1. Nature and Limits of Contract
2. A contract is “a promise or set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes a duty” (R1)
   * 1. A contract is a legally enforceable promise
     2. A promise is a “manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promise in understanding that a commitment has been made” (R2)
        1. Objective standard
        2. Manifestation can be nonverbal (R4)
        3. Promisor, promisee, and beneficiary (third party)
   1. An agreement is a “manifestation of mutual assent” and a bargain is an “exchange” of promises or performance (R3)
      1. A bargain is generally required to form a contract (R17)
   2. Contracts will not be enforced if they are against public policy (R178)
      1. Shaheen
         1. Needs to be universal public sentiment, which this case was not
      2. Baby M
         1. Trial
            1. Primary issue is the child’s best interest but still looks at the contract
         2. Appellate
            1. Contract contradicts statute that forbids paid adoption (baby selling)
            2. Forced relinquishment of parental rights is also illegal
      3. Specific public policies include restraint of trade (R186-88), impairment of family relations (R189-91), and interference with other protected interests (R192-96, 356)
         1. Should judges be making policy judgments?
   3. Contract is void if no party can enforce it but voidable where at least one party has an option to enforce or avoid the agreement (R7)
   4. Capacity
      1. Guardianship (R13)
         1. Adjudicated for mental illness or defect
         2. No capacity
      2. Mentally Challenged (R15)
         1. Voidable duties
         2. If fair terms and other party is unaware, not voidable if this would be unjust (performance has begun)
      3. Minor (R14)
         1. Voidable duties
         2. Some states opt out for performers, etc.
      4. Intoxication (R16)
         1. If other party has reason to know, voidable duties
   5. Duress
      1. Physical Duress (R174)
         1. Manifestation of assent is not effective regardless of awareness or fairness
      2. Improper Threat (R175)
         1. Voidable
         2. If other party acts in good faith, without reason to know of threat, and relies on promise of provides value
         3. Definition of Improper Threats (R176)
            1. Crimes
            2. Torts
            3. Unfair Exchanges: harms victim but does not benefit threatening party
   6. Undue Influence (R177)
      1. Unfair persuasion of someone over whom the persuader is dominant or to whom the persuader owes a duty of trust
         1. Unfair persuasion can be inferred from unfair bargain, unavailability of independent advice, and susceptibility of person being persuaded
      2. Voidable by victim
      3. If third party exerts the influence and counterparty has no reason to know and relies on promise or provides value, not voidable
      4. Odorizzi
         1. Dismisses improper threat
            1. Threatened to publicize his arrest—blackmail?
         2. Two elements of undue influence
            1. Lessened capacity (tired, stressed)
            2. Application of excessive strength by a dominant subject against a subservient subject

Difficult to tell with no duty of trust

Factors

Unusual place

Insistence on immediacy

Multiple persuaders

Absence of independent advisement

* 1. Unconscionability (R208; UCC 2-302)
     1. Can be substantive or procedural
        1. Trying to prevent “unfair surprise”
        2. Can exclude unexpected terms from a form contract (R211)
     2. A catch-all principle that is rarely used because ending genuine good deals is rarely ok
     3. Court can refuse to enforce the contract, enforce it without the terms, or limit the application of the unconscionable term
     4. A fair term is ok even if not negotiated, understood, nor read by promisor
        1. May have been a surprise, but not unfair
        2. Carnival
           1. Ticket had forum selection clause for Florida
           2. Notice is conceded by plaintiff
           3. Not unconscionable because the terms are reasonable and presumably reflected in the price
        3. Caspi
           1. Microsoft used forum selection clause for Washington
     5. Other approaches are to never or always enforce boilerplate
        1. Never
           1. Higher transaction costs
           2. Still possibility of disparate bargaining power
        2. Always
           1. Customers walk away from bad deals and market adjusts
           2. Customers need to know about the law to always enforce
     6. Williams
        1. Dragnet clause
        2. Scrutinizes the deal to see if there was “meaningful choice”: protect party with little bargaining power who may not have understood the terms
           1. Is this paternalistic? Racist?
           2. More economic concerns—maybe sellers can’t cover costs without such clauses or maybe this will invite competition

1. Remedies
   1. Expectation Interest (R347)
      1. Common law called it “benefit of the bargain”
         1. The court is interest in how much the promisee valued the good/service at the time of contract (such as being willing to pay to clean the house again when the first painter failed)
      2. Subtract the current wealth of the promise from their potential wealth (not necessarily lost profit because reliance damages are found within it)
         1. Includes incidental: particular to the contract, transaction, or goods
         2. Includes consequential: result from the breach
      3. UCC generally adopts common law in “liberally administer[ing]” law to put the promise in “as good a position as if the other party had fully performed” (1-106)
         1. Assumes a liquid market of fungible goods
            1. Can opt to cover and recover the difference (2-712)
         2. Can recover benefit of bargain (2-713)
            1. Uses market price at time of breach because the party can cover after that point
            2. Can recover incidental and consequential damages (2-715)
            3. Recovery can be effected by withholding other payment under other parts of the contract (2-717)
         3. Tongish
            1. Common Law/1-106

Bambino and Tongish have no relationship, so Coop should be able to sue for the difference in market price and contract price

Court says lost profits—the $.55 per unit due to the additional relationship with Bambino

* + - * 1. 2-713

Difference between market price and contract price (arguably the same as common law, but the court sees a discrepancy)

