

Contract

Prof. Spoon

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Outline

1. Intention to be legally bound
 - Reasonable person standard:
 - Letter of intent - don't be fool about the title of document
 - Good faith (1-201;2-103):
 - performance of every contract (not necessarily in formation)
 - They did have an agreement to negotiate; if there's no agreement, they don't need to negotiate
 - Contemplation of final writing:
 - Put in writing --> not bound the writing in made, based on **intent**; manifestation of the words
 - Definition of Goods: U.C.C. **2-105**
 - UCC, does not matter the parties who made it, but the subject matter of the contract
 - Missing Terms: gap filler **2-204**
 - Not agree on all the terms, does not mean there is no term
2. Offers
 - Preliminary negotiation: **§24**
 - Price quotation/ads: typically, not the offer, look at the context and circumstance; **reasonable person standard** (what a reason person would think)
 - Some factors used in determining if an offer was
 - Words used in the communication
 - Significant terms included or omitted
 - Whether or not directed to a particular person
 - Relationship of the parties
 - Common practices
3. Offer (Cont)
 - Identification of offeror and offeree
 - Duration of offers
 - (Rejection, Revocation: indirection revocation, counter offer, death)
 - Mailbox rule and its variations: but offeror could change whatever they want
 - Making offers irrevocable (exclusive for becoming irrevocable)
 - Option contract;
 - **Firm offers** by a merchant (**2UCC**)
 - **Sec. 87**: detrimental reliance (not the same as promissory estoppel, the same thing for different situations)
 - Construction contract
 - Part performance for unilateral contracts
4. Acceptances
 - Knowledges, volition
 - Acceptance v. condition (smoke ball); once they buy the ball, it's acceptance
 - Manner of acceptance - **2-206; sect. 30**
 - Shipment of nonconforming goods (**2-206**) “accommodation”
 - Unilateral contract
 - Performance as acceptance (i.e., one right and one duty at time of formation of contract):
 - completion of the performance: 1) not beginning; 2)very contextual, look at what the party intend

- Usually only applicable where expressly requires a performance acceptance exclusively or nature of offer (eg offers to the public) contemplate only such a performance
5. Acceptance (Cont)
 - Silence as acceptance (**sect 69**)
 - If they understand what the silence means
 - Battle of Forms **2-207**: last shot
 - Rolling Offers **2-204**:
 - Warranties **2-213**(express), **2-314**(merchantability), **2-315** (fitness for particular purpose), **2-316** (exclusion or modification of warranties)
 - Express by any seller
 - Implied only by merchants
 - certain words to form it/ look at the statues
 - Output and requirement contract **2-306 (good faith)**
 6. Validation Device
 - Seals: **section 98** (adoption of seal by delivery of a document), limited use
 - Consideration:
 - Legal value: benefit to the promisor or detriment to the promisee
 - Bargain for exchange: promise exchanged for detriment and detriment exchanged for promise
 - Nominal situation: When problem
 - If not bargained-for (including money exception)
 - If mere pretense for a gift
 - If consideration stated not paid for (though not applicable to options under Sect 87. or to surety situation according to Sect 88);
 - In equitable relief (adequacy of consideration)
 - Modification (pre-existing duty rule and exceptions, e.g., **Sect89**) accord and satisfaction
 - Minority rule for the trash collection (Angel v. Murry)
 7. Validation Device (Cont)
 - Promissory Estoppel: **section 90** (expansive application, just for damage)
 - Past consideration and moral obligation: not validation device
 - **Section 86**: promise for benefit (material benefit doctrine) -minority
 - Statute of limitation: **section 82**
 - **UCC 2-306**: **output** requirement and **exclusive** dealing contracts
 - Capacity to contract: **section 12-16** (guardianship, §13, minor, mental ill or defective, intoxicated)
 8. Operative Expression: Statue of Frauds **2-201**
 - Suretyship within (exception is **leading object** rule)
 - Promises in consideration of **Marriage** (eg prenuptial agreements) (w/in) - **part performance** (almost the completion) takes out
 - Sale of **Land** (w/in) - **part performance** takes out
 - Contracts not performable within one **Year** - some courts construe **narrowly**
 - Memo necessary - **sect 131**
 - **UCC 2-201** (admit/performance): for **Goods**
 - **Section 139** - **reliance** to avoid S of F (not majority? Promissory Estoppel)
 9. Parol Evidence Rule:
 - Intended the writing to be completely integrated? If so, no evidence

- If partial, can admit evidence of consistent additional terms
 - Rules to determine if integrated (rest - **natural omission and separate consideration**, UCC-**certain inclusion**)
 - Certain inclusion test is less restricted.
 - UCC 2-202, writing may be explained or supplemented by **course of dealing, or usage of trade, or course of performance** even if complete integration
10. Subsequent Modification **2-209**
- No consideration necessary, but must be in good faith
 - No oral modification clauses and compliance with Statue of Frauds
 - Waivers and retraction of waivers
11. Mistake:
- Mutual mistake (**sect 152**)
 - Unilateral Mistake (**section 153**)
 - When a party bears the risk of mistake
12. CISG:
- Subjective (if know the intent) v. objective theory
 - Subjective intention may be relevant for CISG
 - Time for acceptance of offer-runs from date of letter, not date received
 - No mail box rule - it is when the acceptance reaches the offeror, not when mailed
 - Firm offers - irrevocable if states a duration
 - Last shot principle applies
 - No statute of frauds or parol evidence rule

----- After Mid-Term ----

1. Standard of Interpretation:
 - A. Common meaning of parties
 - B. Maxims:
 - C. Use of extrinsic evidence: unless there is ambiguity
2. Abuse of Bargaining Process (innocent party to void(able))
 - A. Improper threats (rest 175 176)
 - B. Misrepresentation / non-discloser (fraudulent or material) (159-162) --> omission by saying nothing
 - C. Standardized contracts (reasonable expectation)
 - D. Contract of adhesion: bargaining power/take it or leave it; insurance policy (r. expectation, usually favor of the insurer, for the assumption is contract of adhesion)
 - E. Unconscionability 2-302, procedural/substantive (significant one-sided, no bargaining) --> non-enforceability;
 - No clear definition;
 - F. Good faith (205, 1-304) and defn at 1-201 and for merchant at 2-203
 - Subjective: honest in fact, objective: general commercial standard fair dealing
 - You don't sue for good faith or bad faith --> part of breach of contract
 - Relevant in output contract (requirement)
3. Agreement against public policy
 - A. Public policy in legislation 181 (need license but not have one)
 - B. Contracts in restraint of trade 188 (convent not to compete; balancing test for all parties involved to decide what it enforce)
 - C. Gambling: not legal, leave the party where they are

4. Conditions
 - A. Condition: depends on situation, reliance on it --> relief from
 - Smoke ball
 - B. Promise: if words "promise" involved, depends on the significance of the promise
 - Also, a draft problem, usually against the drafter
 - If not sure, then promise not condition
 - C. Promissory condition: when the party say so, I don't have to perform and I have to sue you for damage
 - D. Rest 227-interp preferred to avoid forfeiture: condition subsequent
 - E. Event that terminates a duty 230
 - F. Condition of satisfaction 228 (obj. v. sub.): the party could agree on the requirement; or personal satisfaction
 - G. Constructive conditions and order 234
 - H. Divisible contracts (agreed equivalents) 240: if one of them is not enforceable, it does not turn down the whole contract
 - I. Installment contracts 2-612: term of art, contract where have multiple delivery and separate acceptance --> not what they meant --> if they screw up one, then burden of turning up the whole is hard
5. Excuse non-occurrence of condition
 - A. Avoid disproportionate forfeiture 229
 - B. Wavier 84: depends on whether that is material provision to see if you could retract the waiver
 - C. Breach of contractual condition of cooperation (bad faith)
 - D. Repudiation
6. Breach
 - A. Material breach (241-242)/substantial performance --> fact based inquiry
 - They are all factors to consider not determinative
 - They have different consequence
 - B. 2-601, 2-606(acceptance); revocation of acceptance (2-608); 2-602 (rejection); 2-508 (cure)
 - Perfect tender rule
 - May have the right to cure the defects
 - (buyer) I may take the goods, but still sue for breach
7. Repudiation:
 - A. Repudiation 250
 - If you are wrong, you could be regarded as repudiation
 - B. Retraction of repudiation 256
 - If the other has not material change its position in relying on it/say that is final --> you could retract
 - C. UCC 2-610, 2-611
 - D. Demanding assurance (2-609, 251)
 - Ask them to prove not repudiate
8. Excuse the party/Impracticability
 - A. UCC 2-615 and Restat. 261
 - B. Force majeure (excuse performance): prior agreement to excuse (not relying on court)
 - C. Frustration of Purpose (265): both parties understood that is the purpose
9. Remedies

- A. General: expectation (what if the duty has performed), reliance(out of pocket), restitution(benefit you conferred on breaching party)
- B. Foreseeability limitation: Rest 351; 2-715(foreseeability, obvious or you told them + also incidental); apply to reliance damage as well as expectation
- C. Certainty limitation:
 - "new business" rule not modern rule (it might be hard, but not impossible r. certainty)
 - Lost profits must be established with r. certainty
 - If can't prove lost profits, can use reliance damages or restitution damages.
- D. Emotional Distress Limitation:
 - Only if accompanied by an independent tort unless under 353, (1)hotel(public humiliation/funeral situation; 2) bodily harm accompanies breach (and usually accompanied by an independent tort)
- E. Mitigation -avoidable consequence
 - 350
 - Loss could have been avoided without undue risk, burden or humiliation
 1. The result is no matter you took it or not, they consider it to calculate the damage anyway (deduce it anyway)
 - Applies to acts or omissions (did not do something to mitigate)
 - UCC 2-715 (2) (a)
- F. Liquidation Damage:
 - The party could agree in advance what the damage is
 - Reasonable in light of loss and difficulties of proof of loss (rest. 256 and UCC 2-718)
- G. Construction Contract:
 - Contract price - cost of completion (cost + profit) --> where would the innocent party been if the contract has been performed.
 - Use "diminution in value" if there is **substantial performance** and cost of **correction is too great**.

