Exam Approach:

1. On scrap paper, write out all main topics (the purple enumerated topics in this outline)—look back at them after reading through the fact pattern to MAKE SURE I haven't missed spotting any issues.

2. Read fact pattern CAREFULLY! With pencil, circle and write out the short names of main issues that need to be discussed in the margins.
Be sure to distinguish:

- AT WHAT POINT in the contract process are we? (**Which of the VIII main topics are we in?**)
- Does **UCC** (contracts for the sale of goods—all things movable) or **Restatement** apply to this issue? Or **CISG** (International)?
- Bilateral or unilateral? (two promises or one right and one duty?)
- In writing or oral agreement? (Does it fall within the statute of frauds—MYLE**G**S)

3. Write an IRAC for each issue spotted.

Color Code:
Purple = 8 main topics for the "skeleton" of the outline
Green = memorized subtopics/questions likely to be issues that are found under each purple main heading

Know which Rule I need to apply for each separate issue I identify:
Red = Restatement
Blue = UCC (sale of *goods*)
Orange = CISG (international)

I. CONTRACT FORMATION

In order to determine if a contract has been formed, the parties must have intended to be legally bound (they must have considered *legal consequences* in making the agreement). This is determined by the objective theory of contracts—that **a reasonable, objective person in the position of the offeree would believe that an offer had been made**. (*Subjective intent does not count UNLESS looking at whether parties acted in good faith*)

1. Did the parties intend to be legally bound/is the offer a valid offer?

Definition of an offer: "An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it." Restatement.

Intent to enter into legally binding contract—to analyze whether intent is present, look at:

1. Words used in the communication
2. significant terms included or omitted
3. directed to a particular person—who is the **intended offeree**?
4. relationship of the parties
5. common practices or trade usage

FOR:

- **Valid offer? (1) reasonable person in position of the offeree** would think offer was made; **(2)** made in **good faith**—for **UCC**, good faith: "honesty in fact and the observance of reasonable commercial standards of fair dealing." [can look at subjective intent in good faith]
- doesn't matter what one subjectively thinks (*except for good faith*)
  - **Language is clear, definite, and explicit**
  - Parties are named.
  - Definite proposal/terms.

- Conduct (part performance)
- **TYPICALLY *IS* AN OFFER*:*** *a purchase order in response to a quote*

AGAINST:

- **TYPICALLY NOT offers**: *ads, quotes, letters of intent, invitation to deal, mere statement of minimum selling price, preliminary negotiations.* HOWEVER:
  - Quote *can* be offers IF specific language, ie: "for immediate acceptance."
  - Ads *can* be offers IF there is clear, definite, and explicit language that ***invites acceptance without further negotiations***
- Language is not clear/no parties are named
- **reasonable person would NOT find the offer to be serious**
- Offer was NOT meant for that person.
- Offeror **revoked** (and the offer *could* be revoked)
- Offeror is "Master of the Offer" so offeror should have been more specific
- policy—if we allow social agreements, courts will be flooded.

UCC Gap Fillers/"Default Rules" (when a term is missing): Contract is enforceable if: **(1)** it is clear that parties **intend to be legally bound**; and **(2)** the court has a **reasonable basis for remedy**

- **if price is not settled**: if price is: (1) fixed in good faith and (2) within limits of commercial reasonableness, contract is enforceable
- how goods should be delivered is not specified: goods should be delivered in a single shipment
- no place of delivery specified: then seller's place of business from which the seller would normally ship the goods
- no time specified: a "reasonable time" for delivery
- when payment is due, if not specified: at the time and place the buyer is to receive the goods

2. Did the offeror revoke the offer before acceptance?

General rule:

- an offer is **open for a reasonable period of time** if no time is specified
- can be revoked ***at any time before acceptance is communicated to the offeror*** but NOT afterwards.

FOR:

- offer lapsed because it wasn't accepted within time limit set by offeror
- offeree rejected the offer the first time (**offer is extinguished upon rejection**)
- *EVEN IF a definite time is named in the offer, the offeror can still revoke his offer within that period*
- if offeror **relied to his detriment** on the rejection/revocation
- offeree had **REASON TO KNOW from a reliable source** or there is evidence that offeror knew that offer had already been revoked
- ***conduct***—offeror takes "definite action inconsistent with an intention to enter into the proposed contract and the offeree acquires reliable information to that effect
- revoked upon the *death* of the offeror ***UNLESS*** it is a valid option contract (which then can be enforced after death)

AGAINST:

- **it is a valid option contract and cannot be revoked**
  - ***option contract is STILL open even if it is rejected/a counteroffer is made IF it is later accepted within the period of time specified.***
- no reasonable notice was given for terminating the contract

***<u>HOW TO MAKE AN OFFER IRREVOCABLE</u>:

(1) option contract (non-merchants)**–written, offeree purports consideration so that the offeror will keep the option open (majority says you must pay the consideration, Rest. 87 says just have to recite consideration)**; option still open even if it is rejected/a counteroffer is made but then later accepted within the period of time specified. *DOES NOT use Mailbox Rule* (requires that the offeror receives the acceptance to be effective)—justified because the irrevocable option sufficiently protects the offeree, which is the reason for the Mailbox Rule.

(2) UCC—firm offers—*<u>no consideration</u> necessary!!!* Must be:

- **<u>by a merchant</u>** "a person who deals in goods of the kind or holds himself out to have knowledge/skill—must deal in the good he is selling"
- **offer must be in signed writing** (and if it is a form provided by the offeree, the offeror must sign)
- **give assurance that offer will be held open**
  - **period of time open = reasonable time but *CANNOT EXCEED <u>3 months</u>*.**

(3) reliance (§ 87)—if gen contractor RELIED on subcontractor (show proof of reliance from the facts!) then NOT revocable. If bid is so low that a reasonably prudent gen contractor would not rely on it, then it is not valid.

(4) unilateral contract (one promise [offeror] and one act [offeree]—contract formed AFTER task is completed) and ***<u>part performance</u> was started—offeror cannot revoke offer when offeree is in the middle of performing the task.*** *Restatement §45*

3. Is there a <u>condition</u>?

(1) <u>Condition</u>—an event, not certain to occur, which *MUST* occur before performance under a contract is due. ***The party DOES NOT have to perform until the condition is met—it is NOT a breach of agreement.

Distinguish from "promise"—which is something that, if not done, IS a breach of agreement. (This can be an issue of *interpretation*).

- **Restatement**—In the case of ambiguity as the whether there is a condition or not, the preferred interpretation is that it will be a promise—one that **will reduce the obligee's risk** of forfeiture (UNLESS the obligee is in control/assumed the risk). [<u>Case</u>: farmer's ruined crop]

Promissory condition—both a promise and condition; "best of both worlds"—can sue for breach AND don't have to perform if condition is not met

(2) *Is it an **express** or **constructive** condition?*

- **<u>Express</u>**—IN writing as part of the contract (can actually be oral, written, or done by conduct)
- **<u>Constructive</u>**—a condition that the court imposes (*not in writing and no conduct*; the court decides!)
  - Typically—an exchange in promises and want to know: **<u>which party performs first</u>**?
    - **<u>General Rule</u>** [Restatement]: If unclear, court will say each performance should happen *simultaneously*.
    - **<u>If the performance of only one party requires a longer period of time:</u>** his performance is *due at an earlier time* than that of the other party
      - **<u>Example of this:</u>** sale of real estate or ***employer payment***—must work first (constructive condition) before you get paid!
      - **<u>Case example:</u>** case where constructive condition was that each party must do what is necessary to enable the other party to perform.

(3) Event that Terminates a Duty—**Restatement** [a pending obligation to do something is terminated because a certain event has occurred—<u>Case</u>: man with disability insurance didn't pass policy; didn't have to pay for the new aluminum siding on his home]

- If there are terms in the contract that say if a certain event occurs, it will terminate the obligor's duty of performance, then the obligor's duty is discharged if the event occurs.

