair and reasonable, the recital in and of itself in a signed writing shows the agreement was seriously intended, and it will be enforced.
- iii. Feige v. Boehm
 - 1. Father had agreed to pay medical expenses of alleged son so long as she wouldn't bring bastardy claims against him. Turns out he wasn't the true father.
 - 2. Bc there was belief in good faith, her forbearance on the lawsuit was good consideration because her forbearance was in good faith that she has a claim against him even though he wasn't the father
- iv. Non-compete Agreements
 - 1. Problem 40 p.167
 - 2. Can of worms
 - a. Courts don't like these—violating free enterprise, etc.
 - 3. Employer may have real and abiding interest, though
 - 4. Sets the stage for limitations on these non-compete agreements, they b/c can be bad/unfair
 - 5. Geographic area and duration are limitations
 - a. Courts learned that these limitations really didn't protect interest of employees, esp. when employer didn't have a demonstrable interest in protecting trade secrets, etc.
 - 6. Issue is governed by statute in TX
 - a. Wood Rule: in an employment agreement, the agreement by both parties is "at-will" unless stated otherwise
 - b. "I will do this if I want to"
 - i. Not enforceable
 - ii. Rule in TX: a covenant promise not to compete is not valid unless it's part of an otherwise enforceable agreement
 - 1. At-will not enforceable agreement
 - 2. Therefore, a covenant not to compete that's part of an at-will contract is simply not enforceable
 - 3. Unless the employee receives independent consideration for that (and that other value can be secrets, client lists, etc.)
 - 4. Has to be designed to protect legit interest to the employer
 - 5. Case: by not firing employee in exchange for promise not to compete, employer had good consideration (?? Bad)
 - a. Could say, not to fire for like 5 years though
 - b. Has to meet other requirements
- c. The Illusory Promise
 - i. Mutuality of obligation-- "Law of Illusory Promises"
 - 1. Either both parties are bound or none
 - 2. Both binding obligations
 - 3. Otherwise, no consideration
 - 4. In that context, even though one party has made a binding promise, the other party has given nothing for it, so neither is bound
 - 5. If one promise is illusory and one is not, neither party is bound
 - 6. Condition your promises—"I will perform if I want to"—makes the whole promise illusory
 - 7. Courts don't like the doctrine that if one part is illusory, neither is bound
 - 8. Limitations to doctrine
 - 9. Hypo: tire business. GM said, we want a 5yr contract to buy as many tires from you

- as we want to.
 - a. Don't know how to gauge profits
 - b. But bargain for a chance...a really nice chance
 - c. Is the promise illusory? Yes. They haven't bound themselves in any way.
 - d. They could buy nothing from me
- 10. Courts don't like the illusory promise rule when both parties got what they wanted
- 11. Historically:
 - a. In heyday of MofO, lots courts took issue with Outputs and Requirements (or Exclusive Dealings) contracts
 - i. "He might decide not to have output or requirements"
 - ii. BUT, Outputs and Requirements contracts have been staple of business community since industrial revolution
 - b. UCC comes along and clears things up saying that binding yourself in good faith is obligation
 - i. Is a promisor bound under Outputs or Requirements contract?
 - ii. Is detriment suffered;
 - c. MofO still widely litigated
 - i. Rarely decided against formation of contract
 - ii. Courts now say that if one party has begun performing, so that consideration has now been received, restatement 79 says it's now a contract and mutuality of obligation
- ii. Competing theories—up to me to decide what I like
- iii. Mutuality of obligation in Wood v. Lucy
 - 1. Lucy gave right to her name (no explicit promise in the contract).
 - 2. Cordozo said: appeared to be a contract, there was an implied promise. Parties intended to contract.
 - 3. The circumstances provided implied promise and establish contract
- iv. Sylvan (gravel)
 - 1. Illusory promise but court still held that it was a contract
 - 2. 2nd circuit
 - a. They don't like the mutuality of obligation requirement
 - b. US isn't trying to entrap citizens
 - c. Court uses bogus reasoning that duty to notify of cancellation of K is "Consideration"
 - d. Parties intended to make deal
 - 3. Most cases like this are unenforceable
 - 4. Example of how court will go out of its way to avoid cancelling a K
- v. Prob. 37 p.153
 - 1. Accommodation party by signing negotiable instrument regardless of consideration
- vi. § 87 Option Contract
 - 1. Rule by §87: if you recite a consideration paid, and the deal itself proposed by the option is reasonable, we'll make it enforceable. It shows the agreement was materially enforceable.
 - 2. Nominal consideration is not good
 - 3. You can have an enforceable option contract if option-holder pays for the option
 - a. Options are common—buy land, etc.
 - 4. Apparent disparity in consideration can raise flags (fraud, duress)
 - 5. **The value of an option is highly speculative**
- vii. Output or requirements contract
 - 1. Exclusive dealings contracts; not illusory.
 - 2. Output: buyer agrees to buy all the output that a business makes

