Contracts-2018
Ponoroff

I. Offer and Acceptance

a. Mutual Assent

- Offer and acceptance
  - Determined under objective theory:
    - What would a reasonable person in the position of each party believe based on the other party's words and conduct, regardless of what each party may have actually subjectively intended.
    - Only matters what parties both outwardly manifested
  - **Both prongs of objective theory must be satisfied:**
    1. A reasonable person in that position of the promise must believe the other party intended to be bound
    2. The promisee must have actually so believed
  - Can be bound before writing unless it is understood between the parties that no obligation shall exist until the agreement has been put in writing, then neither party is obligated.

b. Offer

- **In General:**
  - **Offer:** is a promise by one party, made to another party, to do or not do something in the future, contingent upon the other party's acceptance.
    - Objective theory is used when determining whether a particular communication constitutes an offer.
    - If so, the offeree has the "power of acceptance"
  - **An offer must either directly or indirectly through words or conduct:**
    - Be communicated
    - Indicate a desire to enter into a contract
    - Be directed at some person(s)
    - Invite acceptances
    - Create a reasonable understanding that upon acceptance a contract will arise
  - Something is not an offer because the offeror intended to make an offer ("actual meeting of the minds"), but because a reasonable person in the offerees position would believe based on the language used and all of the surrounding circumstances, the offeror intends to be bound.
- **Price Quotes / Public Advertisements**
  - Two types of communication that frequently create uncertainty about whether an offer is made:
    1. Price quotes
    2. Public advertisements

- **General Rule:** Neither are an offer; because merchants need freedom to deliver information about their goods without committing.
    - Merchant invites offer not makes an offer.
    - Reserving the right of final assent to the merchant
    - Comes down to the facts, circumstances, and what it is reasonable for the recipient for the price quote or advertisement to infer in relation to the intent of the person making the quote or ad.
    - If ad is clear, definite, explicit, and leaves nothing open for negotiation then its an offer.
- Different from rewards (offers) because making an offer to one person for a bargained for act ex). Reward if you find my dog

c. Termination of Offer

- **Four ways to terminate an offer:**
    1. **Rejection**: Occurs when the offeree declines the offer. (Expressed or implied)
        1. "<u>No"</u>—Expressed rejection (ends offer)
        2. <u>A counteroffer</u>—Implied rejection (Creates a new offer for original offeror to accept or decline)
            i. Cannot be revived unless the offeror chooses to revive it. Rejection is an absolute, so once there is a rejection the offeree no longer has the power of acceptance.
    2. **Revocation:** an offeror retains complete mastery and control over the offer until acceptance and can modify or revoke the offer at any time—> "offeror is king"
        1. <u>Direct Revocation</u>—offeror withdraws offer by notifying the offeree of the revocation
        2. <u>Indirect Revocation</u>—occurs when the offeree learns from someone other than the offeror that the offeror is no longer interested in the deal.
            - Once the offeror learns from a reliable source that the offeror is going to revoke then there is no longer mutual assent and the offer is terminated because of objective theory.
            - If offeree is not aware of the offeror's revocation (either directly or indirectly) and the offeror makes a deal with another party the offeror has two enforceable contracts meaning there is a breach because the offer was never revoked (since there was no communication to the original offeree).
    3. **Lapse:** an offer lasts as long as the offeror says it will last for—assuming it is not earlier terminated by rejection or revocation.
        a. An offer for an unstated period remains open for a reasonable time.

i. A reasonable time depends on all the facts and circumstances, including market conditions and any prior course of dealings with the parties.
ii. General Rule: Face-to-face offerors lapse when parties are no longer face-to-face unless offeror stipulates otherwise.

4. **Death (or incapacity) of the offeror/offeree:** the offer terminates automatically and without regard to whether the offeree was notified or aware of the death (or incapacity) of the offeror or offeree.

   a. **Note:** The rule on automatic termination does not apply after acceptance. i.e. death ends the offer **NOT** a contract
   b. Applies to the death of offeror and offeree

d. Option contracts

- A promise to hold the offer open for X days is not enforceable unless supported by consideration (apart of exchange transaction)
- To keep the "option" open the offeree will have to give something in return for keeping the promise open, separate from what the contract is for.

  Ex). In return for $1 will you hold your offer open to sell your car to me for a week? Yes—Option Contract is made

  Meaning the offeree now has a week to accept or reject without fear of revocation because the offer is now considered an **Irrevocable offer.**

▪ **Firm offer**

- An offer made by a merchant in the business of selling goods of a specific kind in writing, that provides it will be held open, may not be revoked, even without consideration, for the period stated, or if no period is stated, for a period not to exceed three months.

▪ **Reliance as a basis to create an option**

- An offer that foreseeably induces detrimental reliance of a substantial character by the offeree may be enforced as a binding option contract, to the extent necessary to prevent injustice, despite the absence of both 1) a promise of irrevocability and 2) consideration in support of that promise.

SUMMARY:

- All offers, standing alone, are revocable
- Even offers that are stated to be irrevocable are revocable unless:
  - The promise not to revoke is supported by consideration (option contract)
  - The promise is made enforceable by statute (firm offer)
  - The promise induces substantial reliance

e. Acceptance

▪ Acceptance: a manifestation of assent, objectively determined, to be bound by the terms of the offer.

1. Three rules of Acceptance:

1. The offeree must have knowledge of the offer (intend to accept)
2. Only the offeree can accept an offer
3. The acceptance must be in the form authorized by the offer

A. Intent to Accept

- An offeree cannot manifest assent to an offer he doesn't even know about

  i.e offeree cannot claim an award after he has returned the dog if he didn't know there was an offer for a reward if the dog was found

- However, if an offeree learns of the offer in the midst of the requested performance, the completion of performance is sufficient to constitute acceptance, since there is no point in requiring the offeree to start over

B. Who may accept?

a. Power of acceptance is the offerees; someone who was not made an offer cannot accept it

C. Manner of Acceptance

- An acceptance, to be effective must conform to any an all requirements specified in the offer. Meaning the time, place, or manner of acceptance.
- Restatement: unless otherwise indicated, an offer will be treated as inviting acceptance in any manner reasonable in the circumstances, including return promise or performance of what is requested by the offer

2. Communication and Effectiveness of Acceptance

A. General Rule

- Unilateral: Seeking acceptance by an act
- Bilateral: Seeking acceptance by a return promise
- Acceptance is only proper if done through the manner requested.

  a. Therefore, if the offeror offers $20 for wash and wax the only way to accept is to do the work (Unilateral).

  b. Or if the offeror says I will pay you $20 if you agree to wash and wax (Bilateral).
     i. Acceptance of an offer by return promise is not effective unless communicated
- An offer may be accepted by any reasonable manner of assent unless the offer leaves no doubt that it can only be accepted in the manner stipulated in the offer.

B. Mailbox Rule

- **Definition:** Unless the offer prescribes to the contrary, an acceptance sent by a reasonable means is effective on dispatch not receipt.
- Applies when there is a gap between dispatch and receipt of an acceptance.
- **Rationale:** since the offer was made by mail, the offeror had impliedly authorized acceptance in the same manner.