- **EXCEPTIONS**:
  - If the event is the result of a breach of obligor's good faith and fair dealing
  - If the event could not have been prevented because of impracticability and the obligor is not subjected to a materially increased burden

(4) Condition of Personal Satisfaction—about *aesthetics*! Based on a **good faith *honest* subjective standard**; *usually the objective standard is preferred*, BUT in your contract you can **specify** that a subjective standard should be used:

- **Restatement**—The parties agree that an architect will use the good faith honest subjective standard to judge satisfaction of the work (*architect's opinion will decide the dispute*).

4. Can the court excuse the non-occurrence of a condition?
(court will say the parties have to perform EVEN IF the condition has not occurred)

(1) Avoid Disproportionate Forfeiture—a condition wasn't satisfied, but if the court enforces that condition, it will mean a MAJOR forfeiture even though the condition itself was a relatively minor one (however, court won't enforce the condition if it was a material part of the agreed exchange). High threshold to meet.

(2) A waiver that excuses the condition (waiver NEEDS consideration!)—Conditions (that are *minor*) can be WAIVED by the parties by words or actions (and therefore the parties will perform whether or not the condition is satisfied) *UNLESS* the occurrence of the condition was a MATERIAL PART of the agreed exchange. [Restatement]

- You can ***retract your waiver*** of the condition AS LONG AS the other party **does NOT detrimentally rely on the promise you made**, ***OR*** the **condition was NOT a material part of the agreed exchange**.
- **Usually brought up in a notice period to an insurance company! (ie: you say you'll perform anyway even though you're 2 days late)

(3) Breach of contractual condition of cooperation

- **Bad faith**! [insurance company denied man's application because he had died the same day]—should have at least tried to satisfy the condition since they controlled whether or not the condition was satisfied, so they are bound even though the condition did not occur.

(4) Repudiation

- *e.g.*: Option agreement and one party says you have to pay a certain amount of money; other party says "I'm not going to perform"—court says we'll ignore the condition because the other party acted in bad faith to repudiate the contract.

5. Was acceptance valid?

- **Restatement and UCC: UNLESS OTHERWISE UNAMBIGUOUSLY STATED, an offer is construed as inviting acceptance IN ANY MANNER and BY ANY REASONABLE MEDIUM in the circumstances.**
- **UCC: notification of acceptance within a reasonable time,** otherwise offeror may treat the offer as having lapsed.
- Valid acceptance by **CONDUCT** (offeree accepts by taking actions that suggest he accepts the offer or takes the benefits of the offer, even if he hasn't orally accepted)—ie: *teacher accepted by teaching/paycheck*
- unilateral contracts—must have: (1) **knowledge of the offer** and (2) must **complete performance** (motivation is not relevant)
- **private v. public rewards—(these are offers for unilateral contracts):** private rewards (must have knowledge); public rewards (prior knowledge not needed)
- *acceptance occurs upon shipment*.
- **silence** does NOT normally operate as acceptance EXCEPT:
  - offeree silently takes the offered benefits

- one party relies on the other party's manifestation of intention that silence may operate as acceptance
- previous dealings in which silence as acceptance was valid

- **accommodation** is NOT an acceptance (BUT: must **explicitly state** "THIS IS AN ACCOMMODATION" so that it's not in breach).
- **notification of change in terms** must be within a reasonable time

6. Does the Mailbox Rule apply? Mailbox Rule is the DEFAULT RULE—*ONLY used* when offeror does not specify. [Check to find dates and then count days.]

FOR:

- **ACCEPTANCE** is effective **when MAILED**
- offer, rejection, revocation is effective when received.

AGAINST:

- **UCC**—*NO MAILBOX RULE*: giving notice of acceptance within a "reasonable time" applies.
- **CISG**: Mailbox rule does not apply; in CISG, offer is made from the date the offer is mailed—CISG is ***all opposites*** of Mailbox Rule.
- no mailbox rule in *direct, instantaneous communications* (ie: over the phone)—mailbox rule does not apply.
- ***no mailbox rule for option contract*** (then rule *doesn't apply* since no need to protect offeree—offer CAN'T be revoked anyway.

7. Is this a "Battle of the Forms" type of acceptance? (buyer's form says one thing; seller's form says another)

- **COMMON LAW and CISG**: last-shot rule (party who sent the last form is binding)
- **UCC: 2-207**—is the term an **ADDITIONAL** (was never in the offer to begin with) or **DIFFERENT** term (was already mentioned in offer and change in form)?
  - **IF ADDITIONAL TERM**: and only *one party* is a merchant: construed as a proposal for addition to the contract (other party has to say yes or no) ***UNLESS*** *contract is between two merchants.*
  - **IF BETWEEN TWO MERCHANTS**: additional term automatically becomes part of the contract **UNLESS**:
    - offer *expressly limits acceptance to terms* of the offer→ go to **gap filler**
    - terms MATERIALLY ALTER it
    - CONDUCT by both parties that recognize the existence of contract is sufficient to establish a contract.
  - **So, if an additional term materially alters the contract, it does not automatically become part of the contract**
    - most courts rule that ***dispute resolution clauses*** are considered **materially altering** the contract (ie: arbitration clauses) so it would NOT automatically become part of the contract.
  - **IF DIFFERENT TERM**:
    - USUALLY, both terms are **knocked out** and you **go to the gap filler** (*MAJORITY OPINION*)
    - some courts treat different terms the same as additional terms (see above)
    - if "this acceptance is *expressly made conditional* on your agreement to additional terms", go to gap filler.
  - If one party is **not a merchant**: additional terms are construed as **proposals for addition** to the contract→so, not automatically part of the contract on the merchant's terms
- **Rolling offers** (**UCC**)—offer is rolling until the buyer has a reasonable opportunity to review and accept the terms.

8. Warranties UCC! (representation by seller about the *QUALITY* of the goods)

(1) **Express warranty** (express statement made by manufacturer, ie: "they are unbreakable"
(2) **Implied warranty of merchantability**: IMPLIED, nothing is said; products are fit for the ordinary purposes for which the goods are used; products are fair or average quality. TO EXCLUDE: merchant has to specify that the product is "as is" or "without all faults" either oral or in writing.
(3) **Implied warranty of fitness for a particular purpose**: applies to all sellers. Nothing is wrong with the product, it is simply NOT what the buyer ordered; requires that buyer is relying on seller's expertise and the seller has reason to know that the buyer is relying on him. TO EXCLUDE: MUST BE IN WRITING.

II. CONTRACT ENFORCEMENT

NOW THAT THE CONTRACT HAS BEEN FORMED, **is the contract valid/can it be enforced?**
Look at **four kinds** of validation devices: seal, consideration, promissory estoppel, other (moral obligation).

1. Is there a seal?

- Restatement § 98—any writing/signature/letterhead can be considered a seal
  - Seals have been abolished in most jurisdictions or only count as evidence; seals are not sufficient as a validation device alone.
- **UCC** makes seals inoperative.

2. Was there consideration?

***MUST HAVE:
(1) **legal value** (either a detriment to promisee or benefit to promisor)
(2) **bargained-for-exchange** (promise induces detriment and detriment induces promise)

Majority rule on consideration: **it must be paid for contract to be valid**.
Minority rule: if consideration was **recited** but not yet paid (it is *in writing*, *signed*, and *recites* a purported consideration), Restatement 87 says the contract is valid.

