

## **Contracts Outline**

**NYU Fall 2004, Professor Barry Friedman**

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## Chapter 1 What Promise Ought We Enforce

### 1. WHY WE ENFORCE PROMISE

- 1.1. Moral claim (Foundational)
- 1.2. Efficiency / Mutual exchange: we can not exchange things simultaneously.
- 1.3. Reliance: somebody relies on the promise and changes his plan.
- 1.4. Will theory: somebody makes the promise means he wants the promise to be enforced.
- 1.5. Benefits unjustly retained.

### 2. PROMISE WITH GOOD CONSIDERATION

- 2.1. Bargain for exchange is the test of good consideration
  - 2.1.1. Bargain for exchange is the test of good consideration (RK 71)
    - (a) A performance or return promise is bargained for if it is **sought by** the promisor in exchange for his promise and is given by the promisee in exchange for that promise
  - 2.1.2. No requirement on the equivalence in the values exchanged (RK 79)
  - 2.1.3. No requirement on the causality between the promise and what is bargained for (RK 81)
    - (a) If promisee performed not for the promise, the promisor will still be bound
  - 2.1.4. Policy:
    - (a) bargain shows the seriousness and reveals the true intention of the parties
    - (b) If contract is made by real intention, the social welfare would increase
    - (c) Covenant can not substitute consideration since it is easily induced
  - 2.1.5. Detriment to promisee sought by the promisor is good consideration



- (a) Detriment to promisee is more important than benefit to promisor in establishing good consideration (*Hamer*)
- (b) Forbearance of legal rights is the detriment the law required (*Hamer*)
- (c) The waiver of the legal right to separate or divorce is good consideration. (*Miller*/dissenting opinion)
- (d) The court prefers not to involve in family matters. (*Miller*/dissenting opinion)

2.1.6. Mere gratuity is with no good consideration

- (a) Even if there is detriment to the promisee (not sought by the promisor), mere gratuity is not enforceable contract. (*Kirksey*)
- (b) No bargain for exchange
- (c) Policy: mere gratuity might be not serious
- (d) *Kirksey* could be fixed by reliance theory

2.2. Past consideration is no good consideration

- 2.2.1. The services the promisee voluntarily offers before the promise has been made are past consideration, legally equivalent to no consideration. (*Feinberg*)

2.3. Moral promise could be enforced under material benefit rule

- 2.3.1. Moral promise does not equal to enforceable contract, but could be enforced if there is an material benefit to the promisor
  - (a) Example: life and injury (*Mills and Webb*)
  - (b) No material benefit (*Dementas*)

2.4. Illusory promise is no good consideration

- 2.4.1. If the forbearance is optional to be enforced, it is not the good consideration. (*Strong*)
- 2.4.2. Optional performance could be promise if (RK 77)
  - (a) Each of the option had been bargained for; or

- (b) There is substantial possibility before the promisor exercises his choice events may eliminate the alternatives which would not have been consideration

2.5. Conditional promise could be good consideration

2.5.1. For those contractual conditions whose satisfaction can not be claimed arbitrarily, unreasonably or capriciously, and whose good faith standards could be sought, there is actually good consideration in these types of conditional contracts. (*Mattei*) Satisfaction could be determined by:

- (a) Reasonable commercial standards (commercial transaction)
- (b) Good faith (personal judgment)

2.6. Good consideration could be implied

2.6.1. In **the exclusive marketing agreement**, the promise of the agent towards the principal forming good consideration could be implied. (*Wood*)

2.6.2. The implication should be made in good faith

- (a) **Good faith** means honesty in fact and the observance of reasonable **commercial standards** of fair dealing.

2.6.3. Quantity by the **output** of the seller or the **requirements** of the buyer means actual output or requirements **in good faith** (UCC<sup>1</sup> 2-306)

- (a) No reasonably disproportionate the any stated estimate. Or normal or prior output or requirements

2.6.4. **Exclusive dealing** agreements in kind of goods impose seller and buyer the obligation to **use best efforts** to supply goods and promote the sale.

3. **PROMISE PROMISEE RELIES ON (PROMISSORY ESTOPPEL<sup>2</sup>)**

3.1. Mere gratuity could be enforceable if it caused the detriment of the promisee

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<sup>1</sup> UCC applies to sales of good

<sup>2</sup> The principle that a promise made without consideration may nonetheless be enforced to prevent injustice if the promisor should have reasonably expected the promisee to rely on the promise and if the promisee did actually rely on the promise to his or her detriment.

- 3.1.1. If the promisor intentionally influences the promisee to alter his position to the worse by the promise, the promise even as the mere gratuity is enforceable. (*Ricketts*)
- 3.2. Reliance test (RK 90-1)
  - 3.2.1. Promisor should reasonably expect the promise to induce action or forbearance
  - 3.2.2. Promise did induce action or forbearance
  - 3.2.3. Injustice can be avoided only by enforcement of the promise
  - 3.2.4. Remedy may be limited as justice required (**reliance damage**)
- 3.3. More liberalization under 2<sup>nd</sup> restatement
  - 3.3.1. Deletion of “a definite and substantial character” of the reliance in 1<sup>st</sup> restatement
- 3.4. **Reliance damage** should be compensated
  - 3.4.1. Promisor does not have to realize promisee’s expectation on the gratuity. (*Barcardi*)
  - 3.4.2. Promisor has to compensate promisee’s damage caused by his reliance on the gratuity. (*Barcardi*)
  - 3.4.3. In at-will employment, the relocation expenses are reliance damage, the future wages are expectation damage. (*Barcardi*)
  - 3.4.4. Restricted to reliance damage under 2<sup>nd</sup> restatement
    - (a) 1<sup>st</sup> RK granted expectation damage, while 2<sup>nd</sup> RK only grants reliance damage (RK 90-1, See difference in *Feinberg*)
  - 3.4.5. Suit based on breach of contract (expectation damage) is preferable than reliance suit (reliance damage)

#### 4. **UNJUST ENRICHMENT (RESTITUTION)**

- 4.1. Elements of restitution
  - 4.1.1. Benefit

- 4.1.2. Unjust
- 4.1.3. Expectation test
  - (a) Whether the claimant could expect the remuneration determines the restitution. (*Callano*)
- 4.1.4. No forced enrichment, with the exception in medical services
- 4.2. The claimant must expect the enriching party would pay
  - 4.2.1. Different standard in different jurisdictions (*Callano* and *Paschall*)
    - (a) Exception in medical help
  - 4.2.2. Even if claimant is not required to expect the enriching party to pay, it must first claim against the one it expected to pay. (*Callano*)
- 4.3. Restitution amount
  - 4.3.1. Restitution and restitution amount is a matter of law (*Cotnam*)
  - 4.3.2. Either of the following as justice requires (RK 371)
    - (a) Reasonable cost - market cost of the enriching (in position of the enriched party)
    - (b) Reasonable value - benefit of the enriched party
  - 4.3.3. More generous reasonable cost is commonly allowed
    - (a) Reasonable cost is often more than the reasonable value, and is commonly supported
    - (b) Opportunity of the benefit could support the generosity of the law (RK 371 comment a)
    - (c) Exception is that in breach of contract, breach of statute of fraud, or suit based on unenforceable contracts, recovery should be limited to contract price.
  - 4.3.4. Reasonable cost in medical cases
    - (a) In case of medical emergency help, restitution should be as much as the market value of the services rendered to provide the incentive (*Cotnam*)

(b) Reasonable value of health could worth more

4.4. Restitution could exist in martial relationship

4.4.1. Restitution exists in marital relationship provided one spouse **inures solely** to the benefit of the other by the time of dissolution. (*Pyeatte*)

## 5. MISCELLENEOUS

5.1. Promise to pay indebtedness is enforceable even if run out of statue of limitation (RK 82)

5.2. A charitable subscription or a marriage settlement is binding without consideration (RK 90-2)

5.3. Covenant does not matter

5.3.1. Policy: even promise in good formality could be induced and may not be the serious and true intention of the promisor.