10. Remedies (UCC)

- A. Buyer remedies
 - Cancel 2-711
 - Cover 2-712
 - Hypothetical cover 2-713
 - Keep and still have damage 2-714
- B. Seller 's remedies
 - Resale (2-706)
 - Hypothetical resale (2-708)
 - Lost volume seller (2-708)
 - No consequential damage
- C. Reliance / Restitution Interest: **when there is no contract**
 - Loss offset for expectation and reliance, but not for restitution
 - Restitution measure of damage amount of enrichment
 - Restitution also applies to quasi-contract situation

11. Special Performance as remedies

- If not adequate remedy at law, such as where there is uncertainty in damage or unique or scarce goods
- A. UCC 2-716

12. CISG Difference:
 - A. Foreseeability is broader, since it captures things that are a "possible" result of the breach, as opposed to probable result --> scope is greater
 - B. Basic remedy is specific performance, not damages
13. Third Party Beneficiaries
 - A. Intended/incidental (302)
 - B. Promisor/-ee/TPB
 - C. Vest/rest 311- promisor and promisee can change the deal
 - D. Defenses v. beneficiary: rest 309 - same as against promisee as to the contractual defense, but not include claims against promisee for unrelated transactions
14. Assignment and Delegation:
 - A. Nature of assignment
 - B. Assignment of contractual right (317, 2-210(2)) and delegation of duty (318, 2-210(1))
 - C. Prohibition against assignment (invalid for accounts and for rights to damages under UCC) does not invalidate assignment but gives claim for damages
 - D. Partial assignment
 - E. Assignment of future rights: if the contract of publishing the book has not formed, then it might a promise to assign. To decide where that promise is enforceable, go through the normal contract analysis
 - F. Obligor's defense against assignee: any defense obligor has against obligee arising out the assigned contract plus any defense arising out of other contracts accruing before obligor has notice of the assignment

Chapter 1 Formation of Contract

1. Intention to be legally bound

- Reasonable person standard: S+2P+1E
 - Law imputes to a person an intention corresponding to the reasonable meaning of his words and acts. Not subjective intention.
 - Pepsi: objective reasonableness
 - A reasonable person will conclude that a power to create a contract is conferred, that is not a joke (objective standard)
 - (English Couple) Social and domestic agreements are typically viewed as unenforceable.
 - (Medical Practice) Statement about medical procedure's result will not impose contractual liability even if they prove incorrect.
- Letter of intent - don't be fool about the title of document (1P)
 - It means nothing, so does "agree in principle"; it totally depends on the context.
 - (agree to negotiate in good faith → if no bad faith, no breach)
- Good faith (1-201;2-103): 1S
 - performance of every contract (not necessarily in formation)
 - 2-103: 1) honesty in fact; 2) the observance of reasonable commercial standards of fair dealing in the trade.
- Contemplation of final writing: Golf v. Faqua 1P
 - Put in writing --> not bound by writing, based on intent; manifestation of the words.
 - "The entire document and relevant circumstances surrounding its adoption must be considered"
 - a clear understanding of the terms of an agreement and intent to be bound by its terms.
 - This is a jury question (matter of fact) → entire environment
- (Definition of Goods: U.C.C. 2-105)
 - UCC, does not matter the parties who made it, but the subject matter of the contract
 - Goods, means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale, other than the money in which the price is to be paid, investment securities and things in action.)
- Missing Terms: gap filler 2-204
 - Not agree on all the terms, does not mean there is no term
 - 2-204: Even though one or more terms are left open, a contract for sale does not fail for indefiniteness, if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.
 - Original defense or claim is "neither the escalation clause nor other section contains any basis for determining the new rate to be paid in the event changes in ownership occur → unenforceably vague."
 - UCC will provide the term, "like battle of forms" or default rule.

2. Offers

- Preliminary negotiation: §24
 - 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.

- (Till now, the factor is reasonable person, whole circumstance, intention; the language of the parties/the definiteness of the addressee (person or group)/the definiteness of the proposal itself.)
 - Price quotation/ads:
 - typically, not the offer, look at the context and circumstances
 - The advertisements by merchants listing goods for sale at a particular price are generally invitations to deal, not offer.
 - Exception: "when an advertisement is **clear, definite, and explicit and leaves nothing open for negotiation.**"
 - e.g. "immediately acceptance" + "shipment no later than May15"
 - **reasonable person standard** (what a reason person would think);
 - Some factors used in determining if an offer was made
 - Words used in the communication
 - Significant terms included or omitted
 - Whether or not directed to a particular person
 - Relationship of the parties
 - Common practices
3. Offer (Cont)
- Identification of offeror and offeree (**1P for 2 cases**)
 - An offer for a unilateral contract may only be accepted to form a contract through performance by the offeree.
 - "performance of the contract" --> shipment and installment
 - Duration of offers (**2S, 3P reasonable time**)
 - **Statute:**
 - **Restatement 41:** An offeree's power of acceptance is terminated at the time specified in the offer, or, if no time is specified, at the end of a reasonable time. --> question of fact
 - **UCC 309:** The time for shipment or delivery or any other action under a contract, if not provided in this Article or agreed upon, shall be a reasonable time
 - "Clear limitation about when to accept the offer" --> **If expired, cannot accept.**
 - Late acceptance + Performance → counteroffer (not the original)
 - How to decide what is reasonable? (jury question)
 - Still numerous circumstances surrounding the transaction (limitation of statute is just a factor)
 - If the transaction continually recurs, it probably could be decided as law.
 - (Rejection, Revocation: indirection revocation, counter offer, death)
 - An offer is extinguished upon rejection; once you reject, you cannot accept again.
 - (a possible defense is that offeree could accept the second offer following the first one which he just rejected)
 - You don't have to receive the revocation notification directly from the offeror.
 - Death and mental incapacity:
 - if offeree has not accepted it, the death or mental incapacity means revoke.
 - Mental incapacity could also be explained as incapacity to contract → offeror could void it (voidable)
 - Difference:

- § **Acceptance**: in a clear term and without additional condition, positively and unequivocally to accept,
 - § **Counter offer** (conditional offer/qualified offer): imposing condition, limitation. From **U.C.C. 2-207**, “*unless acceptance is expressly made conditional on assent to the additional or different term*”
- Mailbox rule and its variations: but offeror could change whatever they want (**possibilities**)
 - Offer/Rejection/Revocation effective at when RECEIVED
 - Acceptance effective when MAILED
- Making offers irrevocable (exclusive for becoming irrevocable)
 1. Option contract (**1P**)
 - The notion of “option” means irrevocable through consideration.
 - Option for existing contract:
 - No need to “separate consideration” → e.g. rights of first refusal
 - It's not a general option, only happened when a third party showed up to buy.
 - How to stay effective? For **reasonable time** (for the seller, matter of fact)
 - Option for new contract (for most of contract)
 - Separate consideration is needed, like paying or nominal one or recital.
 2. **Firm offers** by a merchant (**1P + 2UCC**)
 - **2-205**: An offer by a merchant, to buy or sell goods in a signed writing, which by its term gives assurance that it will be held upon is not irrevocable. Any such form of assurance supplied by the offeree must be separately signed by the offeror.
 - **2-205**: during the time stated or if no time is stated for a **reasonable time**, but in no event, may such period of irrevocability exceed **three months**.
 - merchant doesn't have to be directly involved in the transaction.
 - Illustration: Seller said, “I will sell you 10 lots of shoes, this offer will be open until March 15.” → this is not revocable
 - **Three elements test**: 1) offer by merchant? 2) signed writing? (Letter head will be enough) 3) by its term (it said “open till Mar. 15”)
 3. **Sec. 87**: detrimental reliance
 - not the same as promissory estoppel, the same thing for different situations
 - **§87 (2)**: 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.
 - General-sub relationship: usually protect sub
 - In that case, sub did not have mutual intent to be bound (?)
 - Besides, general there did not get the bid in the first place, so it could be that sub did not expect general will rely on it.
 4. Part performance for unilateral contracts (**1P, 1S**)
 - the contract is not accepted until the required performance is **completed**.
 - **Sec. 45**: where an offer invites an offeree to accept by rendering a performance and does not invite a promissory acceptance, an option contract is created ...
 - → unilateral, not bilateral (simply promise to accept is not enough)
 - Under unilateral contract, offeree usually is not obligated to do anything, or lack of consideration, **but it's fine once they complete the performance**.

- **Sec. 45:** an option contract is created when the offeree begins the incited performance or tender part of it. → cannot revoke once the offeree **starts** the performance.
 - E.g. first step on the bridge is the performance; buy a sneaker or warm up doesn't count
- **Sec. 45:** the offeror's duty of performance . . . is conditioned on completion or tender of the invited performance → unilateral contract formed upon **completion**.
 - It means even if offeree (comes in front of offeror and) is about to complete the required performance, offeror still can revoke the offer and not in breach.

4. Acceptances

- General from EE:
 - Objectively reasonable standard: a reasonable person in offeror's position would understand its manifestation of acceptance → (that's why requested performance by offeree could be an acceptance)
 - Two ways of accepting: 1) promise to perform; 2) performance → any reasonable medium is okay, no matter words, action.
 - Offeror is the master: 1) it could specify requirement; 2) or the offeree must accept it in **time** and **manner** reasonably.
- Knowledges, volition (**2P**)
 - Knowledge: all for unilateral contract?
 - the desired act must be performed with knowledge of the offer before or during (?) his performance; even if he does so primarily for reasons unrelated to the offer. (motivation is less important)
 - [for activities that was held by public bodies → no requirement of knowledge]
 - Acceptance v. condition (smoke ball); once they buy the ball, it's **acceptance**; but the contract is not **binding** unless P caught flu, for flu is the condition for performance.
 - Requirement of volition: -ee accepts it voluntarily and deliberately
- Manner of acceptance - **2-206; sect. 30**
 - **U.C.C. 2-206(1)(b):**
 - an order or other offer to buy goods for prompt or current shipment shall be construed as inviting acceptance either by a prompt promise to ship or by the prompt or current shipment of conforming or non-conforming goods. → *though P disagreed with certain term of his contract, he performed his duty, that will be deemed as an acceptance.*
 - Possible defense: 1) he counteroffered with condition without the disagreed term; 2) alleged that is an unilateral contract, yet he has not complete his performance, which is not an acceptance.
 - but such a shipment of non-conforming goods does not constitute an acceptance if the seller **seasonably notifies** the buyer that the shipment is offered only as an accommodation to the buyer → *the shipment of 50 products is not an acceptance of P's order of 1000 at the old price*
 - **U.C.C. 2-206 (2):**
 - Where the beginning of a requested performance is a reasonable mode of acceptance → *Empire, D's performance made a reasonable person in P's position understand that D accepted the contract, for D acted like P's representative.*

- an offeror who is **not notified of acceptance within a reasonable time** may treat the offer as having lapsed before acceptance. → *buyer who did not tell seller he took the truck, seller could sell the old car to a new buyer.*
 - **Sec. 30: Not statue**
 - (1) An offer may invite or require acceptance to be made by an affirmative answer in words, or by performing or refraining from performing a specified act, or may empower the offeree to make a selection of terms in his acceptance.
 - (2) Unless otherwise indicated by the language or the circumstances, an offer invites acceptance in any manner and by any medium reasonable in the circumstances.
 - Shipment of nonconforming goods (**2-206**) “accommodation”
 - **U.C.C. 2-206(1)(b)**: a shipment of non-conforming goods does not constitute an acceptance if the seller seasonably notifies the buyer that the shipment is offered **only as an accommodation** to the buyer.
 - Seasonably --> within the reasonable time, defined at **1-205**.
 - taken at or within the time agreed or, if no time is agreed, at or within a reasonable time → Seasonably is boarder than reasonably
 - **Unilateral** contract (i.e. one right and one duty at time of formation of contract):
 - **Completion** of Performance as acceptance
 - completion of the performance: 1) not beginning; 2) very contextual, look at what the party **intend**
 - Usually only applicable where expressly requires a performance acceptance exclusively, or nature of offer (e.g. offers to the public) contemplate only such a performance.
 - **Bilateral** contract: **beginning** of performance is an acceptance.
5. Acceptance (Cont)
- Silence as acceptance (**sect 69**)
 - (a) Where an offeree takes the benefit of offered services with reasonable opportunity to reject them and reason to know that they were offered with the expectation of compensation.
 - (b) Where the offeror has stated or given the offeree reason to understand that assent may be manifested by silence or inaction, and the offeree in remaining silent and inactive intends to accept the offer.
 - (c) Where because of previous dealings or otherwise, it is reasonable that the offeree should notify the offeror if he does not intend to accept.
 - Battle of Forms **2-207**: last shot
 - A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time **operates as an acceptance** even though it states terms additional to or different from those offered or agreed upon, **unless** acceptance is expressly made conditional on assent to the additional or different terms.
 - (2) The **additional** terms are to be construed as proposals for addition to the contract. → unless other party agree this proposal, or it's not part of contract
 - (Additional) Between merchants, become part of the contract unless:
 - (a) the offer expressly limits acceptance to the terms of the offer;
 - (b) they materially alter it; or
 - (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