****Courts *usually DO NOT look into the value* of the consideration. **Nominal consideration is only a problem IF**:

(1) Not Bargained For
(2) Mere Pretense for a gift
(3) Consideration stated is not paid for (unless minority view regarding RECITING consideration under §87 [options] or §88 [surety])
(4) **Equitable action** § 364 (ie: in a suit for injunction/specific performance)
    BUT will REFUSE such relief IF it is unfair because:
    (1) contract was induced by mistake or by unfair practices
    (2) relief would cause unreasonable hardship/loss to the party in breach/third parties
    (3) the exchange is grossly inadequate or terms of the contract are otherwise unfair.
(5) **Money for money exchange** (ie: 1 cent exchanged for $200)

FOR:

- Can find **both** legal value and bargained-for-exchange
- If you ***give up a legal right*** (ie: had a legal detriment) by refraining from doing something you could do in exchange for $/something else
- *Illusory promise* just means that there must be consideration.

AGAINST:

- missing *either* legal value or bargained-for-exchange
- **GIFTS**—there is no consideration because *no legal value* (the person pays nothing) and the promise to give the gift does not induce detriment to the promisee); also, putting a condition on the gift is not consideration because it doesn't rise to the level of a legal detriment.
- **PRE-EXISTING DUTY RULE** (common law rule; *quite controversial*): If under a pre-existing duty (ie: to your employer) then it does not amount to consideration necessary to support a contract (*agent who wanted to get reward*) UNLESS:
  - **modification to rule**: if unexpected/**unanticipated** difficulties arise that weren't anticipated when the contract was made and the agreement modifying the contract is fair and equitable, it should be enforced even without consideration (*garbage truck case*)

- can't raise consideration issues if contract has been FULLY PERFORMED (***past consideration is no consideration***)

3. Can promissory estoppel be used? (Did the promisee detrimentally rely on the promise?)
Look for this **when you can't find consideration** to enforce the promise.

ALL FOUR ELEMENTS of Restatement §90 MUST BE MET:
(1) there must be a promise
(2) the promisor must reasonably expect the promise to induce the promisee to justifiably rely on that promise to her detriment
(3) the promisee actually does rely on that promise to her detriment
(4) injustice can be avoided only by enforcing the promise

Promissory Estoppel can also apply to **pre-contractual reliance**: promise can be binding if injustice can be avoided only by enforcement of that promise (but must have relied on the promise—and it must be a reasonable reliance) and is limited as to the damages you can receive.

4. "Other" ways besides consideration and promissory estoppel to enforce a promise

- **Material Benefit Doctrine (*MINORITY view*—§ 86)**: if a *promise is made in recognition of benefits previously received*, then that promise is binding to the extent necessary to prevent injustice (freeloader case where guy lived in hotel and used a neighbor's car/ate their meals)
  BUT!! Not binding if: (1) benefit received is a GIFT; or (2) value is disproportionate to the benefit
- **Past Debts**:
  - A ***promise to pay an old debt*** is binding even if the statute of limitations has expired. No consideration is required. Such a promise is made by: (1) voluntarily acknowledging the debt; (2) making a payment on the debt.

5. Is this a requirement, output, or exclusive dealing contract?
Look for* GOOD FAITH *arguments in these—consideration is not normally judged.
Both common law and UCC say that these contacts are enforceable.

Requirement contract: seller is required to produce and provide all product that the buyer needs. Buyer can only buy from the seller. Must be in **good faith**.
- **UCC** restricts the ability of the buyer to **increase** purchases, not decrease them (they can decrease but only in good faith—getting a better price is not good faith)

Output contract: buyer is required to buy all the output of the seller. Seller cannot sell to anyone else. Must be in **good faith**.

Exclusive dealing: requires an obligation by the seller to **use BEST EFFORTS** to supply the goods and by the buyer to **use BEST EFFORTS** to promote their sale (***Higher duty than just good faith!***)
Best Efforts requires (in addition to good faith):
(1) reasonable diligence
(2) reasonable effort
(3) due diligence

6. Is this a Divisible/Severable Contract [Restatement] or Installment Contract [UCC]?

DIVISIBLE—one contract, but contract is divided in segments and various performances are agreed to (e.g., rent) and ONE of the segments is not performed. ***Severability clause****—says not to throw out entire contract if only one part is unenforceable*
- **Two questions to ask**:
  1. Are there corresponding pairs of part performance?

2. Are the parts of each pair regarded as agreed equivalents? (Are the performances of equivalent value?

Restatement—*When Agreement is Enforceable as to Agreed Equivalents*: If answer is yes to both questions, that portion of the agreement is enforceable ***IF*** there is no serious misconduct/not offensive to public policy.
Restatement—*Part Performance as Agreed Equivalents*: IF answer is yes to both questions and one party performs on a part of the pair, the other party has to perform as well.

Installment Contract [UCC]—same principle as severable contracts.

UCC: Installment Contract is one that requires delivery of goods in separate lots to be separately accepted (This has NOTHING to do with installment *payments*; it is **delivering goods in separate shipments**)

- Rule: You can reject the installment, *but NOT the entire contract!*
  - *ONLY exception*: if the **section is very important** and will mess up the entire contract (ie: parts to a machine; machine won't work without a section)
- So, even if there is a mistake on one installment/section, the contract still continues
- To VOID the entire contract: there must be a **severe mistake**

7. Does the person have the *capacity* to contract?

People who DO NOT have the capacity to contract:
(1) **"Infants"** (minors, under 18)—within a reasonable time after attaining majority→return benefits previously received.
(2) **Intoxicated persons** (can void contract if they show that the other person has "reason to know" of the intoxication)
(3) **Mental illness** (can always void, even if the other party is not aware of mental illness)
(4) **Guardianship**

III. OPERATIVE EXPRESSIONS OF ASSENT:
Statute of Frauds, Parol Evidence Rule, Interpretation, Modification

1. Is the contract one that falls within the Statute of Frauds? (only focus on this is there is NO writing but it falls within MYLEGS and therefore SHOULD be in writing… if there is a written document that is signed by both parties, DON'T even go into the Statute of Frauds).

Policy reasons for having contracts in writing: (1) *evidentiary* (need proof the contract existed) and (2) *cautionary* (parties will take it seriously if it is in writing)

Approach: (1) Does it have to be in writing? (MYLEGS); (2) check writing requirements; (3) UCC or Restatement?; (4) does it fit with the *exceptions* of UCC or Restatement?

- Must it be in writing? (**MYLEGS**)—all restatement except **G** is UCC (absolutely no statute of frauds in the CISG)
- It is one of the exceptions? (UCC or Restatement?)
  - **Restatement exceptions**:
    - *main purpose/leading object* (if you are serving your own "pecuniary" purpose by being the surety, it does not have to be in writing—no longer serves the purpose of having it in writing, which is to protect the surety from his own possibly misguided philanthropy.
    - *part performance* (prenuptials—MOST of the promise must be fulfilled; much stricter than part performance for other contracts)
    - *Not performable in a year*—MUST say, in **express terms**, that the specific duration is for more than one year; otherwise, oral agreement is okay.
    - *for Land*—part performance, but requires more than the payment (must also take possession and make improvements to the land); also leases must be longer than a year to be considered a sale of land.
  - **UCC exceptions**:
    - ***QUANTITY* is not stated** in sales of goods over $500.
    - *Between two merchants*: If within a reasonable time a writing in confirmation of the contract is received by the receiving party (and they have reason to know its content), it is enforceable unless written *notice of objection is given* ***within 10 days*** after it is received.
- **GENERAL EXCEPTIONS**:
  - If you **admit** that a contract was made, it is enforceable *even without* the writing requirements of the UCC.
  - **Promissory estoppel**—much, much more difficult to prove when agreement was oral—must have more evidence and very convincing argument of **reliance** on the promise that strongly suggests an agreement had been made. Injustice would result if promise was not honored.

