**Contracts Outline – Gillette Fall 2012**

Was there a contract?

* Consideration - § 1, 2, 4, 71
* Bargains and Adequacy - § 17, 79
* Promissory Estoppel - § 90
* Past Actions as Considerations § 86
* Offer § 18, 19, 24
* Acceptance § 25, 30, 40, 42, 45, 50-56, 62, 69
* Assent in an Electronic Age
* Option contract § 87
* Precontractual Liability § 87

What are the terms?

* Counteroffer and Battle of the Forms § 36, 39
* Interpretation § 20
* Parol Evidence Rule § 209-216
* Modification

Voidable?

* Indefiniteness § 33
* Duress - § 73, 89, 174-176
* Fraud and Misrepresentation § 159-164
* Unconscionability; Standard Forms; § 208, § 211
* Mistake § 151-154

Breached?

* Impracticability § 261
* Frustration § 265
* Substantial Performance § 241
* Remedies for Breach

Remedies?

* Specific Performance § 357, 369
* Expectation Damages § 347, 349
	+ Reliance; Restititution
* Limitations § 350, 351

**Goals of Contract**

Enforce parties' intent to:

What’s *really* going on here?

* Strategic behaviour? - Relationship?
* Sophisticated parties? - Repeat transaction?

**Incentive effects**: *ex ante* (clarity, disclosure, lower costs)

**Default rule**: what majority wants (can opt out, bargain around; think: does it *reduce price* for social majority who won’t go to court?)

**Value maximizing** exchanges

1. Increase Social Wealth
2. Encourage Business and Trade
3. Enforce value-maximizing exchanges

**Principles:** explain *why* apply

**Andy**: Courts should enforce promises (even without consideration) when we think bargains with predictable and fair terms would have occurred if not for high transaction costs (bargaining context).

**Josh**: Courts should allocate loss to the party best positioned to avoid the risk.

Incentivizes cheapest future avoidance of risks (value maximizing)

(1) Was there a contract? (2) What are the terms? (3) Is it voidable? (4) Was it breached? (5) Damages?

1. Was there a contract?
	1. When?
		1. Manifestation of mutual assent § 18/19
			1. Promise/performance
			2. External (*Lucy*)/*Josh* principle (cheaper for idiosyncratic parties to tailor their behaviour than for society to question every manifestation 🡪 default rule)
			3. Intentional
			4. May be voidable for fraud, duress, mistake, misunderstanding
	2. Offer? §24
		1. Manifestation of willingness to enter into a bargain?
			1. Made as to justify understanding that his assent to bargain is invited and will conclude it
				1. Distinct from nonreciprocal promise/conditional statement (e.g. I would sell my house for 70k if I could get that much)
			2. Price quote is usually *invitation to offer*
			3. Ads usually invitation to offer (unless sufficiently definite terms i.e. first come first serve)
		2. Did offeror revoke before acceptance?
			1. An offer can be revoked at any time until it is accepted (even if expressly state otherwise) *unless* option contract
				1. CL requires consideration to be given for the promise in order to hold it open
				2. Can be accepted until revocation §42
				3. Can’t add post-acceptance terms
				4. Could argue no firm offer if not enough details (see **indefiniteness**)
				5. Kidding!
				6. Could argue oral doesn’t count (see acceptance/*Ciaramella*)

Response: oral contract formed, written memorialisation only

Incentives: induce clarity/precision; preserve cheap talk/negotiations (Josh principle)

* + - * 1. UCC 2-205 – firm offers –can be held open *without* consideration

If specified time is included, irrevocable until that time ends; if not, “reasonable time” (<3 months)

Reqs: merchant, signed writing, assurance to offeree it will be held open, if offeree provides form – offerror must sign separately

* 1. Acceptance?
		1. Intent to be bound? (*Ciaramella)*
			1. Express reservation of right not to be bound in absence of X
			2. Partial performance
			3. Were all material terms agreed to?
			4. Is it the type of contract ordinarily committed to writing?
		2. Proper? (offeror is master of offer)
			1. Who accepted? § 52
				1. Only by person whom the offer invites to furnish consideration
			2. How? § 30
				1. Unless otherwise specified 🡪 “reasonable” § 30
				2. Acceptance by promise –notice essential § 56

Must exercise reasonable diligence to notify  *or* offeror receive acceptance seasonably (except as in § 69)

* + - * 1. Acceptance by performance § 53

**Only** if invited

Valid even if performance was initiated before offeree knew of offer so long they knew before performance was complete (e.g. rewards - § 51)

Except as in § 69, rendering of a performance does not constitute acceptance if w/in reasonable time offeree exercises reasonable diligence to notify of non-acceptance

Acceptance by performance valid without offeror knowing (*unless* expressly requested notification of acceptance via performance)