- a. A contract for output or requirements is not too indefinite since it is held to mean the actual good faith output or requirements of the particular party
 - 3. Requirement: buyer says it will purchase all that it requires from the seller
 - a. By agreeing to buy all required you have agreed to a detriment
 - 4. Need a binding commitment on both sides
 - 5. UCC 2-306 (1)
 - 6. Exclusive dealing arrangement (NOT output/requirements K)
 - a. Wood v. Lucy
 - b. McMichael v. Price
 - i. McMichael promised to purchase all the sand that Price could sell.
 - ii. Agreement was for 10 years. Mc ceased purchasing sand before 10 yrs
 - iii. Mc is bound to purchase all sand Price can sell
- d. Past Consideration
 - i. Past consideration is not good consideration
 - 1. Can't be BARGAINED FOR
 - 2. Examples:
 - a. Schnell v. Nell
 - i. (in addition to adequacy, there was issue of past consideration)
 - b. Hayes v. Plantations Steel (retired employee)
 - i. Gratuitous gift -- no detrimental reliance on the promise of the gift
 - ii. not enforceable
 - c. Mills v. Wyman (P took care of D's dying son)
 - i. Past consideration not good consideration
 - ii. left to the conscience of the promisor; not enforceable
 - d. Webb v. McGowin (employee saves boss but maims self)
 - i. Though for past consideration, boss shows promise was not rashly made by paying on promise to day he dies
 - ii. Court therefore enforces
 - 1. Subsequently, restatement 2d § 86: "binding to the extent necessary to prevent injustice."
 - 2. Promissory restitution- Not intended to be a rule but rather a principal; seek to even the playing field
 - ii. Enforceable Promises for past consideration
 - 1. Where made under legal bars -- so long as a promise is made after a legal bar occurs
 - a. Statute of Limitations lapses, but party subsequently promises to perform
 - b. Bankruptcy*
 - i. * Bankruptcy now largely dead due to statutes
 - c. Infancy, if promise affirmed after infancy
 - 2. Such promises for past consideration must be made in writing or must be partly performed in order to be enforceable
 - iii.
- e. The Preexisting Duty Rule
 - i. The Basic Concept
 - 1. 2 categories
 - a. Modification of ongoing contract=unperformed on both sides (executory on both sides)
 - b. Debt obligation=parties reach agreement to discharge debt
 - ii. Modification of ongoing Contract (Unperformed, aka Executory, on both sides)
 - 1. Party agrees to do what he promised and something in addition, and other party does not do something in consideration for the addition,
 - a. Traditional rule:

- i. not enforceable
 - ii. Rule has been strongly criticized
 - iii. Parties are human beings (we lack foresight)
 - iv. Not talking about forcing modification of a contract
 - v. Even if no consideration, should it be enforceable?
 - b. Current Law
 - i. See Rescission below
 - ii. Recognizes ability of parties to modify willingly and have the modified K enforced
- 2. Extortion paradigm
 - a. Once you have someone bound in a contract with you (relational contract that lasts over pd of time, e.g. construction contract), the bargaining leverage and center of power shifts dramatically—you're at the mercy of the contractor
 - i. Relational contract
 - 1. Lasts over period of time
 - ii. After contract entered int
 - 1. Bargaining power shifts to contractor
 - iii. Ex.: Lingenfelder v. Wainwright Brewery Co.
- 3. *****Rescission***SPELL RIGHT ON EXAM**
 - a. Each party giving up (rescinding) their rights under a contract
 - i. Consideration for modification
 - 1. UCC 2-209(1)
 - a. No consideration is required if modification results from circumstances unanticipated
 - b. Any good faith modification is enforceable
- iii. Past Due Monetary Debts
 - 1. Liquidated debt: debt for a sum certain
 - 2. Undisputed debt: there is no question that A owes B and not question as to the amount
 - 3. Foakes v. Beer
 - a. Debtor wanted to pay less than what is owed and creditor agreed to take a lesser amount because he wanted money. Creditor recovered interest. Debtor had to toss in something else: "gift of horse, hawk, or robe etc." (this changes the deal)
 - b. Payment of a lesser sum in satisfaction of a definite and undisputed obligation has no consideration therefore the agreement to pay less is unenforceable
 - c. KNEW THIS WAS BAD RULE
 - 4. Accord
 - a. Contract to settle debt obligation
 - b. Clark v. Elza
 - i. No accord in satisfaction unless the agreed on amount has been paid
 - ii. Creditor can sue for the original debt obligation if the debt has not been paid; however the debtor has a counterclaim based on the accord.
 - 1. Can either recover damages or specific performance
 - iii. If debtor breaches, the creditor has the choice to sue on the original obligation or the new accord.
 - c. § 417 Rest. 2nd An accord; its effect when performed and when broken
 - i. Contract does not discharge the duty, but suspends the right to enforce it as long as there has been neither a breach of the contract nor a justification for the creditor in changing his position because of its prospective non-performance

- ii. if such a contract is performed, the previously existing duty is discharged
 - iii. if the debtor breaks such a contract the creditor has alternative rights. He can enforce either the original duty or the subsequent contract
 - iv. If the creditor breaks such a contract, the debtor's original duty is not discharged. The debtor acquires a right of action for damages for the breach, and if specific enforcement of that contract is practicable, he acquires alternative right to the specific enforcement. If the contract is enforced specifically, his duty is discharged.
- d. Substituted contract
 - i. Substituted contract: looks like an accord except both parties intend to substitute for the accord.
 - ii. If parties intend a substituted contract the original debt is extinguished, and new agreement is on the table
 - iii. Substituted contracts will only be in the case of a unique accord
 - 1. ex: Fifi (special important dog)
- f. Promissory Estoppel § 90 Rest.
 - i. Historical Development
 - 1. Contracts res ipsa loquitur
 - 2. Unbargained-for reliance (or detriment)
 - 3. Gift promised followed by some kind of reliance
 - 4. **EXAM DEATH:** to talk about promissory estoppel until you have determined there is no consideration—only be raised if you don't have an enforceable contract
 - a. **Rule:** must decide you don't have enforceable contract before you bring up promissory estoppel
 - b. Much better to have a full enforceable contract than to have promissory estoppel
 - 5. Allegheny College v. National Chautauqua County Bank (Cardozo case--scholarship)
 - a. Like Hamer v. Sidway
 - b. Cardozo turned it into bilateral contract even though the college never promised to do anything
 - c.
 - d. The condition was not bargained for, though
 - e. NY Court of Appeals gave up Holmes's idea of bargained-for consideration
 - ii. Basic Applications
 - 1. Reliance that should be reasonably expected by the promisor, and that the reliance was reasonable.
 - 2. Not so sterile promises to make a gift; someone promises to make a gift and the promisee reasonably relies on that. There was no bargained for detriment, not benefit to the promisor.
 - 3. Should it be enforced? Even though a gift was intended, the reliance that followed must be reasonable and there must have been consideration.
 - 4. Unbargained for Detriment
 - a. § 90 Rest. 2nd adds that any kind of reliance will do, but the remedy allowed can be limited as the court finds just
 - 5. Universal Computer Systems v. Medical Services (Blue Shield of PA)
 - a. Would have had winning bid if Blue Shield picked it up at airport as they promised
 - b. But then again, would violation of the rules of bidding voided the winning bid?