2. Writing Requirements for Statute of Frauds—Restatement vs. UCC

Restatement:
(1) signed by party to be charged (person you are suing/defendant)
(2) reasonably identify the subject matter of the contract
(3) sufficient to indicate a contract has been made by the signer to the other party
(4) states with reasonable certainty the essential terms of the unperformed promises

UCC:
(1) signed by party against whom enforcement is sought (same)
(2) deals with goods for price of at least $500
(3) writing must be sufficient to indicate a contract has been made (same)
(4) Terms do NOT have to be exact **but MUST STATE QUANTITY of goods; not enforceable beyond the quantity of goods.**

****Special provision for contracts BETWEEN MERCHANTS:** enforced if one of the parties sends a confirming memo, which is signed by the sender and indicates a contract has been made (with quantity specified) **UNLESS written notice of objection to its contents is given within 10 days after it is received.** (otherwise, recipient can't raise statute of frauds defense).

3. Does the Parol Evidence Rule apply?
(PE rule BARS evidence from being admitted if it is **from BEFORE (both oral and written evidence barred) or AT THE SAME TIME (oral evidence barred but likely NOT written evidence) as written contract**—afterwards, it is a *modification* and evidence is always allowed to be heard)
(only comes up in very narrow class of situations)—judge determines as a matter of law

(1) **Totally** or **partially** integrated?
   a. **Total:** parties intended that the written contract contained EVERYTHING the parties agreed to. **NO ORAL EVIDENCE is allowed.**
   b. **Partial:** parties intended that everything in the agreement is the final word on what is in the agreement—**but** if you have **oral/written evidence not within those categories**, then **determine whether or not it *contradicts* what is in the contract**. If it does **contradict**, not admitted. If it does not contradict, court will allow admittance.

(2) Does the evidence **contradict** what is in the written contract? If yes, not allowed. If it doesn't contradict, will allow evidence.

Tests to determine total or partial integration:

(1) appearance—how the contract looks (not used often; very subjective)
(2) **separate consideration** (Restatement uses)—did the oral agreement furnish separate consideration in addition to the consideration given for the written contract? (*Restatement uses this test*)
(3) **natural omission** (Restatement uses)—if the subject matter of the prior agreement may naturally be made in a separate agreement, it is admissible (hard to admit evidence: favors party that wants to keep the testimony out) (*Restatement uses this test*)
(4) **certain inclusion**—unless the subject matter of the prior agreement would certainly have been included in the final contract, it is admissible. (Easy to admit evidence: favors the party that wants to include the evidence) UCC uses this test
(5) writing omission—if the subject matter of prior agreement is not mentioned in the final contract, evidence is admissible.

ALSO: **UCC** calls the writing the "*final expression*"; total integration is the "complete and exclusive statement." Can hear evidence of "consistent, additional terms."—same as Restatement.

****DIFFERENCE* between Restatement and UCC: in UCC, you can **ALWAYS** use:

- **course of performance**: behavior of the parties during the contract at issue
- **course of dealing**: how the parties have behaved with each other IN PRIOR CONTRACTS.
- **usage of trade**: what are the common arrangements in the industry?

Common law exceptions—Courts will hear evidence for:

- oral **conditions** preceding the formation of the contract
- always hear evidence for FRAUD.
- always hear evidence when parties differ on what a term MEANS (interpretation)

4. Is there a modification of the agreement?
(*does **NOT** need consideration to be binding*—UCC)

**Modifications CANNOT be oral if there is a NOM clause ("no oral modification") saying "*any modification of the contract must be in writing and signed by both parties*."

So, if there is a modification:

1. Is it in writing?
2. Is there a NOM clause?
    a. If yes, it MUST be in writing to be an enforceable modification.
    b. If it is NOT in writing, look to **2-209(3)**: the requirements of the statute of frauds must be satisfied if the contract is modified within its provisions (dispute among courts—most say that modification MUST be in writing if within statute of frauds, but some courts say you must look at the term that has been changed—ie: *quantity of goods in UCC* (so, minority would say that only a change in quantity must be in writing). One exception: if the contract is modified to *exclude the statute* (ie: price of goods falls below $500) then the modification does NOT have to be in writing.
3. **2-209(4)**: if (2) and (3) don't work, an attempt to modify can *operate as a **waiver***: "I agree to the oral agreement we have made changing the terms of the contract."
4. **2-209(5)**: parties can retract the waiver by **reasonable notification** UNLESS the other party has **relied** on the waiver.

Special type of modification: In **accord and satisfaction**, if A and B make an agreement for 10k and B defaults but A then says B can give B's car to A instead ("accord"), [if B gives the car, that is "satisfaction"); if B defaults on giving the car, then A can ask for either the 10k or the car. For accord and satisfaction, the parties should specify it in the contract.

5. Is it an issue of interpretation?
(when the parties argue over what the words in the contract MEAN.) *PAROL EVIDENCE RULE DOES **NOT** APPLY (court may hear all prior oral dealings).*

Restatement: if *neither party knows* of the disagreement, there is no contract. If one party knows about the difference and the other doesn't, the restatement protects the INNOCENT PARTY and no contract is formed. In interpretation, all prior oral dealings are allowed to be heard by the court since the PER does not apply. ULTIMATELY, must look at FACTS and circumstances to determine intent.

Rules, Guide, and Maxims:
Contra Proferentem—court gives *benefit of the doubt to the party who DID NOT draft* the document when in doubt.

Expressio Unius Exclusio Alterius—if you make a list in the contract, unless you indicate otherwise, any things NOT specified are meant to be EXCLUDED.

Ejusdem Generis—similar items can be interpreted as being close enough to the items in the list to include these terms.

Also can look at usage of trade and course of performance.

6. Was there a Mistake? (Mutual or Unilateral?)
Mistake definition—"a belief that is not in accord with the facts"

1. *When does this come up?* A party will argue mistake to rescind the contract—only comes up when one party wants to get out of the contract (rescind) or hold that a contract was not formed. **Pay attention to: A party **knew or had reason to know** of the mistake.
2. *Is it Unilateral or Mutual **AND** which party bears the risk?*
    a. **Mutual**—both parties thought one thing but the reality was the other and ONLY ONE party wants out of the contract.
        i. **Restatement 152**
            1. **If a mistake as to the basic assumption on which the contract was made has a MATERIAL EFFECT on the agreed exchange of performances (ie: does the difference matter?), the contract is voidable by the adversely affected party ***UNLESS*** he bears the risk of the mistake under 154.**
            2. To determine material effect, take into account relief by way of reformation, restitution, etc.

ii. **A party bears the risk of the mistake when**: [Restatement 154]
1. the **risk is allocated to him by agreement of the parties** (there is a provision in the agreement that you will take part in this agreement *no matter what* ***OR***
2. *** "**conscious ignorance**"]*** (the party is aware at the time the contract was made that he has only limited knowledge but treats this knowledge as sufficient)
3. **court decides on its own** which party bears the risk on the grounds that it is reasonable to do so

b. **Unilateral**—only one party has made a mistake
i. **two hurdles to get through**:
1. that you **don't bear the risk of the mistake** (recite **Restatement 154**); *AND!!!*
2. **Restatement 153**: (a) that the effect of the mistake is such that enforcement of the contract would be unconscionable, or (b) the other party had **reason to know of the mistake** *OR* **his fault caused the mistake**.

ii. Case Examples:
1. unilateral mistake in the insurance policy settlement where insured was mistaken in belief of the correct limit; so even though the insured did not bear the risk of the mistake, insurance company had reason to know of the mistake so contract is voidable.
2. Contractor made a mistake in calculating a bid; can argue that owner should have known of the mistake because the other bids were so much higher.
3. Mistake of value of painting worth $1 million—*conscious ignorance*.
4. "snapping up" an offer could be an indication of a unilateral mistake

IV. ABUSES OF THE BARGAINING PROCESS

(even if a contract is correctly formed according to above info and has all the elements of an enforceable contract, sometimes courts don't think it should be enforced due to policy reasons)

**These come up when a party wants out of the agreement

**Remember to always say that there is a pervasive "good faith" requirement in both Restatement and UCC.

1. Is this a Duty to Read issue?

General Rule: saying you didn't read is NOT a valid defense for voiding a contract!
EXCEPTIONS:

- **Restatement: a reasonable person would have no reason to know/would not reasonably be able to find the clause/terms that you were meant to read** and so is not bound by those terms (case: indemnity clause was on the back of a receipt/ticket—receiver had no reason to think that something would be on the back, so not a modification)—there must then be some notification that there is something to read.
- If a party creates a **reasonable expectation** in the other party (which is NOT supported by the terms of the contract) the **reasonable expectation will WIN over the language in the terms**—however, this is *only used when there are ambiguous terms* in INSURANCE agreements.
    - Case: Insurance case—Look at what a reasonable person in the position of the insured would expect in the policy.
    - **Reasonable expectation policy requirement**: If these conditions are satisfied, you may use the reasonable expectation policy. [USE THIS when you see INSURANCE AGREEMENTS]
        (1) adhesion contract (one party has a significantly higher bargaining position)
        (2) ambiguity in the contract *OR* complexity of language that a reasonable person would not understand.