- (3) (**different or part of additional**) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract.
- In such case the terms of the particular contract consist of those terms on which the writings of the parties agree (**both agreed part**), together with any supplementary terms incorporated under any other provisions of this Act. (**other different or additional part** leaves to U.C.C.)
- Rolling Offers **2-204**:
- Warranties
 - Implied terms in contract, but not just gap filler; Gap filler showed up when something is wrong an ambiguous; Warranties are required by public policy (kind of always)
 - **2-213**(express), **2-314**(merchantability), **2-315** (fitness for particular purpose), **2-316** (exclusion or modification of warranties)
 - certain words to form it/ look at the statues
 - **§ 2-313. Express warranties** by
 - 1) affirmation, promise, description, sample;
 - 2) which is made **part of the basis of the bargain** (what you think you are buying);
 - 3) not necessary to use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty → but state of opinion (seller's opinion) do not create warranty.
 - Note: State of facts: e.g. "it's a queen size bed" v. State of opinion: e.g. "it's a beautiful thing"
 - **§ 2-314. Implied Warranty:** 1) by merchant; 2) *fit for the ordinary purposes for which such goods are used.*
 - **§ 2-315. Implied Warranty: Fitness for Particular Purpose:**
 - 1) *seller has reason to know*
 - 2) *any particular purpose for which the goods are required, and that the buyer is relying on.*
 - **§ 2-316. Exclusion or Modification of Warranties:** magical words, "as if" "with all faults"+ "express warranty" → magic words to make the disclaimer
 - Output and requirement contract **2-306 (good faith)**
 - **2-306: Output, Requirements and Exclusive Dealings**
 - A term which measures the quantity by the output of the seller or the requirements of the buyer means such actual output or requirements as may occur in **good faith**, except that no quantity **unreasonably disproportionate** to any stated estimate or in the absence of a stated estimate to any normal or otherwise comparable prior output or requirements may be tendered or demanded.
 - A lawful agreement by either the seller or the buyer for exclusive dealing in the kind of goods concerned **imposes**, unless otherwise agreed, 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.
 - Factor: 1) **good faith** (as contrast to bad faith, like a second thought, get rid of current contract); 2) **reasonable expectation**, based on past requirement or input; 3) (minor) **exclusive dealing** → “best effort to sth,” it’s an obligation.

Chapter 2 Validation Device

1. Seals: **section 98** (adoption of seal by delivery of a document), limited use
 - § 2-203. Seals Inoperative for deal of goods → completely abandon it
 - Corporate seal is not a seal instrument; it's more like a letter head.
2. **Consideration:**
 - Legal value: 1) benefit to the promisor or 2) detriment to the promisee
 - One party have **legal** rights to do sth, yet give up for this promise
 - Detriment: give up his legal to smoke to get his uncle's promise's gift.
 - Bargain for exchange: promise exchanged for detriment and detriment exchanged for promise
 - Test: 1) **must** tell the promisor + promisee; 2) find detriment to **promisee** or benefit; 3) bargain for exchange
- Nominal situation: Court doesn't look at the adequacy, so nominal is fine.
 - If not bargained-for (including **money exception**, in that case, no bargain process)
 - If mere pretense for a gift (difference between detriment and condition to gift; incidental detriment)
 - E.g. B promises to use A's donation for scholarship (no consideration); B also lists A's name on its magazine (detriment) → many close call case
 - E.g. "Go to pick up my hamlet, then that will be yours", or if you put your hand in your pocket → incidental action (or condition to gift)
 - If consideration stated not paid for;
 - "sham": said in recitals that some benefit or detriment has done; yet promisee does not really suffer detriment (e.g. do not pay)
 - Restatement that do not require payment here is minority rule: 87(option contract) and 88 (guaranty)
 - In equitable relief (besides the damage) → check **adequacy** of consideration
 - induced by mistake; relief would cause unreasonable hardship or loss to the party in breach; grossly inadequate or unfair.
 - Other:
 - P gave up his right to sue and reached an agreement with D, yet it turns out that P cannot sue the case at that time → **consideration**, as long as the P in good faith thought so.
- Modification (pre-existing duty rule and exceptions, e.g. **Sect89**)
 - Modification for consideration
 - §89, if the modification is fair and equitable in view of circumstances not anticipated by the parties when the contract was mad
 - §2-209: An agreement modifying (both agrees to change) a contract within this Article needs no consideration to be binding → trash collection (minority rule)
 - If you have pre-existing duty → lack of exchange for bargain (sometimes lack of knowledge of the offer before performance)
 - Accord and satisfaction: "A told B, if you give me a car, you don't have to pay."
 - Substitute contract: A **discharged (change)** the original, only sue for car.
 - Accord and Satisfaction: does not discharge just defer, sue for both money and car.
- Incapacity: (Yet if the party complete his performance, there is not case)

- §14, Minor/Infant: capacity to contract until 18th Birthday → or voidable contract (has to do something to make void it, like returning everything he received).
 - §16, Intoxicated Person: voidable only if the other party knew he was drunk and knew he didn't know what he was doing
 - §15, mental illness: almost the same as intoxicated person.
3. Promissory Estoppel: **section 90** (expansive application, just for damage)
- **Sec 90.** A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is **binding** if injustice can be avoided only by enforcement of the promise. (Indicated **3 Elements Test**)
 - Expectation: reasonably expect a reliance
 - Reliance: P did rely on this promise
 - Implied: reasonableness, whether the party have alternative to avoid it instead of relying on it.
 - **Expansive application:** since the contract hasn't formed it, just compensate for the part due to the reliance of D's promise.
 - → seems like expectation damage only applies to formed contract; reliance and restitution could apply to "quasi contract" or no contract.
 - Past consideration and moral obligation: not validation device
 - Past: (rationale) no bargain for exchange → before A is rewarded (given a consideration), A already "performed the contract."
 - Moral obligation: minority rule, e.g. **Section 86**
 - (1) A promise made in recognition of a benefit previously received by the promisor from the promisee is binding to the extent necessary to prevent injustice. → has received the benefit; knew that was not a gift
 - Exception: (a) if the promisee conferred the benefit as a gift or for other reasons the promisor has not been unjustly enriched; or (b) to the extent that its value is disproportionate to the benefit.
 - **Section 86:** promise for benefit (**material benefit doctrine**) –minority
 - to the extent necessary to prevent injustice; unless, as a gift, unjustly enriched; value disproportionate to the benefit
 - Statute of limitation: **section 82.**
 - the indebtedness is still enforceable or would be except for the effect of a statute of limitations (bank made P promise to pay back old debts, yet old debts ran out of SOL, so not enforceable)

Chapter 3 Operative Expression of Assent

1. Statute of Frauds 2-201
 - Suretyship within (exception is **leading object** rule)
 - if the main purpose and object of the promisor is not to answer for the debt of another, but to serve some pecuniary or business purpose of his own (**his own primary or business advantage**)→ don't need writing to be enforceable.
 - E.g the shareholder as his own company's surety
 - Promises in consideration of **Marriage** (eg prenuptial agreements) (w/in) - **part performance (like completion)** takes out

- Part performance: a failure to comply with the statute of frauds is **overcome** by a **party's execution, in reliance** on an opposing party's oral promise, of a substantial portion of an oral contract's requirements
- **E.g.** in case of prenup (before marriage), the oral agreement is enforceable, for both parties had performed its duties during their marriage.
- Sale of Land (w/in) - **part performance** takes out
 - Construction contract is not sale of land; lease for more than a year is.
 - Exception: part performance:
 - Mere payment of price + possession (and/or) improvement
 - Just payment is not enough
- Contracts not performable within one Year - some courts construe **narrowly**
 - **Expressly and specifically** saying cannot be finished within one year
- Goods, Memo necessary:
 - **Common Law §131**
 - Statute of Frauds is enforceable, if it is evidenced by any writing,
 - a) signed by or on behalf of the party to be charged (opposing party who did not allege this claim), which
 - b) reasonably identifies the subject matter of the contract,
 - c) is sufficient to indicate that a contract with respect thereto has been made between the parties or offered by the signer to the other party, and
 - d) states with reasonable certainty the essential terms of the unperformed promises in the contract. (not necessarily quantity)
 - **UCC: 2-201** (admit/performance): for Goods
 - Subsection (1):
 - **more than 500** has to be in **writing**, indicating the **contract has been made, signed by** the party who alleged the claim
 - must mention **quantity** of goods; not specific or incorrect is okay
 - Subsection (2): Only to **merchants**
 - **Signature** requirement: don't have to be the one who alleged SOF
 - **Notification** sent to the other party + **does not object** and sent
 - Subsection (3): **exception to (1)**
 - Special goods;
 - Who did want to enforce the contract admits the formation of contract;
 - payments have made and accepted.
- Reliance: **§139 - reliance** to avoid S of F (not majority? Promissory Estoppel)
 - **High burden of proof:**
 - common law promissory estoppel
 - clear and convincing evidence (cannot be other extra explanation); no other remedy; induce; reasonableness; foreseeability (not scope of risk)

2. Parol Evidence Rule:

- This rule is intertwined with the process of **interpretation** (implied terms). Interpretation is default rule of interpreting parties' intent → environmental or extrinsic evidence is needed; PER is placing control over the evidence.
- Explanation:
 - Whether the court could hear certain evidence

- Whether the oral or written testimony that occurred prior to or at the same time as the written agreement could be heard by trial finder.
 - If this happen after the agreement --> not Parol Evidence, it's modification.
- Rule:
 - Question: Is the contract totally integrated or partially integrated?
 - If it's totally integrated --> jury cannot hear the evidence (final expression and contains everything they agreed upon)
 - If it's partial integrated --> only the evidence that is consistent with the agreement.
- Test:
 - ~~1) The Appearance Test: It appears to the court that it is complete (judge hear all evidence, then decide if the contract is integrated).~~
 - 2) **Separate Consideration:** If it has, then not integrated, admissible.
 - 3) **Natural Omission (Inclusion) Test**
 - a. would a term naturally be omitted from the main contract? → a high burden for P to prove
 - b. If the court would find the provision has been integrated in the original contract, then fail the test.
 - 4) **Certain Inclusion:**
 - a. Would the provision certainly be included?
 - b. a lower bar/burden for the party that want the trial to hear the evidence.
 - ~~5) Writing Omission Test:

 - a. deal with topic not covered in agreement, then the trial to hear the evidence.
 - b. if the subject matter has already covered in the contract, then it's integrated.~~
- Rules to determine if integrated
 - common law - **natural omission and separate consideration** → practically requires showing the intent of parties.
 - UCC-**certain inclusion** – less restricted.
- **Exception** to Parol Evidence Rule (**all above**) **just for UCC §2-202**
 - writing may be explained or supplemented by **course of dealing, or usage of trade, or course of performance** even if complete integration
 - Usage of Trade: What is generally done in the industry.
 - Course of Dealing: What the party has done before the contract, prior contract with the same party.
 - Course of Performance: What the party done to this specific contract.
 - Application:
 - “everyone knows what is supposed to be, that's why they don't put in the contract.”
 - if you could prove that is a part of agreement, then it is admissible, even though the terms might be contracting to each other (contradict to the basic rationale of general rule)
 - merger clause did not control the question whether there is an integrated agreement itself → if the performance is conditional, the non-occurrence of condition will discharge the original duty and contract/clause.
- 3. Subsequent Modification 2-209
 - Common law: general need consideration; §89
 - If the modification is fair and equitable in view of circumstances not anticipated by the parties when the contract was made

- UCC: No consideration necessary, but must be in good faith
- UCC: It can have “no oral modification clauses” and compliance with **Statute of Frauds**
- UCC: Waivers and retraction of waivers: reliance of prior retraction
 - (minority rule) If it's something does not need be in writing in the first place, then the modification of this part does not need to be in writing, either. Only quantity is required in writing.
 - (majority rule, U.C.C.) every modification over 500 needs to be in writing.
- Statute:
 - (1) *An agreement modifying a contract within this Article needs no consideration to be binding.*
 - (2) *A signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded, but except as between merchants such a requirement on a form supplied by the merchant must be separately signed by the other party.*
 - (3) *The requirements of the statute of frauds section of this Article (Section 2-201) must be satisfied if the contract as modified is within its provisions.*
 - (4) *Although an attempt at modification or rescission does not satisfy the requirements of subsection (2) or (3) it can operate as a waiver.*
 - (5) *A party who has made a waiver affecting an executory portion of the contract may retract the waiver by reasonable notification received by the other party that strict performance will be required of any term waived, unless the retraction would be unjust in view of a material change of position in reliance on the waiver.*

4. Mistake:

- Mistake happened at the formation of the contract → parties' **assent** is induced by error;
- Impracticability and frustration of purpose happened after the formation → impact of **supervening events** that **alters** the agreed transaction.
- Mutual mistake (**sect 152**)
 - **Sec 152:** Where a mistake of both parties 1) at the time a contract was made as to a 2) basic assumption on which the contract was made has 3) a material effect on the agreed exchange of performances, the contract is **voidable** by the adversely affected party 4) unless he bears the risk of the mistake under the rule stated in § 154.
 - **Sect 154:**
 - (a) the risk is allocated to him by agreement of the parties, or
 - don't understand it so literally
 - C thought he would make a lot of money via buying a business from D. But it did not go through well → NO! The risk is clearly allocated to the Buyer.
 - If a settlement cover all the known or unknown injury → allocate the risk to injuring party.
 - (b) he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient, or
 - (c) the risk is allocated to him by the court on the ground that it is reasonable in the circumstances to do so.
- Unilateral Mistake (**section 153**):

- Where 1) a mistake of one party 2) at the time a contract was made 3) as to a basic assumption on which he made the contract has 4) a material effect on the agreed exchange of performances that is adverse to him, the contract is voidable by him if he does 5) not bear the risk of the mistake under the rule stated in § 154
 - Allocated by agreement; allocated by courts; conscious ignorance
- 6) the effect of the mistake is such that enforcement of the contract would be unconscionable, or the other party had reason to know of the mistake or his fault caused the mistake.
 - e.g. when it's too good to be true, you will know there was a mistake → the element of unilateral mistake is satisfied → might be voidable

5. CISG:

- Subjective (if know the intent) v. objective theory
 - Subjective intention may be relevant for CISG
- Time for acceptance of offer - runs from date of letter, not date received
- No mail box rule - it is when the acceptance reaches the offeror, not when mailed
- Firm offers - irrevocable if states a duration
- Last shot principle applies
- No statute of frauds or parol evidence rule

Chapter 4 Interpretation

15. Standard of Interpretation:

- A. Common meaning of parties: more broadly
 - Contextual interpretation: surrounding circumstances prior or contemporaneous with the making of the contract --> review in the context
 - Purpose of the parties
 - The transaction as a whole
 - Preferred Public Policy
 - Reasonable, lawful and effective interpretation
- B. Maxims:
 - **Contra Proferentem**: interpretation against the drafting party, or the party providing printed terms. Usually applied to insurance contracts --> "take or leave it" contract against the provider
 - **Expressio Unius Est Exclusio Alterius**: (when the contract is fully drafted) when a contract specifies certain terms, it implies the exclusion of all other not expressed --> "make a list, if not on the list, then not included."
 - **Ejusdem Generis**: (when the draft is not done) general language followed by enumeration of specific items, it limited to matters similar in the same kind to the listed items.
- C. Use of extrinsic evidence: unless there is ambiguity
 - If there is no ambiguous --> no extrinsic evidence
 - If latently ambiguous --> allow extrinsic rule, but still bound by the appropriate objective definition of the words they use to express their intent.
- D. Application:
 - Covenant not to compete case:
 - The expressed provision probably does not include "maitre d'" --> interpretation.
 - The interpretation could be "otherwise engage in or become interested financially" means the same level of employment other than just employee like maitre d'.

Chapter 5 Abuse of Bargaining Process (not enforceable)

1. This chapter is like “inoperative expression of assent,” meaning even though everything is satisfied, the contract is still **not enforceable** → innocent party could void(able) the contract
2. **Hierarchy**: Improper threat (duress) --> Misrepresentation --> Unconscionability --> Bad Faith --> Public Policy
3. Abuse of Bargaining Process:
 - a. Improper threats (rest 175 176): Whether that statement v is inappropriate threats **§175-76**
 - §175 (a) By an improper threat that leaves the victim no other reasonable alternative.
 - §176 (1): Improper Threat: criminal prosecution; civil process + bad faith; crime or tort; breach of good faith.
 - *(a) what is threatened is a crime or a tort, or the threat itself would be a crime or a tort if it resulted in obtaining property, (b) what is threatened is a criminal prosecution, (c) what is threatened is the use of civil process and the threat is made in bad faith, or (d) the threat is a breach of the duty of good faith and fair dealing under a contract with the recipient.*
 - In this case, the attorney threatened with criminal prosecution; even though they are just discussing the possibility of prosecution (--> very careful about that might just be a threat, not a notification of possibility, even if the D did commit the crime)
 - b. Misrepresentation / non-discloser (fraudulent or material) (159-162) --> omission by saying nothing
 - **Duty to read**: if the party has no reason to read (hidden), then that part is not enforceable.
 - Not “battle of forms,” for that is about formation of contract, not modification.
 - **Misrepresentation**: an assertion that is not accord with the facts. §159
 - Two types of misrepresentations: **§162**
 - **Fraudulent** misrepresentation: in order to induce other parties to agree and what they are saying is not true; the other parties do not know that is not true.
 - **Material** misrepresentation: almost the same, except that the maker does not know that is not true.
 - (mistake is about statements of the basic assumption of the contract?)
 - When this make the contract voidable **§164**
 - Voidable: the other party has the option to void it.
 - Other form: **Concealment/non-disclosure**
 - E.g. You tried to sell your house, and hid a hole at the wall and didn't say anything.
 - **Concealment**: **§160**
 - (when one party's action is equivalent to an assertion --> concealment)
 - Active misrepresentation **§160**, when you have to duty to disclose, yet you fail to do something.
 - (concealment necessarily involves non-disclosure, but it is the act that prevent others from knowing is concealment -- > equivalent to an assertion.)
 - **Non-disclosure**: **§161**
 - (a) previous assertion: indicting your annual income before lending a loan, yet recently you lost your job --> have to inform the lender
 - (b) mistake of other party: when you know the danger of tree falling, if you say nothing, it is still a misrepresentation.
 - c. Standardized contracts (reasonable expectation, usually favor of the insurer, for the assumption is contract of adhesion)
 - **Reasonable Expectation**:

- If the terms are either ambiguity and a reasonable person would expect others. They will enforce the **expectation**, even though that might be contrary to the original.
 - Requirement: 1) ambiguity; 2) reasonable expectation
 - Ambiguity: by technical or obscure language or which are hidden in policy provision
 - Possible source to consider: reality of current day commercial practice, what the sales person said.
 - If there are ambiguity in **insurance**, the judgement is usually against the drafter, i.e. insurer.
- d. Contract of adhesion: bargaining power/take it or leave it;
- e. Unconscionability 2-302, procedural/substantive;
- U.C.C. 2-302: statute
 - (1) it is not defined in U.C.C. --> Courts define it, judicial created concept. --> Determination of it is made by court --> tremendous discretion
 - (2) Made at the time the contract was made. Court should hear testimony.
 - Comments: **so one-sided as to be unconscionable**
 - **Procedural:** prevent of oppression and unfair surprise
 - **Oppression:** inequality of bargaining power between the parties preclude the weaker party to negotiate and choose the term of contract
 - **Surprise:** supposedly agreed-upon terms are hidden by the party seeking to enforce it.
 - Majority rule -- > adhesion is only a possible factor; 1) take or leave it nature; 2) relative bargaining positions; 3) economic compulsion motivating the "adhering" party or important reliance like immigration status.
 - **Substantive:**
 - **So one-sided as to shock the conscience.** Unreasonably or grossly favorable to one side <--> alter or limit the rights and remedies available to a party.
 - Look at: coverage of claims, the statute of limitations, the prohibition of class actions, the filing fee, cost-splitting, remedies, and unilateral power to modify or terminate the arbitration agreement.
- f. Good faith (205, 1-304) and definition at 1-201 and for merchant at 2-203
- Subjective: honest in fact, objective: reasonable commercial standard of fair dealing
 - You don't sue for good faith or bad faith --> part of breach of contract
 - Relevant in output contract (requirement)
 - Good faith means that a party may not take opportunistic advantage in a way that could not have been contemplated at the time of drafting
4. Public Policy
- A. Public policy in legislation 181 (need license but not have one)
- § 181: for licensing, registration, or similar requirement → not enforceable, if
 - (a) the requirement has a regulatory purpose, and
 - (b) the interest in the enforcement of the promise is clearly **outweighed by** the public policy behind the requirement.
- B. Contracts in restraint of trade 188 (**convent not to compete**; balancing test for all parties involved to decide what it enforce)
- **Ancillary Restraints:** (this restraint is ancillary/attached to a transaction) may or may not be enforceable. **Sect 188**