## Chapter 2 Formation of Contracts

### 1. MUTUAL ASSENT

#### 1.1. Subjective theory

##### 1.1.1. Cons

- (a) Too much facts finding
- (b) Damages to reliance

#### 1.2. Objective theory

##### 1.2.1. Video capture rule – current rule

- (a) A bargain is a **manifestation** of mutual assent to the exchange (RK 17)
- (b) Reasonable standard should be applied.

##### 1.2.2. Pros

- (a) Demands for security and certainty in business transactions

##### 1.2.3. Cons

- (a) Hard to determine the objective standards, which in fact is a usually social main stream standard.

##### 1.2.4. Gaps filled by court

- (a) Cons
  - (i) Objective standards
  - (ii) Imposing on contractual parties

#### 1.3. Contract in jest is enforceable

##### 1.3.1. Objective manifestation of assent determines the contract, the unexpressed intention is irrelevant. (*Lucy*)

##### 1.3.2. Unless there is evidence that the other party knew the true intention.

#### 1.4. Latent ambiguity and ambivalent assent make no contract

- 1.4.1. If parties have different understanding on material terms of the contract, there is no mutual assent and no binding contract (*Raffles*)
- 1.4.2. If there is a core of common meaning sufficient to determine the performance and remedy, then the question is how to interpret (RK 20 comment a)
- 1.4.3. Test on whether know
  - (a) Generally prevailing meaning in context (RK 201 comment a)
  - (b) Whether the party knows or has the reason to know any different meaning, if not he knows the exact term. (RK 20, RK 201)
- 1.5. Complete contingent contract v. Relational contract
  - 1.5.1. Problems of relational contract: when will it expire?
  - 1.5.2. Death of contract: no more contingent contract but only relational contract

## 2. **OFFER**

- 2.1. Offer is the last step but one to reach a contract
- 2.2. Offer is a promise conditioned on acceptance
- 2.3. Offer is the **manifestation of willingness** to enter into a bargain (RK 24)
  - 2.3.1. Would not sell unless ... (would sell if ...) is not the offer (*Owen*)
  - 2.3.2. Mere quotation of lowest price is not the offer (*Harvey*)
  - 2.3.3. If the lowest price is quoted for immediate acceptance, it is the offer (*Fairmount*)
    - (a) Offeree's response with specified requirement does not affect the contract (*Fairmount*)
  - 2.3.4. Offer could be examined by:
    - (a) Surrounding circumstances (RK 201 comment a)
    - (b) Definiteness and certainty of the term (UCC 2-204 comment)
- 2.4. Ad is generally deemed invitation to deals with some exceptions

2.4.1. Policy:

- (a) Ad is usually indefinite as to quantity
  - (i) Seller may find his offer overaccepted
- (b) Sellers ought to be able to choose with whom they deal

2.4.2. Ads could constitute an offer, if (*Lefkowitz*)

- (a) The performance is promised in positive terms in return for something requested; and
- (b) The ad is clear, definite and explicit and left nothing open for negotiation (i.e. including terms like first come first serve which definite the quantity)

2.5. Offer needs to be reasonably certain

2.5.1. See requirement of definiteness

2.6. The moment of reaching assent could be undetermined (RK 22-2, UCC 2-204-2)

**3. ACCEPTANCE**

3.1. Offeree can accept by promise or by performance, if not required by offeror (RK 30, UCC 2-206-1)

3.1.1. Under UCC, shipment of non-conforming goods is not acceptance if the offeree (seller) seasonably notifies the offeror (buyer) that the shipment is offered only as an accommodation to the buyer. (UCC 2-206-1)

3.2. Acceptance by promise (RK 56)

3.2.1. Bilateral contract: contract exchange promise for promise

3.2.2. Notification to offeror is required

- (a) The fact that offeree sends the offeror a sample request letter is the notification of acceptance (*Int'l Filter Co.*)
- (b) Examined by offeree's reasonable diligence to notify or the offeror's receipt of the acceptance seasonably (RK 56)

3.2.3. Unless the offeror dispenses the notification requirement (*Int'l Filter Co.*)



- (a) Offeror accepts the offer invitation saying in the offer that notification is not required
- 3.3. Acceptance by performance (RK 54)
  - 3.3.1. Unilateral contract: contract exchange promise for performance
  - 3.3.2. Notification is not required (RK 54-1)
  - 3.3.3. Unless the offer requests such a notification (RK 54-1)
  - 3.3.4. Unless the offeror can not reasonably know that
    - (a) Performance could be notification provided there is no reasonable delay (Ever-Tite)
    - (b) Failure to notify may discharge offeror's duty to perform, if offeree has reason to know that the offeror has no adequate means of learning of the performance with reasonable promptness and certainty, unless (RK 54-2)
      - (i) The offeree exercises reasonable diligence to notify the offeror of acceptance, or
      - (ii) The offeror learns of the performance within a reasonable time, or
      - (iii) The offer indicates that notification of acceptance is not required.
  - 3.3.5. Offeror may treat the offer as having lapsed before acceptance, if not notified within a reasonable time (UCC 2-206-2)
- 3.4. Silence generally can not constitute acceptance with some exceptions (RK 69)
  - 3.4.1. Offeree benefits from the offer (RK 69-1-a)
  - 3.4.2. Relational contract (*Hobbs and Bronz*; RK 69-1-c)

#### **4. THE REQUIREMENT OF DEFINITENESS**

- 4.1. The material terms need to be certain in the **offer**

- 4.1.1. Provide a basis for determining the existence of a **breach** and for giving an appropriate **remedy** (RK 33-2)
- 4.1.2. There is a reasonably certain basis for giving an appropriate **remedy** (UCC 2-204-3)
- 4.1.3. Quantity and price are material terms
- 4.2. Indefiniteness in the contract could be filled in by the court
  - 4.2.1. RK allows courts to add sufficiently definite meaning to the bargain (RK 33 comment a)
  - 4.2.2. UCC fills gaps with course of performance, course of dealing and trade usage (UCC 1-303)
  - 4.2.3. UCC supplies more gap fillers than RK by using commercial standards
    - (a) Rationale: UCC wants to make more deals
- 4.3. The quantity must be certain
- 4.4. The contractual price could be uncertain
  - 4.4.1. The court could insert fair market price into the contract; or order parties to mediate or negotiate the price, if the parties **intend to be bound** by the contract (Oglebay)
    - (a) In the present case, it is the long-standing and close business relationship showing such intention
  - 4.4.2. The court generally would not fill in price if the original price is indefinite (rather than completely omitted), i.e. A agrees to employ B at a rate no more than \$ 200 per week.
    - (a) Policy: lack of assent on a material term