6. CONTRACTOR CASES

- a. Most typical application of Promissory Estoppel -- GC relies on subcontractor bids in placing overall bid; Subcontractor retracts bid after overall bid has been one but before acceptance on subcontractor bids
 - b. Sub should have foreseen GC's reliance on initial bid submitted
 - i. James Baird Co v. Gimbel Bros (floor sub-bid)
 - 1. Baird relies on Gimbel bid for winning building bid
 - 2. Court (L. Hand) says PE is for promises without return consideration
 - 3. Formal offer looks to acceptance, not reliance
 - ii. Branco Enterprises, Inc. v. Delta Roofing (refusal of SubCon to install roof)
 - 1. Delta's submitted initial bid was revised the day the bids were compiled by Branco for the overall bid.
 - 2. It was foreseeable that Branco would rely on the promise at the original bid price.
 - 3. Contractor accepted the sub's bid before he submitted his bid. PE wasn't even necessary to apply.
 - 4. Court found contract as a matter of fact.
 - c. **Restatement 2d §87(2) addresses detrimental reliance**
 - i. does not change Dickinson v. Dodds rule that offer may be revoked at any time prior to acceptance
 - ii. Mostly covers subcontractor bid situation
 - d. CAMELOT RULE:
 - i. After General Contract Awarded:
 - 1. GC gets one moment to either bid shop (killing his reliance)
 - 2. or bid chop (also killing his reliance)
 - 3. or accept bids -- creating action for promissory estoppel
 - e. Exceptions:
 - i. Obvious mistake in subcontractor bid
 - 1. (Branco overcame by doublechecking with sub)
- iii. The Limits of the Doctrine
- 1. Hoffman v. Red Owl
 - a. Important question: To what extent will the law enforce a promise?
 - b. Red Owl said, "if you do this, we have a deal"
 - c. This takes promissory estoppel to the business world (not a gift)
 - d. Controversial because promissory estoppel was brought in to bind someone during negotiations of a contract
 - i. Rule had always been to look out for yourself
 - ii. In this case, court injected itself into the negotiation process, saying Red Owl didn't negotiate in good faith
 - e. Lost profits can be detrimental reliance
 - i. Profits lost on grocery store were detrimental reliance
 - 1. Too removed from the breach of promise to be recognized as recoverable damage--justice didn't require a recovery of those specific profits
 - 2. The bakery, however, required recoverable damages
 - 2. Hayes v. Plantation Steel
 - a. Promise didn't induce his retirement. He was never promised a check for a

specific duration

- b. There was no detrimental reliance when the promise didn't induce the action

4. REMEDIES

a. Damages

i. Intro

1. § 344 - Protects 1 of 3 interests of the promisee

a. Expectation

- i. Where party would have been if K were performed as promised

1. 2 types:

a. General

- i. Arise naturally from breach

b. Special

- i. Incidental - Caused by the breach
- ii. Consequential (loss of use); see Hadley v. Baxendale; creates open-ended liability; most contracts will disclaim consequential damages and courts will enforce this

b. Reliance

- i. That measure of recovery that will restore the position at the time of the contract (looks backwards, return to status quo)
- ii. can never exceed lost expectations

c. Restitution:

- i. The above two look to compensate aggrieved; but restitution is not concerned with the loss. It's concerned with unjust enrichment of the promisee

d. Expectation > Reliance (it's part of Expectation) > Restitution (it's part of Reliance)

2. **The categories overlap!**

- a. Lost expectations include reliance, etc.
- b. In most cases, § 344 lists them in descending order of importance (meaning amount you get to recover), so expectation will exceed reliance
 - i. Reliance will exceed restitution