- **Rejections, counteroffers, and revocation** are not effective until receipt
- Applies only to acceptance
- Dispatch rule does not apply for:
  - Irrevocable offers (option contracts)→ only effective if received
  - Communication is near instantaneous (email, texting, facebook)
  - Acceptance follow a rejection or counteroffer
- **Examples:**
  - **a.** If offeree sends in acceptance before receiving the offerors revocation letter than a contract is formed on the mailing of the acceptance.
  - **b.** No contract if offeror dies on the day the offeree receives the offer.
  - **c.** If offeree misaddresses the acceptance, then the dispatch rule is rendered ineffective
  - **d.** If the offeree sends an acceptance and a rejection a contracts formation depends on which letter is received first.

C. Effectiveness of Acceptance

- The offeror's duty to perform is discharged if the offeree who has rendered performance fails to take reasonable steps to ensure that the offeror learns of the performance.
  - Offeror goes on vacation after offering to pay offeree to wash his car. Offeree washes the car but does not reasonably try to make offeror aware, thus offeror may be discharged from having to perform
- Partial performance is a form of acceptance.

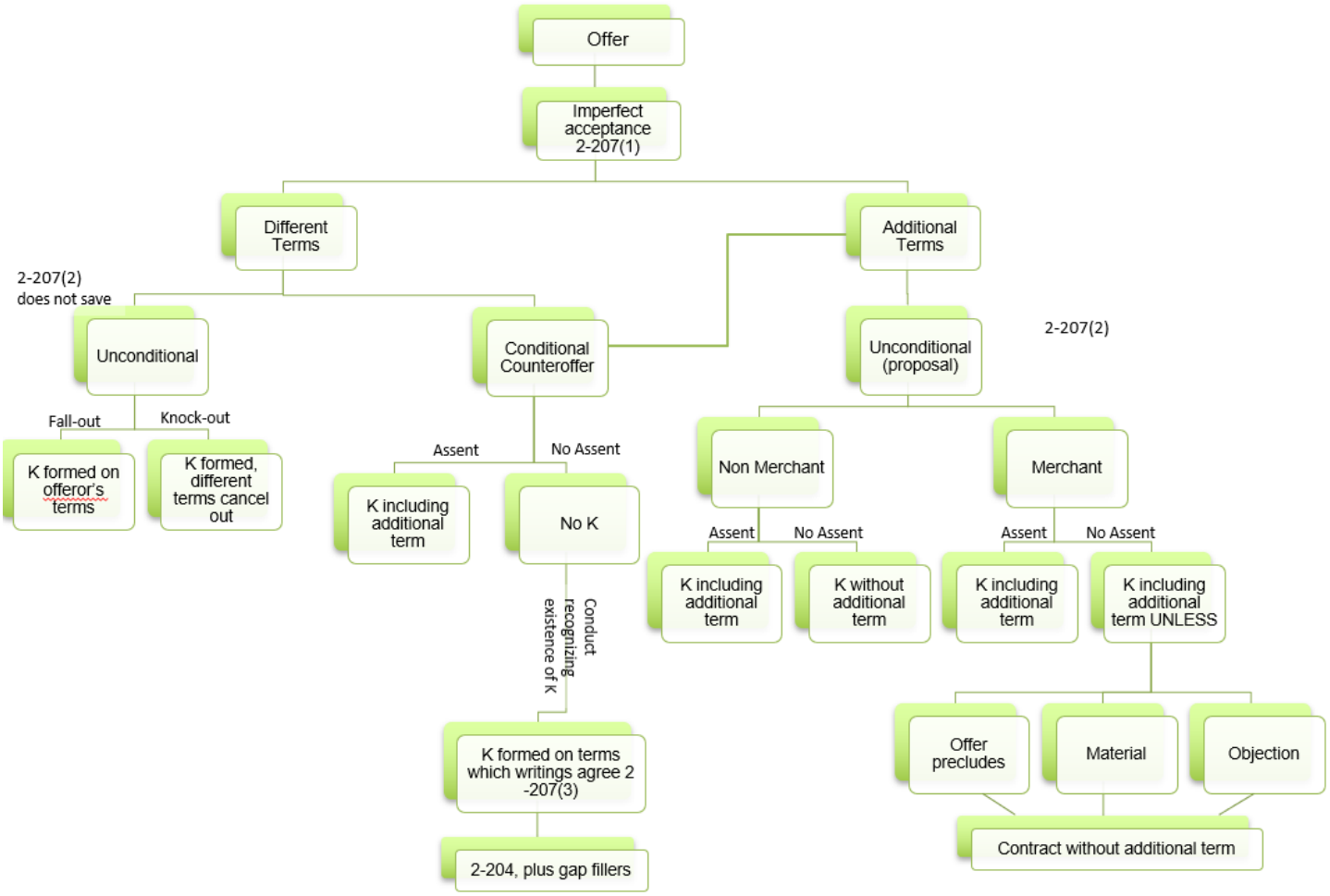
3. Imperfect Acceptance (Counteroffer)

- **Mirror Image Rule:** an acceptance had to be an unconditional expression of assent to the terms of the offer without addition or variation—anything less than that would be regarded as a counteroffer—thereby placing the power of acceptance back in the hands of the original offeror.
- **If an offer for sale of goods adds or changes terms—Look to 2-207.**

- **If an offer is about the sale of goods and either 1) the offer and response adds or changes terms or 2) negotiations with additional or different terms are in writing then look to 2-207.**
  - **Is there a contract? 2-207(1)**
    - Generally, there is a contract even though the response to the offer or summary has additional or different terms. **Yes contract**
    - **Limitation:** If attempted acceptance contains additional or different terms based on the condition of acceptance of the other party's assent to those terms then **no contract.** (I accept on the condition that you agree to delivery by Fri.).
      - **"Subject to"**—is not conditional
    - **2-207(3) only applies if 2-207 (1) finds NO CONTRACT.** When can there be a contract under 2-207(3) when there is none under 2-207(1)?

- **Contract when** the conduct between the buyer and seller. (goods have been delivered and buyer kept and paid for them) then there is a contract.
- Then contract is limited to the terms agreed by buyer and seller with any gaps being filled by the court or UCC (2-204).
    - Terms both parties have in their forms are kept and different terms are knocked out—gap fillers take their place

- **Yes, there is a contract then—2-207(2) which is only for additional terms—what are the terms?**
    - Generally, additional terms are not apart of the contract they are mere proposals that only become part of the contract upon assent from the offeror.
    - **Merchant exception:**
        - If both parties are merchant's additional terms will be part of the contract only if they are not objected too, materially altering contract, or offer expressly precludes additional terms.



