

## Nature and limits of contract

### CASES

<i>Shaheen</i>	Cannot enforce a contract promising to make a person sterile because the child born was perfectly healthy. Why award damages when nothing bad came out of it?
<i>Baby M</i>	Enforcing a contract for the sale of a baby is against public policy.
<i>Carnival</i>	An otherwise fair term in a contract is not unconscionable merely because it is not negotiated, not understood, or not read by the promisor. Also assumed that by allowing these forum-selection clauses, the cost savings were passed down to the consumer.
<i>Caspi</i>	Same principle as <i>Carnival</i> .
<i>Odorizzi</i>	Court holds no duress by improper threat, but there was undue influence. Factors to consider include inappropriate bargaining time and place, emphasis on consequence of delay, multiple persuaders, insistence there is no time to get counsel. Adler thinks there might have been duress by improper threat, since blackmail is a tort and crime (see R2nd §175;176)
<i>Williams</i>	Dragnet clauses (keeping a balance on each item until entire balance is paid) could be considered unconscionable.

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## Remedies

### EXPECTATION DAMAGES

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<i>Tongish</i>	Tongish was supposed to sell to Coop, who was then supposed to sell to Bambino. Tongish sold to Thomas instead. Coop sues. Adler says court's reasoning is in error. Court says there is a conflict between UCC §1-106 (thinks this awards handling fee) and UCC §2-713 (market price less contract price). Adler believes there was not a conflict between UCC §1-106 and UCC §2-713. Both provisions would have been the difference between market price and contract price because <b>it shouldn't matter what Coop was going to do with the seeds.</b>
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### FORESEEABILITY – REMOTENESS OF HARM

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<i>Hadley</i>	In an action for breach of contract, plaintiffs are only entitled to recover damages that both parties may reasonably consider as arising naturally (according to the usual course of things) or that may reasonably be supposed to have been contemplated by both parties, as the time of contracting, as the probable result of a breach of the contract. Special circumstances should be communicated by the plaintiff to the defendant.
<i>Martinez</i>	<i>Hadley</i> allowed for harms that should have been foreseen, and does not require the plaintiff to show that the actual harm suffered was the <i>most</i> foreseeable of possible harms. Capital goods such as machinery have a use value that may equal the rental value of the equipment.
<i>Morrow</i>	Under the tacit agreement test, the plaintiff must inform the defendant as to the nature of the particular circumstances giving rise to the special damages prior to entering the agreement. If the special circumstances had been known, the parties might have specially provided for the breach of contract by special terms.

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### UNCERTAINTY OF HARM

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<i>Dempsey</i>	<b>Lost profits</b> not proven to a reasonable degree of certainty are purely speculative, and thus cannot be rewarded. (Adler says jury should consider similar evidence from other prize fights). <b>Expenses prior to contract</b> did not flow from and were not the result of the breach. (Adler says <i>Anglia</i> makes more sense). <b>Expenses for attempt to gain compliance after repudiation</b> are not awarded because promise incurs expenses at its peril (similar to mitigation doctrine). <b>Necessary expenditures to promote the fight</b> is classic reliance recovery. <b>Expenses after contract</b> to be paid out of gate receipts are not awarded (Adler says unclear why – <b>consider third-party beneficiary</b> ).
<i>Anglia</i>	Pre-contract expenditures can be awarded if they are wasted because of a defendant's breach of contract. (Reliance in this case is the portion of expectation damages that are certain).
<i>Mistletoe</i>	Damages can be reduced when the breaching party can prove a loss. The court presumes that the injured party would have broken even (zero profits on the <i>project</i> ).

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## MITIGATION OBLIGATION

<i>Rockingham</i>	Damages are not recoverable for loss that the injured party could have avoided without undue risk, burden, or humiliation. R2nd §350. Ceasing work is <b>not</b> a burden.
<i>Parker</i>	Adler agrees with the <b>dissent</b> : substitute performance may be different or inferior to the performance promised under the contract, or may require the promisee to incur additional costs, but (at least in the employment context) it may still be unreasonable for the promisee not to pursue or accept such performance. Mitigation is supposed to minimize the unnecessary personal and social (e.g. inefficient use of labor) costs of contractual failure. If injured party fears that accepting the substitute would have been a settlement, then acceptance should be made conditional on preserving the claim. <b>Majority</b> : No obligation if different and inferior, regardless of degree, will reduce the need for the fact-finder to calculate imponderables. This reduces risk on the <i>victim</i> of breach regarding such calculation, particularly important where the objection is moral.
<i>Neri</i>	A <b>lost volume</b> seller who makes a substitute transaction is still entitled to damages if it could have made <b>both</b> transactions if there had been no breach. This is the case of a mitigation obligation, but lack of a mitigation opportunity.