3. § 347 Measure of Damages in General

- a. Injured party has a right to damages based on his expectation interest in
 - i. the loss in the value to him of the other party's performance caused by its failure or deficiency, plus
 - ii. any other loss, including incidental or consequential loss, caused by the breach, less
 - iii. any cost or other loss that he has avoided by not having to perform

ii. Expectation Damages

1. Hawkins v. McGee (Hairy Hand)

- a. Remember his smiley faces visual
- b. Addresses *what promises should the law enforce, and to what extent?*
- c. Rest of the world allows specific performance, but here in common law jurisdictions we have damages
 - i. We are reluctant to force people to do something
 - ii. Substitute: economic measure
- d. Here: awards stops at where he was in the position he occupied at time of the contract
 - i. Reliance
 - ii. Not lost expectations

- e. Lost expectations will always exceed reliance damages, except when P made a bad deal (e.g., let me operate on your hand, I'll make it worse)
 - f.
 - 2. Peevyhouse (Strip Mining -- Willie and Lucille)
 - a. How much should W&L recover?
 - b. Damages should be for diminution of value (300, not 29,000)
 - c. Purpose was not to punish Garland but to compensate Peevyhouse
 - d. The nature of the breach makes no difference, purpose is to compensate
 - e. Rest 2nd has become more P friendly. If rest 2nd had been available the outcome may have been different
 - f. When should money be awarded in these cases:
 - i. If there is convincing evidence P is actually going to use the money for repair
 - ii. If restoration was part of the price paid
 - 3. John Thurmond & Associates v. Kennedy
 - a. Subsection (b): two words—"to him." Built-in subjective value that the courts are willing to consider
 - b. Rule has become more P-friendly simply by allowing consideration of subjective value to P
 - c. Under Restatement 2d, Peevyhouse would've come out the same as it did back then
- iii. Reliance Interest
- 1. Sullivan v. O'Connor (Nose Job)
 - a. Like Hawkins case when trial court limited P's recovery to reliance damages
 - b. Not exactly therapeutic assurance
 - i. Iffy promises case
 - ii. May not want to enforce to the extent that contract law allows
 - 2. Anglia Television v. Reed
 - a. Reed dropped out of a movie, after agreeing to play the part
 - b. Anglia sued to recover expenses incurred; Reed said they could only recover expenses after his agreement/breach.
 - c. Court held he was liable for expenses incurred before contract when his breach of the contract caused the waste of expenditures.
 - 3. §349 Damages based on Reliance Interest
 - i. Rather than suing for lost exp. P can recover reliance expenses
 - ii. May recover all reliance expenses that don't exceed lost expectation
 - 1. Cannot recover a greater amount in reliance damages than you would have recovered in lost expectation
 - 4. Why recover reliance rather than lost exp.?
 - a. Easier to prove
 - b. May be in a better position if you made a bad contract
 - c. Nice guy cases: Intentionally recover less because you either have sympathy or you want to do business with them again in the future
 - 5. Three hurdles to get damages
 - a. **Proving damages w/reasonable certainty**
 - i. **2 Rules**
 - 1. Have to prove that that **breach caused you this type of loss**—"loss in fact" by preponderance of evidence
 - 2. Once above is proven, must prove **certainty as to amount of loss** (standard here is much less)--allowing jury to estimate amount of loss satisfies the standard—less than preponderance

of evidence

- b. Proving damages were **foreseeable** at time of making contract
- c. Farnsworth's obligation to **mitigate** or avoid loss