2. Is this an issue of Misrepresentation, Fraud, Improper Threat, or Non-Disclosure/Concealment that can void the contract?

(comes up when someone wants out of the agreement)

Misrepresentation—an assertion that is not in accord with the facts [Restatement 162]

- Two Types—if found to be induced by either a *fraudulent* or *material misrepresentation*, Restatement says that contract is **voidable** by recipient:
    - **Fraudulent**—if the maker **intends** his assertion to **induce a party** to manifest his assent and the **maker knows or believes that the assertion is not in accord with the facts** *OR* isn't confident about the assertion *OR* knows he doesn't have a solid basis for the assertion (bad faith and voidable)
    - **Material**—if it would be likely to induce a reasonable person to manifest his assent (likely good faith but still voidable)—no intent to deliberately lie/mislead

Improper Threat—if the party's agreement was induced by an improper threat that *leaves that party no reasonable alternative*, contract is **voidable** [Restatement]

- Threat is improper if what is threatened is a crime/tort
- *An action will be considered an assertion* when that action is intended/known to be likely to prevent another from learning a fact.

Nondisclosure—involves no affirmative act; a *seller does not disclose important info* to a buyer that may alter the buyer's wish to buy (**failure to act in good faith**)

- General Rule—you have a **duty to disclose!** If you don't disclose, it will be the same as asserting that the fact does not exist ***IF***:
    - the person knows that disclosure of the fact is necessary to prevent assertion from being a misrepresentation
    - the person knows that disclosure of the fact would correct a mistake of the other party
    - nondisclosure would be a failure to act in good faith

Concealment—an affirmative act to prevent another from learning the fact

3. Is this an Unconscionability issue?
(used in both Restatement and UCC, but ultimately is up to courts as a matter of law)

Two types of unconscionability—*many courts say you need BOTH for voiding contract* [this was the Circuit City employee case]

1. **procedural**—examine ***how the contract was negotiated*** and the circumstances of the party; if it was oppressive or involved surprise it may be unconscionable and unenforceable.
    a. *oppression—inequality in bargaining power* that precludes the weaker party from enjoying a meaningful opportunity to negotiate
    b. *surprise*—the extent to which the *agreed upon terms were hidden* in the printed form by the party seeking to enforce the disputed terms
2. **substantive**—***centers on the terms of the agreement*** and whether those terms are *so one-sided as to shock the conscience*—**no mutuality of conditions** (on one side it is so unfair that it should not be enforced)

UCC:

- If a court finds that the contract is unconscionable:
    - the court may refuse to enforce the contract completely OR
    - only refuse to enforce the unconscionable clause OR
    - limit the application of the unconscionable clause
- When it is claimed that a clause may be unconscionable, the **parties are given a *reasonable opportunity to present evidence* as to commercial setting and purpose**. [*other party can make an argument to say it's NOT unconscionable due to a number of reasons! Case: furniture store*]—use this to analyze both sides of the claim arguing both FOR and AGAINST unconscionability.

4. Is this a Public Policy/Illegal Bargain issue?

Restatement 181: *Failure to Comply with **Licensing*** [Case: Nurses to fill in at the hospital during strike]
So—you weigh the promise to act against the policy reasons for having a license (usually the policy reasons will outweigh the promise!)
If a party is prohibited from doing an act because of his failure to comply with licensing, a promise in consideration of doing that act is unenforceable IF:

- the requirement has a ***regulatory purpose***, AND
- the interest in the enforcement of the promise is clearly ***outweighed by the public policy*** behind the requirement.

Restraint in Trade/Non-Compete Clauses—Two types of restraint:

1. **Direct restraint**—two parties enter into an agreement to not compete with each other in a type of business. One party pays another party to not compete with them. **THESE ARE NOT ENFORCEABLE**.
2. **Ancillary restraint**—an agreement not to compete but the *provision is part of a larger agreement between the parties*; ie: covenants to compete when you *sell a business* or if you are an employee and agree to not compete for a number of years after you leave your company. **MAY BE ENFORCEABLE** [Case example: employee of food company worked for another business/violated covenant not to compete]
    a. **Restatement 188**
        i. A covenant not to compete is unreasonable ***IF***:
            1. the *restraint is greater* than needed to protect the promisee's interest
            2. promisee's need is outweighed by hardship of promisor/likely injury to the public
        ii. Ways that covenants not to compete are considered ancillary:
            1. promise by seller of a business not to compete that would injure the value of the business sold
            2. promise by an employee not to compete with his employer
            3. promise by partner not to compete with partnership

V. BREACH and REPUDIATION

(what kind of breach and what is the consequences/before performance; you learn that the other party will NOT be performing)

1. Breach—which of the three types of breaches is it? (Will determine the consequences!)

1. **Total and material**—promisee can withhold performance, terminate the contract, AND sue for damages
2. **Material**—promisee can suspend performance, require the promisor to cure the breach, AND sue for damages
3. **Immaterial**—the promisee can sue for damages BUT they must continue to perform

Analysis:

1. How to determine materiality of breach when a party fails to perform: [**Restatement** gives suggestions!]
   - the extent to which the injured party is deprived of benefit that he reasonably expected
   - can the injured party be adequately compensated?
   - if the breaching party will suffer forfeiture
   - likelihood the party in breach will cure the failure
   - **if the breaching party was in BAD FAITH**

2. Now that you've determined breach is material, is the remaining duty discharged (is it a TOTAL breach)?
   - **Restatement**: The breaching party has not cured its material failure—so is all remaining duty discharged? To determine:
     - Look at factors from above (question #1)
     - if it reasonably appears to the injured party that a delay would *prevent him from making reasonable substitute arrangements*
     - if the language of the agreement *lists a specific day*—a material failure to perform does NOT discharge the other party's remaining duties unless the language and circumstances show that the DATE is very important.
       - ***A slight delay in payment is NOT material *UNLESS* the date was significant (ie: if the receiving party detrimentally relied on getting the money by that date—facts must show somehow that the date was important!)**

3. When a breach is IMMATERIAL:
   - ***A material breach is NOT allowed if a party **substantially performs** their obligations.***
   - **Restatement**: *Excuse of a condition to avoid forfeiture*: If the non-occurrence of a condition would cause disproportionate forfeiture, a court may excuse the non-occurrence of the condition *UNLESS* its occurrence was a MATERIAL part of the agreed exchange.
   - **A willful breach is NOT automatically a material breach**; it is *only one factor* used to judge materiality of breach.