* + - * 1. Grant the more specific award
        2. Encourages more efficient market and discourages breach of contract

If Tongish doesn’t pay damages because Bambino can’t sue, Bambino will only get seed when it’s overpriced; Bambino won’t join the contract on these terms

* + 1. Efficient Breach Theory
       1. Expectation damages lead to efficient performance and repudiation

|  |  |  |
| --- | --- | --- |
| Relation of Contract Price (CP), Cost of Performance (C), and Value of Performance (V). | Perform? (If CP>C, perform. If not, then if V-CP>C-CP, perform; if C-CP>V-CP, breach) (V-CP is damages. C-CP is net loss) | Efficient? (If C>V, breach. If V>C, perform) |
| CP>C>V | Yes | No! |
| CP>V>C | Yes | Yes |
| C>CP>V | No | Yes |
| C>V>CP | No | Yes |
| V>C>CP | Yes | Yes |
| V>CP>C | Yes | Yes |

* + - 1. Did not work in the roller coaster example—liquidated damages did
      2. There is an argument for the policy that we all keep our promises
  1. Reliance Interest
     1. Lost expenditures
  2. Restitution Interest (R373)
     1. Disgorged profits; best thought of as independent of contracts
        1. The goal is preventing unjust enrichment, so overcompensation may result
     2. Bush
        1. The breach saved Bush money
        2. Restitution v. benefit of the bargain
        3. Only understood with two principles:
           1. Restitution is not part of contracts

Which is why benefit of the bargain is unavailable

* + - * 1. Negative damages aren’t allowed

CP>C>V is inefficient without negative damages

* + 1. Breaching promisor can recover restitution (R374)
       1. Only “in excess of the loss that he has caused by his own breach”
       2. Britton
          1. Laborer quits at nine months of a one-year contract
          2. Employer accepted and benefitted from the labor
          3. Pays for the labor less the benefit of the bargain for the remaining time on the contract (R371)

Default rule: court says the parties could contract to not pay for partial performance, but some courts might also deem this a penalty

* + - 1. Vines
         1. Buyers paid a deposit that was designated as liquidated damages; repudiated; market value of home was greatly increased at time of repudiation; want deposit back
         2. Presumes the liquidated damages clause is enforceable but gives leave to disprove this (R374)
         3. Damages should have been measured at breach

If damages were zero, liquidated damages would be a penalty (aggressive version of Bush)

* + 1. Quasi-Contract
       1. Cotnam
          1. Doctors seek payment on unconscious victim
          2. Ex ante market value for the benefit conferred
       2. Trying to incentivize such services in exigent circumstances
       3. Two requirements
          1. No time/opportunity for negotiation

Economic theory confirms the importance of this requirement

* + - * 1. The person would likely accept the service
  1. Limitations
     1. Remoteness (or Foreseeability) of Harm (R351)
        1. Breaching party owes damages that are “foreseeable as a probable result of a breach” because it had “reason to know,” either because it was an ordinary result or a known special circumstance
           1. Probable?
           2. “Reason to know” in UCC 2-715
        2. Hadley
           1. Remote injury is not compensable unless specially agreed on between the parties

“in the contemplation of both parties, at the time they made the contract, as the probably result of the breach of it”

* + - * 1. Hadley chooses a limited liability default rule (efficient in this case)

More likely to reach separating equilibrium because it favors the majority

The minority (higher liability parties) will contract for higher protection because negotiation costs are distinctly lower

Unlimited liability is more likely to reach pooling equilibrium because it favors the minority

The majority (lower liability parties) will be paying a slightly higher blended price, so negotiation costs will seem too high

* + - 1. Hector Martinez
         1. Equipment delivered late
         2. Probability of damage is not necessary

Not remote enough, so promisor should have foreseen the damage from lost use

* + - 1. Morrow
         1. Even some foreseeable damages are not recoverable
         2. “Tacit agreement” test

Probably a minority only in a formal sense

Even Hadley says “the parties might have specially provided for the breach of contract by special terms”

The parties must contract (i.e. make a bargain) otherwise for remote damages to be compensated

Some courts might be ok with notice that has no objection

* + 1. Uncertainty of Harm (R352)
       1. Uncertain expectation damages are compensated with nominal damages (R346)
          1. As an alternative, can award reliance damages (R349)
       2. Dempsey
          1. Lost profits

Deemed to be “purely speculative”

Some courts would listen to evidence from other fights

* + - * 1. Expenses prior to contract

Did not “result from” the breach

Different in Anglia

* + - * 1. Expenses for attempt to gain compliance and attorney’s fees

Mitigation doctrine—promisee incurs expenses at its peril after repudiation

* + - * 1. Expenses after contract

Awards “necessary expenditures,” which is classic reliance recovery

* + - 1. Anglia
         1. Wins claim for precontract expenditures

Strong counterargument: if he’d never entered the contract, he wouldn’t be liable for such damages

* + - 1. Mistletoe
         1. Locke incurs expense in preparation for the contract but was losing money up until the time of breach
         2. Court presumes that profit would have been zero

Either party can prove otherwise (R352 refers to breaching party proving “with reasonable certainty” that the breach saved a loss)

* + 1. Avoidability of Harm/Mitigation Obligation (R350)
       1. Better characterized as a proper basis for relief because the loss could have been avoided despite the breach
          1. This avoids waste (Value should be at the market price
       2. Rockingham County
          1. Different groups said the contract was repudiated or in full effect, so Luten kept building the bridge and sued for money owed under the contract
          2. Limited to expectation damages at the time of the breach