4. Acceptance by Silence (or inaction)

- <u>General Rule:</u> Silence cannot constitute an acceptance.
- <u>Circumstances where silence is an acceptance:</u>

- Silence in the face of receipt and enjoyment of a benefit with knowledge of an expectation of payment creates a contract. (Taking a hotdog from a hotdog stand—expectation of payment for the benefit).
- Silence (or acquiescence) when construed against prior course of dealing might constitute acceptance. (If after multiple occasions you receive a hotdog and paid for it, then this could be regarded as sufficient meaning to your conduct that your silence is enough for acceptance the next time.)

f. Mutual misunderstanding

- **Applies when** the parties agree to the use of the same term, but each attaches a different meaning to that term.
  - Peerless ships—offer thought December Peerless while offeree thought October Peerless, so when buyer refused to accept or pay for shipment there was no breach because there was no mutual assent.
- **Restatement:** applies mutual misunderstanding only in cases where a different meaning is attached to a material term and 1) neither party knows or has reason to know the meaning attached by the other, or 2) each party does know or have reason to know the meaning attached by the other.
- If a party knows the other party means something else but does not clarify in hopes they can make a claim for what they wanted, then the doctrine of mutual misunderstanding is inapplicable, and that person would be stuck with a binding agreement for what the seller really met.

- **Indefiniteness and deferred agreement**

1. **Indefinite and Missing Terms**
   - **Traditional standard:** If either (a) the terms of the contract are so indefinite that it would be difficult or impossible for the court to detect a breach, or (b) even if breach would be detected, it is difficult or impossible for the court to fashion a remedy, then the contract is "too indefinite" to enforce.
     - i.e. vagueness is tolerated, but "way vague" is too much.
   - **Indefiniteness analysis:**
     - Whether the parties intended to enter into a legally binding deal and if so
     - Whether there is a reasonably certain basis for the court to fashion an appropriate remedy.
   - If the party do not specify the time or amount for performance, then the court will conclude that the time must be a reasonable time and the price would come from the market rate for comparable services.
   - "gap filler"—default rules that apply whenever the agreement is silent as to the subject of the gap filler.

- **Deferred Agreement**
  - **Agreements to agree**

- Useful where performance may span several years and neither party want to accept the risk of setting a price for goods today that will be rendered into the future. [Price will be set when its closer to performance]
- If parties fail to agree the court will decide whether the agreement is too indefinite to enforce or whether the court can supply the missing terms.

i. Precontractual Liability

- Generally, cannot be obligated to one another before mutual assent; i.e. before they have reached a deal.
- Until the parties have actually agreed to be bound to the terms of the deal either party can walk away without liability.
  - **Even if** one or both parties may have expended significant costs while anticipating the deal.

- **Exceptions when necessary to prevent injustice:**
  - There is a duty for an offeror to hold open an offer as an option which the offeror should reasonably expected to induce substantial reliance.
  - "Letters of intent"—the parties agreement is reduced to writing to prevent misunderstanding.
    - Usually contain a provision stating the letter is not intended to create liability
      - Courts will usually respect that provision
    - Some give rise to mutual obligation to continue negotiations in good faith

II. Enforceability

A. Consideration

- **In General**
  - **Defined:** something given in exchange for the promise that is bargained-for.
    - Promise must induce consideration (be bargained-for)
    - Exchanged promises
  - Promises without consideration are not enforceable.
    - **Ex)** Offeror promises to give offeree money in a week and offeree accepts—there is an agreement, but no consideration. This is a gift.
      - **Gift promises**- are not enforceable.
  - **Ex)** Uncle promises to give money in nephew does not swear, smoke, or drink until 21.
    - **Court ruled:** the detriment necessary to constitute good consideration for a promise is a legal not an actual detriment.
      - It was sufficient for nephew to restrict his lawful freedom of action to constitute as good consideration.
      - if the promise incurs a legal detriment then the promisor has obtained a legal benefit.
  - Past Consideration **is not** consideration.
    - Ex) Save my husband's life and I promise to pay you but I never do—no deal because past consideration
    - Something that happened before a promise cannot be consideration for that promise
    - You can't bargain for something that's already been done.

- **Adequacy of Consideration**
  - Courts are more concerned with the existence of consideration rather than the adequacy of the consideration.
    - "a mere peppercorn will suffice to satisfy the requirement of consideration"
- **The Doctrine of Nominal Consideration**
  - A promise should not be enforced if the consideration was not truly bargained for. [gift disguised as a bargain]
    - Nominal consideration is significant because it serves as a red flag that the true nature of the transaction needs to be scrutinized more closely.
- **Consideration from or received by Third-Party**
  - a third-party agreement can serve as the offeree's consideration to the offeror.
  - Does not matter who gives the consideration or whom the benefit/detriment; only matters that its bargained-for and given exchange for a promise
- **Promise as Consideration**
  - A promise of performance can serve as consideration for promise of a performance.
- **Mutuality of Obligation and Illusory Promises**
  - **Mutual Obligation-** an exchange of promises typically creating a binding contract, with each party's promise constituting the consideration for the other party's promise.
    - When each party is bound to the other by a promise.
  - **Illusory Promise-** a promise that appears on its face to be so insubstantial as to <u>impose no obligation</u> on the promisor; an expression cloaked in promissory terms but actually <u>containing no commitment by the promisor.</u>
    1. The promisor holds discretion over the proposed performance
    2. <u>When a real promise is exchanged for an illusory promise, neither promise is enforceable.</u>
       - Not supported by consideration because illusory promises are not "real"
    3. Includes promises for which they are based on conditions that cannot occur
  - Promises that are on their face illusory because performance appears to be left solely to the option of promisor might be rendered real and good consideration.
    - Ex) I will buy it if I can get a loan
- **Modification and Pre-Existing Duty**
  - Modification requires a new promise and new consideration.
    - If there is a modified promise, there is a pre-existing duty.
  - **Pre-existing duty rule:** a performance or promise to preform something that the promisor is already bound to do is not good consideration for a contract modification.
    - The basis for the rule was that there was a concern that a one-sided modification might be a sign that the modification was not voluntary, but a product of bad faith or duress.
      - New consideration helps ensure that the modification was not coerced.
      - Criticized for being overinclusive—prevents voluntary parties from modifying their agreement.
    - Modification needs new consideration to be enforced.
      - A modified promise can be enforced despite the absence of consideration **IF** it is**:**
        - unanticipated
        - fair and equitable adjustment in light of the circumstances
        - voluntary

- a contract that is executory to some extent on both sides (neither party can fully perform the contract).

- **Restatement § 89 Modification**

1. A promise modifying a duty under a contract not fully performed on either side is binding:
   (a) If the modification is fair and equitable in view of the circumstances not anticipated by the parties when the contract was made.
   (b) Extent provided by statute.
   (c) Extent that justice requires enforcement in view of material change of position in reliance on the promise.

- **UCC § 2-209** Contracts for the sale of goods do not need consideration to be enforceable if it meets the test of good faith.