UCC Treatment of Breach: SEE TWEN CHART

UCC definition of breach is very broad—**perfect tender rule**: if the goods or the tender of delivery fail IN ANY RESPECT (*different from Restatement*: even if it isn't significant, buyer can *still reject*!) to conform to the contract, the buyer may:

(1) **reject the whole**;

a. If **BUYER** rejects—it must be within *a reasonable time* after delivery/tender; and buyer must *seasonably notify* seller.

i. **Seller has a right to cure the error in some cases**:

1. if the rejection occurs **within** the time for performance, seller has an absolute right to cure the error;
2. if rejection occurs **after** the time performance is due, and the seller has *reasonable grounds* to believe that their goods would be acceptable and seasonably notifies the buyer, the seller has more time to cure the error).
3. If you don't cure, rejection can be final.

(2) **accept the whole**; OR
   a. If BUYER accepts the goods. **A buyer may accept if he fails to make an effective rejection (i.e.: if he takes the goods and does nothing to object)
      i. **AFTER acceptance**, the buyer can "**revoke the acceptance**" (but this requires a MUCH higher threshold) ***IF*** the non-conformity **substantially impairs the value** and the buyer had accepted the good on the *reasonable assumption* it would be cured *OR* the buyer did not reasonably discover the non-conformity on acceptance (ie: the seller made express assurances that the good is "perfect")—standard is MUCH higher to revoke your acceptance than to reject in the first place; then go to provisions in "rejection" above!
(3) **accept any commercial unit(s) and reject the rest**.

2. Anticipatory Repudiation

(*BEFORE* the time performance is due, one of the parties says (either directly or indirectly through conduct) that they will NOT be performing—you learn ahead of time that a breach will occur; however, if you're wrong, YOU'RE the one who has breached!)

Restatement definition: A statement by the buyer to the seller indicating that the buyer would commit a breach that would give the seller a claim for damages *OR* a voluntary affirmative act that renders the buyer unable to perform without such a breach. Uses *reasonable person standard* (doesn't have to be clear)

- **Restatement** also says that ***retraction of repudiation*** is acceptable IF: you **notify** the other party that you are retracting your repudiation ***BEFORE*** that other party *detrimentally relies* on the repudiation ***OR*** the other party *indicates that he considers the repudiation final*.

UCC definition: Also states the repudiation statement does NOT have to be clear and unequivocal.

- If the other party repudiates, you have 3 choices:
   (1) wait for them to formally breach
   (2) treat it as a breach now and sue for damages (BUT: if you're wrong, you're in breach!)
   (3) resort to any remedy for breach
- ***Retraction of Repudiation***—same as Restatement, with the addition that the party now wanting to retract the repudiation (and perform as they should have) **must give any assurance justifiably demanded**!
   - **Demand adequate assurance (same rule for restatement, except "reasonable time" with no 30 day cap)**—if you have reasonable grounds for insecurity in anticipating that the other party will be in breach, you can demand proof that the other party doesn't plan to breach and UNTIL YOU GET adequate assurance, you don't have to perform your end. *REASONABLE TIME for other party to give you adequate assurance IS CAPPED AT 30 DAYS*. Usually, you must demand assurance ***in writing*** UNLESS there has been a pattern of demanding assurance orally and the oral statement is clear. The assurance then can either be money or proof that you have money.
      - **Generally, you should ask for assurance first and THEN stop performance, not the other way around** (or you may be in breach yourself).
      - **If the party doesn't give you assurance, you may treat it as a repudiation.**

3. Impracticability

*(if there is some **external event** that occurs that it was a basic assumption of the parties that it wouldn't occur, it would allow one of the parties to not perform)*

Case: music hall burned down; impracticable for parties to perform, so both were excused from performance.
IMPORTANT: **distinguish between mutual mistake and impracticability**—based on the TIMING of the existence of the event. If the event DID NOT EXIST when the contract was signed, but happens LATER; then the external event occurring will likely be impracticable. IF the even DID exist, but both parties were unaware of it and signed the contract (so event occurred BEFORE signing), then it is a mutual mistake.

Ask 3 questions:
(1) is it impracticable?
(2) did an external event occur that was *unexpected* and the *non-occurrence was a basic assumption*?

(3) was ***neither party allocated the risk*** to cause the impracticability?

Restatement—If an external event occurs after the contract was made, and it was a basic assumption of the parties that this event wouldn't occur, **the party doesn't have to perform**.

- It would be unduly burdensome (or even impossible) to perform
- Remember: you can *void impracticability* by *allocating the risk to one party* in a contract.

UCC version—**If an unexpected condition occurs, you are excused from performing if performance would be *unduly burdensome***. Seller's obligation—must allocate their goods to their customers in a fair and reasonable manner.

- Misjudging market value fluctuations of a product is NOT considered sufficient
  - Exception—possible increased prices due to a **war**
- ***Increased cost alone does not excuse performance*** (ordinary business risk) ***UNLESS*** it is due to unforeseen circumstances

Force Majeure Clause—privately negotiated paragraph dealing with issues so you don't have to worry litigate the matter in court. The clause **voids a judgment of impracticability** by the courts—the parties' way of keeping it out of court. Court may interpret the clause but cannot use UCC provisions due to the clause.

Frustration of purpose—if the only reason you're performing an act no longer exists, then this is a frustration of purpose.

- **Restatement**—Frustration of purpose will excuse contract performance when:
  - the party's *principle purpose* in making the contract *is substantially frustrated*
  - *without his fault*
  - by the *occurrence of an external, unexpected event, the non-occurrence of which was a basic assumption on which the contract was made*.
- Case: hotel room booked to watch a coronation and king got sick; tenant excused from booking the room since the entire reason he wanted to have the room was to watch the parade from the balcony.
  - ***NOT impracticable*** **(he literally could still rent the room) but a frustration of his purpose for renting the room.**

VI. REMEDIES
(Expectation, Reliance, or Restitution)

1. General—3 remedies that a party may pursue

Expectation interest (most typical/primary remedy!)—party expects contract to be performed and they lost profits because the contract was breached; now we want to put the plaintiff in a position that he would have been in **IF the contract had been performed**!

- **DAMAGES are the typical remedy** for expectation interest—giving money
- Specific performance is only very rarely used—forcing the breaching party to perform anyway.
- **Contract price – cost to complete (expenses + profit)**

Reliance interest—if the court can't with reasonable certainty calculate how much profit the non-breaching party lost, the court will ask, "how much has the party spent IN RELIANCE on the contract?" Tries to restore the party to the position they were in **BEFORE they entered the contract**! (Compensates P for ***out of pocket*** losses)

- **Out of pocket cost – any loss that you would have incurred had you completed the contract**

Restitution interest—the non-breaching party did not lose any profit or spend money in reliance on the contract, BUT the breaching party has actually profited off of the agreement—the court calculates how much the breaching party was enriched.

- **Amount of money the party was unjustly enriched by** (amount of money put into the project/"cost to date")

***No punitive damages in contract law* (doesn't matter if the breaching party INTENTIONALLY breached because it was more efficient to breach than to perform).

2. Limitations on Damages

*(Remember: to collect damages, the damages have to be related—**have a causal connection**—to the breach!)*

(1) **Foreseeability Limitation** (USUALLY deals with ***expectation*** interest, but can also be applied to reliance damages)

- **Restatement**: the breaching party **must know or have reason to know** that these consequences would occur if they had breached (damages must have been foreseeable). If the loss is *NOT foreseeable*, don't have to pay for those damages.
  - ***Remember***: **general damages** are damages that a reasonable person (almost anyone) would foresee—you are *presumed to know* by law; **special damages** are damages that *do not occur naturally* so the breaching party would foresee them and must tell the other party who wouldn't have foreseen them.
  - ***Remember***: if two parties decide on a term of a contract AT A TIME AFTER the original contract is made, you judge foreseeability on the breach of this term AT THE TIME THE TERM WAS AGREED UPON, not the time of the original contract.
- **UCC**: determine if either *seller* or *buyer* breached:
  - IF **SELLER** BREACHES, buyer may get these damages:
    - **Incidental damages**: expenses reasonably incurred in inspection, receipt, transportation, and care plus commercially reasonable charges
    - *AND* **consequential damages**—"any loss resulting from *general or particular* requirements and needs of which the seller at the time of contracting ***had reason to know*** and which ***could NOT reasonably be prevent by cover or otherwise***." *OR* injury to person or property from breach of warranty!
    - *In UCC*: lost profits are recoverable as general damages IF they flow directly and immediately from the breach of contract.
  - IF **BUYER** BREACHES: seller can only collect incidental damages! NO consequential damages for seller.