## Specified damages

### CASES

<i>Kemble</i>	Specific damages are penalty if a very large sum should become immediately payable, in consequence for the nonpayment of a very small sum. Applies even if the actual breach was not minor. Parties cannot simply recite that specific damages are not a penalty. ( <b>Different from R2nd §356</b> , which suggests enforcement of specific damages even if the amount would be disproportionately large compared to a breach that <i>might</i> have occurred).
<i>Wassenaar</i>	Parties specify damages to avoid uncertainty, avoid litigation expenses, substitute for anticipated inadequate judicial award, and provide an incentive for economic efficiency (roller coaster example). Factors favoring enforcement: <b>intangible injury</b> , such as to reputation, means that a full salary to a fired employee is not necessarily overcompensatory. Intangibles also make <b>proof difficult</b> .
<i>Lake River</i>	Specified damages must be (1) a reasonable estimate at the time of contracting of the likely damages from breach, <b>and</b> (2) the need for estimate at that time must be shown by reference to the likely difficulty of measuring the actual damages from a breach of contract <i>after</i> the breach occurs. Interaction between the two prongs. If damages would be easy to determine at the time of contracting, or if the estimate greatly exceeds a reasonable upper estimate of what damages are likely to be, then it is a penalty. ( <b>No retrospective component</b> , unlike R2nd §356).

## Specific performance

### CASES

<i>Loveless</i> (real estate)	Because <b>real estate</b> is presumed to be unique, real estate contracts are presumptively specifically enforceable. (But remember not all land is unique). Resale price of the house, if it does not establish the true value of the land (as determined by market price), are inadequate and should not determine damages (similar to <i>Tongish</i> ). As a result, true expectation damages difficult to prove, making specific performance a valid option.
<i>Cumbest</i> (goods)	Specific performance ordered because stereo sold had irreplaceable parts, some difficult to replace, and sentimental value.
<i>Scholl</i> (goods)	No specific performance in sale of car.
<i>Sedmak</i> (goods)	Specific performance ordered in a Corvette characterized as a “Pace Car.” Uniqueness, or other circumstances justifying specific performance, depends on whether essentially similar goods are available for reasonably easy cover. These factors affect if money damages can be adequately determined.
<i>Mary Clark</i> (services)	Uniqueness is a factor, but one should also consider the need for judicial supervision and the prohibition on indentured servitude when deciding on specific performance for services. A “continual right of command” over the promisor is against public policy. (Note: separate from this case, you can still try for a <b>negative injunction</b> limited in scope, geographical reach, and length of time. However, the effect is to prevent unquantifiable injury to the promisee, rather than to compel performance.)

## Restitution

### CASES

<i>Bush</i>	Restitution is ordered even when performance would have resulted in loss for the non-breaching party. Presumption that there are zero expectation damages. Negative expectation damages are not awarded to the breaching party.
<i>Britton</i>	Breaching party can recover for partial performance: <b>restitution is a default rule</b> , so parties <b>could expressly agree to no-recovery-on-breach</b> terms. Employer at least implicitly accepted the benefits of performance, and thus should be bound to pay for them. (Distinguished from the case where a victim of a breach can reject and thus not benefit from part performance, on an object to be created.)
<i>Vines</i>	Presumption in favor of a seller to keep a buyer’s deposit after a buyer’s breach even if the seller could resell the property at the contract price or greater. However, buyer can contest the clause. Consistent with R2nd §374(2)—except <i>Vines</i> adds that if actual damages are <b>zero</b> , then this <i>alone</i> would justify the return of the deposit (aggressive penalty doctrine).
<i>Cotnam</i> (Quasi-contract)	Fairness may require that the beneficiary of another’s efforts in exigent circumstances (no opportunity for negotiation) to compensate the benefactor for her effort. Benefit is measured <i>ex ante</i> (e.g. market value); the benefit <i>ex post</i> is irrelevant (e.g. benefit of a life). Economics might require the beneficiary in the same circumstances to compensate the benefactor for her effort, or the valuable services would not be provided at all.

# Theory of assent

## OBJECTIVE THEORY OF ASSENT

<i>Embry</i>	If the party's words or acts, judged by a <b>reasonable standard</b> , manifest an intention to agree, then there is an agreement. It is irrelevant what may be the real but unexpressed state of his mind on the subject.
<i>Lucy</i>	It does not matter if Zehmer did not intend to sell the farm; what matters is that Lucy reasonably interpreted Zehmer's actions as assent. (Adler: it would have mattered if Lucy subjectively knew that Zehmer was joking, though it might be excluded under a "four corners" approach)

## EXISTENCE OF AN OFFER

<i>Nebraska Seed</i>	Communication that is best understood as an <b>invitation to consider offers</b> from the recipient is an ad, not an offer, despite its form. Court will not fill gaps regarding lack of quantity. (UCC allows for absence of specific price, place for delivery, specified time for delivery, or specific time for payment; in contrast, R2nd §33 says omission of terms might mean there was no offer)
<i>Leonard</i>	Strong presumption <b>against</b> an offer for widespread communication (such as a television commercial). This presumption can only be overcome by clear, definite, and explicit terms. Application of R2nd §33.