Acceptance by part-performance operates as a promise to render complete performance (*think Evertite)*

***Assent in Electronic Age***

**Duty to read:** one who does not choose to read a contract before signing is still bound

We want **reasonable communication** of terms *and* **manifestation of assent**

* *Click-wrap* (forced to click through agreement/terms of use) – **good** (hyperlink + you are agreeing by clicking acceptable – Facebook)
* *Browse-wrap* (agreement submerged somewhere on website) - **bad**

Could argue only preparation of performance (not acceptance)

(i)Consider extent to which preparation was unique (i.e. will result in a loss) (ii) how definite and substantial, (iii) extent to which it is actual or prospective benefit to the offeror, (iv) terms of communication between parties, (v) prior course of dealings, (vi) relevant usages of trade

* + - * 1. Acceptance by performance *only* § 45

Option contract created when performance begins (§ 25)

Offeror’s duty to perform is conditional upon completion or tender, but **cannot** revoke offer once performance has begun

Offeree not bound to complete it

Acceptance valid as soon as performance begins

|  |
| --- |
| **Option Contracts** when: § 87/45* Fair contract in writing and there is consideration for promise to hold an offer open
* Or K irrevocable by statute
* Offer reasonably can be expected to induce substantial reliance by offeree, does induce such reliance, and enforcement of the requirement is necessary to avoid injustice (Traynor – see below)
* Party accepts unilateral offer by beginning performance
 |

1. Acceptance by Silence:
2. General rule: not valid
3. Autonomy violation/not value maximizing
4. Exception: § 69; if:
* Silence stipulated as a way of acceptance and offeree *wants* to accept, *or*
* Offeree takes benefit when they had reasonable opportunity to reject and know that compensation was expected, *or*
* Reasonable to put onus on offeree to notify offeror of non-acceptance due to past dealings
* *Andrew principle*: cases we believe would have bargained ex ante
* In border line cases, evaluate *transaction costs*

|  |
| --- |
| **Mailbox*** Acceptance as soon as sent (doesn’t matter if not reached) § 63 (except option)
* No revocation until received by offeree –*limits* acceptance power § 42
	+ No longer valid as soon as sent – determining factor is which one is received first by offeror.
* Receipt occurs when it comes into possession of intended recipient, or is deposited in authorized place or is given to authorized agent. § 68
* Email: reasonably believed sent/received immediately – (but Josh – could’ve checked, etc.)
 |

* + 1. Timely? § 63
			1. Reasonable time §41 – circumstances
			2. As soon as it is made, regardless of when it reaches offeror
				1. Except acceptance under option contract (only acceptance when promisor is aware)
				2. Rejection terminates power of acceptance *once* it reaches the offeror § 40

Thus, acceptance sent after a rejection is a counter-offer, not an acceptance, unless received before the rejection

* + 1. Revocation: (ways: 1. affirmative rejects 2. counter offer)
			1. Termination of power of acceptance § 36
				1. Rejection/counter offer
				2. Lapse of time
				3. Revocation by offeror

Or when offeror receives manifestation of intention **not** to enter proposed contract (§ 42)

* + - * 1. Death or incapacity of offerror or offeree
		1. Counter-offer? (valid at moment of receipt, not when sent § 40)
			1. Mirror-image: any proposal with differing terms constitutes a rejection of the original offer, effective upon receipt of the new terms
			2. Last shot doctrine: when both parties performed even though mirror image rule was not satisfied, both are bound to terms of last written offer.
			3. § 39 for counter-offer (as opposed to just an offer)
				1. Deals with the same subject matter
				2. Proposes a different bargain
				3. Capable of acceptance
		2. Conditional Acceptance?
			1. Reply that purports to accept initial offer but is conditional on assent to additional or different terms is a counter offer (see above) § 59
			2. If the condition merely **requests** (i.e. doesn’t condition) different/additional terms, it is acceptance & K consists of original terms § 63
1. Is it enforceable? (**think**: new contract or modification?; does it have new consideration? Who needs to prove consideration?) (consideration + manifestation of mutual assent)
	1. Consideration? § 71 (promise for performance, promise for promise)
		1. Bargained for exchange (promise, forbearance/creation/destruction of legal right to promisor/3rd person)
			1. Was it a gift? (Test: was it meant to induce & actually induce?)
			2. Actions necessary to receive gifts are not consideration
		2. Adequate consideration? §79
			1. Both bound of neither are bound
			2. Nominal consideration?
				1. Mechanism to police fishy bargains (evidence of fraud?); otherwise no b/c parties in best position to evaluate and place value (especially when no market value/hard to measure)

*Batsakis (*don’t want to second guess allocation of risks)