Mitigation was not unduly burdensome because Luten simply had to stop working

* + - 1. Parker
         1. Was the different movie truly “unduly risky, burdensome, or humiliating”? (R350)

Dissent says not necessarily; needs more information for a summary judgment

* + - * 1. The court could have tried to minimize “social” cost (consumption or injury to resources)

Production of the second movie would probably have been efficient for society

Her choice will be based on the damages available to her: if we require mitigation, then she can only sue for the remainder of humiliation if she doesn’t do the movie, so she’ll do the movie because she’ll get humiliation plus the salary

Court probably didn’t want to make such difficult estimations, and this would set a precedent of future, difficult estimations

* + - * 1. MacLaine might have worried that taking the second movie would look like a settlement
      1. Seller Remedies Under UCC
         1. Can resell goods and recover difference in prices (2-706)

Less avoided consequential damages

Includes incidental damages (2-710)

* + - * 1. Can use market price instead (2-708)

For some reason, the code uses time of performance instead of time of repudiation (buyer’s remedy uses time of repudiation 2-713)

Inconsistent

Creates the perverse incentive to perform

* + - * 1. Neri

Limited to smaller of $500 or 20% of performance’s value *unless* seller can establish higher damages through another provision (2-718)

“Lost volume” seller

When damages can’t put the seller in as good a position as performance would have, “the measure of damages is profit” 2-708(2)

* 1. Specified/Liquidated Damages (R356 and UCC 2-718)
     1. General restriction is on punitive remedies
     2. Pros
        1. Avoid uncertainty, avoid litigation expense, substitute for anticipated inadequate judicial award, provide an incentive for economic efficiency, judicial economy, freedom of contract
        2. Economic Efficiency
           1. Addresses an overinvestment problem wherein negotiating parties anticipate compensation from expectation damages and drive up anticipated revenue (and the other party respond to this anticipation)
           2. Overinvestment leads to higher costs
           3. Essentially, they can act as one company
     3. Cons
        1. High damages suggest in terrorem agreement and/or unfair bargaining power
     4. Test
        1. Reasonable in amount
           1. Compare to anticipated and actual amount
           2. Inclusion of actual amount seems insane except that it can be a gauge of what was reasonable to anticipate
        2. Necessary
           1. Did they anticipate that damage would be hard to prove at the time of breach?

This provision makes little sense because they might be trying to avoid litigation expense, so the liquidated damages clause is the parties’ best attempt to forecast damages

* + - 1. The two prongs can sort of compensate for each other
    1. Kemble
       1. Comedian quits, and proprietor is owed 1000 for failure to fulfill “any stipulation”
       2. Court says that the provision would have been a penalty in a small breach
          1. Might depart from R356, which can cover breaches that might have occured
       3. Also, ease of measurement
    2. Wassenaar
       1. Worker wants full salary though he found a job after being fired
       2. Granted
          1. Intangible elements of the firing (such as damage to reputation) are hard to prove and covered by the amount
          2. Employer points out that other damages are easy to prove
    3. Posner’s point: if there’s ever a time to call them penalties, the only measure should be at the time of contract formation
  1. Specific Performance (R357, exceptions in R359-69)
     1. Can also be a negative injunction (R357)
     2. Broadest exception Is when “damages would be adequate to protect the expectation interest of the injured party” (R359)
        1. “Adequate” means “hard to calculate”: difficult to prove or collect, no ready substitute
           1. Tends to coincide with efficient breach because of difficult calculations
     3. Real estate is presumed unique (R360)
        1. Loveless
           1. Exercised option to buy and planned to resell immediately to gain $1000; sellers breach because of the value of improvements
           2. Like Tongish, the resale contract should make no difference
     4. Goods are not presumed unique (UCC 2-716)
        1. Cumbest
           1. Custom built stereo and some parts were hard to replace
           2. At some point, damages would be adequate, but very hard to calculate
        2. Scholl
           1. Corvette was replaceable
           2. Unique, but it’s uniqueness did not contribute to its value
        3. Sedmak
           1. Pace car was not replaceable
           2. Rarity was part of its value
           3. “Hardship” to obtain another one (R364)
           4. Could have bought at auction

What if the bind went above his pay ability

* + - 1. Can essentially similar goods be obtained for reasonably easy cover (R364)
         1. Same considerations for the adequacy of money damages
    1. Personal Services
       1. Considerations include uniqueness and need for judicial supervision
          1. Judge might need to determine “best effort”
       2. Also constitutional concerns; look at the “command” and “control” in the situation
          1. Mary Clark

Degrading and against public policy

* + - 1. Negative Injunctions
         1. The point is to prevent unquantifiable injury to the promisee (rather than punishing performer) (R367)