## AGREEMENTS IN PRINCIPLE

<i>Empro</i>	Factors leading to a "no agreement" holding: the words "subject to"; the fact that Empro's board or shareholders could decline the purchase, Empro's right to get back a deposit. No option contract unless parties manifested such intent. The letter of intent was used to set the stage for negotiations on details.
<i>Texaco</i>	Despite the contrary language of reservation, there was an agreement because the contract was written in indicative terms ("will receive") and that this agreement in principle was a binding agreement to be supplemented later. Open terms could be filled in by a court if not later agreed on by the parties. Complex transactions might require a more formal writing, but this alone is not dispositive.
<i>Dickinson</i>	Knowledge of an offeror's intent to revoke means the offeree no longer has the right to accept. Knowledge is in essence a revocation of an offer. R2nd §42,43.
<i>Ardente</i>	An effective acceptance cannot be conditioned on the offeror's assent to the offeree's proposal for different or additional terms.

## ACCEPTANCE BY ACTION

<i>White</i>	When offer is made and the parties are not together, acceptance of it must be manifested by some appropriate act. Notice to the offeror is not necessary for there to be a contract, unless acceptance only cannot provide notice in the usual course of events, in some reasonable time. Buying wood for a carpentry project could have been for anyone.
<i>Petterson</i>	Gathering a large sum of money and traveling to deliver it is unlike a carpenter's generic treatment of generic wood, like in <i>White</i> .

## ACCEPTANCE BY INACTION OR SILENCE

<i>Hobbs</i>	Normally, an offeror cannot impose an obligation on an offeree. R2nd §69. However, past practice between the parties can indicate that silence is to be treated as acceptance by inaction.
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## BATTLE OF THE FORMS

<i>Union Carbide</i>	A term is considered material under 2-207(2) if the party would have not agreed to the alteration (e.g. an indemnification clause).
<i>ProCD</i>	A term available only after acceptance can be incorporated when it is not unconscionable and the customer can return the product if he does not assent.
<i>Hill</i>	In this case, the offeror is the computer company and the offeree is the customer. A customer accepts the terms in a computer box by not returning the computer. There is simply an agreement.
<i>Klocek</i>	Same facts as <i>Hill</i> , but the offeror is the customer and the offeree is the computer company. The box terms are found to be a proposal for additional terms by the company and are not incorporated since the contract is not between merchants.

## Interpreting the agreement

### GENERAL PRINCIPLES

<i>Raffles</i>	A term that needs interpretation may signal greater importance to the parties than does a gap. An express term that cannot be interpreted reliably, then, might justify the negation of a contract. (Thus, if this case did not mention "Peerless" at all, then we might be more inclined to try to fill in the gap, instead of declaring no contract)
<i>Oswald</i>	<b>"Dog that didn't bark" case.</b> If the seller only a subset of the coins, then she would have offered to sell the coins from the "Rarity" collection soon after the buyer agreed to buy "The Coins." However, because no such conversation took place, the seller probably is not telling the truth.

### GAP FILLING

<i>Central Iron Works</i>	Both parties in a requirement contract have a duty to perform in good faith. Speculation is not allowed and is an indication of an illusory promise. Needs are indicated by market conditions. The party is only allowed to buy as much as she needs, not what she desires.
<i>Wood</i>	Agreement to pay fraction of profits as part of exclusive use for designs has an <i>implicit</i> promise to use reasonable efforts to promote the designer's work, giving the promise mutuality and binding effect. (Adler: the profit incentive alone would have been enough to drive Wood to work; no need to supply obligation).

## Extrinsic evidence

### CASES

<i>Thompson</i>	Do not admit extrinsic evidence about a contemporaneous oral agreement when a written agreement imparts a complete legal obligation (it is comprehensive).
<i>Brown</i>	Admit extrinsic evidence when a subject is not included in the written agreement in order to find out whether there was agreement on the subject.
<i>Pacific Gas</i>	Because words have no meaning apart from the context they are used, you should always allow extrinsic evidence. This is costly, but likely to give the parties what they bargained for.
<i>Trident Center</i>	Citing <i>Pacific Gas</i> , admit extrinsic evidence even when plain meaning is unambiguous (reluctantly cites this case)

## Consideration

### CASES

<i>Johnson</i>	A condition of a gift is not a bargain. Johnson did not give the gift to induce the university to pay off its debt.
<i>Hamer</i>	Consideration found; the uncle made an offer to induce his nephew to stop drinking and smoking before 21. R2nd §79 says consideration only requires an <i>actual</i> bargain.
<i>Stilk</i>	Court found that there was no consideration because the promisor agreed to do no more than what he was obliged to do; Adler says there was consideration because the employer made a bargain: fishermen give up their right to breach in exchange for higher pay
<i>Alaska Packers</i>	Same facts as <i>Stilk</i> ; Adler says these two cases are about modifications lacking good faith. R2nd §89; UCC §2-209. The rule should be to enforce the pay raise only if the promisor would not have performed absent such a modification.
<i>Stump Home</i>	Slight consideration (give up rights for a peppercorn) qualifies as enough to make a modification enforceable, and that could be the result of coercion. Best to look into whether or not the modification was made in good faith, not whether or not it is supported by consideration.