Duress/unconscionable vs. access to money she would not have had otherwise so entitled to $ b/c risks

* + - 1. Pre-existing duty = no consideration § 73/*Alaska Packers*
	1. Exceptions to considerations:
		1. Reliance/promissory estoppel § 90
			1. Promise which promisor reasonably expects to induct action/forbearance
			2. Action/forbearance is actually and justifiably induced
			3. Binding if injustice can only be avoided by enforcement
			4. *Feinberg* (Andy principle) vs. *Hayes (*did not induce/no justifiable reliance)
		2. Precontractual liability (*Red Owl/PEI)* –
			1. Need reliance of *definite and substantial character*
				1. Factors to determine reasonableness of reliance

Probability contract will be concluded

Value of contract if it is concluded

How close were parties to coming to an agreement

Reasonableness

i.e. if sub-bid is suspiciously low there can’t be justifiable reliance (clearly a mistake – Josh)

* + - * 1. Enforceable even if missing material terms

Usually b/c bad faith (*PEI & Red Owl*)

* + - * 1. Not enforceable if indefinite (usually)

**At most** impose obligation to continue negotiating in good faith (obviously ineffective)).

* + - * 1. § 87: an offer which the offeror should **reasonably expect** to **induce** action or forbearance of a **substantial** character on the part of the offeree **before acceptance** and which does induce such action or forbearance is **binding** as an option contract to the extent necessary to **avoid injustice**

Hand – bilateral contract, revoked at any time (issue: subs can act strategically)

* + 1. Charitable subscriptions/marriage settlements don’t require consideration § 90(2)
			- 1. *Salisbury* vs. *Congregation* (not enforced)

Strategic behaviour/exploitation?

* + 1. Material benefit? (reliance on a promise which *followed* performance) § 86 \*rarely enforced
			1. Binding to extent necessary to prevent injustice §86
				1. Andy principle, evidence they wanted to be bound/reasonable to rely?

Think: specific terms? began payments?

Mills (no) vs. Webb (yes)

* + - * 1. Not binding (even to prevent injustice) if:

Promisee conferred benefit as gift (or for other reason promisor has not be unjustly enriched)

Extent that its value is disproportionate to the benefit

1. What are the terms? (Indefiniteness, Battle of the Forms, Interpretation & Parol Evidence, Misunderstanding/Misrepresentation 🡪 no K)
	* 1. Indefiniteness? § 33 (*if indefinite fails* 🡪 ambig term w/o plain meaning 🡪 parol) – *Dolly Rule – if unclear; don’t enforce*
			1. Want to figure out intention of parties
			2. Vague? Ambiguous? (*see Parol*)
			3. Can court fashion a remedy (requires some sort of external metric e.g. market)
			4. Contracts are reasonably certain even if missing important terms if they provide basis for determining existence of breach and giving an appropriate remedy
				1. Lack of “reasonable certainty” can demonstrate lack of intent to be bound

Look to materiality of term (generally, if material must be definite to be enforceable)

* + - * 1. BUT was there a reason for leaving the terms open?

High transaction costs and unlikely risk so not worth costs?

Block agreement b/c signals distrust?

Allow for variation of future events?

May still have intended to be bound even if indefinite.

Answer: What story are we telling???

* + - * 1. Do we want courts to gap fill?

Are they good at it/too material?

* + - 1. UCC § 2-204
				1. Contracts don’t fail for indefiniteness if:

The parties intended to make a contract, and

There is a reasonably certain basis for an appropriate remedy

* + - * 1. K can include **open price term**

Court will fill with reasonable market price at the time of delivery if:

K doesn’t mention price and parties left it to be determined but didn’t

Price is supposed to be fixed to an external standard or set by a third party, but it isn’t

* + - * 1. Consider:

Industry standard suggests common?

Exploitation?

Incentives (clarity vs cheap talk)

* + - 1. **Output** (buyer agrees to purchase whatever quantity seller produces)**, Exclusive** and **Requirement** (seller agrees to provide whatever quantities buyer requires) **Contracts** are binding if there is good faith (relation contracts are meant to maximize combined returns as though they were a uniform firm
				1. Indicators: is situation ahistorical? [i.e. can’t frame good faith because so different to usual circumstances?]

Quantity: is quantity reasonable? Proportionate to previous dealings or stated estimates?

Requirement: “reasonable commercial standards of fair dealing in the trade”

Consider:

Is it possible to determine what is unreasonable disproportionate by either stated amount or prior dealings?

Exclusive: good faith (default rule – implicit) effort to only buy from seller and good faith effort to only produce for buyer?

 Are parties’ interests aligned?

What would decision have been if parties were one unit?