Dempsey court seemed to be punishing performer

* + - * 1. Look at scope of activity, geographical reach, length of time

1. Theory of Assent
   1. General Theory
      1. “Manifestation of mutual assent” (R17) “requires that each party either make a promise or begin or render performance” (R18)
         1. Can be writing, spoken word, other acts, and (rarely) failure to act (R19)
         2. If a party acts such that he has reason to know that the action will be interpreted as assent, even if he is not assenting, this is considered assent (R19)
      2. Embry
         1. Asked for an extension just as the holidays were starting and boss was heading to a stockholders meeting
         2. “Go ahead, you’re all right” v. “I don’t have time to discuss it right now”
         3. Boss was trying to deflect the question
         4. Embry was right to interpret it as an acceptance
         5. Court says that it can interpret oral statements as a matter of law: no reasonable man could construe boss’s words otherwise
            1. It also says that it interprets all written agreements
            2. Seems to hint at the parol evidence rule
      3. Lucy
         1. Selling of Ferguson farm
         2. Some courts would have simply interpreted the writing
         3. Court notes the lengthy negotiation, writing (twice), wife signing, etc.
            1. Zehmer’s joking/bluff doesn’t matter because Lucy’s objective interpretation was reasonable
            2. If Lucy knew of the joke, different story
   2. Existence of an Offer (R24)
      1. Needs to “provide a basis for determining the existence of breach and for giving an appropriate remedy” (R33)
         1. Gaps can be filled (R204)
            1. But gaps might suggest absence of offer (R33)
         2. UCC is very permissive with finding an agreement and finding a “reasonably certain” remedy (2-204)
            1. Fills gaps like price (2-305), delivery location (2-308), delivery time (2-309), time of payment (2-310)
      2. Nebraska Seed
         1. Communication was considered an advertisement, particularly because of a lack of quantity (though even “while supplies last” works)
            1. Could be an offer because it was personalized and maybe “while supplies last” was implied
            2. Delivery time can be filled
         2. Advertisements are when the addressed party has reason to know that the advertising party does not want to conclude the bargain until further manifestation of assent (R26)
            1. An invitation to consider offers
      3. Leonard
         1. The commercial is an advertisement
            1. Gaps imply this (R33)
            2. Refers to a catalog with details
            3. Reasonably interpreted as a joke
   3. Agreements in Principle
      1. Some manifestations of intent are “incomplete” only because the parties want a written memorial (even if it includes modifications or supplements); such manifestations will be interpreted as contracts (R27)
      2. Empro
         1. Sends a “letter of intent” to purchase Ball-Co’s assets on credit
            1. “Subject to”; it was subject to the board of directors; and right to get back deposit
         2. The contract listed two possibilities for debt instruments
            1. Empro is saying that perhaps one party decided to relent on the subject or at least allow that the breaching party can enforce on terms favorable to the other, making the rest of the terms binding
            2. Empro essentially wants an option that they never paid for
            3. The letter expressed no such intent, and Ball-Co signed with the exact reservations that scuttled the deal; Easterbrook thinks that this uncertainty shows that the parties were interested in continuing to negotiate the deal as a whole
            4. Empro can argue that the companies’ consideration was putting reputations on the line
         3. No reliance damages because no promise to rely on
            1. Anglia can’t help—no agreement in the first place
      3. Texaco
         1. Memorandum of Agreement needed to be ratified by Getty’s board of directors; after it was ratified, press releases announced “agreement in principle” with a specific price per share
         2. Court finds for a contract
            1. The press releases as a whole discussed the shareholders “will” receive, etc.
            2. Jury could believe that there’s a contract despite open terms about the logistics of the sale (could be filled or agreed on later)
            3. Lack of writing for something so complex is persuasive but the jury could reasonably conclude otherwise
      4. Three options
         1. No binding effect
            1. Avoids accidental
         2. Binding effect for agreed terms and fill gaps with background rules
         3. Binding effect for agreed terms and fill gaps in favor of non-enforcing party
         4. Always give binding effect
            1. Avoids lack of agreement from technicalities
   4. Revocation (R36)
      1. Power of acceptance is terminated by rejection, counter-offer, lapse of time, revocation, death or incapacity by either party (R36)
      2. Dickinson
         1. Tried to accept after learning of revocation (but through hearsay)
         2. His knowledge of Dodd’s actions effected the revocation anyway (43)
      3. Mail-box rule is pretty unimportant nowadays
         1. Acceptance is effective as soon as its dispatched (R63)
      4. Limited by option contracts (R25)
         1. Holds offer open to agreed-upon time; literally a “right without an obligation”
         2. A counter-offer no longer ends the offer
         3. Firm offers by merchants are enforceable for a time (UCC 2-205)
   5. Counter-Offer/Mirror Image Rule (R36)
      1. If an acceptance is unequivocal but *proposes* changes, it is effective (R61)
   6. Acceptance by Action
      1. Unless offer is expressly conditioned, acceptance can be made by any reasonable manner or medium (R30)
      2. Beginning performance is interpreted as a promise to complete it (R62)
         1. Similar to UCC 2-204 and 2-206
         2. Can replace notice to offeror unless offeree has reason to know that offeror has not adequate means to learn of the partial performance (R54)
      3. White
         1. Actions were not an unambiguous acceptance because he was a carpenter who would be buying wood anyway
         2. Almost certainly bilateral because otherwise he could have started and walked away whenever he wanted
      4. Petterson