(2) **Certainty Limitation**—trend of courts is to say we don't want bright line fixed rules; so "new businesses" *can at least try* to calculate lost profits, **BUT** the **lost profits MUST be established with *reasonable certainty* in order to recover damages**. [Restatement]

- Ways to establish reasonable certainty: expert testimony, economic/financial data, market surveys, business records
- **Proof must pass the realm of conjecture, speculation, or opinion**; PROJECTIONS are worth nothing unless backed up with other data. If you can't prove lost profits, then go to reliance or restitution damages.

(3) **Emotional Distress Limitation**—very rare to recover for emotional distress. Only possible to recover damages IF:

- Accompanied by an independent tort (**bodily injury** accompanies breach)
- Hotel/funeral situation (where breach is particularly likely to cause serious emotional disturbance)
    - Should have as evidence medical testimony/records.

(4) Mitigation—*avoidable consequences*: you should have tried to mitigate your damages; LOOK FOR THIS when you see that an **EMPLOYEE WAS WRONGFULLY FIRED**.
i.e.: by looking for another job (you may still receive damages, you just might be reduced in what you will be allowed to receive if you haven't attempted to mitigate your damages)
TO ANALYZE: (1) determine that terminated employee COULD HAVE reduced/mitigated their loss; (2) when reducing the amount, make sure it's the same amount of hours (full v. part time); (3) remember to see if it's Restatement or UCC)

- **Restatement**: **Damages are NOT recoverable for loss that the injured party COULD HAVE AVOIDED without undue risk, burden, or humiliation**. (*Can still recover from other damages, but your damages will be reduced by the amount you should have mitigated—this is hard to calculate).
    - Court had said that **accepting a job at less pay is not an undue risk, burden or humiliation** (an example that may actually be humiliation would be a PhD having to take a job at McDonald's).
    - *Burden of proof is on the EMPLOYER* to prove that employee should have mitigated!
- **UCC**: **You're not obligated to cover**, but if you do, you can get **consequential damages**—includes any loss resulting from general or particular requirements ***AND*** which *could not reasonably be prevented* ***by cover*** or otherwise. **If you don't try to cover, you can't get consequential damages.**

(5) Liquidated Damages—***parties agree ahead of time*** what damages will be if there is a breach (purpose: saves litigation costs)

- Courts are careful about NOT putting a party into an even better position than they would have been in had the contract been performed—courts still LOOK at the liquidated damages provision in the contract to make sure of this.
    - **Restatement**: the liquidated damages must be **reasonable in light of loss caused by the breach and the difficulties of proof of loss**. *A term fixing unreasonably large liquidated damages is unenforceable on ground of public policy as a penalty*.
        - Some courts say that it must be reasonable **both** at the time when the contract was made ***AND*** at the time of actual loss—some courts say that if you are able to calculate the loss at the time you entered the contract, you CAN'T have a liquidated damages clause that is different; so you can only have a liquidated damage clause when damages are UNCERTAIN at the time of entering into the contract.
        - **If there are NO actual damages that occur**, then you **can't** collect just because you have a liquidated damages clause with an amount in that.
    - **UCC**: same as Restatement!! ☺

(6) Lost volume seller—*typical remedy is "resale remedy"; lost volume is the* ***exception***. If seller goes out and covers (sells to someone else), it doesn't adequately compensate them because they have lost the profit

on that extra sale. Essentially, the seller has lost only the profit on that one sale. NOTE: this does not work with specially made goods tailored to a particular buyer.

- **UCC**: **Damages** = ***difference between the market price at the time and place for tender and the unpaid contract price + incidental damages, BUT MINUS any loss that the injured party would have suffered if the contract had been performed.***
    - If the measure of damages above is inadequate to put the seller in as good a position as performance would have done, the measure of damages is the PROFIT which they WOULD HAVE MADE from buyer's performance +incidental damages, BUT MINUS any loss that the injured party would have suffered if the contract had been performed.

3. Calculating Damages—Construction contracts!

Basic idea: use the formula and always remember the goal is to put the plaintiff in a position that he would have been in **IF the contract had been performed**!

First option: COST TO COMPLETE!
Formula for **Expectation Recovery**: **CONTRACT PRICE – COST OF COMPLETION (expenses + profit)**

Example:

- Contract price = 100k
- Builder's cost = 90k
- Builder's expenses thus far (which he covered) = 50k
- Cost to complete = (90-50) = 40k

--Owner kicks builder off the job. *What is the builder's expectation interest?*
Contract price – cost of completion
100k – 40k = 60k

--If builder breaches, the owner had to pay another company 60k to finish the project. *What is the owner's expectation interest?*
Cost of substitute company – cost of the remainder of project
60k (given) – (100-50) = 10k

Second option: DIMINUTION OF VALUE!
***Only use this when* there is **substantial performance** and **cost of correction** is too high!! i.e.: Reading Pipe—The cost to remedy the breach (to put in new pipe) was so much higher than the diminution of value (which was basically nothing; the pipes were of the same quality). So the **damages would be however much the value decreased** based on the use of the wrong pipe.

4. UCC Buyer and Seller Remedies

Buyer's Remedies when SELLER BREACHES—cancel, **cover (primary remedy)**, hypothetical cover, keep and still have damages

(1) cancel: if seller fails to make delivery, buyer can cancel and MAY also cover, or recover damages for non-delivery (hypothetical cover)
(2) **COVER**: buyer goes out to get the good from someone else (*a **reasonable** purchase* **in good faith** and **without unreasonable delay**) because seller didn't deliver/delivered non-conforming goods and didn't cure. If buyer has to pay more for the goods than he was going to pay the seller, he is entitled to the difference. Recoverable Damages = both incidental and consequential damages if buyer covers (no consequential damages if buyer doesn't cover, but buyer can still get other damages) BUT MINUS any loss that the injured party would have suffered if the contract had been performed.
(3) Hypothetical cover: when buyer doesn't want to go out and cover, so the *courts act like they did*, **using the market price** to measure damages (damages = the difference between the market price at the time when the buyer learned of the breach and the contract price + any incidental and consequential damages, BUT MINUS any loss that the injured party would have suffered if the contract had been performed).

(4) Keep and still have damages: buyer accepts the defective goods and NOTIFIES seller, then buyer can recover damages (typically, breach of warranty). Damages = difference in value between the accepted defective goods and what goods they actually should have received BUT MINUS any loss that the injured party would have suffered if the contract had been performed.

Seller's Remedies when BUYER breaches—resale, hypothetical resale
**NO CONSEQUENTIAL DAMAGES FOR SELLER

(1) **Resale (typical remedy!)**—if the buyer incorrectly rejects goods, the seller may be able to resell and collect damages if they sell the goods for a significant discount than what the buyer had originally agreed to buy the good at (made in good faith and in a commercially reasonable manner). Damages = difference between resale price and contract price, plus incidental damages incurred by needing to resell. REMEMBER: NO CONSEQUENTIAL DAMAGES FOR SELLER.
(2) Hypothetical Resale—same as "*Lost volume seller*"; uses **market price** to measure damages (damages = difference between the market price at the time and place for tender and the unpaid contract price + any incidental damages); if this measure of damages is inadequate, then the measure is the profit that they would have made.