Reasonable effort should be point where returns are highest before cost of additional effort outweighs return

* + - 1. **BUT** CL: Mirror Image & Last Shot Doctrine (most recent offer counters)
			2. **UCC § 2-207 (battle of the forms)** – “*as both X and Y are merchants selling goods and since the terms in the writing are not consistent with those of their oral negotiations, the court will look to UCC 2-207*”
				1. (1) A timely expression of acceptance or written confirmation that states additional or different from those offered or agreed upon acts as acceptance (go to (2)) **unless** acceptance is expressly conditional on assent to the add’l/diff terms (**unless🡪skip (2); possible K under (3))**.
				2. (2) If both parties are **merchants**, additional terms become part of the contract **unless**:

The original offer limited acceptance to the terms of the offer

The additional terms materially alter

Argue back and forth

Notification of objection has already been given or is given within a reasonable time after notice of them is received

What happens to the terms if fall under one of the 3 prongs?

Additional terms drop out

Different terms?

Treat like additional terms (comment 3)

Fall out no matter what because Sub-2 doesn’t apply

**Knock-out: UCC gap-fills** (most common)

* + - * 1. (3) When parties behave like there is a contract even though there are additional/diff terms, the contract is recognized as consisting of the terms that agree. Other terms fall out 🡪 apply default rule

Note: outcome often determined by who you frame to have made the original offer

* + - * 1. *Gateway*: terms only provided after payment are enforceable as long as customers have reasonably opportunity to inspect terms and reject the product if they disagree – because by keeping product Hills accepted (not governed by UCC b/c not merchants)
	1. **Interpretation**:
		1. *Contextualist approach/CA/UCC*:
			1. In Re Soper: EE can *create* ambiguity; no such thing as plain meaning - § 209
			2. Pacific Gas (**CA**): EE can *create* ambiguity if no contradiction so long as that meaning that party is purporting is one to which the term is reasonably susceptible
				1. Trainer: rework to show its not contradictory but instead it clarifies. Difference in theory of language – plain meaning is not best way to get at intention parties.
				2. Seems impossible to clarify what you mean 🡪 parties contract into NY law

Incentives:

No need to specify terms

Lower transaction costs

Higher litigation costs

* + - * 1. **Note:** Can you use EE as “interpretation” but really you are adding a new term?\*\*\*
		1. *Plain Meaning/Objective/NY*:
			1. WWW (**NY**): No EE to *create* ambiguity – if ambiguous on its face then we allow EE.
				1. Look not dictionary definition of terms when considering meaning; look at contextual meaning within four limits of the contract.
				2. Plain meaning is best way to get at intention of parties

Incentives:

Parties more careful in drafting contracts

If you don’t mean plain meaning you specific

Increases transaction costs

* + 1. **Posner:**  in determining whether there should be EE allowed to clarify meaning, courts should consider what the transaction costs would have been had the parties included what they meant.
			1. Was there a good reason for lack of specificity?
				1. Reduces litigation costs?
		2. What if multiple objective/plain meanings?
			1. Outside observer?
			2. Contract void by misunderstanding? (§ 20) (see below)
				1. Consider effect: what does client want to do? Interpretation will allow for enforcement and misinterpretation voids.

Only void if don’t want to perform (i.e. if you are breacher) or want prior agreement enforced (i.e. oral)

* + 1. UCC 2-202: Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented:
			1. By course of dealing or usage of trade or by course of performance and
			2. By evidence of consistent additional terms unless the court finds that the writing is fully integrated
				1. Columbia (one way to read UCC): a finding of ambiguity is not necessary for the admission of extrinsic evidence about the usage of the trade and the parties’ course of dealings.

Doesn’t matter if agreement is fully integrated

Only should be excluded if it cannot be reasonably construed as consistent with the terms of the contract.

*Play with what is reasonable*\*\*

*Play with contradiction*

* 1. **Parol Evidence** (Separate agreement? Contradict? Integrated?)
		1. Does **not** apply to later agreement – use modification or new contract\*\*
		2. Use to determine if you can **ADD** terms – § 216/ §213
		3. Exceptions:
			1. Fraud, duress, mistake, lack of consideration § 214
		4. Step One: Tests for **Integration**:
			1. Four corners Test (NY) – if K looks complete on its face, no EE
			2. “Naturally omitted test” (CA) – look at EE to determine if the term would naturally have been omitted
				1. Is there a good reason it was left out?

If so 🡪 K not integrated with respect to that term

* + - 1. UCC 2-202: “certainly included”
				1. Not integrated unless EE would certainly have been included

Higher bar, let’s in more EE

* + - 1. If integrated 🡪 no EE; if not (at least with respect to that term🡪step two)
		1. Step Two: Is agreement separate or related?
			1. If separate 🡪 different contract; EE allowed
			2. If related🡪 step three
				1. Is this agreement part of the consideration for the other?
				2. Difference will stem from whether you look at the agreement to determine the answer or you look at the EE.