6. Calculating:

- a. Massachusetts Rule: contract price – expenses saved; contractor gets to recover the contract price less whatever expenses he saved
- b. Connecticut Rule: can recover profit + expenses incurred

iv. Limitations on Recovery

- 1. Certainty
- 2. Foreseeability
- 3. Avoidability/Mitigation
- 4. Punitive

v. Certainty

- 1. Requested relief can be denied as too speculative b/c there is too much uncertainty as to:
 - a. that breach caused the type of injury P alleges (causation); OR
 - b. the extent to which P suffered from the breach (dollar amount); OR
 - c. both the causation and the amount
- 2. Burdens of Proof
 - a. Proving Damages with reasonable certainty
 - i. FIRST: Prove Loss in Fact (POE)
 - ii. SECOND: Amount of Loss (Less than POE -- Any reasonably certain basis for allowing jury to estimate amount of loss satisfies standard)
 - 1. Rarely Bars Recovery
 - 2. Most cases where certainty bars recovery: As yet untested venture/New Venture
 - b. Proving damages were foreseeable
 - c. Obligation to mitigate or avoid loss
- 3. Freund v. Washington Square Press
 - a. Rare case where certainty bars recovery
 - i. New Author
 - ii. Cannot show amount of loss
- 4. Humetrix v. Gemplus
 - a. Good example of no past profit but still meet certainty burdens
 - i. One Way: Similar Businesses in same locale or marketing area
 - ii. Second Way: Humetrix: Brand new market (US)
 - 1. Humetrix proved by POE that there would be significant profits based on European performance
 - a. Expert testimony was more than sufficient
 - 2. Franchises often fit this model
 - a. Franchisors make strong biz forecasts to potential franchisees
 - b. If they breach by franchising with different franchisee, that biz forecast then gets used against them

5.

vi. Foreseeability

1. Hadley v. Baxendale

- a. Hadley took shaft from Baxendale for repair; did not return shaft as quickly as they said. Baxendale's output was delayed and Bax lost profits
- b. Limited the discretion of juries; more control in the hands of judges
- c. Positive impact: Created schematic approach for measuring lost expectation

damages

i. 2 Types of Damages

1. General Damages

- a. Arise naturally and necessarily from the breach

2. Special and Remote Damages (Consequential)

- a. Arise naturally but not necessarily
- b. Arise because of special circumstances
- c. Unless promisee makes known special circumstances at the time of the contract, promisor is not liable for that type of loss
- d. Reason to know standard (consequential damages): the parties had to have reason to know about the consequences of the breach
- e. Damages must be foreseeable

d. Negative impact: Foreseeability standard

- i. Obligation that you make circumstances known to the promisor at the time of the contract so that he knows his breach will cause your loss
- ii. You can recover special damages, but they must be foreseeable

2. AM/PM Franchise Assn. v. Atlantic Richfield Co.

a. Consequential damages

- i. Franchise was given bad gas, which caused loss profits on food

b. Types of Lost Expectations

- i. During contract period
- ii. Lost future profits (loss of goodwill)
- iii. Lost secondary profits (All of the junk food at the mini mart)

vii. Avoidability

1. Doctrine of avoidable consequences is the duty to mitigate

2. P cannot recover any damages that could have been reasonably avoidable

3. Avoidability is the third great hurdle to reading of damages

a. *Certainty* wasn't much of one

b. *Foreseeability* hasn't become much of one

c. **Mitigation (avoidability) of damages rule**

i. Duty to mitigate damages (not same as a torts duty)

1. Not affirmatively liable for not having followed through on duty

2. It merely cuts into the recovery

3. Closely related to the causation principle

- a. Prove that the wrong caused the loss

4. Plea and avoidance (affirmative defense)

- a. D has to plead it or he waives it
- b. D has to prove P did not act reasonably to avoid the loss
- c. D has to prove P acted unreasonably at the time he made the decision

ii. Acting as RPP

1. If p acts reasonably to mitigate the loss, but actually INCREASES damages,

2. D is then responsible for those damages as well

- a. Example: Wrongfully terminated employee spends money seeking new employment, those expenses are additional damages

iii. Rockingham County v. Luten Bridge

1. After the breach, they exacerbated damages by continuing to incur expenses
2. County was liable only for damages LB would have suffered if it had stopped work at the time of countermand
- iv. Parker v. Twentieth Century-Fox Film Corp.
 1. Parker declined 2nd job offer and sought full payment of original movie salary
 2. Substitute was not “substantially similar” and was both “different” and “inferior.”
 3. P was reasonable in refusing the substitute offer
 4. Reasonableness is a jury question (dissent)
- viii. Punitive
 1. *Can't get punitive unless breach came from independent tort and unless it's the kind of tort that will allow punitive damages* (Hibschman)
 - a. Not followed by majority of states
 2. Generally found:
 - a. Leaky Caskets
 - b. Lost Bodies of Loved ones

