

## Contracts Outline

### The agreement process:

- Intention carries weight
  - Objective
  - Would a reasonable person viewing their actions think they intended to be bound?
  - Words, actions, inferences
- Preliminary Negotiations
  - Undecided parts of contracts void it
  - Negotiations aren't binding until
    - Terms are set
    - Both parties agree
- Offeror v. Offeree
  - Offeror
    - Master of the offer
    - Can control any terms
  - Offeree
    - Has power of acceptance
- Duration of Offers
  - Reasonable time unless time specified
  - Offer, Revoke – time received
  - Acceptance – time mailed
- Termination of Power of acceptance
  - Revocable anytime, expiration after reasonable time
- Irrevocable offers
  - Firm offers, time specified, no more than 3 months, must be a merchant, in writing
  - Option contracts – contract to keep offer irrevocable
- Manner of acceptance
  - Any manner reasonable in light of all circumstances
- Unilateral
  - Accepted when performed
  - Cannot accept an offer of which not aware before performance
- Bilateral
  - Any manner reasonable (return promise in some form, or completion)
- Silence
  - Offeree takes benefit of offeror's services
  - Reason to know silence would be acceptance

### Battle of the forms

- Battle of forms
  - UCC
    - Definite and seasonable acceptance creates contract
    - UNLESS
      - Acceptance expressly made conditional on consent to different or additional terms
      - UNLESS

- Conduct recognizes existence of a contract- then use gap fillers
- Add'l terms
  - Not merchants
    - Proposals
  - Merchants
    - Part of the agreement
  - UNLESS
    - Expressly limits acceptance
    - Materially alter
    - Notification of objection
- Different Terms
  - Same as 'additional' terms
  - Majority view
    - Knock out rule
      - Cancel each other out
      - Use gap fillers
  - Minority view
    - Last shot
    - Also CISG
- Restatement
  - Mirror image rule

### **The validation process**

- Formalistic Devices
  - Seal
- Consideration
  - Bargained for exchange
  - Legally recognized value
  - Do not inquire into adequacy
    - Except Unconscionable
    - Money exception
  - Restatement
    - Reciting consideration is enough, even if not paid
  - Courts
    - Must actually have consideration
  - Illusory promises
    - I promise unless I change my mind
    - No consideration, no detriment, no contract
  - Output/Requirement contracts
    - Consideration on one side is an agreement to sell, on the other an agreement to buy
    - Obligation must be mutual
    - Good faith reductions/increases
- Capacity to contract
  - Infants
    - Voidable after 18 years old

- Promissory Estoppel
- Past Consideration / Moral Obligation
  - Not consideration, no contract

### **Operative Expressions of Assent**

- Statute of Frauds
    - MYLEGS
    - Must be in writing
      - Surety
        - Leading object exception
      - Marriage
        - Contract in consideration of marriage
        - Marriage itself not needed to be in writing
        - Substantial performance
      - Sale of land
        - Substantial performance
          - Take possession
          - Pay purchase money, whole or part
          - Improvements, or change the land reliance of agreement
        - Transfer of property interest
          - Anything else outside statute
      - Year
        - Normal view
          - Not performable in one year must be in writing
        - Hostile court view:
          - Duration must be expressly stated, if greater than a year then in writing, in the statute
          - If no
      - Goods – UCC §2-201
        - >\$500
        - Only necessary term is quantity
        - Enforceable only to quantity in the contract, no more
        - Writings must be signed
          - Unless, between merchants
            - If one sends writing, receiver has reason to know of the contents and does not object, counts as a writing
            - Objection must be within 10 days
          - Signature can be letterhead or symbol
        - Exceptions, enforceable without writing if
          - Specific, custom manufactured goods not suitable for resale
          - Admit there was a contract
          - Accepted goods
- Parol Evidence Rule
  - If agreement completely integrated
    - Terms to supplement allowed
  - IF not

- Terms allowed so long as they do not contradict the writing
  - Merger clause
    - Almost always enforced
    - This is the entire agreement. Period.
    - Preclude parole evidence of negligent or innocent misrepresentation, but not of fraudulent misrepresentation
  - Oral evidence before or concurrent to a written contract is inadmissible if completely integrated
  - Except
    - If partially integrated, to explain terms
    - If not integrated, allowed
  - Integration tests
    - Restatement
      - Separate Consideration
      - Natural Omission
    - UCC
      - Certain inclusion: admissible if the agreement *would certainly* have been included in the writing
      - Exceptions, evidence admissible if in
        - Course of performance
        - Course of dealing
        - Usage of trade
- Interpretation
  - First, Reasonable expectation of parties
  - Second, rule against party making it ambiguous and overly broad
  - Party with narrower interpretation has burden of proof
- Mistake
  - Mutual
    - Voidable if
      - Basic assumption
      - Affects performance
      - Risk not allocated to party trying to enforce contract
        - Allocated if in agreement
        - If party aware of limited knowledge (conscious ignorance)
        - Allocated by court because it's reasonable
  - Unilateral
    - Voidable if all of Mutual points (above) met
      - Contract would be unconscionable OR
      - Other party knew or had reason to know of the mistake