Look at the facts!

Naturally included vs. certainly included

* + 1. Step Three: Does EE contradict terms of the contract?
			1. What is a contradiction?
				1. Narrow: merger clause does not prevent use of trade usage b/c doesn’t explicitly opt out of custom
				2. Broad: merger clause prevents EE b/c explicitly says this is everything

Play with how you define contradiction – determines whether EE is permissible or not

Consider:

Bad faith?

Prior dealings

Jeopardize certainty of contractual duties?

* + 1. Arguments for Parol Evidence (assuming writing reflects parties’ intent)
			1. If written – seriousness of written terms
			2. Encourages cheap talk
			3. Incentivizes people to write what they mean
			4. Prevents fraud
			5. Limits what juries see
			6. Decreases *ex post* costs BUT increases *ex ante*/transaction costs
		2. Is this a standardized agreement? § 211
			1. Standardized agreements usually integrated unless you know he wouldn’t have signed the agreement had he known
		3. If TU is default rule: - don’t inject in. **“depends if there’s a TU”**
			- 1. Is there really an accurate standard?
				2. Ignorance of TU only counts if they made it known (otherwise other party assumes)
				3. Is situation ahistorical?
				4. Cuts done *ex ante* costs
				5. Can argue that EE that contradicts default rule should not be allowed in because “silence” in contract = default rule
	1. Misunderstanding?
		1. Misunderstanding **§** 20 – does **not** *void* b/c never a K
			1. No K formed when:
				1. Neither party knows or has reason to know that the other means something else; both are equally plausible but different meanings (*Peerless*)
				2. Both parties know or have reason to know the other means something else
			2. K when:
				1. A knows what B means and B does not know what A means (B’s interpretation governs) – even if B is idiosyncratic
			3. Consider: is term ambiguous (see above)?; incentive effects (induce clarity, avoid strategic behaviour)
	2. Misrepresentation – **NO K** when: § 163
		1. Misrepresentation as to the character or essential terms of contract induces conduct that appears to e a manifestation of assent by one who **neither knows** **nor has reasonable opportunity to know** this character or these terms, conduct is not effective as manifestation of assent 🡪 no K.
1. Assuming there was a contract – is it **voidable**? Reason not to enforce?
* Duress, modification/pre-existing, Fraud/Material Misrepresentation (non-disclosure), Fraud, Impracticability, Mistake, Unconscionable, Frustration
	+ **Reasons** not to enforce:
		- 1. (Generally) not socially productive
			2. Likely not value maximizing exchange
			3. Limits autonomy
			4. Outcome is problematic/indicative of defective bargaining process or contract formation
	+ **Should** we police the bargain?
		- 1. How does value placed on thing getting (by pressured party) compare to value they’d pay?
			2. Dire situation? (duress doctrine)
			3. Bargaining process?
			4. Situational monopoly? **Think** Alaska Packers
			5. Working market price?
			6. Wealth generating transaction?
	1. Duress:
		1. Reasons to void b/c of duress (Gillette)
			1. Signals lack of value-maximizing exchange
				1. Constrained choice
			2. Incentive effect
				1. Encourages additional threats & expenditures on preventing them
			3. Autonomy
		2. Physical: § 174
			1. Assent induced by physical threat makes a contract **void** (i.e. there was never a K)
		3. Economic:
		+ Pre-existing duty?
			- § 73 🡪 performance of legal duty owed to promisor (not doubtful/disputable) is not consideration
				* Makes modification invalid
		+ Modification?
			- New consideration required to modify contract
				* Exceptions: (moving away from Packers strict rule) (§ 89)

Modification of contract not fully performed (on either side) is binding, if:

Modification is fair and equitable in view of circumstances not anticipated

To extent provided by statute,  **or**

To the extent that justice requires enforcement in view of material change of position in reliance on promise

[note: § 90 **AND** injustice, § 89 **OR** injustice]

* + - * UCC 2-209: agreement modifying contract needs no consideration to be binding
				+ Only good faith
		- Duress by threat: contract **voidable**: § 175 (I + II + III)

🡪 [easy to re-characterize as just a hard bargain)

* + - 1. Improper threat
				1. Threat is improper if:

What is threatened is a crime/tort/prosecution

What is threatened is use of civil process and threat is made in bad faith (Wolf – house to black people)

\*\*\*Threat is a breach of the duty of good faith and fair dealing under a contract with recipient

Exploit economic strain?