5. Reliance/Restitution Interest

(ONLY go to these when you CAN'T calculate expectation damages (lost profits) with reasonably certainty because the damages would be TOO SPECULATIVE! i.e.: if it was too early in the process to tell what expectation damages would be/no basis for telling lost profits/NO profits because losing money)
***Also remember: if a company is **LOSING MONEY** every year, there are **NO expectation damages**!!*

Reliance—payment of *out of pocket expenses* that someone incurred (made in preparation for performance or in performance itself) BUT MINUS any loss that the injured party would have suffered if the contract had been performed.

Restitution—No lost profits (expectation); no out of pocket expenses; the breaching party just was enriched. ***Simply have the breaching party pay back the amount of benefit they received*** (they were ***unjustly enriched*** that amount of money!)

- only situation where you don't reduce the amount based on any loss that the injured party would have suffered if the contract had been performed!—Therefore, for a contract, you usually **WANT to use the restitution** since it won't subtract the other losses!
- *No restitution damages allowed when* the injured party has performed all of his duties and the only thing left for the other party to do is to pay.
- Restitution damages ***CAN apply to QUASI-contract situations*** (non-contracts!)—measuring the benefit that was conferred on the other party in a non-contract—look at reasonable value of services and any increase in value.

6. Specific Performance

(*the exception for Restatement and UCC*—usually you get monetary damages); used when there is *not an adequate remedy at law for damages*—where there is **uncertainty of damages (can't calculate them with "reasonable certainty")** or ***unique/scarce goods*** and the **court weighs** the fact that the specific performance/injunction would **not be too expensive** to enforce. The court requires you to complete the contract by either performing something or being prevented from doing something (injunction).
UCC: Court can force specific performance when goods are **unique/scarce/rare** and give the injured party the **relief that the *court deems just***. Buyer can't cover due to nature of the goods.
CISG—opposite!! Basic remedy IS specific performance in CISG!

VII. THIRD PARTY BENEFICIARIES

To identify: (Dealing with rights of a person who is ***NOT A PARTY in the original contract***; he becomes a part of the contract AFTER it was originally formed)

1. TO BEGIN: MUST *Identify the Three Parties*: Promisor ("PAY-OR"), Promisee ("PAY ME!"), 3PB
Promisor is usually loaned money; promisee is the person who gave the money to them; 3PB is not a party but was intended to benefit from this contract.

2. Intended or Incidental Beneficiary?

"Incidental" beneficiaries ARE NOT BENEFICIARES!!!! They have no rights.

Intended beneficiaries are determined by the **INTENT of the promisee to give benefits to the 3PB!
Must be able to ***clearly IDENTIFY* the person in order for them to have 3PB status (also, who has the more ***DIRECT interest*** in the benefit, the promisee or alleged 3PB?)

Restatement Test: An **intended beneficiary** exists if:
(1) the performance of the promise will ***satisfy an obligation*** *of the promisee to pay money to the beneficiary* (**creditor beneficiary**)
(2) the promisee intends to ***give*** the beneficiary the benefit of the promised performance (**donee beneficiary**—*giving a gift*!)
**So if (1) or (2) is not the case, then the third party is an "incidental" AKA NOT a beneficiary.

REMEMBER: *Unless the contract EXPLICITY STATES that a subcontractor/owner is a 3PB*, in owner/contractor/subcontractor cases, NO ONE is the 3PB.

3. Vesting of Third Party Rights
*(When can the 3PB say that promisor and promisee **CANNOT modify the agreement without 3PB's consent**?)*

Restatement:
(1) Parties can agree to whatever they want
(2) Absent a specific provision, the parties have the right to modify an agreement
(3) ***BUT***: parties are **limited in modifying the agreement *IF* the 3PB**:
   a. MATERIALLY CHANGES HIS POSITION in *justifiable reliance* on the promise **before he is notified** of it
   b. brings suit on it
   c. manifests assent to it at the request of the promisor/promisee
(4) So if any of those three happen, then the 3PB can object to the modification and the court will uphold that objection.

4. Promisor's Ability (or *Inability*) to Raise Defenses Against the 3PB
(This occurs when the 3PB attempts to sue promisor. What defenses does promisor have against 3PB?)

Restatement: The PROMISOR can raise as a defense those claims against the promisee in defending against the 3PB.
- ***BUT***: the promisor can ONLY raise claims in the ORIGINAL TRANSACTION (promisor **CANNOT use defenses from a separate contract he has with the promisee** against the 3PB—in which the 3PB is not involved).
- ***Also, the beneficiary may CONCEDE to the promisee the right to sue***!

VIII. ASSIGNMENTS

To identify: (NOT A CONTRACT!!!! Rather, a "***present transfer of the right***"—THERE IS NO PROMISE; should SAY specifically that the party "assigns"—also look for banks in these examples)

***TO BEGIN—**MUST identify parties**: obligor; obligee. Then: the obligee assigns a right (and therefore becomes an assignor) to another party (the assignee—usually a *bank*). **The actual assignment/transfer is *not a promise* and therefore NOT A CONTRACT.**

1. Assignment of a Contractual Right—*Determine whether a right may be assigned.*

Restatement: **a contractual right can be assigned *UNLESS***:

- the assignment would **MATERIALLY CHANGE the duty of the obligor**; or
- materially increase the burden or risk imposed on him by his contract; or
- materially impair his chance of obtaining return performance, or materially reduce its value to him.

UCC: same as Restatement! ☺

2. Delegation of Duty (you delegate another person to perform for you)

Restatement: a party may delegate a duty ***UNLESS***:
(1) the other party has a **substantial interest** in having his promise performed (ie: artist!); or
(2) it would go against public policy.

- HOWEVER, just because a party delegates a duty, that party is STILL LIABLE—**you are NOT discharged from performing your duties just because you delegated them**.

UCC: exact same as Restatement! ☺

3. Partial Assignments

(a party is not assigning its entire wages, just a PART)

Restatement: Partial assignments are allowed **BUT** if the obligor objects, the assignment is not allowed ***UNLESS*** all persons entitled to the promised performance are joined in the proceeding (or joinder is not feasible and it is equitable to proceed without joinder).

- Facts showing that the obligor objects:
  - rejection of the claim, **absence of proof of consent**, or a showing of hardship on the part of the employer in complying with the partial assignment (Case: Disney)

4. Assignment of Future Rights

Restatement: An assignment of a right to payment expected to ***arise out of an EXISTING contract*** or other continuing business relationship is **effective IN THE SAME WAY as an assignment of an existing right**.

- As distinguished from: the contract is *NOT YET IN EXISTENCE*, so operates only as a PROMISE to assign the right (not considered an assignment).

5. Prohibition Against Assignments

(Agreement contains a clause that prohibits assignment)

Even though there is a provision that says you cannot assign, it does NOT actually affect the validity of the assignment; rather, *it gives the obligor a right to damages against the assignor*—so, **you cannot delegate the duty BUT YOU CAN ASSIGN THE RIGHTS.**

Restatement: A clause that prohibits assignment means that you cannot delegate the duty but you CAN assign the rights (**the agreement is violated and the obligor may collect damages, but the assignment is still effective**).

- ONLY EXCEPTION: if the language in the clause says something like, "*the assignor shall NOT have POWER to assign and any assignment is void*." Then some courts say any assignment is prohibited.

UCC: **Any clause that prohibits assignments is INVALID in the case of**:

- **accounts** receivable (you'll always be able to assign) AND
- assignments made to **banks**, which then advance cash (you'll always be able to assign)
- However, you still have a right to damages

6. Obligor's Defenses Against Assignee—as distinguished from 3PBs!

Restatement and UCC: MORE EXPANSIVE than 3PBs because obligors **CAN** raise claims that are from **UNRELATED** transactions **IF** those claims arose **BEFORE** they had knowledge of the assignment.