## 5. **TERMINATE THE OFFER**

- 5.1. Rejection (RK 38)
  - 5.1.1. A manifestation of intention not to accept an offer is a rejection unless the offeree manifests an intention to take it under further advisement (RK 38-2)

(a) Further advisement – offer term remains the same (RK 39 comment c)

5.2. Counter-offer is rejection (RK 39)

5.2.1. Any kind of variation in acceptance (qualified acceptance) is counter-offer and terminates the original offer - Mirror image rule

5.2.2. An acceptance varying from the offer is a rejection. The other party, having once rejected the offer, cannot afterwards revive it by tendering an acceptance of it. (*Minneapolis railway Co.*)

5.2.3. Inquiry and request in the acceptance is not rejection

5.2.4. The court may mitigate the mirror image rule by

(a) Finding implied term in the offer (*Fairmount*)

(b) Finding the language of the acceptance related to an additional or different term is only precatory

5.2.5. The parties may use rigorous mirror image rule to deny promise

5.2.6. In practice, the party that sends the last form before performance usually prevails.

5.2.7. Exception under UCC 2-207

(a) See battle of form

5.3. Lapse of time (RK 41)

5.3.1. Specified time in the offer; or

5.3.2. Reasonable time

(a) Matter of fact (RK 41-2)

(b) To be determined by all circumstances (RK 41 comment b)

(i) Nature of contract

(ii) Purpose of the parties

(iii) Course of dealing

(iv) Usage of trade

- (c) General principle: the time would be thought satisfactory to the offeror by a reasonable man in the position of the offeree. (RK 41 comment b)
- 5.3.3. Offer made in face to face conversation lapses when conversation ends
  - (a) An offer made by one to another in a face to face conversation is deemed to continue only to the close of their conversation, and cannot be accepted thereafter (*Akers*)
- 5.3.4. If offeree has begun requested performance, an offeror who is not notified within a reasonable time may treat the offer as having lapsed before acceptance. (UCC 2-206-2)
- 5.4. Revocation
  - 5.4.1. By manifestation of intention (words) (RK 42)
  - 5.4.2. By definite action inconsistent with the intention to enter into the proposed contract (RK 43)
    - (a) Offeree should acquire reliable information to that effect
- 6. FIRM OFFER (OPTION CONTRACT)**
  - 6.1. Offer is a promise conditioned on acceptance
  - 6.2. Option contract is binding with good consideration (*Dickinson*) (RK 25)
  - 6.3. In firm offer with no consideration, the offeror generally can **revoke** at any time before acceptance (*Dickinson*)
    - 6.3.1. Restitution and reliance may seldom provide remedy to the firm offeree in case of revocation
  - 6.4. Exception under RK 87 (recital of purported consideration)
    - 6.4.1. Option contract in **writing and signed** by the offeror
    - 6.4.2. Recitals of purported consideration (not necessarily actual); and
    - 6.4.3. Proposes an exchange on fair terms within a reasonable time
    - 6.4.4. The offeror may not revoke within the proposed time

- 6.5. Exception under UCC 2-205 (firm offer with no consideration)
  - 6.5.1. Offer by a merchant to buy or sell goods
  - 6.5.2. In signed writing
    - (a) If the open term supplied by offeree, must be separately signed by the offeror
    - (b) Policy: authentication by a writing is essence (UCC 2-205 comment 2)
  - 6.5.3. Offeror may not revoke within the stated time, or reasonable time if not time is stated
  - 6.5.4. In any case with no consideration, the non-revocation time may not exceed three months.
- 6.6. Exception under reliance (option contract with no consideration)
  - 6.6.1. Exception in part performance or tender (RK 45)
    - (a) The offeror invites a performance not promise (only unilateral contract)
      - (i) In case of bilateral contract, the acceptance by promise itself makes both parties bound.
      - (ii) In firm offer of unilateral contract, only offeror is bound. (RK 45 comment e)
    - (b) **An option contract is created when the offeree tenders<sup>3</sup> or begins the invited performance, or tenders the beginning of it (RK 45-1)**
      - (i) Borrowing money to buy the property is not sufficient to cause firm offer (*Ragosta*),
        - (1) No begin to perform by borrowing
    - (c) The offeror can not revoke his offer, but his duty of performance is conditional on the completion or tender of the invited performance (RK 45-2)

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<sup>3</sup> Tender: An obligor's demonstration of readiness, willingness, and ability to perform the obligation

- (d) Rationale: the beginning the performance furnishes consideration for an option contract (firm offer) (RK 45 comment d)

6.6.2. Exception in reasonable action or forbearance (RK 87-2<sup>4</sup>)

- (a) Offeror reasonably expect offer to induce action or forbearance and the offer did induce action or forbearance
  - (i) If the offeree can see that offer is an obvious mistake, the reliance provision does not apply (*Drennan*)
- (b) Reliance other than part performance or tender (i.e. offeree must undergo substantial expense, or undertake substantial commitments, or forego alternatives in order to put himself in a position to accept by either promise or performance)
- (c) In project bidding, sub-bidding is binding sub-contractor but not the general contractor
  - (i) Sub-contractor makes the offer and general contractor relies on it in making its own bid
  - (ii) Policy: general contractor faces more time-pressure in submitting its own bid. The law should allow it more capacity to exam the reliability, quality of work and capability of sub-contractor in addition to the price.
- (d) The firm offer is binding to the extent necessary to avoid injustice (restitution of benefits, or partial or full reimbursement of losses is usually proper) (RK 87 comment e)

6.6.3. Example of reliance on firm offer

- (a) Broken leg running half way in the Brooklyn Bridge
- (b) Reward situation

6.7. Remedy for revoking firm offer

6.7.1. Expectation damage is available but would be hard to prove

6.7.2. Reliance damage

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<sup>4</sup> RK 87-2 applies to reliance on the offer, while RK 90 applies to reliance to the promise.

## 6.8. Relationship between firm offer and lapse of time

- 6.8.1. Firm offer discusses when offeror can revoke offer, while lapse discusses if not revoked, when the offer expires.

## 7. BATTLE OF FORMS UNDER UCC 2-207

- 7.1. Common law makes last form before performance to be contract
- 7.2. Acceptance with additional or different terms makes the contract unless they materially change the assent (UCC 2-207-1)
  - 7.2.1. The acceptance should be a definite and seasonable **expression of acceptance** or a **written confirmation** which is sent within a reasonable time
  - 7.2.2. The additional or different terms would not affect the contract formation unless **acceptance** is **expressly** made conditional on assent (**of the offeror**) to the additional or different terms
    - (a) “Acceptance is subject to arbitration” does not mean arbitration is expressly made condition on the assent of the offeree (*Dorton*)
    - (b) **Unwillingness test**: the offeree is unwilling to proceed with the transaction unless he is assured of the offeror's assent to the additional or different terms. (*Dorton*)
  - 7.2.3. If the acceptance is expressly made conditional on assent of the offeror on the additional or different terms (in which case the acceptance becomes a counter-offer), the offeror can accept such term by performance (notice is required under UCC 2-206-2) or by promise. (*Dorton*)
- 7.3. The different (inconsistent from the terms in offer) terms should be knocked out and filled by gap fillers (*Northrop*) (Proposed UCC 2-207)
  - 7.3.1. Extension of warranty period is different not additional term (*Northrop*)
- 7.4. The additional (not different) terms are proposals (UCC 2-207-2)
- 7.5. Between merchants, the proposed additional (not different) terms becomes parts of the binding contract unless they materially changed the assent (UCC 2-207-2)