## Promissory estoppel

### CASES

<i>Rickets</i>	Classic promissory estoppel case. Granddaughter who quits her job after grandfather promises her money. Gift was not conditioned on this event (unlike <i>Hamer</i> ).
<i>Baird</i>	Subcontractor revokes a bid; no contract.
<i>Drennan</i>	Subcontractor revokes a bid, but the firm offer to keep the offer open until a reasonable time after Contractor learns of whether he won the construction project is enforceable, once the Contractor incorporated the Sub's bid into its own. Promissory estoppel applied.
<i>Goodman</i>	Adler: Not a true promissory estoppel case, because the distributor did not make a promise, only representations that a franchise would be granted. Or we can say the distributor made an implicit promise to cover the costs of the would-be franchisee's expenses—a bargain. (If you were simply an acquaintance of the CEO, and you told the would-be franchisee that you think they were going to be given a franchise, there would be no contract if you didn't get anything from it. It would be a tort if the representation had been intentionally false.)

## Breach and Constructive Condition

### CASES

<i>Jacob &amp; Youngs</i>	Held: breach was trivial and unintentional, so the court awarded the (very small) market-based damages. ( <i>Adler says this makes no sense since it was "willful" for them to put in the pipe. What is different here is that there is <b>change in circumstance</b> from the time of contracting versus the time of breach for the cost of the Reading pipe. At the time of contracting, Reading pipe was cheap to put in; at the time of breach, it was expensive. <b>This change in circumstance means no idiosyncratic value</b>, and this justifies awarding market-based damages.</i> )
<i>Peevyhouse</i>	Dissent: Because there are no changed circumstances, the cost of completion is likely incorporated the contract price and thus likely reflects the promisee's true, albeit idiosyncratic value. <b>Cost-of-completion remedy</b> is appropriate as an interpretation of the parties' implicit bargain and an accurate measure of true expectation damages.
<i>Groves</i>	Dissent: market-based damages would give the plaintiff the benefit of his bargain, because property was no unique or specially desirable for a particular or personal use. Adler agrees with the dissent.

## Failure of a Basic Assumption

### MISTAKE

<i>Sherwood</i>	Adler agrees with the dissent, which says no mistake. There was a conscious gamble by both sides as to whether the cow was barren or fertile, and the seller simply made a bad bet.
<i>Nester</i>	Mutual mistake case. Nester made only one payment for all the wood he got, instead of multiple payments. He argued it was because wood was of lower quality. Usually, this sale of goods situation would produced an implied warranty issue (under UCC §2-314) which would let the party modify the agreement, but here warranty was waived through the "as is" deal on quantity or quality.
<i>Wood</i>	Mutual mistake case. If one party has better (i.e. cheaper) access to the information at issue (is it a topaz or diamond), then we should hold that party responsible, whether that means enforcing or avoiding the contract.
<i>Laidlaw</i>	Unilateral mistake case. If one party has more information than the other party, he only has to disclose under certain conditions. If the information is proprietary, or earned only through effort, then no duty to disclose (we want to give people the incentive to go out and find valuable information; if they could not keep secrets, no one would go out and discover valuable information). If the information came across from luck, then there is a duty to disclose. R2nd §161 has a list of when you <i>must</i> disclose.

### FRUSTRATION OF PURPOSE

<i>Paradine</i>	Lessee still had to pay even though there was an extraneous event. A party seeking relief on the basis of impossibility needs to show that the circumstances giving rise to the impossibility were not foreseen or reasonable foreseeable.
<i>Taylor</i>	Court holds that because the music hall burned down, the owner was not liable; he did not have to pay for the lessee's expenditures in advertising. Adler says this case could have had the <b>opposite</b> result under the <b>least-cost-avoider approach</b> . The owner would be liable because he was in the best position to avoid the destruction-by-fire. (However, this case might still be correctly decided if we accept the industry-standard excuse.)
<i>Krell</i>	Extension of <i>Taylor</i> holding. Written contract was silent as to the reason why the rooms were to be leased, but the court allows extrinsic evidence to show that the lessor was renting the rooms for the coronation. Interpretation here helps the court decide if they should release the parties from responsibility.