B. Consideration Substitutes

1. Material Benefit Rule (Promise + Prior Benefit Conferred)

- **Exceptions to past consideration:**
  1) "A debt barred by a statute of limitations"
  2) "A debt discharged in bankruptcy"
  3) "A promise to perform a preciously voidable obligation"

- **Material Benefit Rule:** a <u>moral obligation</u> is sufficient consideration to support a subsequent promise to pay where the promisor has received a material benefit, although there was no original duty or liability resting on the promisor.
- **Restatement §86**
  1) A promise made in recognition of a benefit previously received by the promisor from the promise is binding to the extent necessary to prevent justice.
  2) A promise is not binding under (1) if:
    a. The promise conferred the benefit as a gift and
    b. its value is disproportionate to the benefit conferred (over market price).

2. Quasi-Contracts, Unjust Enrichment, and Restitution

- **Quasi-Contract:** One who without intent to act gratuitously confers a measurable benefit upon another is entitled to restitution if he affords the other an opportunity to decline the benefit or else has a reasonable excuse for doing so.
  i. Mixture of a contract and a tort, liability is based neither on an express nor implied in fact promise (Not a real contract; created to prevent unjust enrichment)
  ii. Promise <u>implied in law</u> to make defendant pay for the value of the benefit conferred from another under circumstances where it would be inequitable to allow that person to retain that benefit without paying for it known as **Unjust Enrichment.**
- **Unjust Enrichment**
  i. One party received a gain at another party's expense.
  ii. A party who unjustifiably retains a thing that is owned by another commits unjust enrichment.
  - **Ex)** daughter builds home on parent's property they get in a feud and they try to kick her off. It would be unjust enrichment to give them the house that the daughter paid for and build.

- Cause of action based on Unjust Enrichment
    - **i.** Provides restitution in circumstances where no contract exists
    - **ii.** **Restitution**- Right of an innocent party to recover for unjust enrichment at law or equity.
        - Recovery not available for "volunteers"; where the benefit conferred gratuitously without any reasonable expectation of compensation.

3. Promissory Estoppel (Promise + Unbargained for Reliance)

a. Defined

- Under the doctrine: a promisor is estopped from asserting the non-existence of consideration as a defense (substitute for when no consideration is given) if these elements are satisfied:
    1. A promise
    2. Justifiable and detrimental reliance on such a promise by the promisee
    3. Foreseeability of the reliance by promisor
    4. Injustice can only be avoided by the enforcement of the promise
- When invoked, it forms the basis for a claim against a party
    - Used as a sword (basis for a claim) to enforce a clam that would otherwise be unenforceable because of the lack of consideration.
- Restatement § 90:
    - **Define.** A promise which the promisor should reasonably expect to induce action or forbearance on the promise is binding if injustice can be avoided by the enforcement of the promise.
- Limited to gift promises or misleading statements intended to be a bargain relationship.
    - Ricketts v. Scothorn- p promised $ by grandfather to not work anymore, p gives up job, grandfather dies, estate reneges on payment, p sues. Court ruled reliance could have been foreseen on his promise and none-enforcement would result in injustice.
    - **Restatement § 90(2)**
        - A charitable subscription or marriage is binding without proof the promise induced action or forbearance. They should be enforced simply off the existence of the promise.
- Remedy: Expectation v. Reliance interest
    1. Either give non-breaching party what was expected **OR**
    2. Measure reliance interest and put party back into position she would have been in had the promise never made

b. Distinguished from Equitable Estoppel

- **Equitable Estoppel-** a defense that bars a person, who mistakes certain facts, from later asserting the truth of the matter earlier misrepresented against a party that relied on the detriment on the statement.
    - "Even though there is an enforceable contract, the promisor should be estopped (barred) because the promise was misled and relied on what they were told"
- **Equitable estoppel** is based on false statements of past or present fact while **promissory estoppel** is based on a promise relating to future behavior.

- **Equitable estoppel** is raised as a defense while **promissory estoppel** is an affirmative basis for imposing liability on the promisor.

c. Pre-contract Negotiations (Independent Basis of Liability)

- Negotiations that have never ripened into a binding contract, but caused the plaintiff to incur expenses in reasonable reliance on the defendant's assurances can be enforced to avoid injustice. (Promissory estoppel)

d. Remedies in Promissory Estoppel

- Restoring the losses that resulted frim or expenses incurred from plaintiff's reliance on the promise.

- **<u>PROMISOORY ESTOPPEL SHOULD NOT BE THE "GO-TO" DOCTRINE FOR CONTRACT ANALYSIS.</u> VIEW AS EXCEPTION NOT THE RULE!!**

III. DEFENSES

A. Statute of Frauds (M.Y.L.E.G.S.)

- **Restatement §110**
  - The following are forbid, under the Statute of Frauds, from being enforced unless there is written memorandum or an applicable exception:
    - A contract of an executor or administrator to answer for a duty of his decedent (<u>the executor-administrator provision)</u>
    - A contract to answer for the duty of another (<u>the suretyship provision)</u>
    - A contract made upon consideration of marriage (<u>the marriage provision)</u>
    - A contract for the sale of an interest in land (<u>the land contract provision)</u>
    - A contract for the sale of goods over $500
    - A contract that is not to be preformed within one year from the making thereof (<u>the one-year provision)</u>
      - Has to be performed within a year; a two-year contract cannot be performed within a year. Thus, statute of frauds requires it be in writing.
- The **purpose of the statute of frauds** was to prevent false claims by an unethical plaintiff that there was an oral agreement when there was no agreement.
- **Most statute of frauds include:** 1) transfers of interests in real estate 2) services contracts not capable of being performed within a year of the contract date and 3) sales of goods for $500 or more.
  - For the sales of goods all that is relevant to the statute of frauds is the purchase price.
- Contracts for a specific task are never within the statute of frauds.
- Contracts for lifetime employment are not within the statute of frauds because a party could die at any time.

- **Writing that satisfies the statute of frauds**
  - **Sale of Goods**
    - §2-201 says the only thing that must be written to satisfy the statute of frauds is the quantity of the product, but it does not require that the price be set.
  - Generally, for a writing to satisfy the statute of frauds it must be signed by the defendant—"the party against whom enforcement is sought"
    - **Exception:** Plaintiff signature satisfies the statute of frauds
      - §2-201(2) is limited to sale for goods in which both the buyer and seller ["merchants"] and the recipient of a signed writing "in confirmation of the contract" fails to object in writing within 10 days.

- i.e. If buyer sends a letter signed confirming an agreement and the seller doesn't object or send the product and the buyer sues then under the **exception** even thought the only writing was by the buyer the statute of frauds is satisfied by the sellers's lack of objection.

- Losing the statute of frauds defense is different from losing a lawsuit. Plaintiff still has the burden to prove all the elements of breach of contract.