         1. Creditor offers debtor a reduction in mortgage if paid by a specified date
         2. Petterson’s statement of intent to accept came first, but the manifestation of revocation did come before his attempt to accept by full performance
            1. Dissent says his statement was his acceptance, and that the offer reasonably implied such a term
         3. Gathering the money is unambiguous (R45)
      5. Bilateral means that partial performance can create the contract
      6. Unilateral means that full performance by the offeree creates the contract, and only the offeror is left to perform
         1. Offeror only wants results or prove-me-wrong cases
         2. Partial performance is interpreted as an option contract to leave open for specified time or, if unspecified, a reasonable time (R45)
            1. Court might require specific performance of the option, not enforce it and simply require reimbursement of reliance damages, or not enforce it and devise expectation damages according to the probability that a party was going to receive the award (really hard and probably not a plausible solution)
         3. Carlill
            1. Arguably not a reward but a warranty
            2. Prove-me-wrong offers can be revoked, but not warranties
         4. Leonard
            1. Affirms Carlill
   7. Inaction/Silence (R69)
      1. Hobbs
         1. Past acceptance of animal skins manifested assent to the continuing relationship, and unwanted skins needed to be returned in a reasonable amount of time
      2. Express consent is ok
      3. Goods that could be easily returned but are kept could also be interpreted this way
   8. Battle of the Forms (UCC 2-207)
      1. (1) first asks about a “definite and seasonable expression of acceptance”
         1. Essentially clarifies a counteroffer as a reply that expressly conditions itself on additional or different/terms
         2. How can a “confirmation” act as an acceptance?
         3. Failure on this point only means that a contract isn’t formed under (1) and (2)
      2. (2) only addresses “additional” terms
         1. Comment 3 seems to equate this treatment with that of “different” terms
         2. Different terms will probably always fail because the original offer was “notice of objection”
         3. What happens if a different term fails?
            1. Maybe it drops out like “additional” terms
            2. Maybe it knocks out the other term and background rules fill its place
      3. If (1) is satisfied, then (1) and (2) use the forms to determine the agreement’s terms
      4. If and only if (1) is unsatisfied, move to (3) and start looking at parties’ conduct
         1. (3) rejects the “Last Shot Doctrine” by using consistent terms from the forms and supplementing other areas with UCC provisions/background rules
      5. Union Carbide
         1. Terms are material if “consent…cannot be presumed”
            1. Parties will never consent to unfavorable terms
         2. Indemnification of back taxes is a material alteration, and Oscar Mayer never actually assented
      6. ProCD
         1. The box contained a reference to terms inside
         2. Deal now, terms later agreements are common
         3. Acceptance was by conduct so 2-207 has no application
      7. Hill
         1. “Everybody knows” about terms inside and that they can return the product if unreasonable
            1. Customers implicitly agree to this upon purchase
      8. Klocek
         1. Customer is the offeror
         2. Gateway accepts and the terms are a confirmation
         3. No implied terms; apply 2-207
         4. Vendor just needs to say “There are terms inside and you need to return in \_\_\_\_ days if you disagree. Ok?”
   9. E-Commerce
      1. Fight between Hill and Klocek continues: what constitutes notice of the terms?
      2. Intentional conduct that one has reason to know will make the other party infer assent is considered acceptance (UCITA 112; UETA 14)
      3. ABA Working Group on Electronic Contracting Practices suggests “click-wrap” agreements, etc.
2. Interpreting the Agreement
   1. Ascertain the agreement’s meaning (R200)
   2. Role of subjectivity (R201)
      1. Actual meeting of the minds controls
      2. The meaning attached by a party with no knowledge or reason to know of another’s meaning controls over the meaning attached by a party with knowledge or reason to know another’s meaning
   3. With competing subjective interpretations (unknown to each other at the time) and no clear objective interpretation, use generally prevailing meaning including technical meaning (R202)
   4. UCC’s Hierarchy of Interpretation (1-205 and 2-208 together)
      1. Express terms
      2. Course of performance
         1. Ongoing in current contract
         2. Can be a “waiver or modification” of any term inconsistent with performance—action can literally replace the terms (2-208(3))
      3. Course of dealing
         1. Past contracts
      4. Usage of trade
         1. Typical trade interpretation
   5. Raffles
      1. Court could have tried to interpret “arrive ex Peerless”
      2. Simpson is concerned that the Seller loses on a winning contract regardless of the ship (this is why the Buyer never sued)
         1. If Bush were different (i.e. negative damages were allowed), Seller could be compensated, so Buyer would have accepted
   6. Oswald
      1. Sale of Swiss coins
      2. “No sensible basis for choosing between conflicting understandings”
         1. Maybe not…
   7. Gap Filling
      1. Interpretation may indicate a term that is important to the parties whereas a gap was not important enough to make express
      2. Implied in fact
         1. Both understood but didn’t express
      3. Implied in law
         1. May not have been understood at the time but makes sense
      4. Default rule fills a gap with a term that is “reasonable in the circumstances” (R204)
      5. Texaco
         1. Industry standards can be used to fill gaps
      6. Illusory promises: court fills a gap in an enforceable contract with little regard for the actual agreement (can be output contracts, requirement contracts, etc.)
         1. NY Central Iron Works
            1. Good faith excludes a speculative requirements contract because one side will lose no matter which way the price moves
            2. UCC would probably say that even meeting good faith demand isn’t enough if the quantity is “unreasonably disproportionate” to a stated estimate or prior requirements (2-306)