- **Definition:** 1) Seller of a business not to compete with buyer in such a way as to injure the value of the business sold; 2) Employee not to compete with employer; 3) Partner not to compete with partnership.
 - **Unenforceable if:** (a) the restraint is greater than is needed to protect the promisee's legitimate interest, or (b) the promisee's need is outweighed by the hardship to the promisor and the likely injury to the public.
 - Court: Reasonable restraint, no hardship for promisor, no injury to public
 - **Direct Restraints:** (directly between competitors) would violate public policy
- C. Gambling: not legal, leave the party where they are

Chapter 6 Condition and Promise

1. Conditions

- Condition: depends on situation, reliance on it --> relief from
 - Smoke ball → buying smoke ball is acceptance; getting is the condition that D must perform;
 - **§224:** A condition is an event, not certain to occur, which **must occur**, unless its non-occurrence is excused, **before performance under a contract becomes due**.
 - Note from cases: *The nonoccurrence of a condition precedent excuses only the performances required after that nonoccurrence, not the entire contract obligation.*
- Promise v. Condition: if words "promise" involved, depends on the significance of the promise
 - Difference:
 - The condition (not destroy) must be satisfied before the insurance paid --> no need to pay P
 - Promise: breach of promise --> D could sue for damage, but it's hard to show damage.
 - A draft / interpretation problem, usually against the drafter
 - Preference: If not sure, then promise not condition → preferred to **avoid forfeiture**
 - **Sect. 227:** Standards of Preference with Regard to Conditions
 - In resolving doubts as to whether an event is made a condition of an obligor's duty, and as to the nature of such an event, an interpretation is preferred that will reduce the obligee's risk of forfeiture, **unless** the event is within the obligee's control or the circumstances indicate that he has assumed the risk.
- Promissory condition: when the party say so, I don't have to perform and I have to sue you for damage
 - Works for both: when the condition did not occur → discharge duty to perform; when the promise did not occur → at least sue for damage.
- "subsequent condition:" Event that terminates a duty §230
 - Difference between subsequent and precedent: the same thing;
 - Precedent: performance does not become due until the condition
 - Subsequent: performance is discharged by nonoccurrence of condition
 - § 230 Event That Terminates a Duty
 - 1) Except as stated in Subsection (2), if under the terms of the contract the occurrence of an event is to terminate an obligor's duty of immediate performance or one to pay damages for breach, that duty is discharged if the event occurs.
 - 2) The obligor's duty is not discharged if occurrence of the event
 - a) is the result of a breach by the obligor of his duty of good faith and fair dealing,
 - b) could not have been prevented because of impracticability and continuance of the duty does not subject the obligor to a materially increased burden.

- 3) The obligor's duty is not discharged if, before the event occurs, the obligor promises to perform (excuse the condition) the duty even if the event occurs and does not revoke his promise before the obligee materially changes his position in reliance on it.
- Condition of satisfaction 228 (obj. v. sub.): the party could agree on the requirement; or personal satisfaction
 - Objective standard → commercial quality, operative fitness, or mechanical utility which knowledge persons are capable of judging.
 - Subjective standard → personal aesthetics, taste or fancy → once the party agrees, it assumes risk of enforcement of such clause (other party might just reject it based on its own taste)
 - e.g. A contracted with B to have a painting; A dislikes it.
 - Default Rule: objective standard,
 - Sect. 228: when satisfaction is the condition, whether **a reasonable person** in the position of the obligor would be satisfied.
 - Express, Implied and Constructive Condition:
 - Express Condition: established through writing or conduct
 - Implied Condition: Established by conduct
 - Constructive Condition: the parties do not address that, the court impose it
 - E.g. D changed his price, for P delayed his performance → implied or constructive condition, if P cannot finish his performance, D cannot complete his duty
 - Constructive conditions and **order** 234
 - (1) Where all or part of the performances to be exchanged under an exchange of promises can be rendered simultaneously, they are to that extent due simultaneously, unless the language indicate the contrary. → If it can happen at the same time, then due at the same time.
 - (2) Except to the extent stated in Subsection (1), where the performance of only one party under such an exchange requires a period of time, his performance is due at an earlier time than that of the other party, unless the language or the circumstances indicate the contrary. → The one who needs time to perform, it will come earlier.
 - Divisible contracts (agreed equivalents) 240: if one of them is not enforceable, it does not turn down the whole contract
 - A contract has several distinct objects, one or more of them are lawful, others are unlawful. The contract is void as to the latter, valid as to the rest.
 - Performance is separable into corresponding pairs of part performance → **divisible contract** → consideration is not single (it could be separable)
 - The parts of each pair must be regarded as agreed equivalents → roughly equivalent value
 - **Restatement. 183**
 - If the parties' performances can be apportioned into corresponding pairs of part performances so that the parts of each pair are properly regarded as agreed equivalents and one pair is not offensive to public policy, that **portion of the agreement is enforceable** by a party who did not engage in serious misconduct.
 - Installment contracts 2-612: term of art, contract where have multiple delivery and separate acceptance --> not what they meant --> if they screw up one, then burden of turning up the whole is hard.

- (1) An "installment contract" is one which requires or authorizes the delivery of goods in separate lots to be separately accepted, even though the contract contains a clause "each delivery is a separate contract" or its equivalent. → still one contract instead of several
 - (2) The buyer may **reject** any installment which is non-conforming if the non-conformity substantially impairs the value of that installment and cannot be cured or if the non-conformity is a defect in the required documents; but if the non-conformity does not fall within subsection (3) and the seller gives adequate assurance of its cure the buyer **must accept** that installment.
 - (3) Whenever non-conformity or default with respect to one or more installments **substantially impairs the value of the whole contract** there is a breach of the whole. But the aggrieved party reinstates the contract if he accepts a non-conforming installment without seasonably notifying of cancellation **OR** if he brings an action with respect only to past installments or demands performance as to future installments.
2. Excuse non-occurrence of condition
- A. Avoid disproportionate forfeiture 229
- To the extent that the non-occurrence of a condition would **cause disproportionate forfeiture**, a court may excuse the non-occurrence of that condition **unless** its occurrence was **a material part of the agreed exchange** → Jacob Young v. Kent
 - If there is express condition to use Reading pipe, the only to win is that the court decide to excuse that condition, for it will result in major lost to the builder --> suffering a forfeiture.
- B. Waiver 84: depends on whether that is material provision to see if you could retract the waiver
- Case: did they know that property was vacant when they issued the policy? If they knew yet still kept the insurance, they waived the policy.
 - Rule from 84:
 - a. If that is an important condition --> saying waive is not enough, it has to be **consideration**
 - b. If we apply this rule to principle case, because there is no consideration + important condition, it cannot be deemed as waiver. (at the time the case is decided, Restatement has not been adopted)
 - c. But if the D required more money from P (consideration), it is a waiver. The insurance company needs to pay for the damage.
 - Statute:
 - (1) Except as stated in Subsection (2), a promise to perform all or part of a conditional duty under an antecedent contract in spite of the non-occurrence of the condition is binding, whether the promise is made before or after the time for the condition to occur, unless → **"such waiver is binding, unless"**
 - (a) occurrence of the condition was a material part of the agreed exchange for the performance of the duty **and** the promisee was under no duty that it occur; or
 - (b) uncertainty of the occurrence of the condition was an element of the risk assumed by the promisor.
 - (2) If such a promise is made before the time for the occurrence of the condition has expired and the condition is within the control of the promisee or a beneficiary, the promisor can make his duty again subject to the condition by notifying the promisee or beneficiary of his intention to do so if → **before the non-occurrence happened + beneficiary can make it happen, the promiser may "revoke" the waiver**

- (a) the notification is received while there is still a reasonable time to cause the condition to occur under the antecedent terms or an extension given by the promisor; and
 - (b) reinstatement of the requirement of the condition is not unjust because of a material change of position by the promisee or beneficiary; and
 - (c) the promise is not binding apart from the rule stated in Subsection (1).
- C. Bad Faith: Breach of contractual condition of cooperation
- If there is Bad Faith, it will excuse the condition of the contract. In this case, it refers to “the insurance company have to find applicant is an acceptable risk to actually accept P’s application.
 - If the court excuses the condition, this condition or provision is deleted from the contract → D’s action of not paying P is a breach of contract → D is liable.
 - Bad Faith: jury questions
 - This case, it deserves a summary judgement → for D did not do the analysis; It did nothing at all
 - It is supposed to require D’s constructive good faith corporation
- D. Repudiation

Chapter 7 Breach and Repudiation

1. Breach: Common Law

- Intro:
 - Material and total: 1) damages, 2) withhold all performance, 3) right to terminate the contract
 - Sue for damage, don't have to perform his duties (e.g. payment), terminate contract
 - Material Breach: 1) damages, 2) suspend performance, 3) wait a cure by the other party
 - Does not give innocent party right to terminate
 - Give a chance to cure --> innocent party might need to perform again (suspend)
 - Immaterial Breach (usually **substantial performance**): 1) damages.
- Statute:
 - What is material? Factors to look at. §241
 - a. the extent to which **the injured party** will be deprived of the benefit which he reasonably expected;
 - b. the extent to which **the injured party** can be adequately compensated for the part of that benefit of which he will be deprived;
 - c. the extent to which **the party failing to perform** or to offer to perform will suffer forfeiture;
 - d. the likelihood that **the party failing to perform** or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;
 - e. the extent to which the behavior of **the party failing to perform** or to offer to perform comports with standards of good faith and fair dealing.
 - What is material and total breach? §242
 - a. Factors of “material” §241
 - b. the extent to which it reasonably appears to the **injured party** that delay may prevent or hinder him in making reasonable substitute arrangements; (how **urgent** that breach is based on the need of innocent party)

- c. the extent to which the agreement provides for performance without delay, but a material failure to perform or to offer to perform on a stated day does not of itself discharge the other party's remaining duties unless the circumstances, including the language of the agreement, indicate that performance or an offer to perform by that day is important. (the parties agree in contract that no delay is acceptable)
 - They are all factors to **consider not determinative** → different consequence
 - Material breach (241-242)/substantial performance --> fact based inquiry
 - **Substantial performance**: if there is substantial performance, any breach will be immaterial breach
 - Analyze substantial performance: **almost finished performance** (class note); inadvertent and trivial defects
 - Performance v. implied term/condition → like Jacob Young & Kent
 - Express condition/term → the court still could excuse the term/condition due to possible reasons of excuse of condition stated above. (impropriate forfeiture; good faith; waiver)
 - Case Application:
 - Issue: what kind of breach was that? Being 3 days late.
 - a. If material and total, sue for the original and the accord contract (20,000 discount).
 - b. If material, they need to wait for cure.
 - c. If immaterial: "right to use 25,000 for that three days" will be the damage.
 - If the failure to perform or delay in performing is so material that it will or may result in the other party not getting substantially what he bargained for, the latter is excused from his promised duty.
 - If the failure or delay is not of that character, the other party continues under a duty and he must recoup his loss due to the breach.
2. Breach: U.C.C. Sale of Goods
- Perfect tender rule: Seller can cure the defects; Buyer take the goods, but still sue for breach;
 - Buyer 2-601
 - *Subject to the provisions of this Article on breach in installment contracts (Section 2-612) and unless otherwise agreed under the sections on contractual limitations of remedy (Sections 2-718 and 2-719), if the goods or the tender of delivery fail in any respect to conform to the contract, the buyer may*
 - (a) *reject the whole; or (b) accept the whole; or (c) accept any commercial unit or units and reject the rest.*
 - Note:
 - "perfect tender" rule: If the goods failed in any respect, the buyer may reject it.
 - This rule is modified: by good faith, or by industry's standard.
 - Accept 2-606
 - (1) *Acceptance of goods occurs when the buyer*
 - (a) ***after a reasonable opportunity to inspect the goods*** signifies to the seller that the goods are conforming or that he will take or retain them in spite of their non-conformity; or
 - (b) fails to make an effective rejection (subsection (1) of Section 2-602), but such acceptance does not occur until the buyer has had ***a reasonable opportunity to inspect them***; or
 - (c) *does any act inconsistent with the seller's ownership; but if such act is wrongful as against the seller it is an acceptance only if ratified by him.* → any action taken by the

buyer, which is inconsistent with his claim that he has rejected the goods, constitutes an acceptance.