EXAM DEATHS

- Don't talk about promissory estoppel until you have determined there is no consideration—only be raised if you don't have an enforceable contract
- To say that article 2 only applies to sales of goods. It applies to all transactions of goods
- Don't use “always” or “definitely” on exam
- Don't misspell RESCIND or RESCISSION
- Always argue first - breach of contract

THINK BEFORE YOU WRITE

UNIFORM COMMERCIAL CODE

Generally:

Article 1 applies to all articles

All other Articles are Discrete (self-contained and don't apply to other articles)

Requires **good faith**

subjectively: honesty in fact

Merchants: reasonable commercial standards

Gap Fillers

Article 1

1-303: Defines which terms predominate over which when there is conflict (*in order of control*):

Express Terms of this Contract: Predominates, but can be overridden by significantly different Course of Dealing

Course of performance: conduct of parties performing this one contract

Course of Dealing: Parties' past transactions together

Usage of trade: custom within the industry (binds all who should know about it)

Article 2

2-204: 2 prong Test: for contract

Did Parties Intend Contract?

Can the Court Fashion the Remedy?

If yes, gaps can be filled by gap fillers

2-205: Where **Merchant** offers to **hold** offer open In **Writing**

Cannot be revoked during that period (up to 3 months)

2-206: Acceptance:

Can be made in any REASONABLE MANNER unless otherwise conditioned

“Reply by mail”? What would Reasonable Person believe that Offeror meant for response

Reasonable response is shipping the goods

Non-conforming goods:

Is at the same moment an acceptance and a breach

UNLESS, shipper includes cover letter stating that goods are non-conforming and recipient may accept or reject (counter offer)

2-102: SCOPE Applies to all **TRANSACTIONS in goods**

Not just sales of goods (**EXAM DEATH** ☠)

Sales = Exchange of Goods for a Monetary

Transactions =

Goods = Chattels that are moveable at the time of the contract

[Not included Real Property; Services; Legal Rights (Insurance); Paper rights (stocks, bonds, etc.)]

Applies WHETHER OR NOT merchant involved

Merchant = Party regularly dealing in such goods or practices involved

2-103:

Article 2A

Leases

Prior to 1978, courts applied Article 2 to leases

Trumps much of the common law

Exam Strategies

Be sure to list all issues even if you can't address them

Don't just state a rule but apply it to the facts

“The Common Law rule is....”

“The Restatement 2d says...” (Restatement is Common Law)

“The UCC states...” (Statutory)

Don't use case names

Counter arguments: “A's best argument would be....”--DO NOT name each “could-be”

Don't restate facts; just bring them in to support conclusions

Theories of Meeting of the Minds:

Pure Objective Theory (Williston)

Sometimes there can be a contract which neither party intended (Turkey- RPP)

Subjective Theory

Contract only for what BOTH parties intended

LIST OF 20ish THINGS TO KNOW

Offer

An offer creates the power of acceptance in the offeree. It is an offer such that the offeree reasonably believes that the offeror intended to create the power of acceptance in good faith.

Acceptance

According to UCC (2-206), unless otherwise unambiguously indicated by the language or the circumstances, acceptance can be given by any reasonable manner or medium given the circumstances.

Consideration

Bargained-for detriment. Rest. 71 says a performance or a return promise must be bargained for; it is bargained-for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for the promise. A performance may consist of an act other than a promise; or a forbearance; or the creation, modification, or destruction of a legal relation. Offered consideration must have value in the eyes of the law.

Mutual assent (“meeting of the minds”)

Mutual assent is a definite and clear offer by one person and unqualified acceptance of that offer by the other person. As stated by CL, the law imputes to a person an intention corresponding to the reasonable meaning of his words and acts. The law looks at the objective manifestations of a person’s intent.