- 7.5.1. “Between merchants” means in any transaction with respect to which both parties are chargeable with the knowledge or skill of merchants (UCC 2-104-3)
- 7.5.2. Unless the offer **expressly** limits acceptance to the terms of the offer; or
- 7.5.3. Unless additional (not different) terms **materially** change the contract; or
  - (a) Materially change means significant change the prevailing commercial standards, i.e.: (UCC 2-207-2 comment 4, 5)
    - (i) A clause negating standard warranties;
    - (ii) A clause reserving the power to cancel upon the buyer’s failure to meet any invoice when due;
    - (iii) A clause requiring complaints be made in a time materially shorter than customary or reasonable.
  - (b) Whether arbitration is material term remains in dispute (*Dorton*)
- 7.5.4. Unless notification of objection to them has already been given or is given within a reasonable time after notice of them is received.
- 7.6. If all the provisions do not work, conduct by parties can make a contract for sale (UCC 2-207-3)
  - 7.6.1. Although the writings of the parties do not otherwise make a contract, conduct still can make a contract
  - 7.6.2. Terms in conduct contract consist of those in writing and those filled by the court by usage of gap fillers in UCC.
    - (a) Arbitration clause can not be filled in the contract by the court (*Itoh*)
  - 7.6.3. Policy
    - (a) UCC requires less formality than RK (common law). It always sees the contract to be formed and fill the gaps.
    - (b) Courts are unwilling to go to conduct contract directly, if there is any expression of assent of the parties.
  - 7.6.4. Practical note



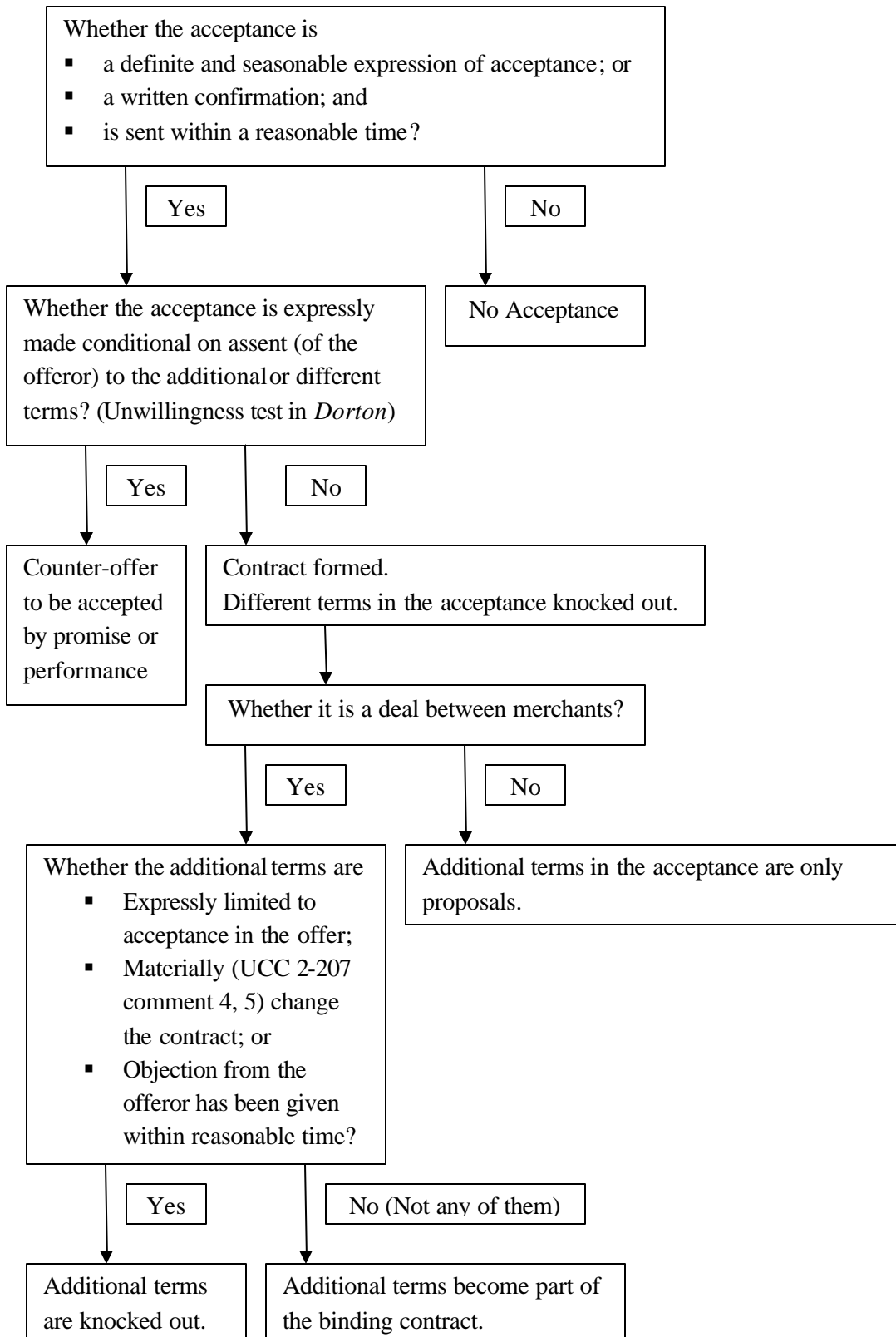
- (a) If parties do want one special clause to be in the contract, they should hold the performance until getting the assent, otherwise UCC 2-207-3 would form the contract without that special clause in it (*Itoh*)

7.7. Buy now-Notice later contract

- 7.7.1. There could be Buy now-Notice later contract in commercial transaction (*ProCD*)
- 7.7.2. Buy now-Notice later contract could be formed when the consumer clicks “I accept”
  - (a) No battle of form, contract in the screen becomes binding
- 7.7.3. Buy now-Notice later contract could be formed when the consumer start to use the product (UCC 2-207-1)
  - (a) Battle-of-form analysis under UCC 2-207: consumer accept the expressly conditioned acceptance by performance
- 7.7.4. Buy now-Notice later contract could also be formed by conduct (UCC 2-207-3)
  - (a) Formed when the buyer continue to use the products (perform) (not as response to seller’s counter-offer)
  - (b) Contract formed would consist of the writing provisions not having been agreed by the party
  - (c) Rest provisions to be inserted by gap fillers
    - (i) Rationale: if the parties do care about one condition, they could express it
- 7.7.5. Buy now-Notice later contract may be subject to adhesion contract restriction (RK 211)
- 7.7.6. Who can protect consumers more in Buy now-Notice later contracts?
  - (a) Stores
    - (i) Stores would no longer sell the products with some ridiculous warnings
  - (b) Consumer associations

- (i) Sellers can award complaining consumers
- (c) Governmental agencies
  - (i) Regulations could be too demanding
  - (ii) Litigation could be very expensive