## Warranties

- Express
  - Any affirmation or promise made by seller relating to goods that becomes part of the basis for the bargain
  - Any description that is made part of the basis of the bargain
  - Any sample or model which is made part of the basis of the bargain
- Implied (merchantability)

- Seller is merchant
- Implied if the seller is merchant with respect to the goods
- Implied (fitness for purpose)
  - Reason to know any particular purpose for which the goods are required and that buyer is relying on the seller's skill or judgment to select or furnish suitable goods
- Exceptions
  - Negation or limitation is inoperative to the extent that such construction is unreasonable
  - Exclude or modify any part of implied warranty of merchantability must mention merchantability and must be conspicuous if in writing
  - To exclude or modify any implied warranty of fitness, exclusion must be by a writing and conspicuous

### **Abuse of the bargaining process**

- Duty to read
  - Not having read a contract does not excuse the promisee
- Adhesion contracts
  - Take-it-or-leave-it
  - Reasonable expectations in insurance contracts
    - Not extended to other fields
  - Technical or unclear language
- Duty to disclose
  - Other not aware
  - Reasonably likely to influence other's decision
  - Not readily accessible by diligent inquiry
- Unconscionability
  - 2 kinds, some require one, some require both
  - Procedural
    - Contract of adhesion
  - Substantive
    - Terms
    - Does everything favor one side?
  - Show why a poor alternative to an alternative kind of contract
  - Rent-to-own stores
- Good faith
  - Duty to deal in good faith
- Fraud
  - Void
- Illegal bargains
  - Illegality makes contract void and unenforceable.
  - If both at fault, less innocent party may recover damages for amount they are less innocent
  - Public licensing: If purpose of license is to protect the public, contract in violation is unenforceable
  - May sever the illegal terms and salvage the contract if possible.
- Impracticability
  - Non occurrence of event was a basic assumption

- Unforeseen supervening circumstances
- Force majeure clause
- Restraints of trade
  - Direct
    - Never enforceable
    - “don’t work near here” no reason for that
  - Ancillary
    - Interest of obligor
    - Interest of obligee
    - Interest of public
  - Blue pencil

### **Conditions, breach, and repudiation**

- Conditions
  - Precedent must happen before a duty matures
  - Subsequent – Event that terminates a duty – Event happens that excuses the party from their duty
    - Causes cancellation unless term can be severed to save contract. Courts seek to avoid forfeiture however possible.
  - Express
    - In the contract
  - Implied
    - Fact
      - Act as though there’s a condition
    - Law/constructive
      - Party’s did not foresee
        - Performance order
          - Same time if equal lengths
          - Longer goes first if not.
- Divisible and Installment Contracts
  - Each division must have consideration
  - Breach §241, 242
  - Material and total
    - Excused from performance
  - Material, but not total
    - Not excuse from performance, may sue for damages
  - Cure
    - Reasonably appears delay may hinder him in making suitable substitution
    - Agreement provides that delay is unacceptable
- Repudiation
  - If not a material breach, repudiation is breach
- Excused Conditions
  - A condition may be excused if not material
    - Court seeks to avoid destroying contract
- Party’s Approval
  - Industry standard
    - Market standard of satisfaction

- Subjective standard
  - Aesthetic or personal taste
- Reasonable person standard
  - Good faith requirement
- Must be in good faith

### **Remedies**

- Three interests
  - Expectation
    - position they would be in if the contract had been performed
    - Contract Price – Cost of Completion
  - Reliance
    - Give back what was lost in reliance of contract or performance
    - Amount party would have lost on original contract deducted from damages. (If completion of the contract would have resulted in a loss, that loss is deducted)
  - Restitution
    - Value of the benefit provided
    - Amount other party has been enriched
- If contract is COMPLETED, the restitution interest is no longer available
- Lost volume sellers
  - Usually no damages for lost profits, unless a seller sells many of the identical good, then the loss is the particular sale, and damages would be the profit lost
- Liquidated damages
  - Reasonably certain
  - Foreseeable
  - Not a punishment, cannot be greater than actual loss

### **Third Party Beneficiaries**

- Contract between two parties to benefit a third
  - Incidental
    - Just happened to benefit, no intent
  - Intended
    - Contracting parties intended the benefit to end up with third party
    - Objective intent, Contract, Surrounding circumstances
  - Warranty options
    - Three alternatives to be chosen by states
      - Warranty extends to any natural person in the house of the buyer
      - Warranty extends to any natural person
      - Warranty extends to any person
- Vesting of rights
  - Rights do not become set and ‘vested’ until
    - Sue
    - Change position in reliance of benefit
    - Give assent at the request of the promisee or promisor
  - Until vested rights, promisee and promisor retain right to contract and modify
- Assignment
  - Cannot prevent assignment of accounts receivable or rights to damages

- Cannot assign if
  - Materially changes obligor's duty
  - Increases risk ???
  - Impair chance of obtaining return performance
  - Reduces contract's value
- Partial assignments
  - Employers must agree to partial assignments for wages for employees or be party to a lawsuit for such
- Defenses
  - Same as defenses against third party
  - PLUS can defend based on any breach or issue that came up before obligor learned of the assignment