* + - * 1. OR, improper if resulting exchange is not on fair terms, **and**

Threatened act would harm the recipient and would not significantly benefit making the party making the threat

Effectiveness of threat in inducing manifestation of assent is significantly increased by prior unfair dealing by the party making it

What is threatened is otherwise a use of power for illegitimate reasons

* + - 1. Inducing assent
				1. Would they have assented regardless?
			2. Leaving no reasonable alternative (can’t get goods from other source/special/etc)
				1. **Think** navy sub-contractor case (*Loral)*
				2. Not merely loss of profits
				3. ARG in here (not in time or diff quality)
			3. **Exception**: § 176
				1. If manifestation of assent induced by third party and beneficiary gave value or relied materially on assent in good faith and without reason to know of duress, K not voidable.
	1. Misrepresentation? \***note: at the time contract was formed**\*
		1. An assertion (can be inferred through conduct) not in accord with the facts (either purposeful or inadvertent) § 159 –
			1. **Does not apply to opinions/predictions re future**
				1. Counter: implied assertion of fact: “good money” – implied promise re future based on inaccurate present information
			2. Action intended/known to prevent another from learning a fact is equivalent to assertion that fact does not exist (160)
			3. Non-disclosure of fact is equivalent to assertion that fact does not exist *only* when: (§ 161)
				1. Where he knows disclosure of the fact is necessary to prevent some previous assertion from being a misrepresentation
				2. Where he knows that disclosure of fact would correct a mistake of the other party as to a basic assumption on which that party is making the contract and if non-disclosure of the fact amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing

**Think** mink vase – seller or buyer? Reasonable expectations? Knowledge investment theory?

**Spiess** – intentionally withheld to induce assent 🡪 fraudulent misrepresentation

* + - * 1. Where he knows that disclosure would correct a mistake of the other party as to the contents/effect of a writing, evidencing or embodying an agreement in whole or in part

Unconscionability\*\*?

* + - * 1. Where the other person is entitled to know the fact because of a relation of trust/confidence.

Fiduciary relationship vs. reasonably expect party to inform themselves

* + 1. Makes a contract **voidable** when: (§ 164)
			1. Assent was induced (i.e. **substantially contributes** to manifestation of assent § 167) by fraudulent *or* material misrepresentation of fact on which they were ***justified*** in relying
				1. *Unless* misrepresentation made by 3rd party and counter-party to K relies or gives consideration in good faith without reason to know of misrepresentation
		2. *Fraudulent* when maker intends his assertion to induce a party to manifest his assent and the maker (§ 162)
			1. Knows/believes assertion is not in accord with the facts
			2. Does not have confidence that he states or implies in the truth of the assertion, or
			3. Knows that he does not have the basis that he states/implies for the assertion
		3. *Material* when likely to induce a reasonable person to manifest his assent *or* if the maker knows that it would be likely to induce the recipient to do so
			1. Induces in a *foreseeable* way
	1. Consider:
		1. Justified? (ex ante)
			1. Relative sophistication?
			2. Asymmetric info?
			3. Damages resulting proximately?
			4. **Think** value maximizing?
		2. Merger clauses – can generally contract out
			1. Unless bad faith? (watch for it in either direction)
		3. Can’t be boiler plate “no misrepresentations” – need specific
			1. Doesn’t preclude claims for fraud if clause itself is a misrepresentation, unless
				1. Clause was specific enough (i.e. not relying on X, and P claims there was misrepresentation about X- **think** Dannan)

Sophisticated parties; no info asymmetry

* 1. Mistake? - *A belief not in accordance with the facts* (§ 151) \***note: at the time contract was formed\*** v**.** misunderstanding (contract term meaning) v. impracticability – future.
		1. **Ask**:
			1. Was there an erroneous belief as to a material fact at the time K was formed?
			2. Was it a basic assumption (would K have been formed if the truth were known?)
			3. Would it have a material effect on the exchange?
			4. Was the risk of mistake implicitly/explicitly allocated to one of the parties?
			5. *Unilateral*: do the equities favour relief? Was there unconscionability or did other party have reason to know of mistake or cause it?
		2. *Unilateral* mistake *voidable* when: (§ 153)
			1. Basic assumption
			2. Material effect on agreed exchange
			3. Adverse to him
			4. K did not allocate risk of the mistake to party (§ 154), **and**
				1. Effect of mistake is such that enforcement of contract would be unconscionable, **or**
				2. The other party had reason to know of the mistake or his fault caused the mistake
		3. *Mutual* mistake *voidable* when: (cow) (§152)
			1. Mistake exists, both have same incorrect belief
			2. About basic assumption (§ 152)
			3. Material effect on agreed exchange of performances
			4. K did not allocate risk of mistake under § 154
			5. There is no relief by way of reformation, restitution, etc.
				1. Sounds like *injustice*….
		4. Party bears risk of mistake when? (§ 154)
			1. Allocated by agreement (explicitly)
			2. He is aware, at the time contract is made, that he *only has limited knowledge* with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient - implicit
				1. *Cow dissent:* turns on what agreement is about (a cow versus **that** cow)
			3. Risk allocated to him by the court on the grounds that it is reasonable in the circumstances to do so
				1. Josh principle
				2. E.g. if due to transmission – CL hold party who selected the method of communication as loss bearer (unless other party knew or should have known a mistake was made)
	2. Unconscionable? **(usually never for sophisticated parties)**
		1. Use if party would not have signed K if knew what it was about
		2. UCC § 2-302 – prevention of unfair surprises/oppression
			1. Doesn’t want to upset allocation of risks due to unequal bargaining power
			2. Clauses must be **so** one-sided
			3. Allows intro of EE to show unconscionability (commercial setting, purpose, and effect)
		3. § 208 – requires procedural **and** substantive
			1. Procedural – how was agreement formed? **Think** Williams
				1. Absence of meaningful choice
				2. Disparity in bargaining power