- (2) Acceptance of a part of any commercial unit is acceptance of that entire unit.
- Note: Accepting the goods does not mean you could not sue the seller.
- Revocation of acceptances: 2-608 (more difficult breach to make)
 - **Substantially impair the value + the buyer did not know about it/seller said it's ok**
 - (1) The buyer may revoke his acceptance of a lot or commercial unit **whose non-conformity substantially impairs its value** to him if he has accepted it
 - (a) on the reasonable assumption that its non-conformity would be cured and it has not been seasonably cured; or
 - (b) without discovery of such non-conformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.
 - (2) Revocation of acceptance must occur **within a reasonable time** after the buyer discovers or should have discovered the ground for it **and** before any substantial change in condition of the goods which is **not caused by their own defects**. It is not effective until the **buyer notifies the seller** of it.
- Reject 2-602
 - (1) Rejection of goods must be within a reasonable time after their delivery or tender. It is ineffective unless the buyer seasonably notifies the seller.
 - (2) Subject to the provisions of the two following sections on rejected goods (Sections 2-603 and 2-604),
 - (a) after rejection any exercise of ownership by the buyer with respect to any commercial unit is wrongful as against the seller; and
 - (b) if the buyer has before rejection taken physical possession of goods in which he does not have a security interest under the provisions of this Article (subsection (3) of Section 2-711), he is under a duty after rejection to hold them with reasonable care at the seller's disposition for a time sufficient to permit the seller to remove them; but
 - (c) the buyer has no further obligations with regard to goods rightfully rejected.
- Cure 2-508
 - If the time to perform has not expired, the seller **has absolute right to cure** till the agreed delivery date.
 - When the time to performance expired, in most situations, the seller has **further reasonable time** to cure the defects.
 - (1) Where any tender or delivery by the seller is rejected because **non-conforming** and the time for **performance has not yet expired**, the seller may seasonably notify the buyer of his intention to cure and may then within the contract time make a conforming delivery.
 - (2) Where the buyer rejects a non-conforming tender which the seller had reasonable grounds to believe would be acceptable with or without money allowance, the seller may if **he seasonably notifies the buyer** have a further reasonable time to substitute a conforming tender.
- Note:
 - Cancellation in U.C.C. means the termination
 - Rejection: 1) Bad faith, 2) usage of trade or something may be also dealing with it.
 - Sometimes total rejection for just 1% bad may be deemed as bad faith

3. Repudiation:

A. Repudiation 250

- If you are wrong, you could be regarded as repudiation
 - E.g. P wrote to D that there is restriction toward its condition + ask to modify contract terms → D stopped to perform → Court ruled P's request is not a repudiation → D actually repudiated the contract.
 - IMPORTANT: Repudiating happens regardless of whether that is made willfully or by mistake; it is about whether there is “a clear manifestation of intention not to perform.”
 - A repudiation is (§250)
 - (a) a statement by the obligor to the obligee indicating that the obligor will commit a breach that would of itself give the obligee a claim for damages for total breach under § 243, or
 - (b) a voluntary affirmative act which renders the obligor unable or apparently unable to perform without such a breach.
 - **Damage 251**: Where reasonable grounds arise to believe that the obligor will commit a breach by non-performance that would of itself give the obligee a claim for damages for total breach under § 243
- B. Retraction of repudiation 256
- If the other has not material change its position in relying on it/say that is final --> you could retract
 - The buyer could retract the repudiation before the seller materially change its position or otherwise consider the repudiation to be final.
 - a. Reliance on that repudiation, OR
 - b. The other party clearly told other that they think it is final
 - --> even if that is repudiation, P can retract the repudiation before D materially rely on it.
- C. UCC 2-610, 2-611
- **U.C.C. 2-610, reactions to anticipatory repudiation**
 - a. Premise: the significant part of contract, not a minor one ("**substantially impair the value of the contract.**")
 - b. (2) It gives the party options to sue at that time at the time of alleged repudiation happened, (there is a risk of being sued for breach) or; he can wait for the deadline
 - c. awaits performance for a commercially reasonable time; (3) suspend his own performance
 - **U.C.C. 2-611**
 - a. The way to cut off retraction: materially change the position or just consider it as final (tell other party so).
 - d. How to make revocation? Clearly indicate his intention to perform + assurance demanded by UCC
 - e. Usually with due excuse and allowance for any delay along with the repudiation.
- A. A **good faith mistake** will not save a party from committing a repudiation.
- A party thought the provision means something, it turns out that's not what it meant → still liable for repudiation
- B. Demanding assurance (2-609, 251)
- Ask them to prove not repudiate
 - Case:
 - a. Repudiating happens regardless of whether that is made willfully or by mistake; it is about whether there is “a clear manifestation of intention not to perform.”
 - b. Reasonable: heard information from others;

- c. What kind of assurance? **e.g.** evidence of its financial condition; put the money in escort;
- d. In this case: P stopped performing before they asked for adequate assurance, (and not in writing).
- Rule:
 - a. You could demand adequate assurance when a reasonable ground arises;
 - For merchants, reasonableness shall be decided by **commercial standard**
 - b. You don't have to pay/ could stop the performance until you received the assurance;
 - c. If the party does not provide the assurance within a reasonable time or 30 days, it could be treated as repudiation.
 - If the party is wrong (that buyer did have ability to buy) + **stop performing**, the party requesting it is in repudiation.
- Restatement §251: **just a reasonable time**
 - a. Where **reasonable grounds arise** to believe that the obligor will commit a breach by non-performance . . . the obligee may demand adequate assurance of due performance **and** may, if reasonable, suspend any performance for which he has not already received the agreed exchange until he receives such assurance.
 - b. The obligee may treat as a repudiation the obligor's failure to provide within a reasonable time such assurance of due performance as is adequate in the circumstances of the particular case.
- U.C.C. §2-609: require **30 days** to provide assurance
 - a. (1) *A contract for sale imposes an obligation on each party that the other's expectation of receiving due performance will not be impaired. When reasonable grounds for insecurity arise with respect to the performance of either party, the other may in writing demand adequate assurance of due performance and until he receives such assurance may if commercially reasonable suspend any performance for which he has not already received the agreed return.*
 - b. (2) *Between **merchants** the reasonableness of grounds for insecurity and the adequacy of any assurance offered shall be determined according to commercial standards.*
 - c. (4) *After receipt of a justified demand failure to provide within a reasonable time not exceeding thirty days such assurance of due performance as is adequate under the circumstances of the particular case is a repudiation of the contract.*

Chapter 8 Defense to Breach

1. Excuse the party/Impracticability: UCC 2-615 and §261
 - A. A mistake causes a defect in **contract formation**, permitting a party to be excused from accountability for a manifestation of assent.
 - B. Impracticability a **post-formation** change of circumstances has such a serious effect on the reasonable expectations of the parties that it should be allowed to excuse performance.
 - C. Statute
 1. **Sect 261** --> performance is discharged
 - a. *Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event **the non-occurrence of which was a basic assumption** on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.*
 2. **U.C.C. 2-615**

- a. (a) *Delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made.*
- b. (b) *Where the causes mentioned in paragraph (a) affect **only a part of the seller's capacity to perform**, he must allocate production and deliveries among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable.*
- c. (c) *The seller must notify the buyer seasonably that there will be delay or non-delivery and, when allocation is required under paragraph (b), of the estimated quota thus made available for the buyer.*

D. Elements from E&E:

1. Nonoccurrence of Which Was a Basic Assumption of the Contract
 - a. "unforeseen supervening circumstance not within the contemplation of the parties at the time of contracting." → unforeseen not unforeseeable
 - b. war, a natural disaster, a strike, and so on. A change in the law or government regulation is also an event →
 - c. A change in market conditions is generally not regarded as a contingency beyond the contemplation of the parties → Suez Canal is not beyond contemplation of parties
 2. Unduly burdensome
 - a. Relief is only appropriate if the change is extreme or very burdensome → Suez Canal may have extra cost, but not extreme and not impracticability.
 3. The party seeking damage is not the fault → did not assume the risk (?)
 4. (Risk Allocation: Force Majeure Clause)
2. Force majeure (excuse performance): prior agreement to excuse (not relying on court)
 - A. In the agreement of itself, the parties agreed to allocate risks in the contract.
 - B. The government did not prevent the coal, just prevent buyer passing the price to customers --> does not apply here
 - C. "For any cause beyond its reasonable control including orders of civil authority which wholly or partly prevent the utilizing of the coal."
 3. Frustration of Purpose (265): **Buyer's provision**, both parties understood that is the purpose
 - A. 2-615 is seller provision; for buyer, the doctrine is "frustration of purpose" (no provision in U.C.C., just common law)
 - B. Example: common law, p.621, note 1
 1. Krell v. Henry, his entire purpose is to see the coronation, but the king is ill --> no purpose for him.
 2. If the price was prepaid in whole or in part, the court would not allow the recovery for everything done before the frustration was viewed as validly done → but this allocation is unsettling.
- C. **Rest. 265**
 - *Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the **non-occurrence of which was a basic assumption** on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary.*
 - D. U.C.C. for goods: no expressly mention

- E. Difference from impracticability
 1. No requirement for unduly burdensome
 2. Just affect the benefit the party reasonably expected

Chapter 9 Remedies

1. Remedies

A. General:

- **Expectation Interest:** (what if the duty has performed)
 - Put in the position that you would haven't been if the contract has been performed.
 - If the party want to pursue this as primary --> mainly seeks the profits,
- **Reliance Interest:** "out of pocket cause"
 - When there might be no profit, or the profit cannot be figured out.
 - In reliance of this contract, the party could at least get the what they spend on this contract.
 - Put the position that **they were** before the contract.
- **Restitution Interest:** (benefit you conferred on breaching party)
 - If there is not too much money in spending, the value of benefit that the party has been stolen from the benefit party.
 - In the position you were before the contract, by the value you conferred breaching party.