Battle of Forms under UCC 2-207



## 8. STATUTE OF FRAUDS

- 8.1. Statute of frauds are rules that require some contracts in writing (RK 110)
- 8.2. Purpose of the writing requirement is to prevent fraud or perjury of contracts never in fact made (RK 131 comment c)
  - 8.2.1. Therefore, the party's pleading or testimony in the court could make the oral contract enforceable against him (UCC 2-201-3)
    - (a) The enforcing scope should be limited to the extent of such pleading or testimony.
- 8.3. Coverage of statute of frauds (RK 110)
  - 8.3.1. Executor-administrator provision
    - (a) A contract of an executor or administrator to answer for a duty of his decedent
  - 8.3.2. Suretyship provision (i.e. *Strong*)
    - (a) A contract to answer for the duty of another
    - (b) Rationale: we suspect whether people really want to takeover the duty.
  - 8.3.3. Marriage as a consideration
  - 8.3.4. Land contract
    - (a) A contract for the sale of an interest in land
  - 8.3.5. One-year provision
    - (a) A contract to be performed for more than a year **in the promise** from the time when the contract is made
  - 8.3.6. Sales of good over \$500 (UCC 2-201)
    - (a) Tangible movable property
  - 8.3.7. Others specified in state law
- 8.4. Writing requirement under statute of frauds (RK 131, UCC 2-201-1)

- 8.4.1. Writing has to be **signed** by or on behalf of **the person to be charged** by the contract;
- 8.4.2. Writing has to identify the subject matter of the contract; and
  - (a) Terms other than **quantity** could be omitted or incorrectly stated in the writing (UCC 2-201-1)
    - (i) Rationale: writing is only required to provide a basis for believing that the offered oral evidence rests on a real transaction. (UCC 2-201 comment 1)
- 8.4.3. Writing has to show the contract has in fact been made
- 8.4.4. Writing has to state with reasonable certainty the essential terms of contractual promise to be performed
- 8.4.5. Writing could be any form other than oral, i.e. telegram and email
  - (a) Rationale: writing is only required to provide a basis for believing that the offered oral evidence rests on a real transaction.
- 8.5. Written confirmation between merchants may satisfy the writing requirement (UCC 2-201-2)
  - 8.5.1. Must be between merchants
    - (a) “Between merchants” means in any transaction with respect to which both parties are chargeable with the knowledge or skill or merchants (UCC 2-104-3)
  - 8.5.2. Must be received and the receiving party has reason to know its contents; and
  - 8.5.3. No written notice of objection to the contents of the written notice is given within 10 days after it is received
  - 8.5.4. Policy: between merchants, failure to answer a written confirmation within ten days of receipt deprives the right to defense under statute of fraud. (UCC 2-201 comment 3)
- 8.6. Partial performance exception to Statute of Fraud
  - 8.6.1. Partial performance under common law

- (a) Payment, possession and improvement on the property can make the property sales contract away from the statue of frauds. (*Johson Farms*)
- (b) Partial payment combined with improving the property may remove the contract from statue of fraud. (*Johson Farms*)
- (c) The key is whether the part performance is consistent only with the existence of the alleged oral contract (*Johson Farms*)

#### 8.6.2. Partial performance under UCC 2-201-3

- (a) Contracts with goods specially manufactured for the buyer
  - (i) Not suitable for seller to sale ordinarily
  - (ii) Seller has made either a substantial beginning of the manufacture or commitments for their procurements
- (b) Contracts which payment has been made and accepted or goods have been received and accepted
- (c) The oral contract is enforceable only to the extent of covering such goods. (UCC 2-201 comment 2)
- (d) Rationale: payment and acceptance of goods constitutes an unambiguous overt that a contract actually exists.

#### 8.7. Failure to fulfill the writing requirement under statue of frauds would make the covered contract unenforceable (RK 138, UCC 2-201-1)

##### 8.7.1. Only judicially unenforceable, not necessarily void for all purposes

- (a) A third party who wrongfully induces a party to refuse to perform an oral contract can not use statue of fraud as a defense.

#### 8.8. Alternative remedies

##### 8.8.1. Reliance (Promissory estoppel) (RK 139)

- (a) Reliance can make the contract enforceable to the extent justice requires (*Monarco*)
- (b) Displacement of writing requirement under statue of fraud is stricter than the displacement of consideration.

- (i) Remedy condition in case of lack of writing (RK 139) is stricter than remedy condition in case of lack of consideration (RK 90), which is either (RK 139 comment b)
  - (1) Reliance furnishes a **compelling substantive basis for relief** in addition to the expectation created by the promise; or
  - (2) Circumstances satisfying the evidentiary purpose of the statute of frauds and fulfill any cautionary, deterrent and channeling functions the statute may serve.
- (ii) Promise with consideration but without writing required by statute of fraud has to fulfill the stricter condition under RK 139 to be enforced.
- (c) Significant circumstances in examining the injustice (remedy) in lack of writing (RK 139-2)
  - (i) the availability and adequacy of other remedies, particularly cancellation and restitution;
  - (ii) the definite and substantial character of the action or forbearance in relation to the remedy sought;
  - (iii) the extent to which the action or forbearance corroborates evidence of the making and terms of the promise, or the making and terms are otherwise established by clear and convincing evidence;
  - (iv) the reasonableness of the action or forbearance;
  - (v) the extent to which the action or forbearance was foreseeable by the promisor.

#### 8.8.2. Restitution

- (a) See restitution in chapter 1
- (b) Unjust enrichment and reliance often occur in the same case (*Monarco*)

## **Chapter 3 Interpretation**

### **1. INTERPRETATION OF EXPRESS TERMS**

#### **1.1. Hierarchy under UCC 1-303**

##### **1.1.1. Express term**

- (a) Specified to the contract
- (b) Other interpretation can not overcome express terms (UCC 1-303-e)

##### **1.1.2. Course of performance**

- (a) Specified to the transaction
- (b) One performance may not be sufficient, two performance is (Nanakuli)

##### **1.1.3. Course of dealing**

- (a) Specified to the parties

##### **1.1.4. Usage of trade**

- (a) Specified to the commercial world
- (b) The contract party must be reasonably aware of (Nanakuli)

#### **1.2. Waiver of express terms (UCC 2-209)**

##### **1.2.1. Only conducted in manifestation**

- (a) Conduct can not waiver, except for express condition

##### **1.2.2. A waiver can be revoked by notification unless the revocation would cause unjust**

### **2. IMPLIED TERMS**

#### **2.1. Implied terms raised from express terms (Dalton)**

##### **2.1.1. Allowing submitting supplementary materials would bring duty to review them**



- 2.2. Duty of good faith, no duty of candor (Market St)
  - 2.2.1. Cannot take deliberate advantage of an oversight, ignorance, inexperience or even naïveté of the contracting party
  - 2.2.2. No obligation to remind any bad term in the contract but has obligation to remind if knows the other party is unaware of the term
  - 2.2.3. Not required to relax the term when the other party has trouble performing
  - 2.2.4. Can exploit superior knowledge of the market
- 2.3. Duty of good faith under UCC 1-304 and UCC 1-201 (20)
  - 2.3.1. Honesty in fact
    - (a) Internal the transaction
  - 2.3.2. Observance of reasonable commercial standards of fair dealing
    - (a) Outside the transaction, higher standard than honesty in good faith
- 2.4. Performance in good faith of the express terms implies performance of implied terms (Burger King)
  - 2.4.1. Franchiser has no duty to exclude other franchisee in nearby area subject to duty of good faith
- 2.5. Implied term cannot sustain independent cause of action
  - 2.5.1. Only use in interpretation or could be used as an independent cause of action

### **3. PAROLE EVIDENCE RULE**

- 3.1. Overview
  - 3.1.1. Substantive law, not rule of evidence and rule of interpretation (RK 213 comment a)
    - (a) A failure to object in the proceeding does not bar a later assertion of the parole evidence rule
  - 3.1.2. State law applied by state and federal court