Literacy, edu, savvy corp

* + - * 1. Manner in which contract was entered

E.g. home?

* + - * 1. Deceptive sales practices?

Hidden fine print?

Incentives: discourage deception

* + - 1. Substantive – terms
				1. Unreasonably favourable term (**think** risk allocation)

Benign vs. malign story

* + - * 1. Duty to read and understand?
				2. Was it meant to be hidden/obscure?
				3. Consider price – is term priced in?
				4. Effects? No good at all?
				5. Standardized clause across industry?

Malign vs. benign story **think** Henningson

* + - 1. Result? (same for UCC)
				1. Want equitable resolution

May refuse enforcement of K

May refuse enforement of term

May limit application of unconscionable term to avoid unconscionable result

1. Assuming there was a contract, was there a breach? Or is breach excused?
	1. Impracticability (rarely used – must be extreme) – duty to perform is discharged (§ 261)

**Think:** if we invalidate this, what does that mean for everyone else?

* + 1. Basic assumption of *both* parties
		2. Not fault of party seeking to void
		3. Unless language/circumstances indicate no
		4. Checklist: (**think** Transatlantic/Suez)
			1. **Unexpected contingency**
				1. Frame broadly/narrowly, more general🡪 more *foreseeable* (**result hinges on this**)
				2. If you say unexpected- who else does that affect?
			2. **Risk of contingency not allocated** (custom/explicitly)

Courts usually let **losses stay where they fall**

* + - * 1. Explicitly: force majeure (outlet to get out; risk to person who wants to stay in)
				2. Implicitly: circumstances/custom
				3. Ask: was contingency foreseeable/likely enough to be worth dickering over?

Courts concerned with holding parties liable for things outside the scope

Would parties have entered into contracts at all given the circumstances?

* + - 1. **Renders performance commercially impracticable**
				1. Lost profit not enough

**CRUSHING** loss (ALCOA)

* + - * 1. Think of portfolio of contracts (are they spreading risk/speculation)? **Gulf**
				2. Good faith?
	1. UCC § 2-615: Delay in delivery or non-delivery in whole or part by seller is not a breach of duty if performance was made impracticable:
		1. By occurrence of unforeseen supervening circumstances whose non-occurrence was basic assumption, **or**
		2. By compliance in good faith with any governmental regulation or order
			1. *Notes*: excuse only applies where contingencies were so unforeseeable they could not have been priced into contract
			2. Increased cost alone does not excuse performance
	2. Impossibility: non-existence of a thing (v. rare)
		1. Test:
		2. Is continued existence of a thing an underlying assumption of contract?
		3. Risk of it no longer existed was not contemplated/allocated?
	3. Frustration of purpose? (still possible & not impracticable) (§ 265)
		1. Contracted w/ particular purpose (mutually known), purpose is no longer attainable + not fault of parties, performance discharged unless language/circumstances indicate the contrary
			1. Contingency frustrates principle purpose?
				1. Actually? Transaction must be worthless to party
			2. So severe shouldn’t be w/in risk assumed?
				1. Analysis similar to impracticability
			3. Was there speculation? (less likely to let party out)?
	4. Substantial performance?– **not for goods**
		1. **Think**: is this strategic behaviour? 🡪 don’t want party to get away with it
		2. To determine if use is appropriate, consider: § 241
			1. Innocent mistake or intentional?
			2. Purpose to be served by the promise?
			3. What is the desire to be gratified?
				1. Is it reasonable?
				2. Can it be adequately compensated?
			4. Cruelty of enforcing?
				1. What would it require?
			5. Is term one of mere utility or aesthetics?
			6. More lenience w/ larger jobs (more room for error)
			7. Incentives created?
				1. Don’t want to allow for intentional mistakes/breaches to be acceptable
		3. **Think**: does unilateral mistake apply? Did the party bear the risk of the mistake? (§ 153 + 154)
		4. Parties can contract out for perfect tender
		5. **Damages:** if substantial performance 🡪 entitled *only* to the difference in value
	5. Perfect tender? UCC § 2-601
		1. A buyer of goods can reject the goods (and thereby avoid having to pay) for any defect, however minor
1. Remedy?