Parties might want to bet on price movements

The case discuss the “kind” of demand; the UCC discusses the “amount” of demand

Courts are looking for a reasonable expansion of the business

Comment 2 says that a shutdown due to lack of orders is permissible but not a shutdown to curtail losses—these aren’t distinguishable, so a buyer’s breach would be impossible to discern

* + - * 1. Economists reject any other interpretation anyway because the agreement would be wasteful

As a unit, the two parties wanted to maximize joint welfare ex ante *because this means a lower contract price* (of course, once the contract begins, each is trying to maximize individual welfare). We can tell that something was probably not part of the agreement when it hurts one party more than it helps the other. Any other seeming inequalities are due to the better bargaining by one party or the other.

* + - 1. Wood
         1. Imputes obligation of best efforts
         2. May have wanted to rely on Wood’s incentives

She may have even just wanted the chance of his services, and he wouldn’t accept any “reasonable” requirement because he didn’t want a lawsuit

* + 1. Good faith is a mandatory rule (R205; UCC 1-203)
       1. Not synonymous with best efforts
  1. Extrinsic Evidence
     1. Parol evidence rule says that a written final expression of an agreement discharges any prior (or contemporaneously oral) agreement that conflicts with the writing or that adds a term within the scope of a comprehensive portion of the writing (R213)
        1. Indisputably final🡪won’t listen to evidence of conflicting agreements
        2. Indisputably final and comprehensive🡪won’t listen to evidence of any prior agreement (i.e. additional terms)
     2. Merger clause clearly expresses that the written agreement is final for all terms
     3. Thompson
        1. Admitting evidence to see if the writing is complete is circular
     4. Brown
        1. Can hear evidence on completeness, decide, and then ignore the evidence based on the decision
           1. Doesn’t really save any resources, but maybe the only point is to give weight to final writings
     5. Test: agreements that would naturally have appeared in the writing but don’t are presumed to be fabricated (R216(2)(b))
     6. Parol evidence rule does not restrict extrinsic evidence for interpretation (R214)
        1. This renders the rule useless
        2. Pacific Gas
           1. Did the company agree to indemnify anyone or only third parties?
           2. If a term might be interpreted a certain way, the court will hear evidence accordingly
           3. Words “have no meaning” apart from context
        3. Trident Center
           1. Borrower did not have the right to prepay (they want to because interest rates have dropped)
           2. Contract language is plain and the evidence should be inadmissible
        4. Pacific rule will probably give the actual agreement; Trident rule will probably have more certainty (which companies want)
     7. CISG allows extrinsic evidence, but the difference is probably minimal
  2. Statute of Frauds (R10)
     1. Requires writing for sale of land
     2. Cannot be performed within one year
        1. Not bound to statute when the performance has already been rendered
     3. Sale of goods above a certain price
     4. Matrimony
     5. Oral modifications of a contract that now qualify it for statute of frauds means it must now be written

1. Consideration exists when “performance or return promise is…sought by the promisor in exchange for his promise and is given by the promisee in exchange for the promise” (R71)
   1. Policy justification
      1. Indication of intent to be bound
         1. Other options include a seal or signed writing
      2. Importance of exchange to economic development
         1. Bargains don’t all help businesses
      3. Most important agreements where we will allow government interference
   2. Johnson
      1. Promises to donate money to the school if it’s used to pay off debts
      2. A condition is not a bargain
         1. Courts cut through formalities and recognize a promised gift
      3. Not “a promise to do an act of advantage to Johnson, or of detriment to the institution”
         1. Maybe he valued the university being able to pay its debts, and he was unable to do it himself
         2. Maybe he derives value just from another’s acceptance of the money
   3. Hamer
      1. Promises money for abstaining from drinking, smoking, and gambling
      2. Does not require benefit to promisor or detriment to promisee (R79)
         1. Motive for making the bargain is irrelevant (R81)
      3. Nephew had engaged in the behavior before, so he actually changed according to the offer
   4. Modifications require consideration (R73)
      1. UCC has done away with consideration through firm offers (2-205) and contract modifications (2-209)
      2. Stilk and Alaska Packers
         1. Modification lacked consideration, so not enforceable (R73)
            1. Seafarers gave up the right to breach and be answerable only in damages
      3. Stump Home
         1. The modification rule is probably better characterized as a lack of good faith because the terms are unfair (R89)
      4. When should the rule be different?
         1. If fisherman are solvent and expectation damages are fully compensatory, the captain doesn’t care about the rule because she’ll be compensated on shore
         2. If fishermen are insolvent, fishermen might breach because they’re not expecting the modification to be enforced on short—the captain would want the opposite rule because she won’t get paid on shore
            1. Fishermen will breach/perform based on initial contract price, realized cost of performance, and assets subject to liability
            2. Sort of adopted in leniency towards promisors with little “financial strength” (R89 comment b)
         3. Always enforcing modifications could incentivize either side to threaten nonperformance until the other concedes
      5. A rule that enforces modification if and only if the promisor would not perform absent such modification means that the modification was made in good faith
   5. Past or Moral Consideration
      1. In some cases, the value placed on the service is uncertain, so we wait until a promise is made to show that value
         1. No need for this with gifts
         2. Applies with promise to repay loans after statute of limitations has expired or promise to pay for emergency or accidental repairs
   6. Promissory Estoppel
      1. If the promisor could reasonably expect the promisee to act on the promise and promisee did act, promise will be enforced if this is the only way to avoid injustice (R90)
         1. Also as an option contract (R87)
      2. Typical award is reliance interest
      3. Rickets
         1. Granddaughter quit job after promise
         2. Court gives the full promise instead of reliance (equitable estoppel, which means the court estops any situation it considers unfair)
            1. Maybe not the right choice because equitable estoppels applies with misrepresentation
      4. Baird
         1. Contractor submits bid but subcontractor made a mistake; subcontractor tries to withdraw before acceptance is communicated
         2. Judge deems it an offer that is revocable until accepted, and the acceptance can only come through communicated assent (not use of the bid alone)
      5. Drennan
         1. Similar facts to Baird
         2. Judge deems it a promise to leave the offer open for a reasonable time after hearing if contractor won the construction project; thus, the promise was binding
            1. Subcontractor wanted its offer to be relied on
            2. Judge is conflicted