- (a) Erie doctrine - federal court applies state parol evidence rule in diversity cases

### 3.1.3. Rationale

- (a) Later agreement discharges the prior one.
- (b) Writing evidence is more accurate than human memory.
- (c) Prevent the party to make faulty memory to get over from economic hardship

### 3.1.4. Exception in mistake and fraud (Gianni)

### 3.1.5. Even if parol evidence rule is admitted, the jury has the power to disbelieve.

## 3.2. Separate agreement with separate consideration is not subject to parol evidence rule (Gianni)

## 3.3. Integrated agreement is subject to parol evidence rule

### 3.3.1. General

#### (a) Definition

- (i) A writing constituting a final expression of contractual terms (RK 209-1)

#### (b) Determination

- (i) To be determined by all relevant evidence (RK 209 comment c)
- (ii) Complete agreement must be a integrated agreement unless proven to be not a final expression of terms (RK 209-3)
- (iii) Merger clause is not a safe guard but could help to determine the integration. (Masterson)

#### (c) Effect

- (i) Discharge prior inconsistent agreement (RK 213-1), prior written agreement or contemporaneous oral agreement (UCC 2-202)

- (ii) Evidence of prior or contemporaneous agreements or negotiations is not admissible in evidence to contradict a term of writing. (RK 215)
  - (1) May be admissible to a question of interpretation (RK 215 comment b)
- (iii) May be explained or supplemented by course of performance, course of dealing, or usage of trade (UCC 2-202)
- (iv) If not binding, voidable and avoided, the only effect is to render inoperative a term which would have been part of the agreement if it had not been integrated. (RK 213-3)

### 3.3.2. Completely integrated agreements

#### (a) Definition

- (i) A complete and exclusive statement of the terms of the agreement (RK 210)

#### (b) Determination

##### (i) RK

- (1) Written contract format may be decisive on completeness in absence of credible contrary evidence. (RK 210 comment b)
- (2) Writing is not sufficient for completeness, wide latitude must be allowed for inquiry into circumstances bearing on the intention of the parties. (RK 210 comment b)
- (3) By comparison with the other agreement (Gianni)

- \* Whether parties, situated as were the ones to the integrated contract would naturally and normally include the separate one if it were made.
- \* If they relate to the same subject-matter, and are so interrelated that both would be executed at the same time and in the same contract, the scope of the subsidiary agreement must be taken to be covered by the writing

(4) Not complete, if the writing omits a consistent additional agreed term which (RK 216-2)

\* is agreed to for **separate** consideration or

\* might **naturally** be omitted from the writing

(ii) UCC

(1) Whether the term would definitely come on the contract. If not, the parol evidence proving it could come in. (UCC 2-202)

(2) UCC is more favorable to parol evidence

(iii) Merger clause is not sufficient for completeness (*LS Heath & Son*)

(c) Effect

(i) All general effect of integrated agreements

(ii) Consistent additional terms not reduced to writing may not be shown (RK 210 comment a)

(iii) Discharge prior agreement within its scope (RK 213-2)

(iv) Evidence of a consistent additional term is not admissible to supplement. (RK 216-1)

(v) May NOT be explained or supplemented by consistent additional terms (UCC 2-202)

### 3.3.3. Partially integrated agreements

(a) Definition

(i) Other than the completely integrated agreements (RK 210)

(b) Effect

(i) All general effect of integrated agreements

(ii) Consistent additional terms not reduced to writing may be shown (RK 210 comment a)

- (iii) Evidence of a consistent additional term is admissible to supplement. (RK 216-1)
- (iv) May be explained or supplemented by consistent additional terms (UCC 2-202)

#### 3.3.4. Collateral agreement doctrine (Materson)

- (a) Overview
  - (i) The principle that in a dispute concerning a written contract, proof of a second (usu. oral) agreement will not be excluded under the parol-evidence rule if the oral agreement is independent of and not inconsistent with the written contract, and if the information in the oral agreement would not ordinarily be expected to be included in the written contract
  - (ii) Collateral agreement has no separate consideration
    - (1) Otherwise it forms a separate contract and can even contradict the written agreement
- (b) Elements of an admissible contemporaneous oral agreement
  - (i) It must not contradict express or implied provisions of the written contract; and
  - (ii) It must be one that parties would not ordinarily be expected to embody in the writing, or, put in another way, an inspection of the written contract, read in the light of surrounding circumstances, must not indicate that the writing appears to contain the oral engagements of the parties, and to define the object and measure the extent of such engagement

## **Chapter 4 Relief from Promises**

### **1. CAPACITY**

- 1.1. Contract with incapable people is voidable at incapable's discretion (RK 12, 14)
  - 1.1.1. Infants or mental patients
  - 1.1.2. Implication: dealers may become unwilling to deal with incapable people
- 1.2. Statement in the contract to claim capacity cannot validate the contract (Kiefer)
  - 1.2.1. Rationale: such statement could be deceit.
- 1.3. Seemingly adult can not validate the contract (Kiefer)
  - 1.3.1. Rationale: the line has to be drawn somewhere
- 1.4. Exception to capacity rule
  - 1.4.1. Necessity (Kiefer dissenting)
  - 1.4.2. Contract of marriage
  - 1.4.3. Contract to support an illegitimate child (Kiefer)
- 1.5. Adults can void or affirm a contract entered into when they were minors
  - 1.5.1. If void, the contract must be made reasonably recently
  - 1.5.2. If affirm, it could be in form of payment
- 1.6. Voiding incapable people should pay restitution
  - 1.6.1. Sellers could be punished for dealing with incapable people

### **2. DURESS AND PRE-EXISTING DUTY**

- 2.1. No reasonable alternative choice is the test for duress (RK 175)
  - 2.1.1. Example: physical compulsion and threat
- 2.2. Duress makes the contract voidable (Alaska Packers)
- 2.3. Modification of contract with good explanation is okay (RK 89; UCC 2-209)

2.3.1. Ethnical practice in business dealing can justify modification of contract (Schwarzreich; Watkins)

(a) Example: unforeseeable event

2.3.2. Only good faith is required (UCC 2-209)

### **3. CONCEALMENT AND MISREPRESENTATION**

3.1. Active concealment makes the contract voidable (RK 160)

3.2. Fraudulent or material misrepresentation of facts makes the contract voidable (RK 162, Kannavos)

3.2.1. Buyer's failure to do due diligence can not immune seller's liability (Kannavos)

3.2.2. In answering an inquiry, the truth must be given. (Vokes)

3.3. Non-disclosure of facts only in some occasions makes the contract voidable (RK 161)

3.3.1. Failure to correct some already stated which found to be incorrect

3.3.2. Non-disclosure is not in good faith and disclosure would correct a basic assumption of the other party

(a) Termites in the house is not basic assumption (Swinton)

3.3.3. Rationale: People tend to know their need best. Inefficient to require the other party to guess what they want.

3.4. Experts can benefit from the intentional non-disclosure

3.4.1. Rationale: encourage more discovery (productivity theory)

3.5. Statement of opinion should not make the contract voidable in arm length transaction

3.5.1. Special relationship between the parties can make the opinion become fact (RK 169)

(a) Relationship of trust and confidence

(b) Experts

3.5.2. Rationale:

- (a) Everybody has the freedom to express opinion
- (b) If opinion equals fact, no advertisement
- (c) But fiduciary has the duty to give objective statement