Expectation	Reliance	Restitution
In the position as if the contract has been performed.	Return plaintiff to the position before they entered into contract	Restore value of benefit conferred on the defendant
Lost profit	Reliance on the contract	Unjust enrichment
Contract price - cost to complete	out of pocket (reliance) - lose of completion	Unjust enrich price
<u>Assumption: there is a contract</u>		

- **Example:**
 - House of 150,000, deposit 5,000, pay for architect 1,000, substitute house, 155,000
 - Expectation: (substitute) 5,000 + (deposit) 5,000 + pay for architect (1,000)
 - Reliance: deposit 5,000 + pay for architect 1,000
 - Restitution: deposit 5,000 (that is the part that D unjustly enriched)

B. **Foreseeability** limitation: Rest 351; 2-715(foreseeability, obvious or you told them + also incidental); apply to reliance damage as well as expectation

1. Common Law:

- a. Foreseeability limitation, have reason to foresee as a probable result at the time of formation
- b. how could they know/foresee?
 - (a) everybody knows --> "general damage"
 - (b) (when not obvious) as a special circumstance --> had reason to know/ they were told at that time that they entered the contract --> "special damage"
- c. **limit** the damage by excluding the profit, just for the reliance part, or when justice so requires --> to avoid **disproportionate consequence** (not unlimited).

2. **Statute:**

- a. (1) Damages are not recoverable for loss that the party in breach did not have reason to foresee as a probable result of the breach **when the contract was made**.
- b. (2) Loss may be foreseeable as a probable result of a breach because it follows from the breach
- c. (a) in the ordinary course of events, or
- d. (b) as a result of special circumstances, beyond the ordinary course of events, that the party in breach had reason to know.
- e. (3) A court may limit damages for foreseeable loss by excluding recovery for loss of profits, by allowing recovery only for loss incurred in reliance, or otherwise if it concludes that in the circumstances justice so requires in order to **avoid disproportionate compensation**

3. U.C.C. 2-715: for **buyers**, the same concept as common law

- a. General or particular (U.C.C.) <--> general or special (common law)
- b. Incidental damage (**just for U.C.C., not restatement**):
 - expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach.
 - **e.g.** If the goods are not conforming, the buyer has to ship it back --> so the shipment fee will be incidental damage
- c. Consequential Damage:
 - General damage + particular (special damage in common law)
 - Injury to person and property proximately resulting from any breach of warranty.
- o Case Note: D(Seller) is expensive and sophisticated. The submission of data from the registers to a mainline computer is a common feature in these types of registers → not particular or unique → general damage

C. **Certainty** limitation:

1. "new business" rule not modern rule (it might be hard, but not impossible r. certainty)
2. Lost profits must be established with r. certainty
 - a. when the evidence is a sheet of gross profits that the restaurant made --> unsupported by any standard or fixed method
3. If can't prove lost profits, can use reliance damages or restitution damages.

D. **Emotional Distress** Limitation:

- Only if accompanied by an independent tort unless under 353, (1) hotel (public humiliation/funeral situation; 2) bodily harm accompanies breach (and usually accompanied by an independent tort)
16. Normal rule: not a remedy for breach of contract; **Exceptions: 353 (a)**
- A. Likely emotional results are apparent for breaching contract, e.g. passengers and guests, dead body, message of death, sudden impoverishment, bankruptcy.
 - B. Breach causes bodily harm (it is tort anyway) and therefore causes emotional distress.

17. **§ 353 Loss Due to Emotional Disturbance**

18. Recovery for emotional disturbance will be excluded unless the breach also **caused bodily harm** or the contract or the **breach is of such a kind that serious emotional disturbance was a particularly likely result**.

A. *Comments: for the second exception. Common examples are contracts of carriers and innkeepers with passengers and guests, contracts for the carriage or proper disposition of dead bodies, and contracts for the delivery of messages concerning death. Breach of such a contract is particularly likely to cause serious emotional disturbance. Breach of other types of contracts, resulting for example in sudden impoverishment or bankruptcy, may by chance cause even more severe emotional disturbance, but, if the contract is not one where this was a particularly likely risk, there is no recovery for such disturbance.*

E. **Mitigation** -avoidable consequence

- Rest. 350

B. *(1) Except as stated in Subsection (2), damages are not recoverable for loss that **the injured party could have avoided without undue risk, burden or humiliation.***

C. *(2) The injured party is not precluded from recovery by the rule stated in Subsection (1) to the extent that he has made reasonable but unsuccessful efforts to avoid loss.*

- Exception:

D. Loss could have been avoided without undue risk, burden or humiliation or unsuccessful effort.

E. Rationale: The result is **no matter you took it or not**, they consider it to calculate the damage anyway (deduce it anyway)

- Applies to acts or omissions (did not do something to mitigate)

- **Case Calculation:**

F. P refused to work for the school. \$20 for full-time v. \$31 for part-time (if she was not fired)

G. Original damage: 17,401.48

H. If she took the job, salary for that full-time job will be 9,100; But she just worked for part-time, the deduction should be just 50% of 9,100

I. Plus, her earning during the two years' interval: 1,755

J. The final damage: 17,401 - 4,550 - 1,755 = 11,096

- **UCC 2-715 (2) (a)**

F. Liquidation Damage:

- The party could agree in advance what the damage is
- **Reasonable** in light of loss and **difficulties** of proof of loss (rest. 256 and UCC 2-718)

19. Explanation

. If you know exactly what the loss is, the court will not respect that amount --> designed for difficult damage

A. Reasonable at the time when the agreement was made or when the breach happened --> fuzzy line, the court will look at both ("in the light of anticipated or actual loss). The language suggests reasonableness should be at either of them.

B. If the amount is extremely large, that is not enforceable due to public policy

20. Rest 356

. *(1) Damages for breach by either party may be liquidated in the agreement but **only at an amount that is reasonable** in the light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss. A term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty.*

A. *(2) A term in a bond providing for an amount of money as a penalty for non-occurrence of the condition of the bond is **unenforceable** on grounds of public policy to the extent that the amount exceeds the loss caused by such non-occurrence.*

21. U.C.C. § 2-718. Liquidation or Limitation of Damages; Deposits. → the same
- (1) Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the **inconvenience or nonfeasibility of otherwise obtaining an adequate remedy.** A term fixing unreasonably large liquidated damages is void as a penalty.

G. Construction Contract: Cost of Completion v. Diminution in Value

- Contract price - cost of completion (cost + profit) --> where would the innocent party been if the contract has been performed.
- Use "diminution in value" if there is **substantial performance** and cost of **correction is too great**.
- Rule: **substantial performance** + contract in **good faith** (not intentional to breach) + result in economic **waste**
 - Economic waste:
 - even if that is large and out of proportion, does not mean diminution. (small value property should not be trammelled)
 - Economic waste is not disparity in relative economic benefits (benefit is 100, completion cost is 2,000)
 - The breach should just be incidental to the main purpose of contract + completion is disproportionately costly
 - Reading pipe v. identical pipe, the main purpose is to build the house
 - Not in this case, that the main purpose is to remove all objects
 - Not breach intentionally + substantial performance made in good faith.
- Example:
 - Builder v. Owner
 - 50,000 spent by B; O repudiated; the whole is 100,000, builder cost 90,000
 - formula of expectation damage: Contract Price – Cost to complete
 - e.g. 100,000 – 40,000 (90,000-50,000) = 60,000
 - **rationale:** 10,000 (profits, 100,000-90,000) + 50,000 (Builder spent yet has not been reimbursed)
 - Purpose: put the innocent party in the position that the contract has been performed.

2. Remedies (UCC) for expectation

A. Buyer remedies

- 人话版本
- 22. **Principle:** Put in the position that you would haven't been if the contract has been performed.
- 23. If buyer send it back and seller cannot cure, or the seller does not deliver the goods
 - 2-712 (cover):
 - If the buyer needs the good, it needs to buy the good again from others --> substitute goods "cover"
 - The difference between the price: the substitute price / cost of cover (1250), and contract price (1000) --> get 250
 - Plus incidental damage + formal consequential damage
 - A. 2-713 (market price):
 - If the seller repudiate or never deliver the goods

- E.g. Market price (1300) (when the buyer knows the breach) - contract price (1000) --> 300
- 24. If buyer keeps the goods, but still flaws (breach of warranty) 2-714
 - "the value of goods accepted and the value they would have had if they had been as warranted"
- Cancel 2-711
 - A. Where the seller fails to make delivery or repudiates or the buyer rightfully rejects or justifiably revokes acceptance then with respect to any goods involved, and with respect to the whole if the breach goes to the whole contract (Section 2-612), the **buyer may cancel** and whether or not he has done so may in addition to **recovering so much of the price** as has been paid
 - B. (a) "cover" and have damages under the next section as to all the goods affected whether or not they have been identified to the contract; or
 - C. (b) recover damages for non-delivery as provided in this Article (Section 2-713).
- Cover 2-712
 - D. (1) After a breach within the preceding section the buyer may "cover" by **making in good faith and without unreasonable delay** any reasonable purchase of or contract to purchase goods in substitution for those due from the seller.
 - E. (2) The buyer may recover from the seller as damages **the difference between the cost of cover and the contract price** together with any incidental or consequential damages as hereinafter defined (Section 2-715), but less expenses saved in consequence of the seller's breach.
 - **Cost of cover – Contract price + incidental/consequential damage – saved expense due to the breach.**
 - F. (3) Failure of the buyer to effect cover within this section does not bar him from any other remedy.
- Hypothetical cover 2-713
 - G. (1) Subject to the provisions of this Article with respect to proof of market price (Section 2-723), the measure of damages for **non-delivery or repudiation by the seller** is the **difference between the market price** at the time when the buyer (**learned of the breach**) and the contract price together with any incidental and consequential damages provided in this Article (Section 2-715), but less expenses saved in consequence of the seller's breach.
 - **Market price (at the time of breach) – contract price + incidental/consequential damage – expense saved due to breach**
 - H. (2) Market price is to be determined as of **the place for tender** OR, in cases of rejection after arrival or revocation of acceptance, as of the **place of arrival**.
- Keep and still have damage 2-714
 - I. (1) Subject to the provisions of this Article with respect to proof of market price (Section 2-723), the measure of damages for **non-delivery or repudiation by the seller** is the **difference between the market price** at the time when the buyer (**learned of the breach**) and the contract price together with any incidental and consequential damages provided in this Article (Section 2-715), but less expenses saved in consequence of the seller's breach.
 - **Market price (at the time of breach) – contract price + incidental/consequential damage – expense saved due to breach**

J. (2) *Market price is to be determined as of **the place for tender** OR, in cases of rejection after arrival or revocation of acceptance, as of the **place of arrival**.*