Also says that the sub didn’t want the offer to be irrevocable

Gives expectation remedy

Court observes that Contractor could not shop around

* + 1. Best way to reconcile Baird and Drennan’s issues is that the offer was accepted by using the bid
       1. Judges get lazy and fall back on promissory estoppel when they see a promise and reliance
  1. Equitable Estoppel
     1. Goodman
        1. Distributor’s representations justified reliance remedy
           1. Maybe better understood as an implied promise to cover the expenses of preparing for the franchise in exchange for business with the franchisee

Perhaps formalities have some use

* + - 1. If intentionally false, there would be a tort

1. Breach
   1. Constructive Condition: filling a contractual gap with a condition
      1. Generally “a condition of each party’s remaining duties to render performance to be exchanged uder an exchange of promises that there be no uncured material failure by the other party to render any such performance due at an earlier time.” (R237)
      2. Simultaneous obligations are treated as conditions for one another (R238)
   2. Materiality
      1. Factors (R241)
         1. “The extent to which the injured party will be deprived [by the failure of performance] of the benefit which he reasonably expected”
         2. “The extent to which the injured party can be adequately compensated for the part of the benefit of which he will be deprived”
         3. Large breaches for which damages might not be adequate and/or paid are probably material while small breaches for which damages will fully compensate are considered immaterial
            1. In a perfect world, no breach would be material (which allows one to get out of performance) because damages would always adequately compensate
      2. Damages
         1. Typically restitution less any injury
            1. In-class example had no injury because the contract price was above market
            2. Restitution comes from the value of the work performed, but if this is hard to estimate, use the property’s value change or the price of completing the work (R348(2))
         2. If not material, i.e. if substantially performed, then expectation damages
         3. Peevyhouse
            1. Coal miners failed to restore land as promised but the drop in property value was far less than the cost of restoration
            2. Considers a variety of factors

Materiality: substantial performance favors market based damages

Willfulness: suggests cost-of completion

Waste: cost-of-completion would be unnecessarily expensive

Idiosyncrasies puts this in a different light because the economic gain will go to the plaintiff

Disproportionality: cost-of-completion is so much higher than its disfavored

Idiosyncrasies put this in a different light because perhaps the cost of completion is actually reflective of the great value placed on the performance and suggests that market-based damages would be disproportionately small

Incidental Nature of Promise: disfavors cost-of-completion

Uniqueness or Special Purpose: Favors cost-of-completion

Dissent discusses that if there are “conditions now existing which could not have been reasonably anticipated by the parties” then we don’t assume that the “cost of performing the contract could have been reasonably approximated when the contract was negotiated and executed”

If nothing has changed, then each side was already anticipating these costs and values and considered it a good bargain ex ante

Absent the idiosyncratic value, we don’t want to award the promisee a windfall because this will discourage efficient investment

Suggests that this very case was decided wrong because nothing had changed; the company just didn’t want to fulfill its bargain

* + - 1. Groves
         1. Didn’t even try to grade the land—“nothing had changed,” so we don’t believe that its costs were any different than at the start
         2. The fact that the people were planning to immediately resell convinces the dissent that there was no idiosyncratic value
      2. Jacob & Youngs
         1. Pipe installed was not Reading; huge cost to replace it; no noticeable damage from its not being installed
         2. Company refused to put in new pipe, which seems “willful”
         3. Cardozo overlooks the availability of restitution in his analysis
         4. The likelihood of idiosyncratic value strikes us as low
      3. The court can let the parties determine the idiosyncrasies by allowing the breaching party one chance offer the promisee x dollars to compensate for specific performance plus a little more. Promisee will accept the slightly higher compensation, and society is spared the excess waste of filing for breach, etc.
  1. Adequate Assurance (R251)
     1. Anticipation of a breach is governed by case law
     2. Can demand “adequate assurance of due performance” (R251)
        1. Defined as a positive statement or action that breach will occur (R250)
     3. Can withhold performance until the adequate assurance comes
     4. If adequate assurance doesn’t come in a reasonable amount of time, failure is a repudiation of the contract