Purports to put promisee in the same position she would have been in had promisor performed

* 1. **Specific performance** – extraordinary (b/c creates high transaction costs)
		1. *Only* when damages are inadequate – court’s discretion
		2. Factors to consider: § 360
			1. Difficulty of procuring suitable substitute performance
				1. Unique goods?
			2. Difficulty of proving value
			3. Likelihood that damage award could not be collected
		3. Rarely ordered for service contracts (indentured servitude + subpar performance)
		4. *Not* appropriate where damages are recoverable and adequate
			1. Adequacy of damages for part does not preclude use of specific performance as to the contract as a whole. §359
		5. These situations are exception b/c they make efficient breach impossible (goods/services will not be with the party who values them most).
		6. *Injunction* against breach if:
			1. Duty is one of forbearance, or
			2. Duty is one to act and specific performance would be denied only for reasons that are inapplicable to an injunction.
		7. **UCC** § 2-716– when goods are unique “or other proper circumstances”
			1. E.g. not technically unique but replacement cannot be obtained with substantial expense, trouble or loss
	2. **Expectation damages** (default remedy)– want benefit of bargain by putting promisee in as good of a position had K been performed
		1. Must be proven w/ reasonably certainty
			1. If **speculative** 🡪 nominal § 346 – court’s discretion
		2. § 347 = expected profit + any other costs (reliance/substitution) – costs avoided by non-performance – avoided/avoidable losses
		3. Calculate by looking at *what parties bargained for*
		4. Methods
			1. **Cost completion**
				1. Damages must be direct natural and immediate consequence of breach **and**
				2. In contemplation of parties **at the time of contract formation**
			2. **Diminution in value** (e.g. substantial performance)
				1. If breached provision merely **incidental to the main purpose** of the contract, and the **economic benefit** to be gained by non-breacher from full performance is **grossly disproportionate to the cost of performance**; damages limited to difference in value

Doesn’t take wilfulness into account for calculating damages

* + - * 1. *Ask:*

Was breach in bad faith?

Was breached clause part of the primary function of contract?

What did they bargain for?

What was the consideration? Was it priced into the contract?

Was expectation really to perform or was it to have land at a certain market value?

Will awarding full damages result in **economic waste**?

* + 1. **Lost Volume Seller** – when party would and could have made both original sale + any subsequent resale 🡪 entitled to lost profits (b/c necessary to put them in pre-breach position)
			1. Requires
				1. Would have been able to produce breach goods + all subsequent sales
				2. Would have been able to sell breached goods + all subsequent sales
				3. All would have been profitable sales
			2. *Note:* If buyer can show he could enter market and resell the goods to one of seller’s future sales 🡪 no LVS
				1. Burden of proof on seller
			3. UCC § 2-709
		2. **Reliance damages** § 349 – interest in reimbursing for losses caused by reliance by being put in the position she would have occupied had the K not been made (*ante status quo*)
		3. For *performance* of *preparation for performance* of the contract
			1. Once accepted or § 87 or § 90
		4. Does not include lost profits
		5. *Expectation usually includes reliance*
			1. **Ask:** special circumstance so additional?
		6. *Ex post* – calculated at time of breach
		7. Subtract losses would have suffered absent breach
	1. **Restitution** – payment/return of benefits conferred on the other party
	2. **Limitations**
		1. Forseeability § 351
			1. Can only recover for **foreseeable damages** that would “arise naturally” according to the usual course of things, and special circumstances that have been communicated (*Hadley*)
				1. Information forcing default

Does this make sense in modern world?

Mass transactions

* + - * 1. People can opt out
				2. Josh: buyer in better position to insure against consequences b/c has all info
		1. Certainty – can only recover damages that may be *reasonably considered* to have arisen naturally or that were *in contemplation of parties at time of contract formation* as a *likely result* of breach
		2. Duty to mitigate (**prevents waste**) § 350
			1. Not liable for damages *which need not have occurred*
				1. Could it have been avoided w/o “undue risk, burden or humiliation”?

*Play* with what is *undue*\*\*\*

* + - * 1. Injured party not precluded to the extent that the reasonable attempts were unsuccessful
			1. Were losses exacerbated?
			2. Reputational factors? (e.g. had to close b/c reputation at stake thus reasonable)