B. Seller 's remedies

- No consequential damage
- If seller resells the goods --> difference between resell price and contract price (+ incidental damage-expense saved)
- If they do not sell the goods --> Difference between the market price at the time of tender (delivery goods) and the contract price (+ incidental damage-expense saved)
- If the seller resells the goods, that price will not compensate the seller (the re-sale or market price might be the same)
 - A. Typical situation: "lost volume seller" --> lost profit will be the damage
 - B. i.e. even if the seller could sell the product at the same price to another buyer, the seller still could recover from the **profit** for all these product that buyer promised to buy.
 - C. B promised to buy 100 T-shirts from S. Profit S could make from every T-shirt is \$1. B did not buy or take the delivery. S sold these T-shirts to another buyer. B owed S $100 * \$1 = \100.00
- Resale (2-706):
 - K. *Under the conditions stated in Section 2-703 on seller's remedies, the seller may **resell** the goods concerned or the undelivered balance thereof. Where the resale is made **in good faith and in a commercially reasonable manner** the seller may recover the **difference** between the resale price and the contract price together with any incidental damages allowed under the provisions of this Article (Section 2-710), but less expenses saved in consequence of the buyer's breach.*
- Hypothetical resale (2-708)
 - L. *The measure of damages for **non-acceptance or repudiation** by the buyer is the **difference** between the market price at the (**time and place for tender**) and the unpaid contract price together with any incidental damages provided in this Article (Section 2-710), but less expenses saved in consequence of the buyer's breach.*
- Lost volume seller (2-708)
 - M. (2) *If the measure of damages provided in subsection (1) is inadequate to put the seller in as good a position as performance would have done, then the measure of damages is **the profit** (including reasonable overhead) which the seller would have made from full performance by the buyer, together with any incidental damages provided in this Article (Section 2-710), due allowance for costs reasonably incurred and due credit for payments or proceeds of resale.*

3. Reliance / Restitution Interest: **when there is no contract**

A. **Review Points:**

- 25. Loss offset for expectation and reliance, but not for restitution
- 26. Restitution measure of damage amount of enrichment
- 27. Restitution also applies to quasi-contract situation

B. Reliance:

- Principles: If the buyer breaches the contract for not buying something, the seller cannot prove damage with certainty under expectation or some contracts are non-profitable. The only damage that could be used is reliance interest (out of pocket interest).
- Statute:
 - Reliance → any cost must be deducted by the reliance (Rest. 349)

- *As an alternative to the measure of damages stated in § 347, the injured party has a right to damages based on **his reliance interest**, including **expenditures** made in preparation for performance or in performance, **less** any loss that the party in breach can prove with reasonable certainty the injured party would have suffered had the contract been performed.*
- Case Calculation:
 - Can they sue for **expectation interest**? May be interest of showing the movie, like ad or other products. → But it is hard to prove the lost profit with reasonable certainty. The movie had not been made yet.
 - CBS could have 833,000 for what Merrick had been unjustly enriched (**restitution interest**)
 - Or the innocent party recovered from what it unjustly enriched the breaching party
 - **Reliance Interest**: what CBS paid to writer and director, 250,000 + 500,000 = 750,000
 - Which is not restitution interest, for the benefit is conferred to third parties.
 - CBS relied on the contract to hire director and writer
 - Note: There must be causation link. P who lost profit every year since he entered the contract did not have such a causation to sue D.

C. Restitution:

- Statute:
 - *(1) Subject to the rule stated in Subsection (2), on a breach by non-performance that gives rise to a claim for damages for total breach or on a repudiation, the injured party is entitled to restitution for any benefit that he has conferred on the other party by way of part performance or reliance.*
 - *(2) The injured party has no right to restitution if he has performed all of his duties under the contract and no performance by the other party remains due other than payment of a definite sum of money for that performance.*
 - Note: **If they fully perform, the restitution damage is not available.**
- Example:
 - Builder, anticipated cost 90,000; they already spent 90,000, but far from completion. The real cost is 90,000+ 90,000
 - Owner repudiated, did not paying anything
 - Expectation: contract price - cost to complete = 10,000 (they would lost 80,000)
 - Reliance: out of pocket (reliance, 90,000) - lost of completion (80,000) = 10,000
 - Restitution: 90,000
- Special Situation:
 - Defaulting Plaintiff – comparative negligence
 - **Formula**: pro rata of contract price - damage resulting from breach
 - E.g. in the campaign case:
 - Client's payment - D's profits - P's discount for breach - D's payment to P before
 - Quasi-Contract:
 - Mutual Mistake case:
 - There is no contract form for that --> cannot recover from expectation and reliance for there is no contract.
 - Not a contract damage, just **quasi-contract** remedy, aka **unjust enrichment action**.
 - Aunty Case:

- If the payment is gratuitous, it is not entitled to reimbursement.
- Family member's service are gratuitous, unless there is express agreement to pay for the expense, or proof of circumstances that the D (the receiving party) knew or should have known that P expected to compensation or reimbursement.

Implied in Fact (implied contract)	The victim was injured but conscious. He called an ambulance. Though there was no discussion about payment between he and the staff, it is an implied contract	
Implied in Law or Quasi-Contract (implied in law, no contract)	The victim was injured and unconscious; A pass-by doctor administrated a treatment --> no contract, can only recover from unjust enrichment	The "exclusive agency" means detriment --> construction

- The distinction turns on whether there is **sufficient usage and context** on which to base the implication of an actual contract.

4. Special Performance as remedies

A. If not adequate remedy at law, such as where there is uncertainty in damage or unique or scarce goods

B. Rule:

28. When the remedy is inadequate?

A. E.g. purchase of real estate, the house is unique, the seller need to sell you the house --> you cannot compute them, too speculative.

29. It is up to the court to decide

30. Order someone to do something that it promised to do/or not to do --> more unusual for common law

A. UCC 2-716

31. (1) Specific performance may be decreed where the goods are unique or in other proper circumstances (like inability to recover (in a reasonable time))

32. (2) The decree for specific performance may include such terms and conditions as to payment of the price, damages, or other relief as the court may deem just.

33. Unique Goods --> purchase of real estate

34. Typical Circumstance: not quickly enough (thought not unique --> r. period of time)

5. CISG Difference:

A. Foreseeability is broader, since it captures things that are a "possible" result of the breach, as opposed to probable result --> scope is greater

B. Basic remedy is specific performance, not damages

Chapter 10 Third-Party Beneficiary & Assignment and Delegation

1. Third Party Beneficiaries

A. Intended/incidental (302)

1) Intended Beneficiary

a. *beneficiary is appropriate to effectuate the intention of the parties* --> what the party **intends**

- b. More limited version of **creditor beneficiary**, for it just mention money--> *the performance of the promise will satisfy an obligation of the promisee (Holly) to pay money to the beneficiary (Lawrence)*
 - c. If there is service owed from Lawrence, **not money, donee beneficiary** --> *the circumstances indicate that the promisee (Holly) intends to give the beneficiary (Lawrence) the benefit of the promised performance*
 - o Even though Lawrence cannot sue Holly for a gift that never happened.
- 2) **Incidental beneficiary** --> no right to sue
- B. Promisor/-ee/TPB
 - 1) Lawrence v. Fox: Lawrence(TPB) – Holly (Promisee) – Fox (Promisor)
 - 2) Case Note:
 - a. **Hickman v. SAFECO**: Hickman was TPB, for, he is recognized as the borrower under the policy terms; and the insurance premiums were paid by Hickman.
 - b. **Raritan v. Cherry (lender v. account)**: 1) IMC and D testified they did not intend to benefit P --> P and D did not know each other at that time; 2) IMC did not show financial report that D made to P + policy not to show FS to trade creditors.
- C. Vest/rest 311
 - 1) **Rule**: - promisor and -ee can change the deal without TPB's consent.
 - 2) Exception: TPB 1) change its **reliance** on the agreement; 2) **sue** for them; 3) manifest **assent** to it at the request of the promisor or promisee
 - 3) Statute:
 - a. (2) In the absence of such a term, the promisor and promisee retain power to discharge or modify the duty by subsequent agreement.
 - b. (3) Such a power terminates when the beneficiary, **before he receives notification of the discharge or modification**, materially changes his position in justifiable reliance on the promise or brings suit on it or manifests assent to it at the request of the promisor or promisee.
- D. Defenses v. beneficiary: rest 309
 - 1) same as against promisee as to the contractual defense, but not include claims against promisee for unrelated transactions
 - 2) (EE) The promisor cannot raise against the beneficiary any defense that is purely personal against the promisee, such as a defense that promisee owes money to the promisor in another transaction.
- E. TPB could sue both the promisee and promisor, but he can only get one satisfaction.
- F. Note: The promisee **could always sue** promisor, even though she has no interest in it.
- G. Public Beneficiary: contract with government
 - 1) Intention: The intention of FHA is to stimulate building and benefit all citizens.
 - 2) Definition in the contract;
 - 3) Statute: not really a contract, for there's no negotiable terms between gov.(-ee) and manufacture (-or) → statute; if statute does not allow civil suit, then TPB cannot sue.
- 2. Assignment and Delegation:
 - A. Nature of assignment: gratuitous and revocability
 - 1) Gratuitous: **automatically unless** 1) consideration for exchange or return of performance; 2) pre-existing duty or obligation
 - 2) Revocable: **when** death, incapability, new assignment, notification from assignor.
 - 3) Irrevocability: **automatically unless** in writing (not oral), detrimental A (expect to and did induce reliance), payment/satisfaction, judgement by court, new contract by novation.

- B. Assignment of contractual right (317, 2-210(2)) and delegation of duty (318, 2-210(1))
- 1) Assignment: §317
 - a. Materially change the duty of obligor; or
 - b. Materially increase the burden or risk imposed on him by his contract
 - c. Materially impair his chance of obtaining return performance
 - d. Or materially reduce its value to him.
 - e. (**as always**) Precluded by **statute or public policy** or an anti-assignment **provision**.
 - 2) Application of assignment:
 - a. **Detroit News**: it's not about his new employer's delegated duty (to pay P); due to the assignment, new employer did not change P's duty, burden/risk → it might be argued chance of perform or reduce value, yet not materially + his contract is not about this + he didn't reject it for a year.
 - b. **Requirement Contract**: If the buyer changes and the requirement change → increase burden or risk; impair chance to perform.
 - c. **Pizza Chain**: P(obligor) didn't like the new assignee. Yet the court didn't think that wil increase the burden or risk of P.
 - 3) Delegation: §318
 - a. **General**: Delegation will not discharge the delegator's liability for breach of contract.
 - b. **Exception**: a promise **requires performance by a particular person** only to the extent that the obligee has **a substantial interest in having that person perform**.
 - 4) Application: DQ
 - a. Consent to assignment ≠ **Novation of contract** (that will be like a modification)
- C. Prohibition against assignment (invalid for accounts and for rights to damages under UCC) does not invalidate assignment but gives claim for damages
- 1) Power v. right to assign
 - a. if just a **right**, then D is only liable for breach + damage (if any) → the assignment is still enforceable
 - b. if it's **power**, then D's assignment is not enforceable
- D. Partial assignment:
- 1) **Statute §326**: A partial assignment of a debt may not be enforced against the obligor without the obligor's consent, unless everyone who is entitled to a part of the total debt is joined together in one action.
 - 2) E.g. Obligor (Disney) -- Obligee(employee) --> Credit Union (assignee)
- E. Assignment of future rights:
- 1) Fair Lady is okay, for the contract of producing has already formed (it's an existing right)
 - 2) Daughter to mother's promise → depends. If the contract of publishing the book has not formed, then it might a promise to assign. To decide where that promise is enforceable, go through the normal contract analysis → (this is a real "**future right**.")
- F. Obligor's defense against assignee: any defense obligor has against obligee arising out the assigned contract plus any defense arising out of other contracts **accruing before** obligor has notice of the **assignment**.