**4. ADHESION CONTRACTS AND UNCONSCIONABILITY**

4.1. Conscionable exculpatory clause is enforceable (O'Callaghan)

4.1.1. Conscionable test

- (a) Benefit to both parties
- (b) Market competition

4.1.2. Rationale: parties have the right to adjust their rights if well informed

4.1.3. Legislature has the power to adjust the market

4.2. Procedure unconscionability

4.2.1. Reasonable notice should be given for exculpatory clause (Klar)

4.2.2. Confusing clauses (in tiny font) in adhesion contracts should be void (Henningsen)

- (a) Parties would reasonably believe he owns the right contrary to the contract provision

4.3. Adhesion contract

4.3.1. Reasonable understanding of the adhesion contract is adopted, even if the party has read the provisions (RK 211)

- (a) Rationale: People usually will not read adhesion contracts

4.3.2. Provisions which would be reasonably resisted by the party is not part of the contract (RK 211-3)

4.3.3. Unconscionable clause in adhesion contract is unenforceable (O'Callaghan dissenting, Henningsen)



- (a) Market failure: uniform clause in the market
- (b) A reasonable man would believe he owns the right excluded by the exculpatory provision

#### 4.4. Substance unconscionability

##### 4.4.1. Unconscionable contractual term is unenforceable (UCC 2-302; Williams; Jones)

- (a) Unconscionability test (UCC 2-302; Williams)
  - (i) Whether the terms are so extreme as to appear unconscionable according to the mores and business practices of the time and practice.
- (b) Factors to be considered
  - (i) Business practice of the time
  - (ii) Contract parties' status
  - (iii) Manner in which contract was entered
- (c) Excessive price contract can also be unenforceable (Jones)
  - (i) Fulfill the unconscionability test above
  - (ii) Must be very cautious since judgment price can hardly substitute the contract price

4.4.2. Rationale: respecting party's contractual right does not mean having to assist the performance of the contract.

4.4.3. Practical note: Unconscionability doctrine is rarely applied. The court goes from procedural unconscionability to adhesion contract to substance unconscionability.

4.4.4. Legislature is more suitable to decide the substance unconscionability

## 5. MISTAKE AND FRUSTRATION OF PURPOSE

### 5.1. Overview

5.1.1. Mistake is unawareness of what existed

- 5.1.2. Event is what occurred after the contract was made
- 5.2. Immaterial mistake (tough) can not void contract (Steers; Transatlantic)
  - 5.2.1. Tough standard
    - (a) Mistake only increasing fee is tough
    - (b) Mistakes to market condition and financial ability is tough (RK 152 comment b)
  - 5.2.2. Contract can be modified (Watkins)
  - 5.2.3. Rationale: No mutual assent was harmed.
    - (a) If foreseeable, there is mutual assent
    - (b) If immaterial, there is mutual assent
- 5.3. Material mistake (frustration of purpose) makes contract voidable unless risk is allocated (RK 152; Renner)
  - 5.3.1. Material Standard
    - (a) Frustration of purpose: must be as to a basic assumption of the contract (RK 152, 153)
    - (b) Mistakes must have material effect on the performance
      - (i) To be measured by any way of relief reformation, restitution or otherwise
  - 5.3.2. Rationale:
    - (a) Lack of assents: facts occurred before the contract but the party did not know
    - (b) Mistake is usually unintentional (no fraud in misrepresentation and concealment)
  - 5.3.3. Allocation of risk (RK 154)
    - (a) Force majeure or event triggering term in the contract
      - (i) Rationale: mutual assents again
    - (b) Condition terms

- (c) One has only limited knowledge but treats his limited knowledge as sufficient bear the risk, i.e. **sellers** (Diamond case)
  - (i) Policy reason: productivity theory
- (d) Windfall theory: it just depends on who get the property who get the loss or value
- (e) Cost of avoidance theory: those people who can more easily take the risk bear the risk
- (f) Productivity theory: those people who can create value should not bear the risk

5.4. Restitution damage is available (Renner)

5.4.1. Rationale: No assent, put everything back to no contract status

## Chapter 5 Performance and Breach

### 1. CONDITIONS AND MITIGATION

#### 1.1. Express Condition

##### 1.1.1. Conditions expressly stated in the contract

- (a) No fulfillment of condition, no contract
- (b) Example: condition precedents, condition concurrent

##### 1.1.2. Failure to meet express condition would excuse performance

##### 1.1.3. Conditioning party can waive the condition and also has the right to insist on condition (Luttinger)

##### 1.1.4. Very hard to get restitution

#### 1.2. Mitigating condition effect

##### 1.2.1. Prevention doctrine

- (a) Party who prevent the condition to be met can not excuse his performance

##### 1.2.2. Waiver doctrine (McKenna)

- (a) Party who consistently waived condition can not excuse his performance based on condition

- (i) Rationale: reliance

- (b) Party can not still insist condition to be applied in future situation

##### 1.2.3. Forfeiture avoidance doctrine

- (a) The court would interpret the contract to avoid forfeiture

- (i) Interpret condition of satisfaction to be reasonably satisfaction by third party standard

- (b) Parties express intention is respected

- (i) Parol evidence is admissible in proving conditions

(c) Constructive condition and substantial performance rule

1.3. Duty

1.3.1. Breach of duty would entitle expectation damages

1.3.2. Restitution is still available (Britton)

1.4. Constructive condition

1.4.1. Duty whose performance logically proceeds to the other party's duty

1.4.2. Duty constructed by the court to be **constructive condition** (Jacob & Young)

1.4.3. Substantial performance rule

(a) Substantial test: whether the performance meets the essential purpose of the contract (Plante)

(b) Substantial performance would excuse constructive condition (Jacob & Young)

(i) The other party cannot excuse performance

(ii) Same function as material breach

(c) In express condition, only full performance would trigger other party's performance

(d) Even if substantially performed, the party can still claim for expectation damages

(i) Could be disputes on diminution in value remedy or specific performance remedy (Jacob & Young)

1.4.4. Party who fails to substantially perform (fails to fulfill constructive condition/material breach) can still claim for restitution (Britton)

**2. BREACH AND ANTICIPATORY REPUDIATION**

2.1. Material breach (RK 237)

2.1.1. Partial breach and material breach entitle damages claim

- 2.1.2. Only material breach can suspend performance (Walker)
  - (a) Material test: all relevant factors (RK 241)
- 2.2. Total breach (Walker)
  - 2.2.1. Repudiation and breach of material terms
  - 2.2.2. Aggrieved party has the right to terminate the contract and sue for damages
- 2.3. Anticipatory repudiation (Hochster; RK 253; UCC 2-610)
  - 2.3.1. Repudiation of material performance entitles the aggrieved party to
    - (a) Suspend performance; and
    - (b) Sue for damages immediately; or
    - (c) Wait until the performance is due
  - 2.3.2. Rationale: repudiation destroy the expectation
  - 2.3.3. Repudiation could be revoked unless the aggrieved party has changed position due to repudiation (UCC 2-611; Hochster)
- 2.4. Assurance of performance (RK 251; UCC 2-609)
  - 2.4.1. Must have reasonable ground for insecurity
    - (a) Reasonable ground to be determined by commercial standards
  - 2.4.2. Right to request assurance
  - 2.4.3. Right to suspend performance until assurance is given
  - 2.4.4. Failure to provide assurance within reasonable time is a repudiation
- 2.5. Restitution claim is available for breaching and repudiation party (Walker, Hochster)