- **Statute of Frauds Enforceability Without a Writing (Exception to SOF)**
  - **a. Part Performance**
    - **Land**
      - **a.** an oral agreement to transfer an interest in land is enforceable if the buyer/plaintiff can prove any two of the following three facts:
        1. payment of all or part of the purchase price
        2. possession of the land and/or
        3. improvements to the land
    - **Sale of Good**
      - **2-201(3)(a)**
        - **a.** If goods are specially manufactured for the buyer and are not suitable for sale for others then it can be enforced without writing under the statute of frauds
      - **2-201(3)(c)**
        - **a.** If payments or goods have been made or delivered and accepted then it is enforceable without a writing under statute of frauds
  - **b. Reliance**
    - **Restatement §139**
      - **a.** a promise which the promisor should reasonably expect to induce action or forbearance on the part of the promise which does induce the action or forbearance is enforceable notwithstanding the statue of frauds if injustice can be avoided with the enforcement.
        - **i.** An oral promise can be enforceable because of reliance, notwithstanding the statute of frauds
  - **REVIEW**
    - Not all agreements must be in writings: some agreements are not within the statute of frauds.
    - Sometimes an agreement within the statute of frauds without a writing and not all writings satisfy the statute of frauds.
    - The defendant losing on its statute of frauds defense does not mean that the defendant has lost the case because the plaintiff still has the burden of proving breach in contract and the defendant may have other defenses such as duress, misrepresentation, concealment, mistake, or unconscionability.

B. Other Defenses

1. Duress

a. Economic Duress

- One party is placed in a position to accede to the other party's modification of contract terms.
  - Alaska Packers-Fishers contracted for 5k but when they arrived they refused to work unless their pay was increased to 10k. The promisor had to increase pay because there was no one else available to fulfill the contract.
- Economic Duress based on:
  - **i. (bad act)** The party trying to enforce the contract applied wrongful pressure (threatened) on the other party and
  - **ii. (vulnerable person)** The party avoiding enforcement had no reasonable alternative but to accede to the demand.

2. Misrepresentation

a. Restatement §159

i. Any manifestation by words or other conduct by one person to another that, under the circumstances, amounts to an assertion not in accordance with the facts.

ii. Even innocent misrepresentation as to existing facts can make a contract voidable if its material.

b. Courts look at:

i. How important (material) the representation was

ii. Whether the other party relied on the misrepresentation

iii. Whether reliance was reasonable

c. Fraudulent or Material Misrepresentation

i. Restatement §162--Fraudulent

a. Inducement by a party of another party to manifest assent.

a. Party knows or believes the assertions is not in agreement with the facts

b. lacks confidence that the truth is stated or implied in the assertion.

c. knows that there is no basis for stating or implying the assertion.

b. Material

a. Material misrepresentation if it is likely to induce a reasonable person to manifest assent.

a. Inducing party knows that the recipient would likely be induced to manifest assent.

d. Misrepresentation is about <u>inducement of a party to enter a contract</u>, even if the material act is **intentionally fraudulent or not.**

e. Most fraud cases involve consumer transactions.

i. In business transactions, there will be the following:

1. Series of warranties from seller that will be negotiated as part of the contract.
2. Due diligence clauses that gives buyer the opportunity of true representation of fact.

3. Nondisclosure/Concealment

a. Nondisclosure without concealment is irrelevant because a person making a contract is not required to tell a person all they know.

b. Nondisclosure coupled with concealment is treated the same as misrepresentation—defense to the enforcement of an agreement.

i. Ex). Moving a dresser in front of a crack in the wall.

c. Recession of Contract

i. The revocation, cancellation, or repeal of the agreement.

a. Permitted if there was any misrepresentation, intentional or not.

4. Mutual Mistake

a. Restatement §152

i. Where a mistake of both parties at the time a contract was made as to a basic assumption on which the contract was made has a material effect on the agreed exchange of performance, the contract is voidable

ii. in determining whether the mistake has a material effect on the agreed exchange of performance, account is taken of any relief by way of reformation, restitution, or otherwise.

b. Even if both contracting parties have the same misunderstanding of the facts, courts will deny relief if:

i. the court concludes there was bad judgement or ignorance instead of "legal mistake" or

ii. there is a mutual mistake but it is not "material" or

iii. there is a material mutual mistake but "under the circumstances," the person seeking relief because of mistake should bear the risk of the mistake.

5. Unilateral Mistake

a. Only the person trying to get out of the deal was mistaken / did not bear the risk

i. Ex. Promisor is mistake about the cow being barren but promisee knows better.

b. Relief for unilateral mistake happens when there is a clerical or mathematical error. i.e. forgetting a cost in a bid

C. Defenses on what the agreement says

1. Illegality

a. Contracts for illegal performance is unenforceable

- But in cases where one pays for the illegal act before hand cannot get his money back as the court will "leave them where it finds them"

b. Policies that underlie illegality

- Belief that refusal to enforce will deter those types of contracts
- the dignity of the court should not have to take on this type of deal
- does not mean the entire contract is illegal

c. Illegality via licensing—Restatement §181

- If a party is prohibited from acting because of a failure to comply with licensing, registration, or a similar requirement, a promise in consideration of doing an act is unenforceable on grounds of public policy.

1. the requirement has a regulatory purpose

2. the interest in enforcement of the promise is outweighed by the public policy behind the requirement.

2. Public policy

- **Restatement §178**

- A promise or other term of an agreement is unenforceable on grounds of public if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms.
    - Allows for greater judicial flexibility against the strength of other legally recognized policies, if freedom of contract was respected.
    - a contract that violates the criminal law could be enforceable.
    - A non-criminal or non-tortious contract may be unenforceable.
- **Violates Public Policy**
    - Debatable whether it is unenforceable due to public policy or not.
    - **Covenant (Contract) Not to Compete** must balance:
        1. Freedom of contract
        2. Restraint of trade
        3. Freedom to compete
        4. The right of an employee to earn a livelihood
    - **Adhesion Contracts**
        - A standard-form contract prepared by one party, to be signed by another party in a weaker position, usually a consumer, who adheres to the contract with little choice about the terms.
            - "Take it or Leave it"
            - Benefits of mass marketing by means
                - Mass or standard form of contract
                - Differs from unconscionability in that courts need only to decide to shoot the conscience of the court to refuse enforcement.
                - Establishes the limits of proper behavior in the marketplace.
            - **Adhesion contracts may still be enforceable**
            - Most contracts in use are adhesion contracts
                - Courts will often narrowly construe the terms in favor of the party who had no choice but to accept the terms offered.
            - "Blue Pencil" Rule
                - Where the severity of the agreement is to evident from the contract itself, the court can't create a new agreement for the parties to uphold.
                    - "Blue penciling" is the court modifying an agreement to a level that is reasonable.