Solicitations

A solicitation is a public offer to large groups. In this country, the vast majority states that mass solicitations are not offers; merely solicitations for offers.

Counter Offer

A counteroffer is a rejection of the previous offer. It terminates the power of acceptance. Exceptions to this include option contracts or rejection during the offer period; language making clear that no rejection was intended; and merely aspirational language.

Silence as Acceptance

Generally, silence is not acceptance unless there is a duty to speak. According to Restatement (69), silence may be acceptance only where because of previous dealings it is reasonable that the offeree should notify the offeror if he does not intend to accept.

Option Contract

According to Rest. 2d (87), an option contract is binding when it is in writing and signed by the offeror, recites consideration for the making of the offer, and proposes exchange on fair terms within a reasonable time; or is made irrevocable by statute. An offer which is expected to and does induce forbearance/some action is binding as an option contract to the extent to avoid injustice.

Output Contract

UCC 2-306. Buyer agrees to buy all the output a business makes. Not illusory.

Requirements Contract

UCC 2-306. Buyer says it will purchase all that it requires from seller. Not illusory. Agreeing to a detriment.

Preexisting Duty Rule

UCC 2-209. Rest. 417. A modification of a current contract which is unperformed on both sides. The modification is an executory accord. The original contract is “suspended” until the modified contract has been performed. When it’s performed, the preexisting duty is discharged.

Promissory restitution

Restitution interest

Concerned with the unjust enrichment of the promisee. Restoring any benefit he conferred on the other party.

Expectation

Where a party would have been if the contract had been performed as promised. Either general (arising from the breach) or special (caused by breach (incidental) or loss of use (consequential)).

Reliance Interest

That measure of recovery that will restore the position at the time of the contract (looks backwards). Can't exceed lost expectations. Reimburses for loss caused by reliance (put in a position as if a contract had not been made).

Promissory estoppel

Rest. 90: Gift promised followed by some unbargained-for reliance. Not an enforceable contract. Reliance must be reasonable. Remedy as the court finds just.

Unilateral Contract

A unilateral contract is a very rare contract in which performance is required for acceptance, rather than a return promise. At any time, the performer can walk away whistling. According to CL, acceptance of a unilateral contract is when payment is actually paid, instead of just tendered. According to the Restatement (45), preparation to perform does not constitute a performance of a unilateral contract; but rather creates an option contract for a reasonable period of time.

Bilateral Contract

A bilateral contract starts with a promise for a promise.

2-207 (Battle of the forms)

No express acceptance of additional or different terms is required unless acceptance is expressly made conditional on those terms. Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract. The terms of that contract are parties' shared terms and supplemental UCC provisions.

Mailbox Ruler

According to CL, as soon as a letter of acceptance goes into the mail, it constitutes acceptance (if mail is a reasonable form of acceptance). Exceptions, however, are effective upon receipt of the letter: rejections, counteroffers, and option contracts.

Indefiniteness

A contract is indefinite if there are not enough terms for the court to enforce it. The UCC can provide filler terms, including the price. According to UCC, a contract does not fail for indefiniteness if the court finds that the parties intended to contract and they have agreed to enough terms for the court to give a reasonable remedy for breach.

Illusory promise

Non-compete agreement

Courts don't like these. The rule in TX is that a covenant promise not to compete is not valid unless it's part of an otherwise enforceable agreement. A covenant not to compete that is part of an at-will contract is NOT enforceable unless the employee receives independent consideration for it.

Rescission

UCC 2-209. Each party rescinding their rights under a contract. Consideration for modification (see preexisting duty rule).

Avoidability

Duty to mitigate.

Quasi Contract

Contract implied-in-law.

Adhesion Contract

A take it or leave it contract that does not allow the other party to negotiate terms. It is not enforceable against a weaker party where it is not within reasonable expectations; or it is within reasonable expectations but it is unduly oppressive, unconscionable, or against public policy.