## Chapter 6 Remedies

### 1. OVERVIEW

#### 1.1. Expectation damages

1.1.1. What would be **the aggrieved party's interests** if the contract is performed (Charter Communications)

1.1.2. Only compensation, no penalty (Charter Communications; Snepp; Benkowskis)

(a) But the parties can contract with liquidated damages

#### 1.2. Reliance damages (RK 90, 349)

1.2.1. What would be **the aggrieved party's interests** if the contract has never been performed

1.2.2. Normally available in non-commercial contract, i.e. medical contract, where it is hard to prove expectation damages (Sullivan)

#### 1.3. Restitution damages (RK 371)

1.3.1. Reasonable cost of the enrichment in the claimant's position; or

(a) Only reasonable cost in case of emergency medical help

1.3.2. Reasonable value of the enrichment

1.3.3. Injured party has the right to select between value and cost (RK 371 Illustration 1)

### 2. MEASURING THE EXPECTATION INTEREST

#### 2.1. General formula

2.1.1. Expectation damages = loss in contract value + other loss - cost avoided - loss avoided

2.1.2. Expectation damages = loss in contract value + other loss + reliance cost – performance cost – loss avoided

2.1.3. Expectation damages = profit + other loss + reliance cost – loss avoided

## 2.2. Profit

### 2.2.1. Loss in contract value minus cost of performance

- (a) Cost of performance include fixed cost and variable cost (Viek)

### 2.2.2. Profit for the whole contract (Rockingham)

- (a) Even if stop production due to the breach
- (b) But subject to mitigation restriction

### 2.2.3. Gained by market price plus difference (UCC 2-723)

- (a) For losing contract, expectation damages could be 0.
- (b) Aggrieved party has to prove the fair market price
- (c) Such gain could exceed the actual lose (Tongish)
  - (i) In fixed price situation
  - (ii) Rationale: discourage damage to insure an efficient market

### 2.2.4. Cover right (UCC 2-706, 2-712)

- (a) If resell or repurchase in good faith and in a commercially reasonable manner, the price difference can be recovered
- (b) Aggrieved party only has to prove the good faith and commercial reasonableness. (Laredo)
  - (i) Policy: Encourage party to proceed the contract
- (c) Not mandatory to buyer and seller, but law push you to cover
  - (i) If no cover right, the aggrieved party has to prove the fair market price

### 2.2.5. Subsequent sale

- (a) Sellers can claim the cover is subsequent sale rather loss avoidance
- (b) Sellers can get double the profit
- (c) Element of the subsequent sale
  - (i) Seller's capacity to produce more



- (ii) Potential buyer
  - (iii) Profitability for the subsequent sale
- (d) No available in employment contract since nobody can serve to masters.
- 2.2.6. Certainty requirement (Fera)
  - (a) No speculative profits should be recovered
  - (b) Profits with sufficient evidence is recoverable
- 2.3. Other losses
  - 2.3.1. Incidental damages (UCC 2-710, 2-715)
    - (a) Expenses of the cover and other incidents
  - 2.3.2. **Consequential losses** (RK 351; UCC 2-715)
    - (a) Caused by the breach
    - (b) Only for buyers
      - (i) Since buyers are more easy to be harmed by defect products, while seller can rarely be harmed by money (delayed payment of money)
    - (c) Must be reasonably known to the breaching party (RK 351; Hadley)
      - (i) Consequential losses under ordinary situations
      - (ii) Or consequential losses under special situations which have been communicated to the buyer
    - (d) Buyer must mitigate consequential damages
      - (i) Using cover right
  - 2.3.3. Emotional disturbance (RK 253)
    - (a) Kind of consequential damage
    - (b) Remedy for emotional disturbance is rarely available
    - (c) Except the breach accomplishes a body injure

- (d) Except contract or breach has a particularly likely risk
    - (i) i.e. contracts for carriage of dead bodies
- 2.4. Reliance cost
  - 2.4.1. Cost have been undertaken for performance
    - (a) Cost of performance indicates total cost of performance
- 2.5. Loss avoided
  - 2.5.1. Obligation to take affirmative action to mitigate loss
    - (a) Obligation to stop producing waste (Rockingham, RK 350)
      - (i) Exception in unfinished goods (UCC 2-704-2)
  - 2.5.2. If mitigation was unsuccessful, no loss would be avoided (RK 350)
- 3. SPECIFIC PERFORMANCE**
  - 3.1. Specific performance is only available when money remedy is inadequate (RK 359)
    - 3.1.1. Rationale:
      - (a) Market economy could allow substitute
      - (b) Costly to supervise the specific performance
    - 3.1.2. How to decide inadequate (RK 360)
      - (a) The difficulty of proving damages with reasonable certainty
      - (b) The difficulty of procuring a suitable substitute performance by means of money awarded as damages
    - 3.1.3. Unique contract would make money remedy inadequate
      - (a) Land contract and personal service contract are unique
  - 3.2. Law cannot order personal service but can order injunction (RK 359)
    - 3.2.1. Common in sport law
    - 3.2.2. Injunction could make parties to negotiate the damages

- 3.2.3. When to order a injunction – Economic Prospective (Walgreen)
- (a) When it is more costly for the court to measure the damages than for the parties to negotiate

3.2.4. Pros

- (a) Save the court the cost to determine the damages

3.2.5. Cons

- (a) Parties has to negotiate within a certain range (bilateral monopoly)

3.3. Specific performance under UCC 2-716

3.3.1. Goods are unique

- (a) i.e. brought for personal, family or household purposes

3.3.2. Inability to cover or cover effects would be unavailing

3.3.3. Goods are ordered under reservation; or

3.3.4. Satisfaction of the security interest in them has been made or tendered

3.3.5. Trend in UCC is to compare SP with money damage to see which is more justice

- (a) Often result in SP

**4. REMEDY RULE UNDER UCC**

	General	Cover Right	Expectation Damage (Fair market price)	SP
Buyer	711	712	713	716
Seller	703	703	708	709

## **5. DIMINUTION IN VALUE RULE**

- 5.1. Diminution in value rule would apply, if expectation damage would cause unreasonable economic waste. (Jacob & Young; Peevyhouse; RK 348-2)
  - 5.1.1. When the cost of completing performance or remedying defects is disproportionate to the probable loss to the aggrieved party (RK 348 comment c)
  - 5.1.2. Example: reconstruction and undoing the whole project
- 5.2. Exception in real desire plus intentional breach (Grove)
  - 5.2.1. Real desire of the party should be respected
    - (a) The court need to figure the read desire of the party
    - (b) But the party does not have to complete the performance with money
  - 5.2.2. Intentional breach indicates breach would create more value than expectation damage

## **6. LIQUIDATED DAMAGES**

- 6.1. Pros: more certain between the parties
- 6.2. Cons: could be unconscionable
- 6.3. Reasonable liquidated damages would be upheld (RK 356; UCC 2-718)
  - 6.3.1. Reasonable in light of anticipated damage or actual damage (Wasserman);  
or
  - 6.3.2. It would be hard for parties to calculate the damage
- 6.4. Unconscionable liquidated damages is unenforceable (Wasserman)
  - 6.4.1. Way out: put liquidated damages as award