D. Unconscionability

- describes terms that are so extremely unjust, or overwhelmingly one-sided in favor of the party who has the superior bargaining power, that they are contrary to good conscience.
    - Includes an absence or meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.
- **Substantive Unconscionability**
    - Problems with terms of the agreement—overly harsh or one sided
    - **Resulting from actual contract terms that are: (one sided)**
        - Unduly harsh
        - Commercially unreasonable—commercial needs of the trade
            - Commercial background—do other people do it
        - Grossly unfair given the existing circumstances

- **UCC §2-302 and Restatement §208 Approach**
  - Unconscionability is tested at the <u>time the contract was made</u> then the court may refuse enforcement.
    - The court may enforce the remainder of the contract without the unconscionable results
    - The court may choose to limit the unconscionable clause to avoid any unconscionable results
- **Procedural Unconscionability**
  - Problems with agreement process, such as oral misrepresentation or unfair bargaining position.
    - Adhesion contracts
    - Hidden factors such as fine print provisions
    - Sharp practices like deceptive promises
- **Most cases combine procedural and substantive unconscionability.**

IV. Parol Evidence

- **Rule**
  - The principle that a writing (only applies to written contracts) intended by the parties to be a final embodiment of their agreement cannot be modified by evidence of earlier or contemporaneous agreements that might add to, vary, or contradict the writing.
    - This rule operates to prevent a party from introducing extrinsic evidence of negotiations that occurred before or while the agreement was being reduced to its final written form.
  - **Rule says:**
    1. A binding integrated (complete and final) agreement discharges prior agreements to the extent that it is consistent with them. (if a second deal is stuck the first contract is discharged and only payment for the second contract applies)
    2. Binding completely integrated (complete and final) agreement discharges prior agreement to the extent that they are within the scope.

Example: Buyer is interested in purchasing a new car from Dealer. He settles on a particular car, and Buyer and Dealer begin to negotiate the terms of the sale. During the negotiations, Dealer tells Buyer that if he agrees to buy the car "today," Dealer will provide free car washes for as long as Buyer owns the car. The two parties finally come to an agreement on price and sign a written contract. The written contract contains a clause providing that it is the full agreement between the parties. However, it does not provide for free car washes. Absent an applicable exception, the parol evidence rule would prevent Buyer from introducing evidence in court of the oral agreement concerning car washing services that was made prior to the execution of the written contract.

- **Is the writing intended as the final expression?**
  - If writings are not the "final" expression (just preliminary final draft) then the parol evidence rule will not bar introduction of further evidence.
  - Any relevant evidence would be admissible to show that the parties did not intend the writing to be final.
  - **NOTE:** the *more complete* the agreement appears to be on its face the more likely it was intended to be integration
- **Is the writing a <u>complete</u> or <u>partial</u> integration?**

- If the writing is "final" then you have to determine if it is "complete" or "partial"
  - **If complete:**
    - The writing may not be contradicted or supplemented
    - **Merger clause:**
      - Statement in writing saying the agreement is complete—courts will usually find the agreement is completely integrated if there is this clause.
  - **If partial:**
    - It **cannot be contradicted**, but it **can be supplemented** by proving up consistent additional terms.
- Whether complete or partial depends on the intent of the parties.

- **Exceptions**
  - In some cases parol evidence can be used to explain or provide the meaning of the written document, even if completely integrated.
    - You may be able to use external evidence—prior negotiations, dictionaries, letters between parties—to assist in determining the meaning of the written contract and who breached.
  - **Condition Precedent to Effectiveness**
    - Where a party asserts that there was an oral agreement that the written contract would not become effective until a condition occurred, all evidence of the understanding may be offered and received.
    - The rationale is that the writing is not being altered by parol evidence if the written agreement never came into being.
- **Ambiguity and External Evidence**
  - **Plain Meaning Rule**-unless ambiguity can be show from within the document itself (without external sources) the parties cannot introduce evidence tending to show ambiguity. Meaning a party cannot introduce evidence of a meaning different then the accepted meaning of the term at issue.
  - **External Evidence Rule**-parties may bring in evidence that is external or "extrinsic" to the contract in order to show ambiguity in more cases than under the plain meaning rule.
- **First use the plain meaning test to see if the document in which the alleged ambiguity exits has any contradictions or contrary use of the term in question.**
  - **If so** then you can use parol evidence (previous evidence is not barred)
  - **If not** then you cannot use evidence external to the contract to create ambiguity.
- **Then examine the external evidence test—inquire whether a reasonable person with the knowledge of the parties would think the alleged ambiguity was genuine or spurious.**
  - **If so** then the court will allow extrinsic evidence to clarify the term.
  - **If not** then you exclude the proffered parol evidence.
- Courts use parties deals remove ambiguity
- **Special rules for adhesion contracts**
  - Some jurisdiction will delete a provision from a contract if there is a reason to believe the other party would not have assented to the provision if they had knew about it.'
- **Implied Terms**
  - Courts will provide missing terms when they are convinced that the parties intended to contract but overlooked or omitted an essential term that can be inferred.
  - **"Trade contracts"**- contracts that lots of other people have entered into

- **UCC-**any practice or method of dealings having such regularity of observation in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction.
    - **Follow the practice in particular place, for a particular job, or trade.**
        - **i.** Ex) Practice to get veterinarian certificate when animal is sold then can use parol evidence to show that is a term.
    - **Applies whether both parties are merchants or even know about trade usage.**
- **Terms implied to achieve policy goals**
    - The main implied term is implied covenant of good faith and fair dealing.
        - Attempts to impose on parties the obligation to refrain from taking or not taking actions that would deprive the other party of the benefit to bargain.
            - **Ex)** asking someone to paint and rejecting everything they do despite it being good so he doesn't have to pay.
        - When a contract gives a party the power to exercise satisfaction, the law implied that he would exercise the discretion in good faith (reasonably exercised).
        - if a party's performance is subject to a condition that is in that party's control the control must be exercised in good faith.
        - **Expressed language in the contract will prevail over implied.**
- **UCC supplied terms**
    - UCC will insert terms that are necessary to form a definite contract like:
        - Place of delivery (residence or place of business)
        - Time of performance (reasonable time)
        - Or price. (reasonable price only if there is a well-established market)
    - UCC will also supply terms for implied warranty of title (a promise that the seller owns the goods sold)
        - Goods sold by merchants will:
            - Be recognized in the trade as matching the contract description
            - Be at least of fair average quality and
            - Will be fit for the ordinary purposes for which goods are used.
        - If a product breaks on first use there is a claim for breach of warranty even if the contract doesn't mention warranty.
    - Theses default terms can be changed in a parties agreement or provisions

V. EXCUSES

- Defined. – nonperformance of the promise is not considered a breach that gives rise to liability.
- **Types of Excuses:**
    - **Party says he is not going to perform**
        - Party says he changed his mind indicating he is not going to perform (called **repudiation**)
            - Repudiating before it is time to perform is **called anticipatory repudiation (breach).**
                i. An anticipatory repudiation, if material, excuses further contract performance by the other guy just like in the case of an actual failure perform at the agreed upon performance
                ii. It requires a form of breach of contract and
                iii. An unequivocal indication of intention not to performance (declaring he will never act under it)