1. Failure of a Basic Assumption
   1. Bilateral Mistake (R152)
      1. If the mistake has a material effect, then the contract is voidable by the adversely affected party “unless he bears the risk of the mistake” (R152)
      2. Bearing the risk of the mistake is determined by allocation of it through the agreement, acted knowledgeable about a fact that was uncertain but now treats it as a mistake, or “it is reasonable in the circumstances” (R154)
      3. Sherwood
         1. Purchases a cow priced according to it being barren; cow is pregnant
         2. Majority thinks an implicit term of the contract was to return the cow if fertile
            1. Somehow the cow sold wasn’t the true object of the contract because the contract was for a barren cow—they essentially call it a material mistake such that it was collateral
         3. Dissent
            1. The purchaser and sellers were gambling on the cow’s barrenness, and the buyer won the gamble
            2. (The disproportionate difference in price reflects the perception of low probability that she was fertile)
      4. Our overall goal is to decide if the parties cared about the distinction at the time of the contract; we want to assign risk to whomever they wanted at that time
         1. Can pick from a few default rules: only accept conditions that were expressed; guess at the conditions the parties would have chosen
         2. It might be most efficient to hold the expert party responsible because they can investigate at the lowest cost, which maximizes joint welfare
         3. A default rule is an arbitrary choice if the contingency wasn’t contemplated at all because there’d be no incentives
      5. Nester (J. Sherwood, who was the dissent in Sherwood)
         1. Buyer was pushed into the risk of buying acres of pine trees that were not as dense as thought; seller made clear the chances and priced accordingly (meaning he was willing to accept the loss if the density was higher than estimated); buyer lost the gamble
         2. The court expresses the view that the pine was bought “as is”
      6. Wood
         1. Seller brought in stone and was told it was probably topaz; offered $1; came back later and accepted the offer because she tight on money; turned out to be a diamond worth $900
         2. She had time to research what it was
         3. But the buyer was the expert, and besides economical reasons, perhaps both kind of assumed that giving his opinion meant he was willing to bear the risk
         4. (UCC does discuss implied warranty of merchantability, 2-314, and that “as is” deals negate this warranty)
         5. Court does not rescind the contract (rescission is an equitable remedy that puts both parties back to pre-contract states)
      7. Mutual mistakes regarding the contract (R157)
         1. The court will likely reform the contract to reflect the actual agreement (R155)
      8. Mutual mistakes regarding subsequent events; both rules state that if “the language and circumstances indicate” that you bore the risk, then the court should so decide
         1. Impracticability/impossibility: a subsequent event makes performance difficult/impossible (R261) or the lack of a subsequent event has the same effect (R263)
            1. Taylor

Music hall burned down

Lessor is not bound because the contracted rental space ceases to exist

The lessor was in the best position to prevent/avoid the damage, but probably still decided correctly because trade custom dictated in accord with the holding

* + - * 1. Can decide again to assume the condition was not addressed or interpret the contract to see who bore the risk
        2. Least-cost-avoider: whoever was in a position to avoid loss from the event at the lowest cost does not get an excuse
      1. Frustration of purpose: a subsequent event, or the lack thereof, makes performance less valuable (“substantially frustrates” a party’s “principal purpose”) (R265)
         1. Paradine

Invading army took over the lessee’s apartment; didn’t pay rent (not an impracticability case because paying rent wasn’t any harder, just less valuable)

Considered a breach of contract

* + - * 1. Krell

Pays deposit to rent room to watch the king’s coronation; king gets sick; coronation postponed

Contract can be disaffirmed

Distinguishes such a specific purpose from hailing a cab on derby day because the customer could have used any cab (was there not more than one house along the pathway of the coronation?)

* + - * 1. Least-cost-avoider would probably not help much in interpreting either case but courts can use other tools
  1. Unilateral Mistake (R153)
     1. “Where a mistake of one party at the time a contract is made as to a basic assumption on which he made the contract has a material effect on the agreed exchange of performances that is adverse to him, the contract is voidable by him if he does not bear the risk of the mistake (defined in R154)” and “the effect of the mistake is such that enforcement of the contract would be unconscionable” or “the other party had reason to know of the mistake or [the other party’s] fault caused the mistake”
     2. The parties can’t have agreed on this point, so we can’t interpret how they would have allocated risk; doctrine is more similar to unconscionability
     3. Laidlaw
        1. Buyer found out about the end of the War of 1812, which meant the British market would open to American tobacco and increase the price; ran to seller before he could find out and tried to strike a deal; seller’s agent asked “whether there was any news which was calculated to enhance the price or value of the article”; buyer did not respond
        2. Buyer’s silence is accused of being equivalent to lying (could be interpreted as confession of knowledge—trying to change the subject is pretty suspicious)
        3. “He was not bound to communicate it [intelligence of extrinsic circumstances]”
           1. He gained the knowledge through “superior diligence and alertness”
           2. We want people to be incentivized to seek out profitable information, but they won’t do that if the profit incentives are continually removed
     4. Non-disclosure can be equivalent to an assertion (R161)
        1. Agency relationships
        2. Knows that disclosure will correct a basic assumption and not disclosing is bad faith and not in accordance with reasonable standards of fair dealing
           1. This is the point where Laidlaw could seemingly be argued as unfair
     5. Fraudulent or material misrepresentations (R162)
        1. Intends to induce other party to assent AND
        2. Believes the fact is wrong or fails to disclose his uncertainty
        3. Such misrepresentations make a contract voidable unless made by a third party, and the other party didn’t know and has now relied materially on the transaction (R164)

Policy Arguments

1. Shaping society
2. Administrability
   1. Will people actually obey the rule?
   2. Will the State be able to administer it?
3. Consistency
   1. Over time—change will be too disruptive and unfair
   2. Uniformity/independence from other rules and the rules in other states
   3. Across social categories
   4. Across economic class
4. Institutional role
5. Government non-interference
6. Paradox
   1. Additional facts that support the opposite policy (the further apartment has a bus stop, so I can get to work quicker, so actually the further apartment is more convenient or even “closer” in a way)
      1. Short-term v. long-term impact
      2. Intent v. effects
      3. Law on the books v. law in action