        - Employer's anticipatory repudiation gave the employee the option to sue immediately—instead of waiting until the contract date for an actual breach.
            - It also leaves the employee free for another job
    - If one party stops performance because he honestly but incorrectly interprets the other party's words and conduct to rise to the level of an anticipatory repudiation, then it is the first party who has actually committed the anticipatory repudiation (breach).
- **Reasonable grounds for insecurity**
    - **UCC § 2-609 provides basis for excuse of performance by other party**
        - The other party can demand in writing assurance of performance; suspend her own performance until she receives assurance, if commercially reasonable and stop performance altogether if assurance is not timely provided, without worry that it might be construed as a breach.
        - **Must be:**
            i. Reasonable ground for insecurity
            ii. Adequate assurance and
            iii. Commercially reasonable to suspend performance
- **Party's improper performance**
    - Breach is material because of quality of performance or lack thereof
    - **Material Breach**
        - <u>Only material breaches can excuse further performance of a contract</u>
            - **Types of material breach (quality based):**
                i. Not enough of the performance is completed
                ii. Performance is completed at a level unacceptable to the party receiving the benefit.
    - **Substantial performance**
        - Breach is NOT material if there is unsubstantial performance. (cannot exist together for a breach)
        - **RULE:** Condition is excused once performance reaches a substantial performance.
            i. The rule avoids a disproportionate penalty.
            ii. *Does this mean the owner must pay the remaining balance, and the builder is off the hook?*
                - YES, the owner must pay, and NO, the builder is not off the hook. The builder is still liable for damages resulting from the duty of the performance.
        - **Perfect Tender Rule (UCC Sale of Goods)**
            - If goods or tender of delivery fail in any respect to conform to contract buyer may reject without paying for them (excused from performing).
                i. 1000 widgets for $1000; delivered 999 buyer can reject all (failed within any respect)
- **Non-occurrence of express condition**
    - The non-occurrence of an express condition excuses performance.
        - **What is an express condition?**
            - Language in a contract
            - Language that excuses the contract's other promises rather than create new ones.
                - Failure to satisfy a condition is not a breach of contract—it excuses performance.

- Satisfied or not satisfied—if not then excused
- no breach because it is not a promise

- "Magic words" to look for in exam hypotheticals.
  a. "If…" "Only if…" "Provided that…" "So long as…" "Subject to…" "In the event that…" "Unless…" "When…" "Until…" "On condition…"

- **How is an express condition satisfied?**
  - If the express condition has been "satisfied," then there is no excuse for a non-performance.
  - Express conditions are "satisfied" if strictly complied by the performing party.
- **When non-occurrence of an expression occurs?**
  - To avoid forfeitures (penalty)
  - Preventing a satisfied condition
  - Person protected by the condition can waive it

- **Express Condition ***Precedent***
  - Defined. – A condition that is a prerequisite to the parties' performance obligations.
    - Occurs between the express condition and the time the actual obligation to perform according to the contract terms.
      - **Ex)** appraisal (condition) then payment (performance)
    - The **non-occurrence** of an express condition precedent excuses any contract performance.
- **Express Condition ***Subsequent***
  - Defined. – A condition that imposes a post-contractual limitation on the duty to perform.
    - **Language that limits obligation**
  - The **occurrence** of an express condition subsequent excuses continuing performance.
- ***Constructive Conditions*** (implied condition)
  - Are not expressed conditions
  - Defined. – Language of promise in the contract and are subject to the material breach rule.
    - "Constructive" refers to actions made up by the courts, and not the parties involved.
    - Doctrine that explains why performance by a party is dependent on performance by the other party.
  - **Constructive Conditions of Exchange**
    - Since a bilateral contract involves an exchange of promises, each party's performance of his or her promise becomes a condition to the other party's duty to perform.
    - Each party will receive the promise from the other party. Reasoning for dependence, and whenever possible, to be performed simultaneously.
    - Absent those circumstances, each party is protected in the sense of not sacrificing the leverage associated with withholding one's own performance.

- **Impossibility (impracticability)**
  - Performance becomes impossible
  - Damage or destruction of the subject matter of the contract does not always excuse performance
    - **Ex)** contracted to build house and old house burns down; not excused

- **Ex)** contracted to paint house and house burns down; excused from performance.
- **UCC sale of goods**
  - Cannot recover for breach of contract if you cannot show market value for specific time. Excused.
  - No specific item identified such as grits which are easily replaceable. Not excused.
  - the performance becoming more expensive does not make it impracticable
- **Death of contract party**
  - Death of either party to a contract after contract was entered into but before performed does not generally terminate a contract (unexcused).
    - **i.** Usually handed down to estate
    - **ii.** **Except** in rare personal services case where that person provides a service not easily replaced (excused).
- **Supervening Law**
  - Contract is made and then a law changes prohibiting it (excused)
- **Force Majeure and "Hell or High Water" Clause**
  - Post contract occurrences in either force majeure clause that excuses performance in the event of a specified occurrences or hell or high water clause that requires performance regardless of what occurs.

- **Frustration of purpose**
  - Triggered by post-contract events not anticipated by the contract that do not affect the ability to perform, but instead affect the mutually understood purpose for the contract performance.
  - Reason for contract (implied condition) is frustrated so no enforceable.

VI. DAMAGES (Remedies)

- <u>Seeks to place non-breaching party in the place he or she would have been in if contract was performed.</u>
- **Restatement §347**
  - The injured party has a right to damages based on his expectation interest.
    - ways interest is measured:
      - the loss in the value to him of the other partys performance caused by its failure or deficiency.
      - **(Plus)** any other loss, including incidental or consequential loss, caused by the breach.
      - **(Minus)** any cost or other loss that he has avoided or mitigated by not having to perform.
- "The cost avoidance concept often comes into play when a nonbreaching party claims lost profits as contractual damages."
  - The cost is not saved; rather it is allocated to the other transactions making each one proportionately more expensive, and in turn, less profitable.
  - Must bear an amount of overhead
  - Each transaction bears more overhead and less profitable.
- **Types of Damages: Easier formula → (k price – cost) + (spent – paid)**
  - **i. Direct Damages**
    - **a.** Damages necessary to award the nonbreaching party the benefit of his bargain.
      - **i. Ex**). Buy a $50 book for $35—awarded the shortfall = $15
  - **ii. Consequential Damages**

a. Special damages that reflect losses over and above standard expectation damages.
  i. Usually lost profit
b. May be recovered only if **at the time the contract was made, a reasonable person would have foreseen** the damages as a probable result of breach.
c. Plaintiff must show the breaching party knew or had reason to know of the special circumstances giving rise to the damage.

iii. Reliance Damages

a. Reliance damages award the plaintiff the cost of her performance. (Put the plaintiff in the position she would have been in had the contract never been formed).
b. Restatement § 349
  i. The injured party has a right to damages based on his reliance interest, including expenses made in preparation for performance or in performance, <u>less any loss that the party in breach can prove with reasonable certainty the injured party would have suffered had the contract been performed.</u>

iv. Restitution Damages

a. Measured by the value of the benefit conferred on the promisor in the course of performance.
b. Objective is not to put the promise in the same position as before, rather to put the breaching party back in the position as if the promise had not been made.
c. It does not take into account the expectation or reliance that produces the benefit.
d. Least generous
e. Differentiated from quasi-contract because there is a definitive promise.
  i. Restitution damages are an alternative to an action to enforce the contract.
  ii. Breacher must account for the benefit conferred during the course of performance.
  iii. Measured by the amount necessary to put the breaching party back into the position as if the promise had never been made.
f. Quantum Meruit- allow a promise to recover the value of services he gave to the defendant irrespective of whether he would have lost money on the contract and been unable to recover in a suit to the contract. (reasonable value of employees services – damages caused by the breach)
  i. A claim or right of action for the reasonable value of services rendered.
g. "Net Benefit" Rule-Restatement §374

- Subject to the rule stated subsection 2, if a party justifiably refuses to perform on the ground that his remaining duties of performance have been discharged by the other party's breach, the party in breach is entitled to restitution for any benefit that he has conferred by way of part performance or reliance in excess of the loss that he has caused by his own breach.
- (2) To the extent that, under the manifested assent of the parties, a party's performance is to be retained in the case of breach, that party is not entitled to restitution if the value of the performance as liquidated damages is reasonable in the light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss.

v. Incidental Damages (sale of goods)

a. Includes expenses reasonably incurred by the buyer in inspection, receipt, transportation, car, and custody of goods rightfully rejected and other expenses

reasonably incident to the seller's breach, and by the seller in storing, shipping, returning, and reselling the goods as a result of the breach.

i. **Does not include attorney fees unless provided in statute.**

- **Formula for Calculating Expectation Damages**
  - Restatement (Second) of Contracts § 347
    - **(LV + OL) – (CA + LA)**

(Loss in value + Other Loss) – (Cost Avoided +Loss Avoid)

- LV – Difference between what was promised and what received.
  - For payee (seller/supplier) – unpaid cost to complete or repair.
  - For payor (buyer/recipient) – cost of substitute performance.
- OL (Other Loss)
  - **i.** Incidental loss – Expenses incurred as a result of the breach that would not have occurred if but for the breach.
    - **i.** Any consequential loss that resulted.
- CA – Cost avoided
- LA – Loss avoided – gain made possible (mitigation)

a. Foreseeability

1. There are occasions that even if the aggrieved party is awarded or benefit of damages, the ultimate remedial objective to make the nonbreaching party whole IS NOT SERVED.

- **Loss in Value** – there are sometimes other losses beyond direct damages.
  - **1.** Reflected in the contract market differential.

2. Distinction between LV and OL

- Expenses incurred by the nonbreaching party that would have been incurred if but for the breach of contract.
- In order to resell goods and mitigate damages, nonbreaching party might have to take additional steps to resell
  - Incurred costs
- Consequential Damages—Typically much more substantial.
- The nonbreaching party has relied on the performance when ordering other affairs, and will suffer an additional loss when the reliance is misplaced.

- Remedial objective to get the nonbreaching party to be made whole economically.
- **Limitations on Damages**

1. **Certainty**
   - Contract damages must be proved to a reasonable certainty in order to be awarded to the nonbreaching party.
     1. Lost profits must be shown with reasonable certainty.
2. **Foreseeability**
   - Applies to special or consequential damages
   - The breaching party must be able to prove that, at the time of contract formation, it was able to reasonably foresee the loss that could be caused by the breach of contract.
     1. Made known during the formation process.

2. General circumstances must be known to all.

3. **Avoidability**
   - Mitigation – the nonbreaching party can obtain substitute performance and minimize loss.
     1. Damages are **denied** to the nonbreaching party if they were avoidable if only the nonbreaching party had obtained specific performance
        - Breaching parties are not liable for damages that the nonbreaching party could have avoided.
     2. Limitations
        - The nonbreaching party does not have to mitigate damages if doing so requires undue risk, burden, or humiliation.
          - Ex) employment contracts
   - Because of the breach, the nonbreaching party does not have to pay for the return performance.

- **Damages for Specific Performance**
  - <u>Generally ordered when the remedy of (monetary) damages is adequate and when it is fair and reasonable to compel performance.</u>
    1. Order for specific performance over money damages
       - Either to do something or refrain from doing something. Order to the person to perform or be in contempt of court.
         1. Prohibitory injunction – Restrains the defendant from taking a specific course of action.
       - Often used as an indirect means as a force of duty owed.
    2. Elements of specific performance as damage remedy
       - Inadequacy of monetary damages
       - "equity"
  - *Under what circumstances will a court assert it its discretion and order an equitable remedy?*
    - General rules that guide courts as to when it is appropriate to provide equitable relief.
  - **Economic waste:** something irremediable or impossible to cure without substantial burden or expense.
  - UCC § 2-716

    (1) Specific performance may be decreed where the goods are unique or in other proper circumstances. a. The subject matter of the contract may not be unique, but the terms of the contract may be unique, thus falling adequately under a test of uniqueness by the UCC.

    (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.

    (3) The buyer has a right of replevin for goods identified to the contract if after reasonable effort he is unable to effect cover for such goods or the circumstances reasonably indicate that such effort will be unavailing or if the goods have been shipped under reservation and satisfaction of the

security interest in them has been made or tendered. In the case of goods bought for personal, family, or household purposes, the buyer's right of replevin vests upon acquisition of a special property, even if the seller had not then repudiated or failed to deliver.

- Liquidated/Stipulated Damages
  - Can the parties alter those remedies by their prior agreements?
    1. Yes, to an extent. But given the notion of freedom of contract that exists when the parties are bargaining for the terms of the contract, the power to bargain for remedial rights is much more limited.
    2. There is a freedom to bargain, to some extent, for remedies.
  - Encounter the limits of freedom of contract when dealing with remedies sooner, as opposed to performance.
  - **Theories of Liquidated Damages**
    1. Traditional Approach – Restatement (Second) of Contracts § 356
       - A court will not enforce a liquidated damage if it acts as a penalty or forfeiture clause.
       - Parties bargain for stipulated damage to act as a deterrent for breach of contract.
         - Avoids cost of litigation.
         - Promotes rational decision-making for the course of future conduct.
         - If damages will be difficult to assess and prove, it might be beneficial to define terms of damages ahead of time.
         - Parties might want to negotiate to minimize risk of breach.
         - Minimum adequate remedy.
    - Consistent with freedom of contract – *What are the limits?*
      1. Allow the parties who have economic interests to allocate risk as they see fit.
      2. Adjust economic relationships accordingly.
      3. Generally aligned with conservatively-bent economics.
    - Traditional Enforcement
      1. Parties must not intend the liquidation of damages to operate as a penalty of forfeiture. a. If compulsion of performance is a concern, why does intent matter? Does it operate as a penalty or not?
      2. Damages anticipated from breach must be uncertain in amount or difficult to prove.
      3. Provision must be a reasonable forecast of damages that are uncertain or difficult to prove.
         a. When was forecast assessed?
            i. Traditional View – At the formation of the contract.
            ii. Contemporary Approach – Accept the reasonableness either at the anticipated or actual loss.
      - Efficient Breach of Contract
        1. If one party can breach the contract, and realizes that a better deal can be made with another party and still make the original affected party whole, it may be worth breaching.
        2. Makes a lot of assumptions.
           a. Assumes no transaction costs.
           b. No moral notion to promissory liability